Loyola of Los Angeles Law Review

Volume 30
Number 1 *Symposium: Responsibilities of the Criminal Defense Attorney*

Article 22

11-1-1996

Law West of the Pecos: The Growth of the Wise-Use Movement and the Challenge to Federal Public Land-Use Policy

Patrick Austin Perry

LAW WEST OF THE PECOS: THE GROWTH OF THE WISE-USE MOVEMENT AND THE CHALLENGE TO FEDERAL PUBLIC LAND-USE POLICY

I. INTRODUCTION

On July 4, 1994, Nye County, Nevada Supervisor Richard Carver mounted a county bulldozer and attempted to open a road through the Toiyabe National Forest, "forcing at least one federal ranger to leap out of his path."[1] On March 30, 1995, a pipe bomb blew out windows at the U.S. Forest Service office in Carson City, Nevada, and "[o]n Halloween 1993, a bomb was thrown onto the roof of Bureau of Land Management headquarters in Reno."[2] Environmentalists in Washington, New Mexico, Texas, and Montana have received death threats, and assailants painted a hammer and sickle on Forest Service offices in Catron County, New Mexico.[3]

> Increasingly, federal employees are taking precautions. Fish and Wildlife has stripped insignias off its cars. Forest Service employees are shedding their brown uniforms in favor of more discrete civilian clothes. In some troubled areas, they travel only in pairs. The Forest Service also recently issued employees cards with the phone numbers of the local U.S. attorney's office in case they are jailed or detained by local officials.[4]

These events are among the more radical manifestations of a growing movement in the rural areas of several western states to controvert or even defy the authority of the federal government in

1. Marianne Lavelle, *'Wise-Use' Movement Grows*, NAT'L L.J., June 5, 1995, at A1, A22.

2. Alex Barnum, *Battle Over U.S. Land Gets Nasty, Personal*, S.F. CHRON., Aug. 14, 1995, at A1, A11.

3. Mary Hanna, *'Frenzy Politics' Descends on Nature Lovers: The Anti-Abortion Movement's Scare Tactics Now Threaten the Guardians of the Environment*, L.A. TIMES, July 16, 1995, at M5.

4. Barnum, *supra* note 2, at A1, A11.

order to "take back" public lands, placing them under local rather than federal control.[5]

At the forefront of this challenge to federal authority over federal lands, the so-called "Wise-Use movement" first emerged on the national scene in 1989, touting "a volatile mix of traditional conservative ideology blended with some revolutionary proposals to open public lands to greater private exploitation."[6] Well-funded and well-organized, the Wise-Use movement represents a coalition of property owners, natural resource industries, trade associations, and conservative political interest groups, all of whom profess an ideological and economic interest in the continued utilization of public lands.[7]

The movement was launched by Alan M. Gottlieb, "a direct-mail fund-raiser for conservative politicians and causes, especially his Citizens Committee for the Right to Keep and Bear Arms."[8] Gottlieb created a new organization, the Center for the Defense of Free Enterprise, and sponsored the Multiple Use Strategy Conference in Reno, Nevada in August of 1988.[9] Among the more than 200 groups and individuals that participated in the conference were the National Inholders Association, representing owners of private property in or near national parks and forests, the Wilderness Impact Research Foundation, representing grazing and other commercial interests on public lands, and the Blue Ribbon Coalition, representing users and manufacturers of off-road recreational vehicles.[10] The list of conference supporters also included natural resource corporations such as Boise-Cascade, Georgia Pacific, and Exxon U.S.A., as well as various industry trade associations such as the National Association of Wheat Growers, the Nevada Miners and Prospectors Association, and the Western Wood Products Association.[11] Participants in the conference presented more than

5. Hanna, *supra* note 3, at M5.

6. LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT 11 (John D. Echeverria & Raymond Booth Eby eds., 1995).

7. Tarso Ramos, *Wise Use in the West*, *in* LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT, *supra* note 6, at 82, 82.

8. Thomas A. Lewis, *Cloaked in a Wise Disguise*, *in* LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT, *supra* note 6, at 13, 15.

9. Ramos, *supra* note 7, at 82-83.

10. Margaret Kriz, *Land Mine*, *in* LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT, *supra* note 6, at 27, 29; Lewis, *supra* note 8, at 16.

11. Ramos, *supra* note 7, at 83.

100 papers, which were later published as a "Wise-Use Agenda."[12] "This document called for a number of initiatives, including: opening 'all public lands including wilderness and national parks to oil drilling, logging, and commercial development;' immediate oil and gas development of Alaska's Arctic National Wildlife Refuge; liquidation of all old-growth forests; and privatization of public rangelands."[13]

Other groups with connections to the Wise-Use movement include the Alliance for America, a national umbrella organization that represents such interests as the National Cattlemen's Association; the Oregon Lands Coalition, an organization linked to agricultural, ranching, and timber interests that champions efforts to limit federal protections for endangered species; and the Western States Public Lands Coalition and its subsidiary, People for the West!, which was formed by mining companies in an effort to improve their industry's public image, fight efforts to reform federal mining laws, and help organize grassroots groups in communities that are dependent on grazing, logging, and mining on federal lands.[14]

With annual budgets that range anywhere from $100,000 to $1.7 million,[15] the various groups that make up the Wise-Use movement "generally fall into two categories: those that promote private property rights and those that support resource extraction on public lands.... The property rights groups ... want to expand the rights of property owners to gain compensation when the government restricts the use of their lands."[16] Meanwhile "[t]he other wing of the movement ... argues that the [government] is threatening their lifestyles by trying to restrict grazing, logging, mining, recreation, and other activities on federal lands."[17]

Wise-Use advocates employ a number of arguments in support of their positions.[18] These arguments fall into two general

12. Lewis, *supra* note 8, at 16.

13. *Id.* at 16-17.

14. Kriz, *supra* note 10, at 28-29; *see also* Martin Van Der Werf & Steve Yozwiak, *New War for the West: Lobbying Group Fights to Expand Development of Land's Resources*, ARIZ. REPUBLIC, July 3, 1994, at A1 (providing a detailed discussion of the goals, activities, organizational structure, and industry connections of People for the West!).

15. Kriz, *supra* note 10, at 29.

16. *Id.* at 31-32.

17. *Id.* at 32.

18. *See* Anita P. Miller, *The Western Front Revisited*, 26 URB. LAW. 845 (1994) (discussing various legal approaches that Wise-Use advocates have adopted). "As

classifications. The first is the property rights argument, "which holds that increased environmentally oriented regulation of public lands constitutes a Fifth Amendment taking when economic activities of public land users are adversely affected."[19] The second is the county supremacy argument, which holds that "county governments have virtually a veto power over . . . regulation when it adversely impacts the economic interests of counties and their residents."[20]

In the following pages both of these arguments will be examined in some detail, and they will be shown to lack any firm legal basis in the context of current federal land-use policy. However, in order fully to understand the nature of the controversy surrounding the control of federal lands, it is first necessary to understand something of the nature and development of federal land-use policy, particularly as it applies to those states west of the Rocky Mountains. Accordingly, Part II of this Comment presents a brief history of the development of federal land-use policy in the western United States. Part III then examines the legal basis of the property rights argument, especially in light of recent Supreme Court decisions concerning regulatory takings, and Part IV examines the county supremacy argument. Finally, Part V discusses ways in which Congress and the federal agencies should respond to the Wise-Use philosophy while still protecting the legacy of our public lands for the greater good.

II. BACKGROUND

The United States owns in fee approximately 650 million acres or roughly twenty-nine percent of the nation's total land area of 2.3 billion acres.[21] Excluding lands used for such purposes as defense installations and post offices, federal lands are classified into five systems managed by four federal agencies in two executive departments.[22] The National Park System, administered by the National Park Service (NPS) under the Department of the Inte-

---

one legal strategy is disposed of by the courts, another leaps up to take its place." *Id.* at 857.

19. Anita P. Miller, *America's Public Lands: Legal Issues in the New War for the West*, 24 URB. LAW. 895, 897 (1992).

20. *Id.* at 897-98.

21. BUREAU OF LAND MANAGEMENT, 177 PUBLIC LAND STATISTICS 1992 1 (1993).

22. GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 2.04 (2d ed. 1995).

rior, encompasses approximately 80 million acres of national parks and monuments.[23] The National Forest System, administered by the United States Forest Service (USFS) under the Department of Agriculture, encompasses approximately 190 million acres of national forest.[24] The National Wildlife Refuge System, administered by the United States Fish and Wildlife Service (USFWS) under the Department of the Interior, encompasses approximately 90 million acres.[25] An additional 260 million acres that were neither homesteaded nor reserved for federal conservation purposes are administered by the Bureau of Land Management (BLM) under the Department of the Interior.[26] Finally, the system of wilderness areas, scenic rivers, and national trails is superimposed on the preexisting systems and is administered by the agency responsible for the lands on which individual portions of the system occur.[27]

Although federal public lands are located in all states, they are concentrated in the eleven westernmost contiguous states and Alaska.[28] These lands became part of the public domain through a variety of transactions. Original grants from Great Britain to the colonies of Massachusetts, New York, Connecticut, Virginia,

23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. The disposition of federal public lands in Alaska is an interesting topic well worth further study; however, because the Wise-Use movement has thus far largely occupied itself with conditions in the lower forty-eight states, it is not a topic that this Comment seeks to address. The distribution of public lands within those states with which this Comment is primarily concerned is as follows:

State	Total Acreage Owned by Federal Gov't	Total Acreage of State	Percent Owned by Federal Gov't
Arizona	34,235,605.0	72,688,000	47.1
California	44,541,202.2	100,206,720	44.5
Colorado	24,069,202.4	66,485,760	36.2
Idaho	32,672,007.0	52,933,120	61.7
Montana	26,142,802.0	93,271,040	28.0
Nevada	58,134,543.8	70,264,320	82.7
New Mexico	25,728,629.0	77,766,400	33.1
Oregon	28,756,761.2	61,598,720	46.7
Utah	33,620,182.9	52,696,960	63.8
Washington	12,374,262.7	42,693,760	29.0
Wyoming	30,415,720.1	62,343,040	48.8

BUREAU OF LAND MANAGEMENT, *supra* note 21, at 5.

North Carolina, South Carolina, and Georgia purported to grant all land within fixed latitudes from the Atlantic to the Pacific Ocean.[29] These grants were later reduced in 1763 when Great Britain recognized Spanish claims west of the Mississippi River.[30] Following the Revolution, however, Maryland, by refusing to sign the Articles of Confederation, led five other states that had no western lands in an effort to force the larger states to place their western lands under federal control.[31] Roughly 230 million acres thereby became the property of the federal government.[32] Beginning with the Louisiana Purchase in 1803 and ending with the Alaska Purchase in 1867, the United States acquired by means of purchase and conquest an additional 1.5 billion acres[33] or roughly seventy-five percent of the total land area of the country.

A. Traditional Land-Use Policy

> Unless the government shall grant head rights, . . . these prairies, with their gorgeous growth of flowers, their green carpeting, their lovely lawns and gentle slopes, will for centuries continue to be the home of the "wild deer and wolf;" their stillness will be undisturbed by the jocund song of the farmer, and their deep and fertile soil unbroken by his ploughshare. Something must be done to remedy this evil.[34]

For the first 150 years, the official land policy of the United States government was to exploit the federal lands, first for the purpose of generating revenue[35] and, subsequently, for the purpose of settlement.[36] The Land Ordinance of 1785[37] represents the first attempt by the Continental Congress to address the disposition of the public lands. Motivated primarily by the need to raise revenue for the fledgling government,[38] the Land Ordinance of 1785 "laid

29. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 49 (1968).
30. *Id.*
31. *Id.* at 50.
32. *Id.* at 55.
33. *Id.* at 86.
34. CONG. GLOBE, 28th Cong., 2d Sess. 52 (1845) (statement of Rep. Ficklin).
35. *See* PHILLIP O. FOSS, POLITICS AND GRASS 12-13 (1960); GATES, *supra* note 29, at 61.
36. *See* FOSS, *supra* note 35, at 19.
37. Land Ordinance of 1785, *reprinted in* DOCUMENTS OF AMERICAN HISTORY 123 (Henry S. Commager ed., 7th ed. 1963) [hereinafter Commager].
38. GATES, *supra* note 29, at 63.

the foundations for the public land system, followed in most essentials until 1862."[39] The Ordinance provided for the systematic survey of the public land in townships six miles square, divided into thirty-six sections of one square mile, or 640 acres each. The land was to be auctioned at a minimum purchase price of one dollar per acre with a minimum purchase of 640 acres.[40] "Henceforth until 1841, newly surveyed land could not be bought from the government until first offered at public auction . . . ."[41] The Ordinance included no limitations on the amount of land individuals or companies could purchase.[42] Neither settlement nor construction of improvements on the land were required for purchase,[43] nor were preemption rights granted to squatters.[44] In addition to these measures, one section per township was to be reserved and sold to pay for the maintenance of public schools in the township,[45] and "one-third part of all gold, silver, lead and copper mines, [were] to be sold, or otherwise disposed of as Congress shall hereafter direct."[46]

The Land Ordinance of 1785 led to the enactment of the Northwest Ordinance of 1787,[47] which established the framework for the creation and admission of new states "to a share in the Federal councils on an equal footing with the original States."[48] Of special significance are the provisions in the Ordinance that prohibit the legislatures in the new states from interfering with "the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers."[49] Moreover, "[n]o tax shall be imposed on land the property of the United States."[50]

---

39. Commager, *supra* note 37, at 123.
40. *Id.* at 123-24.
41. GATES, *supra* note 29, at 65.
42. *Id.* at 66.
43. *Id.*
44. *Id.*
45. Commager, *supra* note 37, at 124.
46. *Id.*
47. Northwest Ordinance of 1787, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS 957 (Francis N. Thorpe ed., 1909) [hereinafter Thorpe]. The Northwest Ordinance was subsequently re-enacted by the First Congress, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.
48. Thorpe, *supra* note 47, at 960.
49. *Id.* at 961.
50. *Id.*

During subsequent decades Congress enacted a substantial volume of legislation designed to further promote the orderly disposition of the western public lands. In order to accelerate the settlement of the public lands, to raise revenue, and to discourage speculation, Congress experimented with a number of measures, including raising the minimum purchase price to as much as two dollars an acre[51] while lowering the minimum purchase from 640 acres to 320 acres,[52] then to 160 acres,[53] 80 acres,[54] and finally to 40 acres.[55] Congress also sought to discourage the practice of preemption, "the preferential right of a settler-squatter to buy his claim at a modest price without competitive bidding."[56] The adoption of the revenue policy for the public lands in 1785 and again in the Land Act of 1796,[57] and the system of sales of land only at public auction, meant that intrusions of squatters could not be tolerated.[58] In 1807 Congress went so far as to authorize the President "to employ such military force as he may judge necessary and proper, to remove from lands . . . secured to the United States, . . . any person . . . who shall hereafter take possession . . . or attempt to make a settlement thereon."[59] Eventually, however, "Congress gradually gave way to western pressures by relaxing the prohibitions and penalties against intrusions, then by enacting measures that forgave previous intrusions."[60]

The Preemption Act of 1830[61] was enacted for one year and applied only retroactively, but it served as the first general preemption act insofar as it allowed every "settler or occupant" on public lands who had been in possession and made improvements on claims in 1829 to enter up to 160 acres at $1.25 per acre.[62] Con-

51. Act of May 18, 1796, ch. 29, § 4, 1 Stat. 464, 467; Act of May 10, 1800, ch. 55, § 5, 2 Stat. 73, 74; Act of Mar. 26, 1804, ch. 35, § 5, 2 Stat. 277, 279.

52. Act of May 10, 1800, ch. 55, 2 Stat. at 74.

53. Act of Mar. 26, 1804, ch. 35, 2 Stat. at 281.

54. Act of Apr. 24, 1820, ch. 51, § 1, 3 Stat. 566 (codified at 43 U.S.C. § 672), *repealed by* Act of Dec. 16, 1930, ch. 14, § 1, 46 Stat. 1029.

55. Act of Apr. 5, 1832, ch. 65, 4 Stat. 503 (codified at 43 U.S.C. § 673), *repealed by* Federal Land Policy and Management Act, Pub. L. No. 94-579, § 703(a), 90 Stat. 2743, 2789 (1976).

56. GEORGE C. COGGINS & CHARLES F. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 67 (1981).

57. Act of May 18, 1796, ch. 29, 1 Stat. 464.

58. GATES, *supra* note 29, at 219.

59. Act of Mar. 3, 1807, ch. 46, § 1, 2 Stat. 445.

60. GATES, *supra* note 29, at 220.

61. Preemption Act of 1830, ch. 208, 4 Stat. 420.

62. *Id.*; GATES, *supra* note 29, at 225.

gress finally enacted prospective preemption in 1841, allowing settlers who inhabited and improved previously surveyed land to claim 160 acres at $1.25 per acre.[63] Beginning in 1853 Congress extended the right to preemption on unsurveyed land first to California,[64] then to Oregon and Washington Territories,[65] then to Kansas and Nebraska Territories,[66] and finally to Minnesota Territory.[67] In 1862 Congress authorized preemption on all remaining unsurveyed federal land "to which the Indian title has been or shall be extinguished."[68]

The Homestead Act of 1862[69] largely resolved the issue of preemption first on surveyed land and, later, on unsurveyed land.[70] The Homestead Act entitled any persons who were heads of families or at least twenty-one years of age, and who were citizens or who had filed declarations to become citizens, to enter up to 160 acres of previously unappropriated land.[71] After five years of actual residence and cultivation, settlers could take title to the land; however, it was also possible for settlers to commute their homesteads to preemption entries by paying the minimum purchase price for the land "as provided by existing laws granting preëmption rights."[72] Each settler could acquire only one homestead under the Act, but because the preemption laws were still in effect, one settler could acquire separately both a preemption and a homestead, each consisting of 160 acres.[73]

Congress further sought to accomodate settlement on the public lands by means of the Timber Culture Act of 1873,[74] which allowed entry of an additional 160 acres, on forty acres of which the settler was required to plant and cultivate trees for a period of

63. Act of Sept. 4, 1841, ch. 16, § 10, 5 Stat. 453, 455-56.
64. Act of Mar. 3, 1853, ch. 145, § 6, 10 Stat. 244, 246.
65. Act of July 17, 1854, ch. 84, § 3, 10 Stat. 305.
66. Act of July 22, 1854, ch. 103, § 12, 10 Stat. 308, 310.
67. Act of Aug. 4, 1854, ch. 249, 10 Stat. 576.
68. Preemption Act of 1862, ch. 94, § 1, 12 Stat. 413.
69. Homestead Act of 1862, ch. 75, 12 Stat. 392 (codified as amended in scattered sections of 43 U.S.C.), *repealed by* Federal Land Policy and Management Act, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787 (1976).
70. Act of May 14, 1880, ch. 89, § 3, 21 Stat. 140, 141 (codified at 43 U.S.C. § 166), *repealed by* Federal Land Policy and Management Act, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787 (1976).
71. Homestead Act of 1862, ch. 75, 12 Stat. 392.
72. *Id.* at 393.
73. GATES, *supra* note 29, at 395.
74. Timber Culture Act, ch. 277, 17 Stat. 605 (1873).

ten years.[75] Because residence was not required,[76] it was possible for one settler to enter a timber claim and either a homestead or a preemption claim at the same time. By commuting a homestead to a preemption, entering a second homestead, and applying for an additional claim under the Timber Culture Act, one settler could acquire possession of up to 480 acres of land.[77]

Convinced that further measures were required to promote settlement in the arid and semi-arid lands west of the 100th meridian, Congress passed the Desert Land Act of 1877,[78] which allowed entry on 640 acres at $1.25 an acre if the claimant could offer proof at the end of three years that the land had been reclaimed for irrigation.[79] The Enlarged Homestead Act[80] followed in 1909, allowing entry on 320 acres instead of 160 acres west of the 100th meridian, and in 1916 the Stock Raising Homestead Act[81] allowed entry on 640 acres of land designated for grazing.

"In the haphazard development of land legislation Congress had never devised a policy for timberlands. Instead, it had allowed all laws such as cash sale, . . . preemption, . . . and homestead to apply to them as to all other lands when offered."[82] Not until 1878 did Congress enact legislation specifically addressing the disposition of existing timber resources on the public lands, and even then the effect was largely to legitimize prior abuses.[83] The Timber and Stone Act of 1878[84] provided that

> surveyed public lands of the United States within the States of California, Oregon and Nevada and in Washington Territory, . . . valuable chiefly for timber, but unfit for cultivation, . . . may be sold to citizens of the United States, or persons who have declared their intention to

75. *Id.* at 605-06.
76. GATES, *supra* note 29, at 399.
77. *Id.* at 400 n.27.
78. Desert Land Act, ch. 107, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. §§ 321-339 (1994)).
79. GATES, *supra* note 29, at 401.
80. Enlarged Homestead Act, ch. 160, 35 Stat. 639 (1909) (codified at 43 U.S.C. § 218), *repealed by* Federal Land Policy and Management Act, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2788 (1976).
81. Stock Raising Homestead Act, ch. 9, 39 Stat. 862 (1916) (codified as amended at 43 U.S.C. §§ 291-298), *repealed by* Federal Land Policy and Management Act, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2789 (1976).
82. GATES, *supra* note 29, at 417.
83. *See* COGGINS & WILKINSON, *supra* note 56, at 118-19.
84. Timber and Stone Act, ch. 151, 17 Stat. 89 (1878) (codified as amended at 43 U.S.C. §§ 311-313), *repealed by* Act of Aug. 1, 1955, ch. 448, 69 Stat. 434.

> become such, in quantities not exceeding one hundred and sixty acres . . . at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands.[85]

The Act also made it illegal "to cut, or cause or procure to be cut, . . . any timber growing on any lands of the United States, . . . or remove, or cause to be removed, any timber from said public lands."[86] The Act further provided, however, that

> any person prosecuted in said States and Territory . . . may be relieved from further prosecution and liability therefor upon payment . . . of the sum of two dollars and fifty cents per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same.[87]

In 1892 Congress extended the provisions of the Timber and Stone Act to "all the public-land States."[88]

The Timber and Stone Act also provided that "none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled 'An act granting the right of way to ditch and canal owners over the public lands, and for other purposes', shall be abrogated by this act."[89] The Act of July 26, 1866,[90] in spite of its title, was the first significant attempt by Congress to address mining on the public lands. Prior to 1866 Congress had failed to adopt a consistent policy for the disposition of mineral resources on the public lands.[91] Although the Land Ordinance of 1785 had reserved "one-third part of all gold, silver, lead and copper mines, to be sold, or otherwise disposed of as Congress shall hereafter direct,"[92] Congress never incorporated such language into the various land acts that it enacted following ratification of the Constitution.[93] After an unsuccessful attempt to lease lead

---

85. *Id.*

86. *Id.* at 90.

87. *Id.*

88. Act of Aug. 4, 1892, ch. 375, § 2, 27 Stat. 348 (codified at 43 U.S.C. § 311), *repealed by* Act of Aug. 1, 1955, ch. 448, 69 Stat. 434.

89. Timber and Stone Act, ch. 151, 17 Stat. at 89.

90. Act of July 26, 1866, ch. 262, 14 Stat. 251 (codified as amended at 30 U.S.C. §§ 43-46, 51 (1994) & 43 U.S.C. § 661 (1994)).

91. *See* CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 244 (1987).

92. Commager, *supra* note 37, at 124.

93. Robert W. Swenson, *Legal Aspects of Mineral Resources Exploitation*, *in* GATES, *supra* note 29, at 701-02.

mines in the upper Mississippi valley,[94] Congress in 1846 opened mineral lands to public sale and preemption, though on somewhat different terms than those for agricultural lands.[95]

The Mining Act of 1866 declared the "mineral lands of the public domain, both surveyed and unsurveyed, . . . to be free and open to exploration and occupation."[96] Any person filing a claim, "having previously occupied and improved the same according to the local custom or rules of miners in the district where the same is situated, and having expended in actual labor . . . thereon an amount of not less than one thousand dollars,"[97] could, upon payment of five dollars per acre, "enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode . . . to any depth, although it may enter the land adjoining."[98] The Act of July 9, 1870[99] enlarged the rights of claimants on mineral lands and extended the provisions of the Act of 1866 to surface mining claims, or placers. Under the 1870 Act each claimant could acquire up to 160 acres at a cost of $2.50 per acre.[100]

The General Mining Act of 1872[101] largely codified and consolidated the previous acts while making various substantive changes designed primarily to simplify the procedure for obtaining patents.[102] The basic policy of "free and open" exploration and acquisition was retained, however, and the Mining Act of 1872 remains the principal statutory provision governing mining activity on the public lands.[103]

B. Modern Land-Use Policy

The approach to the management of the public lands began to change with the passage of the General Revision Act of 1891.[104]

---

94. *Id.* at 702-06.
95. *Id.* at 706.
96. Act of July 26, 1866, ch. 262, 14 Stat. 251.
97. *Id.* at 251-52.
98. *Id.* at 252.
99. Act of July 9, 1870, ch. 235, 16 Stat. 217 (codified as amended at 30 U.S.C. §§ 35-38, 52 (1994) & 43 U.S.C. § 661 (1994)).
100. *Id.*
101. General Mining Act of 1872, ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C. (1994)).
102. WILKINSON & ANDERSON, *supra* note 91, at 244.
103. COGGINS & WILKINSON, *supra* note 56, at 87.
104. General Revision Act of 1891, ch. 561, 26 Stat. 1095 (codified as amended in scattered sections of 16 U.S.C. (1994), 30 U.S.C. (1994) & 43 U.S.C. (1994)).

Repealing the Preemption and the Timber Culture Acts, the General Revision Act empowered the President to "set apart and reserve . . . any part of the public lands wholly or in part covered with timber or undergrowth . . . as public reservations."[105] Along with the reservation in 1872 of two million acres on the Upper Yellowstone River in Wyoming Territory "as a public park or pleasuring-ground for the benefit and enjoyment of the people,"[106] the General Revision Act marked the beginning of a new policy of federal retention and management of public lands from which current federal land use policy has evolved.

Although it allowed forest lands to be set aside, the General Revision Act did not provide any mechanism for the administration of the forest reserves.[107] Not until the passage of the Organic Administration Act of 1897[108] did Congress delegate broad regulatory power to the Secretary of the Interior to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."[109] Administration of the forest reserves was first entrusted to the General Land Office, which originated as a bureau of the Treasury Department in 1812,[110] but which became a part of the newly created Department of the Interior in 1849.[111] In 1905 Congress transferred primary administrative responsibility for the forest reserves to the Division of Forestry in the Department of Agriculture.[112] The Division of Forestry was subsequently renamed the Forest Service,[113] and in 1907 the forest reserves were designated national forests.[114] Thus, by the end of the first decade of this century the basic administrative structure for the National Forest System was firmly

105. *Id.* at 1103.

106. Act of Mar. 1, 1872, ch. 24, § 1, 17 Stat. 32, 32 (codified as amended at 16 U.S.C. § 21 (1994)).

107. WILKINSON & ANDERSON, *supra* note 91, at 18.

108. Organic Administration Act of 1897, ch. 2, 30 Stat. 11, 34 (codified as amended at 16 U.S.C. §§ 473-482 (1994)).

109. *Id.* at 35.

110. Act of Apr. 25, 1812, ch. 68, § 1, 2 Stat. 716, 716 (codified as amended at 43 U.S.C. § 2 (1994)).

111. WILKINSON & ANDERSON, *supra* note 91, at 18. On the origins of the General Land Office, see FOSS, *supra* note 35, at 13; GATES, *supra* note 29, at 127-28.

112. WILKINSON & ANDERSON, *supra* note 91, at 18.

113. *Id.*

114. Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1256, 1269 (codified at 16 U.S.C. § 420 (1994)).

established.

The primary emphasis of the Organic Administration Act of 1897 was "for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."[115] The Secretary of the Interior was thereby authorized,

> [f]or the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, . . . under such rules and regulations as he shall prescribe, [to] cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe.[116]

The forest reserves were thus set aside to be utilized for the managed exploitation of their timber resources in such a way as not to deplete those resources or to cause damage to watersheds. This position found its most effective advocate in the person of Gifford Pinchot, the first head of the National Forest Service.[117] It was Pinchot who first articulated the concept of the wise use of forest resources.[118] "All the resources of forest reserves are for *use*, and this use must be brought about in a thoroughly prompt and businesslike manner, under such restrictions only as will insure the permanence of these resources."[119]

In addition to managing timber sales, Pinchot sought to regulate grazing on the national forest lands.[120] Whereas timber harvesting in the forest reserves was well within the limits prescribed for sustained use due to the continued availability of timber resources on private lands and the difficulty of access to remote federal timberlands, public rangelands were already experiencing severe overgrazing.[121] Utilizing his authority under the Organic Administration Act "to regulate [the] occupancy and use and to preserve the forests . . . from destruction . . . ,"[122] Pinchot restricted

115. Organic Administration Act of 1897, ch. 2, 30 Stat. at 35.
116. *Id.*
117. WILKINSON & ANDERSON, *supra* note 91, at 18.
118. *Id.* at 22.
119. *Id.* at 54 n.269 (quoting Gifford Pinchot).
120. *Id.* at 55.
121. *Id.* at 21.
122. Organic Administration Act of 1897, ch. 2, 30 Stat. at 35.

grazing in the national forests and instituted the sale of grazing permits.[123]

> Thus, planning for timber and range began for different reasons and reflected different priorities. Timber planning sought, first, to facilitate use (i.e., cutting) of the trees and, second, to ensure reforestation after cutting. Range planning sought, first, to protect the range resource from overuse and, second, to facilitate use (i.e., grazing) of the forage. Then, as now, emphasis was placed on the water resource; a paramount objective of both timber and grazing planning was to protect watersheds by preserving the forest cover and preventing soil erosion and compaction.[124]

During the 1920s the utilitarian philosophy of Pinchot began to give way to the preservationist spirit championed by such figures as John Muir and Aldo Leopold, who advocated the protection of natural resource reserves for their own sake rather than for economic use.[125] The Forest Service accordingly began to include wilderness and recreational planning within its administrative guidelines.[126] Prior to World War II there was little conflict between the management of range, timber, and water resources on the one hand and the various noncommodity uses on the other.[127] During the 1950s, however, a number of factors, including the postwar building boom and a dramatic increase in the annual number of recreational visits to the national forests, placed increasing pressure on the Forest Service to alter its management policies. "Lumber interests sought further increases in the allowable rate of timber cutting while preservation interests urged legislation to prohibit the agency from harvesting or developing the remaining wilderness in the national forests."[128]

Congress responded by enacting the Multiple-Use Sustained-Yield (MUSY) Act of 1960,[129] which gave legislative sanction to the existing administrative guidelines promoting multiple use and sustained yield of the national forest resources. The MUSY Act

---

123. WILKINSON & ANDERSON, *supra* note 91, at 55.
124. *Id.* at 22.
125. *Id.* at 335-36.
126. *Id.* at 26.
127. *Id.* at 28.
128. *Id.* at 29.
129. 16 U.S.C. §§ 528-531 (1994).

provided that "[i]t is the policy of the Congress that the national forests . . . shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."[130] Moreover, "[t]he establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of [this Act]."[131] The Act defined multiple use to include the

> harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."[132]

At the same time that the Forest Service was developing plans for the conservation and preservation of timber and grazing resources in the national forests, concern was growing over the deterioration of other portions of the public lands due to overgrazing. This concern led to the enactment of the Taylor Grazing Act[133] in 1934, which authorized the Secretary of the Interior, "in order to promote the highest use of the public lands pending its [sic] final disposal,"[134] to withdraw "from all forms of entry of settlement"[135] up to eighty million acres of "vacant, unappropriated, and unreserved lands from any part of the public domain of the United States."[136] By means of language similar to that contained in the Organic Administration Act, the Taylor Grazing Act organized these lands into grazing districts for which the Secretary was directed to "make provision for the protection, administration, regulation, and improvement" and to

> make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this [Act] and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement,

130. *Id.* § 528.
131. *Id.* § 529.
132. *Id.* § 531.
133. Taylor Grazing Act, 43 U.S.C. §§ 315-315r (1994).
134. *Id.* § 315.
135. *Id.*
136. *Id.*

and development of the range.[137]

In addition, the Act authorizes the Secretary to issue permits "to graze livestock on such grazing districts . . . upon the payment annually of reasonable fees in each case to be fixed or determined from time to time."[138] The Act further provides that fifty percent of all revenues derived from grazing fees shall be distributed "to the State in which the lands producing such moneys are located, to be expended as the State legislature may prescribe for the benefit of the county or counties in which the lands producing such moneys are located."[139] The Act did nothing to disturb the exercise of the rights of homesteaders on those lands not reserved for grazing districts.[140] As to the grazing districts themselves, however, "the creation of a grazing district or the issuance of a permit pursuant to the provisions of this [Act] shall not create any right, title, interest, or estate in or to the lands."[141]

An additional step toward the withdrawal of certain portions of the public lands from unrestricted exploitation was taken by the Wilderness Act of 1964,[142] the avowed purpose of which was "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."[143] The Secretaries of Interior and Agriculture were directed to inventory all roadless areas within their respective administrative authority and to recommend those areas suitable for inclusion in the National Wilderness Preservation System.[144] Once included, the Act prohibited any commercial enterprise or permanent road "within any wilderness area . . . and, . . . there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area."[145]

Modern federal land-use policy crystallized with the passage of the National Forest Management Act[146] (NFMA) and the Fed-

137. *Id.* § 315a.
138. *Id.* § 315b.
139. *Id.* § 315i.
140. *Id.* § 315f.
141. *Id.* § 315b.
142. 16 U.S.C. § 1131-1136 (1994).
143. *Id.* § 1131.
144. *Id.* § 1132(b)-(c).
145. *Id.* § 1133(c).
146. 16 U.S.C. §§ 1600-1614 (1994) and other scattered sections of 16 U.S.C. (1994).

eral Land Policy and Management Act[147] (FLPMA), both of which became law on the same day in 1976, and both of which represent current statutory authority for federal land-use policy by the National Forest Service and the Bureau of Land Management, respectively. The NFMA essentially reinforces the provisions of the MUSY Act but mandates more extensive planning procedures for the Forest Service to follow in allocating available timber resources.[148] The FLPMA repealed the various homestead acts, thereby retaining in federal ownership all remaining unclaimed public lands.[149] It also mandated planning procedures to be followed by the BLM in allocating grazing allotments.[150]

The other major environmental statutes that affect the public lands are the National Environmental Policy Act of 1969[151] (NEPA), which requires all agencies of the federal government to perform an environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment,"[152] and the Endangered Species Act of 1973,[153] which requires each federal agency to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ."[154]

III. THE PROPERTY RIGHTS ARGUMENT

The Fifth Amendment to the Constitution prohibits the federal government from taking private property without payment of just compensation.[155] Such a taking can occur in one of two ways. It can result from the physical occupation of private property by

147. 43 U.S.C. §§ 1701-1784 (1994).
148. WILKINSON & ANDERSON, *supra* note 91, at 69.
149. 43 U.S.C. §§ 221-224 (1994).
150. WILKINSON & ANDERSON, *supra* note 91, at 108-09.
151. 42 U.S.C. §§ 4321-4370d (1994).
152. *Id.* § 4332.
153. 16 U.S.C. §§ 1531-1544 (1994).
154. *Id.* § 1536(a)(2).
155. U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation."). The takings language of the Fifth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states as well. U.S. CONST. amend. XIV, § 1. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978) (stating that "of course [the Takings Clause of the Fifth Amendment] is made applicable to the States through the Fourteenth Amendment.").

the government,[156] or it can result when governmental regulation of private property "goes too far."[157] In analyzing any alleged regulatory taking, courts are guided by two basic criteria. The first is whether the government has advanced a legitimate state interest by means of its regulation, and the second is the extent to which the governmental regulation has restricted the economically viable use of the property.[158]

Traditionally, the Supreme Court has allowed a great deal of latitude in government regulation of private property.[159] In recent years, however, the Court has begun redefining its approach to regulatory takings,[160] applying a somewhat more rigorous analysis

---

156. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

> [W]here governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, . . . "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

Id. at 831-32 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432-33 n.9, 434-35 (1982)).

157. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

158. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992) ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*'" (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980))).

159. *See, e.g.*, Glynn S. Lunney, Jr., *A Critical Re-examination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1932 (1992) (concluding that all but one of the modern Court's cases finding a compensable taking have been grounded on the physical occupation of the complainant's property).

160. In *Nollan* the Court ruled that a taking had occurred, despite the absence of any adverse economic impact on the owner, because the condition imposed as part of a permit requirement was not sufficiently related to the government's alleged regulatory interest. 483 U.S. at 837. Similarly, in Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), the Court went further to determine not only "whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city," *Id.* at 2317 (quoting *Nollan*, 483 U.S. at 837), but also whether there was a "rough proportionality" according to which "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 2319-20.

In *Lucas* the Court found a taking on alternate grounds where state regulation had denied "all economically beneficial or productive use of land." 505 U.S. at 1015. The extent to which property owners have been deprived of the economically viable use of their property depends to a large degree upon "'[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Id.* at 1019 n.8 (quoting *Penn Cent.*, 438 U.S. at 124). The only exceptions to this principle that the Court identifies are "restrictions that background principles of the State's law of property and nui-

of government regulation that adherents to the Wise-Use movement have sought to interpret in such a way as to protect various types of private interests in the public lands from government intrusion.

One obvious problem with applying a takings analysis in the context of public land regulation is that a private property right must first exist before it can be taken. Accordingly, those seeking compensation for government interference with private property rights in the public lands must first establish that they do indeed hold such rights. Only then can they claim that federal regulation of the public lands has so far divested them of those rights as to result in a taking of their private property. The determination of such a claim must then, in turn, be resolved on the basis of the criteria articulated by the Court as to what kind of government action constitutes a compensable taking.

Wise-Use advocates have employed a number of legal arguments to support their claims to a property interest in the public lands.[161] The majority of these claims relate to the right to graze livestock on western public rangelands and vary in complexity from the sophisticated to the absurd. One such argument contends that, in spite of statutory language to the contrary,[162] the granting of a grazing lease or permit[163] on the public lands results in a vested property right in the permit itself. The federal courts, however, have repeatedly rejected the contention that grazing permits are anything other than mere privileges subject to revocation or modification without compensation at any time.[164] In *McKinley v.*

---

sance already place upon land ownership." *Id.* at 1029.

161. *See* Miller, *supra* note 18, at 845; Lavelle, *supra* note 1, at A22.

162. "[I]ssuance of a permit pursuant to the provisions of this [Act] shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315b (1994); "Nothing in this Act shall be construed as modifying in any way . . . with respect to the creation of right, title, interest or estate in or to . . . lands in National Forests by issuance of grazing permits." 43 U.S.C. § 1752(h) (1994).

163. Although there are technical differences between a grazing lease and a grazing permit, for the purposes of this Comment, the two terms will be used interchangeably. *See* 43 C.F.R. § 4100.0-5 (1995).

164. "The provisions of the Taylor Grazing Act . . . make clear the congressional intent that no compensable property right be created in the permit lands themselves as a result of the issuance of the permit." United States v. Fuller, 409 U.S. 488, 494 (1973); *see also* Swim v. Bergland, 696 F.2d 712 (9th Cir. 1983) (holding that permits may be modified or cancelled in order to implement grazing rights); Pankey Land & Cattle Co. v. Hardin, 427 F.2d 43 (10th Cir. 1970) (holding that livestock permits are not constitutionally protected against taking); United States v. Jaramillo, 190 F.2d 300 (10th Cir. 1951) (recognizing that permits can be withdrawn or cancelled at any time); United States v. Cox, 190 F.2d 293 (10th Cir. 1951) (recognizing a preferential

United States[165] the district court denied that a reduction by the USFS of the plaintiff's grazing allotment in the Cibola National Forest in New Mexico constituted a compensable taking. Recognizing that grazing permits are clearly valuable to ranchers, the court nevertheless determined that "'they are not an interest protected by the Fifth Amendment against taking by the government who granted them with the understanding that they could be withdrawn . . . without payment of compensation.'"[166] Moreover,

> "[i]t is safe to say that it has always been the intention and policy of the government to regard the use of its public lands for stock grazing, either under the original tacit consent or, as to national forests, under regulation through the permit system, as a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation."[167]

More recently, in *Hage v. United States*[168] the plaintiffs alleged on various grounds that a number of actions by the USFS to interfere with their grazing allotment on national forest lands constituted a taking of their property. Ruling on the government's motion for summary judgement, the United States Claims Court denied the plaintiffs' claim to a property interest in their grazing permit, concluding that "as a matter of law plaintiffs do not have a

---

right to graze, but regarding the right as subject to withdrawal); Osborne v. United States, 145 F.2d 892 (9th Cir. 1944) (upholding appropriation of grazing land under permit for military purposes).

165. 828 F. Supp. 888 (D. N.M. 1993).

166. *Id.* at 893 (quoting *Pankey Land & Cattle Co.*, 427 F.2d at 44).

167. *Id.* (quoting Swim v. Bergland, 696 F.2d at 719).

168. 35 Fed. Cl. 147 (1996). Plaintiffs E. Wayne Hage and Jean N. Hage are ranchers who live near Tonopah, Nevada. In addition to filing a takings claim against the federal government, Wayne Hage has authored a book outlining many of the philosophical justifications upon which his lawsuit is predicated. WAYNE HAGE, STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS (1989). Hage also removed trees in the Toiyabe National Forest, allegedly to insure water flow in an irrigation ditch that carries water to which he claims to have a private property interest. Although he was found guilty in federal court of injury to federal property, Anita P. Miller, *All Is Not Quiet on the Western Front*, 25 URB. LAW. 827, 837 (1993), Hage's conviction was overturned by the Ninth Circuit Court of Appeals. United States v. Seaman, 18 F.3d 649 (9th Cir. 1994). Hage's book, *Storm Over Rangelands*, is published as a project of the National Federal Lands Conference, a Wise-Use group, with an introduction by Ron Arnold, Executive Vice President of the Center for the Defense of Free Enterprise, *see supra* note 9 and accompanying text. For a thorough discussion of Hage's property rights argument in the context of current takings jurisprudence, see Theodore Blank, Comment, *Grazing Rights on Public Lands: Wayne Hage Complains of a Taking*, 30 IDAHO L. REV. 603 (1994).

property interest in the permit or the rangeland themselves."[169] The court further determined that "Congress had no legislative intention of creating a property interest in the permit just as Congress had no legislative intention of creating a property interest in the underlying federal lands."[170] Nor did the "Supreme Court . . . determine that private parties had a property interest in the federal lands. Rather, the Supreme Court held that one who makes beneficial use of the public lands has a greater priority to the use of . . . that land than another private party who did not."[171] Addressing plaintiffs' further claims, the court characterized a grazing permit as a revocable license, "the cancellation of which does not give rise to damages."[172] However, the court agreed to hear evidence concerning plaintiffs' claims to compensation for the impoundment and sale of plaintiffs' cattle that continued to graze on the suspended allotment,[173] for the construction by plaintiffs of permanent improvements on the suspended allotment,[174] and for plaintiffs' property rights in water, ditch rights-of-way, and forage on the suspended allotments.[175]

The claim to compensation for water, ditch rights-of-way, and forage on public lands represents a somewhat more sophisticated variation on the property rights argument. This argument relies on the so-called split-estate theory[176] according to which the federal government holds title to the public lands, but various types of private interests, such as mining claims, water rights, and grazing rights, have been severed from the public domain and have been acquired by private property owners. This argument maintains that the acquiescence of the federal government in the prior appropriation of western public lands and resources has conferred a property interest on those who occupied and made beneficial use of those resources.[177] Because different facets of federal public land-use policy developed separately, the validity of this argument depends upon the nature of the resource in question; however, cer-

169. *Hage*, 35 Fed. Cl. at 170.
170. *Id.*
171. *Id.* (citing Wyoming v. Colorado, 259 U.S. 419, 460-61 (1922) *vacated*, 353 U.S. 953 (1957)).
172. *Id.* at 150.
173. *Id.* at 177.
174. *Id.* at 179.
175. *Id.* at 171.
176. HAGE, *supra* note 168, at 3-5, 87-92.
177. *Id.* at 9-13, 135-39.

tain general principles apply to the disposition of all public lands.

Under the Property Clause of the Constitution, "[t]he Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[178] In practice, the courts have interpreted this to mean that a private right in the public lands may vest only through an affirmative act of the federal government.[179] As a result, the government cannot forfeit title to the public lands by means of adverse possession[180] or by prescription.[181] In order to assert a private property interest in the public lands, one must therefore establish that Congress has expressly conferred such a right.

Even when a private property right in the public lands can be shown, it does not necessarily follow that any government interference with that right automatically results in a taking. Accordingly, the following discussion will first examine the substance of various arguments advanced by Wise-Use advocates in support of private property rights in the public lands. It will then argue that even if these arguments can succeed, the property rights asserted do not warrant protection under the Fifth Amendment from interference by the federal government without payment of just compensation.

A. Grazing Rights

Having been thwarted in their attempts to assert a property right in the possession of a permit to graze livestock on the public lands, those who wish to establish a private property interest in grazing rights on the public lands now argue that federal acquiescence in the prior occupation and use of the public lands for livestock grazing has conferred an equitable estate in the use of those

---

178. U.S. CONST. art. IV, § 3, cl. 2.

179. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 536 (1976) ("[D]eterminations under the Property Clause are entrusted primarily to the judgement of Congress.").

180. *E.g.*, United States v. California, 332 U.S. 19 (1947).

> The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules . . . and officers . . . cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

Id. at 40; United States v. Wilson, 523 F. Supp. 874, 898 (N.D. Iowa 1981) ("It is well settled that title by adverse possession, laches, or statutes of limitation cannot be asserted against the United States . . . ."), *rev'd on other grounds*, 707 F.2d 304 (8th Cir. 1982).

181. *E.g.*, United States v. Osterlund, 505 F. Supp. 165, 168 (D. Colo. 1981) ("[N]o right by prescription may be obtained against the government."), *aff'd*, 671 F.2d 1267 (10th Cir. 1982).

lands for which the grant of a grazing permit merely serves as an acknowledgement.[182] This argument thus maintains that the property right is not in the permit itself, but in the grazing preference that recognizes the permittee's pre-existing right to graze livestock on the public range, thereby bestowing on the owner exclusive right to the permit.[183]

The BLM regulations define a grazing preference as "the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee."[184] A grazing preference is thus the amount of forage, calculated in terms of animal unit months,[185] that a permittee is entitled to claim on the public lands during the grazing season. Moreover, a grazing preference is attached to base property,[186] which consists of the following:

> (1) Land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or (2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing.[187]

To qualify for a grazing preference, an applicant must therefore own or control livestock and base property.[188] In addition, the argument maintains that because grazing preferences were awarded primarily to those who were already engaged in livestock grazing on the lands to which the grazing preference applied at the time that the public lands were withdrawn from settlement, a grazing preference cannot be created by the BLM or the Forest Service, but can be acquired only through transfer from one base property to another, or from transfer of the base property itself from one owner to another.[189] According to this reasoning, then, "the preference on federal lands is not created by the federal gov-

182. Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 IDAHO L. REV. 505, 506 (1994).

183. *Id.* at 509 n.27; HAGE, *supra* note 168, at 187.

184. 43 C.F.R. § 4100.0-5 (1995).

185. An animal unit month is defined as "the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month." *Id.*

186. *Id.* § 4110.2-2(b).

187. *Id.* § 4100.0-5.

188. *Id.* § 4110.1.

189. Falen & Budd-Falen, *supra* note 182, at 507-08 (citing 43 C.F.R. § 4110.2-3 (1995) & 36 C.F.R. § 222.3 (1995)).

ernment, but rather was acquired by the permittee because of, among other things, prior use of the federal lands."[190] Given these characteristics, adherents to this argument maintain that, with respect to grazing rights, the conclusion is inescapable that "a *private property right* of some sort in the federal lands is obviously involved."[191]

Proponents of the argument further seek to bolster their position by means of case law, citing in particular two specific cases, both of which are capable of alternate interpretations. In *Shufflebarger v. Commissioner*[192] the United States Tax Court held that a grazing preference constitutes, at least for tax purposes, an indefinitely continuing right that cannot be amortized over time.[193] Wise-Use advocates maintain that this case stands for the proposition that a grazing preference amounts to a property right.[194] However, the court also stated that grazing preferences "in and of themselves do not convey or grant the legal right to the use of the range, but they do supply the means whereby the apportionment of the range among the members of the livestock industry making use thereof is effectuated."[195] It is a strange form of property right that does not grant the legal use for which it purportedly serves as the foundation. Instead, the court determined that a grazing preference does nothing more than "entitle 'the holder to special consideration over other applicants who have not established preferences.'"[196]

The court in *Hage v. United States*[197] dealt similarly with the issue, characterizing a grazing preference as merely a "right of first refusal."[198] "In fact, all precedent indicates that the privilege to graze never created a property interest but rather a preference to use the allotment before the government gave the right to another."[199] Thus, the courts have so far maintained that a grazing preference confers no property right in the public rangeland, nor does it constitute a property interest in itself.

---

190. *Id.* at 508.
191. HAGE, *supra* note 168, at 4.
192. 24 T.C. 980 (1955).
193. *Id.* at 994.
194. Falen & Budd-Falen, *supra* note 182, at 511.
195. *Shufflebarger*, 24 T.C. at 992.
196. *Id.* at 981 n.1 (quoting Forest Service Manual).
197. Hage v. United States, 35 Fed. Cl. 147 (1996).
198. *Id.* at 170.
199. *Id.*

More significant in the development of federal policy regarding grazing rights on the public lands is *Buford v. Houtz*,[200] which Wise-Use advocates cite for the proposition that

> there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States . . . shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use. . . . The government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement.[201]

While the implied license language in *Buford* seems to support the assertion of a grazing right on the public lands, the facts in the case serve to undermine that position. The plaintiff, who owned sections of rangeland in Utah that were interspersed among sections of public land on which he grazed cattle, sought an injunction to prevent the defendant from grazing sheep on the public lands over which the plaintiff sought exclusive control.[202] By denying the injunction, the Court established that the plaintiff could not assert a preferential right to the public lands. Instead, the Court ruled that the public lands were to remain open to all equally, at least as long as "no act of government forbids this use."[203]

Congress had in fact acted for the purpose of maintaining equal and open access to the public lands by means of the Unlawful Inclosures Act of 1885,[204] which made it illegal to enclose the public lands or hinder another in their use. Moreover, under the statute "the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States . . . without claim, color of title, or asserted right . . . is likewise declared unlawful, and prohibited."[205] In interpreting this statute, the Supreme Court went so far as to prohibit the fencing of private land where

200. 133 U.S. 320 (1890).
201. *Id.* at 326. *See* HAGE, *supra* note 168, at 15-16, 72-74, 115 (citing Buford v. Houtz, 133 U.S. 320 (1890)).
202. *Buford*, 133 U.S. at 321-24.
203. *Id.* at 326.
204. 43 U.S.C. §§ 1061-1066 (1994).
205. *Id.* § 1061.

the effect of such action was to enclose public land.[206] The Court was firm in its judgement that "[i]f there be any general impression that in dealing with public lands the rights are altogether those of the individual proprietors, and that such rights as the Government has exist only by their sufferance, the [Unlawful Inclosures Act] will do much to rectify this misapprehension."[207] Furthermore,

> [i]f practices of this kind were tolerated, it would be but a step further to claim that the defendants, by long acquiescence of the Government in their appropriation of public lands, had acquired a title to them as against every one except the Government, and perhaps even against the Government itself.[208]

It would be difficult to conceive of a more forthright expression of the Court's determination that no private preferential grazing right exists in the public lands. However, the Court addressed the issue yet again in adjudicating the rights of a Colorado rancher who challenged the government's authority to withdraw public rangeland under the General Revision Act of 1891.[209] In *Light v. United States*[210] the Court reiterated its position that the government's "failure to object . . . did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes."[211] In addition, "[t]he United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely."[212]

The case law thus clearly establishes that the government's acquiescence in the grazing of livestock on the public lands conferred no proprietary right to the continued use of the public domain by ranchers and stockmen. Although it was within the power of Congress to create property rights in those who had established a prior use of the public lands for grazing purposes, Congress never did so. Absent such an express provision by Congress, no

206. Camfield v. United States, 167 U.S. 518 (1897).
207. *Id.* at 526.
208. *Id.* at 527.
209. General Revision Act, ch. 561, 26 Stat. 1095 (1891) (codified as amended in scattered sections of 16 U.S.C. (1994), 30 U.S.C. (1994) & 43 U.S.C. (1994)). *See supra* notes 104-07 and accompanying text.
210. 220 U.S. 523 (1911).
211. *Id.* at 535.
212. *Id.* at 536.

property right in a grazing preference can exist. For obvious reasons, therefore, any argument claiming that government interference with such a nonexistent right constitutes a taking must inevitably fail.

B. Water Rights

The situation is somewhat more complex in regard to the ownership of water rights on the public lands. In the absence of a clear federal policy for the disposition of water rights in the public domain, early settlers who sought to divert water from the public lands for the purpose of mining or grazing livestock developed, on the basis of custom and use, a system of acquisition by means of prior appropriation.[213] When Congress finally addressed itself to the issue of water rights, it tended to bow to necessity and recognize the system that had already grown into place. The Mining Act of 1866[214] largely validated pre-existing claims to water on the public lands, stating,

> whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.[215]

The Placer Mining Act of 1870[216] incorporated provisions of the preceding Act and further provided that "all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the [Mining Act of 1866]."[217] Finally, in the Desert Land Act of 1877[218] Congress predicated "the

213. *See* Jennison v. Kirk, 98 U.S. 453, 457-58 (1878) (discussing the development of the prior appropriations doctrine in the context of mining claims and water rights).

214. Act of July 26, 1866, ch. 262, 14 Stat. 251 (codified as amended at 30 U.S.C. §§ 43-46, 51 (1994) & 43 U.S.C. § 661 (1994)).

215. *Id.* at 253.

216. Act of July 9, 1870, ch. 235, 16 Stat. 217 (codified as amended at 30 U.S.C. §§ 35-38, 52 (1994) & 43 U.S.C. § 661 (1994)).

217. *Id.* at 218.

218. Desert Land Act, ch. 107, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. §§ 321-339 (1994)).

right to the use of water . . . upon bona fide prior appropriation."[219] Moreover, "the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."[220]

Attempting to unravel the language of these statutes in the context of actual claims to water on the public lands, the Supreme Court eventually arrived at a formulation that recognized the prior appropriation of water rights on the public lands in conformity with state law as long as state law did not seek to extend beyond the specific authority granted by Congress and interfere with the rights of the United States in water on public lands.[221] According to the Court, the effect of these statutes was thus to sever the water rights from the public lands.[222] It would appear, therefore, that the split-estate theory does indeed apply to water rights that have been acquired on the public lands by means of prior appropriation in accordance with state law.

Wise-Use advocates have seized on the willingness of Congress and the courts to recognize the acquisition of vested water rights on the public lands in order to assert two separate but closely related arguments. The first argument maintains that insofar as water rights on the public lands were granted primarily on the basis that the grazing of livestock on the adjoining rangeland constituted the beneficial use that made possible the acquisition of

---

219. *Id.*

220. *Id.*

221. *See, e.g.*, United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899). The Court recognized the power of a state to regulate water rights within its dominion, subject to the limitation that "in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters." *Id.* at 703. Nevertheless, "[t]he effect of [the Mining Act of 1866] was to recognize, so far as the United States are concerned, the validity of the local customs, laws and decisions of courts in respect to the appropriation of water." *Id.* at 704; *see also* California Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).

> If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the [Desert Land Act of 1877], cannot be doubted.

Id. at 162.

222. *California Or. Power Co.*, 295 U.S. at 158 ("If this language [of the Desert Land Act of 1877] is to be given its natural meaning, and we see no reason why it should not, it effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself.").

the water rights in the first place, the acquisition of the water rights thereby validated the right to graze livestock on the adjoining land. In other words, the water rights, once severed from the public domain and acquired by means of prior appropriation, became the basis for asserting a property interest in the land that facilitated the acquisition of the water rights to begin with.[223]

This rather convoluted argument has been litigated in the federal courts where it received little sympathy. In *Hunter v. United States*[224] the appellant claimed water rights on public lands for which cattle grazing served as the beneficial use.[225] When the United States sought to enjoin Hunter from grazing cattle on lands recently annexed to Death Valley National Monument, he claimed that cattle grazing was an appurtenant right to his vested water right.[226] The court agreed that under the Mining Acts of 1866 and 1870, Hunter did indeed possess a valid water right;[227] however, the court held that neither common law nor statutory enactment created any right to graze cattle on the adjoining public rangeland.[228] Likening Hunter's argument to a claim that vested water rights for the use of irrigation would grant rights to the land upon which the water is to be used, the court rejected the notion that a property right necessarily "include[s] the thing with which the right granted is used."[229]

Hunter's further argument that Congress must have intended to include grazing in the statutory grant of water rights was likewise rejected by the court because the Act in question specifically granted rights only for "the construction of ditches and canals."[230] Moreover, any such construction of the statute would tend to restrict the free use of the public lands in a manner inconsistent with stated policy goals.[231] Thus, regardless of how one seeks to get around it, the principle remains that no private property right can accrue on the public lands absent the unambiguous expression of Congress to create such a right. Again, where no private property right exists, there can be no taking by the government.

---

223. *See, e.g.*, HAGE, *supra* note 168, at 115, 141-44; Blank, *supra* note 168, at 610.
224. 388 F.2d 148 (9th Cir. 1967).
225. *Id.* at 151.
226. *Id.* at 150-51.
227. *Id.* at 151-53.
228. *Id.* at 154.
229. *Id.*
230. *Id.* (quoting Act of July 26, 1866, ch. 262, 14 Stat. at 253).
231. *Id.*

The second and somewhat more straightforward argument that arises from the recognition of vested water rights on the public lands maintains that any reduction in grazing allotments by federal agencies results in a corresponding reduction in the value of the vested water rights and therefore constitutes a taking. This issue was broached but not resolved in *Nevada Land Action Ass'n v. United States Forest Service*,[232] in which the Ninth Circuit ruled that under the provisions of the NFMA the plaintiff could not preclude action by the USFS to decrease grazing levels in the Toiyabe National Forest, but could file suit to obtain compensation if a taking of vested water rights had occurred. Since the plaintiff had not filed such an action, the court did not rule on its merits.[233]

The argument has since been taken up in *Hage v. United States*,[234] where the plaintiffs claim that suspension of their grazing permit by the USFS deprived them of their vested water rights in the Toiyabe National Forest.[235] Recognizing that the Mining Act of 1866 "clearly acknowledges vested water rights on public lands,"[236] the court agreed to hear evidence concerning plaintiffs' "ownership of water rights and the scope of that property right in Nevada."[237] Depending upon the resolution of the factual issue regarding plaintiffs' water rights, the court will allow the plaintiffs' taking claim to proceed.[238]

Under *Lucas v. South Carolina Coastal Council*,[239] in order for a taking to occur, the government must deprive a property owner of "all economically beneficial or productive use" of the property in question.[240] It is unlikely that a mere reduction in grazing allotments is sufficient to reduce the value of vested property rights to such a degree; however, allowing that such a situation may occur, the extent to which property owners have been deprived of the economically viable use of their property depends upon "the extent to which the regulation has interfered with distinct investment-backed expectations."[241] Moreover, the test is whether such

232. 8 F.3d 713 (9th Cir. 1993).
233. *Id.* at 719.
234. Hage v. United States, 35 Fed. Cl. 147 (1996).
235. *Id.* at 156.
236. *Id.* at 172.
237. *Id.* at 173.
238. *Id.* at 180.
239. 505 U.S. 1003 (1992).
240. *Id.* at 1015.
241. *Id.* at 1019 n.8 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S.

investment-backed expectations are reasonable.[242] According to the Court's decision in *Lucas*, a property owner's expectations are not reasonable where "the proscribed use interests were not part of his title to begin with."[243] This language clearly defeats any claim to grazing rights on the federal lands where valid title never passed into the hands of private property owners; in addition, however, similar language has been used by the Court to defeat claims to compensation for interference by the government with vested property rights on the public lands.

Even where recognized possessory interests have been divested through government regulation of the public lands, courts have not hesitated to rule that such regulation did not amount to a compensable taking. In *United States v. Locke*,[244] appellees were holders of unpatented mining claims on public lands near Ely, Nevada who failed to file their annual notice of intent to hold their claims by the December 30 deadline as required under section 314(a) of the FLPMA.[245] In accordance with section 314(c), appellees were subsequently notified by the BLM that their claims had been declared abandoned.[246] In reversing the lower court's finding in favor of appellees, the Supreme Court acknowledged that "owners of unpatented mining claims hold fully recognized possessory interests in their claims."[247] However, such interests are a "'unique form of property'"[248] because "[t]he United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired."[249] Because in this case the burden of compliance was slight and the statute and its purpose were reasonable, the Court held that "[r]egulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restric-

---

104, 124 (1978)).

242. *Id.* at 1034 (Kennedy, J., concurring) ("Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.").

243. *Id.* at 1027.

244. 471 U.S. 84 (1985).

245. *Id.* at 89-90.

246. *Id.* at 90.

247. *Id.* at 104.

248. *Id.* (quoting Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963)).

249. *Id.*

tions the legislature has imposed."[250] It appears, therefore, that because private interests in the public lands are acquired subject to the federal government's paramount title to the public domain, even possessory interests can be divested by government regulation as long as such regulation is reasonable.

Mining claims became subject to private ownership by means of statutory enactment in much the same way that water rights did.[251] It is reasonable to conclude, therefore, that water rights are subject to the same expectations to which mining claims are subject. Water rights can thus be made subject to reasonable government regulation without such regulation constituting a taking for which compensation is required. Whatever valid arguments that the Wise-Use movement may adduce in favor of its claims to the continued unrestricted exploitation of our nation's public resources, the argument that regulation of the public lands by the federal government constitutes a taking for which just compensation must be paid is not one of them.

IV. THE COUNTY SUPREMACY ARGUMENT

The County Supremacy movement finds expression in the enactment in recent years of a number of ordinances by various counties throughout the western states designed to establish local control over public lands within their boundaries.[252] These ordinances typically follow one of two patterns.[253] The first approach relies for its justification upon the protection of local custom and culture, which it defines almost exclusively as grazing and resource extraction.[254] The second, and more radical, approach argues on the basis of the equal footing doctrine[255] that, upon statehood, the various state governments assumed control over all public lands

250. *Id.* at 107.

251. *See* Act of May 10, 1872, ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C. (1994)).

252. Lavelle, *supra* note 1, at A22; Miller, *supra* note 168, at 828.

253. Lavelle, *supra* note 1, at A22.

254. *Id.*; Miller, *supra* note 168, at 828, 833; *see* Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525, 529 (1994); *see also* Falen & Budd-Falen, *supra* note 182, at 511-22 (arguing that grazing rights in the southwestern states derive from early Spanish usages that were recognized by the United States in the Treaty of Guadalupe-Hidalgo of 1848, which ended the Mexican War).

255. The Northwest Ordinance provided for the admission of new states "to a share in the Federal councils on an equal footing with the original states." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50. *See supra* notes 47-50 and accompanying text.

within each state to which the federal government could not assert jurisdiction under Article I of the Constitution.[256] A close examination of each approach, however, reveals flaws in legal reasoning that invalidate the resulting ordinances that seek to impose local control over the public lands.

A. Custom and Culture

Modelled after the Interim Land Use Policy Plan of Catron County, New Mexico,[257] those ordinances that rely upon the protection of local custom and culture to assert local control over public lands challenge federal authority primarily on statutory grounds.[258] Adapting language from NEPA[259] stating that it is the policy of the federal government to "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice,"[260] the counties assert that Congress has allowed for local interests to take precedence over federal management of the public lands.[261]

According to the Catron County ordinance, "all federal and state agencies shall comply with the Catron County Land Use Policy Plan and coordinate with the County Commission for the purpose of planning and managing federal and state lands within the geographic boundaries of Catron County, New Mexico."[262] Designating the County Commissioners as the lead planning agency within the county,[263] the ordinance further requires that "[f]ederal and state agencies proposing actions . . . shall prepare and submit in writing, . . . report(s) on the purposes, objectives and

256. Lavelle, *supra* note 1, at A22. Article I of the Constitution grants Congress exclusive authority over specific lands designated for "the seat of the government of the United States" and "for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." U.S. CONST. art. I, § 8, cl. 17.

257. Catron County, N.M., Ordinance 004-91 (May 21, 1991), *repealed by* Catron County, N.M., Ordinance 003-92 (Oct. 6, 1992). The Catron County Interim Land Use Policy Plan was subsequently published by the National Federal Lands Conference, a Wise-Use umbrella group in Bountiful, Utah that markets the plan to interested county governments at a cost of $250. Miller, *supra* note 168, at 828; *see* Reed, *supra* note 254, at 529.

258. Lavelle, *supra* note 1, at A22.

259. 42 U.S.C. §§ 4321-4370 (1994).

260. *Id.* § 4331(b)(4).

261. Reed, *supra* note 254, at 549.

262. Catron County, N.M. Ordinance 004-91 (May 21, 1991).

263. *Id.*

estimated impacts of such actions . . . to the Catron County Commission . . . for review and coordination prior to . . . initiation of action."[264] Moreover, county concurrence is required for all federal land adjustments in the county.[265] Federal agencies may not change any land uses prior to the preparation and approval by the county of an adverse impact statement;[266] federal agencies may not acquire additional property within the county without ensuring that parity in current public and private land ownership status is maintained;[267] public lands that are difficult to manage or lie in isolated tracts are to be targeted for disposal;[268] no additional wilderness areas shall be designated in the county,[269] and federally proposed designations of wild and scenic rivers shall comply with county water use plans.[270]

Despite the recent proliferation of County Supremacy ordinances throughout the western states,[271] at least one such ordinance has failed to survive challenge in state court. In *Boundary Backpackers v. Boundary County*,[272] the Idaho Supreme Court struck down an ordinance substantially similar to that of Catron County.[273] Declaring that "portions of the ordinance are preempted by federal law and are therefore unconstitutional,"[274] the court refused to sever the offending provisions and concluded that "the entire ordinance is invalid."[275]

The doctrine of preemption upon which the court in *Boundary Backpackers* relied is well established.

---

264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. For a comprehensive discussion of the widespread adoption of custom and culture ordinances by counties throughout the western United States, see Andrea Hungerford, Comment, *"Custom and Culture" Ordinances: Not a Wise Move for the Wise Use Movement*, 8 TUL. ENVTL. L.J. 457, 461-68 (1995).
272. 913 P.2d 1141 (Idaho 1996).
273. *See id.* at 1143-44 (quoting relevant portions of the Boundary County Interim Land Use Policy Plan). In addition to provisions borrowed from the Catron County ordinance, however, the Boundary County Interim Land Use Policy Plan requires specific prior county approval for "any proposed changes in wildlife habitat, wildlife recovery plans, timber sales volume projections, restricted access, road closures, and primitive or wilderness designation." Boundary County, Idaho, Ordinance 92-2 (Aug. 3, 1992).
274. *Boundary Backpackers*, 913 P.2d at 1148.
275. *Id.*

> [S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[276]

In the context of public land law, congressional authority to regulate the public lands derives from the Property Clause of the Constitution, according to which, "[t]he Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[277] Such rules and regulations take precedence over state and local laws by operation of the Supremacy Clause, which states, "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; . . . any thing in the Constitution or laws of any state to the contrary notwithstanding."[278] Construing the Property Clause, the United States Supreme Court has "repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'"[279] Hence,

> [a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.[280]

Thus, where state or local law conflicts with federal legislation "passed pursuant to the Property Clause, the law is clear: The state laws must recede."[281]

---

276. *Id.* at 1146 (quoting California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581 (1987)).

277. U.S. CONST. art. IV, § 3, cl. 2.

278. *Id.* art. VI, cl. 2.

279. Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)).

280. *Id.* at 543 (citations omitted).

281. *Id.*

What is not so clear, perhaps, is what happens when state laws regulating federal land do not directly conflict with federal legislation. In this regard the Court has recognized that "[t]he Property Clause itself does not automatically conflict with all state regulation of federal land."[282] In the absence of a clear conflict, federal preemption of state law occurs "[i]f Congress evidences an intent to occupy a given field."[283] Such intent may be either express, according to which Congress has clearly prohibited the action of state or local regulation within a given area of law,[284] or implied, according to which Congress assumes such total control in a given area as to preclude the operation of state legislation.[285]

Because federal statutes affecting management of the public lands tend to promote rather than discourage cooperation among federal, state, and local regulatory agencies, express preemption seldom occurs in public land law.[286] Among the policies and goals of NEPA, for instance, is the stated purpose to work "in cooperation with State and local governments."[287] NEPA further provides that "local agencies, which are authorized to develop and enforce environmental standards" have the right to comment on proposed federal actions.[288] Accordingly, the regulations implementing NEPA establish that "[a]gencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements."[289] Such cooperation includes joint planning processes, environmental research and studies, joint public hearings, joint environmental assessments, and joint environmental impact statements.[290] Because NEPA applies to all "major Federal actions significantly affecting the quality of

282. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987).

283. *Id.* at 581 (quoting Silkwood v. Kerr-McGee, Corp., 464 U.S. 238, 247 (1984)).

284. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 530-32 (1976) (holding that explicit language in the Federal Meat Inspection Act preempts inconsistent state labeling requirements).

285. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (stating that preemption occurs when "the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained").

286. COGGINS & GLICKSMAN, *supra* note 22, § 5.03(1)(a). One exception occurs in the Endangered Species Act, which voids any state law or regulation that imposes more lenient restrictions on the importation and exportation of threatened and endangered species. 16 U.S.C. § 1535(f) (1994).

287. 42 U.S.C. § 4331(a) (1994).

288. *Id.* § 4332(2)(c).

289. 40 C.F.R. § 1506.2(b) (1995).

290. *Id.* § 1506.2(b)-(c).

the human environment,"[291] its impact upon federal management of the public lands is substantial. Similar language in FLPMA requires the BLM to "coordinate . . . land use inventory, planning, and management activities" with state and local government agencies;[292] and regulations implementing NFMA direct the USFS to coordinate its planning efforts with local governments.[293] Far from excluding local governments, federal public land legislation and regulation encourage their participation.

Such participation has limits, however, and although federal agencies are obligated to listen to local governments, they are not necessarily obligated to obey them.[294] The same provision in FLPMA that requires coordination between state and federal land-use planning and management programs also provides that "[l]and use plans of the Secretary . . . shall be consistent with State and local plans *to the maximum extent he finds consistent with Federal law and the purposes of this Act.*"[295]

In *California Coastal Comm'n v. Granite Rock Co.*,[296] the United States Supreme Court specifically addressed the issue of preemption in the context of federal management of the public lands and ruled that federal land-use regulation of the national forests did not preempt the enforcement of state environmental regulations. Citing provisions in FLPMA and NFMA that regulate mining in the national forests, the Court made a distinction between land-use and environmental controls.[297] Apart from this distinction, the Court also stated, "[f]or purposes of this discussion and without deciding this issue, we may assume that the combination of the NFMA and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands."[298] However, "[c]onsidering the legislative understanding of environmental regulation and land use planning as distinct activities, it would be anomalous to maintain that Congress intended any state environmental regulation of unpatented mining claims in national forests to be *per se* pre-empted as an impermis-

291. 42 U.S.C. § 4332(2)(c) (1994).
292. 43 U.S.C. § 1712(c)(9) (1994).
293. 36 C.F.R. § 219.7(d) (1995).
294. *See Granite Rock*, 480 U.S. at 596 (Powell, J., dissenting).
295. 43 U.S.C. § 1712(c)(9) (1994) (emphasis added).
296. 480 U.S. 572 (1987).
297. *Id.* at 587.
298. *Id.* at 585.

sible exercise of state land use planning."[299]

By declining to decide the issue of whether federal public land-use legislation preempts local control over the public lands, the Court did little to clarify the situation. By indicating at the same time that state environmental laws are specifically not preempted by federal public land-use statutes, the Court has indicated a willingness to entertain the possibility of some measure of local control over the public lands that adherents to the County Supremacy movement have not been slow to exploit.[300] Far from validating any set of conditions that may qualify as something other than land-use controls, however,[301] the Court in *Granite Rock* merely delineated a narrow category of state environmental regulations for which it found no intent on the part of Congress to preempt.[302]

In any event, the court in *Boundary Backpackers* avoided the issue raised in *Granite Rock* by finding that several provisions in the Boundary County ordinance are in direct conflict with federal public land-use law. Specifically, the court ruled that the requirement that federal agencies maintain parity in land ownership status within the county violates the Wild and Scenic River Act[303] (WSRA) "authorizing the Secretary of the Interior and the Secretary of Agriculture to acquire land within the boundaries of any component of the wild and scenic rivers system;"[304] FLPMA, "authorizing the Secretary of the Interior to 'acquire . . . by purchase, exchange, donation or eminent domain, lands or interests therein;'"[305] and NFMA "authorizing the Department of Agriculture to 'acquire land, or interest therein, by purchase, exchange or

299. *Id.* at 588.

300. *See* Rene Erm II, Comment, *The "Wise-Use" Movement: The Constitutionality of Local Action on Federal Lands Under the Preemption Doctrine*, 30 IDAHO L. REV. 631, 658-59 (1994) (arguing that under the *Granite Rock* "test," the Boundary County ordinance is not preempted as long as "there exists a set of conditions that would not prohibit a land use permissible under federal legislation").

301. *See, e.g., id.* at 659 (arguing that the requirement in the Boundary County ordinance conditioning further federal acquisition of land in the county upon maintenance of parity in public and private ownership status could avoid preemption because it does not regulate land use, but only impacts land transfer).

302. *Granite Rock*, 480 U.S. at 583 ("[T]he Forest Service [environmental] regulations . . . not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations will comply with state laws.").

303. 16 U.S.C. §§ 1271-1287 (1994).

304. *Boundary Backpackers*, 913 P.2d at 1147 (citing 16 U.S.C. § 1277 (1994)).

305. *Id.* (quoting 43 U.S.C. § 1715(a) (1994)).

otherwise, as may be necessary to carry out its authorized work.'"[306] The requirement that federal agencies must submit to county approval prior to implementing proposed changes in land use violates portions of the ESA, "which requires the Secretary of the Interior and the Secretary of Commerce to develop and implement recovery plans for endangered species."[307] The requirement that federal agencies coordinate the designation of wild and scenic rivers with the county water use plan further violates WSRA,[308] and the prohibition against wilderness areas in the county violates the Wilderness Act.[309] The court declared in no uncertain terms that "[n]one of the federal land laws give local governmental units this type of veto power over decisions by federal agencies charged with managing federal land. . . . This veto power stands as an obstacle to the accomplishment of the full purposes and objectives Congress evidenced in these federal laws."[310]

Although the opinion in *Boundary Backpackers* is binding only within the borders of Idaho, the effect of such a strong declaration against the constitutionality of the Boundary County ordinance cannot but have reverberations throughout the entire County Supremacy movement. Here again, the effect of the Property Clause of the Constitution has been to reaffirm that, absent a clear expression of intent to the contrary, Congress retains sole discretion over the disposition of the public domain, and state and local governments have no authority to dictate to the federal agencies responsible for administering public lands what they may and may not do in discharging their duties under federal law, "any thing in the . . . laws of any state to the contrary notwithstanding."[311]

B. The Equal Footing Doctrine

County ordinances that invoke the equal footing doctrine to assert local control over the public lands are equally problematic. The federal government has, in fact, successfully challenged one such ordinance in federal district court.[312] Following the attempt

306. *Id.* (quoting 7 U.S.C. § 428a (1994)).
307. *Id.* (citing 16 U.S.C. § 1533(f) (1994)).
308. *Id.* at 1147-48 (citing 16 U.S.C. §§ 1275-1276 (1994)).
309. *Id.* at 1148 (citing 16 U.S.C. § 1132 (1994)).
310. *Id.* at 1147.
311. U.S. CONST. art. VI, cl. 2.
312. United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996).

by Nye County Commissioner Richard Carver to reopen the Jefferson Canyon Road through the Toiyabe National Forest,[313] the United States filed suit against the county, seeking a declaratory judgement to invalidate the Nye County resolutions from which Carver derived authority for his actions.[314]

The resolution primarily at issue in *Nye County* maintains, pursuant to Nevada statute,[315] that federal jurisdiction extends only to those lands specifically granted to the federal government under Article I, Section 8, Clause 17 of the Constitution.[316] The resolution states as its justification that

---

313. *See supra* text accompanying note 1.

314. *Nye County*, 920 F. Supp. at 1110. Carver claimed to be acting pursuant to Nye County, Nev., Bd. of Comm'rs Resolution No. 93-49 (Dec. 7, 1993). Among other provisions, the resolution states,

> Whereas, the title to the public lands passed to the State of Nevada under the equal footing doctrine upon Nevada's admission into the Union in 1864....
>
> ....
>
> All ways, pathways, trails, roads, county highways, and similar public travel corridors across public lands in Nye County, Nevada, whether established by usage or mechanical means, whether passable by foot, beast of burden, carts or wagons, or motorized vehicles of each and every sort, whether currently passable or impassable, that was [sic] established in the past, present, or may be established in the future, on public lands in Nye County, are hereby declared Nye County Public Roads.

Id.

More significant, however, is Nye County, Nev., Bd. of Comm'rs Resolution No. 93-48 (Dec. 7, 1993), which states that "Nye County in cooperation with the State of Nevada, is the public land management authority within the borders of Nye County on *all public lands*." *Id.*

315. NEV. REV. STAT. ANN. §§ 321.596-321.599 (Michie 1994). This statute, according to which Nevada claims ownership of all unappropriated public lands within its borders, initiated the Sagebrush Rebellion in 1979 when a number of western states enacted legislation to assert control over the public lands. John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980). Although "Nevada now concedes that its statutory claim is legally untenable," *Nye County*, 920 F. Supp. at 1113, the United States amended its complaint in *Nye County* to join Nevada as a defendant. *Id.* at 1112. Interestingly, the Nye County resolution claims to control more land than Nevada claims to own under state statute. "For example, while Nevada does not claim ownership of the national forests, Nye County has asserted that Nevada owns the lands managed by the Department of Agriculture." *Id.* at 1111.

316. Nye County, Nev., Bd. of Comm'rs Resolution No. 93-48 (Dec. 7, 1993). The Article I clause grants Congress the power

> [t]o exercise exclusive legislation in all cases whatsoever, over such district ... as may . . . become the seat of government . . . 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, dock-yards, and other needful buildings.

U.S. CONST. art. I, § 8, cl. 17.

> the only enumerated power of the Constitution that allows the Federal Government to own and regulate land within the border of a state is found in Article I of the United States Constitution....
>
> ....
>
> ... Article IV of the United States Constitution, "The Property Clause," grants Congress complete power to dispose of and regulate land and property within the territory before it becomes a state, and...
>
> ....
>
> ... [T]he title to the public lands passed to the State of Nevada under the equal footing doctrine upon Nevada's admission to the Union in 1864.[317]

The equal footing doctrine, upon which this resolution depends, consists of two separate but interrelated arguments. The first is the so-called "classic property clause doctrine,"[318] according to which the Article IV Property Clause, under which Congress asserts control over the public lands, "is not a grant of power to govern federal land once that land is included within a state."[319] As a result, "[t]he classic doctrine ... resolves into an equal footing argument: because the federal government had no [ownership or control] over land as land in the original thirteen states, the presence of either in the new states violates equal footing."[320]

The fundamental premise underlying the classic property clause doctrine is that there are two separate provisions in the Constitution that address the jurisdiction of Congress over federal land.[321] The first provision, in Article I of the Constitution, grants Congress exclusive jurisdiction over specific lands acquired within the borders of the various states "by the consent of the legislature of the state within which the same shall be."[322] The second provision is Article IV of the Constitution which, although it confers on Congress the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to

317. Nye County, Nev., Bd. of Comm'rs Resolution No. 93-48 (Dec. 7, 1993).

318. Dale D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495 (1986).

319. *Id.* at 496-97.

320. *Id.* at 497.

321. *Id.* at 496 ("For proponents of the classic doctrine, the *presence* of two clauses is decisive.").

322. U.S. CONST. art. I, § 8, cl. 17.

the United States,"[323] does not grant Congress exclusive jurisdiction over the public lands. As a result, advocates of the classic property clause doctrine maintain that "[b]ecause the article I clause preempts all state laws, the article IV clause must therefore lack preemptive effect."[324]

As further support for their position, classic property clause theorists cite *Pollard v. Hagan*[325] in which the Supreme Court stated that "the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted."[326] The Court went on to state that under Article I of the Constitution,

> [w]ithin the District of Columbia, and the other places purchased and used for the purposes . . . mentioned, the national and municipal powers of government, of every description, are united in the government of the union. And these are the only cases, within the United States, in which all the powers of government are united in a single government.[327]

What this says, however, is nothing more than that the federal government has exclusive jurisdiction over those lands within state borders described in Article I of the Constitution. It does not say that Congress lacks jurisdiction over those lands within state borders described in Article IV of the Constitution. The classic property clause doctrine thus sets up a false dichotomy, interpreting the absence of exclusive jurisdiction over lands within state borders to mean the absence of all jurisdiction over lands within state borders.[328] The weakness of the classic property clause doctrine is further apparent from subsequent case law, which recognizes that federal authority over the public lands, though not exclusive, does have preemptive force.[329]

---

323. U.S. CONST. art. IV, § 3, cl. 2.

324. Goble, *supra* note 318, at 496.

325. 44 U.S. (3 How.) 212 (1845); *see* Goble, *supra* note 315, at 502.

326. *Pollard*, 44 U.S. (3 How.) at 223.

327. *Id.*

328. *See* Goble, *supra* note 318, at 500 n.27 ("The negation of *complete preemptive power* is *incomplete preemptive power* instead of *no preemptive power*.").

329. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 543 (1976) ("Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause."); Omaechevarria v. Idaho, 246 U.S. 343, 346 (1918) ("The police power of the State extends over the federal public do-

Pollard v. Hagan is also cited for the proposition that, under the equal footing doctrine, title to lands held by the federal government tranfers to new states upon their admission as an attribute of sovereignty.[330] In holding that title to formerly submerged land in Alabama passed according to state rather than federal law, the Court in *Pollard v. Hagan* stated,

> Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits . . . to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states.[331]

However, citing English common law as applied by the Supreme Court in *Martin v. Waddell's Lessee*,[332] the only lands over which the Court recognized state sovereignty were "the navigable waters and soils under them."[333] Moreover, under the holding in *Martin v. Waddell's Lessee*, the submerged lands passed to the people of each state upon admission to the union "for their own common use,"[334] and thus as a "public trust . . . requiring the sovereign to hold the navigable waters and submerged lands open for public access."[335] At the same time, the Supreme Court has not held "that the original thirteen states gained title to the dry lands as a public trust . . . to hold in common for all people."[336] More importantly, "the Supreme Court has held that title to lands that are not submerged, . . . including dry and fast lands, did not pass to the states upon admission."[337] The Supreme Court has instead maintained not only that title to land underlying non-navigable waters remains

---

main, at least when there is no legislation by Congress on the subject.").

330. *See* Nye County, Nev., Bd. of Comm'rs Resolution No. 93-48 (Dec. 7, 1993); *Nye County*, 920 F. Supp. at 1115-16; Goble, *supra* note 318, at 502-03.

331. *Pollard*, 44 U.S. (3 How.) at 228-29.

332. 41 U.S. (16 Pet.) 367 (1842).

> [W]hen the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.

Id. at 410.

333. *Pollard*, 44 U.S. (3 How.) at 229.

334. *Martin*, 41 U.S. (16 Pet.) at 410.

335. *Nye County*, 920 F. Supp. at 1116.

336. *Id.*

337. *Id.*

vested in the United States,[338] but also that title to dry lands does not pass to the states upon admission.[339] Accordingly, the court in *Nye County* determined that "the entire weight of the Supreme Court's decisions requires a finding that title to the federal public lands within Nye County did not pass to the State of Nevada upon its admission pursuant to the equal footing doctrine."[340]

V. CONCLUSION

Throughout our nation's history, the management of the public domain has been directed primarily toward the exploitation of the vast natural wealth that the public lands afford. It is only within the last twenty years that Congress has sought to reverse decades of virtually unrestricted access to the public domain and to protect the public lands from the serious environmental degradation that such access has entailed. Even now, "statutory mandates and BLM protestations to the contrary notwithstanding, livestock grazing remains the first priority of BLM range management, with environmental protection and alternative land uses relegated to a distant secondary role."[341] Still, even such limited interference with what some people consider to be their personal right to expropriate our national heritage is more than they can bear.

When the dust settles, the Wise-Use movement will have amounted to little more than a great deal of sound and fury. By seeking legal solutions to what is essentially a political issue,[342] Wise-Use adherents have thus far expended considerable resources to achieve virtually nothing of substance. Absent the unlikely prospect that Congress will readjust federal land-use policy, the fundamental relationship between state and federal control over the public lands will remain unchanged, and the only possible accomplishment of which Wise-Use adherents might boast is that they may possibly have temporarily forestalled further attempts by the federal government to redress some of the continuing inequi-

338. *Id.* (citing United States v. Oregon, 295 U.S. 1, 14 (1935)).
339. *Id.* (citing Scott v. Lattig, 227 U.S. 229 (1913)).
340. *Id.* at 1117.
341. Joseph M. Feller, *What Is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 557 (1994).
342. *See* Leshy, *supra* note 315, at 325 n.23 (arguing in the context of the Sagebrush Rebellion that state governments have chosen to seek solutions in the courts instead of the political process at a time when their influence in Congress has never been greater).

ties in the administration of the public lands. Local authorities already possess, but fail to exercise, many of the rights they seek to obtain. Federal agencies are currently subject to extensive requirements to coordinate their management of the public lands with local governments,[343] and under federal law for most, if not all, of the western states, local governments have standing to force federal agencies to comply with their own procedural requirements.[344]

Now that many of the underlying legal theories upon which the Wise-Use movement has sought to advance its claims have met with defeat in the courts, perhaps it is time for local governments to sit down with federal regulators to fashion workable solutions to satisfy the needs of local communities as well as to protect the public lands from environmental degradation. Such an approach has now been adopted in Catron County and in neighboring Lincoln County, New Mexico, where County Supremacy ordinances were repealed in favor of memoranda of understanding according to which federal agencies and local officials have agreed to work together to achieve common objectives.[345] Insofar, however, as adherents to the Wise-Use movement seek instead to subvert the political process by means of specious legal arguments designed primarily to intimidate opponents into submitting to their self-interested world view, they are performing a disservice to themselves and to our nation. In their attempt to fight what they characterize as efforts by the federal government to lock away the public lands from the people, a minority of citizens are, in actuality, attempting to lock the federal lands away from the use and enjoyment of the majority of the American public in order to promote their own commercial exploitation of public resources for private gain. The public lands are the property of all the people of the United States and not of a self-appointed few. It is therefore the duty of our government to manage these lands in such a way "that will best meet the present and future needs of the American people."[346] To the extent that the Wise-Use movement hinders this

343. *See supra* notes 286-93 and accompanying text.

344. Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995).

345. Miller, *supra* note 168, at 839; Lavelle, *supra* note 1, at A22; *see also* Matthew Hilton, *Defending the Right of Local Governments to Contribute to Local Decision Making Regarding Public Lands in the Western United States*, 27 URB. LAW. 267, 289 (1995) (recommending wording for a model county ordinance and memorandum of understanding to address the concerns of state and federal public land-use policies).

346. 43 U.S.C. § 1702(c) (1994).

goal and continues to constitute a serious threat to the preservation of our national heritage, "[s]omething must be done to remedy this evil."[347]

Patrick Austin Perry[*]

347. CONG. GLOBE, 28th Cong., 2d Sess. 52 (1845) (statement of Rep. Ficklin).

* This Comment is dedicated to my wife, Hsiao-ling, and to our daughters, Esmé, Elene, and Eisha, in loving appreciation for their indulgence. In addition, I wish to acknowledge the influence of Professor Francis Oakley, from whose teaching I have developed a profound respect for law as a product of the human reason, and of Judge Roy Bean, from whose example I have developed a profound respect for law as a product of the human imagination.