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

Part II

by

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Lands Conservation Act.[351] Of special interest is the Coastal Zone Management Act of 1972 (CZMA),[352] as implemented by the coastal states. The CZMA generally provides, among other things, that if a coastal state develops an approved coastal zone management plan, federal activities that "directly affect" the coastal zone must be certified as consistent with the state plan.[353] Those statutes in combination have complicated offshore leasing considerably. As Secretary Watt entered office, for instance, the Court of Appeals for the District of Columbia Circuit enjoined the implementation of his predecessor's more modest five-year leasing plan.[354]

Secretary Watt sought to simplify the process. The final version of the ultimately ambitious Watt plan was announced on July 21, 1982.[355] Despite criticism of earlier drafts, the final plan was very similar to the original proposal.[356] The final plan emphasized provisions to "streamline" lease procedures,[357] with a single EIS covering millions of acres and new bidding procedures that contained few safeguards against poor market conditions and below-market lease sale receipts.[358] Ensuing litigation, claiming failure to comply with fair market value provisions and to provide adequate environmental safeguards, was unavailing.[359] Similarly, the Supreme Court in 1981 held that bidding methodology remained largely within secretarial discretion.[360]

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351 16 U.S.C. §§ 3101–3233 (1988). *See* Amoco Prod. Co. v. Village of Gambell, 107 S. Ct. 1396, 1397 (1987).

352 16 U.S.C. §§ 1451–1464 (1988).

353 *Id.* §§ 1454, 1456(c)(1).

354 California v. Watt, 668 F.2d 1290, 1325–26 (D.C. Cir. 1981).

355 *See Watt Plan, supra* note 336, at 420–21.

356 Comment, *supra* note 338, at 99, 102. The initial proposal was published in April, 1981. 46 Fed. Reg. 22,468 (1981).

357 *Interior Makes Final Regulations to Streamline OCS Leasing Program,* 13 Env't Rep. (BNA) 280 (June 25, 1982). The original proposal also emphasized "streamlining." *See Interior's Streamlined OCS Schedule Calls for Tiering Environmental Studies,* 11 Env't Rep. (BNA) 2245, 2246 (Apr. 24, 1981).

358 *See* COMM'N ON FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RESOURCES, FISCAL ACCOUNTABILITY OF THE NATION'S ENERGY RESOURCES 13–38 (1982) (management problem in royalty collection); Davis, Wilen & Jergovic, *Oil and Gas Royalty Recovery Policy on Federal Indian Lands,* 23 NAT. RESOURCES J. 391 (1983); Editorial, *A Federal Fire Sale,* Wash. Post, May 12, 1982, at A22. Despite the passage of the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701–1757 (1982 & Supp. V 1987), creation of the Mineral Management Service, 47 Fed. Reg. 28,368 (1982), both designed to improve the management and fiscal accountability of OCS revenues, underpayment of lease royalties continues and may be getting worse. *See* Shapiro, *Sagebrush and Seaweed Robbery: State Revenue Losses from Onshore and Offshore Federal Lands,* 12 ECOLOGY L.Q. 481, 489–91 & n.69 (1985).

359 *See* California v. Watt, 712 F.2d 584 (D.C. Cir. 1983).

360 *See* Watt v. Energy Action Educ. Found., 454 U.S. 151, 162 (1981).

Mr. Watt's privatization blueprint for offshore resources faced a wide spectrum of opposition, and even many oil companies regarded the idea as far too much, far too soon.[361] States objected to Mr. Watt's brand of new federalism when he insisted on leasing in areas that the affected states thought too risky, and litigation exploded.[362] As in its other resource disposition programs, the Department sometimes attempted to circumvent procedural requisites, and a series of injunctions ensued.[363]

Congress also rebelled, declaring moratoria on certain lease sales and constricting or eliminating budget authority for others.[364] In addition, market conditions and nature militated against accelerated leasing during much of this period. Oil prices dropped sharply. Several leases yielded only dry holes and were abandoned.[365] Despite the streamlining, offshore oil leasing never approached Mr. Watt's billion-acre goal during the ensuing five years. The billion-acre leasing program generated more acrimony, confusion, litigation, and futility than oil and gas.

b. The Offshore Oil and Gas Lease as a Property Interest

The minor premise of Mr. Watt's major program of resource divestiture was the sanctity of private property. A lease from the government certainly qualified as private property in Mr. Watt's philosophical lexicon. Courts, however, had been eroding steadily the quantum of property rights held by offshore oil and gas lessees. In 1975, the Court of Appeals for the Ninth Circuit held that undue delay in allowing a lessee to enjoy the benefits of production from a leasehold would constitute an unconstitutional taking.[366] By 1977,

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[361] *See* Jones, *supra* note 338, at 225.

[362] *See* 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); Massachusetts v. Watt, No. 8301530 (D. Mass. filed Mar. 2, 1983); Kean v. Watt, 18 Env't Rep. Cas. (BNA) 1921 (D.N.J. 1982); North Slope Borough v. Watt, No. A82-421 (D. Alaska filed Oct. 21, 1982).

[363] *See, e.g.*, Massachusetts v. Watt, 716 F.2d at 951.

[364] Act of Oct. 12, 1984, Pub. L. No. 98-473, § 108, 98 Stat. 1837, 1853–55; Act of Nov. 4, 1983, Pub. L. No. 98-146, §§ 107–109, 113, 97 Stat. 919, 934–37, 938; Act of Dec. 30, 1982, Pub. L. No. 97-394, §§ 107–108, 96 Stat. 1966, 1982. Moratoria were continued on most of these same areas at least through fiscal year 1986. Act of Dec. 19, 1985, Pub. L. No. 99-190, § 107, 99 Stat. 1185, 1241-1243; *see* CONG. RESEARCH SERVICE, LEASING OF ENERGY RESOURCES ON FEDERAL LANDS: ENERGY, WILDERNESS AND OTHER CONCERNS 8 (Issues Brief No. IB83058) (May 22, 1984).

[365] *See, e.g.*, Massachusetts v. Watt, 716 F.2d at 951.

[366] Union Oil Corp. v. Morton, 512 F.2d 743, 750 (9th Cir. 1975); *see also* Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973) (equity required extending oil company's lease by the number of days that Secretary suspended the lease).

however, the Second Circuit Court of Appeals confirmed the ability of the Department to halt lease operations or change lease conditions after the lease issuance if circumstances encountered subsequently warranted new controls.[367] The Court of Appeals for the District of Columbia Circuit went a step further in 1980, holding that the leasing process was segmented and that environmental evaluation could occur at the later stages even if the lessee were precluded from developing the lease because of information acquired after lease issuance.[368] When Mr. Watt assumed office, therefore, he was not writing on a clean slate.

The new Secretary's desire to return resource decisionmaking to the states in practice was selective. While he frequently trumpeted the superior wisdom of states in resource allocation and regulation, he was seldom willing to listen to state voices counseling caution in resource development. One such state/federal dispute prominently featuring the CZMA landed in the Supreme Court with potentially devastating consequences for federal offshore oil and gas lessees.[369]

California, fearing another Santa Barbara disaster, objected to a lease sale planned for the nearby Santa Maria Basin. When political persuasion failed to convince the Secretary of the Interior to delete the areas in controversy, the State of California sued, claiming, *inter alia*, that the lease sale could not go forward until the State certified the sale's "consistency" with California's coastal zone management plan.[370] The lower courts agreed and enjoined the sale.[371] The Supreme Court reversed, the majority of five holding that the CZMA consistency provision was inapplicable to the initial offshore oil and gas lease sale because the sale by itself did not "directly affect" the state coastal zone.[372] The strong dissent argued that the federal government had bound itself to the state determination at all stages of the leasing process.[373]

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[367] County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1390 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

[368] North Slope Borough v. Andrus, 642 F.2d 589, 606 (D.C. Cir. 1980).

[369] *See* Secretary of the Interior v. California, 464 U.S. 312, 343 (1984).

[370] *Id.* at 317. The Coastal Zone Management Act provides that, for states with approved coastal management plans, all federal activities "directly affecting the coastal zone" must be "consistent with" the state plan. 16 U.S.C. § 1456(c)(1) (1988).

[371] 464 U.S. at 319.

[372] *Id.* at 339.

[373] *Id.* at 357–59 (Stevens, J., dissenting). Bills to reverse the holding have been introduced in Congress. *E.g.*, H.R. 4589, 98th Cong., 2d Sess.; S. 2324, 98th Cong., 2d Sess. In the 99th Congress, bills were introduced in both houses again. H.R. 5, 99th Cong., 1st Sess. (1985); S. 55, 99th Cong., 1st Sess. (1985); *see also* 15 Env't Rep. (BNA) 1504 (Jan. 11, 1985). Both died in committee.

The price of confirming federal supremacy was destruction of the protectible property aspects of the offshore leasehold, a result obviously abhorrent to Mr. Watt's privatization philosophy. The majority of the Court was well aware of the congressional desire to make leasing more environmentally responsible. Environmental consistency realistically could not be considered at the lease sale stage due to a lack of relevant information, the Court noted, but it could be factored in at the exploration and production stages.[374] In other words, California and the Department of the Interior were free to make new consistency determinations at later stages and to impose additional conditions to alleviate newly-discovered or more clearly defined problems.[375] To the natural objection that the reservation of such unbounded regulatory power would destroy the lessee's property interest in the lease, the Court replied that a lessee has no traditional property interest but rather only an exclusive right to pursue further administrative permission to develop the leasehold.[376] To make sure that this holding would not be misunderstood, the Court carefully repeated it several times.[377]

The demise of property rights in offshore oil and gas leases will haunt indefinitely the very entities Mr. Watt most wanted to benefit. The same principles have already been applied in other areas of mineral leasing.[378] An oil and gas lessee conceivably could lose its million- or billion-dollar investment in the lease and preliminary development if unforeseen environmental problems cannot be overcome by regulatory means. Secretary Watt evidently did not understand that the interests of resource developers and of the states do not always and necessarily coincide. In retrospect, considering the multitude of factors then known that militated against immediate divestiture of all offshore oil and gas resources, Mr. Watt's efforts in this arena must be characterized as ill-considered.

2. Coal Leasing

The United States owns several hundred billion tons of low-sulphur coal in the West, much of it located in the Northern Great

[374] 464 U.S. at 339–41.

[375] *Id.* at 340–41. The Court stated: "The first two stages are not subject to consistency review; instead, input from State Governors and local governments is solicited by the Secretary of the Interior. The last two stages invite further input for Governors or local governments, but also require formal consistency review." *Id.*

[376] *Id.* at 338.

[377] *See id.* at 338–42.

[378] *See* Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983); *see also infra* notes 438–40 and accompanying text.

Plains.[379] Treated separately in law since 1864, coal became a leasable mineral in 1920.[380] Coal leases before 1975 contained terms extremely favorable to lessees.[381] Acquisition, frequently by oil companies, of federal coal leases for speculation in the 1960s[382] triggered first a 1971 moratorium on further coal leasing,[383] and then the Coal Leasing Amendments Act of 1975.[384] Congress enacted the latter Act in large part to require competitive bidding on all lease sales, to obtain better royalty return to the government, and to ensure greater diligence in lease development.[385] The Ford and Carter Administrations' attempts to resume coal leasing were halted by further litigation.[386] Except for holdover preference right leases, no federal coal was leased during the 1970s.[387] The moratorium created widespread legal confusion but likely had little effect on the coal market because billions of tons of coal were already under federal lease and awaiting development.[388]

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[379] *See* 1979 OTA REPORT, *supra* note 224, at 298–301. It is estimated that there are up to 1.73 trillion tons of coal in identified United States reserves. *Id.* at 300 (table A-2). About 55–60% of the identified reserves in western states are located on federal land. *Id.* at 301. About 37% of identified reserves are located in North Dakota and Montana. *See id.*

[380] Mineral Leasing Act of 1920, 30 U.S.C.A. §§ 181–287 (West 1986 & Supp. 1989).

[381] *See, e.g.*, Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553, 558–59 (D.C. Cir. 1979) (environmental protection conditions absent); *cf.* FMC Wyoming Corp. v. Watt, 587 F. Supp. 1545, 1548 (D. Wyo. 1984) (12% royalty is a 1000% increase), *rev'd*, 812 F.2d 496 (10th Cir. 1986), *cert. denied*, 484 U.S. 1041 (1988).

[382] A BLM study in 1970 found that, from 1945 to 1970, the number of acres of land under federal coal leases increased tenfold, but annual coal production from these lands decreased during the same period from 10 million tons to 7.4 million tons. Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981, 984 (D.D.C. 1977) (citing DIVISION OF MINERALS, BUREAU OF LAND MANAGEMENT, HOLDINGS AND DEVELOPMENT OF FEDERAL COAL LEASES (Nov. 1970)).

[383] *See* Krueger v. Morton, 539 F.2d 235, 237 (D.C. Cir. 1976) (challenging order by Secretary of Interior suspending issuance of prospecting permits); American Nuclear Corp. v. Andrus, 434 F. Supp. 1035, 1035–36 (D.D.C. 1977) (asserting right to coal prospecting permit by way of prior application for permits); Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981, 993 (D.D.C. 1977) (challenging implementation of coal leasing program prior to issuance of Environmental Impact Statement required under section 102 of NEPA).

[384] Federal Coal Leasing Amendments Act of 1975 (FCLAA), 30 U.S.C. §§ 201–209 (1982).

[385] On some of the problems the FCLAA was designed to address, see *Federal Coal Leasing, 1975: Hearings on H.R. 3265 Before Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 10 (1975); Hustace, *The New Federal Coal Leasing System*, 10 NAT. RESOURCES LAW. 323 (1977).

[386] Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981, 993–94 (D.D.C. 1977), *settlement aff'd*, 454 F. Supp. 148, 149 (D.D.C. 1978); *see also* Tarlock, *supra* note 139, at 332–33.

[387] *See* Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553, 556 (D.C. Cir. 1979) (Department of Interior stopped issuing permits for coal exploration in 1973).

[388] According to the plaintiffs in *Hughes*, 437 F. Supp. at 991, federal reserves already under lease would last for over a century even at considerably higher production rates.

Secretary Watt's approach to coal leasing paralleled his program for accelerated offshore oil and gas leasing. He announced plans to resume coal leasing on a large scale and scheduled a series of major coal lease sales. His apparent goal was to privatize most remaining unleased federal coal without much regard for demand or safeguards.[389] The Department did manage to sell some coal during the Watt tenure, but by the time of Mr. Watt's resignation the coal leasing program was left in total shambles, a state in which it remains. Little if any federal coal is likely to be sold at least until the 1990s. At the same time, Secretary Watt essentially destroyed the Interior agency responsible for policing all coal stripmining operations. That damage too has not yet been repaired.[390] The Department's brushes with coal blackened its reputation for credibility and competence, and those ravages with coal leases remain a prominent part of the Watt legacy.[391]

Two relatively small lease sales were completed in 1981.[392] The Powder River Basin fiasco came in 1982. Despite a soft market and pronounced lack of developer interest, in 1982 the Department sold leases for 1.6 billion tons of coal in the Powder River Basin of Wyoming and Montana, one of the largest coal lease sales in history.[393] The Powder River Basin sales were marked by allegations

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[389] Watt claimed that the accelerated sales were necessary to "reduce the vulnerability of America to blackmail, embargoes, or other national-security threats." Taylor, *Interior's James Watt: Hero or Villain?*, U.S. NEWS & WORLD REP., June 6, 1983, at 52. The sales were more likely part of the Secretary's desire to transfer "more control and discretion for development of federally owned resources to private industry." COMM'N ON FAIR MARKET VALUE POLICY FOR FEDERAL COAL LEASING, FAIR MARKET VALUE POLICY FOR FEDERAL COAL LEASING 374 (1984) [hereinafter COAL COMM'N REPORT]. The Coal Commission was highly critical of Watt's pre-determined mindset to lease large amounts of coal regardless of the market. *See infra* note 411 and accompanying text.

[390] *See supra* note 321.

[391] This subsection sketches the main points of coal leasing under Secretary Watt without detailing the Byzantine political maneuvers in those years.

[392] The Department leased 573 million tons of coal in the Green River-Hams Fork region, and offered 555 million tons in the Uinta-Southwestern Utah region, though only 88 million tons were sold. OFFICE OF TECHNOLOGY ASSESSMENT, ENVIRONMENTAL PROTECTION IN THE FEDERAL COAL LEASING PROGRAM 67 (table 6) (1984) [hereinafter 1984 OTA REPORT].

[393] COAL COMM'N REPORT, *supra* note 389, at 374, 379. The Powder River area contains the richest coal beds in the United States. Seams, in places more than 100 feet thick, are estimated to contain about 142.5 billion tons, accounting for two-thirds of all western U.S. coal reserves. *Powder River Basin Regional Coal Lease Sales: Was Fair Market Value Received? Hearing Before the House Comm. on Interior and Insular Affairs*, 98th Cong., 1st Sess. (1983). Watt set a target leasing level of 2.5 billion tons at the sale. GENERAL ACCOUNTING OFFICE, ANALYSIS OF THE POWDER RIVER BASIN FEDERAL COAL LEASE SALE: ECONOMIC VALUATION IMPROVEMENTS AND LEGISLATIVE CHANGES NEEDED 1 (1983) [hereinafter GAO POWDER RIVER REPORT].

of corruption and fire sale prices;[394] an investigating commission later estimated that the sale price was perhaps as much as $100 million below market value.[395] This sale was made possible by eleventh-hour regulation changes to lower the minimum acceptable bid.

Two lawsuits challenged the legality of the lease sales. The plaintiffs in one suit secured an injunction in 1985 against the sale insofar as it affected tribal lands in Montana. The Court of Appeals for the Ninth Circuit later affirmed and expanded upon the injunction.[396] Also in 1985, the United States District Court for the District of Montana held that the sale did not contravene land use plan provisions, and in August, 1987, the same court ruled that the leases covering nontribal lands did not violate the statutory fair market standard.[397] The Ninth Circuit Court of Appeals affirmed those holdings in 1988 without much helpful explanation or analysis.[398]

The latter judicial decisions came too late to rescue federal coal leasing. Public and congressional reaction to the Powder River Basin sales in 1983 halted coal leasing and indirectly drove Mr. Watt from office. In response to widespread criticism, more western state antagonism, and critical reports by legislative auditors,[399] Congress

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[394] The eleventh hour changes in the leasing procedures were especially controversial. In March, 1982, the government's estimate of fair market value for each tract (called minimum acceptable bids, or MABs) became known to some coal company officials. COAL COMM'N REPORT, *supra* note 389, at 376. MABs are proprietary information. *See id.* The Department learned of the leak but took no action to delay the Powder River Basin sale. Shortly thereafter, Interior changed the bidding program by, among other things, cutting the original MABs nearly in half. *Id.*; GAO POWDER RIVER REPORT, *supra* note 393, at 17 & n.3. The new MABs provided no incentive to initial competitive bidding because the coal companies could increase their offers if the tract attracted competitive bids. Only three of thirteen did, and sale receipts were only slightly more than the revised minimum bid numbers. COAL COMM'N REPORT, *supra* note 393, at 390, 391, 392 & table 2.

[395] GAO POWDER RIVER REPORT, *supra* note 393, at 25. Under the FCLAA, coal is to be leased for fair market value. 30 U.S.C. § 207(a) (1982). Only three of the thirteen tracts offered received more than one bid; two were not bid on at all. COAL COMM'N REPORT, *supra* note 389, at 377. The average price paid for the Powder River coal was 3.5¢ per ton. Barron, *Watt, the Nation's Trustee, is Selling the Goods*, L.A. Daily J., Feb. 21, 1983, at 4, col. 3.

[396] Northern Cheyenne Tribe v. Hodel, 842 F.2d 224 (9th Cir. 1988).

[397] National Wildlife Fed'n v. Burford, 677 F. Supp. 1445 (D. Mont. 1985), *aff'd*, 871 F.2d 849 (9th Cir. 1989). For an analysis of the reaction to the district Court decision, see *Top Court Asked to Hear Coal Royalty; Watt Sale Appeal*, 12 Pub. Land News, Nov. 26, 1987, at 2.

[398] 871 F.2d 849 (9th Cir. 1989). In addition, litigation challenging Interior's general coal leasing regulation revisions of this period has been pending since 1982. Natural Resources Defense Council v. Burford, No. 82-2763 (D.D.C. filed Sept. 28, 1982).

[399] SURVEY AND INVESTIGATIONS STAFF OF HOUSE COMM. ON APPROPRIATIONS, 98TH CONG., 1ST SESS., REPORT ON THE COAL LEASING PROGRAM OF THE DEPARTMENT OF INTERIOR (1983); GAO POWDER RIVER REPORT, *supra* note 393. The GAO found that Interior's last-minute changes were "untimely and ineffective." GAO POWDER RIVER REPORT,

established a commission to examine whether fair market value was obtained in the coal lease sales.[400] Undeterred, Secretary Watt held two additional, but relatively minor, sales of Powder River area coal[401] and a larger sale of coal leases in the Fort Union region of Montana and North Dakota. The Department held the latter sale in the face of a House committee order to withdraw the lands from sale—an order Mr. Watt defied.[402] The Fort Union sale was enjoined due to the Department's failure to observe its own regulations.[403] Congress then prohibited the expenditure of any funds for the Fort Union sale, effectively revoking it.[404] In Mr. Watt's last days at Interior, Congress reinstituted the moratorium on coal lease sales until the new commission reported.[405]

The Linowes Commission report, released in early 1984, was scathing in its criticism of departmental leasing procedures and results.[406] Hearings by legislative committees and investigations by the Office of Technology Assessment reached similar conclusions.[407] Secretary Clark quickly acknowledged the problems and promised to return coal leasing to the drawing board.[408] Coal leasing has never

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supra note 393, at 13. The GAO also disagreed with Interior's lowering of minimum bids on maintenance tracts. It believed that these tracts should command an even higher price than previously estimated fair market value, because these leases essentially isolate the owner of the nearby existing mine from leasing competition. *See id.* at 69–71.

[400] Act of Nov. 4, 1983, Pub. L. No. 98-63, 97 Stat. 301 (1983).

[401] *See* COAL COMM'N REPORT, *supra* note 389, at 378. The two new leases sold for a total of $23.7 million. *Id.*

[402] *See id.* at 5. Secretary Watt believed that he need not comply with the House Resolution because the House had previously used the same provision to try to prevent oil and gas leasing in wilderness areas, but a court challenge resulted in a ruling that only the Secretary could determine the duration of such a withdrawal. *See infra* notes 422–34 and accompanying text. In refusing to comply, Watt declared that a delay would signal unreliability in the government's coal leasing plans, COAL COMM'N REPORT, *supra* note 389, at 5, implying that a withdrawal of any duration was unacceptable.

[403] National Wildlife Fed'n v. Clark, 571 F. Supp. 1145, 1151, 1156, 1158 (D.D.C. 1983). Because the regulations, 43 C.F.R. § 2310.5 (1985), had not been rescinded, the court held that the Secretary was bound to follow them, even if the statute on which they were based was unconstitutional.

[404] Act of Nov. 4, 1983, Pub. L. No. 98-146 § 112, 97 Stat. 937 (1983).

[405] *See Interior Inadequately Evaluated Tracts Leased Since 1981, Congressional Report Says*, 15 Env't Rep. (BNA) 145, 146 (June 1, 1984).

[406] *See* COAL COMM'N REPORT, *supra* note 389, at 415–20. "[A]t the very least, the Interior Department made serious errors in judgment in its procedures for conducting the . . . Powder River lease sale . . . ." *Id.* at 420.

[407] *See* 1984 OTA REPORT, *supra* note 392, at ix. The OTA noted that "[t]he planning processes . . . have become too unpredictable and unsystematic to ensure compliance with the environmental mandate." *Id.*

[408] *See Congress/Administration Coal Lease War Comes to a Head May 24*, Pub. Land News, May 10, 1984, at 8.

re-emerged. Until the coal market recovers and coal producers demonstrate the need to transfer new reserves to them, federal coal leasing may remain quiescent.

Secretary Watt's intemperate actions and remarks brought rebukes from the White House on several occasions.[409] White House patience had been exhausted by the time Mr. Watt—by then a distinct political liability—described the Coal Commission as composed of "a black, a woman, two Jews, and a cripple."[410] That remark signaled the end of the Watt tenure, although aspects of the Watt legal philosophy lingered on in the Department.[411]

Mr. Watt enjoyed less success in his program to privatize coal than in his offshore oil and gas leasing program. The reasons for the failures were similar. Economically, demand for the resource did not justify the projected leasing levels. Politically, the Secretary antagonized state officials, enraged members of Congress, and inspired widespread popular obloquy. Legally, the Department cut too many corners, thereby undermining its credibility and generating disruptive lawsuits with a procession of injunctions. Practically, the biggest losers over the long haul could be the coal developers with a real need for new mines and a lack of access to existing leases. Haste and heedlessness again achieved counterproductive results.

3. Mineral Leasing in Wilderness and Wilderness Study Areas

Secretary Watt not only took an interest in accelerated fossil fuel leasing, but he also concerned himself with the places to be leased. More particularly, and in keeping with his desire to open more lands to development, Mr. Watt attempted to lease minerals in wilderness and wilderness study areas, a radical break from bipartisan policy since passage of the 1964 Wilderness Act.[412] The results of this initiative were iterative: the attempt failed, leaving only legal prec-

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[409] The best-known instance was Mr. Watt's decision to ban the Beach Boys from the Washington, D.C. Fourth of July celebration as subversive influences. *See* G. COGGINS & C. WILKINSON, *supra* note 19, at 887–88.

[410] *See* Bernstein, *supra* note 101, at 74.

[411] In September, 1987, BLM Director Robert Burford, one of the few remaining Watt appointees, was still describing the Department's many setbacks in court as the result of a concerted attack on his multiple use philosophy by "environmental vigilantes." Address by BLM Director Robert Burford to New Mexico State Bar Ass'n, Santa Fe, N.M. (Sept. 25, 1987).

[412] *See, e.g.*, Mountain States Legal Found. v. Andrus, 499 F. Supp. 383, 394 (D. Wyo. 1980) (concerted governmental refusal to process lease applications for wilderness study areas).

edents that will haunt the Department and boomerang against prospective lessees indefinitely.

a. Opening Designated Wilderness Areas

The original Wilderness Act[413] embodied several compromises between preservation and resource use.[414] The Act, later made applicable to the BLM lands,[415] provided that mineral location and leasing in wilderness areas were permissible under stringent controls, but only until 1984.[416] After December 31, 1983, leasing still could occur in BLM wilderness study areas, but lessees are subject to a management standard so strict as to discourage exploration in all but the most promising areas.[417]

Until 1981, the Department refused to process lease applications for wilderness areas.[418] A federal district court in 1980, at the behest of the Mountain States Legal Foundation, found that this policy constituted a land withdrawal without observance of FLPMA procedures.[419] Despite the highly questionable basis for that holding,[420] the Reagan Administration did not appeal it.[421]

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[413] 16 U.S.C. §§ 1131–1135 (1988).

[414] *Id.* §§ 1133(d)(2)–(3) (minerals); 1133(d)(4) (grazing); 1133(d)(8) (hunting); 1133(d)(5) (BWCA); *see* McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288 (1966); Watson, *supra* note 272, at 58–61 & nn.90–101.

[415] 43 U.S.C. § 1782 (1982).

[416] 16 U.S.C. § 1133(d)(3) (1988); *see* Toffenetti, *Valid Mining Rights and Wilderness Areas*, 20 LAND & WATER L. REV. 31, 32 & n.2 (1985). The ban on mineral leasing did not become effective until December 31, 1983, 16 U.S.C. § 1133(d)(3) (1988), thus leaving a 20-year "window" from 1963 until 1983 during which wilderness areas would legally be available for leasing. A few wilderness areas were designated with no development windows. *E.g.*, 16 U.S.C. §§ 460aa-1, -9 (1988) (Sawtooth National Recreation Area and Wilderness); 16 U.S.C. §§ 460gg-1, -8 (1988) (Hell's Canyon National Recreation Area and Wilderness). Other individual areas were designated with shorter windows. *E.g.*, Act of Oct. 21, 1978, Pub. L. No. 95-495, § 11, 92 Stat. 1649, 1655 (Boundary Waters Canoe Area Wilderness). Still others have longer development windows. *E.g.*, Endangered American Wilderness Act of 1978, Pub. L. No. 95-237, § 5, 92 Stat. 40, 46 (1978) (Gospel-Hump Wilderness); Central Idaho Wilderness Act of 1980, Pub. L. No. 96-312, § 5(d), 94 Stat. 948, 949 (River of No Return Wilderness). Several writers have argued that mineral leasing of any kind is inconsistent with wilderness and permanently destroys the area's primitive characteristics. *See, e.g.*, Edelson, *The Management of Oil and Gas Leasing on Federal Wilderness Lands*, 10 B.C. ENVTL. AFF. L. REV. 905, 913–14 (1983).

[417] 43 U.S.C. § 1782(c) (1982); *see also* Rocky Mountain Oil and Gas Ass'n v. Watt, 696 F.2d 734, 750 (10th Cir. 1982).

[418] Mountain States Legal Found. v. Andrus, 499 F. Supp. 383, 397 (D. Wyo. 1980).

[419] *Id.*

[420] *See* Getches, *supra* note 215, at 326 & n.267.

[421] Reagan administrative officials issued a directive ordering the dismissal of the appeal on

On the contrary, Mr. Watt instead announced plans to approve oil and gas leases in several designated wilderness areas.[422] Members of Congress reacted angrily to this departure. The House Interior and Insular Affairs Committee purported to withdraw the affected areas from availability for leasing pursuant to the "emergency withdrawal" section of FLPMA.[423] The Department reluctantly acceded to the Committee's withdrawal order, but both the Pacific and the Mountain States Legal Foundations sought judicial invalidation of the congressional command.[424] The legislative branch and environmental organizations intervened in the suit,[425] making it a six- or seven-cornered donnybrook that some called "Watt v. Watt."[426]

The case turned on the constitutionality of an odd form of the legislative veto, which is really more like a legislative action-forcing mechanism.[427] The district court's decision—rendered before the Supreme Court ruled in *Immigration & Naturalization Service v. Chadha*[428]—tiptoed a very fine line. The court held that the congres-

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March 4, 1981. *Id.* at 328. In August, 1987, the United States District Court for the District of Wyoming again ruled that delay in processing lease applications amounted to an unlawful land withdrawal, relying in part on the earlier decision. Mountain States Legal Found. v. Hodel, 668 F. Supp. 1466, 1475 (D. Wyo. 1987).

[422] 46 Fed. Reg. 27,734 (1981) (Washakie Wilderness, Wyoming); 46 Fed. Reg. 27,735 (1981) (Bob Marshall Wilderness, Great Bear Wilderness, Scapegoat Wilderness, and Mission Mountains Wilderness, Montana); *see also* Watson, *supra* note 272, at 52 & n.61 (citing BLM Instruction Memorandum No. 83-355, Feb. 28, 1983). The decision to approve oil and gas leases in these wilderness areas was sparked by at least three different factors. First, the dramatic increases in oil and gas prices in the 1970s spurred interest in leasing on public lands. In 1972, oil cost $3.39 per barrel; in July, 1981, it cost $33.76 per barrel. Edsall, *Boom and Bust: Economic Ills Strain Alliance of Oilmen, GOP*, Wash. Post, Apr. 25, 1983, at 1, col. 1. Second, the "window" on leasing was rapidly closing. *See* 16 U.S.C. § 1133(d)(3) (1988). The third and most important factor was the Reagan/Watt philosophy to open the public lands to private development. The Reagan Administration's aggressive onshore leasing plan was not limited to wilderness areas. In 1981, the amount of onshore acreage leased was 150% greater than in 1980, and the 1982 acreage leased was nearly double the 1981 acreage. *See* U.S. DEP'T OF THE INTERIOR, A YEAR OF PROGRESS: PREPARING FOR THE 21ST CENTURY 1 (1982). Designated wilderness areas were not the only areas affected by Watt's push to make public lands available for private development—wilderness study areas, as well as candidates for wilderness, were also opened to leasing. *See infra* text accompanying notes 435–43.

[423] 43 U.S.C. § 1714(e) (1982).

[424] Pacific Legal Found. v. Watt, 529 F. Supp. 982 (D. Mont. 1981), *modified*, 539 F. Supp. 1194 (D. Mont. 1982).

[425] *Id.*

[426] Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983).

[427] *See* Glicksman, *Severability and the Realignment of the Balance of Power Over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 1, 44–48 (1984).

[428] 462 U.S. 919 (1983).

sional committee could order the Secretary to withdraw land, but that, to avoid constitutional problems, the timing, duration, and conditions of the withdrawal must remain within secretarial discretion.[429] This Solomonic rendering satisfied no one, but no appeal was decided because Congress mooted the controversy by forbidding any expenditures for processing the wilderness area leases.[430] Although the proviso expired three months before all leasing was outlawed by the Wilderness Act,[431] Secretary Watt threw in the towel and agreed not to approve any wilderness leases during the "window" period.[432] Litigation convinced other lessees of wilderness lands to exchange them for nonwilderness.[433] When 1984 arrived, little or no damage had been done to official wilderness areas by the Secretary's fervor.[434]

b. *Opening Wilderness Study Areas*

The FLPMA requires very strict controls on mineral operations commenced after 1976 in BLM wilderness study areas.[435] The Wilderness Act, however, does not prescribe similar safeguards for leasing in Forest Service wilderness study areas, where the Interior Department processes the leases in consultation with the Forest Service.[436] The agencies long regarded single leases as environmentally insignificant and did not prepare environmental impact statements (EISs) on them.[437] In *Sierra Club v. Peterson*,[438] the Court of Appeals for the District of Columbia Circuit decided that leases in

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[429] 529 F. Supp. at 1004.

[430] Act of Dec. 30, 1982, Pub. L. No. 97-394, § 308, 96 Stat. 1966, 1996–97; Act of Oct. 2, 1982, Pub. L. No. 97-276, § 126, 96 Stat. 1186, 1196.

[431] 16 U.S.C. § 1133(d)(3) (1988).

[432] INSIDE ENERGY/WITH FEDERAL LANDS, Jan. 10, 1983, at 11.

[433] Edelson, *supra* note 416, at 917 n.86; *Wilderness Area Leased Despite Agreement With Congress Not to Do So*, 13 Env't Rep. (BNA) 606 (Sept. 3, 1982). Watt said that he was "unaware" that the area was wilderness when he issued the leases. When Congress questioned him about the leases, he obtained "no surface occupancy" stipulations on them.

[434] Mining and mineral leasing rights established before 1984 can be developed, *see* Toffenetti, *supra* note 416, at 36, and a few recent additions to the Wilderness System have longer "windows." The number of existing mining claims is unknown, but most have been or probably will be abandoned. *Id.* at 31 n.1, 61–65.

[435] 43 U.S.C. § 1782(c) (1982). *See* Rocky Mountain Oil and Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982).

[436] 16 U.S.C. § 1133(d)(2) (1988) (permitting prospecting and other activities to gain information about mineral resources in national forest wilderness and requiring Department of Interior to survey land for mineral values and to make results public).

[437] Since lessees drill on only a small fraction of leases, and fewer leases actually produce, environmental evaluation at the lease stage was thought to be time-wasting and futile.

[438] 717 F.2d 1409 (D.C. Cir. 1983).

wilderness study areas were major federal actions with significant environmental effects.[439] The court ordered the leasing agencies to prepare EISs in this situation unless the agency retained full authority to deny the lessee all exploration and development rights.[440] The Ninth Circuit Court of Appeals twice has endorsed this reading and has extended it to all federal lands,[441] while the Tenth Circuit Court of Appeals has allowed oil and gas leasing to proceed without full EISs.[442] As with offshore oil and gas leasing, the Department's compulsion to cut corners redounded to the detriment of lessees, whose oil and gas leases now more resemble exclusive procedural rights than vested property interests.[443]

c. Opening Florida Wilderness to Phosphate Leasing

While Congress was debating legislation to designate a wilderness area in the Osceola National Forest in Florida, Secretary Watt announced his intention to issue four phosphate leases covering much of the proposed wilderness.[444] The Forest Service had for years denied applications for these leases, contending that restoration of the sensitive wetlands environment following mining would be technologically impossible. Suddenly, during late 1981, the Forest Service changed its mind and decided that reclamation would be feasible, and Interior coincidentally decided to issue the leases immediately.[445]

Florida Senators and other state officials filed suits to enjoin the issuance of the leases.[446] Furthermore, Congress responded by adding a mining ban to the proposed wilderness legislation.[447] The mining ban inspired President Reagan to veto the Florida wilderness designation legislation, the first veto of a wilderness bill.[448] Under

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[439] *Id.* at 1412.

[440] *Id.* at 1415.

[441] Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1340 (1989); Connor v. Burford, 836 F.2d 1521 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1121 (1989).

[442] Park County Resources Council v. United States Dep't of Agric., 817 F.2d 609 (10th Cir. 1987).

[443] *See* G. COGGINS, PUBLIC NATURAL RESOURCES LAW § 23.02[4][B] (1989).

[444] *Chiles, NWF File Suit Against Interior, Agriculture Over Mining in Osceola Forest*, 13 Env't Rep. (BNA) 69 (May 21, 1982).

[445] *Id.*

[446] *Id.*

[447] *House Suspends Rules, Passes Bill to Ban Phosphate Leases in Osceola*, 14 Env't Rep. (BNA) 245 (June 10, 1983) [hereinafter *House Bans Phosphate Leases*].

[448] *Reagan Veto of Florida Wilderness First Under 1964 Wilderness Protection Act*, 13 Env't Rep. (BNA) 1621 (Jan. 21, 1983).

pressure from Congress and Florida officials, Mr. Watt then announced that he would not issue the phosphate leases after all because reclamation was not technologically feasible.[449] Congress again proceeded to pass the Florida wilderness bill, but without the mining ban, and this version was signed into law in 1983.[450]

The prospective lessees sued to force issuance of the disputed preference right leases, claiming that they had satisfied all legal requisites.[451] In the course of his opinion rejecting that claim, Judge Parker noted that mineral development is not a primary purpose of national forest establishment, and that it can be incompatible with timber and water supply purposes.[452] If that admonition influences other courts, it could justify far more stringent regulation of mining operations in national forests than has traditionally been the case.[453]

Judge Parker's opinion also might affect the validity of hardrock mining claims at their inception. The standard for issuance of preference right leases under the Acquired Lands Leasing Act[454] is whether the applicant has discovered "valuable deposits" of phosphate,[455] a standard that the court opined was identical to the meaning of the 1872 General Mining Law.[456] In holding that the plaintiff had not discovered valuable deposits because reclamation was administratively deemed infeasible,[457] the court apparently put in jeopardy some hardrock mining claims that might otherwise meet the discovery test of *United States v. Coleman*.[458] If a finding of technical feasibility or infeasibility is to be treated as a political decision, industry can stake little comfort in science or in departmental statements of intention. Like the decision in *Secretary of the Interior v. California*,[459] this Interior Department victory is potentially Pyrrhic from the viewpoint of Mr. Watt's privatization philosophy.

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[449] *House Bans Phosphate Leases*, *supra* note 447, at 246.

[450] *See* Florida Wilderness Act of 1983, § 1, 98 Stat. 1665.

[451] Kerr-McGee Corp. v. Hodel, 630 F. Supp. 621 (D.D.C. 1986), *vacated as moot*, 840 F.2d 68 (D.C. Cir. 1988).

[452] *Id.* at 629.

[453] *See* Converse v. Udall, 399 F.2d 616, 622 (9th Cir. 1968). *See generally* J. LESHY, *supra* note 17, at 164–66.

[454] 30 U.S.C. §§ 351–359 (1982).

[455] *Id.* § 352.

[456] *Kerr-McGee*, 630 F. Supp. at 624–25; *cf.* 30 U.S.C. § 211(b) (1982). *See generally* Fairfax & Andrews, *Debate Within and Debate Without: NEPA and the Redefinition of the "Prudent Man" Rule*, 19 NAT. RESOURCES J. 505 (1979).

[457] *Kerr-McGee*, 630 F. Supp. at 629.

[458] 390 U.S. 599 (1968); *see also* J. LESHY, *supra* note 17, at 148–50.

[459] 464 U.S. 312 (1984); *see also supra* notes 369–72 and accompanying text.

B. Livestock Grazing Management on the Public Lands

The problems of the Watt Administration in managing subsurface mineral resources were mirrored by the difficulties it experienced in managing surface resources—which, for the BLM, is primarily livestock grazing management.[460] Secretary Watt tried to reverse historic trends in this arena, but he achieved only mixed results. In the short term, courts emphatically rejected his new program for abdicating federal management responsibility, but, in the longer term, his initiatives may have set back by a decade or more the national priority of improving public rangeland conditions. This section begins with a synopsis of historical public range law developments and then recounts Mr. Watt's changes and their judicial reception.

1. Short History of Livestock Grazing Regulation on the Public Lands

Outside Alaska, the BLM administers roughly 170 million acres, nearly all of it devoted to livestock grazing.[461] BLM land tends to be high, rocky, and arid or semi-arid, and most is unsuitable for conventional agriculture.[462] A century ago, when these public lands were free from regulation, overgrazing severely eroded their grass-producing capacity.[463] Pursuant to the Taylor Grazing Act of 1934,[464] the government withdrew the unclaimed, unreserved federal lands into grazing districts to be managed by a federal agency.[465]

A half-century of BLM regulation under the Taylor Act has stabilized but not appreciably improved range conditions.[466] The BLM

[460] Although the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411–1418 (expired 1970), and the FLPMA, 43 U.S.C. § 1732(a) (1982), called for rough equality of resource treatment in BLM surface management, the agency has continued to regard livestock use as the dominant use of the public lands to which all other uses (save minerals) and values are subservient. *See generally* Coggins, *supra* note 57.

[461] *See* Coggins & Lindeberg-Johnson, *supra* note 17, at 2.

[462] *See, e.g.*, P. FOSS, *supra* note 55, at 4; E. PEFFER, *supra* note 27, at 219.

[463] *See, e.g.*, Box, *The American Rangelands: Their Condition and Policy Implications for Management*, in RANGELAND POLICIES FOR THE FUTURE 16 (1979) (proceedings of a symposium held Jan. 28–31, 1979, in Tucson, Ariz.); Coggins, Evans & Lindeberg-Johnson, *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 541 n.29 (1982); Cox, *Deterioration of Southern Arizona's Grasslands: Effects of New Federal Grazing Legislation Concerning Public Grazing Lands*, 20 ARIZ. L. REV. 697 (1979).

[464] 43 U.S.C. §§ 315–315r (1982 & Supp. V 1987).

[465] *See* E. PEFFER, *supra* note 27, at 225–31.

[466] *See, e.g.*, Natural Resources Defense Council, Inc. v. Morton, 388 F. Supp. 829 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976).

was unable to effectuate reforms to improve range conditions because it has long been a weak agency, dominated by the ranchers it is supposed to regulate.[467] The Bureau initiated several improvement programs in the 1960s, but these efforts usually collapsed when the ranchers with heavily subsidized grazing permits opposed reductions in grazing levels.[468]

Three related developments in the 1970s, however, promised fundamental change in public rangeland management. First, a court in 1974 ordered the agency to prepare environmental impact statements for all of its districts detailing the consequences of livestock grazing.[469] The EISs publicly revealed that range conditions were very poor and that improvement was unlikely until grazing levels were reduced to grazing capacity.[470]

Second, Congress in 1976 indicated its displeasure with range conditions[471] and supplemented the Taylor Act by giving explicit authority to reduce grazing levels whenever the Secretary judged that conditions warranted it.[472] The FLPMA also commanded the BLM to plan and manage for multiple use, not just grazing use,[473] and to observe sustained yield principles.[474] Two years later, Congress more emphatically decried poor and declining range conditions,[475] authorized funding for range improvement projects,[476] and made range improvement a high management priority.[477] The Carter Administration took tentative steps to implement multiple use, sus-

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[467] *See* Coggins, Evans & Lindeberg-Johnson, *supra* note 463, at 550–52.

[468] *See* Coggins & Lindeberg-Johnson, *supra* note 17, at 89–100. The federal grazing fee is only a small fraction of fair market value. The fee subsidy has been capitalized into the value of the permittee's base ranch, which accounts for the adamant resistance to reductions in permitted grazing levels, even though ranchers would be the prime beneficiaries of more productive grass ecosystems. *See id.* at 74–75.

[469] *Morton*, 388 F. Supp. at 831–33. The BLM agreed to comply with the decision. The agency procrastinated for several years, however, until the court refused to accept further postponements. *See* Natural Resources Defense Council, Inc. v. Andrus, 448 F. Supp. 802, 804 (D.D.C. 1978).

[470] *See* Coggins, *The Law of Public Rangeland Management III: Creeping Regulation at the Periphery, III, 1934–1982*, 13 ENVTL. L. 295, 363–65 (1983).

[471] *See* 43 U.S.C. § 1751(a) (1982 & Supp. V 1987).

[472] *Id.* § 1752(e). Grazing privileges may be adjusted at any time "to the extent the Secretary concerned deems necessary" if he "finds on reexamination that the condition of the range requires adjustment in the amount or other aspect of grazing use." *Id.*

[473] *Id.* § 1712.

[474] *Id.* § 1732(a). The terms "multiple use" and "sustained yield" are defined in 42 U.S.C. § 1702(c), (h).

[475] Public Rangelands Improvement Act of 1978, 43 U.S.C. § 1901(a) (1982 & Supp. V 1987).

[476] *Id.* § 1904.

[477] *See id.* § 1903(b). This section contains the strongest congressional statement of managerial priorities in all of the grazing statutes.

tained yield planning and management for range condition betterment.[478] When those efforts included grazing reductions, the affected ranchers raised storms of protest that fueled the Sagebrush Rebellion.

As Secretary, James Watt evidently gave credence to the views of some permittee ranchers that they, not the government, were entitled to decide how to use the federal lands under grazing permit.[479] In addition to his plans for privatizing the BLM lands,[480] Mr. Watt instituted a series of actions designed to privatize the public grass and to remove regulatory restraints on livestock grazing permittees.

2. Grazing Regulation in the Watt Administration

The grazing regulation changes took a variety of forms. Under Mr. Watt's personal orders, the BLM imposed a moratorium on grazing reductions, introduced a "triage" system for evaluating grazing allotments, and instituted a "cooperative management agreement" (CMA) program.[481] While other reforms of similar purpose and effect went unchallenged, courts took differing approaches to lawsuits growing out of the grazing reduction moratorium and the CMA program.

a. *Planning and the Moratorium*

Environmental impact statements showing that more grass was allocated to permittee ranchers than was grown were primary sources of western unhappiness. Mr. Watt decided in 1981 that these EISs were all based on faulty science.[482] From that premise, his Administration proceeded to abandon the resource inventorying procedures mandated by FLPMA[483] in favor of trend data monitoring, to classify allotments by productivity (essentially giving up on those deemed in irremedially poor condition),[484] and to hold livestock use

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[478] *See* U.S. DEP'T OF THE INTERIOR, MANAGING THE NATION'S PUBLIC LANDS 51–52 (1980).

[479] Before assuming office as Secretary, Mr. Watt represented permittee ranchers as head of the Mountain States Legal Foundation. *See* Valdez v. Applegate, 616 F.2d 570 (10th Cir. 1980).

[480] *See supra* notes 143–62 and accompanying text.

[481] *See infra* notes 506–22 and accompanying text.

[482] *See* Dahl v. Clark, 600 F. Supp. 585, 586, 589 (D. Nev. 1984) (citing 1981 Directive from Secretary Watt).

[483] 43 U.S.C. § 1711(a) (1982).

[484] The monitoring and classification systems are described in Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. 1045, 1050 (D. Nev. 1986), *aff'd*, 819 F.2d 927 (9th Cir. 1987).

at current levels even where the EISs showed gross damage from overgrazing.[485] Those reforms led indirectly to a judicial decision that promises harmful consequences both for federal land use planning and for range productivity.

For some purposes, the BLM has combined its NEPA obligations and planning duties into one process following its pre-FLPMA planning practice.[486] The second stage planning document becomes the proposal for action evaluated in the EIS and, as modified, then becomes the final land use plan.[487] The philosophical assumptions of the Watt appointees, as translated into the grazing reduction moratorium and accompanying changes, greatly inhibit planning by eliminating many remedial options from consideration by planners. The stultifying effect of the limitations on the BLM planning process is starkly illustrated in *Natural Resources Defense Council v. Hodel*[488] (*NRDC II*). The Reno planning area, some 700,000 acres in Nevada, has a history of overgrazing and concededly poor conditions on roughly half of its land.[489] In promulgating a plan and EIS for the area, the moratorium on grazing level reductions precluded the BLM from implementing the obvious remedy.

Consequently, the Reno plan was a nonplan: it postponed for five years consideration of grazing reductions, which it admitted were ultimately necessary; it indicated that the agency would rely instead on generally unspecified range improvement projects in the interim; it failed to specify any concrete actions or deadlines; and it lacked any significant substantive content.[490] The EIS mirrored the plan's vagueness. It too lacked factual detail and discussed only a very limited range of alternatives.[491] The plan thus was a substantively unreasonable delaying action, and the environmental evaluation of the do-nothing proposal steadfastly downplayed the overgrazing problem while ignoring possible solutions.[492]

In an earlier case involving wild horse populations, a federal district judge in Nevada discerned the nakedly political motivation for

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[485] *See Dahl*, 600 F. Supp. at 589–91.

[486] 43 C.F.R. § 1600 (1988). Neither the court nor the agency explained why the FLPMA planning process was not being followed in the 1980s.

[487] *See* Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. at 1049.

[488] *Id.* at 1045.

[489] *Id.* at 1048, 1053.

[490] *Id.* at 1052, 1054–56, 1058.

[491] *Id.* at 1052–55. In fact, the EIS even failed to mention the "no action" alternative, previously the *sine qua non* of the environmental evaluation process. *Cf.* Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981, 990–91 (D.D.C. 1977).

[492] The court was well aware of the main reason why the plan was a "nonplan." *See infra* note 501.

the moratorium and declared it arbitrary and capricious.[493] In *NRDC II*, Judge Burns upheld the plan and the EIS, however, and the Court of Appeals for the Ninth Circuit affirmed without analysis.[494] The Burns opinion rested on three propositions: neither the FLPMA nor the 1978 Public Rangelands Improvement Act (PRIA)[495] impose substantive standards against which BLM plans can be judged, and therefore, promulgation of a vague and facially counterproductive plan contravenes no law;[496] a "rule of reason" allows the agency to evaluate a vague, nonspecific plan with vague environmental analysis;[497] and—perhaps foremost—the court should not be put in the position of "rangemaster."[498] From these propositions and some narrow Ninth Circuit precedent on judicial review of land management agency actions,[499] Judge Burns opined that plan review was limited to whether the BLM action was clearly "irrational."[500] The court took pains to point out that, while the plan made little if any management or ecological sense,[501] policy choices are beyond the scope of review, irrespective of the motivation behind them.[502]

The trial and appellate courts in *NRDC II* can be criticized for failing to read and interpret the governing statutes.[503] The case

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[493] Dahl v. Clark, 600 F. Supp. 585, 592 (D. Nev. 1984).

[494] Natural Resources Defense Council, Inc. v. Hodel, 819 F.2d 927 (9th Cir. 1987). After reciting the facts, the Ninth Circuit panel merely stated that "we agree with the district court that we cannot label this policy decision as either irrational, or contrary to law." *Id.* at 930.

[495] 43 U.S.C. §§ 1901–1908 (1982).

[496] Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. 1045, 1060 (D. Nev. 1986).

[497] *Id.*

[498] *Id.* at 1062–63. It is perhaps ironic that in one of the cases mentioned by the court, the Supreme Court upheld a district court judge who had assumed sweeping powers and duties as a state's "fishmaster." *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 659 (1979).

[499] Perkins v. Bergland, 608 F.2d 803 (9th Cir. 1979); Strickland v. Morton, 519 F.2d 467 (9th Cir. 1975). The court apparently distinguished the more liberal approach of later cases. *E.g.*, California v. Block, 690 F.2d 753 (9th Cir. 1982); Foundation for N. Am. Wild Sheep v. United States Dep't of Agric., 681 F.2d 1172 (9th Cir. 1982).

[500] Natural Resources Defense Council, Inc. v. Hodel, 624 F. Supp. at 1062.

[501] In a footnote, the court observed:

> Why the agency would propose a course of action that can, with little effort, be seriously criticized as being more expensive, resulting in less long-run improvement, and even less grazing in the long run can only be the source of speculation to the outsider. Certainly one obvious explanation is that the BLM performed an administrative policy pirouette under the baton of Secretary Watt around 1981, essentially deciding to postpone grazing reductions indefinitely.

Id. at 1056 n.6.

[502] *Id.* at 1062.

[503] Contrary to the courts' unexamined assumptions, the FLPMA multiple use, sustained yield management and planning sections do have some substantive content, however difficult

outcome seems to represent a dual abdication. The BLM abdicated its responsibility for improving range condition, and the courts abdicated their review responsibilities. The possible consequences of the decision may be significant for public natural resources law. If courts continue to find that nonplans comply with the FLPMA, the congressional desire to systematize public land management through formal land use planning could be thwarted entirely.[504] Unless some administrative, statutory, or judicial change occurs, BLM land use planning could be a dead letter, a paperwork holding action against confronting resource conflicts. Fortunately, other courts in other contexts have enforced FLPMA planning requirements in a more realistic fashion.[505] *NRDC II*, however, still suggests that FLPMA purposes may be circumvented by plan provisions so general that they offer no guidance for actual management. Whether Mr. Watt desired this result is problematic. The unfettered administrative discretion in planning now apparently permissible is a two-edged sword that could work to the detriment of Mr. Watt's intended beneficiaries.

b. *Cooperative Management Agreements*

In 1983, the BLM proposed a series of amendments to its grazing regulations.[506] The most radical amendment established a new Cooperative Management Agreement program.[507] In reality, nothing was particularly "cooperative" about the idea. Instead, the BLM proposed near-total abdication of management responsibility to selected permittee ranchers on their grazing allotments. Those chosen, by nearly nonexistent criteria,[508] could graze their livestock when and how they pleased, without limitations, seasons, or conditions.[509] The agency practically agreed in advance not to penalize them for

to interpret and apply. *See* Coggins, *supra* note 57, at 65–74, 98–109. The courts' NEPA analysis is also at best shallow.

[504] *See id.* at 98–100, 107–09.

[505] National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987); American Motorcyclist Ass'n v. Watt, 714 F.2d 962 (9th Cir. 1983); Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848, 853 (E.D. Cal. 1985); American Motorcyclist Ass'n v. Watt, 543 F. Supp. 789, 795–97 (C.D. Cal. 1982).

[506] 43 C.F.R. §§ 4100–4120.2-2 (1989). The proposed regulations initially appeared at 48 Fed. Reg. 21,820 (1983).

[507] 43 C.F.R. § 4120.1(a) (1984).

[508] Permittees were to be selected on the basis of whether they had demonstrated "exemplary rangeland management practices." *Id.*

[509] Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848, 862–63 (E.D. Cal. 1985).

even egregious abuses of this new, automatically renewable privilege.[510] The several dozen such open-ended agreements entered into before the final regulations were published demonstrated the lack of criteria and conditions.[511] In addition to the CMA program, the new regulations also provided that the BLM, in effect: (1) would no longer dictate permitted grazing limits in allotment management plans;[512] (2) would allow local BLM managers to ignore land use plans in making grazing decisions;[513] (3) would remove penalties for rancher violations of air, water, and wildlife laws on federal lands;[514] and (4) would no longer allow the general public to participate in or appeal from agency grazing decisions.[515]

Judge Ramirez, of the Eastern District of California, in *Natural Resources Defense Council, Inc. v. Hodel* (*NRDC I*),[516] invalidated every one of the challenged regulations. He did not speculate on the BLM's motives in seeking to avoid its conservation mission, and he assiduously avoided taking sides in the "cows vs. environment" debate.[517] He nevertheless found the BLM regulations fatally flawed without reaching many of the plaintiff's substantive arguments. Procedurally, the BLM did not draft an EIS for the proposed changes,[518] and it did not describe accurately what the regulations were intended to and would accomplish.[519]

The court threw out the CMA program on the merits. It was not authorized by PRIA's experimental stewardship section,[520] the court ruled, and it ran directly contrary to every federal law on the subject going back to the 1934 Taylor Act.[521] On this point, Judge Ramirez concluded: "It is for Congress and not [the BLM] to amend the grazing statutes. In the meantime, it is the public policy of the United States that the Secretary and the BLM, not the ranchers, shall retain final control and decisionmaking authority . . . on the

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[510] *See* 43 C.F.R. § 4120.1(b), (c), (d) (1984).

[511] *See* 618 F. Supp. at 863. "These agreements list no terms or conditions whatsoever which prescribe the manner in or extent to which livestock grazing shall be managed on these allotments." *Id.*

[512] *See* 43 C.F.R. § 4120.2(a) (1984).

[513] *See id.* § 4130.6–3.

[514] *See id.* § 4140.1(b) (7).

[515] *See id.* § 4100.0–5.

[516] Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985).

[517] *Id.* at 881.

[518] *Id.* at 871–73.

[519] *Id.* at 878.

[520] *Id.* at 866–68 (construing 43 U.S.C. § 1908 (1982)).

[521] *Id.* at 868–71.

public lands."[522] The government did not appeal, and it later paid attorneys' fees to the plaintiffs in recognition that its position was not substantially justified.[523] The official attempt to privatize federal forage thus failed, but, as *NRDC II* illustrates, the BLM grazing regulation scheme remains far from rigorous.

BLM Director Burford (by 1987, one of the last remaining Watt appointees in the Department) later attempted to resurrect the CMA program in a package of regulation amendments that also would have abandoned the grazing capacity concept.[524] Public opposition forced him to abandon this latest manifestation of departed Secretary Watt's invisible hand. That seems a fitting postscript to the Watt Revolution.

VI. CONCLUSION

> And indeed there will be time
> To wonder, 'Do I dare?' and, 'Do I dare?'
> Time to turn back and descend the stair,
> With a bald spot in the middle of my hair —
> . . .
> Do I dare
> Disturb the universe:
> In a minute there is time
> For decisions and revisions which a minute will reverse.
>
> T.S. Eliot, *The Love Song of J. Alfred Prufrock*[525]

James G. Watt took office at a time when the Sagebrush Rebellion was still alive and resource economists were earnestly debating the merits of various privatization options.[526] The political mood had shifted far to the right, and President Reagan fully endorsed his appointee's radical proposals.[527] Less than three years later, Mr. Watt was dismissed in disgrace, his programs and his Department[528]

[522] *Id.* at 871.

[523] Conversation with attorneys for plaintiffs (July, 1987).

[524] 52 Fed. Reg. 19,032 (1987).

[525] T.S. ELIOT, THE WASTE LAND AND OTHER POEMS 4–5 (1958).

[526] *See, e.g.*, FORESTLANDS, *supra* note 212; G. LIBECAP, *supra* note 212; R. STROUP & J. BADEN, *supra* note 212.

[527] Vig & Kraft, *Environmental Policies From the Seventies to the Eighties*, in REAGAN'S NEW AGENDA, *supra* note 98, at 2.

[528] Mr. Watt left Department morale at an all-time low because he fired and transferred career employees, dismantled the Solicitor's Honors Program, hired on solely political bases, and imposed strict censorship. *See* Coggins, *supra* note 12, at 25 n.203.

in shambles. Blanket judicial rejection of his initiatives was on the horizon. By any scoresheet, Mr. Watt was a personal, professional, political, and philosophical loser.

The reasons why Mr. Watt fell off the surging wave of conservatism when many other facets of President Reagan's programs were being adopted bear reemphasizing. It is not enough to dismiss Secretary Watt as an ideological zealot whose inflammatory rhetoric brought deserved political retribution. Other Reagan Administration officials of similar ilk, such as Attorney General Meese, survived in office far longer. Historians at some future time may produce a full exposition of public resource policy during the early 1980s, but at this brief remove we can only conclude with preliminary evaluations.

The main reasons for the debacle, aside from Mr. Watt's provocative utterances, were the more precise substantive and procedural limitations of modern public land law; Mr. Watt's underestimation of public support for environmental protection, of the strength of opposing conservation groups, and of the inertial forces opposing change; his failure to obtain congressional ratification or state cooperation; and his nonrecognition of the degree to which these trends effectively had circumscribed secretarial authority.

The past quarter-century has seen public land law and policy change greatly, but the changes were more evolutionary than revolutionary, and they continued long-established trends.[529] Mr. Watt's experience demonstrates that radical reform in this area is difficult, if not impossible, to accomplish administratively. Not only do recent statutes restrict secretarial discretion, but the interests of the Department's political constituencies from all over the spectrum also have become so entrenched that even moderate reform proposals must overcome a form of political gridlock.[530] During Mr. Watt's tenure, many public land users favored his ideas generally, but even his strongest supporters resisted any proposal that might adversely affect their positions in any way.[531] Other initial supporters were appalled at Mr. Watt's personal and policy extremism, and the western state governments quickly became disenchanted when the Department did not consult and cooperate with them to the extent that they desired.

Congress seldom legislates in the public land arena unless it perceives an emergency or the contending parties reach general agree-

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[529] *See id.* at 3–10.
[530] *See* Leshy, *supra* note 4, at 272.
[531] *See supra* notes 140–42, 208–11, 311, 364 and accompanying text.

ment on the need for new, legislatively-set management priorities.[532] With Mr. Watt in the saddle, however, even individual mineral leases became emergencies to which Congress strongly reacted.[533] The conservation/preservation interests were of course adamantly against nearly every change proposed by Mr. Watt, and they translated their opposition into effective legal and political action. Because Mr. Watt's attempt to impose his philosophy on the legal structure of federal land and resource allocation was essentially political, his failure was entirely fitting. Congress, not the Interior Secretary, has the constitutional power and duty to make such political determinations, and it is to Congress that Mr. Watt should have turned for reform authority.

The inconsistencies and unrealism of Mr. Watt's programs also contributed heavily to their rejection. Certainly he tried to do too much too soon. If the overall Department strategy contemplated overwhelming its opponents by sheer mass, then the strategy was defective. Instead, it led to broader and more concerted opposition in every forum. Economically, many of the Watt proposals were ill-timed. Massive coal leasing, for instance, makes little sense from any governmental perspective in the absence of strong demand.[534] Politically, ideas such as leasing in wilderness areas were bound to cause far more trouble than any possible production would have been worth. Practically, land and resource privatization controversies kept the Department continually on the defensive and embarrassed the only constituencies likely to support broad developmental initiatives.

Mr. Watt could never reconcile conflicting strains in his ideology. Western public land users are heavily subsidized in a variety of ways.[535] Mr. Watt could not both continue those preferences and

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[532] An example is the National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1614 (1988). It took a lawsuit, West Virginia Division of Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975), which shut down many Forest Service operations, to prompt Congress into action, and Congress then acted only after the combatants had agreed on some general outlines of the necessary legislation.

[533] *See supra* notes 444–59 and accompanying text.

[534] *See supra* notes 392–411 and accompanying text.

[535] Federal water is delivered and federal grass is allocated by permit for a fraction of market value, preference right lessees pay no bonus, mineral locators pay nothing, and recreationalists usually enter federal lands without leave or payment, for example. Further, states receive a large share of the relatively small federal revenues from these activities. *See* S. FAIRFAX & C. YALE, THE FINANCIAL INTEREST OF WESTERN STATES IN NON-TAX REVENUES FROM THE FEDERAL PUBLIC LANDS (1985). The federal government also subsidizes the West in less direct ways, such as predator control. *See* Coggins & Evans, *Predators' Rights and American Wildlife Law*, 24 ARIZ. L. REV. 821 (1982).

introduce free market, fair market value economics. Similarly, the Secretary's federalism principles were doomed when he honored the primacy of state resource allocation desires only insofar as states wanted unrestricted resource development within their borders.

The names of cases cited in this Article suggest another reason for the demise of Mr. Watt's reactionary reforms. The Sierra Club, the Natural Resources Defense Council, the National Wildlife Federation, and the National Audubon Society figure prominently as plaintiffs that successfully challenged Interior policy initiatives. Mr. Watt seriously underestimated the strength, tenacity, sophistication, and popular support of these and other self-appointed public interest guardians. To compound the consequences of that underestimation, Mr. Watt's confrontational rhetoric spurred the conservation organizations to greater efforts and filled their ranks with eager volunteers and donors.[536] These groups thought of their efforts as holding actions to contain environmental damage until another Administration entered office. In fact, the legislative and judicial defeats they inflicted on Mr. Watt solidified the legal constraints on resource development that they advocated far more than would have occurred under a less ideological Secretary.

The Watt experience illustrates another important lesson: the conservationists have won the battle for the hearts and minds of Americans. Because conservation and preservation values are firmly entrenched in the American consciousness, legal questions now usually revolve around means, and the ends are seldom disputed. Congress reflected that preference: not a single major piece of environmental legislation was repealed or seriously diluted during 1981–1983, and several new laws and amendments in that period strengthened legal protection of environmental amenities.[537] Mr. Watt was wrong—politically, legally, and popularly—in claiming that the pendulum of environmental protection had swung too far. His futile experience (as well as that of Anne Gorsuch at the Environmental Protection Agency[538]) demonstrated that the environmental ethic is as firmly

[536] The Sierra Club, for instance, doubled its membership and its budget during Mr. Watt's tenure. *See* Gendlin, *Mike McCloskey: Taking Stock, Looking Forward*, SIERRA, Jan./Feb. 1983, at 45; Mitchell, *Public Opinion and Environmental Politics in the 1970s and 1980s*, in REAGAN'S NEW AGENDA, *supra* note 98, at 61–62.

[537] *E.g.*, The Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1420 (Oct. 13, 1982) (codified as amended at 16 U.S.C. §§ 1531–1544 (1988)); *see also* Coggins & Harris, *The Greening of American Law?: The Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 NAT. RESOURCES J. 247 (1987).

[538] In at least one notable instance, the EPA scandals had a decided effect on an Interior Department public resource allocation controversy. *See* Conservation Law Found. v. Watt,

fixed high on the national political priority list as it is embedded in positive law.

In the end, that law proved to be the main agent of Mr. Watt's undoing. He consistently disregarded the process that Congress commanded as due, and his attempted circumvention of statutory strictures verged on the contemptuous. Procedurally, the Department often had been inept long before Mr. Watt's secretaryship,[539] but the failure to observe statutorily required procedures during his tenure plumbed new depths. NEPA, by 1981, was neither unknown nor novel, but the Department often tried to ignore or circumvent the environmental evaluation it required.[540] As the "unwithdrawal" case demonstrated, Mr. Watt also neglected to read FLPMA or abide by its procedural requirements.[541] A common thread in these instances was the apparent desire to exclude all but the economic resource users from the decisionmaking process.[542] At least since Watergate, administrative secrecy can be a prescription for disaster. Procedural corner-cutting proved counterproductive, because courts seized upon the procedural deficiencies to justify injunctions against the developments that corner-cutting was intended to facilitate.[543] Many of those disputed development proposals were then abandoned—perhaps permanently.[544]

Substantively, the Watt initiatives generated congressional and judicial rejections of unprecedented sweep and magnitude. Wholesale land privatization was simply a bad idea, incapable of realizing much popular support. Courts in the St. Matthew's Island land exchange,[545] BLM grazing

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560 F. Supp. 561, 580 (D. Mass.), *aff'd sub nom* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

[539] *See, e.g.*, Natural Resources Defense Council, Inc. v. Hughes, 437 F. Supp. 981 (D.D.C. 1977); National Wildlife Fed'n v. Morton, 393 F. Supp. 1286 (D.D.C. 1975); Natural Resources Defense Council, Inc. v. Morton, 388 F. Supp. 829 (D.D.C. 1974).

[540] *See supra* notes 181–95, 264–71, 349–54 and accompanying text.

[541] *See* National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C. Cir. 1987); *see also supra* text accompanying notes 230–44.

[542] That thread was evident in the "unwithdrawal" case, the grazing regulations case, *supra* notes 481–524, the St. Matthew's Island exchange case, *supra* notes 181–99, and the privatization program, *supra* notes 143–62.

[543] *See* cases cited *supra* notes 181–95, 251, 268–75, 332–37, 480.

[544] *E.g.*, the Fort Union coal sale, *supra* notes 402–03; the St. Matthew's Island land exchange, *supra* notes 181–98; oil and gas leases in wilderness areas, *supra* notes 414–33; land privatization, *supra* notes 143–62; the Osceola National Forest phosphate lease, *supra* notes 451–58; wolf hunting, *supra* note 322; and the cooperative management program, *supra* notes 506–24.

[545] National Audubon Soc'y v. Hodel, 606 F. Supp. 825 (D. Alaska 1984), discussed at *supra* notes 184–92.

regulation,[546] wilderness study area deletion,[547] and jurisdictional transfer[548] cases were not the only courts to decide that Secretary Watt's judgments contravened the substantive statutes.[549]

Strangely enough, it is possible to surmise that the legacy of Secretary Watt ultimately might be positive. Federal land and natural resources law, even after the reforms since 1960, remains a nearly impenetrable maze of statutes, regulations, doctrines, common law, and historical assumptions, which in its totality still lacks logic, consistency, equality, and fairness. Mr. Watt's pendulum swinging helps bring those defects into stark relief. Future Congresses may and should use the Watt misadventures as points of departure for streamlining and rationalizing the law governing the Nation's landed heritage. At the very least, future Interior Secretaries may profitably learn from the events of the Watt years that administrative reform must be moderate, cautious, and popularly accepted.

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546 Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985); *see also supra* notes 516–23 and accompanying text.

547 Sierra Club v. Watt, 608 F. Supp. 305 (E.D. Cal. 1985); *see also supra* notes 264–71 and accompanying text.

548 Trustees for Alaska v. Watt, 690 F.2d 1279 (9th Cir. 1982); *see also supra* notes 280–87 and accompanying text.

549 Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985); cases cited *supra* notes 229–40, 321, 322.