

The National Agricultural
Law Center



University of Arkansas
System Division of Agriculture

NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

**“Nothing Beside Remains”: The Legal Legacy of
James G. Watt’s Tenure as Secretary of the
Interior on Federal Land Law and Policy**

Part I

by

George Cameron Coggins and Doris K. Nagel

Originally published in BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW
REVIEW

17 B.C. ENVTL. AFF. L. REV. 473 (1990)

www.NationalAgLawCenter.org

**“NOTHING BESIDE REMAINS”: THE LEGAL LEGACY
OF JAMES G. WATT’S TENURE AS SECRETARY OF
THE INTERIOR ON FEDERAL LAND LAW AND
POLICY**

*George Cameron Coggins**
*Doris K. Nagel***

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

* Frank Edwards Taylor Professor of Law, University of Kansas. J.D. 1966, University of Michigan; A.B. 1963, Central Michigan University. The authors are grateful for the financial support of the University of Kansas General Research Fund and for the research assistance of Charles Cavenee, J.D. 1988, University of Kansas.

** Associate Attorney, Sidley & Austin, Washington, D.C. J.D. 1988, University of Kansas; M.S. 1984, University of Wisconsin; B.A. 1980, University of Illinois.

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

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

Percy Bysshe Shelley, *Ozymandias*, 1817¹

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

were conservatives grappling with a slew of new environmental mandates.⁸ Secretary Hickel stood out in that transition period both for his advocacy of change and for his dismissal as a result.⁹ Secretary Andrus' tenure under President Carter solidified the conservation gains of preceding administrations. By use of statutory withdrawal powers¹⁰ and new allocation policies more in line with the new statutory structure,¹¹ Secretary Andrus moved resource protection closer to the top of Interior's priority list.

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

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

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

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

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

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

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

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

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

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

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

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

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

II. THE DEPARTMENT AND MR. WATT: AN INTRODUCTION

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

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

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

¹⁴ See *infra* notes 203-06, 309-11 and accompanying text.

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

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

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

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

A. *The Department of the Interior*

1. History

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

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

¹⁶ See Leshy, *supra* note 4, at 251.

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

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

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

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

The Interior Department also was responsible for overseeing the large grants to the transcontinental railroads²³ and small grants to individual homesteaders²⁴ by which the West was settled. Implementation of both programs was marked by fraud, corruption, laxness, and perjury, but a degree of lawlessness generally was tolerated in the era following the Civil War.²⁵ The massive transcontinental railroad grants ended in 1871,²⁶ and homesteading ceased for all practical purposes in 1934.²⁷

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

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

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

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

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

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

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

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

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

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

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

lowstone National Park in 1872, the Department was powerless to manage the area as a park until much later,²⁹ and the National Park Service (NPS or Park Service), now the most visible agency in the Department, did not see birth until 1916.³⁰ Similarly, while wildlife refuges were reserved as early as 1903, the Department did not have an agency (now the Fish and Wildlife Service) devoted to their management as refuges until 1940.³¹ In 1902, the Reclamation Act created the Bureau of Reclamation (BuRec), which has since constructed an immense system of dams and diversions for irrigation in the West.³²

The Interior Department still retains most of its historic functions. The Bureau of Land Management (BLM), the unhappy product of a 1946 merger of the Grazing Service and the General Land Office, administers the few remaining programs whereby individuals, corporations, and political entities can gain title to federal land.³³ The BLM also oversees mineral locations under the General Mining Law of 1872,³⁴ leases various minerals under various laws,³⁵ and issues permits for livestock grazing on the public lands,³⁶ among other tasks.³⁷ In addition to housing the NPS, the FWS, the BLM, BuRec, and other agencies,³⁸ the Department has its own legal³⁹ and

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

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

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

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

³² See Kelley, *Staging a Comeback—Section 3 of the Reclamation Act*, 18 U.C. DAVIS L. REV. 97 (1984); Taylor, *California Water Project: Law and Politics*, 5 ECOLOGY L.Q. 1 (1975).

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

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

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

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

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

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

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

adjudicative⁴⁰ arms, and was given the task of surface mining regulation in 1977.⁴¹

2. The Mixed Mandate

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

The National Park Service empire has steadily grown; it now encompasses monuments, recreation areas, rivers, battlefields, gateway and urban parks, and a variety of other special areas, in addition to the "flagship" national parks.⁴² The basic Park Service mandate is limited to preservation and recreation⁴³—sometimes internally inconsistent management objectives—and many units within the park system are governed by specific management statutes.⁴⁴ Resource conflicts in national parks are litigated relatively rarely. One prominent dispute concerned the allocation of rafting privileges on the Colorado River through Grand Canyon National Park; the courts upheld the quota system devised by the NPS.⁴⁵

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵³ Wilderness Act, 16 U.S.C. §§ 1131-1136 (1988).

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

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

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

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

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

One other agency, although not within the Department of the Interior, deserves mention. The Department of Agriculture houses the Forest Service, which has managed the 190 million acres of reserved forest lands since 1905.⁶¹ The Forest Service has encountered the same conflicts between preservation and development that bedevil Interior. It too has been forced to reassess its practices in light of new statutory emphases on preservation and multiple use.⁶²

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

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

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

⁶⁰ See *infra* note 321.

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

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

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

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

3. Secretarial Discretion

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

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

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

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

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

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

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

⁶⁸ See *infra* note 252 and accompanying text.

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

In the era of conservation, Congress greatly broadened secretarial discretion. Although the Yellowstone⁷¹ and National Park System⁷² Acts strictly limited the purposes of park management, they gave the Secretary considerable leeway in the means used to achieve those purposes. Laws of 1891⁷³ and 1906⁷⁴ granted the President authority to decide which lands merited protection as forests and monuments, and the 1910 Pickett Act allowed the executive branch to withdraw any public land for any purpose it deemed public.⁷⁵ The 1920 Mineral Leasing Act⁷⁶ made fuel mineral exploitation dependent upon an initial secretarial decision whether to lease or to grant prospecting permits, and also authorized the Secretary to attach conditions to leases.⁷⁷ The leasing model was followed and extended to subsequent energy mineral legislation.⁷⁸ The 1934 Taylor Grazing Act contained some guidelines for grazing permit issuance but essentially left the matter to the Secretary's judgment.⁷⁹ Although not confirmed by a general statute until 1966, secretarial authority to manage wildlife refuges long was assumed to be without significant limitation.⁸⁰ Departmental discretion has never been as broad as that of the Forest Service under its 1897 Organic Act,⁸¹ coupled with the 1960 Multiple-

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

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

⁷¹ *Yellowstone National Park Protection Act*, 16 U.S.C. §§ 21-40c (1988).

⁷² *National Park Service Act*, 16 U.S.C. §§ 1-18(f) (1988).

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

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

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

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

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

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

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

⁸⁰ See *Greenwalt*, *supra* note 46.

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

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

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

Just as significantly, perhaps, courts since the 1969 *Parker v. United States*⁹¹ decision have evinced a willingness to confine secretarial discretion within statutory bounds⁹²—a very important reversal of earlier judicial laissez-faire attitudes.⁹³ Other judicial doctrines such as implied reserved water rights⁹⁴ and the public trust⁹⁵

⁸² 16 U.S.C. §§ 528–531 (1988).

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

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

⁸⁵ 16 U.S.C. §§ 1531–1544 (1988).

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

⁸⁷ 16 U.S.C. §§ 1131–1136 (1988).

⁸⁸ 16 U.S.C. §§ 1271–1287 (1988).

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

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

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

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

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

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

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

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

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

B. James Gaius Watt

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. PRIVATIZING THE PUBLIC LANDS

AMBITION, *n.* An overmastering desire to be vilified by enemies while living and made ridiculous by friends when dead.

DUTY, *n.* That which sternly impels us in the direction of profit, along the line of desire.

MORAL, *adj.* Conforming to a local and mutable standard of right. Having the quality of general expediency.

Ambrose Bierce, *The Devil's Dictionary*, c. 1911¹¹⁰

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

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

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

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

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

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

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

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

As Secretary of the Interior, Mr. Watt did not openly espouse the more extreme aims of the Sagebrush Rebellion—which, by 1982, was petering out as a political force from its own internal inconsistencies and unpopularity.¹¹³ The courts also assisted in the movement's interment by holding that Nevada had no legal claim to federal lands within its borders¹¹⁴ and that the general twelve-year statute of limitations barred state claims of title against federal property.¹¹⁵

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

A. *The Sagebrush Rebellion and Privatization*

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

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

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

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

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

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

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

land.¹¹⁷ While some of the tracts were in the national forests¹¹⁸ or under the jurisdiction of various other agencies, the bulk of the lands proposed for sale were managed by Interior's Bureau of Land Management. James Watt was the main proponent of the plan and thus the focus of the controversy. Disposition versus retention of the public lands was hardly a new issue, but this was a new approach to it.

1. The Sagebrush Rebellion

The recent Sagebrush Rebellion had its roots in the settlement of the West, when the federal government long attempted to dispose of western lands through such legislation as the Homestead Act of 1862,¹¹⁹ the Timber and Stone Lands Act of 1878,¹²⁰ the Desert Lands Act of 1877,¹²¹ the General Mining Law of 1872,¹²² and the Stock-Raising Homestead Act of 1916.¹²³ All of these laws gave lands to anyone meeting, or claiming to meet, their minimal legal conditions.¹²⁴ Much land remained unclaimed into the 1930s, however, because it was unsuitable for agriculture, forestry, or mining.¹²⁵ By this time, national land policy had shifted away from unfettered disposal toward permanent retention and management of public domain lands. The Taylor Grazing Act of 1934,¹²⁶ although facially an interim measure, actually ended the disposal era, leaving several hundred million acres of unreserved public domain land in long-term federal ownership.¹²⁷

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

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

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

¹¹⁹ 43 U.S.C. §§ 161-284 (repealed 1976).

¹²⁰ 43 U.S.C. §§ 311-313 (repealed 1891).

¹²¹ 43 U.S.C. §§ 321-339 (1982).

¹²² 30 U.S.C. §§ 21-28 (1982).

¹²³ 43 U.S.C. §§ 291-302 (repealed 1976).

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

¹²⁵ See *id.* at 110.

¹²⁶ 43 U.S.C. § 315-315r (1982).

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

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

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

Even so, federal ownership of land has long been a sore point in the West. The seeds of the most recent Sagebrush Rebellion, which began around 1976, were sown by new constraints on western resource development,¹³² by the Federal Land Policy and Management Act of 1976, and by a streak of general cussedness in some public land users. The Rebellion was marked by bills in state legislatures¹³³ and in the Congress¹³⁴ to transfer the BLM lands, or, alternatively, the BLM and the Forest Service lands, from the federal government to the states.¹³⁵ The FLPMA, by formally adopting the policy that the public or BLM lands would be retained, was the ostensible reason for the controversy.¹³⁶ Further, the FLPMA forced the BLM into an unfamiliar new role as multiple use manager and planner of vast national resources,¹³⁷ meaning that the agency likely would become less responsive to the local mining and grazing interests who were the main leaders of the Rebellion. Anti-regulatory attitudes are

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

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

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

¹³¹ J. LESHY, *supra* note 17, at 64-67.

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

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

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

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

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

¹³⁷ See Coggins, *supra* note 57, at 32-33.

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

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

2. Privatization

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

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

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

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

¹⁴¹ See *id.*

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

¹⁴³ Mr. Watt stated in his confirmation hearings:

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

Drew, *supra* note 97, at 104.

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

With cooperation and encouragement from Secretary Watt, the PRB soon released an inventory of lands for sale that included 4.4 million acres of BLM lands. The sale plan was developed without a hearing or any rulemaking procedures. In July, 1982, the PRB announced that the General Services Administration (GSA) would sell 307 parcels totalling 60,000 acres.¹⁴⁶ The Board projected that its sales program would generate receipts of \$1.3 billion in fiscal year 1983, and more than \$4.25 billion in each of fiscal years 1984-87.¹⁴⁷ By contrast, prior GSA receipts from sales of surplus property only amounted to \$60 million annually.¹⁴⁸

The PRB's plan soon ran into major legal and political obstacles. Conservation organizations filed suit, alleging that the Board's proposed sale required preparation of an environmental impact statement (EIS), and that the Administrative Procedure Act¹⁴⁹ required notice of the PRB regulations governing the sale.¹⁵⁰ In May, 1984, the United States District Court for the District of Massachusetts rejected several of the plaintiffs' substantive claims,¹⁵¹ but ruled that the PRB was an "agency" for NEPA purposes and that the sale constituted a major federal action requiring a programmatic EIS prior to any land sales.¹⁵² Further, the PRB must give notice and an opportunity for hearing before promulgating rules and regulations.¹⁵³

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

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

¹⁴⁵ See 3 C.F.R. 134-35 (1982).

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

¹⁴⁷ *Harper*, 587 F. Supp. at 362.

¹⁴⁸ *Id.* at 362-63.

¹⁴⁹ 5 U.S.C. §§ 551-559, 701-706 (1988).

¹⁵⁰ *Harper*, 587 F. Supp. at 363-65.

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

¹⁵² *Harper*, 587 F. Supp. at 362-65.

¹⁵³ *Id.* at 367-68.

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

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

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

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

¹⁵⁵ *Id.* at 620.

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

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

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

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

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

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

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

B. The Moratorium on Parkland Acquisition and the Hit List

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

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

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

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

¹⁶² *Id.*

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

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

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

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

¹⁶⁷ Land and Water Conservation Act of 1964, 16 U.S.C. §§ 4601-4 to -11 (1982). The LWCF was established in 1964 to alleviate the necessity of obtaining appropriations for parks from general revenues. The money comes from earmarked receipts from various sources, including offshore oil and gas leases. The LWCF has two components—grants to state governments and money for land acquisition by the NPS, FWS, BLM, and USFS. Originally, the Fund was authorized at \$50 million; by 1970, it had grown to \$300 million. See Futrell, *Parks to the People: New Directions for the National Park System*, 25 EMORY L.J. 255, 262-63 (1976). When Mr. Watt took office, annual authorizations approached \$1 billion. See Glicksman & Coggins, *Federal Recreational Land Policy: The Rise and Decline of the Land and Water Conservation Fund*, 9 COLUM. J. ENVTL. L. 125, 160 (1983).

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

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

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

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

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

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

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

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

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

¹⁷⁴ *Id.* at 126–27.

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

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

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

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

did not take that combination of factors adequately into account. Although the Secretary used GAO reports critical of federal land acquisition policies¹⁷⁹ as ammunition for his crusade, he might have been more successful had he also followed the GAO's recommendations to substitute or supplement outright acquisition with the purchase of easements and management agreements with private landowners to permit more effective management of the national park lands.¹⁸⁰ He might also have taken a lesson from the reaction to President Carter's unpopular "hit list" of water development projects. Because Secretary Watt failed to heed history, law, and politics, the ideological pendulum did not swing back appreciably.

C. The St. Matthew's Island Exchange

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

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

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

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

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

¹⁸² 16 U.S.C. §§ 3101-3233 (1982).

¹⁸³ See *id.* § 3192(h).

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

St. Matthew's, an uninhabited island in the Aleutians, has been a wildlife refuge since 1909 and a wilderness area since 1970.¹⁸⁵ Mr. Watt proposed to exchange a portion of the island for inholdings in other Alaskan wildlife refuges owned by Native corporations.¹⁸⁶ The purpose of the exchange was to facilitate oil and gas development in the area. The Native corporations would lease the exchanged lands to oil companies for an air support base, refinery, and natural gas processing facility.¹⁸⁷

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

¹⁸⁵ *Id.* at 828.

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

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

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

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

¹⁹⁰ *Id.* at 835-36.

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

The decision to proceed was therefore an enjoined abuse of discretion.¹⁹²

The St. Matthew's Island lawsuit not only halted a small part of Mr. Watt's resource development program, it also set a precedent of potentially historic proportions. Courts, of course, have long assessed public interest considerations both in ascertaining substantive authority¹⁹³ and in evaluating procedural remedies.¹⁹⁴ But the St. Matthew's Island case apparently is the first instance in which a court has reviewed in depth a formal public interest determination necessary to perform an otherwise discretionary function by the Secretary and found the determination to be so lacking in substance as to be arbitrary and capricious. Given the vast number of statutes that refer to the public interest as a (or the) factor in decisionmaking,¹⁹⁵ the court's opinion could have important implications.

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

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

¹⁹² *Id.* at 827.

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

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

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

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

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

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

D. Project Bold

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

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

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

¹⁹⁸ *Interior Characterizes Talks*, *supra* note 196, at 911-12.

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

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

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

²⁰² *Id.*

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

²⁰⁴ *Id.* at 5.

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

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

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

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

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

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

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

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

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

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

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

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

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

The Sagebrush Rebellion now is little more than a faint memory, disowned by all save a clique of ideological economists.²¹² Secretary Watt's post-Sagebrush privatization efforts similarly went down in inglorious flames, and even his defensive strategy of refusing to purchase new parkland was immediately disavowed by his successor. While conservationists may justly regard the failure of privatization as a gain for the conservation cause, they should also be dismayed that Project Bold, a good idea whose time ought to have come, was thrown out with the bathwater. In any event, the 1976 congressional decision to retain the public lands in federal ownership²¹³ has been emphatically reaffirmed by these developments, and the pendulum of federal land history ultimately was unaffected.

IV. RECLASSIFYING THE PUBLIC LANDS

Who overcomes
By force, hath overcome but half his foe.

John Milton, *Paradise Lost*²¹⁴

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

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

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

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

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

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

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

A. Terminating Classifications and Revoking Withdrawals

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

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

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

²¹⁷ *United States v. Midwest Oil Co.*, 236 U.S. 459, 477-81 (1915).

Act of 1910²¹⁸ authorized the President to withdraw lands from all uses except metalliferous entry when the President thought withdrawal would serve a public purpose, but later decisions held that the Pickett Act did not restrict presidential power to withdraw land even from metalliferous entry so long as Congress continued to acquiesce.²¹⁹

Many early withdrawals (for military use, bird sanctuaries, and so forth) became permanent reservations, and the ad hoc executive exercises of the withdrawal power from 1910 to 1976 closed a substantial part of the erstwhile public domain to the prohibited uses enumerated in the withdrawal orders.²²⁰ The Taylor Grazing Act of 1934²²¹ and the 1964 Classification and Multiple Use Act (CMUA)²²² direct the BLM to "classify" lands for certain purposes,²²³ and the classifications remained after the CMUA expired in 1970. The uses prohibited by withdrawals and classifications often include mineral location and mineral leasing as well as settlement. By 1976, the map of the public lands was a crazyquilt of new and old withdrawals and classifications, many of which were overlapping and obsolete.²²⁴

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

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

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

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

²²¹ 43 U.S.C. §§ 315-315r (1982).

²²² *Id.* §§ 1411-1418 (1970) (expired 1970).

²²³ *Id.* §§ 315j, 1411.

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

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

²²⁶ *Id.* §§ 1712(a), 1739(e).

²²⁷ *Id.* § 1740.

²²⁸ *Id.* § 1714(l).

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

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

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

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

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

²³² *Id.* at 1615.

²³³ 43 U.S.C. § 1712(d) (1982).

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

²³⁵ 23 Env't Rep. Cas. (BNA) at 1614-15.

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

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

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

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

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

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

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

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

²⁴⁰ 23 Env't Rep. Cas. (BNA) at 1616.

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

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

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

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

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

B. Paring Down the BLM Wilderness Study

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

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

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

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

²⁴⁷ 43 U.S.C. § 1782 (1982).

²⁴⁸ *Id.* § 1782(a).

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

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

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

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

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

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

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

²⁵⁴ 60 IBLA 305 (Dec. 18, 1981).

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

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

Id. (emphasis in original).

²⁵⁶ 61 IBLA 300 (Feb. 3, 1982).

²⁵⁷ *Id.* at 307.

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

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

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

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

²⁵⁹ 64 IBLA 27, 33 (May 6, 1982).

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

²⁶¹ 47 Fed. Reg. 58,372 (1982).

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

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

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

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

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 335.

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

²⁶⁷ 608 F. Supp. at 333.

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

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

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

²⁶⁸ *Id.* at 340.

²⁶⁹ *Id.* at 341-42.

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

²⁷¹ 608 F. Supp. at 341-42.

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

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

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

C. Transferring Jurisdiction

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

1. The Arctic National Wildlife Refuge

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

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

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

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

²⁷⁷ 16 U.S.C. §§ 3101–3233 (1988).

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

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

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

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

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

²⁸¹ 524 F. Supp. at 1307.

²⁸² *Id.* at 1310.

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

²⁸⁴ 524 F. Supp. at 1304-05.

²⁸⁵ 16 U.S.C. § 668dd (1988).

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

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

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

2. The Matagorda Island Transfer

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

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

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

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

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

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

²⁹² See S. REP. NO. 176, 98th Cong., 1st Sess. (1983), Appendix.

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

²⁹⁴ *Id.*

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

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

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

3. The BLM/Forest Service Land Exchange Proposal

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

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

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

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

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

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

use, sustained yield statutory mandates,³⁰¹ unlike the “dominant use” commands to the National Park Service³⁰² and the Fish and Wildlife Service.³⁰³ The Forest Service, as its name implies, traditionally has been viewed as the nation’s timber resources manager,³⁰⁴ while the BLM historically has been associated with grazing regulation.³⁰⁵ But both agencies manage large tracts of grazing and timber lands; both have a say in hardrock mining-claim location and oil, gas, and coal leasing; both must cater to recreation demands; and both manage wilderness areas.³⁰⁶ The interrelationship between the two agencies is geographical as well, because their lands are contiguous and even intermingled in many areas.³⁰⁷

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

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

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

³⁰² 16 U.S.C. § 1 (1988).

³⁰³ *Id.* § 668dd.

³⁰⁴ *E.g.*, Huffman, *supra* note 61.

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

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

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

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

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

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

disapproval, as did some western states and environmental groups.³¹¹ Congress expressed its displeasure through the appropriations process by voting to prohibit any exchange before October 1, 1985.³¹² In the face of nearly universal antagonism, this exchange, like Project Bold, was shelved. Congress resurrected the idea in 1988 by authorizing an exchange between the agencies limited to lands in Nevada.³¹³ If Secretary Watt had only proceeded openly, with full public participation, and perhaps more incrementally, the streamlining project as a whole might have stood a better chance of general acceptance.

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

V. PRIVATIZING RESOURCES AND DEREGULATING PUBLIC LAND USERS

There is this trouble about special providences—namely, there is so often a doubt as to which party was intended to be the beneficiary.

Mark Twain, *Pudd'nhead Wilson*³¹⁴

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

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

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

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

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

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

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

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

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

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

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

³¹⁷ See *infra* notes 344-67 and accompanying text.

³¹⁸ See *infra* notes 379-411 and accompanying text.

³¹⁹ See *infra* notes 481-505 and accompanying text.

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

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

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

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

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

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

³²³ See *infra* notes 506-24 and accompanying text.

³²⁴ See *infra* notes 412-42 and accompanying text.

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

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

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

A. Mineral Leasing

Hardrock minerals in the national forests and "public domain" lands can be acquired free of charge by any prospector who discovers them and locates a claim under the 1872 General Mining Law.³²⁷ Coal, however, has never been subject to location, and, starting in 1920, Congress has removed fuel, chemical, and other types of minerals from the location system in favor of mineral leasing.³²⁸ The 1920 Mineral Leasing Act³²⁹ was the model for later legislation governing outer continental shelf minerals,³³⁰ geothermal resources,³³¹ and acquired lands.³³² If a hardrock mineral prospector locates a valid claim, the Department may impose some controls on exploration and extraction methods, but it cannot regulate so strictly as to deny or unduly restrict the established right.³³³ Mineral leasing of all kinds, however, is almost completely at the discretion of the Secretary until a prospecting permit or lease actually issues.³³⁴ Even after lease issuance, the Department retains broad powers of control over lessee operations.³³⁵ Mr. Watt determined to accelerate mineral

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

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

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

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

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

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

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

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

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

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

1. Offshore Oil and Gas Leasing

Echoing the petroleum industry position, Secretary Watt declared at the outset of his tenure that national security demanded accelerated offshore oil and gas leasing.³³⁶ His announced plans, however, exceeded even the most optimistic industry hopes: he decided to lease the entire billion-acre outer continental shelf within five years.³³⁷ Had that plan been carried out, all offshore fuel mineral resources would have been "privatized" in a short span of time. By contrast, the Department had leased only forty-two million acres in the preceding twenty-eight years³³⁸ under the 1953 Outer Continental Shelf Lands Act (OCSLA).³³⁹ State opposition, congressional obduracy, judicial interference, and dry holes conspired to thwart Mr. Watt's grandiose leasing scheme.

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁴³ See *infra* notes 374-78 and accompanying text.

³⁴⁴ 43 U.S.C. § 1332(3) (1982).

³⁴⁵ *Id.* § 1344(a).

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

³⁴⁷ *Id.* § 1340.

³⁴⁸ *Id.* § 1351 (1982).

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

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