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Wyoming Land and the Law One Hundred Years after Statehood - A Perspective

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WYOMING LAND AND THE LAW ONE HUNDRED YEARS AFTER STATEHOOD — A PERSPECTIVE

*Joseph R. Geraud**

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I. INTRODUCTION

Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts.

Justice Holmes¹

Wyoming's one hundredth year of statehood celebrated on July 10, 1990, affords an opportune time to reflect on "law," and how it governs human conduct in the use of Wyoming land.

Our legal system establishes the framework within which all economic and social activities take place. Those activities cannot be properly planned unless the legal system clearly sets forth the "rules of the game"—that pattern of rights and obligations which will govern those activities. In the context of land, those rules are embodied in the concept of property rights. Property rights are critical to such pursuits as the acquisition of a homesite, locating a commercial enterprise, mineral extraction, animal husbandry, harvesting renewable resources, recreational activities and a host of others. Each of these pursuits is affected by, and to some degree dependent on, the law which governs the use of land.

In the past one hundred years, our legal system has evolved dramatically. That evolution has naturally wrought significant changes to our concepts of property rights. These changes have been most significant in the diminution of private property as a boundary between rights of ownership and the power of government to interfere.² This article will examine those changes, seeking to identify the characteristics of today's law which define the relationship of Wyoming citizens to Wyoming land.

II. LAW AND LAND

Traditionally, property rights are created and defined by the state.³ As with other public land states, however, Wyoming's power has been limited. When Wyoming was granted statehood, the Act of Admission ratified the Wyoming Constitution, proclaimed the State to be admitted into the Union on an equal footing with the original states, and confirmed the territorial boundaries of the State.⁴ But, Wyoming's power to define property extended only to that land which had been transferred by the United States to private entities or to the State of Wyoming; Congress retained the power to legislate regarding land still held by the United States government.⁵ As a result, the use

1. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

2. Cribbett, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1.

3. 1 R. POWELL & P. ROHAN, *POWELL ON REAL PROPERTY* § 158 (1991).

4. Act of July 10, 1890, ch. 664, 26 Stat. 222.

5. See *infra* note 57 and accompanying text.

of any specific tract of land within Wyoming (or, for that matter, any other public land state) may be subject to, or affected by, the existence of separate and distinct legal systems which control recognition, acquisition, transfer, or uses of the land. Thus, the applicable "law" depends upon identifying the current "owner" of the specific tract of land: (1) privately-owned lands resulting from patents or grants authorized by Congress, (2) lands owned by the United States government, (3) lands owned by the State of Wyoming, or (4) lands within the boundaries of the Wind River Indian Reservation.⁶

After Wyoming's admission into the Union, the factors influencing the settlement of the West⁷ resulted in two dominant categories of land ownership: (1) privately-owned lands resulting from patents or grants authorized by Congress, and (2) lands owned by the United States government. The latter consisted of those lands which were not sought by individuals, land not suitable or available for private acquisition under statutes authorizing disposition of land into private ownership, and lands withdrawn or reserved by Congress or the President from operation of the disposal laws.

The pattern of ownership of Wyoming land can be readily determined from maps⁸ and other data.⁹ These sources disclose the following:

a. The State's borders encompass 62,343,040 acres of land which are occupied by fewer than 500,000 people. The two largest cities have populations of approximately 50,000 people. Vast open spaces exist and less than half of the total acreage, or 27,026,077 acres, about 43%, is owned by private entities. The federal government owns 29,829,562 acres or about 48% of the land within Wyoming's borders.

b. A total of 9,253,087 acres are included within the National Forest System administered by the United States Department of Agriculture. These lands include virtually every part of the State upon which nature permitted the growth of trees.

c. The National Park Service of the United States Department of Interior serves as steward for the preservation of 2,408,660 acres, including Yellowstone, Teton, and other national parks within the State.

d. The Bureau of Land Management of the United States Department of Interior administers 11,060,552 acres of vacant federal lands as grazing districts and an additional 3,072,690 acres outside of such districts.

6. This article will not discuss the bodies of law which control land within the Wind River Indian Reservation or those lands granted to the State of Wyoming.

7. PUBLIC LAND LAW REVIEW COMMISSION, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968); B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (1939).

8. Bureau of Land Management, U.S. Dep't of Interior, State of Wyoming Land Status, U. S. Gov. Print. Off. 1978-781-155 (map).

9. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, PUBLIC LAND STATISTICS Table 4 (1984).

e. The land administered by the Departments of Interior and Agriculture are now generally subject to extensive procedures for multiple use planning and management such as recreation, range, timber, minerals, watershed, wildlife and fish, natural scenic, scientific, and historical values. Congress has also required the Departments to designate natural wilderness areas which exclude any uses by humans which would destroy the land's natural wilderness characteristics. The Wyoming Wilderness Act designates several such areas, and further planning may result in additional designations.¹⁰

f. Private lands lie predominantly within the eastern one-third and central parts of the State and represent lands naturally productive of crops and forage or subject to irrigation projects. Elsewhere, privately-owned lands are scattered in the midst of federal lands. Such isolated private lands resulted from homesteaders seeking land with water and/or a home where livestock grazing could be conducted upon vacant public lands. Mining claims also resulted in scattered private ownership.

g. Incident to construction of the Union Pacific Railroad across southern Wyoming, Congress granted the railroad company every other odd-numbered section of land for twenty miles on each side of the track.¹¹ This resulted in a checkerboard of alternating federal and private ownership. This pattern still exists in the western two-thirds of the state and presents unique issues of land use and access.¹²

The foregoing division of land ownership between private entities and the federal government is of great significance to Wyoming residents. With respect to privately-owned lands, they can act through their own state government to recognize or limit rights of individuals to own or use such land. But with regard to the federal lands, they must look to the laws of Congress. These latter laws are enacted by representatives of all the states, and do not necessarily reflect the values and purposes of the people of Wyoming. Moreover, the use and value of private lands may be significantly affected by the federal law applicable to adjacent federal lands.¹³ Regardless of the local residents' desire to make use of federal lands, state government cannot recognize or create enforceable rights in such land.¹⁴ Fulfillment of such desires and needs is dependent upon Congress and its response to initiatives of Wyoming's two senators and one congressman.

10. Wyoming Wilderness Act of 1984, Pub. L. No. 98-550, 98 Stat. 2807; see Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1988).

11. Act of July 1, 1862, ch. 120, 12 Stat. 489, amended by Act of July 2, 1864, ch. 216, 13 Stat. 356.

12. *E.g.*, *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979) (holding that the doctrine of implied reservations of easements by necessity does not apply to private lands within the checkerboard).

13. See *infra* notes 82 through 86 and accompanying text.

14. See *infra* notes 55 through 57 and accompanying text discussing Limiting State Powers.

Congressional ratification of the Wyoming Constitution seemingly promised a state government in which "[a]ll power is inherent in the people."¹⁵ Because much of the State's land remains under federal control, such promise has not been realized.

A. Private Ownership

"Ownership" is a term used to describe a bundle of rights, powers, liberties, and privileges vested in an individual or other entity and relating to a particular item of real or personal property.¹⁶ The following fundamental attributes of real property ownership have been recognized:

1. The right to have and obtain possession, the right to prevent interference by others with the owner's exercise of the attributes of ownership, and the right to exclude others from control, use, or enjoyment of the land;
2. The power of alienating the land or granting to others rights, liberties or privileges with respect to it;
3. The liberty of using the land according to the owner's will, the liberty of enjoying the fruits of the owned land, and the liberty of changing its form or even destroying it.¹⁷

The foregoing attributes will be useful in evaluating changes which have occurred since 1890, particularly with regard to the liberties of using the land according to the owner's will.¹⁸

These traditional attributes of private property prevailed for many years.¹⁹ However, societal problems and issues associated with populous urban areas have led to significant limitations upon the owner's freedom to use his land. One such limitation is the modern law of private and public nuisances. The Wyoming Supreme Court

15. WYO. CONST. art. I, § 1 & art. II, § 1.

16. V R. POUND, JURISPRUDENCE 127 (1959).

17. *Id.* at 128.

18. Further, these attributes characterize the power over land held by the United States upon acquisition of territories. See *infra* notes 58 through 73, and accompanying text.

19. In 1735 Blackstone described the common law relating to private property as: So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community . . . In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature can, and indeed frequently does, interpose, and compel the individual to acquiesce . . . by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange.

1 W. BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 100 (1870).

has defined a nuisance as being "a class of wrongs which arises from an unreasonable, unwarranted, or unlawful use by a person of his own property, working an obstruction of injury to the right of another."²⁰ Where a nuisance is found to exist, the court may enjoin the owner from continuing his offensive use of his property.

Restrictions on landowner rights have occurred largely as a result of the enormous expansion of the police power exercised by state and other local governments. For example, state laws authorize the creation and imposition of land-use controls by agencies of the state and local or city governments.²¹ Such laws are justified as essential to the furtherance of public order, safety, health, morality and general well-being of affected communities."²² But, excessive regulation of property use can be deemed constitutionally invalid as an uncompensated taking.²³

The limitations imposed upon the use of privately-owned land by such mechanisms as police power regulation and nuisance law have significantly altered our concept of property. As stated by Professor Cribbett in 1978 with regard to governmental controls on land use:

Today, the *res* is rather freely alienable, but the 'kernel of enjoyments' covered by the shell of title, is shrinking. In this sense, the state has replaced the landed gentry and is creating a status for land ownership which contains echoes of the past. The bundle of rights that the individual receives may, in many cases be little more than the non-freehold estate of our ancestors. The state is the landlord in a peculiar sense, and this has profound significance for the twenty-first century.²⁴

It is important to recognize that Cribbett's shrinking kernels of enjoyment of privately-owned land are attributable to state legislative actions supported by the majority of elected representatives. As in Wyoming, states have delegated police powers to local governments

20. *Hein v. Lee*, 549 P.2d 286, 291 (Wyo. 1976). Local city ordinances may also declare what shall constitute a public nuisance subject to abatement. *Knight v. City of Riverton*, 71 Wyo. 459, 259 P.2d 748 (1953).

21. R. FREILICH & L. STUHLER, *THE LAND USE AWAKENING* 39-48 (1981).

22. WYO. CONST. art X, § 2 makes "[t]he police power of the state . . . supreme over all corporations as well as individuals." The Wyoming Supreme Court has also described the police power "as a government's ability to regulate private activities and property usage without compensation as a means of promoting and protecting the public health, safety, morals and general welfare." *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 726 (Wyo. 1985).

23. The court applies a balancing test whereby the impact of the regulation upon the usage of the land is to be weighed, with consideration given to relevant factors: "the near-complete frustration of investment-backed expectations; the diminution of the property's market value as a result of regulation; and perhaps most significantly, the absence of a reasonable remaining economic use." *Cheyenne Airport Bd.*, 707 P.2d at 731.

24. Cribbett, *Property in the Twenty-First Century*, 39 OHIO ST. L.J. 671, 672 (1978).

immediately responsible to local residents for their safety, health and general welfare.²⁵ Arguably, such delegation enables the local community to determine the need for exercises of police power which will infringe upon liberty of property use. Thus, despite this representational foundation, governmental limitation of private land use creates tension in a state where the spirit of individualism runs high.

B. *New Property*

The past one hundred years have witnessed great changes in society and the form of wealth supporting the society. Ownership of land is no longer the single most dominant source of wealth desired by individuals. Food, shelter, and security can now be procured from employment or entrepreneurial activities.

Twenty seven years ago, Professor Reich authored his article "The New Property"²⁶ in which he described the emergence of government as a major source of wealth and noted the increasing numbers of Americans living on "government largess—allocated by government on its own terms, and held by recipients subject to conditions which express 'the public interest.'"²⁷ His general thesis was that government largess is rapidly supplanting those forms of individual wealth which were traditionally protected as individual property beyond the power of the public. In his view,

property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner . . . while the Bill of Rights comes into play only at extraordinary moments of conflict or crisis, property affords day-to-day protection in the ordinary affairs of life.²⁸

Reich acknowledged that the institution of property is created by society, and that society caused a reform of private property in order to limit arbitrary private power arising from accumulations of property. However, Reich warned that such reform should not obscure the truth that the only dependable foundation of personal liberty is the economic security of private property.²⁹ He identified an emerging society—a "public interest state"—driven by the doctrine that the wealth which flows from government is held by its recipients conditionally, subject to confiscation in the interest of the paramount state.³⁰ In con-

25. WYO. STAT. § 15-1-601 (Supp. 1990), § 15-1-611 (1980) (cities and towns); §§ 34-12-101, 115 (1990) (counties); §§ 9-8-101, 302 (1987) (state and local land use plans). See, generally, G. RUDOLPH, WYOMING LOCAL GOVERNMENT LAW ch. V (1985).

26. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

27. *Id.* at 733. Reich was primarily concerned with forms of wealth other than ownership of land, but his thoughts are clearly applicable to land.

28. *Id.* at 771.

29. *Id.* at 773.

30. *Id.* at 756, 768, 774.

cluding, Reich stated:

[i]t is time to recognize that 'the public interest' is all too often a reassuring platitude that covers up sharp clashes of conflicting values, and hides fundamental choices We cannot safely entrust our livelihoods and our rights to the discretion of authorities, examiners, boards of control, character committees, regents, or license commissioners. We cannot permit any official or agency to pretend to sole knowledge of the public good If the individual is to survive in a collective society, he must have protection against its ruthless pressure. There must be sanctuaries or enclaves where no majority can reach We must create a new property.³¹

It is somewhat ironic that in the same year as Reich's article, 1964, Congress decreed that certain lands would be retained in federal ownership for management because of "public values that would be lost if the land passed from federal ownership."³² Regarding such land, the "public interest state" has arrived. Basic policies seeking the transfer of ownership of public land to individuals have been abandoned. Fundamentally, a theory of public ownership has been adopted which will perpetuate the power of the federal government to control the use of such land according to the government's will. The Federal Land Policy and Management Act of 1976 reaffirmed the federal government's policy of retaining public lands in public ownership. The State of Wyoming's authority to regulate ownership of lands within the State will continue to be circumscribed as respects federal land, except when the "national interest" dictates a transfer of public land into private ownership.³³

Thus, for the foreseeable future, the federal government will continue to own one half of the land within Wyoming. A key question will be whether traditional "property" concepts underlie permitted uses of federal lands or whether such uses represent a form of government largess.³⁴

31. *Id.* at 787.

32. Interim Multiple-Use/Classification Act of 1964, Pub. L. No. 88-607, 78 Stat. 986 (a)(10).

33. The Act provides that public lands shall be retained in public ownership unless it is determined that disposal of a parcel will serve the national interest. 43 U.S.C. § 1701(a)(1) (1988). Before the sale of public lands, the Secretary of Interior must make a determination based upon criteria which include the balancing of "important public objectives" against "other public objectives and values." 43 U.S.C. § 1713 (1988).

34. Recent legislation for the planning and management of federal lands will be reviewed in a second installment of this perspective to be published in a later issue. This later installment will seek to identify the extent to which individual users of public lands have the protection of "property" in planning their economic and social activities.

C. *Past and Future Uses of Federal Public Lands*

Historically, Wyoming's vacant and unappropriated federal lands were freely used by people for a variety of purposes, with or without the express consent of the United States. In fact, much of Wyoming's sparse population had become dependent upon use of the public land. Mineral extraction, grazing, timbering, and hunting generated essential jobs and entrepreneurial opportunities. Because so much of our land is federally owned, Wyoming's economy depends heavily upon the "law" which will authorize or prohibit specific uses of that land.³⁵ But, by 1964 Congress had enacted a considerable body of legislation regarding these uses.³⁶

The acquisition of rights to extract minerals was provided by the General Mining Law of 1872³⁷ or the Mineral Leasing Act of 1920, as amended.³⁸ The Forest Service exercised its congressionally delegated powers to regulate grazing upon forest lands.³⁹ Land administered by the Bureau of Land Management was subject to regulated grazing pursuant to the Taylor Grazing Act of 1934.⁴⁰ Timber sales were regu-

35. The economic activity generated upon the federal lands provides much of the fiscal support for Wyoming's educational system and other state services. For example:

Grazing: In 1987, 1046 livestock operators grazed 937,193 animals within grazing districts, and 1679 livestock operators grazed 175,084 animals on federal lands outside grazing districts. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, PUBLIC LAND STATISTICS, Tables 13-14 (1987).

Hunting & Fishing: Expenditures by hunters and fisherman in 1988 were estimated to be \$192,178,565, and much activity can be assumed to occur on federal lands. VII STATE OF WYOMING 1989 ANN. REP., Game & Fish Comm'n, at 61.

Mineral Production: Royalties resulted in the distribution of \$175,066,952 in varying percentages to cities, counties, the University of Wyoming, the public school foundation fund, the state highway fund and others. I STATE OF WYOMING 1989 ANN. REP., State Treasurer, at 20. The State's mineral severance tax also produced \$231,027,286 from mineral production within Wyoming. II STATE OF WYOMING 1989 ANN. REP., Revenue and Taxation, at 77. Likewise, local governmental entities levied property ad valorem taxes of \$225,003,410 on mineral production. II STATE OF WYOMING 1989 ANN. REP., Revenue and Taxation, at 38.

Lumber & Timber: In 1987 the estimated wholesale value of lumber produced was \$71.4 million and the lumber and wood products industry employed 1393 workers. VII STATE OF WYOMING 1989 ANN. REP., Public Lands, at 40. The State Treasurer also distributed \$1,464,862 to counties which represents 25% of the stumpage value of timber sales within Wyoming's national forests. I STATE OF WYOMING 1989 ANN. REP., State Treasurer, at 29.

Oil, Gas & Coal Production: The Division of Research and Statistics, Department of Administration and Fiscal Control, estimates that 64.5% of oil, gas and coal production occurs on federally owned lands. Telephone interview with Mary Byrnes, Division of Research and Statistics (Mar. 5, 1990).

36. PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 7.

37. 30 U.S.C. §§ 21-42 (1988).

38. 30 U.S.C. §§ 181-287 (1988).

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

40. Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269 (codified as amended at 43 U.S.C. §§ 315-315r (1988)).

larly conducted by the Forest Service pursuant to its statutory obligation.⁴¹ In 1960, Congress had broadened the mission of the Forest Service to include administration of the national forests for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.⁴²

Following the 1970 report of the Public Land Law Review Commission,⁴³ Congress enacted legislation implementing many of the Commission's recommendations.⁴⁴ Under this legislation historical uses of public lands will continue.⁴⁵ However, the legislation significantly expanded the types of "uses" to be considered in the multiple-use planning processes. In addition to historical uses of mining and grazing, BLM planners must also consider recreation, wildlife and fish, and natural scenic, scientific and historical values.⁴⁶ Planning for the national forests must assure implementation of the Multiple-Use Sustained-Yield Act of 1960,⁴⁷ and in particular must "include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness."⁴⁸ The ultimate goal of modern federal land use planning is the preparation of management plans which encompass all multiple uses and provide the "maximum benefit for the general public"⁴⁹ or "serve the national interest."⁵⁰ The ultimate concern of past and present federal land users is how much of the land will continue to be available for a particular use and what is the nature of their "right" to use the land.

The federal land use planning and management process has generated extensive litigation devoted to review of administrative processes and interpretation of legislative standards.⁵¹ Modern federal public land law is evolving. This body of law, together with the body

41. 16 U.S.C. § 476 (1988).

42. Multiple-Use, Sustained-Yield Act of 1960, 16 U.S.C. § 528, 1783 (1988). Similarly, on BLM lands, the public pursued hunting, camping and other recreational activities free of federal regulation.

43. Besides declaring that the public lands would be retained and managed, the Interim Multiple-Use/Classification Act also established a Public Land Law Review Commission. Interim Multiple-Use/Classification Act of 1964, Pub. L. No. 88-606, 78 Stat. 982 (1964). The Commission's Report describes the need for review and recommendations to Congress concerning the federal lands. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970).

44. *E.g.*, Federal Land Policy Management Act of 1976, 43 U.S.C. §§ 1701-1783 (1988); Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (1988); Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1600-1612 (1988).

45. Basic authorization for grazing and mineral development has not been repealed.

46. 43 U.S.C. § 1702(c) (1988).

47. 16 U.S.C. § 528 (1988).

48. 16 U.S.C. § 1604(e)(1) (1988).

49. Interim Multiple-Use/Classification Act, Pub. L. No. 88-606, § 1, 78 Stat. 982 (1964).

50. Federal Land Policy Management Act of 1976, 43 U.S.C. § 1701(a)(2) (1988) (Declaration of Policy).

51. *See, e.g.*, cases and materials collected by G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW (2d ed. 1987).

of judicial precedent articulating powers of the federal government, separation of powers, constitutional power, and states' rights, explains why western state governments are unable to create "property rights" in federal land within their territories.

III. THE UNITED STATES: SOVEREIGN AND PROPRIETOR

The value of private landholding was deeply embedded in American life at the time of the American revolution. The absolute autonomy of fee-simple ownership was at the center of the political climate. Ownership of land was a primary means of promoting individual autonomy.⁵² History reflects the struggle to acquire and guarantee land as private property beyond public intervention. Not surprisingly, there was a strong policy favoring transfer of the lands owned by the United States into private hands.⁵³ While the United States Constitution is relatively barren of language seeking to guarantee the distribution of land to freeholders, there is no evidence that any consideration was given to making the public lands a permanent and irrevocable possession of the United States government.⁵⁴

A. *Limiting State Powers*

As a step in the formation of the United States, some of the new states ceded to the United States their claims to unsettled areas of land extending eastward to the Mississippi River.⁵⁵ This was followed by major acquisitions by the United States extending to the Pacific Ocean, and the exercise by Congress of its power to admit new states into the Union.

Before Wyoming was admitted as a state, the Supreme Court was confronted with issues pertaining to the rights of individuals to occupy these lands, as well as the power of newly established territorial or state governments to recognize "rights" of occupation or ownership. The Court held that the United States acquired the rights of the British government including that government's assertion of title to all

52. J. OPIE, *THE LAW OF THE LAND* 19-21 (1987).

53. P. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968).

54. The United States Constitution has two clauses applicable to land:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular State.

U.S. CONST. art. IV, § 3, cl. 2.

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dockyards, and other needful Buildings.

U.S. CONST. art. I, § 8, cl. 17.

55. See 1 R. POWELL & P. ROHAM, *POWELL ON REAL PROPERTY* § 162 (1991).

the lands as far west as the Mississippi River.⁵⁶ However, the courts of the United States could recognize new titles to land pursuant only to statutes enacted by Congress and in the manner therein authorized.⁵⁷ Thus, the territorial and state governments were denied the power to grant or recognize rights in land until after the land had been transferred to persons by the United States.

Whether *title* had passed from the United States was resolved by federal laws authorizing disposition of the land. As stated in 1857 in *Irvine v. Marshall*:

It cannot be denied that all the lands in the Territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the government may deem most advantageous to the public fisc, or in other respects most politic.⁵⁸

After title passed from the United States, state governments were then empowered to define or recognize the attributes of an individual's title to that land.

The Supreme Court has often been called upon to reconcile the powers of the federal and state governments. The acquisition during the 1800's of enormous tracts of land prompted the creation of temporary territorial governments, pending inclusion of the land within new states.⁵⁹ The Constitution does not expressly authorize the federal government to legislate concerning such acquired territory. Accordingly, some questioned the power of the federal government to legislate regarding the rights of persons occupying territories.

In the landmark case of *Dred Scott v. John F. A. Sandford*,⁶⁰ the Supreme Court considered how the constitutional property clauses applied to newly-acquired territory. In essence, the majority found that the property clause did not vest any power in the federal government except over the original territory ceded by the original states of the Union. The United States was not empowered to enlarge its territory except by the admission of new states. Only the states possess an independent sovereignty to determine all internal and domestic concerns such as "property of a person."⁶¹

The *Dred Scott* decision upheld the power of the individual states to determine whether property included slaves, and to deny the power of Congress to enact legislation affecting "property rights" cre-

56. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

57. *Id.*

58. 61 U.S. (20 How.) 558, 561 (1857).

59. *E.g.*, Act of July 25, 1868, ch. 235, 15 Stat. 178 (providing a temporary government for the Territory of Wyoming).

60. 60 U.S. (19 How.) 393 (1857).

61. *Id.* at 450.

ated by a state. The decision acknowledged the power of the states to recognize rights of persons as constituting property; it also implied clear limitations on powers of the federal government. In speaking of federal power, the court said:

A power, therefore, in the general government to obtain and hold Colonies and dependent Territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form. Whatever it acquires, it acquires for the benefit of the people of the several states who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.⁶²

The decision contained two important principles: (1) the Constitution's property clause does not apply to territory acquired after formation of the Union, and (2) Congress does not have the power to hold dependent territories subject to unrestricted legislation of Congress. Subsequent decisions, however, have eroded these principles.

Shortly after the civil war, the case of *Gibson v. Choteau* addressed the respective powers of Congress and the state courts regarding land being transferred from federal to private ownership.⁶³ In *Gibson*, a Missouri court was attempting to resolve a dispute between private parties concerning unpatented land. The Supreme Court held that the Missouri court had no jurisdiction over such land until title vested in a private party. The opinion stated:

It is a matter of common knowledge that statutes of limitation do not run against the State. That no laches can be imputed to the King, and that no time can bar his rights, was the maxim of common law . . . [T]he Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitation.⁶⁴

Such early decisions resurrected the powers of the King for the United States government. Of greater significance is the attribution of "ownership" rights to territory acquired by the United States. Regardless of constitutional delegation of powers issues, the Supreme Court found that common law concepts of land ownership vested powers in the United States, enabling it to control the use of its land.⁶⁵

Such federal control was manifest before Wyoming's admission into the Union. Congress adopted a practice of reserving the power to control the vacant and unappropriated lands within new states. For example, the Wyoming Territorial Legislature was prohibited from

62. *Id.*

63. 80 U.S. (13 Wall.) 91 (1872).

64. *Id.* at 99.

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

enacting any law interfering with disposal of the soil.⁶⁶ Subsequently, the Act of Admission granted land to the State for specified purposes, but also provided that the State of Wyoming would not be entitled to any further grants of land for any purpose.⁶⁷

Control of western lands and their settlement were matters of importance to the then-existing states. The exercise of federal power incident to the admission of states like Wyoming must have created doubt as to the scope of "sovereign" powers vested in new states. For example, could the state establish law recognizing rights in land arising from occupation and use? Such questions were presumably answered by the conditions of admission. For example, the Wyoming Constitution, as accepted by Congress, provides: "The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public land lying within the boundaries thereof . . . and the same shall be and remain subject to the disposition of the United States."⁶⁸ Similar conditions are found in other acts of admission and federal legislation. The Supreme Court has upheld such conditions as contracts between private parties or a "solemn bilateral compact."⁶⁹

If these conditions are viewed as a "solemn bilateral compact," an interesting argument arises. Wyoming's disclaimer of right and title indicates that unappropriated lands "remain subject to . . . disposition." Since Congress approved this language in admitting Wyoming into the Union, it might be argued that Congress obligated itself to dispose of such lands, and indeed, this was the prevailing practice at the time.⁷⁰ However, this argument is not supported by subsequent case law.

Congress' power to reserve forest lands from operation of the disposal laws was upheld in *Light v. United States*.⁷¹ The Supreme Court rejected arguments that Congress could not constitutionally withdraw lands from settlement without the consent of the state where the lands were located. The opinion offered no explanation of the meaning of the Constitution's property or jurisdiction clause. Such congressional power was said to exist because "[t]he government has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers."⁷²

66. Act of July 25, 1868, ch. 235, § 6, 15 Stat. 178.

67. Act of July 10, 1890, ch. 664, § 12, 26 Stat. 222 (the specified purposes were education and state governmental facilities).

68. WYO. CONST. art. XXI, § 26.

69. See, e.g., *Andrus v. Utah*, 446 U.S. 500, 507, 523 (1980); *Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938).

70. In 1890 and preceding years, cash sales, preemption, military bounties and homesteading were fostered by federal laws seeking to transfer ownership of land to individuals. Dry farming and stock raising homesteads subsequently continued such a policy. See generally P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

71. 220 U.S. 523 (1911).

72. *Id.* at 536. Light was prosecuted for trespassing—i.e., grazing cattle on federal

Light summarizes the 1911 judicial view with regard to a proprietor and sovereign as follows:

"All public lands of the nation are held in trust for the people of the whole country." *United States v. Trinidad Coal Co.*, 137 U.S. 160. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes; nor interfere when in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.⁷³

Inherent in this view is the principle that so long as Congress does not divest itself of ownership of land, there are no rights of use residing in the public or individuals, except to the extent authorized by Congress. Moreover, each succeeding Congress is free to enact its own decisions as to what should be done with federal lands.⁷⁴

One of the most basic municipal or sovereign powers residing in governments is the power of eminent domain by which property can be taken to satisfy needs of the public. Inevitably, questions arose as to whether federal lands could be taken under a state's power of eminent domain. This was the issue presented in *Utah Power & Light Company v. United States*.⁷⁵ The lawsuit was a test case to determine whether federal land needed for facilities to generate and distribute electric power to nearby communities could be taken under the state law.⁷⁶ *Utah Power* argued: (1) that the powers of owners of land are governed and determined by the law of the state in which the land is located; (2) that there is no federal common law of property; (3) that for the sake of orderly government there must be one, and only one, source of power to define by law the rights and powers which are incident to ownership of land; (4) that federal land which is not used or needed for a governmental purpose is subject to the laws of the state in which that land is located, just as privately-owned land; (5) that

forest land without a permit. Since he intended that his cattle would graze upon the forest reserve, the opinion did not consider whether the United States was required to fence its property in accordance with local law, and did not address other constitutional questions. *Id.* at 538.

73. *Id.* at 537.

74. The reference to a "trust" in the lands for the people of the country does not impose any limitation upon the power of Congress. The Court refers administration of the trust back to the Congress without setting forth any enforceable rights of people against the trustee.

75. 243 U.S. 389 (1917).

76. See *Utah Power*, 61 L. Ed. 791, 793-814 (1917) (briefs and contentions of the parties).

the question whether the use of any particular land is necessary for some public purpose is essentially a local one, to be determined by the states, and their decision should be final unless Congress determines that the use of that land is necessary for some governmental purpose of the United States; and, (6) that each state has power to determine for itself what purposes are public and sufficient to sustain the exercise of the power of eminent domain.⁷⁷

Such contentions were rejected by the Supreme Court, citing the constitutional power "to dispose of and make all needful rules and regulations respecting"⁷⁸ the lands of the United States. The Court further noted that the "settled course of legislation, congressional and state, and repeated decisions of this court, have gone upon the theory that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired."⁷⁹

The general tenor of the opinion was to sustain the ultimate sovereign powers of the United States when in conflict with claims by states affecting public lands. It contained no discussion of the arguments presented by Utah Power, nor did it consider the local needs of people for exercise of the power of eminent domain in a local governmental setting. Only Congress could make state laws applicable.⁸⁰

B. *The Federal Police Power and Public Lands*

Early on, the Supreme Court recognized that a state has civil and criminal jurisdiction over public lands within its borders.⁸¹ But, such jurisdiction does not extend to state action which would be inconsistent with the power of the United States to protect its lands.⁸² The 1897 Supreme Court decision in *Camfield v. United States* is frequently cited as precedent for this principle.⁸³

In 1895 Congress enacted the Unlawful Enclosures Act,⁸⁴ which prohibited persons from erecting enclosures around public lands to which they had no claim or color of title. Camfield had acquired extensive private lands from the Union Pacific Railway Company located within the checkerboard area in northern Colorado. A fence was

77. *Id.*

78. *Utah Power*, 243 U.S. at 404.

79. *Id.*

80. The opinion further described Congress' power to include the exercise of the police power to protect public lands from trespass and injury because "[a] different rule would place the public domain of the United States completely at the mercy of state legislation." *Id.* at 405 (quoting *Camfield v. United States*, 167 U.S. 518, 526 (1897)).

81. *Omaechevarria v. Idaho*, 246 U.S. 343 (1918) (holding that Idaho could legislate so as to restrict sheep grazing upon public land used by cattle).

82. *Utah Power*, 243 U.S. at 404.

83. 167 U.S. 518 (1897).

84. Unlawful Enclosures Act, ch. 149, 23 Stat. 321 (1895) (codified as amended at 43 U.S.C. §§ 1061-66 (1988)).

constructed around the perimeter of a large tract of private land. The result was to enclose about 20,000 acres of public land. *Camfield* asserted he was free to erect fence upon his land, and that if the Act was construed so as to prohibit fences on private property, it was unconstitutional. The Supreme Court reasoned that under common law, no man has the right to maintain a nuisance upon his own land which renders the occupancy of adjoining property intolerable; the sanctity of private property does not shelter nuisances. The Court found that the fence was a nuisance because it was intended to enclose government lands. The Court held that Congress has the power to legislate for the protection of public lands, though it may involve the exercise of the police power. "A different rule would place the public domain of the United States completely at the mercy of state legislation."⁸⁵

Interestingly, the *Camfield* opinion is barren of any reference to the Constitution. The Court simply concluded that a sovereign proprietor can enact legislation to prohibit what it considers to constitute a nuisance. *Camfield* became the cornerstone of other judicial opinions upholding congressional enactments that affect adjacent private lands.⁸⁶

C. Impacts Upon Private Lands — Regulatory Takings

1. *Kleppe v. New Mexico*

Generally, it may be said that private landowners have ownership rights to use the land as they will, subject to the police power of the state to regulate uses of their land. Private landowners therefore look to the state legislature for enactment of laws necessary to the enjoyment of their use of the land, or to the common law applied by the state court. In recent years, however, Congress has enacted federal legislation which directly and uniquely affects private lands adjacent to federal lands within the western states.⁸⁷ Consequently, implementation of Congress' will has displaced or preempted state law on certain matters pertaining to land ownership.

The 1976 Supreme Court decision in *Kleppe v. New Mexico* offered an extremely expansive reading of federal power over public lands.⁸⁸ At issue was the question of whether the State of New Mexico could enforce its stray law intended to control unbranded and unclaimed burros roaming private and public lands. New Mexico authorities had seized unbranded and unclaimed burros, which were subsequently sold at private auction. The United States asserted a right of possession under the 1971 Wild Free-Roaming Horses and Burros

85. *Camfield*, 167 U.S. at 526.

86. *E.g.*, *Alford v. United States*, 274 U.S. 264, 267 (1927); *Kleppe v. New Mexico*, 426 U.S. 529, 538 (1976).

87. Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§ 1331 to 1340 (1988); Endangered Species Act of 1976, 16 U.S.C. §§ 1531 to 1543 (1988).

88. 426 U.S. 529 (1976).

Act⁸⁹ and demanded that the burros be returned to the public domain. The declared congressional policy in the Act is that the described animals "shall be protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands."⁹⁰ The Act specifically directs protection and management of the animals "as components of public lands . . . in a manner that is designed to achieve and maintain thriving natural ecological balance on the public lands."⁹¹

A three-judge federal district court held the Act was unconstitutional, and enjoined the federal defendants from enforcing the Act.⁹² The court reasoned that the Act was grounded upon the power of Congress to make rules respecting territory or other property belonging to the United States, but that wild horses and burros do not become property of the United States by simply being present on land of the United States.⁹³ Traditional doctrines concerning wild animals treated them as property of the states. The court also noted that Congress made no finding to indicate it intended to protect the public land the horses and burros lived upon.⁹⁴

In reversing the trial court,⁹⁵ the Supreme Court provided a variety of explanations in support of the Act's constitutionality. Inherent in the decision is the principle that Congress has the power to legislate in any manner it pleases with regard to whatever subject matter Congress determines to be a *component of the public lands or essential to achievement of an ecological balance on the public lands*. The Court reminded itself that determinations under the property clause are entrusted primarily to the judgment of Congress,⁹⁶ citing the Court's precedents upholding the power of Congress and distinguishing those precedents cited by New Mexico. *Camfield*⁹⁷ was cited as containing "no suggestion of any limitation on Congress' power over conduct on its own property; its sole message is that the power granted by the Property Clause is broad enough to reach beyond territorial limits."⁹⁸

Such a reading of *Camfield* appears erroneous, as *Camfield* was directed towards the power of Congress to protect public lands by prohibiting nuisances on adjacent private land. Be that as it may, the

89. 16 U.S.C. §§ 1331-40 (1988).

90. 16 U.S.C. § 1331 (1988).

91. *Id.* § 1333 (a).

92. *State of New Mexico v. Morton*, 406 F. Supp. 1237 (D.N.M. 1975) *rev'd sub. nom.* *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

93. 406 F. Supp. at 1238.

94. *Id.* at 1239.

95. The decision of the three-judge trial panel was appealed directly to the United States Supreme Court pursuant to 28 U.S.C. § 1253 (1988).

96. *Kleppe*, 426 U.S. at 536.

97. *Camfield v. United States*, 167 U.S. 518 (1897).

98. *Kleppe*, 426 U.S. at 538.

property clause now represents the constitutional authority for Congress to legislate on any subject it determines to be related to the ecology of the public lands. *Kleppe* was basically concerned with upholding federal powers which can displace historical state powers; the Court specifically left open the question of the permissible reach of the Act over private lands under the property clause.⁹⁹

2. Mountain States Legal Foundation v. Hodel

The issue of the reach of the Wild Free-Roaming Horses and Burros Act over private lands was subsequently presented to the Tenth Circuit Court of Appeals in the case of *Mountain States Legal Foundation v. Hodel*.¹⁰⁰

Hodel involved a vast unfenced checkerboard¹⁰¹ area which exists along the Union Pacific railroad right of way in southwestern Wyoming. Owners of the private lands maintained a grazing enterprise on both private and public lands in accordance with the terms of grazing permits issued by the Bureau of Land Management (BLM). Free roaming horses have long inhabited the area. As a result of the protection extended to the horses, their numbers rapidly expanded. Because the horses were free to roam and pasture upon private as well as public land, the private owners sought an agreement with the BLM as to a reasonable number of horses to be managed within the checkerboard area. Unable to reach an agreement, demand was made upon the BLM to remove the horses from private lands.¹⁰² The BLM acknowledged that the horses grazed on the private lands, that an overpopulation of horses existed, and that the BLM had a statutory duty to remove the horses.¹⁰³ However, the BLM refused to remove the horses. The private owners then initiated a lawsuit seeking removal of excess free-roaming horses from the open range. The landowners also sought compensation for the "taking" of forage by horses protected under the Act.¹⁰⁴

An appeal from the trial court's actions was heard by a panel of the Tenth Circuit. The trial court had issued a writ of mandamus ordering all wild horses removed from the private lands, but had granted summary judgment in favor of the government on the taking issue.¹⁰⁵ The Tenth Circuit panel reversed as to the issue of taking of forage and remanded for factual determinations. According to the

99. *Id.* at 547.

100. 799 F.2d 1423 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987).

101. The checkerboard consists of alternating sections of private land and federal public land.

102. *Hodel*, 799 F.2d at 1432.

103. *Id.*

104. *Id.* at 1425.

105. *Mountain States Legal Found. v. Clark*, 740 F.2d 792, 794 (10th Cir. 1984), *vacated sub. nom.*, *Mountain States Legal Found. v. Hodel*, 765 F.2d 1468 (10th Cir. 1985).

panel, the Act was drafted so that the BLM was the only entity which could manage or control the impact of the increased number of horses.¹⁰⁶ Further, the continuing consumption of forage on the private lands was held to be a "taking" within the constitutional protection afforded personal property.¹⁰⁷

Judge McKay dissented from the panel's decision, stating "[h]owever innocuous it may at first appear, the court's opinion represents a radical departure from established constitutional precedent with sweeping implications for the enforcement of all environmental regulatory statutes."¹⁰⁸ The panel's opinion was subsequently withdrawn and the appeal was reheard *en banc*. Writing for the majority of the court after rehearing, Judge McKay concluded that no "taking" had occurred.¹⁰⁹ In his view, the Wild and Free-Roaming Horses and Burros Act "is legally nothing more nor less than a run-of-the-mill regulatory scheme enacted by Congress to insure the survival of a particular species of wild animals,"¹¹⁰ or "nothing more than a land-use regulation enacted by Congress to ensure the survival of a particular species of wildlife."¹¹¹

The majority concluded that management of free-roaming horses by the federal government was no different than the government's regulation over other forms of wildlife such as endangered species.¹¹² In reaching this conclusion, the majority's factual interpretations and citations of authority are highly questionable. For example, none of the cited cases involved a factual situation in which government officials are mandated to manage the wildlife and cause their removal from private land. Congress obviously intended to provide some level of protection for private land under the Wild and Free-Roaming Horses and Burros Act: "If wild free-roaming horses or burros stray from public lands onto privately owned land, the owners of such land may inform the nearest Federal marshal or agent of the Secretary, who shall arrange to have the animals removed."¹¹³

The Tenth Circuit majority characterized the Act as "nothing more than a land-use regulation enacted by Congress to ensure the survival of a particular species of wildlife. It is not unique in its impact on private resource owners."¹¹⁴ It is incomprehensible why the majority would refer to "survival" of a particular species when the lawsuit involved an admitted excess population of horses subject to reduction in accordance with Congress' specific directions.¹¹⁵

106. *Clark*, 740 F.2d at 795.

107. *Id.*

108. *Id.* (McKay, J., dissenting).

109. *Hodel*, 799 F.2d at 1431.

110. *Clark*, 740 F.2d at 797.

111. *Hodel*, 799 F.2d at 1428.

112. *Id.*

113. 16 U.S.C. § 1334 (1988).

114. *Hodel*, 799 F.2d at 1428.

115. *Clark*, 740 F.2d at 794 (Secretary admitted an overpopulation of horses).

It is equally difficult to rationalize the majority's characterization of the Act as a land-use regulation. There is no basis whatsoever for suggesting that the private lands involved had been subjected to any form of land-use regulation. It appears the court simply concluded that all land must bear the burden of congressionally protected animals which may cause damage, eat crops, or otherwise interfere with the owner's use of the land. It made no difference to the court that federal government officials failed to discharge their obligation to remove the animals.

Another justification proffered by the majority in support of its decision is by way of a footnote reference to the right of a private landowner to fence the land and exclude the horses.¹¹⁶ Cited therein is *Camfield v. United States* as supporting the right of landowners to fence lands lying within the checkerboard so as to exclude the free roaming horses. In fact, *Camfield* holds to the contrary.¹¹⁷ Indeed, the Tenth Circuit has more recently held that private landowners cannot fence their lands within the checkerboard so as to interfere with lawful purposes of the public lands, including the migration of antelope seeking winter forage.¹¹⁸

Finally, the majority concluded that "[i]n view of the important governmental interest involved . . . no taking [had] occurred."¹¹⁹ The court declined to consider the forage annually consumed by horses as a distinct and separate object of property subject to "taking." It opined that the economic impact on the private land did not interfere with expectations of using the land for grazing or impair the right to hold property for investment purposes.¹²⁰

From the perspective of a Wyoming rancher, the forage growing on the arid lands of southwestern Wyoming is the only renewable resource representing any value of the land's surface. The forage can be consumed only once in each season of growth. It will support only a given number of cattle, sheep, antelope, deer, elk, and horses grazing on the land; the numbers must therefore be controlled. It is difficult for a rancher to understand what "economically viable use" exists in forage after it has been consumed by an animal, or what "investment-backed opportunity" remains in private grazing land when it may be taken by a federally-protected animal on an annual basis. However, as the matter stands, horses maintained within the checkerboard will continue to consume part of the annual crop of forage on private land to the detriment of the landowner's animals. A significant portion of the burden of providing forage for a component of the public lands,

116. *Hodel*, 799 F.2d at 1428 n.8.

117. See *supra* notes 83 through 86 and accompanying text.

118. *United States v. Bergen*, 848 F.2d 1502 (10th Cir. 1988), cert. denied, 109 S. Ct. 528 (1988).

119. *Hodel*, 799 F.2d at 1431.

120. *Id.* at 1431; cf. *Seth, J.*, dissenting at 1434 (forage is a separate item of property under Wyoming law).

the horses, therefore falls on a few landowners.

In his dissenting opinion, Judge Barrett asserted that Congress clearly intended that the federal government maintain these animals.¹²¹ Consequently, he would not hold as a matter of law that a taking had not occurred because:

it is not only fair and just that the government not impose a burden on a few individuals to sustain the free-roaming horses, but it is also the express intent of Congress that private landowners not be required to share the burden of sustaining these animals which compete with livestock for scarce and valuable high plains forage.¹²²

Judge Barrett stressed that there is no set formula for identifying a "taking" forbidden by the fifth amendment. Rather, ad hoc factual inquiries must be made into the circumstances of each case.¹²³ The majority failed to make such an inquiry. The majority opinion reveals no examination of the factual situation involving the duty of federal officials to manage and remove horses from private lands and the willingness of private landowners to accommodate a reasonable number of horses roaming at will upon unfenced private and public lands. The result of the case reflects an emerging federal "law" which permits Congress to determine that private ownership rights can be taken without compensation.

3. The Endangered Species Act

Another illustration of federal legislation encroaching upon traditional property rights is the Endangered Species Act of 1976 (ESA).¹²⁴ The ESA extends protection to threatened or endangered species and their habitat as designated by the Secretary of Interior in accordance with the Act. The ESA applies regardless of whether the species is found on public or private lands. Two of the stated purposes of this complex and far reaching legislation are "to provide a means whereby the ecosystem upon which endangered species and threatened species depend may be conserved, and to provide a program for the conservation of such endangered species and threatened species."¹²⁵

The impact of the ESA upon the manner in which people normally conduct their affairs was dramatized by the Supreme Court's

121. *Id.* at 1437-38 (Barrett, J., dissenting).

122. *Id.* at 1437.

123. *Id.*

124. 16 U.S.C. §§ 1531-44 (1988).

125. *Id.* § 1531(b). Congress' policy is that "all federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." *Id.* § 1531(c). The Secretaries of Agriculture and Interior have a clear obligation to assure that the forest and BLM lands are utilized in a manner which will conserve any and all designated species of fish, wildlife and plants. *Id.* § 1534(a).

1978 opinion in *Tennessee Valley Authority v. Hill*.¹²⁶ Designation of the small snail darter fish found in the Little Tennessee River as an endangered species prompted action to terminate the multi-million dollar Tellico Dam project. Impoundment of water behind the dam would result in total destruction of the snail darter's river habitat. Literal interpretation of the ESA led to an injunction halting all activities on the Tellico Dam project until such time as Congress exempted the project from compliance with the Act or the snail darter was removed from the list of endangered species.¹²⁷ The Supreme Court affirmed the injunction, and essentially declined to adopt a standard of reasonable application of the ESA because of its determination that Congress intended to "afford first priority to the declared national policy of saving endangered species."¹²⁸ That the Court had reservations about possible applications of the ESA is reflected in its closing statement:

We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.¹²⁹

The ESA was subsequently interpreted to require the removal of feral sheep and goats whose grazing on non-federal land was modifying the habitat of the endangered Palila bird, found only in Hawaii.¹³⁰ Continuation of grazing by the sheep and goats was a threat to the Palila's habitat and constituted a prohibited "taking" under the ESA.¹³¹ The affected landowner was the State of Hawaii, whose officials maintained the feral sheep and goats.¹³² Rights of use by the landowner were not considered in the case. The effect of the decision was to prohibit use of non-federal lands in a manner that would constitute a "taking" of an endangered species' habitat.

The open and uninhabited lands in the Rocky Mountain Region are a haven for many forms of wildlife, including species protected by the ESA. It is inevitable that protection of certain species and their habitats will prohibit different forms of human activity and will have a significant impact upon affected private property. This gives rise to

126. 437 U.S. 153 (1978).

127. *Hill v. Tennessee Valley Authority*, 549 F.2d 1064, 1075 (6th Cir. 1977).

128. *Tennessee Valley Authority*, 437 U.S. at 185.

129. *Id.* at 195. Congress subsequently exempted the Tellico project from the ESA. See *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir. 1980), cert. denied, 449 U.S. 953 (1980).

130. *Palila v. Hawaii Dep't. of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981).

131. *Palila*, 639 F.2d at 497. The ESA makes it unlawful for any person to "take" any endangered species. 16 U.S.C. § 1538(a)(1)(B) (1988).

132. *Palila*, 639 F.2d at 496.

the question of possible application of the fifth amendment's compensation requirement for the taking of property.

The grizzly bear has been designated under the ESA as a threatened species which cannot be taken except in limited circumstances.¹³³ Glacier National Park in Montana provides natural habitat for the grizzly bear. Certain lands adjacent to Glacier National Park are privately owned and used for grazing by domestic sheep. An owner of sheep leased the private land and commenced grazing activities. One or more grizzly bears subsequently killed a number of sheep. Appeal to federal officials for help resulted in efforts by the United States Fish and Wildlife Service to trap the offending grizzly bear(s). These efforts were unsuccessful.¹³⁴ One evening while a federal trapper and the owner of the sheep were on the land, two grizzly bears emerged from the forest and one of them moved toward the sheep. The sheep owner shot and killed the bear.¹³⁵ Shortly thereafter the owner removed his sheep from the land and obtained a cancellation of his lease. He had lost eighty-four sheep to the grizzlies.¹³⁶

In accordance with the ESA, the Department of Interior assessed a civil penalty of \$3,000 for the taking of the grizzly bear. The penalty was subsequently reduced to \$2,500 at an administrative hearing during which the sheep owner admitted killing the bear knowing it was a protected grizzly, and that he had been warned of the imposition of a fine even if he killed in defense of the sheep.¹³⁷

Thereafter, sheep owners instituted a lawsuit seeking an injunction against federal officials restraining them from enforcing the ESA and its regulations when private owners are defending their property. The trial court granted summary judgment to the federal officials, which was affirmed by the Ninth Circuit in *Christy v. Hodel*.¹³⁸

The plaintiffs in *Christy* asserted a fundamental right to kill wild animals in defense of their property. The Ninth Circuit rejected this, indicating that "[t]he U. S. Constitution does not explicitly recognize a right to kill federally protected wildlife in defense of property."¹³⁹ The court was unwilling to infer such a right,¹⁴⁰ and further noted that the Supreme Court had cautioned against finding new fundamental constitutional rights which are neither "implicit in the concept of ordered liberty" nor "deeply rooted in this Nation's history and

133. 50 C.F.R. § 17.40(b) (1989).

134. *Christy v. Hodel*, 857 F.2d 1324, 1326 (9th Cir. 1988), cert. denied, 109 S. Ct. 3176 (1989).

135. *Id.* at 1326.

136. *Id.*

137. *Id.* at 1327.

138. 857 F.2d 1324 (9th Cir. 1988).

139. *Id.* at 1329.

140. The court noted that in a sodomy case, the Supreme Court had refused to expand the right of privacy to embrace homosexual conduct. *Id.* at 1330.

tradition."¹⁴¹

The manner in which *Christy* rejected the claimed right to kill animals in defense of property invites scrutiny. For one, the concept of federally-protected wildlife was unknown when the Constitution was adopted. Hence, it would be ludicrous to search for explicit constitutional authority to kill such wildlife in defense of property. Moreover, the right of privacy is nowhere mentioned in the Constitution. In contrast, the fifth amendment specifically prohibits the taking of property without due process and just compensation. Finally, the Ninth Circuit acknowledged that the Wyoming and Montana Constitutions have been construed to confer a limited right to kill wild animals in defense of property.¹⁴² This fact might well have sufficed to show that such a right is deeply rooted in this Nation's history and tradition. At the very least it established that such a right is a recognized attribute of property.

Having determined that the United States Constitution does not protect the right to kill wildlife in defense of property, the court then considered whether the ESA and implementing regulations effected a "taking" of property.¹⁴³ The court pointed out that the plaintiffs remained in full possession of their sheep. It was the bears who took the sheep and not the federal government. Substantial authority was cited for the general proposition that destruction of private property by protected wildlife does not constitute a governmental taking.¹⁴⁴ The court observed that the federal government does not own the wild animals it protects, nor does the government control the conduct of such animals. The plaintiffs attributed the conduct of the protected grizzly bears to the government and asserted that the government should compensate them for their losses because "[i]t is axiomatic that the Fifth Amendment's just compensation provision is designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole."¹⁴⁵ This principle was held to be inapplicable because the ESA and regulations did not "force" the plaintiffs to bear any burden.¹⁴⁶

In dissenting to the Supreme Court's denial of certiorari, Justice White indicated that perhaps a government edict barring one from resisting the loss of his property is the constitutional equivalent of an edict taking such property in the first place.

Thus, if the government decided (in lieu of the food stamp program) to enact a law barring grocery store owners from "harass-

141. *Id.*

142. *Id.* at 1329 (citing *Cross v. State*, 370 P.2d 371 (Wyo. 1962), and *State v. Rathbone*, 110 Mont. 225, 100 P.2d 86 (1940)).

143. *Id.* at 1334.

144. *Id.*

145. *Id.* at 1335 (quoting *First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987)).

146. *Id.* at 1335.

ing, harming, or pursuing" people who wish to take food off grocery shelves without paying for it, such a law might well be suspect under the Fifth Amendment. For similar reasons, the Endangered Species Act may be suspect as applied in petitioner's case.¹⁴⁷

Certain observations are perhaps appropriate here. For one, the ESA does not purport to directly "take" any property, personal or real. Indeed, the ESA authorizes federal departments to acquire land when necessary to carry out a program to conserve wildlife.¹⁴⁸ However, so long as the "law" permits a protected species to roam and wrest its sustenance from private land, there is little justification to seek federal funding to acquire new public land. More important, when grazing represents the only economic value of private land adjacent to the habitat of predators such as the grizzly bear, and the private owner is no longer permitted to protect the livestock by killing bears which cannot be captured, the involved risk of grazing may prove too great. The use of such land for grazing may have to be abandoned, as it was in *Christy*, and it is difficult to identify other land uses of equivalent value. The loss is thus more than the specific livestock eaten by the grizzly bear.

To equate a predator such as the grizzly bear with other species of wildlife is to ignore the history of the settlement of this Nation. State laws pertaining to wild and unowned creatures have long delineated our rights and liabilities with regard to wildlife. In Wyoming, the legislature declared that all wildlife is the property of the State for purposes of its legislation.¹⁴⁹ Through their legislature, the people of the State determined that protection of specific forms of wildlife required compensation to landowners for damage to livestock or the land and its crops.¹⁵⁰ Predators were not protected for many years. Eventually, predators such as bear and mountain lion were extended protection subject to being taken by licensed persons. Wyoming legislation specifically authorizes the taking and killing of protected predators by owners of property when the predator is doing damage to private property.¹⁵¹ Distinctions based upon the natural needs and propensities of wildlife as well as a recognition of the burdens forced upon affected property are reflected throughout the State's statutory

147. 57 L.W. 3811, Journal of Proceedings, June 12, 1989.

148. 16 U.S.C. § 1534(a)(2) (1988).

149. Wyo. STAT. § 23-1-103 (1986). The use of the concept of "property" is simply a means for declaring the State will define the extent to which people may acquire or interfere with the named species of wildlife.

150. *Id.* § 23-1-901.

151. *Id.* § 23-3-115. Naturally, a federal law such as the ESA will govern in the event of conflict with a state statute. U.S. CONST. art VI, § 2. To the extent that such a predator may also be protected by the ESA, the Wyoming statute authorizing the predator's destruction in defense of property would be effectively "trumped" by conflicting federal law.

scheme.¹⁵²

Christy v. Hodel illustrates how congressional legislation may effectively abolish some attributes of property, even when those attributes have been recognized by the state's supreme court. It may therefore be imprudent to rely upon the fifth amendment to restrain Congress in drafting new legislation.¹⁵³ In lieu of such reliance, it becomes incumbent upon the people and their congressional representatives to scrutinize legislation closely to determine whether it might potentially result in loss of desired property attributes.

D. *The Sagebrush Rebellion*

In the 1970's, a movement arose within the western states to establish state control over some federal lands. This movement came to be known as the "Sagebrush Rebellion."¹⁵⁴ In 1980, the Wyoming legislature enacted its version of a "sagebrush rebellion statute."¹⁵⁵ Essentially, this legislation set forth a legal claim to federal lands, water and minerals within the State of Wyoming based upon interpretation of the United States Constitution. The claim could be enforced only if the Supreme Court were to hear a dispute raising that constitutional interpretation and hold it to be valid. A court order could then compel the "transfer" of the jurisdiction and ownership of certain lands and mineral resources to the State.¹⁵⁶ After analyzing such claims, a noted commentator concluded that the sagebrush rebels' constitutional ar-

152. See generally WYO. STAT. §§ 23-1-101 to 23-6-207 (1986 & Supp. 1990).

153. Notably, Executive Order 12630 of March 15, 1988 provided the following direction to the executive branch of government:

Recent Supreme Court decisions . . . in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interest in the same private property and even if the action constituting a taking is temporary in nature Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Executive Order No. 12630, 3 CFR, 1988 Comp., p. 554. If nothing else, this order directs the executive branch to consider whether its actions may have the effect of a regulatory taking. However, only an ad hoc judicial inquiry can establish whether a taking has in fact occurred. It remains for Congress to foresee the consequences of its actions, and to affirmatively decide whether justice and fairness requires that compensation be paid. The only limitation upon federal exercise of eminent domain powers is "undue or unplanned burdens on the public fisc." See *United States v. Gettysburg Electric Ry.*, 160 U.S. 668, 680 (1876).

154. See generally Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

155. WYO. STAT. §§ 36-12-101 to -109 (Supp. 1990). The Wyoming legislature's claim was limited to a right to manage present federal multiple use lands including mineral resources. It is significant to note that the legislature accepted the idea of the government managing lands in the future, rather than selling them to private entities.

156. *Id.*

gument was fatally flawed, and that the concerns of the rebels represented a political question for resolution by Congress.¹⁵⁷

It is possible to frame a plausible argument in support of the State's claim. Arguably, the Supreme Court has not directly considered the constitutional power of Congress to assume permanent governance of territory acquired beyond that claimed by the thirteen original states. The United States Constitution is silent on the matter. Dictum in the *Dred Scott* decision states that the Constitution does not authorize the United States to hold new territory over which it might legislate without restriction.¹⁵⁸ Even so, careful analysis indicates that congressional power over public lands must be upheld.

First, it was the United States, as a sovereign among the community of nations, which acquired sovereign powers and rights of ownership with regard to newly acquired territory. As the Supreme Court has often stated, the United States is a proprietor of land with all the rights bestowed by the concept of common law ownership.¹⁵⁹ It may do with its lands as it will, to the exclusion of all people.

Second, the absence in the Constitution of expressly delegated power with respect to new territory would refer the issue to the tenth amendment for resolution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁶⁰ Generally, it may be said that Congress has broadened the scope of its legislation to matters affecting the "national public interest." In *Garcia v. San Antonio Metro. Transit Authority*, the Supreme Court upheld congressional legislation affecting local government employee relationships.¹⁶¹ The Court held that state interests "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."¹⁶² Notwithstanding vigorous dissents by Justices Powell and Rehnquist,¹⁶³ *Garcia* indicates that the "law" delineating the sover-

157. Leshy, *supra* note 154, at 354. This conclusion is strongly supported by case law declaring that the power of Congress over public lands is unlimited. *E.g.*, Kleppe v. New Mexico, 426 U.S. 529 (1976).

158. *Dred Scott*, 60 U.S. (19 How.) at 718.

159. *E.g.*, *Light*, 220 U.S. at 537.

160. U.S. CONST. amend. X.

161. 469 U.S. 528 (1985).

162. *Id.* at 552. In essence, the power of the states to protect their interests rests in the federal structure for representation in Congress. The Court cited numerous situations where federal legislation provided assistance to state and local governments, concluding that "[t]he political process ensures that laws that unduly burden the States will not be promulgated." *Id.* at 556.

163. Justice Powell's viewed the states' role in our system of government as a matter of constitutional grace, not legislative grace, and characterized the state as providing a far more effective role of democratic self-government. *Id.* at 576 (Powell, J., dissenting). Justice Rehnquist observed that "all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint." *Id.* at 588 (Rehnquist, J., dissenting).

eign powers of states lies in the political processes which compel Congress to act. As a legal argument, the sagebrush rebellion was destined to fail. Revision of existing federal public land policies will occur only when Congress is persuaded to effectuate specific changes.

What prompted the 1970's sagebrush rebellion?¹⁶⁴ It is difficult to authoritatively document all possible factors, however, some general observations can be offered: So long as the policy of the federal government was to dispose of land and foster use of public land by individual entities, there was little reason to question the manner in which the federal agencies administered existing public land statutes. However, the new federal legislative scheme for retention, planning, and management marked the arrival of environmental and preservation interests. Western residents and the federal land managers were suddenly challenged by *national* special interest groups rallying and soliciting membership throughout the United States. These groups were prepared to influence federal land use planning by all possible means in the courts or in the political arena. In the eyes of many western residents, their economic and social well-being was endangered if historical uses of the public lands were eliminated or restricted because of decisions giving primacy to preservation, wildlife, and scenic values. Many westerners have a deep-seated belief that those people who have chosen to work for a living in states like Wyoming should be allowed to determine the use of land surrounding them. These individuals believe that balancing economic opportunities and environmental concerns is better accomplished through local state government.

Ten years have elapsed since the Wyoming legislature declared its desire for control of federal multiple-use lands. Nothing has occurred to foster its implementation. However, the performance of the federal land use planning process and the implementation of federal statutes subjecting private property to the burdens of sustaining protected animals may have generated further support for a sagebrush rebellion. Indeed, a resolution was introduced in the 1991 Wyoming Legislature which called upon Congress to authorize the State of Wyoming to "have ultimate management authority over federal lands within the state's boundaries."¹⁶⁵ However, the resolution failed to specify why or how state management would better resolve the perceived shortcomings of federal management systems. More important, the resolution did not articulate any failures of the federal system which justify change at this point in time, nor did it offer specific examples of how the people of the state are frustrated in fulfillment of their expectations.

164. Professor Leshy's article reviews some of the contributing factors. Leshy, *supra* note 154, at 341-48.

165. H.J.R. 15, 51st Leg., 1991 Wyo. Laws. House Joint Resolution 15 passed the House 49-13 but died on general file in the Senate. Telephone conversation with Lisa Kinney, Senator, Wyoming State Senate (D., Albany) (Mar. 12, 1991).

Ten years ago Professor Leshy posed the following questions with regard to the sagebrush rebellion:

Does it represent a genuinely inspired effort to replace distant, inefficient and unresponsive federal land management with better, local government control? Or is it instead merely a land grab, with states fronting for certain interest groups who seek exclusive rights to exploit the resources of these lands free from any regulation?¹⁶⁶

Such questions need to be addressed by advocates of the proposed transfer. In addition, other questions must be asked. Does the federal system provide individuals with a firm basis for planning their economic and social activities? Does it provide "law" defining legally enforceable relationships to the land? Should the "national interest" acknowledge that states provide a far more effective vehicle for democratic self government regarding the use of federal lands?¹⁶⁷

Whatever else may be said of the continuing sagebrush rebellion, it does focus attention upon the foregoing types of questions regarding the future of the public lands. The rebellion has not been the sole source of criticism of the prevailing federal public land system. Citizens nationwide assert a wide diversity of value judgments with respect to what *ought* to be done with the federal lands.¹⁶⁸

E. A Role For State Government

The evolution of law since 1890 has effectively prohibited the State from defining ownership rights in federal lands. However, when Congress decided to retain ownership of public lands, it also provided that state and local governments would have a role in the planning and management of multiple-use lands.¹⁶⁹ Current legislation requires federal officials to coordinate public land use planning with the planning and management programs of state and local governments, and further provides for meaningful public involvement by state and local

166. Leshy, *supra* note 154, at 318-19.

167. It is appropriate to observe that after seventy years of socialistic control of land resources in the Union of Soviet Socialist Republics, the Soviet leadership is seeking to privatize certain lands, and individual republics are denying the supreme sovereignty of the central government. Bogert, *Marching to the Market*, Newsweek, Sept. 24, 1990, at 35; Coleman, *Last Minute in Moscow*, Newsweek, Oct. 1, 1990, at 38.

168. *E.g.*, W. HAGE, *STORM OVER RANGELANDS—PRIVATE RIGHTS IN FEDERAL LANDS* (1989); B. DYSART & M. CLAWSON, *MANAGING PUBLIC LANDS IN THE PUBLIC INTEREST* (1988); P. FOSS, *FEDERAL LANDS POLICY* (1987); S. BRUBAKER, *RETHINKING THE PUBLIC LANDS* (1984); P. TRULUCK, *PRIVATE RIGHTS & PUBLIC LANDS* (1983); H. BOSCHKEN, *LAND USE CONFLICTS* (1982).

169. Besides providing for selective retention of such lands and creating a commission to make recommendations concerning which lands should be so retained, the statute also created an advisory council, which included representation from state and local governments, as well as a representative designated by each state's governor. Interim Multiple-Use/Classification Act, Pub. L. No. 88-606, §§ 6, 7, 78 Stat. 982, 983-84 (1964).

government officials.¹⁷⁰ The effectiveness of such coordination and involvement upon federal land use decisions deserves study and analysis beyond the scope of this article.

From the perspective of state government, the key issue is how to best represent Wyoming in the federal planning process. If there is such a thing as a Wyoming public interest distinct from the "national public interest," that Wyoming interest is best identified through the state government. It is no easy task to identify that interest, however, for there is no clear consensus within the State regarding federal land use management strategies.¹⁷¹ Even so, it is clear that Wyoming's interest must be identified and injected into the federal land use management process. Otherwise, uses of federal lands will be decided upon the basis of a planning process dominated by national special interest groups.

Organized national interest groups have a dramatic impact upon the federal land use decision-making process. Such groups have the resources, expertise and commitment necessary to forge what appears to be a national public interest calling for a particular strategy. But such groups typically represent and advocate only limited viewpoints.¹⁷² Other voices also need to be heard. Wyoming shopkeepers,

170. For example, one statute requires the Secretary of Agriculture to "establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs." 16 U.S.C. § 1612(a) (1988). In like manner, the Secretary of Interior is directed to

coordinate the land use inventory, planning and management activities . . . with the land use planning and management programs . . . of the States and local governments . . . [T]he Secretary shall, to the extent he finds practical, . . . assure that consideration is given to those State [and] local . . . plans that are germane in the development of land use plans for public lands . . . and shall provide for meaningful public involvement of State and local government officials . . .

43 U.S.C. § 1712 (c)(9) (1989).

Similarly, the Surface Mining Control and Reclamation Act allows any state with an approved State Lands program to assume responsibility for "regulation of surface coal mining and reclamation operations on Federal lands within the State . . ." 30 U.S.C. § 1273(c) (1988).

171. Wyoming newspapers frequently report disputes among citizens as to federal land use plans. *Compare* Laramie Daily Boomerang, Feb. 10, 1990, at 7, col. 1 (Environmental groups want oil and gas leasing suspended on Wyoming forests) *with* Laramie Daily Boomerang, May 19, 1990, at 10, col. 2 (State's pro-development groups criticize Forest Service lease withdrawal decision).

172. Lawsuits initiated by such groups advocate interpretations of law which result in land use mandates most consistent with the values they hold dear. Federal land managers must litigate in defense of their decisions or seek compromise as to the contested land use plans. Such litigation may result in "law" which has significant impact upon the future of State citizens who were not parties to the lawsuit or compromise. Are there occasions on which the State should intervene in defense of "state" interests? Is it possible that some fine tuning of existing federal laws or procedures would alleviate the "severe, continuous and debilitating hardship upon the people of the State of Wyoming" described in the sagebrush rebellion legislation? Answers to such questions could be forthcoming from a directed effort toward participation through a state government structure supported with essential resources.

teachers, laborers and others have a vital interest in the State's economy, which is closely tied to what uses will, and will not, be permitted on the federal lands. Mineral developers, timbering companies, ranchers and others who depend upon the federal lands also contribute to the State's economy, and also deserve to be heard in identifying what constitutes the Wyoming public interest. A process must be established by which all affected sectors may present their viewpoint, and in which all affected parties may have confidence, knowing that the ultimate result of that process will be a comprehensive and balanced presentation of how various alternative land use decisions will affect Wyoming's future.¹⁷³

Fundamentally, state government exists for the "peace, safety, and happiness"¹⁷⁴ of the people. The State ought to actively and forcefully pursue ways in which it can truly influence federal public land use planning and management for the benefit of its citizens. The permanent residents of Wyoming have a direct interest, whether they realize it or not, in how federal legislation authorizes uses of the public lands or impacts upon the use of private land. The law prevents state government from establishing "rights" in the public lands, but it has invited the State to participate in the planning and management process. The State ought to accept that invitation, and should seek to assure that affording predictable status and tenure to the investment-backed expectations of Wyoming residents becomes as much of a goal in the federal planning process as affording recreation and other amenities to the national population.

There is little public evidence of the manner in which state government has interacted with federal officials in the planning of uses of public land in Wyoming. News stories report responses of the governor or state agencies to planning initiatives announced by federal officials.¹⁷⁵ However, there is no indication of any change in the State's governmental structure intended to bring state government resources to focus upon the federal planning and management system. The fed-

173. A 1970 Public Land Commission report recognized that there are several "publics" which, in the aggregate, comprise the constituency to be served in deciding whether to retain public lands and how such lands should be managed. The report identified various separate interests, including state and local governments, and users of public lands and resources. PUBLIC LAND LAW REVIEW COMMISSION, *One Third of the Nation's Land* (1970). In setting forth certain recommendations, the Commission noted that many localities are dependent upon federal lands for economic and social growth, and that the federal government must protect the rights of its citizens and treat them all fairly.

One of the Commission's recommendations was to subject federal lands to state and local zoning regulation. But, Congress rejected this recommendation, instead providing for state involvement in planning uses of BLM and forest lands. 43 U.S.C. § 1712(c)(9) (1988); 16 U.S.C. § 1612(a) (1988).

174. WYO. CONST. art. 1, § 1.

175. E.g., Laramie Daily Boomerang, Jan. 23, 1991, at 8, col. 1 (Governor Sullivan calls for redrafting of Yellowstone "vision document"); *Id.*, Feb. 7, 1991, at 8, col. 2 (Bighorn National Forest wildlife standards violated—quoting official of Wyoming Game and Fish Department).

eral laws, regulations, and procedures are extremely complex. A structured state entity and process ought to be in place to assure that state and local government officials exercise all opportunities provided by federal law to participate in the planning and management of public lands. A credible state position can be developed only as the result of systematic study, analysis, and assessment of the federal planning and management process for all federal lands within the state. Such a state effort could also identify impacts of federal legislation dealing with wildlife present on federal and private lands.

State government should be expected to seek means for reconciling perceived conflicts between state and national interests, as well as for formulating judgments as to the most judicious use of the land. The federal land use system contemplates ongoing maintenance of land use plans, with revision when appropriate.¹⁷⁶ Only a structured state process will be able to meaningfully participate on into the future and to maintain a state perspective as to the many uses of both federal and private lands. At a minimum, a structured state process would provide the people of Wyoming appropriate representation regarding their interests in the use of all land located within their state.

One-half of Wyoming's land is now controlled by a management process in which Congress and the federal agencies make a majority of the decisions. Structured state participation in that process would serve as a constant reminder that federally-owned resources are critical to enjoying a productive life in Wyoming. Such participation would serve as a substitute for the legislatively-claimed right to manage lands owned by the United States and reinforce the traditional function of state government as the constitutional body responsible for defining property rights. Whatever decisions emanate from current and future planning for uses of federal land, those decisions will weigh heavily upon how the people of Wyoming plan their futures.

IV. SUMMARY

The Wyoming Constitution proclaims that "all power is inherent in the people."¹⁷⁷ Admission into the union as a sovereign state on equal footing with the original states created a vision in which the Wyoming territory would be inhabited and developed in accordance with laws enacted by the new state's legislature. Such a vision has not been realized. State law does not extend to the recognition of rights in land remaining in the ownership of the United States—land which constitutes about one-half of the State's territory.

176. The Secretary of Agriculture is required to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System . . ." 16 U.S.C. § 1604(a) (1988). The Secretary of Interior must "develop, maintain, and, when appropriate, revise land use plans . . ." 43 U.S.C. § 1712(a) (1988).

177. WYO. CONST. art. I, § 1.

With regard to the unappropriated lands of the United States, the law recognizes Congress as having unlimited power to determine whether they are to be sold, used by people, or preserved for national purposes. The ultimate sovereignty of the United States in our federal system gives Congress the lawful power to enact laws governing human conduct with regard to any matter Congress determines to be a component of the public lands or essential to achievement of an ecological balance on the public lands.

Laws of western states pertaining to animals roaming the vast expanses of unfenced public and private lands have been negated by federal legislation providing protection of certain animals. Rights to compensation for regulatory takings of property resulting from federal protection of such animals have been denied by the federal judiciary. Federally-protected animal species may consume private property in the form of forage or livestock, and the owner can no longer protect his property in a manner recognized by state law. To do so subjects him to criminal penalties provided by federal law.

But, the most dramatic federal policy affecting Wyoming land is the congressional decision to retain ownership of federal public lands and actively manage them in accordance with management plans developed by a mandated land use process. Historic uses of public lands by Wyoming residents may continue, albeit with some uncertainty as to the extent such uses will be continued.

Ultimately, Wyoming residents do not have the power to control use of federal lands within the state. Indeed, because of their numbers and their highly organized operations, national interest groups may be in a better position to influence the future use of Wyoming's lands than its own people. It is thus incumbent upon state government to express the State's interest as a part of the federal planning and decision making process.

In conclusion, it may be said that the "kernels of enjoyment" of property will be limited to those uses of land which government will allow. With regard to federally owned lands, individuals will not be able to acquire traditional property rights. At best they may be able to acquire a defined "kernel of enjoyment" for a particular use of land in conjunction with the holders of other kernels. The availability and distribution of such kernels will depend upon results of evolving land use and management plans adopted by federal agencies. Differing perspectives held by national publics and state publics as to the compatibility or desirability of uses of public lands will be a continuing source

of conflict to be resolved by federal land managers or the courts, as guided by acts of Congress.¹⁷⁸

178. How are "rights" of the public to use public lands evidenced and enforced? A perspective of Wyoming land and the law is not complete without consideration of the major characteristics of the federal land system of 1990. That system represents fourteen years of experience directed towards promulgation of management plans which will guide federal land managers. This activity has been based upon general rules laid down by Congress. In fact, much of the legislation represents the means by which to plan toward achieving multiple use of land serving the national interest or providing the maximum benefit for the general public. The latter terms only conceal the absence of real agreement by Congress on the ends of planning. As described by Hayak in his discussion of planning and democracy,

{t}he effect of the people's agreeing that there must be central planning, without agreeing on the ends, will be rather as if a group of people were to commit themselves to take a journey together without agreeing where they want to go: with the result that they may all have to make a journey which most of them do not want at all.

HAYAK, *THE ROAD TO SERFDOM* at 62 (1944). Investment-backed activities dependent upon public lands must rest upon assurances as to the full nature of investor "rights." Other members of the public also need to know how the law may permit them to use the public lands or control their use.

A later installment of this article will explore such issues in greater detail.