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## PUBLIC LANDS LITIGATION IN THE GEOGRAPHY OF HOPE

*Lois J. Schiffer & Sylvia Quast\**

### I. INTRODUCTION

Over 128 years ago, Congress dedicated Yellowstone National Park as a “public park or pleasuring ground for the benefit and enjoyment of the people.”<sup>1</sup> It is a premier example of a national park,<sup>2</sup> and has more than fulfilled its promise as one of the crown jewels of the National Park System. It is one of the most beautiful and—literally—wonderful places on earth. The millions of visitors it receives every year from all over the world are a testimony to its special status.<sup>3</sup> Moreover, Yellowstone isn’t just scenic beauty, amazing wildlife, and natural wonders—it also pumps millions of dollars into the local economy every year.

But Yellowstone is also a microcosm of public lands litigation in the West. Consider the following sampling of current Environment Division cases involving the Park and its immediate environs:

**Reintroduction of wolves**—In March 1995, fourteen gray wolves were released into Yellowstone as an “experimental

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1. 17 Stat. chap. 24, pp. 32-33 (Washington: U.S. Printing Office, 1872).

2. Some might claim this distinction for Yosemite Valley, now a part of Yosemite National Park, but Yosemite was not established as a national park until 1890. Nevertheless, the federal government’s 1864 cession of Yosemite to the State of California in order to preserve its scenery was an important antecedent to the Congressional Act establishing Yellowstone—indeed, the language of the 1872 Act closely tracked the language of the Yosemite cession.

3. The official attendance figure for 1999 was 4,123,664 people. National Park Service, *Yellowstone National Park* (last modified Nov. 1, 2000) available at <http://www.nps.gov/yell>.

population” under Section 10(j) of the Endangered Species Act, with an additional seventeen released in April 1996. The number of wolves is now in the low hundreds, bearing witness to the success of the reintroduction program, and after years of litigation, both the Ninth and Tenth Circuits have determined that the program is legal.<sup>4</sup> Despite these clear affirmations, a Wyoming rancher has brought another action claiming that the program violated the Endangered Species Act and caused a “taking” of his property without compensation. The Fish and Wildlife Service has issued the rancher a permit to shoot wolves if he sees them preying on his livestock and referred his compensation claims to a private fund administered by the Defenders of Wildlife, which reimburses ranchers for cattle and sheep killed by wolves. Nonetheless, the case is awaiting a decision on the merits.

**Winter use by snowmobiles**—In 1997, conservation and animal rights groups sued under the National Environmental Policy Act (NEPA) and the Endangered Species Act to stop individuals from using motorized vehicles such as snowmobiles in both Yellowstone and Grand Teton National Parks.<sup>5</sup> Earlier this month, the Park Service released a Winter Use Plan/Environmental Impact Statement as part of a settlement agreement in that case, and expects to make a final decision on the plan before the end of 2000.<sup>6</sup>

**Bison management**—In 1995, the State of Montana sued the Park Service regarding management of the Park’s bison herd in relation to the transmission of brucellosis to cattle.<sup>7</sup> As part of the settlement of that litigation, the Park Service released its final Environmental Impact Statement for its long-term bison management plan in August 2000 and is working with the State

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4. *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224 (10th Cir. 2000); *United States v. McKittrick*, 142 F.3d 1170 (9th Cir. 1998).

5. National Park Service, Winter Use Plans—Final Environmental Impact Statement for the Yellowstone and Grand Teton National Parks and John D. Rockefeller, Jr. Memorial Parkway—Volume I, summary (visited Nov. 16, 2000), available at <http://www.nps.gov/planning/yell/winterfinal/frames.htm>.

6. *Id.*

7. *Montana v. Babbitt* (D. Mont. Case No. CV95-6). See also National Park Service, Summary—Final Environmental Impact Statement for the Interagency Bison Management Plan for the State of Montana and Yellowstone National Park (visited Nov. 16, 2000) < <http://www.nps.gov/planning/yell/bisonfinal/main2.htm> >.

of Montana to develop a joint long-term bison management plan.<sup>8</sup>

**Elk**—The State of Wyoming is suing the federal government over denial of Wyoming's request for access to the National Elk Reserve in order to conduct an experimental elk vaccination program, also for brucellosis.<sup>9</sup> Wyoming lost in the federal district court, and this case is now pending in the Tenth Circuit Court of Appeals.<sup>10</sup>

**Grizzlies**—Litigation over grizzlies surrounds the Park. Environmental groups are suing over alleged Endangered Species Act violations pertaining to oil and gas leases in the Shoshone National Forest on the Park's eastern flank, and pertaining to a timber sale and off-road vehicle and snowmobile use in the Gallatin National Forest bordering the Park on the north and west.<sup>11</sup>

**Bioprospecting**—In 1997, Yellowstone Superintendent Mike Finley, Secretary Bruce Babbitt, and other top environmental officials announced that the federal government had entered into a contract with San Diego-based Diversa Corporation, granting Diversa a nonexclusive right to "bioprospect" microbial organisms in Yellowstone in exchange for Diversa agreeing to share potential financial returns with the Park. This novel agreement, termed a Cooperative Research and Development Agreement (CRADA), is the first of its kind for a national park. In 1999, three non-profit organizations sued the Secretary of the Interior and the Director of the Park Service, arguing that the Park Service did not have the authority under the existing laws to enter into the CRADA. Among other claims, the organizations argued that the agreement violated NEPA.<sup>12</sup>

With the exception of the NEPA claim, the federal district court in Washington, D.C., ultimately denied all of the plaintiff organizations' claims, and the case is now on appeal.<sup>13</sup> In the meanwhile, the Park Service suspended implementation of the CRADA pursuant to the court's

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8. *Id.*

9. *Wyoming v. United States*, 61 F. Supp.2d 1209 (D. Wyo. 1999).

10. *Id.*

11. *Wyo. Outdoor Council v. United States Forest Serv.*, 165 F.3d 43 (D.C. Cir. 1999).

12. *Edmonds Inst. v. Babbitt*, 42 F. Supp. 2d 1 (D.D.C. 1999).

13. *Id.* at 17.

order while the Service completes the environmental review required by NEPA.<sup>14</sup>

These cases give a flavor of the range of litigants, statutes, and competing interests that are present in federal public lands practice. In these respects, as in many others, Yellowstone truly is a microcosm of Western public lands litigation. This has its negative aspects, but our hope is that ultimately, Yellowstone can serve as a beneficial model for our public lands. Just as Yellowstone has survived trial by fire and is still a wonder in which we can all take pride, so too we expect that the federal public lands will survive and be something that we can pass on with pride to our children and grandchildren.

## II. YELLOWSTONE AND PUBLIC LANDS LITIGATION—A COMPARISON

There are many parallels between Yellowstone's natural phenomena and the phenomena of modern public lands litigation.

Morning Glory Pool. One of Yellowstone's well-known geothermal features is Morning Glory Pool, a colorful thermal pool at the end of a mile-and-a-half long trail. As one walks toward the pool, one can see geysers on one side of the trail and sulfurous mudpots on the other. Unfortunately, careless visitors have diminished the pool's beauty by throwing debris into it.

Public lands litigation is much like the path to Morning Glory Pool—it is a long path with threats on the left and the right, and the promise of something wonderful at the end that might be ravaged by the time one arrives. The cases often last for years and federal agencies are sued regularly by people and groups on both sides of a dispute. In fact, an informal survey of the Environment Division's current public lands caseload assessed the number of cases in which the federal agencies were being sued by environmental groups as compared to the number in which they were being sued by resource users—the numbers were almost even. Some people would say the fact that federal agencies are being sued by both sides puts those agencies in the moderate middle and means they must be doing something right.

The Grand Canyon of the Yellowstone. The Grand Canyon of the Yellowstone, cradling the Yellowstone River as it makes its way north out of the Park, is truly grand. The paintings of Albert Bierstadt and Thomas Moran capture well the sight, power, and sounds of the canyon.

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14. *Edmonds Inst. v. Babbitt*, 93 F. Supp. 2d 63 (D.D.C. 2000).

Much like the canyon, however, public lands litigation also has its deep divides that are filled by falls and that some people seem unable to see across.

Although there have been several changes in public lands cases since the 1970s—for example, dramatic increases in Endangered Species Act litigation, regulatory takings cases, and challenges to national forest management—the most striking transformation between then and now is the level of intransigence that has become associated with public lands litigation. Many though, certainly not all—of the parties filing this litigation, whether on the side of environmental interests or of resource users, have dug in and are deeply suspicious of one another and of the federal government. The result is an unwillingness to see merit in the other side's position, making settlement difficult at best.

Geysers. One of the main reasons that tourists come to Yellowstone is to see the geysers, particularly Old Faithful. Current public lands litigation also has its own phenomena that erupt in predictable ways. This level of extreme contentiousness can be tiring to deal with on a regular basis, but the real problem is not with the Old Faithfuls. It is with those who actually threaten to shoot or harm others if they do not get their way. This behavior is not just unproductive—it is unacceptable. Sometimes it is frightening.

A recent example in which we dealt with this problem is the lawsuit that the United States brought against Nye County, Nevada, on what many have referred to as the issue of “county supremacy.”<sup>15</sup> Briefly, in many parts of the West in 1994 and 1995, counties were passing ordinances declaring that they, not the federal government, owned the public lands. The Environment and Criminal Divisions at the Justice Department, the FBI, land management agencies and their enforcement officers, and the United States Attorneys developed a strategy that included a legal test of the counties' theories in support of these ordinances. Many in the West agreed that the court was a fair forum, and channeling the dispute from the range to the courtroom played a major role in maintaining the peace.<sup>16</sup>

Importantly, the vast majority of Westerners—indeed, of Americans—want peaceful solutions to the many difficult issues that manage-

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15. *United States v. Nye County*, 178 F.3d 1080 (9th Cir. 1999).

16. Although organizations such as the National Cattlemen's Beef Association (“NCBA”) did not agree with the federal government on every point, NCBA did help forestall violence by communicating to Western communities that violence would not help matters.

ment of our public lands present. As evidence of this, consider the “Enlibra” doctrine, which the governors of Oregon and Utah developed and which the Western Governors’ Association (WGA) adopted.<sup>17</sup> One of the fundamental tenets of Enlibra is using collaborative processes to break down barriers and find solutions. Collaboration—not polarization—is something on which we can all agree, and federal agencies are working hard with communities across the West to open up communication, encourage participation, and form partnerships to resolve public lands issues before they become problems.

The Justice Department’s Environment and Natural Resources Division has also worked hard to find cooperative solutions to these issues. One such solution brought an end to several years of threatened and actual litigation over the New World Mine District, located on a patchwork of federal and private lands in Gallatin National Forest, just a few miles into Montana from Yellowstone’s northeast entrance. In 1993, environmental and other resource groups (collectively, the “Greater Yellowstone Coalition”) sued Crown Butte Mines and two affiliated companies over acid mine drainage into nearby creeks from historic mining operations.<sup>18</sup> Two years later, the district court held that Crown Butte and its affiliated co-defendants had violated the Clean Water Act.<sup>19</sup>

Meanwhile, pursuant to the 1872 Mining Law which gave it the right to do so, Crown Butte was investigating the development of an underground gold mine in the same area that would have been up-gradient from ground and surface waters flowing into Yellowstone Park. According to the development plans that Crown Butte submitted in support of state and federal permit applications related to the mine, the mining company was planning a massive, multi-story tailings dam behind which tailings would be perpetually stored under water, a substantial plant to treat water contaminated by the mining operation, and a slurry delivery system. This development posed a significant risk of environmental damage not just to the Gallatin National Forest, but to Yellowstone Park itself due to acid mine drainage and discharges into Soda Butte Creek.

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17. The WGA Web site characterizes “Enlibra” as “a new shared doctrine for environmental and natural resource management that seeks to resolve issues and enhance the environment by relying on greater participation in decision-making, focusing on outcomes rather than just programs and recognizing the need for a variety of tools beyond regulation to improve environmental and natural resource management.” Western Governors Association (visited Nov. 16, 2000), *available at* <http://www.westgov.org>.

18. *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168 (D. Mont. 1995).

19. *Id.*

This threat sparked local, national, and international concern, which in early 1996 resulted in both Crown Butte and the Greater Yellowstone Coalition approaching the federal government to discuss the possibility of a federal land exchange.<sup>20</sup> Under the terms of the exchange, the federal government would acquire Crown Butte's interests in the area and stop the mine. After many months of hard work, the company, others with mining interests, the environmental groups, the State of Montana, and the United States entered into an agreement which provided that the United States would acquire Crown Butte's interests in the patented and unpatented mining claims and identify \$65 million worth of federal property to give Crown Butte in exchange.<sup>21</sup> Eventually, the government paid Crown Butte \$65 million in cash, of which, pursuant to the agreement, Crown Butte put \$22.5 million in a cleanup fund to resolve claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), and the Clean Water Act related to the former mining operations.<sup>22</sup> The Forest Service is now using the money to improve the contamination and injury to the natural resources in the area. Not only does this resolution clean up the environment, it also protects Yellowstone, a vital part of the local economy that will be around for many, many years to come.

### III. CONFLICT RESOLUTION REGARDING THE PUBLIC LANDS AND GRAZING

The New World Mine is a good example of how a conflict over public land use may start with parties who are polarized and mistrustful and land that is slowly (or not so slowly) deteriorating, but then get turned around. This movement from confrontation to cooperation can happen in other areas of public land conflict as well, even areas such as grazing in which there is considerable contention over a variety of issues.

Conflict over grazing is nothing new. Consider the following facts: Rancher decides to turn his cattle loose in such a way that they move into a national forest where good water and pasturage are available. Rancher declines to get a permit to do so, threatens to resist the removal of his stock, and justifies his resistance on the basis of state law.

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20. Robert B. Semple, Jr., Editorial, *Canceling the New World Mine*, N.Y. TIMES, Dec. 10, 1995.

21. The Associated Press Political Service, *Yellowstone Area Mine Property Now Protected Land*, Aug. 7, 1998, 1998 WL 7435490.

22. The Associated Press, *Mining Firm Hands Deed to Yellowstone*, DENVER POST, Sept. 20, 1998, at B-7.



Rancher further claims that the federal government has no legal remedy in this situation and that it “cannot constitutionally withdraw large bodies of land from settlement without the consent of the state where it is located.”<sup>23</sup> Nevada in the 1990s? No—these were the facts in a 1911 Supreme Court case involving a Colorado rancher.<sup>24</sup>

But it was not just ranchers and the federal government that were in conflict—cattle ranchers were also at war with sheep ranchers and homesteaders. The Johnson County War of 1892, a conflict in which large cattle companies in a northern Wyoming county brought in “regulators” or hired gunmen to kill homesteaders who were allegedly rustling cattle, ended only when local citizens called in the Cavalry.<sup>25</sup>

Concerns about overgrazing and the destruction of the range are also nothing new. John Wesley Powell, that visionary explorer and federal government employee par excellence, recognized in 1878 that ordinary homesteading laws would not work in the arid West, and called for “a general law . . . to provide for the organization of pasturage districts.”<sup>26</sup> Powell was joined by President Theodore Roosevelt, who warned only a few years later that “scantiness of food, due to overstocking is the one really great danger” in the northern Great Plains.<sup>27</sup> Although there were various attempts to pass legislation, regulating grazing on the public lands, nothing happened until the 1930s, by which time overgrazing through unrestricted access to public lands had caused substantial injury to those lands.<sup>28</sup> One senator described the storms of the Dust Bowl as “the most tragic, the most impressive lobbyist that had ever come to this Capitol.”<sup>29</sup> The situation was “a source of grave national concern, both to Government officials interested in the conservation of the natural resources of the public domain and stockmen whose operations are dependent upon grazing,”<sup>30</sup> and resulted in Congress passing the Taylor Grazing Act of 1934 (TGA).<sup>31</sup> On the first anniversary of

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23. *Light v. United States*, 220 U.S. 523, 535 (1911).

24. *Id.* Ivan Doig also wrote about the Forest Service arriving in Montana in the early 1900’s and calling for reduction of numbers of sheep grazing on public lands so that the condition of the land would not further decline. IVAN DOIG, *DANCING AT THE RASCAL FAIR* (1996).

25. CHARLES WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 86 (1993).

26. Report on the Lands of the Arid Region of the United States, H.R. Exec. Doc. No. 73, 45th Cong., 2d Sess., 28 (1878).

27. WILKINSON, *supra* note 25, at 89.

28. See Paul W. Gates, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 607 (1968).

29. 79 CONG. REC. 6013 (1935).

30. H.R. Rep. No. 903, at 2 (2d Sess. 1934).

31. Taylor Grazing Act of 1934, 43 U.S.C. § 315 et seq. (1994). The TGA resolved

the law bearing his name, Colorado Representative Edward Taylor explained the need for the law:

[A] very large part of the public lands had become badly overgrazed, eroded, and entirely barren; . . . roving itinerant sheepmen came into competition with the many thousands of resident ranchmen throughout the West who owned their lands and homes near the public domain. . . . In the absence of Federal legislation many of the States were compelled to assume jurisdiction over the public domain to keep the peace and prevent bloodshed and ruthless destruction of property.<sup>32</sup>

Thus, even an ardent supporter of the rights of the western states such as Taylor saw the virtues of having the federal government take an active role in public lands management in the face of what was both an economic and ecological disaster. In fact, in a number of areas in the United States, people have looked to the federal government to become involved in what were initially local or regional conflicts. Federal involvement is a way to institute significant changes that are difficult for local people or agencies to make because of the constraints that powerful local interests or customary ways of proceeding placed on them. It is also a way to insure national uniformity and fair treatment across states. Examples include important civil rights changes in our country in the 1960s, and national air and water standards that helped prevent states from engaging in a “race to the bottom” in terms of pollution standards.

Characterizing use of the public range for grazing as a “right” is also not new. The House of Representatives’ version of what became the TGA provided that “grazing rights” that were “recognized and acknowledged by the local customs, laws, and decisions of the courts” would be “adequately safeguarded.”<sup>33</sup> The Senate substantially amended that language, however, substituting the term “grazing privileges” for “grazing rights,” and removed any reference to “local customs, laws, and decisions of the courts,”<sup>34</sup> and it was the Senate’s language that was enacted.

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the ongoing debate of whether the policy of disposal and largely unregulated use of federal lands that had been in place essentially since the Louisiana Purchase of 1803 should continue, or be replaced by a policy of retention and management by the federal government. *See generally* Gates, *supra* note 28, at 1-32, 463-941; Philip O. Foss, POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN 8-58 (1960); George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 *Envtl. L.* 1, 40-48 (1982).

32. 79 CONG. REC. 10,394 (1935).

33. H.R. 6462, 73d Cong., 2d Sess. § 3 (1934).

34. *See* 48 Stat. 1271.

Thus, under section 3 of the TGA, the Secretary may issue permits to graze livestock to “such bona fide settlers, residents, and other stock owners as under [the Secretary’s] rules and regulations are entitled to participate in the use of the range.”<sup>35</sup> Although the TGA requires that preference in issuing these permits be given to “those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them,”<sup>36</sup> it also states that the issuance of a permit “shall not create any right, title, interest, or estate in or to the [public] lands.”<sup>37</sup>

Even in the face of this pellucid statutory language, there are some who refuse to give up. Last spring, the Supreme Court heard the Public Lands Council and other non-profit ranching-related organizations assert that there was “an indefinitely continuing right” to “adjudicated preferences” under the TGA. The Court rejected this view and affirmed the Secretary of the Interior’s discretion to determine “just how, and the extent to which, ‘grazing privileges’ shall be safeguarded, in light of the Act’s basic purposes.”<sup>38</sup> The Court went on to point out that the Act’s “basic purposes” include “‘stop[ping] injury to the public grazing lands by preventing overgrazing and soil deterioration.’”<sup>39</sup>

So here we are in the year 2000, fighting the same fights and facing the same problems as we were one hundred years ago. Is the situation hopeless? Are the conflicts over grazing and use of the public lands in the West intractable? We would like to think not. Some people point to demographic and economic changes in the West and in the United States more generally and suggest that it is just a matter of time before these conflicts fade away. This seems speculative at best, and in any event, why wait to see if conflicts that have been simmering for one hundred years will boil over again before they cool down?

In fact, through the use of alternative forms of resolving disputes, we have made substantial progress in areas of bitter and even violent conflict involving grazing and the public lands. One such area involves water rights. Water right disputes often involve complex issues concerning the use of water for multiple purposes. The focus of litigation in this area has changed over time from simply allocating water re-

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35. 43 U.S.C. § 315b (1994).

36. *Id.*

37. *Id.*

38. *Pub. Lands Council v. Babbitt*, 529 U.S. 728; 120 S. Ct. 1815, 1823 (2000).

39. *Id.* (quoting 48 Stat. 1269).

sources for agrarian and other water supply purposes to a larger recognition by federal agencies and others that water and watershed management are critical to the preservation of the environment. Because the issues are so complex and the parties often in the thousands, litigation is extraordinarily expensive.

One example in which conflict and litigation were cut off and resolved was the adjudication of Basin 41-I near Helena, Montana. When the federal government got involved in the Basin 41-I adjudication in the mid-1990s, there were well over six hundred claims pending, with federal parties such as the Bureau of Reclamation or the Bureau of Land Management involved in about two-thirds of those cases. However, the State of Montana had the wisdom to enact a water rights law that encourages mediation and settlement, and the Montana Water Court and the two water masters for the basin encouraged the use of mediators trained by the court. These court-trained mediators were well-acquainted with water law, but not necessarily lawyers, and often were ranchers or farmers from the area who have considerable practical experience. In the case of the Basin 41-I adjudication, the court-appointed mediators were knowledgeable ranchers who had the respect of the parties, many of whom did not have counsel. They provided information about how the court looked at issues generally, which helped to create a common base of understanding and make all participants feel that they were on a par. The parties, who were generally all neighbors, were able to raise and resolve issues that, although somewhat tangential to the core proceeding, were important to the resolution of the larger dispute. The process was very informal, often involving trips to ranches to look at diversion points and creek flows, and very successful. In fact, five years into the adjudication, only a few dozen cases are left to be resolved. Those who have been involved with basin adjudications will recognize the impressiveness of this accomplishment, and it is a testament to the value of mediation and other such ways of resolving disputes.

Another example of a successful resolution of a case short of litigating through to trial is one related to Devils Tower National Monument in Wyoming. This unit of the National Park Service is sacred to Native Americans, especially in the month of June. It is also sacred, in a more secular sense, to climbers. The National Park Service worked out a resolution in which climbers agreed to refrain from climbing in June. Certain climbers challenged that resolution, the Park Service performed a new environmental assessment, and now the courts have upheld the

National Park Service's approach of encouraging climbers not to climb in June and allowing tribes to use the Tower for their observances.<sup>40</sup>

Based on our experience in public lands disputes, we have drawn certain conclusions about how to foster resolution and minimize confrontation in such disputes. First, using courts and litigation can assist in channeling a dispute into a more peaceful dispute-resolution forum, and assuring that interested parties may have the right and skills to go to court provides a framework and background that can lead to more effective negotiations. Having the right to go to court helps parties to negotiate vigorously but flexibly, since the outcome of litigation is rarely guaranteed and is often not as comprehensive as a negotiated resolution of the dispute.

Second, whether or not a court is available, it is important to include in the negotiating process all those with an interest in the outcome of the conflict. A process missing key participants is not as likely to generate a long-lasting solution. For public lands disputes, we need to remember that all Americans have an interest in federally-owned public lands, not just those who live near them. Two corollaries: having all interests involved in a negotiation or other dispute resolution approach need not mean that they are all involved in all the same meetings at the same time—sequential discussions are often more useful and more practical. Also, dispute resolution is usually more effective when it occurs in a setting that does not encourage posturing or playing to an audience. This often means that the participants in a dispute resolution process must agree to a level of confidentiality in their discussions.

Third, resolution is fostered by having the interested parties focus on the immediate conflict that gave rise to the dispute (climbers who want to scale Devils Tower in June while tribes are conducting religious ceremonies) rather than getting entangled in larger philosophical arguments (free exercise of religion vs. establishment of religion under the First Amendment).

Fourth, a good facilitator can help create an environment in which these conditions obtain and can help the parties to find common ground on which to build a solution. Trained mediators can be helpful here, but as the example of the Montana water rights adjudication demonstrates, non-professionals and non-lawyers may be effective mediators as well. Some experience in acting as a third-party neutral is often more important than experience in the particular subject matter at issue. Dis-

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40. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999).

putants can be creative in finding someone that has the respect of all and who also has the training and/or experience in conflict resolution to help move toward an effective resolution.

These principles have helped the federal government and other parties, both public and private, to arrive at solutions in the traditionally contentious areas of water rights and Indian law. If, working together, we can resolve disputes in these areas, we should be able to accomplish effective resolution of just about any dispute. We at least ought to try.

#### IV. CONCLUSION

Our nation's public lands are here for all of us—for those who live near them, and for those who may live far away but still enjoy and benefit from them. Management of these lands for all of us requires taking into account the interests of those nearby and those far away. We encourage everyone involved in conflicts over the public lands to make use of what has been called Seventh Generation thinking. It is a Native American concept and counsels that, in making decisions, we should think not only of ourselves but of our children, grandchildren, and their children and grandchildren, seven generations out. This long view leads to a better approach and wisdom.

Like all of our public lands, Yellowstone was born into controversy. One Helena newspaper of the time complained that "the effect of this measure [creating a national park] will be to keep the country a wilderness . . . . We regard the passage of the act as a great blow struck at the prosperity of the towns of Bozeman and Virginia City."<sup>41</sup> But just as earlier generations of Americans overcame fears that Yellowstone would strike a mortal blow to surrounding communities, so too we will survive the fights over use of the public lands in the West. Hope and perseverance will eventually overcome fear and intransigence regarding our public lands in what one famous western writer called "the geography of hope."<sup>42</sup>

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41. PAUL SCULLERY, *SEARCHING FOR YELLOWSTONE: ECOLOGY AND WONDER IN THE LAST WILDERNESS* 65 (1997).

42. WALLACE EARLE STEGNER, *THE AMERICAN WEST AS LIVING SPACE* 43 (1987).

