CHAPTER 1

PUBLIC LAND LAW: AN INTRODUCTION

A. THE FIELD OF PUBLIC LAND LAW

Most citizens are unaware of the full extent to which the United States government owns or controls land. Many are generally familiar with some of the national parks, the "crown jewels" of the federal land holdings. Those who have gazed into the Grand Canyon, or marvelled at the natural wonders of Yellowstone, or found incomparable beauty in Yosemite Valley may have breathed a prayer of thanksgiving that some of our predecessors had the wisdom to protect those unique areas for the awe of generations then unborn. But the national parks are merely the tip of the federal iceberg: they account for only a part of the lands managed by the National Park Service, which in turn are only about 12% of the Nation's total federal land. Other people may have frequented a national forest, perhaps not realizing that national forests are in a management system separate from the national parks, in the charge of a different agency (the U.S. Forest Service) in a different department (Agriculture rather than Interior). Only in the West and in Alaska are the existence and activities of the Bureau of Land Management (BLM) common knowledge, but this little-publicized agency controls more federal land than any other, nearly one-tenth of the total national land surface. Most citizens also are at least vaguely aware that a variety of federal agencies own land for some purpose, from post offices to reservoirs, from military forts to wildlife refuges, and from atomic reactor sites to office buildings. In all, the United States owns in fee some 662 million acres, or about 29% of all land in the country.

Public land law is at the core of the history of national economic development, but it encompasses far more than mundane legalities. Federal land policy impelled homesteaders to seek new lives, validated the Gold Rush mining claims, brought about the range wars, and helped promote the massive dams in the West. Even today the livelihoods of pipeline roughnecks, subsistence hunters, loggers, cattle barons, mineral prospectors, and other latterday rugged individualists are intimately affected by the constraints of public land law. Contemporary concern over the uses and abuses of the public lands and natural resources goes much deeper than interest in romantic exploits. Lord Macaulay long ago noted that the true test of American institutions would come when the free public domain was exhausted and an increased population competed for ownership of the land and its depleted resources. That time has arrived, and the competition is intense. The controversies, large and small, that contribute to growth and
direction of the new and emerging body of federal land and resources law provide one of the most fascinating studies in all of legal literature.

A brief introductory note on terminology [from G. Coggins & R. Glicksman, 1 PUBLIC NATURAL RESOURCES LAW § 1.02[1] (1990)]:

"Public domain" has had two traditional meanings. It referred, first, to lands acquired by the United States from other sovereigns, including Indian tribes, and still federally-owned. This meaning contrasts with "acquired lands," which were once in private or state ownership. "Public domain" also took on the connotation of "lands open to entry and settlement." This meaning is the opposite of "reserved" and "withdrawn" lands. As virtually all federal lands are now off-limits to traditional entry and settlement, this [term is an artifact].

* * *

"Acquired lands" are lands the United States acquired from private or state owners by gift, purchase, exchange, or condemnation. In most but not all cases, such lands actually have been "reacquired," because the United States previously had purchased or won them from foreign and Indian sovereigns. Distinguishing between lands because of ownership origins that go back over a century is a policy with little to recommend it, but some statutes and judicial opinions maintain the distinction.

* * *

The meaning of the term "public lands" has varied greatly. In common parlance, the term simply means all lands owned by the United States. Matters are not that simple, however. At some times, the term was synonymous with both meanings of "public domain" described * * * above. Its common law definition came to be "unreserved and unappropriated public domain lands open to entry, settlement, and appropriation." But the common law meaning, never precise, has been superseded to a considerable extent by statutory definitions. In 1920, for instance, Congress defined "public lands" for purposes of federal power development to mean unreserved lands "subject to private appropriation and disposal." Congress in 1976 complicated the matter further by defining public lands as "any land and interest in land owned by the United States * * * and administered by the Bureau of Land Management, without regard to how the United States acquired ownership," except Indian and offshore lands. A 1979 statute defines public lands as all federally-owned lands for limited purposes.

The terms "public lands" and "federal lands" may also include less than full fee interests, such as severed mineral estates. They usually do not, however, refer to submerged lands off the seacoasts (over which the United States asserts jurisdiction but not title), or lands held in trust for Indians. Like so much of public land law, in other words, consistency is not a hallmark and generalization is hazardous.
This book is organized around the concepts that the public lands and
the resources they contain are, indeed, public, and that public land law is
an expression of and is guided by the public interest. Society through its
elected representatives professes to see virtue in many products and values;
it wishes to have both energy production and wilderness preservation. On
these and other questions, an overall balance must be sought that will
guide individual decisions as to individual tracts of public land. The issues
and particulars and forums of public land disputes have changed over the
years as the nature of public land law has changed. The one enduring
element is the argument over what course of action will best serve the
public interest, but the premises used in the argument have radically
shifted.

1. TRADITIONAL PUBLIC LAND LAW: PRIVATE RIGHTS IN
CONFLICT

That federal lands should be retained in federal ownership and man-
aged by federal agencies for the general public interest is a fairly modern
phenomenon. For a century and a half, public land law existed to facilitate
and make more profitable transfers of federal lands and resources into
private hands. Traditional public land law, however, was never an organ-
ized, coherent body of rules or knowledge. In 1880, for instance, there
were an estimated 3500 federal statutes governing the disposition and use
of federal lands; by 1964 the number was still close to 3000. Considering
the vast judicial common law that has grown up around such statutes,
together with the thousands upon thousands of pages of administrative
regulations and rulings, it is not difficult to see that the practice of public
natural resources law can approach the arcane. Further, through most of
American history, it has been common practice to ignore, evade, circum-
vent, or violate the laws on the books governing the public lands. The
Teapot Dome scandal in the 1920's was not an isolated incident; defraud-
ing the government already had been a national sport for over a century.

"Public Land Law" always has been a somewhat ambiguous phrase,
more descriptive than definitive. In general, it has meant those statutes,
rules, practices, and common law doctrines that define who has a right to
own or use a parcel of federal land or its tangible resources. Fairly discrete
bodies of law—including oil and gas, water rights, and mining law—have
grown up within it. The typical controversies in the traditional formul-
tion involved individuals or entities contesting between themselves or with
the government for private right or privilege. Examples are the now-
legendary contests between cattle and sheep ranchers over priority to graze
the public domain, mining claim-jumping and resultant litigation, disputes
between agricultural surface owners and holders of subsurface mineral
rights, the efforts of the government to eject squatters on public lands, and
scores of similar controversies. The resolution of these derivative "pri-
ivate" disputes likely will continue to be a main business of practicing
lawyers, and this volume presents the basic legal doctrines governing
private interests in the public resources.
2. MODERN FEDERAL LAND AND RESOURCES LAW: THE SEARCH FOR THE PUBLIC INTEREST

During the last generation, the central place of private rights, private disputes, and private law as components of overall public land law has been partly superseded by overriding public considerations. Whether viewed as a new direction in traditional public land management, or as another instance of counterproductive federal overregulation, modern federal land and resources law encompasses far more than questions of property rights. The natural resources lawyer now must be conversant with such subjects as zoning, pollution control, land use planning, reclamation requirements, environmental impact statements, public trust duties, competing recreational and preservational values, wildlife protection, pesticide restrictions, and other limitations on economic activity. These, in the aggregate, have come to be as important to public land users as classic private contests. Because of this development, Professors Coggins and Glicksman argue that the phrase "public land law"—traditionally referring to laws relating to public domain disposition—is outmoded. To reflect more accurately the modern focus, they suggest the term "public natural resources law." G. Coggins & R. Glicksman, 1 PUBLIC NATURAL RESOURCES LAW § 1.02[1] (1990).

Modern public land law therefore has become somewhat broader in dimension and more diverse in concept. New disputants bringing different philosophies have entered oldtime controversies; Congress has changed the statutory framework drastically; winds of reform periodically sweep through land management agencies; formerly disregarded aspects assume new importance. There is an elusive unity concerning treatment of the public land which for want of a more definitive phrase can be called the public interest in the public resources.

In the search for the public interest, no one simple answer in any concrete situation ordinarily suffices. The changing nature of private interest and public emphasis necessarily dictates that the public interest is but an ambiguous goal, always sought but never ultimately found. Whether a particular tract is better suited for timber cutting or wildlife propagation or recreation, for instance, is a question that is seldom finally resolved. Virtually every controversy recounted herein is relevant to the central question. A dispute may be phrased in terms such as:

— should cattle or wild horses be removed from an overgrazed tract in Idaho?
— have all procedural steps been completed in the grant of a timber cutting contract?
— does a hunter have a right of access over an unpatented mining claim?
— should off-road vehicles be banned from certain areas?
— should creation of a wilderness area impliedly override state water laws?
should a road to a potentially valuable mineral deposit be cut through an area used by grizzly bears for denning?

But, in every such case, the initial inquiries are the same: Where lies the public interest? Who decides where it lies in particular situations? What are the legal and practical consequences of the choice? These "public" questions must be answered before, or at the same time, "private" questions are addressed.

Preconceptions of the public interest are hazardous to mental health. To many, wilderness preservation is one of the highest endeavors of organized society. But potential wilderness areas may have supplied the lumber that built wilderness advocates' houses, the materials that formed their cars, and the oil that makes them go. Few of those who complain of pollution from the local utility generating plant would readily give up air conditioning altogether. On the other hand, those who espouse production over all else have an equally narrow perspective. There are points of diminishing returns: it is inescapable that the oil burned now or old growth timber cut now will not be available ten or twenty years from now to fuel even more expansion for us and for our descendants. Further, the societal upheaval of the 1960's and 1970's should have taught us that there are values beyond the economic that society prizes more than gold. More people prefer, for instance, to watch birds than to hunt them. Legislation has reflected these public preferences. More and more preservation and recreation lands systems have been created in the past three decades, and more and more lands have been set aside for special, non-economic purposes. This is not to say that the "preservationists" have "won" or should win. The Nation needs energy, it needs food, it needs minerals, it needs timber; unless the American way of life is to change, some national requirements must be filled from national lands. Few heroes or villains are prominent in modern public land controversies, only people with differing conceptions of the public interest.

This book attempts to provide students with all sides of the public policy arguments on particular questions to the extent possible. Little is gained by adhering rigidly to preconceptions or by thinking only in terms of absolutist maxims. The debate over the wise use and management of the Nation's natural heritage is not enhanced by name-calling or ideological rigidity. Fortunately, the recent history of legal and political strife seems to have calmed the ardor of zealots in many respects. Most state and local politicians now concede that not all federal environmental regulation or public interest litigation is necessarily bad. Many preservationists admit that economic development of some natural resources must be pursued if done in an environmentally sound manner. Natural resource extraction industries are generally accepting of (or at least resigned to) the new fabric of legal constraint; increasingly, they seek accommodation rather than evasion. Government has opened itself to new concerns expressed by new organizations, and has in the process gradually but radically reformed agency procedures and outlooks. The efforts of President Reagan's flamboyant Secretary of the Interior, James Watt, to swing the pendulum of public land law back to an earlier era largely failed.
In traditional public land law dramas, the cast of characters was usually rather small; most involved relatively simple private property disputes. Could a new upstream appropriator of stream-flow reduce the water available to prior downstream users? Did Jones jump Smith's gold mining claim? To what extent could Monumental Oil Company disrupt the surface use of Johnson's ranch in pursuing its right to subsurface resources? In these private fights, the government and the direct public interest became involved only indirectly, when the courts were called upon to resolve them. The presence and participation of a new element in the decisional equation, the self-styled "public interest" organization, is largely responsible for a new emphasis. Because much of the change in federal land and resources law has resulted from efforts of non-traditional lobbyists and litigators, it is appropriate to introduce the newcomers to the dramatis personae of public land controversy.

Even though the conservation movement won some notable victories in the late 19th century, it is fair to say that non-commodity oriented interests did not achieve an equal, or even significant, voice until the late 1960's. Nowadays, the main public land controversies, many of which are examined in later chapters, virtually always involve the degree to which the interest of the public, or segments of it, is translated into the eventual decision. Most such modern disputes tend to be at least three-cornered, and private rights are frequently subordinated to or contingent upon the initial determination of the public rights in the decisional process. This has been brought about by changes in legal doctrines, by the growth and new-found aggressiveness of environmental organizations and individuals, by new legislation, and by other factors, but the most important cause of change in public land law is the change in general public attitudes and awareness. No longer is the question whether a ski resort should be developed on public land one solely between the developer and the federal agency. No longer is a timbercutting contract in a national forest automatically granted on the rationale that the nation needs lumber. No longer is the condition of BLM grazing lands of concern to ranchers alone. No longer can wildlife and recreation values be ignored in multiple use management. In these and many other disputes over use of public lands, a new class of disputants has successfully challenged all of the old assumptions and ushered in a new era.

It is not possible to delineate precisely just who the new parties are or what they represent. In some cases, private landowners have rejected economic benefit to themselves by various forms of development on or adjacent to their property. They have, for instance, risen up in litigation against forms of the condemnation power. In terms of public lands, adjacent private landowners frequently do not accept new mines, new energy facilities, new logging operations, and the like as unalloyed blessings, and they have demonstrated a willingness to go to court to halt them. Allied to new landowner attitudes is a new aggressiveness on the part of non-consumptive economic users of public lands. Resorts, guides, river outfitters, backpacking equipment manufacturers, and so forth have resisted development of a resource valuable to them as primitive real estate. Growing numbers of economists and political conservatives are calling into
question the many federal subsidies afforded to developers of public lands and resources.

Many of the largest changes have come about through institutional strategies and actions by established and new environmental organizations. Among the most active and effective organizations are the oldline Sierra Club, Wilderness Society, and National Wildlife Federation, and three relative newcomers, the Environmental Defense Fund (EDF), the Natural Resources Defense Council (NRDC), and the Sierra Club Legal Defense Fund (now called “Earth Justice”). Even the traditionally apolitical Audubon Society has found itself lobbying and litigating. These organizations alone—and there are dozens of similar if less visible groups—have wrought legislative change, pursued hundreds of successful lawsuits—NRDC v. EPA cases alone are legion—and mobilized considerable public support. Overlap and coalitions among organizations are common.

Defining the goals of conservation organizations is difficult, as they cover a broad spectrum. In general, they are striving to achieve their vision of a higher quality of life, a more “natural” or environmentally compatible existence. That scarcely enhances semantic definition, but it is understandable to many on some level. Slightly more specifically, and realizing that each group professes a somewhat different group of aims, one common denominator appears to be a disdain for profits at the expense of less tangible values. While there are ideological relationships between “conservationist” and “conservative,” the former tend to be politically liberal in the sense of preferring government control over unfettered private enterprise in public land management. Preservation of fauna, flora, land and waters in something like their primeval condition is often high on priority lists of conservationists.

Modern public land law, like politics, often makes strange bedfellows: there is a tendency toward coalitions of otherwise divergent entities. In the 1980’s, for instance, when a large coal slurry pipeline was proposed to send Wyoming coal to Louisiana, common cause was joined by environmentalists, ranchers (fearing the shipment of scarce western water), and railroads (fearing the loss of lucrative shipping contracts). It is likely that more such coalitions will form as corporate self-interest overcomes corporate distaste at cooperating with the erstwhile enemy, as conservationists become more realistic on goals and methods, and as the “sides” more fully comprehend the areas of common interest where joint action can be mutually beneficial.

The emergence of so-called public interest guardians has not lessened the role of the traditional economically-oriented disputants. To the contrary, new emphases in the legal processes affecting public land use and management have caused extractive and consumptive industries to redouble their efforts in courts, Congress, and agencies. Beginning with the Pacific Legal Foundation, industries and individuals have financed their own versions of public interest law firms to present the corporate view of the public interest in resource litigation. Interior Secretary Watt earned his spurs with the Mountain States Legal Foundation.
Some of the most powerful economic interests in the country have large stakes in the direction of public land policy. Oil companies have paid billions of dollars for the privilege of drilling on offshore and other federal lands. Energy companies own or have leased from the government billions of tons of coal underlying hundreds of thousands of acres. Public utilities not only rely upon federal coal and federal dams for hydroelectric power, but are also desirous of locating new generating facilities on federal lands. Mining companies jealously guard their statutory right to extract any mineral locatable on the public domain. While the prospector with a pan and mule may be a thing of the past, not all modern mining is done by corporate giants. The public lands have yielded immense stores of mineral wealth, and most remaining domestic ore bodies will probably be located on federal lands in the West, including Alaska. Timber companies, too, find it necessary to cut a large share of their requirements from national forests because private lands do not yield sufficient lumber to meet national and international demand. Many small communities are dependent on the local timber harvest from national forests. The nuclear energy industry taps uranium on the public land. Many of the politically powerful cattle and sheep ranchers of the West use public lands for grazing their stock.

Direct users frequently have strong views as to the proper means and degree of public land utilization, and they are supported by other indirect users and their colleagues. Many people hold as a philosophic tenet that land and water are commodities to be used like any other; correlative, they believe that the federal government has an obligation to develop its resources to the fullest for the sake of the Nation’s economic health while accepting as inevitable unfortunate environmental byproducts. Especially in the west, it is still widely held view that states, not the federal agencies, should have the final say on resource development, that federal agencies and environmental organizations are bureaucratic intermeddlers into matters of local concern, and that the public interest is best served by full development of the economic potential of the public domain.

Federal land management agencies are frequently caught in the middle of modern federal land use controversies. Historical missions and practices have been severely eroded by new statutes, and new missions have been charted, but congressional directives often have held out little concrete guidance in concrete situations, and procedural requisites have proliferated. Interests over a wide spectrum forcibly argue that their conception of the public interest should prevail in the circumstances, and all sides are willing to resort to higher forums if dissatisfied with decisional results. Federal budget deficits have focused unwanted attention on the many subsidies available to public land users. The land manager’s role is increasingly difficult.

The student should know how public land law is made as well as what the law currently provides. The interactions in and among the main components of the legal process are not always clearly perceived. Neither statutes nor regulations nor judicial opinions are sufficient in themselves for an understanding of the broader context in which the broader questions are resolved. Any limited approach is fundamentally fallacious, for it
assumes that “law” is a given when in fact public land law is an everchanging complex of rules derived from and altered by different sources. Although the final determination usually resides in Congress, each of the three branches of government has and uses the power to alter or upset the result reached in another branch. Throughout this volume are scattered “non-legal” or “quasi-legal” materials affording a glimpse into the interactive and interdisciplinary nature of public land law.

One other seldom-noted facet of lawmaking that pervades these materials is that the federal government is by no means a monolithic, homogeneous entity. Sometimes the main dispute is between two agencies, and the private parties who may have initiated the legal challenge become passive or active bystanders. In TVA v. Hill, 437 U.S. 153 (1978) (the Snail Darter case), for instance, the federal Fish and Wildlife Service (FWS) joined with the environmentalist plaintiffs against the federal Tennessee Valley Authority. The Justice Department opted for the TVA position in argument before the Supreme Court, but it filed a “split” brief appending FWS’s argument against the conclusions in the main body. In that controversy, like many others, the litigation was but the prelude to ultimate resolution of the problem by Congress. There has always been a certain amount of interagency competition, but openly taking opposing sides in litigation and like proceedings is a relatively recent development. Whether that is a good thing from the standpoint of governmental efficiency may be debated, but it does serve the function of bringing issues into clearer focus.

In retrospect, it is apparent that a time of unparalleled change and ferment in federal land and resources law began about 1964. Old truths were challenged, and many have fallen. Hundreds of old United States Code sections were swept away at a stroke. Congress suddenly command long-advocated planning, inventorying, and other modern management techniques. Wildlife protection achieved an unanticipated degree of priority in a few short years. The Bureau of Land Management finally received a statutory mission in the sweeping Federal Land Policy and Management Act of 1976. Thoroughgoing reform came to the Forest Service, the oldest federal land agency, in the National Forest Management Act of 1976. The Alaska National Interest Lands Conservation Act of 1980 allocated more than 100 million federal acres in Alaska to various conservation systems. Elsewhere, Congress conferred wilderness status on more than 100 million acres between 1964 and the late 1990’s.

Legislative, judicial, and administrative developments in this modern era have redefined some first principles. The Public Land Law Review Commission Report of 1970, addressing one of the fundamental issues throughout the history of public land policy, found that retention, not disposition, of federal lands should be the guiding principle for the future. Congress then adopted the concept of retention as a policy declaration in the first provision of the comprehensive Federal Land Policy and Management Act of 1976: “The Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this
Act, it is determined that disposition of a particular parcel will serve the national interest.” 43 U.S.C.A. § 1701(a)(1). This policy statement was among the political and legal developments that prompted the “Sagebrush Rebellion” of the late 1970’s. The Rebels, with fervor equalling or exceeding that of earlier efforts to achieve a large-scale transfer of public lands, called for a sell-off of most federal lands to the states or private developers. The Sagebrush Rebellion has receded, but it has left in its wake an intensified focus on the proper relationship between the state and federal governments in relation to public lands and resources.

3. THE FUTURE

The intersections of laws and changing values will determine future land law policy. In spite of the 1980 Alaska Lands Act, a host of issues remain unresolved concerning Alaska’s lands, minerals, and animals. Mineral development, whether for coal in the upper Great Plains or for oil and gas in the Overthrust Belt in the heart of the Rockies, will continue to present hard choices between energy requirements and the protection of non-commodity resources. Federal land policy will be heavily influenced by federal water allocation and development policies now in a state of flux if not confusion. Pressure to discard the century-old law governing mineral claim location wanes and waxes. The growing public appetite for recreation will engender new and continuing conflicts with preservation as well as with extraction. Whether a variety of large wild mammals can survive on this continent will largely be determined by future public land policy. Much of the western livestock industry faces curtailment or bankruptcy. The stakes are enormous, and the times are fluid. In the future of federal land and resources law lies a good part of the Nation’s future welfare.

B. THE FEDERAL LANDS AND RESOURCES

Except for the area of the original thirteen colonies, Texas, and Hawaii, the United States government once owned nearly all of the land within its present borders. The real estate comprising this original “public domain” is probably the richest in the variety and extent of its natural resources of all comparable areas in the world. The forests, the farmlands, the rivers and harbors, the mineral wealth, and the scenic wonders are of literally inestimable economic, social, and aesthetic value.

Most of the original national legacy passed out of national ownership as the public lands were opened for settlement and development. Easy availability of land was the primary incentive for pioneers, then settlers, to move west and populate the Nation. Each wave of settlers chose the available lands that were then thought to be the most economically valuable. New cities grew up around the ports and many of the strategic river junctions. The heart of public land policy was to promote the small family farm: after the best agricultural lands in the Midwest were settled, the homesteaders moved to the Willamette Valley in Oregon, the Central Valley in California, and other verdant agricultural areas. Prospectors and
mining firms claimed the land over the fabulous gold, silver, iron, and copper deposits in areas such as the California Mother Lode country, the Comstock Lode in Nevada, the Mesabi Range in Minnesota, and Butte in Montana. The timber industry obtained prime timber lands throughout the country; their relatively low-lying lands in the Pacific Northwest remain especially valuable. In this century, reclamation projects were built to irrigate otherwise arid homesteads in the Great Plains, the Great Basin between the Sierra Nevada and Rocky Mountains, and elsewhere.

In the mid-19th century, Congresses and presidents withdrew a few public land parcels from the various programs for disposition into private hands and dedicated—or “reserved”—them for some specific purpose. Reservation for other than military or Indian purposes began haltingly with establishment of Yellowstone National Park in 1872, and “conservation” momentum has grown ever since. Large-scale homesteading ended in 1894, and eventually retention supplanted disposition as official federal public land policy. In the modern era, however, land selection by the State of Alaska and Alaska Natives have taken nearly 150 million acres out of federal ownership. Furthermore, some minor sales or exchanges of lands especially suited for certain forms of non-federal ownership are still authorized. Conversely, some acquisitions of private lands by the federal government likely will continue. On balance, however, today the outlines of the federal landed estate seem reasonably stable, despite periodic proposals for largescale disposition.

While it used to be said that the U.S. owned about one-third of the Nation’s total land area of 2.3 billion acres, the Alaska Native and Statehood grants have reduced the proportion to 29%, or 662 million acres. Although federal public lands are located in all states, they are heavily concentrated in the “eleven western states” (Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming) and especially in Alaska, which still has 37% of all federal lands. These lands constitute nearly half of the land in the eleven western states in the lower 48, about two-thirds of the land in Alaska, and less than 5% of the land in most of the remaining states.

The federal government also owns major less-than-fee interests. In addition to such holdings as acquired waterfowl easements, the United States retains subsurface mineral interests under some 60 million acres in the West. The federal government asserts sovereignty over the resources of the outer continental shelf, an area of about 860,000-square miles extending from 3 miles offshore (3 marine leagues off the Florida and Texas coasts) seaward to the edge of the geographic shelf, and also controls fisheries out to 200 miles.

Because of the historical pattern of national disposition, the federal lands have relatively less economic potential than the other two-thirds of the United States land area. The public lands tend to be relatively more arid and infertile, higher in elevation, lower in population, and remote from major transportation systems. Nevertheless, such generalizations may prove too much: in fact, immense riches of many kinds remain in federal ownership. Further, just as lands containing uranium were of no interest
to our forebears, it is likely that other forms of wealth necessary for 21st century needs will be located on the federal lands.

In 1964, as a part of the compromise whereby the Wilderness Act became law, Congress created a body to study the federal laws and recommend more coherent courses for their disposition or management. After years of debate, massive studies, and political compromises, the Public Land Law Review Commission issued its Report in 1970. The Commission recognized that Congress and federal land management agencies will always be challenged by the difficulty of structuring general policies to govern the munificent national potpourri of lands and resources:

One of the most important characteristics of the public lands is their great diversity. Because of their great range—they are found from the northern tip of Alaska to the southern end of Florida—all kinds of climate conditions are found on them. Arctic cold, rain forest torrents, desert heat, mountain snows, and semitropical littoral conditions are all characteristic of public lands in one area or another.

Great differences in terrain are also typical. The tallest mountain in North America, Mount McKinley in Alaska, is on public lands, as is the tallest mountain in the 48 contiguous states, Mount Whitney in California. But the lowest point in the United States, Death Valley, is also on public lands, as are most of the highest peaks in the White Mountains of New Hampshire and the Appalachians of the southeastern states.

Not all of these lands are mountains and valleys, however. Vast areas of tundra and river deltas in Alaska are flat, marked only with an incredible number of small lakes. Other vast areas in the Great Basin area of Nevada and Oregon are not marked with lakes, but with desert shrubs. Still other areas of rolling timber-covered mountains extend for mile after mile, both in the Pacific Northwest and the Inland Empire of Idaho, eastern Washington, and western Montana, and in the Allegheny, Green, and Ouachita Mountains of Pennsylvania, Vermont, and Arkansas. And still other vast areas are rangelands used for grazing domestic livestock.

However, not all of these public lands can be characterized as vast wild or semideveloped expanses. In many instances, Federal ownership is scattered in relatively small tracts among largely privately owned lands. The condition of the land may still be undeveloped, but our consideration of how the land should be used is necessarily influenced by the scattered nature of the Federal ownership. In some cases, public lands are found almost in the midst of urban areas and here again we must view the use of the lands in relation to the surrounding lands.

The great diversity of these lands is a resource in itself. As needs of the Nation have changed, the public lands have been able to play a changing role in meeting these needs. Whether the demand is for minerals, crop production, timber, or recreation, and whether it is
national or regional, the public lands are able to play a role in meeting them.


Comparison of Federal Land With Total Acreage of States as of September 30, 1989

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SOURCE: PUBLIC LAND STATISTICS 1989, TABLE 4, P. 5

Because the federal government now intends to retain ownership of almost all its lands, the basic public land legal conflicts are over use, not disposition, of the public resources. In some instances, use of a parcel for development of one resource can be entirely compatible with a different use: timber harvesting can benefit some wildlife and recreation resources by creating meadows beneficial for deer habitat; a wilderness area can provide watershed protection for downstream development; a reclamation project for irrigation purposes can also produce electrical energy and recreation. The theory that uses should be allowed in compatible combinations is at the heart of much modern land management law. But often the
development of one resource is detrimental, even devastating, to others: the creation of a wilderness area eliminates timber harvesting and curtails mineral development; an open pit mine preempts all other uses in the area, at least until the area is reclaimed; the designation of a minimum stream flow can restrict the use of water for grazing and mining. Avoiding or resolving such resource conflicts is the overriding problem of modern land law. The seven major resources of the federal lands, water, minerals, timber, range, wildlife, recreation, and preservation, each deserves its own introduction.

WATER

Water is the resource most often involved in the tough resource use choices. Availability of water has always been the limiting factor for development in many Trans-Mississippi regions. Wallace Stegner, one of the most respected contemporary commentators on the American West, has observed that the region's aridity and large concentration of public lands are the two most distinctive features of western society. See W. Stegner, THE SOUND OF MOUNTAIN WATER 33 (1969). Justice Rehnquist, who has joined Justices Field, Van Devanter, and McKenna among the most prolific public land law opinion writers, commented in California v. United States, 438 U.S. 645, 648-50 (1978):

* * * The final expansion of our Nation in the 19th century into the arid lands beyond the hundredth meridian of longitude, which had been shown on early maps as the "Great American Desert," brought the participants in that expansion face to face with the necessity for irrigation in a way that no previous territorial expansion had.

* * * "[T]he afternoon of July 23, 1847, was the true date of the beginning of modern irrigation. It was on that afternoon that the first band of Mormon pioneers built a small dam across City Creek near the present site of the Mormon Temple and diverted sufficient water to saturate some five acres of exceedingly dry land. Before the day was over they had planted potatoes to preserve the seed." During the subsequent half century, irrigation expanded throughout the arid States of the West, supported usually by private enterprise or the local community. By the turn of the century, however, most of the land which could be profitably irrigated by such small scale projects had been put to use. Pressure mounted on the Federal Government to provide the funding for the massive projects that would be needed to complete the reclamation, culminating in the Reclamation Act of 1902.

The arid lands were not all susceptible of the same sort of reclamation. The climate and topography of the lands that constituted the "Great American Desert" were quite different than the climate and topography of the Pacific Coast States. * * * [T]he latter States not only had a more pronounced seasonal variation and precipitation than the intermountain States, but the interior portions of California had climatic advantages which many of the intermountain States did not.
Almost two-thirds of the run-off in the eleven western states, and all
the great western rivers, originate on the public lands. These lands
comprise most of the Continental Divide, the Sierra Nevada, the Cascade
Range, and other mountainous areas in the West. Although water is
"renewable," reusable, and storable, there has never been enough to fulfill
human desires in most western areas. In this century, the United States,
through at least eight separate agencies, has developed water resources in
an engineering effort unparalleled in history. These projects have provided
irrigation water, municipal drinking supplies, electricity, and recreational
opportunities, but they have also taken a heavy toll on wildlife and the
amenities of free-flowing rivers. Problems of federal ownership and develop-
ment of water—and particularly those concerning state-federal relation-
ships—are examined in Chapter 5.

MINERALS

Minerals found on the public lands have played a signal role in the
economic and social history of the Nation. The discovery of gold in the
California foothills in 1848 prompted the true opening of the West, and
later bonanzas would lead miners and then settlers to many other western
states. Mining has long been subject to "boom and bust" cycles, but in
spite of virtually unlimited prospecting for over a century, the present
federal lands are still thought to hold vast deposits of minerals. Some idea
of the magnitude of the mineral wealth, under both the onshore lands and
the outer continental shelf, is provided in the following excerpts.

In the past, the Federal onshore land has proven to be a source of
large reserves of a wide variety of essential minerals. In addition, for
some minerals (for example, coal) large resources on Federal onshore
land can be predicted on the basis of current knowledge, while for some
other minerals (for example, copper) a large potential can be inferred
on the basis of past experience and geologic evidence.

* * *

Substantial deposits of coal, phosphate, and sodium compounds are
also known to exist on Federal onshore land, and large resources of
these minerals are under lease. The value of production at the mine
or wellhead of all leasable minerals on Federal onshore land in 1975
was more than $2.21 billion. Their cumulative production value for
1920 through 1975 was more than $22.5 billion.

Detailed records are not kept for production of hardrock minerals
on Federal land unless they are produced from leases on Federal
acquired land. * * * Nevertheless, some idea of the importance of
Federal land for hardrock mineral production can be obtained from the
data on mineral production in the Western States because * * * most
hardrock mines on what is now private land in the Western States
have passed into private ownership through location on Federal land
under the Mining Law. In 1975, the Western States produced the
following approximate amounts of the Nation's domestic primary min-
eral supply: 92 percent of the copper, 84 percent of the silver, and
almost 100 percent of the nickel. In fact, the bulk of the known domestic resources of a majority of the metallic minerals is situated in the West.

* * * Of the 14 [representative essential] mineral commodities, 7 (coal, copper, nickel, phosphate rock, silver, sodium carbonate, and uranium) have a relatively high potential for occurrence on Federal onshore land, 6 (geothermal steam, fluor spar, lead, natural gas, petroleum, and potash) have a more moderate potential, and 1 (iron ore) has only limited, but possibly locally important, potential. Even minerals with lesser Federal land potential may take on added significance when viewed within the context of national needs and the reliability of imports.

Office of Technology Assessment, MANAGEMENT OF FUEL AND NON-FUEL MINERALS IN FEDERAL LAND 41–46 (1979). In recent years, production of oil and gas from onshore federal land has comprised about 5.5% and 6.5%, respectively, of the total domestic production. At any one time, tens of thousands of oil and gas leases cover tens of millions of acres of federal land. Federal coal production in recent years has been on the order of about one-quarter of total domestic production. PUBLIC LAND STATISTICS 1997.

Using the Department of the Interior’s definition, the OCS [outer continental shelf] is composed of an area of approximately 1 billion acres. Although 56 per cent of the shelf lies off the coast of Alaska, Louisiana has historically been the major OCS oil and gas producer * * * . Although the area is vast and largely unexplored, its oil and gas potential is impressive. The OCS is estimated to contain somewhere between 26 and 41 percent of the nation’s undiscovered recoverable crude oil reserves and 25 to 28 percent of the undiscovered, recoverable, natural gas reserves. This amounts to between 17 and 44 billion barrels of oil and between 117 and 230 trillion cubic feet of gas. Although these estimates are variable and likely to change, OCS production currently accounts for a significant proportion of our national totals. * * * .


Hardrock minerals are freely available to private prospectors, and fuel minerals can be leased to bidders, but only on the lands that have not been withdrawn for other purposes. Such withdrawals pose a fundamental policy dilemma. Some argue that when national parks, wilderness areas, wildlife refuges, and other special reservations by their terms prohibit or limit mineral exploration, an inadvertent national sacrifice can occur because the extent of underground resources is not always known when the designation is made. Others respond that the resource is being saved for the future, not sacrificed to present consumption, while other and equally important resources are being protected at the same time. The legal regimes governing mineral extraction and the problems they create vis-à-vis other resources are taken up in Chapter 6.
TIMBER

The public timber resource has become increasingly important to American forestry as private stands of timber have been depleted. Expanding demand for housing, paper, plastics, fuel, and other uses has dictated great demand for timber production on the public lands. The federal government owns about 18% of the nearly 500 million acres of commercial timber lands in the United States. Six-sevenths of federal commercial timber is in national forests. Before World War II, federal timber holdings managed by the Forest Service and the Bureau of Land Management were managed conservatively, producing only about five percent of the national total timber harvest. One result of that former conservatism is that the federal lands still hold a comparatively large amount of old-growth, virgin timber of great economic value, especially in the Pacific Northwest. About half of the national softwood timber inventory is located on national forests, roughly three times the amount owned by the forest industry, with small private owners and other public entities controlling the rest. Many of the lands containing timber, particularly the extraordinary stands of old-growth Douglas fir, redwood, and pine, also contain unique scenic and aesthetic values.

A central policy issue in public timber management is the rate at which old-growth stands will be liquidated to make way for new, faster-growing forests. “Below-cost” sales of national forest timber (in which timber sales fail to return the government’s full cost of growing and selling the trees) is an issue that also promises to bedevil forest planners. Below-cost sales benefit the timber industry and some local communities but are sharply criticized by resource economists, who believe that sales of federal timber should be subjected to the full rigors of the market, and by environmentalists, who oppose timber harvesting in remote roadless areas. The timber resource is explored in Chapter 7.

GRAZING

More acres of federal lands are used for domestic livestock grazing than for any other single use except recreation. The number of animals on the federal range has declined substantially, but ranchers still graze cattle and sheep on some 170 million acres of BLM lands and 101 million acres within the National Forests. The public lands supply 12% of the total forage in the West. Historically, the public domain was a “commons” where grazing was allowed with no federal regulation whatsoever, a situation that took a great toll on the forage resource. In spite of some federal regulations since the 1930’s (and earlier, in the case of national forests), the public range is largely in “fair” or “poor” condition, overgrazing by modern standards is still common, and some assert that land conditions continue to deteriorate. As the following excerpt from Phillip Foss’s classic study shows, federal officials and western ranchers face a complex task in reducing erosion and resuscitating the range resource:

* * * Competition for water and the scant grass and browse of this free land was chiefly responsible for the range wars and the “romantic” legend of the gun-toting cowboy.
Stockmen attempted to reserve grazing rights for themselves by homesteading waterholes, by acquiring land along creeks, by checkerboard patterns of ownership, and by various other devices. These schemes all had as their objective the free and exclusive use of parts of the public domain. This kind of finagling does not necessarily imply that the early stockmen were rogues or possessed of any particularly sinister or wicked intent. Most of the land so manipulated was of such low productivity that homestead tracts were too small to provide a reasonable living. Consequently, stockmen and farmers were forced to supplement their homestead with "free land" or go bankrupt.

* * *

There were two general results of this "free land" situation. First, squabbles over range and water continued interminably and even the most powerful operators lived an uncertain economic existence. Second, the "free land" had to result in overgrazing. Cattlemen and sheepmen could not be expected to withhold stock from government range to prevent overgrazing when they knew that other stockmen would get the grass they left. Overgrazing permitted an accelerated rate of erosion by removing the forage that held moisture and soil. Erosion of soil led to still greater erosion with the result that the carrying capacity of the range decreased and floods and desert land increased.

Overgrazing caused millions of acres of grassland to become desert. Lands which produced native grasses "up to your stirrups" within the lifetime of persons now living became, and remain today, virtual deserts. The Department of Agriculture reported in 1936, "a range once capable of supporting 22.5 million animal units [an animal unit was one cow or horse or five sheep or goats] can now carry only 10.8 million." This meant that the forage capacity of the western range had been reduced by more than one half.

To remedy the evils of unrestricted competition for the range and consequent overgrazing and soil erosion, Congress passed the Taylor Grazing Act in 1934. By that year all of the most desirable land had become privately owned, but there still remained approximately 170,000,000 acres of government land. In 1934 this was still open range—the open range of cutthroat competition and extreme overgrazing.

* * *

An area of 142,000,000 acres is 221,875 square miles. This is 9,000 square miles larger than the republic of France. It is almost twice the area of Japan. Naturally, in such a large area there exist wide diversities in topography, climate, soils, and vegetation. Probably the most uniform feature of these lands is the low precipitation rate. According to F. R. Carpenter, 95 per cent of the public lands are within a zone of less than fifteen inches of annual rainfall. * * *

Today about 7.6 million domestic animals spend part of their lives on federal rangeland. The forage on the public range, however, is also used by an estimated 60,000 wild horses and burros and by uncounted millions of antelope, deer, moose, and mountain sheep. Regulation to reconcile the competition among those uses and to increase the productivity of grazing lands is the dominant theme of Chapter 8.

WILDLIFE

The federal lands contain some of the most valuable wildlife habitat in the world. Maintenance of wildlife in the wild is valuable to hunters, to industries that depend upon wildlife products or that support recreational pursuits, to people who only watch wildlife, and to those who simply believe that wild animals should remain free and wild. The native ranges of certain species, such as wild turkeys, moose, elk, and mountain sheep, correspond closely to public land holdings. Even in many eastern states, big game species depend heavily on public land habitat. The Public Land Law Review Commission reported, for example, that 21% of big game populations in Arkansas, Florida, Michigan, Minnesota, New Hampshire, North Carolina, South Dakota, Virginia, and West Virginia occurred on public lands. In some instances, the public lands offer the last refuge for species in danger.

A number of species of American wildlife owe their very survival to the preservation of their habitat on public lands. The Whooping Crane, for instance, would have been extinct by now, except for a few specimens in zoos, if it had not been for the protection of their wintering ground on the Aransas National Wildlife Refuge and on their nesting grounds in the Wood Buffalo National Park in Canada. The most successful Bald Eagle population in the contiguous states is in the Chippewa National Forest in Minnesota, where 78 young were produced in 1976.

Grizzly Bears and Grey Wolves could not have survived in the lower 48 states except for the National Forests and National Parks which provided them the required habitat and protection. These are wide-ranging species which need vast areas of relatively undisturbed land—areas so large that only the government could provide them. Grizzly Bears, for example, range so widely that it is questionable whether viable populations could continue even in areas as large as Yellowstone Park (2.2 million acres) or Glacier Park (1 million acres) which form the nucleus of the lower 48 Grizzly Bear population habitat.

For some species of wildlife, then, a sine qua non is large tracts of undisturbed or relatively undisturbed lands, and only the public lands provide them. For other species, illustrated by the Kirtland’s Warbler, it is not size of the area which is important, for each pair of warblers uses a breeding territory of only about 30 acres; it is the nature of the management of the area which is critical. These warblers, for reasons unknown, will nest only in young pine lands (primarily Jack Pine) where the scattered trees are 8 to 20 years old. Before forest fires were fought and controlled, wildfires created the conditions ideal for
the Jack Pine; management measures required for maintenance of this unique and beautiful songbird include prescribed burning on the state and National Forests in certain areas of northern Michigan. Again the public lands are a prerequisite. In the 1976 census, 162 males were found on state lands, 32 on the National Forests, and only 6 on private lands.

* * *

The increasing public interest in wildlife over the past half century has resulted in numerous changes, sometimes by legislation, often through executive decisions. Through the first decades of this century, the public accepted narrow single use policies of management for vast areas of public lands which ignored or neglected the now widely accepted fact that wildlife and public recreation could be enjoyed on many of these lands without serious interference with other uses.


RECREATION

Minerals, timber, water, forage, and even wildlife are commonly considered the conventional resources on the public lands. Nothing better symbolizes the recent evolution of public land policy than the emergence of recreation and preservation as co-equal and competing resources. As an economic matter, the recreation resource in the third millennium swamps all of the commodity resources combined.

Americans with their leisure time, affluence, new philosophies, and means of transportation desire recreational opportunities in myriad forms, and they demand that such opportunities be made available on the public lands. Congress and federal land management agencies have hastened to obey the popular will. Every major federal land system offers something of a recreational nature to somebody, from hiking to powerboating to resorts. One can tour a national park by car, shoot the rapids on a wild river, fish, swim, and boat in federal reservoirs, ride jeeps through grazing districts, and collect rocks in national forests. These opportunities have been considered “givens,” unchallenged rights available to all citizens. But, as in the case of all resources, the underlying productivity of the recreation resource can be threatened by human overuse. The novel legal questions arising from conflicts between recreational use and other resources are addressed in Chapter 10.

PRESERVATION

American society was indelibly marked in 1868 when John Muir stepped on the wharf in San Francisco, and said, “Take me anywhere that is wild.” Because of the work of Muir and others, Congress was moved to set aside numerous national parks in the late 19th and early 20th centuries. National parks were and are an important part of the preservation resource, but government officials came to recognize the need to preserve truly wild areas without roads, lodges, or restaurants. Before wilderness
was fashionable, Aldo Leopold, at one time a forester in the Forest Service, commented:

Like winds and sunsets, wild things were taken for granted until progress began to do away with them. Now we face the question whether a still higher "standard of living" is worth its cost in things natural, wild, and free. For us of the minority, the opportunity to see geese is more important than television, and the chance to find a pasque-flower is a right as inalienable as free speech.

These wild things, I admit, had little human value until mechanization assured us of a good breakfast, and until science disclosed the drama of where they come from and how they live. The whole conflict thus boils down to a question of degree. We of the minority see a law of diminishing returns in progress: our opponents do not.

A. Leopold, A SAND COUNTY ALMANAC vii (1949).

From obscure philosophical beginnings, the movement to preserve wild areas has succeeded in persuading Congress to create a new public land system, the dominant purpose of which is preservation. One of the most articulate wilderness advocates, the late Justice William O. Douglas, made the following observations on the place of preservation in national resource priorities:

* * * The islands of wilderness, even if they never shrink in acreage, shrink per capita. For the pressure of population is ever and ever greater; and the year is drawing near when one who wants to backpack or travel by pack train into the High Sierras, the Northern Cascades, the Wind River Range, or the Teton must get a permit—just as he does today for picnicking along Rock Creek Park, Washington, D.C.

* * *

There are inside the national park areas roads, accommodations, and installations deemed necessary "for the enjoyment of the parks" as the law provides, but yet not compatible with wilderness per se. National parks have indeed been greatly developed. * * * Yellowstone has about 2 million visitors and needs accommodations for 15,000 people. That makes up into a "small city" or into several "small cities." It means long avenues cut through thick forests to bring power lines to these new communities. It means the debris of civilization inside the sanctuary.

W. Douglas, A WILDERNESS BILL OF RIGHTS 61–70 (1965).*

There is no longer an open "public domain" where ranchers can graze their stock without regulation and citizens can obtain land by homesteading. But the phrase "public domain" is still commonly used, and those who know the public lands have a mental image of the public domain. It is high desert or plains country, uncluttered and quiet. The colors are not dramatic—it is a land of pastels. There is a growing awareness that this land, too, has preservation values.

For years, the public domain—especially outside Alaska—has suffered from a bad press; even those who have fought for its preservation have frequently assumed that it consisted of little more than godforsaken wastelands, bleak alkali flats, smelly sumps, and monotonous stretches of sand and sagebrush. In fact, it is quite as varied in all its characteristics as the West itself (not too surprising, since in many respects the public domain is the West), and is neither bleak nor forsaken by God. If a good deal of it is desert (and it might be useful to remember that the Son of God once walked in deserts), it also includes grasslands and prairie and tundra; mountain peaks as sheer and rock-ribbed as anything in Rocky Mountain National Park; swamps, lakes, streams, rivers, tarns, marshlands, hot springs, and geysers; forests of chaparral, oak, juniper, redwood, western red cedar, white pine, yellow pine, and bristlecone pine; flattopped mesas that float in the distance like mirages, spectacular canyons that look as if they had been sliced into the earth with a knife yesterday afternoon, and balancing rocks, toadstool rocks, caves, caverns, sandstone arches, and all the other geological formations carved by the hand of time; a zoological index of deer, antelopes, elk, caribou, moose, bears—black, brown, and grizzly—beaver, otters, coyotes, wolves, mountain lions, golden eagles and bald eagles, pelicans, peregrine falcons, and ospreys, and hundreds more, including such rare fish as the desert pupfish and the Utah cutthroat trout; and the marks of twenty thousand years of human history, from the delicate petroglyphs of prehistoric Indians to the axle-grease scrawls of wagontrain pioneers, from the cliff dwellings of the Anasazi and Moqui to the prospect holes of the new Jasons of the nineteenth century.

T. Watkins & C. Watson, Jr., THE LANDS NO ONE KNOWS 138 (1975). The legal underpinnings of the preservation movement, and its implications for other federal land uses, are explored in the concluding Chapter 11.

These, then, are the primary resources of the public lands. For every proposed use there are phalanxes of disparate advocates and opponents. Many claim that if the United States were literally to "lock up" for preservation even one of the major economic resources, catastrophic social and economic consequences would follow. On the other hand, opening all federal lands for wholesale, unregulated development would irreparably wound a special part of the national spirit. Because of the compulsion to compromise inherent in our political, legal, and administrative mechanisms, resource decisions mostly fall in the middle of the two extremes. It is within this diverse and emotional context that legislators, land management officials, lawyers, and judges must operate in making and reviewing decisions affecting the national resources.

It is difficult to locate a common legal denominator among the many diverse instances of present federal ownership. The federal purposes behind construction of a post office and creation of a wilderness area are so different that comparison in legal terms is nearly impossible. One writer has divided all federal holdings into three broad classifications: resource preservation lands; multiple resource use lands; and lands used for specific
non-resource oriented purposes. Muys, The Federal Lands, in FEDERAL ENVIRONMENTAL LAW 495 (1974). The "resource preservation" lands include the National Park System (which includes Monuments, Preserves, Recreation Areas, Seashores, Lakeshores, Trails, and Rivers), Wilderness Areas, and the National Wildlife Refuge System. The "multiple use" category includes National Forests (including the National Grasslands), the BLM lands (the traditional "public domain"), outer continental shelf lands, and the lands administered for power, irrigation, or flood control purposes by the Federal Energy Regulatory Commission, the Army Corps of Engineers, and the Bureau of Reclamation. The final "non-resource oriented" category is a catchall for all other forms of federal land ownership. That category is not necessarily negligible—the Department of Defense administers millions of acres—but the focus of this volume is on the vast bulk of the federal lands in the two "resource" categories.


Coggins' and Glicksman's three volume treatise, PUBLIC NATURAL RESOURCES LAW (1990) is a useful complement to this casebook, covering all the topics addressed here in comprehensive fashion. Ernest Baynard's PUBLIC LAND LAW AND PROCEDURE (1986), addresses primarily the management of nonmineral resources on BLM public lands. R. Glicksman & G. Coggins, MODERN PUBLIC LAND LAW IN A NUTSHELL, is based on and keyed to this casebook.
The following case involves a quaint provision, enacted along with the Mining Law of 1866, commonly called R.S. 2477 (for that was how it was codified in the "Revised Statutes" in the nineteenth century, when Congress periodically did that kind of thing). Repealed in FLPMA, subject to valid existing rights, R.S. 2477 said, in its entirety: "[T]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." As you will see, the court's opinion covers a lot of ground, provides a textbook example of how history's hand influences management of public lands today, and addresses a number of issues we will encounter throughout the course -- such as statutory construction principles, the relationship between federal public land law and state property law, and judicial versus executive branch land management agency authority over federal lands.

SOUTHERN UTAH WILDERNESS ALLIANCE v. BLM

United States Court of Appeals, Tenth Circuit, 2005

425 F.3d 735.

Before HENRY, HARTZ, and McCONNELL, Circuit Judges.

McCONNELL, Circuit Judge.

This case involves one of the more contentious land use issues in the West: the legal status of claims by local governments to rights of way for the construction of highways across federal lands managed by the Bureau of Land Management (BLM). In 1866, Congress passed an open-ended grant of "the right of way for the construction of highways over public lands, not reserved for public uses." This statute, commonly called "R.S. 2477," remained in effect for 110 years, and most of the transportation routes of the West were established under its authority. During that time congressional policy promoted the development of the unreserved public lands and their passage into private productive hands; R.S. 2477 rights of way were an integral part of the congressional pro-development lands policy.

In 1976, however, Congress abandoned its prior approach to public lands and instituted a preference for retention of the lands in federal ownership, with an increased emphasis on conservation and preservation. As part of that statutory sea change, Congress repealed R.S. 2477. There could be no new R.S. 2477 rights of way after 1976. But even as Congress repealed R.S. 2477, it specified that any "valid" R.S. 2477 rights of way "existing on the date of approval of this Act" (October 21, 1976) would continue in effect. The statute thus had the effect of "freezing" R.S. 2477 rights as they were in 1976.
The difficulty is in knowing what that means. Unlike any other federal land statute of which we are aware, the establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested. As the Supreme Court of Utah noted 75 years ago, R.S. 2477 "was a standing offer of a free right of way over the public domain," and the grant may be accepted "without formal action by public authorities." *Lindsay Land & Live Stock Co. v. Charnos*, 75 Utah 384, 285 P. 646, 648 (1929). In its Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands 1 (June 1993), the Department of the Interior explained that R.S. 2477 highways "were constructed without any approval from the federal government and with no documentation of the public land records, so there are few official records documenting the right-of-way or indicating that a highway was constructed on federal land under this authority."

To make matters more difficult, parties rarely had an incentive to raise or resolve potential R.S. 2477 issues while the statute was in effect, unless the underlying land had been patented to a private party. If someone wished to traverse unappropriated public land, he could do so, with or without an R.S. 2477 right of way, and given the federal government's pre-1976 policy of opening and developing the public lands, federal land managers generally had no reason to question use of the land for travel. Roads were deemed a good thing. *** Thus, all pre-1976 litigated cases involving contested R.S. 2477 claims (and there are dozens) were between private landowners who had obtained title to previously-public land and would-be road users who defended the right to cross private land on what they alleged to be R.S. 2477 rights of way.

Now that federal land policy has shifted to retention and conservation, public roads and rights of way in remote areas appear in a different light. Some roads and other rights of way are undoubtedly necessary, but private landowners express the fear that expansive R.S. 2477 definitions will undermine their private property rights by allowing strangers to drive vehicles across their ranches and homesteads. Conservationists and federal land managers worry that vehicle use in inappropriate locations can permanently scar the land, destroy solitude, impair wilderness, endanger archeological and natural features, and generally make it difficult or impossible for land managers to carry out their statutory duties to protect the lands from "unnecessary or undue degradation." *FLPMA § 302(b), 43 U.S.C. § 1732(b).* They argue that too loose an interpretation of R.S. 2477 will conjure into existence rights of way where none existed before, turning every path, vehicle track, or dry wash in southern Utah into a potential route for cars, jeeps, or off-road vehicles. For their part, the Counties assert that R.S. 2477 rights of way are "major components of the transportation systems of western states," and express the fear that federal land managers and conservationists are attempting to redefine those rights out of
existence, with serious "financial and other impacts" on the people of Utah. Kane and Garfield County (K & G C.) Rep. Br. 21. Thus, the definition of R.S. 2477 rights of way across federal land, which used to be a non-issue, has become a flash point, and litigants are driven to the historical archives for documentation of matters no one had reason to document at the time.

I. FACTUAL AND PROCEDURAL BACKGROUND

In September and October of 1996, road crews employed by San Juan, Kane, and Garfield Counties entered public lands managed by the BLM and graded sixteen roads (or "primitive trails," as the BLM calls them) located in southern Utah. The Counties did not notify the BLM in advance, or obtain permission to conduct their road grading activities. With a few possible exceptions, none of these roads had previously been graded by the Counties, though some of them showed signs of previous construction or maintenance activity. The roads are claimed by the Counties as rights of way under R.S. 2477; some of them are listed on County maps as Class B or Class D highways. Six of the routes lie within wilderness study areas. Nine are within the Grand Staircase-Escalante National Monument. Six others traverse a mesa overlooking the entrance corridor to the Needles District of Canyonlands National Park. According to the Complaint filed by a consortium of environmental organizations including the Southern Utah Wilderness Alliance (hereinafter collectively referred to as "SUWA"), the areas affected by the Counties' road grading activities "contain stunning red-rock canyon formations, pristine wilderness areas, important cultural and archeological sites [sic], undisturbed wildlife habitat, and significant opportunities for hiking, backpacking and nature study in an area largely undisturbed by road or human ... development."

SUWA protested to the BLM, but these initial protests resulted in no apparent action against the road grading actions of the Counties. In October of 1996, SUWA filed suit against the BLM, San Juan County, and later Kane and Garfield Counties, alleging that the Counties had engaged in unlawful road construction activities and that the BLM had violated its duties under [various federal laws] by not taking action. The complaint sought declaratory and injunctive relief requiring the BLM to halt the Counties' construction activities and enjoining the Counties from further road construction or maintenance without the BLM's permission. The BLM filed cross-claims against the Counties, alleging that their road construction activities constituted trespass and degradation of federal property in violation of FLPMA. In addition to declaratory and injunctive relief, the BLM sought damages to cover the cost of rehabilitating the affected areas.

The Counties defended on the ground that their road improvement activities were lawful because the activities took place within valid R.S. 2477 rights of way. The district court acknowledged that "the validity and scope of the claimed rights-of-way [were the] key to resolving the trespass claims," Memorandum Decision of May 11,
1998 at 3, but *** stayed the litigation and referred the issue of the validity and scope of the claimed rights of way to the BLM. ***

The BLM then conducted a thorough informal adjudication of the Counties' purported rights of way [with public notice, requests to the counties to provide any relevant information, documentary and field investigations, publication of draft determinations, receipt of public comment, and publication of final determinations] *** concluding that the Counties lacked a valid right of way for fifteen of the sixteen claims, and that Kane County had exceeded the scope of its right of way in the sixteenth claim, the Skutumpah Road.

[The trial court rejected the counties' request for a de novo review of BLM's determinations, and] affirmed the BLM's determinations in their entirety, concluding that the BLM's factual determinations were supported by substantial evidence in the record and that its interpretation of R.S. 2477 was persuasive ***

III. TRESPASS CLAIMS AGAINST THE COUNTIES

*** [T]he district court granted SUWA's request for *** (1) a declaratory judgment that the Counties do not have R.S. 2477 rights of way on fifteen of the roads and exceeded the scope of the right of way on the Skutumpah road; and (2) a declaratory judgment that the Counties' action in grading the roads constituted trespass. We turn first to the trespass issue and then to the issue of the validity and scope of the Counties' R.S. 2477 claims.

The BLM contends, as it did below, that the Counties' actions in grading and realigning the roads in question without prior notice to or authorization from the BLM constituted trespass, whether or not the Counties have a valid R.S. 2477 right of way on those routes. *** We *** agree with the BLM, at least in part, and conclude that the holder of an R.S. 2477 right of way across federal land must consult with the appropriate federal land management agency before it undertakes any improvements to an R.S. 2477 right of way beyond routine maintenance. We remand this issue to the district court to determine whether the work performed on the routes in this case went beyond routine maintenance and thus constituted trespass.

The trespass claim presents an issue of "scope," which was litigated in this Court in Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir.1988). In Hodel, the issue was whether Garfield County could convert a one-lane dirt road on an established R.S. 2477 right of way into a two-lane gravel (later paved) road. Applying a state law definition of the scope of the right of way, the Court held that improvements on a valid R.S. 2477 right of way are limited to those "reasonably necessary for the type of use to which the road has been put." Hodel, 848 F.2d at 1083. Relying on Nielsen v. Sandberg, 141 P.2d 696, 701 (1943), for the proposition that "an easement is limited
to the original use for which it was acquired," the Court held that "the correct 'reasonable and necessary' definition fixed as of October 21, 1976." In other words, the scope of an R.S. 2477 right of way is limited by the established usage of the route as of the date of repeal of the statute. That did not mean, however, that the road had to be maintained in precisely the same condition it was in on October 21, 1976; rather, it could be improved "as necessary to meet the exigencies of increased travel," so long as this was done "in the light of traditional uses to which the right-of-way was put" as of repeal of the statute in 1976.

The *Hodel* court also noted that "Utah adheres to the general rule that the owners of the dominant and servient estates 'must exercise [their] rights so as not unreasonably to interfere with the other.' " This requires a system of coordination between the holder of the easement and the owner of the land through which it passes. The Court thus concluded that the BLM needed to make an "initial determination" regarding the reasonableness and necessity of any proposed improvements beyond mere maintenance of the previous condition of the road. **This is** consistent with holdings of circuit courts that changes in roads on R.S. 2477 rights of way across federal lands are subject to regulation by the relevant federal land management agencies. See Clouser v. Espy, 42 F.3d 1522, 1538 (9th Cir.1994) (holding that "regardless whether the trails in question are public highways under R.S. [ ] 2477, they are nonetheless subject to the Forest Service regulations"); *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir.1988) (holding that proposed improvements to an R.S. 2477 route in a National Preserve is subject to regulation by the National Park Service); see also *United States v. Jenks*, 22 F.3d 1513, 1518 (10th Cir.1994) (holding that the owner of a patent or common law easement across national forest lands had to apply for a special use permit). **

The Counties argue, in effect, that as long as their activities are conducted within the physical boundaries of a right of way, their activities cannot constitute a trespass. But this misconceives the nature of a right of way. A right of way is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a particular way. To convert a two-track jeep trail into a graded dirt road, or a graded road into a paved one, alters the use, affects the servient estate, and may go beyond the scope of the right of way. **This does not mean that no changes can ever be made, but that any improvements must be made in light of the traditional uses to which the right of way had been put, fixed as of October 21, 1976. *Hodel*, 848 F.2d at 1084. The Counties are correct that, under *Hodel*, the right-of-way holder may sometimes be entitled to change the character of the roadway when needed to accommodate traditional uses, but even legitimate changes in the character of the roadway require consultation when those changes go beyond routine maintenance. Just because a proposed change falls within the scope of a right of way does not mean that it can be undertaken unilaterally. **

We therefore hold that when the holder of an R.S. 2477 right of way across
federal land proposes to undertake any improvements in the road along its right of way, beyond mere maintenance, it must advise the federal land management agency of that work in advance, affording the agency a fair opportunity to carry out its own duties to determine whether the proposed improvement is reasonable and necessary in light of the traditional uses of the rights of way as of October 21, 1976, to study potential effects, and if appropriate, to formulate alternatives that serve to protect the lands.\textsuperscript{1} The initial determination of whether the construction work falls within the scope of an established right of way is to be made by the federal land management agency, which has an obligation to render its decision in a timely and expeditious manner. The agency may not use its authority, either by delay or by unreasonable disapproval, to impair the rights of the holder of the R.S. 2477 right of way. In the event of disagreement, the parties may resort to the courts.

In drawing the line between routine maintenance, which does not require consultation with the BLM, and construction of improvements, which does, we endorse the definition crafted by [a] district court in [a prior case involving a comparable federal regulation]:

\textbf{** ** "construction" \** ** includes the widening of the road, the horizontal or vertical realignment of the road, the installation (as distinguished from cleaning, repair, or replacement in kind) of bridges, culverts and other drainage structures, as well as any significant change in the surface composition of the road (e.g., going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.), or any "improvement," "betterment," or any other change in the nature of the road that may significantly impact Park lands, resources, or values. "Maintenance" preserves the existing road, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road, grading it, making sure that the shape of the road permits drainage [, and] keeping drainage features open and operable--essentially preserving the status quo.}

Under this definition, grading or blading a road for the first time would constitute "construction" and would require advance consultation, though grading or blading a road to preserve the character of the road in accordance with prior practice would not.

\textsuperscript{1}The BLM also has authority to grant new rights of way \textsuperscript{** ** "subject to such terms and conditions as the Secretary concerned may prescribe regarding extent, duration, survey, location, construction, maintenance, transfer or assignment, and termination." FLPMA § 504(c); 43 U.S.C. § 1764(c); see 43 C.F.R. § 2801.2.}
Drawing the line between maintenance and construction based on "preserving the status quo" promotes the congressional policy of "freezing" R.S. 2477 rights of way as of the uses established as of October 21, 1976. Hodel, 848 F.2d at 1081. It protects existing uses without interfering unduly with federal land management and protection. As long as the Counties act within the existing scope of their rights of way, performing maintenance and repair that preserves the existing state of the road, they have no legal obligation to consult with the BLM (though notice of what they are doing might well avoid misunderstanding or friction). If changes are contemplated, it is necessary to consult, and the failure to do so will provide a basis for prompt injunctive relief. "Bulldoze first, talk later" is not a recipe for constructive intergovernmental relations or intelligent land management.

The record is not sufficient to determine whether the work performed by the Counties in the Fall of 1996 was routine maintenance or construction. On remand, therefore, the parties should be permitted to introduce evidence relevant to the question of trespass, as defined in this opinion.

IV. PRIMARY JURISDICTION OVER R.S. 2477 RIGHTS OF WAY

We turn now to the district court's holding that none of the fifteen contested routes falls within a valid R.S. 2477 right of way. We address first the question of whether the district court should have treated this dispute as an appeal of an informal, but legally binding, administrative adjudication, or instead should have treated it as a de novo legal proceeding.

The difference is significant. If the doctrine of primary jurisdiction applies, judicial review is limited to determining whether there was substantial evidence in the BLM proceeding to support the agency's determinations. If not, the district court should have conducted a de novo proceeding [in which] the parties were entitled to introduce evidence in court (including but not limited to the administrative record), and questions of fact would be decided by the court on a preponderance of the evidence standard.

Primary jurisdiction is a prudential doctrine designed to allocate authority between courts and administrative agencies. An issue of primary jurisdiction arises when a litigant asks a court to resolve "[an] issue [] which, under a regulatory scheme, ha[s] been placed within the special competence of an administrative body." United States v. Western Pac. R.R. Co., 352 U.S. 59, 64 (1956). If the issue is one "that Congress has assigned to a specific agency," Williams Pipe Line Co. v. Empire Gas Corp., 76 F.3d 1491, 1496 (10th Cir.1996), the doctrine of primary jurisdiction allows the court to stay the judicial proceedings and direct the parties to seek a decision before the appropriate administrative agency. The agency is then said to
have "primary jurisdiction."

There is no mechanical formula for applying the doctrine of primary jurisdiction. *** The doctrine serves two purposes. First, it promotes regulatory uniformity by preventing courts from interfering sporadically with a comprehensive regulatory scheme. Second, the doctrine promotes resort to agency expertise by allowing courts to consult agencies on "issues of fact not within the conventional experience of judges. ***

All of this assumes that Congress has, by statute, given authority over the issue to an administrative agency. If not, there is no need to assess uniformity and expertise because the issue is not one that, "under a regulatory scheme, ha[s] been placed within the special competence of an administrative body." [Western Pac. R.R., 352 U.S. at 64.] Thus, before we delve into questions of uniformity and expertise, we must determine whether Congress has granted the BLM authority to determine validity of R.S. 2477 rights of way in the first place.

R.S. 2477 is silent on this question. It makes no mention of what body—courts or agencies—should resolve disputes over R.S. 2477 rights of way. The BLM argues that we should interpret this silence against the backdrop of general statutory provisions that give the BLM authority to execute the laws regulating the acquisition of rights in the public lands.2 According to the BLM, there is a presumption that when Congress makes a grant of land and does not specify which agency, if any, is to administer the grant, the general statutory provisions giving the BLM authority over the public lands also give it authority over the grant. The Counties counter that we should interpret the statutory silence against the backdrop of over one hundred years of practice under R.S. 2477. They maintain that both the BLM and the courts have always operated under the assumption that courts are the final arbiters of R.S. 2477 rights of way, and that this practice should inform our interpretation of the statute.

The BLM's argument, we believe, confuses a land agency's responsibility for carrying out the executive function of administering congressionally determined procedures for disposition of federal lands with the authority to adjudicate legal title to real property once those procedures have been completed. The latter is a judicial, not an executive, function. It is one thing for an agency to make determinations regarding conditions precedent to the passage of title, and quite another for the agency to assert a continuing authority to resolve by informal adjudication disputes between itself and private parties who claim that they acquired legal title to real property interests at some point in the past. ***

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2The BLM directs our attention to [several laws dating back to the establishment of the General Land Office in 1812, giving it] authority "to superintend, execute and perform, all such acts and things, touching or respecting the public lands of the United States ***."
The BLM relies primarily on the Supreme Court's decision in *Cameron v. United States*, 252 U.S. 450 (1920). In that case, the owner of an unpatented mining claim applied to the Land Department (the BLM's predecessor) for a patent, which is the instrument by which the government conveys a grant of public land to a private person. After a hearing, the Department denied him a patent, concluding that the land was nonmineral in character and that there had been no adequate mineral discovery—in effect, declaring the claim invalid. When the United States later sued in district court to eject the claimant from the premises, the district court gave conclusive effect to the Land Department's declaration of invalidity [and on appeal the Supreme Court affirmed].

The BLM urges us to extend the reasoning of *Cameron* to the R.S. 2477 rights of way at issue here. According to the BLM, the same general statutory provisions giving the Land Department authority to rule on the validity of unpatented mining claims should give the BLM authority to rule on the validity of R.S. 2477 rights of way. However, this argument ignores a fundamental difference between mining claims and R.S. 2477 rights of way: title to a mining claim passes by means of a patent, which is issued by the agency in accordance with specified procedures and subject to specified substantive prerequisites. Title to an R.S. 2477 right of way, by contrast, passes without any procedural formalities and without any agency involvement.

Mining claimants who want legal title must apply to the BLM for a patent. Once the BLM will issue a patent—and thus pass title—only when it is satisfied that all statutory requirements have been met. Once title passes, however, the BLM loses authority over the subject lands, and the title granted by the patent can be challenged only through the courts. *See United States v. Schurz*, 102 U.S. 378, 396 (1880).

Congress established a very different system for R.S. 2477 rights of way. Because there are no patents, title to rights of way passes independently of any action or approval on the part of the BLM. All that is required are acts on the part of the grantee sufficient to manifest an intent to accept the congressional offer. In fact, because there were no notice or filing requirements of any kind, R.S. 2477 rights of way may have been established—and legal title may have passed—without the BLM ever being aware of it. Thus, R.S. 2477 creates no executive role for the BLM to play.

This suggestion is confirmed by longstanding BLM practice under the statute. Until very recently, the BLM staunchly maintained that it lacked authority to make binding decisions on R.S. 2477 rights of way. This refusal to adjudicate R.S. 2477 disputes has been the consistent position of the BLM and the IBLA for over one hundred years.

In sum, nothing in the terms of R.S. 2477 gives the BLM authority to make
binding determinations on the validity of the rights of way granted thereunder, and we decline to infer such authority from silence when the statute creates no executive role for the BLM. This decision is reinforced by the long history of practice under the statute, during which the BLM has consistently disclaimed authority to make binding decisions on R.S. 2477 rights of way. Indeed, there have been 139 years of practice under the statute—110 years while the statute was in force, and 29 years since its repeal—and the BLM has not pointed to a single case in which a court has deferred to a binding determination by the BLM on an R.S. 2477 right of way. We conclude that the BLM lacks primary jurisdiction and that the district court abused its discretion by deferring to the BLM.

This does not mean that the BLM is forbidden from determining the validity of R.S. 2477 rights of way for its own purposes. The BLM has always had this authority. It exercises this authority in what it calls "administrative determinations." In its 1993 Report to Congress, the Department of the Interior explained that the BLM had developed "procedures for administratively recognizing and ... record[ing] this information on the land status records." 1993 D.O.I. Report to Congress, at 25. These procedures "are not intended to be binding, or a final agency action." Id. Rather, "they are recognitions of 'claims' and are useful only for limited purposes," namely, for the agency's internal "land-use planning purposes." Id. at 25-26. Nonetheless, they may reflect the agency's expertise and fact-finding capability, and as such will be of use to the court. ***

Nothing in our decision today impugns the BLM's authority to make non-binding, administrative determinations, or the introduction and use of BLM findings as evidence in litigation.

V. LEGAL ISSUES ON REMAND

Because the BLM lacks primary jurisdiction over R.S. 2477 rights of way, a remand is required to permit the district court to conduct a plenary review and resolution of the R.S. 2477 claims in this case. On remand, the parties are permitted to introduce evidence regarding the validity and scope of the claims, including, but not limited to, the evidence contained in the administrative record before the BLM.

Bearing in mind the burden this places on the district court, and the importance of these issues to resolution of potentially thousands of R.S. 2477 claims in the State of Utah and elsewhere, this Court will proceed now to address some of the significant legal issues that have been briefed by the parties on appeal and ruled on by the court below. This should not be understood as a comprehensive catalog of applicable legal principles. Undoubtedly, new legal issues will arise in the course of the proceedings on remand. More importantly, as explained below, we are aware that

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3 For example, the parties have not addressed the issues of abandonment, substitution of equivalent routes, or federal government involvement in the
some of the central legal concepts involved in this case cannot be resolved in the abstract, but must necessarily be fleshed out in the context of the actual facts of the case.

A. State or Federal Law

The central question in this case is how a valid R.S. 2477 right of way is acquired. As framed by the parties, the answer to this question turns on whether federal or state law governs the acquisition of rights of way under R.S. 2477. For reasons discussed below, we are more doubtful than the parties that the choice between federal and state law is outcome determinative. The principal difference between the federal and state standards, according to the parties, is whether acceptance of an R.S. 2477 right of way is dependent on actual "construction," meaning that "[s]ome form of mechanical construction must have occurred to construct or improve the highway," (the supposed "federal" standard adopted by the BLM), or whether it can be established by the "passage of vehicles by users over time" (the supposed "state" standard advocated by the Counties). *** [I]t is far from clear that any of the R.S. 2477 claims under adjudication would pass the "usage" test and flunk the "construction" test, or vice versa. Much depends on questions of degree: what type, how frequent, and how well documented need the "passage of vehicles over time" have been to establish a right of way under state law, if applicable? How extensive must "construction" activities have been to establish a right of way under the BLM administrative definition? If the necessary extent of "construction" is the construction necessary to enable the general public to drive vehicles over the route, it may well turn out that the two standards will lead to the same results in most cases.

We nonetheless begin with this question: which law applies?

1. The BLM Interpretation

In making its administrative determinations, the BLM found that three criteria must be satisfied for a right of way to be recognized under R.S. 2477: "The claimed right-of-way must have been located on unreserved public lands; it must have been actually constructed; and it must have been a highway." The agency further defined each of these terms.

The district court, recognizing that the BLM's interpretation of the statute "appears in informal policy statements and opinion letters," declined to accord the

construction or improvement of roads. The parties are free to address these and other issues on remand, if relevant.
interpretation Chevron deference, instead giving it "respect," but "only to the extent that [it has] the 'power to persuade.'" quoting Christensen v. Harris County, 529 U.S. 576, 586 (2000), in turn quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). Under Skidmore, the degree of deference given informal agency interpretations will "vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertise, and to the persuasiveness of the agency's position." United States v. Mead Corp., 533 U.S. 218, 228 (2001) (footnotes omitted). Upon consideration of each of the elements of the BLM's statutory interpretation, under this standard, the district court found "the BLM's statutory interpretation of R.S. 2477 to be both reasonable and persuasive and concur[red] with the BLM interpretation." 147 F.Supp.2d at 1145.

On appeal, the BLM contends that the district court erred in not according its interpretation Chevron deference. *** The Counties argue that BLM's statutory interpretation is entitled to no deference at all. *** [Both sides pointed to prior and conflicting administrative interpretations, opinion letters and policy statements issued in 1980, 1988 and 1997. This squabble amply demonstrates that the agency's interpretation lacks the "consistency" that is required to warrant strong Skidmore deference. Mead Corp., 533 U.S. at 228. As near as we can tell, the agency has shifted its position on this issue at least three times since the repeal of R.S. 2477 in 1976. In light of the fact that FLPMA explicitly preserved and protected R.S. 2477 rights of way in existence as of October 21, 1976, and that those rights have the status of vested real property rights, any post-1976 changes in agency interpretation of the repealed statute have questionable applicability.

*** While it is ordinarily true that agencies with the delegated authority to interpret and enforce federal statutes have the discretion to reconsider and change their interpretations, Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983), it is hard to square such law-changing discretion with the concept of property rights that vested, if at all, on or before a date almost 30 years ago. This is further reason to doubt that R.S. 2477 rights are subject to administrative definition and redefinition. ***

This does not mean we disregard the BLM interpretation. It means only that the interpretation receives no more "respect" than what comes from its "persuasiveness." Mead Corp., 533 U.S. at 228.

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*** [R.S. 2477's] language is short, sweet, and enigmatic: "And be it further enacted, that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." There is little legislative history.
Interestingly, Sections 1, 2, 4, 5, and 9 of the Act make explicit reference either to state law or to the "local customs or rules of miners" in the district. ** * * On the other hand, Sections 7, 10, and 11 make explicit reference to other federal laws. ** Section 8 refers to neither state law nor federal law. ** ** [In a prior decision, Sierra Club v. Hodel, supra, we] suggested that "[t]he silence of section 8 reflects the probable fact that Congress simply did not decide which sovereign's law should apply." The real question, we think, is not whether state law applies or federal law applies, but whether federal law locks to state law to flesh out details of interpretation. R.S. 2477 is a federal statute and it governs the disposition of rights to federal property, a power constitutionally vested in Congress. ** ** As the Supreme Court has stated, "The laws of the United States alone control the disposition of title to its lands. The states are powerless to place any limitation or restriction on that control." United States v. Oregon, 295 U.S. 1, 27-28 (1935). "The construction of grants by the United States is a federal not a state question." Id. at 28.

Even where an issue is ultimately governed by federal law, however, it is not uncommon for courts to "borrow" state law to aid in interpretation of the federal statute. The Supreme Court has explained that "[c]ontroversies ... governed by federal law, do not inevitably require resort to uniform federal rules.... Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.'" United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-28 (1979) (quoting United States v. Standard Oil Co., 332 U.S. 301, 310 (1947)); see also Wilson v. Omaha Indian Tribe, 442 U.S. 653, 671-72 (1979) (same); P. Bator, et al., Hart & Wechsler's, The Federal Courts and the Federal System 768 (2d ed. 1973) ("[i]t may be determined as a matter of choice of law, even in the absence of statutory command or implication, that, although federal law should 'govern' a given question, state law furnishes an appropriate and convenient measure of the content of this federal law."). ** **

In determining when to borrow state law in the interpretation of a federal statute, the Supreme Court has instructed courts to consider: whether there is a "need for a nationally uniform body of law," whether state law would "frustrate federal policy or functions," and what "impact a federal rule might have on existing relationships under state law." Wilson, 442 U.S. at 672. ** ** It follows that to the extent state law is "borrowed" in the course of interpreting R.S. 2477, it must be in service of "federal policy or functions," and cannot derogate from the evident purposes of the federal statute. State law is "borrowed" not for its own sake, and not on account of any inherent state authority over the subject matter, but solely to the extent it provides "an appropriate and convenient measure of the content" of the federal law. Bator, et al., supra, at 768.\footnote{To be sure, R.S. 2477 constitutes an offer of rights of way, which requires acceptance by public authorities of the State. Such acceptance could}
To modern eyes, R.S. 2477 may seem to stand on its own terms, without need for reference to any outside body of law. At the time of its enactment, however, the creation and legal incidence of "highways" was an important field within the common law, with well-developed legal principles reflected in numerous legal treatises and decisions. *** It is reasonable to assume that when Congress granted rights of way for the construction of highways across the unreserved lands of the West in 1866, it was aware of and incorporated the common law pertaining to the nature of public highways and how they are established.

In the decades following enactment of R.S. 2477, when disputes arose, courts uniformly interpreted the statute in light of this well-developed body of legal principles, most of which were embodied in state court decisions.

One prominent example is the Supreme Court's decision in Central Pacific Railway Co. v. Alameda County, 284 U.S. 463 (1932). [The County's case was argued by County Attorney Earl Warren, later to be appointed Chief Justice of the United States by President Eisenhower -eds.]. *** In contrast to this and the many other decisions employing state law standards to resolve R.S. 2477 disputes, the parties have not cited, and we have not found, any cases before its repeal in which entail public responsibilities for upkeep. See Jeremy v. Bertagnole, 101 Utah 1, 116 P.2d 420, 423 (1941) ("[The] authorities are bound to keep the road open and in suitable repair, and, if obstructions be placed thereon, it is their duty to remove the same, and care for the rights of the public."). Accordingly, some states might wish to impose a higher standard for acceptance of the grant than is required under federal law. See, e.g., Tucson Consol. Copper Co. v. Reese, 12 Ariz. 226, 100 P. 777, 778 (Ariz.Terr.1909) (requiring that all roads "be located and recorded by authority of the [county] board of supervisors" after a "petition of 10 or more resident taxpayers within the county" before such roads can be considered "public highways" under R.S. 2477). Such limitations apply not as a matter of federal law, but as an expression of the authority of the state to govern its own acceptance of rights of way.
R.S. 2477 controversies were resolved by anything other than state law. This
unanimity of interpretation over a great many years is entitled to weight. ** *

This did not mean, and never meant, that state law could override federal
requirements or undermine federal land policy. For example, in an early decision, the
BLM determined that a state law purporting to accept rights of way along all section
lines within the county was beyond the intentions of Congress in enacting R.S. 2477.
described this state law as "the manifestation of a marked and novel liberality on the
part of the county authorities in dealing with the public land," and stated that R.S. 2477
"was not intended to grant a right of way over public lands in advance of an apparent
necessity therefor, or on the mere suggestion that at some future time such roads
may be needed." Id. at 447. ** * In none of the cases applying state law was there
any suggestion of a conflict between the state law and any federal principles or
interests. Rather, state law was employed as a convenient and well-developed set of
rules for resolving such issues as the length of time of public use necessary to
establish a right of way, abandonment of a right of way, and priorities between
competing private claims.

We do not believe application of state law in this fashion offends the criteria set
forth in Wilson for appropriate borrowing of state law in the interpretation of federal
statutes. The first question is whether there is a "need for a uniform national rule"
regarding what steps are required to perfect an R.S. 2477 right of way. We think not.
Although the substantive content of state law could in some cases conflict with the
purposes of federal law (the second Wilson criterion), we do not think uniformity for
uniformity's sake is necessary in this area of the law. Indeed, there is some force to
the view that interpretation of R.S. 2477 should be sensitive to the differences in
geographic, climatic, demographic, and economic circumstances among the various
states, differences which can have an effect on the establishment and use of routes of
travel. ** * [1] In the southern Utah canyon country in which this case arises ** *
[1] the
sparse population, rugged terrain, scarcity of passable routes, seasonal differences
in snow, mud, and stream flow, fragile and environmentally sensitive land, and paucity
of towns or other centers of economic activity, could have an effect on the location of
roads.

Moreover, for over 130 years disputes over R.S. 2477 claims were litigated by
reference to non-uniform state standards, a fact that casts serious doubt on any
claims of a need for uniformity today. ** *

We therefore conclude that federal law governs the interpretation of R.S. 2477,
but that in determining what is required for acceptance of a right of way under the
statute, federal law "borrows" from long-established principles of state law, to the
extent that state law provides convenient and appropriate principles for effectuating
congressional intent. The applicable state law in this case is that of the State of Utah,
supplemented where appropriate by precedent from other states with similar principles of law.

B. Specific Legal Issues

   We turn now to the criteria governing recognition of a valid R.S. 2477 right of way. * * *

1. Burden of proof

   The district court correctly ruled that the burden of proof lies on those parties "seeking to enforce rights-of-way against the federal government." 147 F.Supp.2d at 1136. Under Utah law determining when a highway is deemed to be dedicated to the use of the public,5 "[t]he presumption is in favor of the property owner; and the burden of establishing public use for the required period of time is on those claiming it." Leo M. Bertagnole, Inc. v. Pine Meadow Ranches, 639 P.2d 211, 213 (Utah 1981).6 Courts in other states have reached a similar conclusion. See, e.g., Luchetti v. Bandler, 108 N.M. 682, 777 P.2d 1326, 1327 (App.1989). Because evidence in these cases is over a quarter of a century old, the burden of proof could be decisive in some cases.

   This allocation of the burden of proof to the R.S. 2477 claimant is consonant with federal law and federal interests. As the district court noted, "[T]he established rule [is] that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." quoting United States v. Union Pac. R.R. Co., 353 U.S. 112, 116 (1957). * * * On remand, therefore, the Counties, as the parties claiming R.S. 2477 rights, bear the burden of proof.

2. The public use standard

   Under the common law, the establishment of a public right of way required two steps: the landowner's objectively manifested intent to dedicate property to the public

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5 [A Utah statute] provides: "A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." The Utah Supreme Court held a nearly identical earlier version of this statute applicable to R.S. 2477 claims in Lindsay Land & Live Stock Co. v. Churnos, 75 Utah 384, 285 P. 646, 648 (1929) * * *

6 The burden may be different in cases where the R.S. 2477 claim has previously been adjudicated, or where there is a federal disclaimer of interest, memorandum of understanding, or other administrative recognition. We have no occasion in this case to opine on the legal effect of such administrative determinations.
use as a right of way, and acceptance by the public. ** ** In the years after its enactment, R.S. 2477 was uniformly interpreted by the courts as an express dedication of the right of way by the landowner, the United States Congress. The difficult question was whether any particular disputed route had been "accepted" by the public before the land had been transferred to private ownership or otherwise reserved.

The rules for "acceptance" of a right of way by the public (whether under R.S. 2477 or otherwise) varied somewhat from state to state. Some states required official action by the local body of government before a public highway could be deemed "accepted." ** ** In such states, the appropriation of public funds for repair was generally deemed sufficient to manifest acceptance by the public body. In most of the western states, where R.S. 2477 was most significant, acceptance required no governmental act, but could be manifested by continuous public use over a specified period of time. This was the common law rule. ** ** In some states, the required period was the same as that for easements by prescription, in some states it was some other specified period, often five to ten years, and in some states it was simply a period long enough to indicate intention to accept. ** **

[The court then reviewed Utah law, and summarized as follows:] Acceptance of an R.S. 2477 right of way in Utah thus requires continuous public use for a period of ten years. The question then becomes how continuous and intensive the public use must be. The decisions make clear that occasional or desultory use is not sufficient. ** ** [As] the Utah Supreme Court stated: "While it is difficult to fix a standard by which to measure what is a public use or a public thoroughfare, it can be said here that the road was used by many and different persons for a variety of purposes; that it was open to all who desired to use it; that the use made of it was as general and extensive as the situation and surroundings would permit, had the road been formally laid out as a public highway by public authority." Lindsay Land & Live Stock, 285 P. at 648.

The requirements for establishing acceptance of a right of way by user cannot, we think, be captured by verbal formulas alone. It is necessary to set forth the factual circumstances of the decided cases, both those recognizing and those not recognizing the validity of R.S. 2477 claims. On remand, the district court will have the difficult task of determining whether the Counties have met their burden of demonstrating acceptance under these precedents. ** **

3. The "mechanical construction" standard

The BLM and SUWA argue that mere public use cannot suffice to establish an R.S. 2477 right of way. Instead, following the BLM administrative determinations in this case, they contend that R.S. 2477 requires that "[s]ome form of mechanical construction must have occurred to construct or improve the highway." ** **
The BLM and SUWA cite no pre-1976 authority for this interpretation of R.S. 2477, and we are aware of none. No judicial or administrative interpretation of the statute, prior to its repeal, ever treated "mechanical construction" as a pre-requisite to acceptance of the grant of an R.S. 2477 right of way. The standard has no support in the common law, which, as we have noted, formed the statutory backdrop for R.S. 2477. In no state was mechanical construction of a highway deemed necessary for acceptance of a public right of way. Even the BLM took the opposite position not long ago. * * *

The few decisions in which a construction standard is discussed rejected it. * * *

Consistent with our conclusion that acceptance of the grant of R.S. 2477 rights of way is governed by long-standing principles of state law and common law, we cannot accept the argument that mechanical construction is necessary to an R.S. 2477 claim. Adoption of the "mechanical construction" criterion would alter over a century of judicial and administrative interpretation. This is not to say that evidence of construction is irrelevant. Construction or repair at public expense has sometimes been treated as a substitute for public use, as shortening the period of public use necessary for establishing acceptance, or as evidence of public use or lack thereof. Thus, although there are no Utah cases directly on point, we hold that evidence of actual construction (appropriate to the historical period in question), or lack thereof, can be taken into consideration as evidence of the required extent of public use, though it is not a necessary or sufficient element.

The BLM and SUWA defend their proposed "mechanical construction" standard primarily as dictated by the "plain meaning" of R.S. 2477, which grants the rights of way for the "construction" of highways. The BLM quotes the definition of "construction" from an 1860 edition of Webster's Dictionary as "[t]he act of building, or of devising and forming, fabrication." BLM Br. 48. * * *

We are not persuaded. First, it would take more semantic chutzpah than we can muster to assert that a word used by Congress in 1866 has a "plain meaning" that went undiscerned by courts and executive officers for over 100 years. But even confining ourselves to the quoted dictionary definitions of "construction," we are left with a wide range of meanings, including "build," "form," and "make." If nineteenth-century pioneers made a road across the wilderness by repeated use—the so-called "beaten path"—this would fall squarely within the scope of the quoted definition. Such a road would be "formed" and "made" even if no mechanical means were employed. * * *

We must not project twenty-first (or twentieth) century notions of "mechanical construction" onto an 1866 statute. Historical records of early southern Utah road
"construction" indicate that work was performed as economically as possible: if
drivers could be conveyed across the land without altering the topography, there was
no need for more extensive construction work. Typically, little more was done than
move boulders, clear underbrush or trees, or dig the occasional crude dugway. **
Surely Congress did not require mechanical construction where no construction was
needed. The necessary extent of "construction" would be the construction necessary
to enable the general public to use the route for its intended purposes.

For this reason, we are skeptical that there is much difference, in practice,
between a "construction" standard (if applied in light of contemporary conditions) and
the traditional legal standard of continuous public use. If a particular route sustained
substantial use by the general public over the necessary period of time, one of two
things must be true: either no mechanical construction was necessary, or any
necessary construction must have taken place. It is hard to imagine how a road
sufficient to meet the user standard could fail to satisfy a realistic standard of
construction. Thus, we do not necessarily disagree with the BLM's statement that:

A highway right-of-way cannot be established by haphazard, unintentional, or
incomplete actions. For example, the mere passage of vehicles across the
land, in the absence of any other evidence, is not sufficient to meet the
construction criteria of R.S. 2477 and to establish that a highway right-of-way
was granted.

** As the precedents in Utah and other states demonstrate, a road may be created
intentionally, by continued public use, without record evidence of what the BLM defines
as "mechanical construction." Such action is not haphazard, unintentional, or
incomplete, though it might lack centralized direction; and the legal standard is not
satisfied "merely" by evidence that vehicles may have passed over the land at some
time in the past. That is a caricature of the common law standard.

Indeed, contrary to the apparent assumptions of the parties, it is quite possible
for R.S. 2477 claims to pass the BLM's "mechanical construction" standard but to fail
the common law test of continuous public use. See Town of Rolling v. Emrich, 122
Wis. 134, 99 N.W. 264, 464 (1904) (rejecting R.S. 2477 claim despite evidence that
two men "cut out a road ... through the 80 acres in question to haul logs upon") **
Large parts of southern Utah are crisscrossed by old mining and logging roads
constructed for a particular purpose and used for a limited period of time, but not by
the general public. Thus, we cannot agree with Appellees' argument that a
"mechanical construction" standard is necessary to avoid recognition of "a multitude
of property claims far beyond the scope of Congress's express grant in R.S. 2477."
SUWA Br. 39. The common law standard of user, which takes evidence of
construction into consideration along with other evidence of use by the general public,
seems better calculated to distinguish between rights of way genuinely accepted
through continual public use over a lengthy period of time, and routes which, though
mechanically constructed (at least in part), served limited purposes for limited periods of time, and never formed part of the public transportation system.

We therefore see no persuasive reason not to follow the established common law and state law interpretation of the establishment of R.S. 2477 rights of way.

4. Definition of "highway."

R.S. 2477 grants "the right of way for the construction of highways over public lands, not reserved for public uses." At common law the term "highway" was a broad term encompassing all sorts of rights of way for public travel. **Joseph K. Angell & Thomas Durfee, A Treatise on the Law of Highways 3-4 (2d ed. 1868) ("Highways are of various kinds, according to the state of civilization and wealth of the country through which they are constructed, and according to the nature and extent of the traffic to be carried on upon them, from the rude paths of the aboriginal people, carried in direct lines over the natural surface of the country, passable only by passengers or pack-horses, to the comparatively perfect modern thoroughfare."). The Department of the Interior expressly adopted this interpretation in a decision in 1902:

The grant of right of way by Section 2477, R. S., is not restricted to those which permit passage of broad, or of wheeled, vehicles, or yet to highways made, owned, or maintained by the public. Highways are the means of communication and of commerce. The more difficult and rugged is the country, the greater is their necessity and the more reason exists to encourage and aid their construction.

*The Pasadena and Mt. Wilson Toll Road Co. v. Schneider, 31 Pub. Lands Dec. 405, 407-408 (1902). Under traditional interpretations, therefore, the term "highway" is congruent with and does not restrict the "continuous public use" standard: any route that satisfies the user requirement is, by definition, a "highway."

The BLM and SUWA urge us to adopt a more restrictive definition. In its administrative determinations in this case, the BLM offered the following definition of the statutory term "highways":

A highway is a thoroughfare used by the public for the passage of vehicles carrying people and goods from place to place (BLM Instruction Memorandum No. UT 98-56). The claimed highway right-of-way must be public in nature and must have served as a highway when the underlying public lands were available for R.S. 2477 purposes. It is unlikely that a route used by a single entity or used only a few times would qualify as a highway, since the route must have an open public nature and uses. Similarly, a highway connects the public with identifiable destinations or places. The route should lead vehicles somewhere, but it is not required that the route connect to cities. For example, a
highway can allow public access to a scenic area, a trail head, a business, or other place used by and open to the public. Routes that do not lead to an identifiable destination are unlikely to qualify.

The district court found this interpretation by the BLM "to be both reasonable and persuasive" and concluded that "BLM did not err in its interpretation of the term 'highways' in R.S. 2477." 147 F.Supp.2d at 1143-44.

For purposes of this case, we need not consider the broader implications of the common law definition, because this case involves exclusively claims for roads appropriate to vehicular use. Moreover, there is no disagreement regarding the BLM's holding that "[t]he claimed highway right-of-way must be public in nature" and that "[i]t is unlikely that a route used by a single entity or used only a few times would qualify as a highway, since the route must have an open public nature and uses." That is simply a restatement of the "continuous public use" requirement of Utah law. The parties disagree, however, over whether R.S. 2477 routes are limited to roads that lead to "identifiable destinations or places."

Cases interpreting R.S. 2477, and analogous cases involving claims to public easements across private land under state law, occasionally refer to a lack of identifiable destinations as one factor bearing on the ultimate question of continuous public use. ***

It is far from clear that this factor has much practical significance. None of the contested rights of way were rejected by the BLM solely on the basis of a lack of identifiable destinations. It is hard to imagine a road satisfying the "continuous public use" requirement that did not "lead anywhere." Moreover, given the BLM's concession that "a highway can allow public access to a scenic area, a trail head, a business, or other place used by and open to the public," it is hard to imagine much of a road that would not satisfy the standard.

We therefore hold that, on remand, the district court should consider evidence regarding identifiable destinations as part of its overall determination of whether a contested route satisfies the requirements under state law for recognition as a valid R.S. 2477 claim.

5. 1910 Coal Withdrawal

R.S. 2477 rights of way may be established only over lands that are "not reserved for public uses." The BLM determined that a 1910 coal withdrawal "reserved for public use" over 5.8 million acres of land in Utah, including land over which Garfield County claimed three rights of way. It therefore invalidated those rights of way on the ground that they were not established "at a time when the lands were open for establishment of a claim under R.S. 2477." The district court affirmed. We must
plant found only within a wilderness, and generated a commercially valuable product in a laboratory outside the wilderness. Cf. the Edmonds Institute case, casebook, p. 1073. Does this leave the wilderness "untouched" by commerce?

4. Look closely at part III of the Opinion. The Wilderness Act does not explicitly authorize land managing agencies to issue regulations to carry out the Act. If it did, would the result have been the same? Even though the Act may not authorize regulations, could the U.S. Fish & Wildlife Service here, with more careful attention to the issues presented, have made a persuasive case that issuing the permit was consistent with the Wilderness Act?

5. The Court did not address the consistency or compatibility of this project with the National Wildlife Refuge Act. See footnote 18. Is it compatible? See pp. 882-87 of the Casebook. Here the compatibility determination was made by the Refuge Manager, presumably using his "sound professional judgment," see p. 882. The legal standard applied was whether the project significantly conflicted with Refuge purposes, not whether it contributed to or advanced Refuge purposes. Is that the correct interpretation of the Act? A permissible interpretation of the Act?

6. In High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630 (9th Cir. 2004), the Court upheld an injunction against the U.S. Forest Service, based on inadequate compliance with NEPA, in renewing special use permits to outfitters taking large pack groups with stock into wilderness. The court upheld the agency's finding under the Wilderness Act that allowing large pack groups was a "necessary" commercial service under §1133(d)(5), but faulted the agency for failing to show that the number of permits granted was no more than necessary to achieve the goals of the Act, and its renewal of permits "in the face of documented damage resulting from overuse does not have rational validity," and that summary judgment was inappropriate on this issue. It found that the ultimate purpose of the Act was "long-term preservation of wilderness areas," and concluded that—despite the "diverse, and sometimes conflicting list of responsibilities imposed [by the Act] on administering agencies," and despite its emphasis on the importance of wilderness areas as places for the public to enjoy," public use should be restricted if it "would impair their future use as wilderness." 390 F.3d at 638 (emphasis in original). See also Wilderness Watch v. Mainella, 375 F.3d 1085 (11th Cir. 2004).
decide whether the coal withdrawal constitutes a "reservation" for public use under R.S. 2477. The text of the coal withdrawal states:

[S]ubject to all of the provisions, limitations, exceptions, and conditions contained in [the Pickett Act and the Coal Lands Act], there is hereby withdrawn from settlement, location, sale or entry, and reserved for classification and appraisement with respect to coal values all of those certain lands of the United States ... described as follows: [describing over 5.8 million acres of land in Utah].

a. Why the 1910 Coal Withdrawal was not a "reservation"

It is important to note at the outset that "withdrawal" and "reservation" are not synonymous terms. Although Congress and the Supreme Court have occasionally used the terms interchangeably, that does not eliminate their distinct meaning. A withdrawal makes land unavailable for certain kinds of private appropriation under the public land laws. Just as Congress, pursuant to its authority under the Property Clause, can pass laws opening the public lands to private settlement, so also it can remove the public lands from the operation of those same laws. That is what a withdrawal does. It temporarily suspends the operation of some or all of the public land laws, preserving the status quo while Congress or the executive decides on the ultimate disposition of the subject lands.

A reservation, on the other hand, goes a step further: it not only withdraws the land from the operation of the public land laws, but also dedicates the land to a particular public use. ** Thus, a reservation necessarily includes a withdrawal; but it also goes a step further, effecting a dedication of the land "to specific public uses." ** The text of R.S. 2477 reinforces this point by requiring not merely that the land be "reserved," but that it be reserved "for public uses."

The text of the Coal Lands Act of 1910, subject to which President Taft issued the 1910 coal withdrawal, adheres to this distinction. The Act applied to all "[u]nreserved public lands ... which have been withdrawn or classified as coal lands." 30 U.S.C. § 83. The use of the phrase, "unreserved public lands which have been withdrawn," indicates that lands could be "withdrawn" or classified as coal lands under the 1910 act and yet remain "unreserved."

Turning to the text of the withdrawal, we read that the subject lands were "withdrawn from settlement, location, sale or entry, and reserved for classification and appraisement with respect to coal values." On its face, "withdrawn ... and reserved" sounds like a reservation. But just because a withdrawal uses the term "reserved" does not mean that it reserves land "for public uses." We must decide whether "reserved for classification and appraisement with respect to coal values" is equivalent to "reserved for public uses."
We conclude that it is not. As noted above, land is "reserved" when it is dedicated to a specific public purpose. This is not what the coal withdrawal did. Instead, the coal withdrawal narrowly, and temporarily, removed potential coal lands from certain kinds of private appropriation. This is evident from its historical context. In the early 1900s, the nation confronted a coal shortage which coincided with the discovery of "widespread fraud in the administration of federal coal lands." *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 868 (1999). Unscrupulous characters would obtain land under other pretenses, only to use the land for coal mining without having to pay for the real value. Due to a lack of funding, the Department of the Interior had to rely on affidavits of entrymen to determine whether lands were valuable for coal or not. This allowed railroads and other coal interests to obtain vast tracts of coal lands under railroad and agricultural grants for a nominal price. President Roosevelt "responded to the perceived crisis by withdrawing 64 million acres of public land thought to contain coal from disposition under the public land laws." *Id.* at 869. This gave the United States an opportunity "to reexamine and reclassify lands which it thought might have exceptional value, thus preventing them from being disposed of at a price which took no account of that value." *Confederated Bands of Ute Indians v. United States*, 112 Ct.Cl. 123, 1948 WL 5025, *5 (Ct.Cl.1948) (unpublished). President Roosevelt's order did not, however, reserve the withdrawn lands for a public use. As a 1924 Department of the Interior decision explained: "Temporary withdrawals made prior to ... classification or reservation merely for the purpose of withholding the land from further disposition under the public land laws until further investigation has been made and a decision arrived at as to the character of the land and its chief value, have no effect as raising any presumption as to the character of the land, nor do they dedicate it to any special purpose or reserve it for any special form of disposal." *George G. Frandsen*, 50 Pub. Lands Dec. 516, 520 (1924).

President Roosevelt's broad withdrawal outraged homesteaders and other western interests, as even those homesteaders who had made a valid entry lost the opportunity to obtain a patent unless they could prove that the land was not valuable for coal. *Amoco Prod.*, 526 U.S. at 869. Congress thus crafted a compromise with the Coal Lands Acts of 1909 and 1910. The 1909 Act protected the rights of homesteaders who had entered coal lands prior to President Roosevelt's 1906 withdrawal. It authorized the federal government to issue patents for those lands, subject to "a reservation to the United States of all coal in said lands." 30 U.S.C. § 81. The 1910 Act opened the remaining coal lands to entry under the homestead laws, subject to the same reservation of coal to the United States. See 30 U.S.C. § 83; *Amoco Prod.*, 526 U.S. at 870. Taken together, these acts achieved "a narrow reservation of the [coal] resource that would address the exigencies of the crisis at hand without unduly burdening the rights of homesteaders or impeding the settlement of the West." *Amoco Prod.*, 526 U.S. at 875.

Thus, not only were the lands subject to the coal withdrawal not "reserved" for
any particular "public use"; they remained open to settlement, sale, and entry under several important public land laws, including the homestead laws, the desert-land law, and certain mining laws. Because the lands subject to the coal withdrawal were "public lands, not reserved for public uses," they were available for establishment of rights of way under R.S. 2477.

Indeed, because R.S. 2477 provided one of the most important means of establishing access to homestead, desert-land, and mining claims, it would make little sense for Congress to open public lands to private claims but forbid settlers to construct highways to access those claims.

VI. CONCLUSION

This case is REMANDED to the district court for a de novo proceeding, in accordance with this opinion. The parties shall be permitted to introduce evidence including, but not limited to, the administrative record before the BLM in making its determinations. In that proceeding, the Counties will bear the burden of proof on their R.S. 2477 claims. The district court shall determine whether the road work undertaken by the Counties in 1996 constituted a trespass, whether the Counties have a valid R.S. 2477 claim with respect to the fifteen disputed routes, and whether Kane County exceeded the scope of its right of way with respect to the Skutumpah Road.

Notes and Questions

1. Note that R.S. 2477 issues might be separated into two categories: first, the validity of the R.S. 2477 claim (the issue that occupies most of the court’s opinion); and second, assuming the claim is valid, its scope, including the extent to which the holder might “improve” or “enlarge” it (the issue the court take up first, in the trespass portion of the opinion). Notice on the trespass issue, the court seems to assume that the counties’ R.S. 2477 claims are valid, and the only issue is scope. But what if the federal government believes a county’s claim is invalid for one reason or another? Does the county have notify the United States before going out to do “routine maintenance” of these claims? Does the court, in other words, license R.S. 2477 claimants like the counties here to fire up their bulldozers to “maintain” the rights-of-way they claim, regardless of whether validity is at issue? To rip down “closed to vehicles” signs federal land managers have posted on federal lands that the counties think are subject to their R.S. 2477 claims? Or do they have to obtain permission from the federal land manager first? In short, who controls the federal land subject to the claim before the courts determine the validity of the claim - the claimant or the federal agency? And who has the burden of going to court, the county or other R.S. 2477 claimant, or the United States or other landowner seeking to contest such a claim? Does the court provide any answers to these questions? Should it have (considering how hard it worked to answer lots of other questions about R.S. 2477)?

2. Why did the parties fight so hard over the primary jurisdiction issue? What difference did it make, especially since the court acknowledges that BLM can still make its own determinations about the validity of county right-of-way claims, and the courts can take them into account? For an extended argument in favor of primary jurisdiction here, see Bret C. Birdsong, Road Rage and R.S.
3. Is the court saying state property law applies, or is the court saying federal law applies but it “borrows” state property law? What difference, if any, does it make? Does the result mean that the federal statute may be applied to federal lands in different ways in different states? Is uniformity in such things an important value that is undermined by this decision?

4. It seems likely that the evidence to be adduced on R.S. 2477 claims to meet the standard in Utah law (continuous use for ten years sometime prior to 1976) will often be stale or thin, depending on old documents or fading memories. Does that suggest the burden of proof may be crucial to many outcomes? Who has the burden of proof, and by what reasoning? Does it also suggest an answer to the question posed in paragraph # 1 above?

5. Examine how the court handles the issue of whether the BLM deserves any deference in its interpretation of this statute. This is a recurring issue throughout the course.

6. All told, does this ruling effectively create a kind of World War I-style trench warfare over the existence of rights of way, with R.S. 2477 claimants and their opponents fighting yard by yard, applying vague standards to a thin and likely not very reliable historical record? And that war will take place directly in the federal district courts with full-blown trials, rather than primarily in the agencies, with the courts merely reviewing record assembled by, and the findings of, the agency? Should Judge McConnell (often mentioned as on the short list for Bush Supreme Court nominees) have given more consideration to the workload the opinion places on the courts?

7. Can one make a claim for an R.S. 2477 right-of-way on a “single-track” foot or livestock trail? Or a dogsled trail in Alaska? If the answer is yes, and such a claim is established, what is its scope; that is, can it be widened into a trail suitable for motorized vehicles? Can a wagon trail be converted into an eight-lane highway? By what process, and who controls the decision?

8. Try to answer the questions in notes 1, 3, and 5 on pp. 165-66. Omit notes 2–4, but read the remainder, and go on with the discussion of the ANILCA provisions at bottom of p. 167. Note, regarding the impact of RS 2477 on private property (question 5), Judge McConnell acknowledges the concern of private property holders that “expansive R.S. 2477 definitions will undermine their private property rights by allowing strangers to drive vehicles across their ranches and homesteads.” If you owned private property in rural Utah, which your predecessor in title obtained from the federal government under one of the homestead laws in 1908, and there was an old trail crossing the property that you believe dates back to the 1880s, should you be worried by this decision? Is this a case where environmental advocates usually friendly to government regulation of private property are taking positions that effectively protect private property rights?

9. Does this ruling make it possible to claim rights-of-way through national parks, wilderness areas and other protected areas? Canyonlands National Park, comprising 340,000 acres somewhat to the north of Kane and Garfield Counties, was created by Act of Congress in 1964; previously, it had been open public lands. Could the local county (or anybody, for on its face R.S. 2477 does not seem to restrict who may claim rights-of-way) assert a claim on a foot trail or wagon road that was in existence when the Park was created? If it succeeds, can it pave the road to stimulate tourist traffic?

[See also James Rasband, Questioning the Rule of Capture Metaphor for Nineteenth Century Public Land Law: A Look at R.S. 2477, 35 Envtl.L. ___ (2005).]
THE WILDERNESS SOCIETY et al.

v.

UNITED STATES FISH & WILDLIFE SERVICE.

353 F. 3d 1051 (9th Cir., 2003) (en banc)

Before SCHROEDER, Chief Judge, PREGERSON, REINHARDT, T.G. NELSON, HAWKINS, SILVERMAN, WARDLAW, W. FLETCHER, GOULD, BERZON, and CLIFTON, Circuit Judges.

GOULD, Circuit Judge.

We consider an action brought by the Wilderness Society and the Alaska Center for the Environment (Plaintiffs) challenging a decision by the United States Fish and Wildlife Service (USFWS), to grant a permit for a sockeye salmon enhancement project (Enhancement Project) that annually introduces about six million hatchery-reared salmon fry into Tustumena Lake, the largest freshwater lake in the Kenai National Wildlife Refuge (Kenai Refuge) and the Kenai Wilderness. Plaintiffs assert that the USFWS permit for the Enhancement Project violated the Wilderness Act, 16 U.S.C. §§ 1131-1136, by offending its mandate to preserve the natural conditions that are a part of the wilderness character of the Kenai Wilderness, id. §§ 1131, 1133, and by sanctioning an impermissible commercial enterprise within a designated wilderness area. Id. § 1133(c). Plaintiffs also claim that the Enhancement Project violates the National Wildlife Refuge Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee (Refuge Act), because the project is not consistent with the purposes of the Kenai Refuge as set forth in the Refuge Act. Id. § 668dd. The district court denied Plaintiffs' motion for summary judgment and sua sponte entered summary judgment in favor of the USFWS. After final judgment was entered a timely appeal followed. ** We conclude that the district court erred in finding that the Enhancement Project is not a commercial enterprise that Congress prohibited within the designated wilderness. We reverse and remand so that the final decision of the USFWS may be set aside, the Enhancement Project enjoined, and judgment entered for Plaintiffs.

I

A

The area now known as the Kenai Refuge has been recognized as protected wilderness by the federal government for more than sixty years. In 1941, President Franklin D. Roosevelt issued an Executive Order designating about two million acres
not intend to ban human-powered transport that "leaves no permanent trace" and thus the federal land management agencies should allow it, subject to regulation to prevent improper or overuse).

Page 1116, add the following at the bottom of the page:

The guidelines also nudged the Forest Service to be tender toward existing grazing practices, structures, facilities, and use of motorized equipment in wilderness areas.

Page 1117, add the following, substituting for the last sentence before section D. Logging:

Can a federal land manager increase the amount of livestock in wilderness? The late Wallace Stegner, a strong wilderness advocate, once rather surprisingly argued as follows:

I have known enough range cattle to recognize them as wild animals; and the people that herd them have, in the wilderness context, dignity and rareness; they belong on the frontier, moreover, and have a look of rightness. The invasion they make on the virgin country is sort of an invasion that is as old as neanderthal man, and they can in moderation, even emphasize a man's feeling of belonging to the natural world."


Page 1125, first full paragraph, change last sentence to: Regarding the meaning of this section, consider the Clouser case, supra p. 1113; and see the Forest Service's regulation, 36 C.F.R. § 228.15.

Pages 1125-26, last line p. 1125, continuing: The citation to the Wilderness Watch case is wrong; it was an unpublished opinion found at 1998 WL 1750033 (D.D.C., 1998), which deferred to the Forest Service's interpretation of its statutory authority to "approve some permanent structures, but only as necessary for minimal management of the wilderness."

Page 1126, substitute the following materials for the material in the middle of page 1126, beginning with "See also High Sierra Hikers Ass'n." and ending at Subsection H:
of land on Alaska's Kenai Peninsula, including Tustumena Lake, as the Kenai National Moose Range for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose. Exec. Order No. 8979, 6 Fed.Reg. 6471 (Dec. 16, 1941).

In 1964 Congress passed the Wilderness Act, which established the National Wilderness Preservation System with the explicit statutory purpose to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition. 16 U.S.C. § 1131(a). Congress thereby expressed support for the principle that wilderness has value to society that requires conservation and preservation. As President Lyndon B. Johnson reportedly said upon signing of the Wilderness Act in 1964, if future generations are to remember us with gratitude rather than contempt, we must leave them more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning, not just after we got through with it.

In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371 (1980), to control the management of Alaska refuge lands. ANILCA expanded the Kenai National Moose Range by nearly a quarter-million acres, renamed it the Kenai National Wildlife Refuge, and further set aside 1.35 million acres of the Refuge, including Tustumena Lake, as the Kenai Wilderness, a designated wilderness pursuant to Congress's authority to protect lands under § 1132(c) of the Wilderness Act. ANILCA § 702(7). ANILCA recited that the purposes of the Kenai Refuge encompass, among other aims, the conservation of fish and wildlife populations and habitats in their natural diversity. ANILCA § 303(4).

Tustumena Lake lies near the western edge of the Kenai Refuge and within the Kenai Wilderness. Tustumena Lake is the largest freshwater lake located within the Kenai Refuge and is the fifth largest freshwater lake in the State of Alaska. The lake's outlet is the Kasilof River, which drains into the Cook Inlet, a tidal estuary that flows into the Gulf of Alaska and the Pacific Ocean.

As a result of its remote location, the ecosystem around and within Tustumena Lake is in a natural state. This ecosystem supports several species of anadromous fish, including sockeye salmon, which spawn within the Kasilof River watershed. A commercial fishing fleet, operating outside the boundaries of the Kenai Refuge, intercepts and harvests these sockeye salmon during their annual run from the Gulf of Alaska back to the Kasilof River, Tustumena Lake, and other spawning streams.

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The antecedents of the present Enhancement Project date back to 1974, when the Alaska Department of Fish and Game (ADF & G) first conducted a sockeye salmon egg collection at Tustumena Lake as part of a research project designed to test the ability of the ecosystem to produce fish. The eggs were incubated at the Crooked Creek Hatchery, outside of the Kenai Refuge, and the resulting fry were stocked outside of the Kenai Refuge in the spring of 1975. In 1976, fry were first released into Tustumena Lake, and since have been released into Tustumena Lake in all but two subsequent years. The number of fry stocked yearly in Tustumena Lake has ranged from a low of 400,000 in 1978 to a high of 17,050,000 in 1984. Since 1987, the number of fry released annually into the lake has been slightly greater than 6 million.

Before 1980, ADF & G operated the Enhancement Project without a special use permit, and ADF & G did not seek permits for the operation of the project. In 1980, following passage of ANILCA, the USFWS’s Refuge Manager for the Kenai Refuge notified ADF & G that special use permits would be required for all ongoing projects within the Refuge. In 1985, the USFWS and ADF & G entered into a Memorandum of Understanding that allowed ADF & G annually to obtain a special use permit for the Enhancement Project to study the effect of stocking on native lake fish and on the incidence of disease within the fish population.

In 1989, the USFWS and ADF & G reached a joint agreement that by 1993 a decision should be made either to discontinue the research project at Tustumena Lake or to elevate it to enhance commercial fishing operations for the benefit of the Cook Inlet fishing industry. In a 1992 report, ADF & G requested that the project become an operational enhancement project[, giving as one of two reasons that,] *** beginning in fiscal year 1992, a reduced state budget would require curtailing project evaluation. In 1993, ADF & G entered into a contract with the Cook Inlet Aquaculture Association (CIAA) to staff and run the Crooked Creek Hatchery and its hatchery programs.

The CIAA is a private, non-profit corporation comprised of associations representative of commercial fishermen in the region as well as other user groups interested in fisheries within the region. Alaska Stat. § 16.10.380(a) (2003). *** The CIAA relies on funding from two sources. First, the Cook Inlet commercial salmon industry imposes a voluntary two percent tax on the value of its fishermen’s annual salmon harvest. Second, the CIAA generates income through producing hatchery-raised salmon from the surplus fry not used to stock Tustumena Lake.

In May 1994, the USFWS’s Regional Director *** recommended that the Enhancement Project be evaluated through the National Environmental Policy Act (NEPA) review process. Among the concerns raised were that the Enhancement Project potentially violated the intent and purpose of the Wilderness Act, ANILCA, and regional policy, and that the project would threaten a unique, glacial, natural freshwater spawning and rearing aquatic ecosystem ... merely to provide additional economic benefit primarily for Cook Inlet east side net fishermen.
In June 1997 the USFWS and the CIAA jointly released a draft EA of the Enhancement Project, which addressed concerns regarding the project, but the USFWS in a separate document concluded that mitigation measures could minimize risks of the project. During the 45-day period for public comment and review, the Wilderness Society submitted comments challenging the legality of any fisheries enhancement program in designated Wilderness for the purpose of providing for the stocking of commerce and questioning the compatibility of the project with the area's wilderness designation. In August 1997, the final EA of the Enhancement Project was released. In a simultaneously released Mitigated Finding of No Significant Impact, the USFWS concluded that mitigative measures contained in the Special Use Permit would minimize risks associated with the Enhancement Project, and that preparation of an Environmental Impact Statement was not required.

Also in August 1997, the Kenai Refuge Manager issued a Wilderness Act Consistency Review, addressing legal concerns regarding whether the Enhancement Project was consistent with the Wilderness Act's mandate to preserve wilderness in its natural condition and whether the project was a prohibited commercial enterprise. Referring to a legal opinion prepared by the United States Department of Interior's Regional Solicitor's Office, which concluded that the Enhancement Project does not have to contribute to achieving Refuge purposes but it may not significantly conflict with them, the Kenai Refuge Manager, in the Consistency Review, dismissed concerns that the project altered natural conditions and was a commercial enterprise. The Kenai Refuge Manager concluded that the Enhancement Project was consistent with the Wilderness Act, which he viewed as a legislative compromise not reflecting absolute preservationist values. The Refuge Manager also suggested that, because the State of Alaska had previously administered the project, criticism that the Enhancement Project was a commercial enterprise raised a distinction without a difference. In August 1997, the Refuge Manager also released a Compatibility Determination, which concluded that the Enhancement Project cannot ... be considered as supporting refuge purposes, but neither can it be found incompatible with them.

After issuance of these documents, the USFWS on August 8, 1997, issued a Special Use Permit to the CIAA for the Enhancement Project. Under the terms of this permit, each summer the CIAA establishes a temporary camp within the Kenai Wilderness at the mouth of Bear Creek, which flows into Tustumena Lake, and catches about 10,000 returning sockeye salmon, which yield about 10 million eggs. These eggs are transported to a hatchery outside the Kenai Wilderness. The following spring about six million salmon fry produced by the eggs are stocked and returned to the wilderness in Bear Creek.
There is disagreement among the parties as to what level of deference, if any, we should accord the USFWS's decision to permit the Enhancement Project. Defendant USFWS maintains that the case is controlled by *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and that USFWS decisions interpreting the Wilderness Act and Refuge Act must be given broad deference. Plaintiffs, on the other hand, argue that the challenged project offends the literal terms of the Wilderness Act by not preserving the designated wilderness area and by sanctioning a commercial enterprise within it. Responding to the defendant's argument for *Chevron* deference, which was adopted by the district court, Plaintiffs rely on the Supreme Court's clarification of *Chevron* in *United States v. Mead Corp.*, 533 U.S. 218 (2001), urging that the USFWS's permitting decision is entitled at most to _respect_ as set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

In *Chevron*, the Supreme Court set forth a two-step test for judicial review of administrative agency interpretations of federal law. Under the first step: _If the intent of Congress is clear, that is the end of the matter;_ for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress._ *Chevron*, 467 U.S. at 842-43. Congressional intent may be determined by _traditional tools of statutory construction,_ and if a court using these tools ascertains that Congress had a clear intent on the question at issue, that intent must be given effect as law. *Id.* at 843 n. 9; see *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164 (9th Cir.1999) (stating that questions of congressional intent _are still firmly within the province of the courts under *Chevron* _). Conversely, at step two of *Chevron*, when applicable, we recognize that if a statute is silent or ambiguous with respect to the issue at hand, then the reviewing court must defer to the agency so long as _the agency's answer is based on a permissible construction of the statute._ *Chevron*, 467 U.S. at 843. In such a case an agency's interpretation of a statute will be permissible, unless _arbitrary, capricious, or manifestly contrary to the statute._ *Id.* at 844.

*Chevron* considered only formal notice-and-comment rule-making and did not state what other types of agency decisions should be given such deference. In *Mead*, the Supreme Court clarified that _administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority._ 533 U.S. at 226-27 (emphasis added).⁶ *Mead* also clarified the weight that

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⁶Although *Mead* did not state with specificity what types of agency powers are indicative of authority _generally to make rules carrying the force of law_, the Court
a reviewing court should give to administrative decisions not meeting these standards. Quoting Skidmore, the Court held that the deference to be accorded to such decisions depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. _ Mead, 533 U.S. at 228 (quoting Skidmore, 323 U.S. at 140.

With the Supreme Court's precedents in mind, we adopt the following analysis:
Under Chevron's first-step test, we ask whether the Enhancement Project offends the plain meaning and manifest congressional intent of the Wilderness Act or the Refuge Act. If so, Congress's intent must be enforced and that is the end of the matter. Conversely, if the statutory terms are ambiguous, then we must give Chevron deference only upon a conclusion that the USFWS's statutory interpretation has the force of law. Otherwise, we give the USFWS's view respect if persuasive based on the factors recited in Skidmore and endorsed in Mead.

B

Addressing the first step in the Chevron analysis, Section 4(c) of the Wilderness Act states that, subject to exceptions not relevant here, there shall be no commercial enterprise ... within any wilderness area. 16 U.S.C. § 1133(c). The Wilderness Act does not define the terms commercial enterprise or within. The district court considered these terms ambiguous and concluded that they do not bar the Enhancement Project.

Because no statutory or regulatory provision expressly defines the meaning of the term commercial enterprise as used in the Wilderness Act, we first consider the common sense meaning of the statute's words to determine whether it is ambiguous. Webster's defines enterprise to mean a project or undertaking. Webster's Ninth New Collegiate Dictionary 415 (1985). Webster's defines commercial as occupied with or engaged in commerce or work intended for commerce; of or relating to commerce. Id at 264-65. The American Heritage Dictionary of the English Language provides a strikingly similar definition, viewing commercial as meaning 1.a. of or relating to commerce, b. engaged in commerce, c. involved in work that is intended for the mass market. American Heritage Dictionary of the English Language 371 (4th ed.2000). Black's Law Dictionary adds that commercial may be defined as relates to or is connected with trade and traffic or commerce in general;

provided this guidance: Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. 533 U.S. at 227.

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is occupied with business or commerce. Black’s Law Dictionary 270 (6th ed.1990). These definitions suggest that a commercial enterprise is a project or undertaking of or relating to commerce.

We also consider the purposes of the Wilderness Act. The Act’s declaration of policy states as a goal the preservation and protection of wilderness lands in their natural condition so as to leave them unimpaired for future use and enjoyment as wilderness and so as to provide for the protection of these areas, [and] the preservation of their wilderness character. 16 U.S.C. § 1131(a). The Wilderness Act further defines wilderness in part, as an area where the earth and its community of life are untrammeled by man. Id. § 1131(c). These statutory declarations show a mandate of preservation for wilderness and the essential need to keep commerce out of it. Whatever else may be said about the positive aims of the Enhancement Project, it was not designed to advance the purposes of the Wilderness Act. The Enhancement Project to a degree places the goals and activities of commercial enterprise in the protected wilderness. The Enhancement Project is literally a project relating to commerce.

The structure of the relevant provisions of the Wilderness Act may also be considered. The Wilderness Act’s opening section first sets forth the Act’s broad mandate to protect the forests, waters and creatures of the wilderness in their natural, untrammeled state. 16 U.S.C. § 1131. Section 1133, devoted to the use of wilderness areas, contains a subsection entitled prohibition provisions. Id. § 1133(c). Among these provisions is a broad prohibition on the operation of all commercial enterprise within a designated wilderness, except as specifically provided for in this Act. Id. The following subsection of the Act enumerates special provisions, including exceptions to this prohibition. Id. § 1133(d). This statutory structure, with prohibitions including an express bar on commercial enterprise within wilderness, limited by specific and express exceptions, shows a clear congressional intent generally to enforce the prohibition against commercial enterprise when the specified exceptions are not present. * * * There is no exception given for commercial enterprise in wilderness when it has benign purpose and minimally intrusive impact.

The language, purpose and structure of the Wilderness Act support the conclusion that Congress spoke clearly to preclude commercial enterprise in the designated wilderness, regardless of the form of commercial activity, and regardless of whether it is aimed at assisting the economy with minimal intrusion on wilderness values.

C

Because the aim of Congress in the Wilderness Act to prohibit commercial enterprise within designated wilderness is clear, we do not owe deference to the USFWS’s determination regarding the permissibility of the Enhancement Project if it is a commercial enterprise. Chevron, 467 U.S. at 842-43.
The district court grounded its decision in part on an assessment that the impact on wilderness of millions of fry unseen beneath the waters of Bear Creek and Tustumena Lake was not terribly intrusive on wilderness values and that the project would hardly be noticed by those visiting the wilderness. The district court also was impressed that the CIAA was a nonprofit entity, that the State of Alaska heavily regulated the Enhancement Project, and that commercial effects of the project generally occurred years after the collection of salmon eggs and later release of the fry and were realized by commercial fishermen who sought their catch outside the wilderness bounds.

We thus deal with an activity with a benign aim to enhance the catch of fishermen, with little visible detriment to wilderness, under the cooperative banner of a non-profit trade association and state regulators. Surely this fish-stocking program, whose antecedents were a state run research project, is nothing like building a McDonald's restaurant or a Wal-Mart store on the shores of Tustumena Lake. Nor is it like conducting a commercial fishing operation within designated wilderness, which we have previously proscribed. See Alaska Wildlife Alliance v. Jensen, 108 F.3d 1065, 1069 (9th Cir.1997). Nor is the project like cutting timber, extracting minerals, or otherwise exploiting wilderness resources in a way that is plainly destructive of their preservation.

Conversely, the challenged activities do not appear to be aimed at furthering the goals of the Wilderness Act. The project is not aimed at preserving a threatened salmon run.\textsuperscript{7} Looked at most favorably, for the proponents of the fish-stocking project, it might be concluded that the project only negligibly alters the wild character of Tustumena Lake and is not incompatible with refuge values, though those issues are disputed.\textsuperscript{8} And it might also be considered that, to the extent the project is a servant of commerce, it may pose a threat to the wild, even if it operates under the eye of state and federal regulators.

Before further addressing the reasoning of the district court, we acknowledge that none of our precedent, and no explicit guidance from the United States Supreme

\textsuperscript{7}In describing the present Enhancement Project, the Kenai Refuge Manager has stated: "The activity is no longer experimental in nature, nor is restoration of fish stocks an objective. It is strictly an enhancement effort to increase the number of sockeye salmon available to the commercial fishery." This declaration occurs as part of a broader statement about the primary purpose of the project to enhance the commercial catch of sockeye salmon. See infra 1065.

\textsuperscript{8}In footnote 18 we decline to reach the issues of whether the challenged project alters natural conditions that are part of the wilderness character to be preserved by the Wilderness Act and whether it is compatible with purposes of the Kenai Refuge.
Court, has addressed how to assess _commercial enterprise_ when faced with activities involving mixed purposes and effects. The lack of explicit guidance on this issue in part led the district court to defer to the agency action. Yet we have determined that Congress absolutely proscribed commercial enterprise in the wilderness, and it is a traditional judicial function to apply that prohibition to the precise facts here, to determine if the challenged project may continue consistent with the will of Congress.

In light of Congress's language and manifest intent, we conclude that the most sensible rule of decision to resolve whether an activity within designated wilderness bounds should be characterized as a _commercial enterprise_ turns on an assessment of the purpose and effect of the activity. See Sierra Club v. Lyng, 662 F.Supp. 40, 42-43 (D.D.C.1987) [Eds. See Casebook, pp. 1117-21] *** [There,] the district court stressed that the _purpose_ and effect of the program [was] solely to protect commercial timber interests and private property, and imposed an affirmative burden on the Secretary of Agriculture to justify the eradication program in light of wilderness values. Lyng, 662 F.Supp. at 42-43.

The consideration of purpose and effect of challenged actions not infrequently assists in determining whether a prohibition is to be applied to complex conduct. For example, the United States Supreme Court has long looked to the purpose and effect of state action to determine whether it violates the Establishment Clause. E.g., Agostini v. Felton, 521 U.S. 203, 218 (1997). It is also commonplace to assess purpose and effect to determine whether a trade restraint is unreasonable. E.g., Bd. of Trade, Chicago v. United States, 246 U.S. 231, 238 (1918). Similarly, the Supreme Court has directed us to rely on considerations of purpose and effect in determining whether there is a conflict between state and federal law that leads to preemption of the state law. E.g. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 106-07 (1992). The Supreme Court has also focused our review on purpose and effect in evaluating whether a statute is properly characterized as civil or criminal. E.g., Hudson v. United States, 522 U.S. 93, 99(1997).

The importance of considering purpose and effect to judge the legality of challenged action is also a recurring theme in statutory law [briefly discussing the section five of the Voting Rights Act and a provision in copyright law which prohibits the import, manufacture or distribution of devices or services with the primary purpose or effect of circumventing controls on the reproduction of copyrighted works.] ***

For all these reasons, we conclude that as a general rule both the purpose and the effect of challenged activities must be carefully assessed in deciding whether a project is a _commercial enterprise_ within the wilderness that is prohibited by the Wilderness Act. Thus we will give great weight to an assessment of purpose and effect in deciding whether the Enhancement Project is a proscribed commercial enterprise within the Kenai Wilderness. This familiar test looking to _purpose and

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effect is persuasive here because it gets to the heart of what has occurred in the wilderness.

The primary purpose of the Enhancement Project is to advance commercial interests of Cook Inlet fishermen by swelling the salmon runs from which they will eventually make their catch. The Enhancement Project is operated by an organization primarily funded by a voluntary self-imposed tax instituted by the Cook Inlet fishing industry on the value of its salmon catch. In the words of the Kenai Refuge Manager, in a memorandum to the Department of Interior's Regional Solicitor:

The primary purpose of the enhancement activity is to supplement sockeye catches for East Side Cook Inlet set-net commercial fishermen, and for lower Cook Inlet enhancement projects. A secondary purpose is use of the excess eggs taken from Tustumena in a CIAA cost recovery project to help finance the Tustumena lake and lower Cook Inlet sockeye salmon enhancement projects. The activity is no longer experimental in nature, nor is restoration of fish stocks an objective. It is strictly an enhancement effort to increase the number of sockeye salmon available to the commercial fishery.

Memorandum from Kenai Refuge Manager to Regional Solicitor 2-3 (undated), ER 224-26 (emphasis added). The Fishery Management Plan for the Kenai Refuge characterizes the purpose of the Enhancement Project as commercial enhancement of sockeye salmon populations in ... Tustumena lake[ ]_ This primary purpose is not contradicted by evidence that the Enhancement Project serves other secondary noncommercial purposes, including providing a general benefit to the fishery commonly used by commercial and recreational fishermen alike. Incidental purposes do not contradict that the Enhancement Project's principal aim is stock enhancement for the commercial fishing industry.10

The primary effect of the Enhancement Project is to aid commercial enterprise of fishermen. More than eighty percent of the salmon produced by the Enhancement Project are caught by commercial fishermen, who realize over $1.5 million in additional annual revenue from project-produced fish. USFWS documents highlight the primary effect of the Enhancement Project to aid commercial enterprise. For example, the July 1997 EA states that it is apparent because commercial fishing economics is emphasized ... the main reason for continuing the project is economic[] in nature._ Similarly a USFWS _Briefing Statement_ concludes that _[w]e should

10USFWS's own definition of _commercial enhancement_, as set forth in the Kenai Refuge Fishery Management Plan, confirms this conclusion. According to this definition, although commercial enhancement _is primarily directed toward maintaining commercial fisheries_, _[s]ome sport and subsistence harvest of the enhanced fish may occur._

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consider [CIAA's cost-recovery harvest] to be a commercial fishing operation. The 1997 Compatibility Determination concludes that the Enhancement Project primarily benefits Eastside Cook Inlet set-net commercial fishermen. In light of this primary effect, any incidental benefit to sport fishermen or others is not controlling. The incidental benefit that the program may provide to recreational and sport fishermen is subordinate to the primary benefit conferred on the commercial fishing industry.

In light of the unmistakable primary purpose and effect of the Enhancement Project, we reject arguments advanced by the USFWS that were credited by the district court. The district court reasoned in part that the CIAA is itself a nonprofit organization. But the non-profit status of the CIAA cannot be controlling because its non-profit activities are funded by the fishing industry and are aimed at providing benefits to that industry. The CIAA’s continued funding and operation is dependent upon the revenues of commercial fishermen, and we have previously recognized that even non-profit entities may engage in commercial activity. *Dedication and Everlasting Love to Animals v. Humane Soc.*, 50 F.3d 710, 713 (9th Cir.1995) (A nonprofit organization...may engage in commercial activity.).

In addition, the district court relied on the involvement of the State of Alaska, which previously had run the stocking project to research the viability of artificially enhancing salmon runs. But prior management activity and present regulatory control by the State of Alaska is irrelevant to assessing the primary purpose and effect of the current Enhancement Project. When the State had direct control of operations, the project’s primary purpose was research-oriented. As set forth in the 1985 Memorandum of Understanding, the project was aimed at researching the viability of techniques to enhance the salmon run and evaluating the side effects of stocking, including its effect on lake-reared fish, escapement levels, and the incidence of disease in the salmon population. But now the project, as run by the CIAA, is aimed at enhancing

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12 The CIAA itself, to some extent, engages in commercial activity through its cost-recovery sale of the excess salmon produced each year by the Enhancement Project, from which it realizes nearly one million dollars in annual revenue. We need not stress this factor, for in light of the primary purpose and effect to benefit the commercial activities of fishermen, our conclusion that a commercial enterprise prohibited within wilderness has been shown would remain the same even if the CIAA discarded without sale all fry supplementary to the stocking program.
salmon runs to increase the catch of commercial fishermen. The purpose of the project has changed from research on techniques to practical operations to swell the catch of fish and the commerce thereon. That the State maintains regulatory control over the Enhancement Project, by its permitting authority over the CIIA's hatchery operations, see Alaska Stat. §§ 16.10.380, 16.10.400(a) (2003), does not matter. The State regulates an array of commercial enterprises, from cruise ship operation to oil exploration. See, e.g., Alaska Stat. §§ 31.05.090, 46.03.460 et seq. (2003). That an industry or activity is regulated does not mean that it is no longer a commercial activity.

Furthermore, the essential nature of the Enhancement Project is not changed merely because the commercial benefit derived from the Enhancement Project is conferred when fishermen make their salmon catch outside the bounds of the Kenai Wilderness. It is correct that what the Wilderness Act bars is the operation of a commercial enterprise ... within any wilderness area. 16 U.S.C. § 1133(c) (emphasis added). But it is not disputed that substantial and essential parts of the Enhancement Project's operation, the collection of eggs taken to a hatchery and the stocking of six million fry returned to Bear Creek, occur within the Kenai Wilderness.\textsuperscript{13}

\textsuperscript{13}If we were to accept the argument that the Enhancement Project, despite its commercial aims, is exempt from the Wilderness Act because the project's commercial benefit is conferred outside the wilderness, we would likely soon face arguments that other commercial operations, more intrusive on the wilderness, might be sustained under the Wilderness Act, if transactions constituting commerce occur outside of the wilderness area's bounds. The weakness in this line of argument is obvious if we consider that a logging operation within the wilderness could not sensibly be urged to be permissible, even though the trees harvested were sold outside of the wilderness area.
Implicit in the justifications urged for the project is the premise that we may recognize that the benign purposes of the project should be permitted to continue because the Wilderness Act resulted from a _compromise_ of the legislature. But regardless of any tradeoffs considered by Congress in enacting the Wilderness Act, we interpret and apply the language chosen by Congress, for that language was chosen in order to incorporate and effectuate those tradeoffs. The plain language of the Wilderness Act states that there shall be _no commercial enterprise_ within designated wilderness. 16 U.S.C. § 1133(c) (emphasis added). This mandatory language does not provide exception to the prohibition on commercial enterprise within wilderness if aimed at achieving a benign goal for commerce with modest impact on wilderness. That compromises may have been made in the legislative process does not alter an analysis of Congress's words of proscription based on traditional canons of statutory construction.

We must abide by Congress's prohibition of commercial enterprise in wilderness and may not defer to the contrary interpretation argued by the USFWS. In light of the clear statutory mandate, the Wilderness Act requires that the lands and waters duly designated as wilderness must be left untouched, untrammeled, and unaltered by commerce. By contrast, the Enhancement Project is a commercial enterprise within the boundaries of a designated wilderness and violates the Wilderness Act.

III

As an alternative holding in support of our decision, even if we were to assume that the Wilderness Act's prohibition on commercial enterprise within the wilderness is ambiguous, we would reach the same conclusion that the Enhancement Project offends the Wilderness Act. Assuming ambiguity in the scope of the prohibition, under _Mead_ agency action is not entitled to heightened _Chevron_ deference unless the agency can demonstrate that it has the general power to _make rules carrying the force of law_ and that the challenged action was taken _in the exercise of that authority_. _Mead_, 533 U.S. at 226-27. Administrative interpretations not meeting these standards are entitled not to deference, but to a lesser _respect_ based on the persuasiveness of the agency decision. _Id._ at 228; _Skidmore_, 323 U.S. at 139-40.

Applying _Mead_, we conclude that this case involves only an agency's application of law in a particular permitting context, and not an interpretation of a statute that will have the force of law generally for others in similar circumstances. The issuance of a permit by a federal agency cannot in this case be characterized as the exercise of a congressionally delegated legislative function. _Mead_, 533 U.S. at 229-30. Even when

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14The Regional Solicitor's opinion on which USFWS relied urges that _[the Wilderness Act] is a legislative compromise that by no means reflects pure or absolute preservationism._
considered together, the Special Use Permit and the underlying documents 
supporting it do not _bespeak the legislative type of activity that would naturally bind 
more than the parties to the ruling._ _Id._ at 232.

Pursuant to the NEPA process, the USFWS issued several documents before 
granting the CIAA a Refuge Special Use Permit for the Enhancement Project. These 
documents included the EA, a Mitigated Finding of No Significant Impact, a 
Wilderness Act Consistency Review, and a Compatibility Determination. Only the 
Consistency Review and Compatibility Determination contain legal analysis of the 
Wilderness Act. Both the Consistency Review and the Compatibility Determination 
speak in terms specific to the Enhancement Project, and do not address general 
principles of law. *** Nothing in the review documents or the Solicitor's opinion would 
bind the USFWS to permit a similar activity in another wilderness.

We recently stated *** that _[l]nterpretations such as those in opinion letters ... do not 
warrant Chevron-style deference._ _Turtle Island Restoration Network v. Nat'l Marine 
Fisheries Service, 340 F.3d 969, 975 n. 10 (9th Cir.2003) (quoting Christensen v. 
Harris County, 529 U.S. 576, 587(2000))._ The Solicitor's opinion relied upon by the 
USFWS in issuing the Special Use Permit to CIAA was not a document intended to 
have the general force of law. See generally Robert A. Anthony, Which Agency 
Interpretations Should Bind Citizens and the Courts?, 7 Yale J. on Reg. 1, 58 (1990) 
(surveying the landscape of deference to agency action and concluding that 
_[l]nterpretations presented in [opinion letters] do[ ] not have the force of law_). 
Neither can the project-specific documents that rely upon this opinion be considered 
to carry the general force of law.

Under _Mead_ and _Skidmore_, the weight that we are to give an administrative 
interpretation not intended by an agency to carry the general force of law is a function 
of that interpretation's thoroughness, rational validity, and consistency with prior and 
subsequent pronouncements. _Skidmore_, 323 U.S. at 140. _Mead_ adds as other 
relevant factors the _logic[] and expertness_ of an agency decision, the care used in 
reaching the decision, as well as the formality of the process used. _Mead_, 533 U.S. at 116

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16There has been judicial suggestion that Solicitor's opinions specifically are 
not entitled to _Chevron_ deference. _Manning v. United States_, 146 F.3d 808, 814 n. 4 
(10th Cir.1998) (addressing a Department of the Interior Solicitor's opinion regarding 
the Multiple Use Mining Act of 1955). In terms of the principles set forth in _Chevron_ 
and _Mead_, we likewise conclude that Solicitor's opinions, helpful as they may be to 
agencies which study them, cannot properly be viewed as an administrative agency 
interpretation of statute that has the force of law. Such opinions, which normally are 
the product of individual lawyers advising their client agencies, and which do not in 
their formulation involve procedural protections comparable to an agency's 
rulemaking procedures, do not invoke _Chevron_ deference.
228, 235. Even if we assume the Wilderness Act’s prohibition on commercial enterprise to be ambiguous, the USFWS’s permitting of the Enhancement Project goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear, Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 481 (2001). Whatever else might be done permissibly within wilderness in extraordinary circumstances for purposes relating to conservation or preservation of the wilderness, we conclude that it is quite clear that conduct with the primary purpose and effect to aid commercial enterprise cannot be countenanced.

Moreover, the USFWS’s decision-making process shows little attention to the precise question of whether the Enhancement Project is a commercial enterprise. *** [1]he issue of commercial enterprise was not addressed explicitly by the Solicitor’s opinion upon which the USFWS relied; the Solicitor’s opinion cannot be considered persuasive on interpretation of a statutory term that it does not discuss with specificity. And the record before the agency in our view supports a conclusion squarely contrary to that reached by the USFWS.

The final USFWS decision that the Enhancement Project is not a commercial enterprise contains little analysis of the commercial enterprise issue. Relying on the Regional Solicitor’s opinion, the Wilderness Act Consistency Review devotes only a few sentences to the question of whether the Enhancement Project is a commercial enterprise, concluding that close state regulation of the project obviates the commercial enterprise issue. We have concluded to the contrary that state regulation does not preclude characterizing as a commercial enterprise an activity with the primary purpose and effect to benefit commerce. The USFWS analysis on consistency was not thorough, see Skidmore, 323 U.S. at 140, and we are not impressed by persuasiveness of the agency’s position, See Mead, 533 U.S. at 228. We do not consider the USFWS decision to have significant rational validity, Skidmore, 323 U.S. at 140, or to reflect the product of specialized agency expertise. Mead, 533 U.S. at 228, 235.

Having considered the Mead and Skidmore factors, we are not persuaded by the agency’s analysis. We hold, alternatively, that even if the term commercial enterprise within designated wilderness is ambiguous, the Enhancement Project under the total circumstances is a prohibited commercial enterprise within wilderness.

18Plaintiffs also assert that the Enhancement Project violates the Wilderness Act’s requirement that any action taken within a federally-designated wilderness area preserve the natural conditions that are a part of the wilderness character of such an area, 16 U.S.C. §§ 1131, 1133, and also that the project violates the Refuge Act’s mandate that special use permits be issued only after a determination that such uses are compatible with the major purposes for which such areas were established, 16 U.S.C. § 668dd(d)(1)(A). Because we have determined that the
Plaintiffs were entitled to prevail on their motion for summary judgment * * * [and] to gain a final judgment enjoining operation of the Tustumena Lake Sockeye Salmon Enhancement Project.

REVERSED and REMANDED for further proceedings not inconsistent with this opinion.

NOTES AND QUESTIONS

1. Is the interpretation of "commercial enterprise" offered here reasonable? Should it turn on the physical impact of the commercial enterprise in the wilderness, or the degree of psychological intrusion"? Should the Court have deferred to the agency, especially since this seemed to be a case of first impression, with an ambiguous statute? (That was essentially the approach of the district court, and the majority of the Ninth Circuit panel which first heard this case, before it was reviewed en banc.)

2. The Ninth Circuit's en banc decision was, remarkably, unanimous. In recent years this Circuit decisions have fairly often splintered along ideological lines between liberals and conservatives on a variety of issues. The luck of the draw resulted here in a rather uniform lineup of "green" judges. Because of the large amount of federal lands in most of the states in the Ninth Circuit, it is seen as the most important federal circuit on federal land and natural resource issues. The population of most of the states in the Circuit has been growing much faster than the national average, and its caseload and its size has grown correspondingly. In recent years many proposals have been made, mostly by ideological conservatives, to split the Circuit in two. Federal lands issues have been an important part of this debate, as members of Congress from more conservative states like Idaho and Arizona have chafed at the dominance of judges from more populated, greener states, especially California.

3. Look at the treatment in footnote 13 of the "within the wilderness" issue. Are you persuaded by the Court's "slippery slope" argument? Is there a reasoned basis for distinguishing between logging inside a wilderness and the salmon enhancement project at issue here? How about a project that removed genetic material from a rare
district court erred in granting summary judgment to the USFWS, because the Enhancement Project is a prohibited commercial enterprise, we need not and do not consider these additional claims.

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plant found only within a wilderness, and generated a commercially valuable product in a laboratory outside the wilderness. Cf. the Edmonds Institute case, casebook, p. 1073. Does this leave the wilderness “untouched” by commerce?

4. Look closely at part III of the Opinion. The Wilderness Act does not explicitly authorize land managing agencies to issue regulations to carry out the Act. If it did, would the result have been the same? Even though the Act may not authorize regulations, could the U.S. Fish & Wildlife Service here, with more careful attention to the issues presented, have made a persuasive case that issuing the permit was consistent with the Wilderness Act?

5. The Court did not address the consistency or compatibility of this project with the National Wildlife Refuge Act. See footnote 18. Is it compatible? See pp. 882-87 of the Casebook. Here the compatibility determination was made by the Refuge Manager, presumably using his “sound professional judgment,” see p. 882. The legal standard applied was whether the project significantly conflicted with Refuge purposes, not whether it contributed to or advanced Refuge purposes. Is that the correct interpretation of the Act? A permissible interpretation of the Act?

6. In High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630 (9th Cir. 2004), the Court upheld an injunction against the U.S. Forest Service, based on inadequate compliance with NEPA, in renewing special use permits to outfitters taking large pack groups with stock into wilderness. The court upheld the agency's finding under the Wilderness Act that allowing large pack groups was a “necessary" commercial service under §1133(d)(5), but faulted the agency for failing to show that the number of permits granted was no more than necessary to achieve the goals of the Act, and its renewal of permits “in the face of documented damage resulting from overuse does not have rational validity,” and that summary judgment was inappropriate on this issue. It found that the ultimate purpose of the Act was “long-term preservation of wilderness areas,” and concluded that—despite the “diverse, and sometimes conflicting list of responsibilities imposed [by the Act] on administering agencies," and despite its emphasis on the importance of wilderness areas as places for the public to enjoy," public use should be restricted if it “would impair their future use as wilderness.” 390 F.3d at 638 (emphasis in original). See also Wilderness Watch v. Mainella, 375 F.3d 1085 (11th Cir. 2004).