Public Lands (High A, Fall 2001 – Squillace. Supplement with Enviro. outline for NEPA/ESA)

Course Outline

Public Domain unreserved lands that are open to settlement or entry. Always owned by the federal government.

Reserved/Withdrawn Lands Ask: withdrawn from what? Unless reserved or withdrawn, public domain lands are assumed to be open for say mineral exploration. Typical reservations are for military installations, r-o-w, recreational uses, leases, national parks, Indian reservations.

Acquired lands are "reacquired" by the fed. govt. from states or private owners.

Statehood Grants

In lieu selection state land grants not available to states because particular sections are within areas already withdrawn. States may choose others in lieu of lands. States were granted lands at statehood for school trusts, prisons, and ag colleges.

Andrus v. Utah Utah wanted in lieu of lands to be blocked together in oil shale areas (state land grant lands must be used to fund schools). No. court said that Taylor grazing act allowed secretary to give in lieu lands that were "equal in quality." Would not grant lands that were "grossly disproportionate."

Beds of all navigable waters to states. Nonnavigable waters, each party owns to the thread of the stream. States must preserve as a part of the public trust.

Illinois Central state granted submerged lands under Lake Michigan to railroad company for dock construction. Court disallowed fearing that it would create monopolies that would restrict access to public lands and restrict access to harbor. Public trust doctrine is not severable, the state must serve the public interest.

Preemption

General Act of 1941 to legalize claims of settlors-squatters. Sanctioned preexisting claims and provided prospective prospect to settle new lands (could be purchased at $1.25/a).

Homesteading must establish residence within 6 months and cultivate 1/8 of the tract, then file proof to obtain patent. There were filing fees but no charge for acreage. Could get 160 acres by preemption and 160 by homesteading. Act was subject to many abuses: stripping of timber, land companies, etc. Created by 5-year right of entry and possession prior to proof.

Stewart don't have to succeed at homesteading to obtain patent, simply have to make effort required by statute. Must meet burden of proof that requirement met.

Desert Lands Act required that land be irrigated to obtain patent. Could obtain 640 acres at $0.25/acre.

Stockraising Homestead Act patentee obtained only surface rights, no mineral rights.

Mineral estate is usually dominant estate. Some state statutes limit dominance. May require explicit use when estates were split or will not allow strip mining.

Grants to Miners still viable right of entry. Codified from miner's codes that developed in camps. Generally that first in time is first in right.

General Mining Law of 1872 may patent claim for fee title, or may remain on land unpatented.

Mineral Leasing Act of 1920 removed fuel and fertilizer minerals from General Mining Law.

1955 Surface Res. Act removed common varieties (like sand, gravel and building stone) from General Mining Law.

Railroads granted r-o-w and ancillary parcels (odd numbered parcels within 20 miles of r-o-w) to induce/finance expansion and construction.

Unlawful Enclosures Act to combat the checkerboard lands, must allow access and management.

Leo Sheep if congress had intended r-o-w access to public lands across lands granted to railroad, it would have provided so in the statutes/grants. Here, it looked like a public invasion to reach Seminoe reservoir.

Camfield v. U.S. no private owner has the right to fence in public lands. There is no implied easement over public lands for a fence.

Federal Land Transaction Facilitation Act (Bacca Ranch Act). If lands are designated as appropriate for sale by a federal land manager, then the sale is authorized and proceeds are held for purchase of other lands by fed. Problem is that money is put into a pot that can be used by any federal agency.

Reclamation Act authorizes federal spending for large irrigation projects (dams, aqueducts, canals, etc.)

Reservation and Withdrawal

Gettysburg Electric under the constitution, the federal government may condemn private land for public uses. Fed sought to condemn land for Gettysburg park. Landowner claimed that there was no public purpose or use. Court agreed that there was, that it was the site of one of the greatest battles of the world, feds could reserve it for a public use.

BLM condemnation authority is generally limited to access for public lands (r-o-w).

Forest Reserves General Revision Act of 1891 (Creative Act) to prohibit entry for homesteading on forest lands. Mining and grazing were typically allowed.

Grimaud ranchers claimed that the Sec. of Ag. could not regulate use of forest land (secretary required permits for grazing) to prohibit grazing where the purpose of the

act was to improve and protect the forest and instream flows. Court said that secretary's authority was a proper delegation and he could regulate.

Light cattlemen claimed that Colorado law gave implicit right of entry to forest lands because forest lands were not fenced out. Court said no, that public lands were held by U.S. and are reserved for public trust.

Dept. of Agr. = Forest service, Dept. of Int. = National Park Service & BLM.

Midwest Oil in 1909 president Taft withdrew land for strategic oil reserves. Made law for oil and gas claims unclear because 1897 placer act allowed 160 acre claims. Challenged presidential authority to make the withdrawals. President claimed constitutional authority as commander and chief. Also, the land withdrawn was already public land. The claimants had no right to stake a claim without the fed's permittance. Therefore, there was no injury to a private interest because there was no pre-existing right. Also, because president is in charge of the public domain, he can make withdrawals to protect the public interest (an inherent power). [President's implied power was repealed by FLPMA, except power to create national monuments.]

Taylor Grazing Act 43 U.S.C. § 315, first land use policy. Designated grazing districts and land chiefly valuable for grazing (land use classification). Still effective (not repealed by FLPMA, although possibly superseded). Land use planning is a lot like zoning.

Omaechevarria v. Idaho Sheep v. cows. State law required 2-mile between cattle and sheep, and that any land currently grazed by cattle would not be open to sheep in the future. Sheep growers claimed that a state statute which regulates the use of public lands was a violation of 14th amendment. Court disagreed, this was not like the unlawful enclosures, this state statute is not inconsistent with federal law. Rather, the state is merely enforcing its police power. Exclusion of sheep is to prevent breaches of the peace, the state statute does not create an exclusive use for public lands for cattle ranchers. Other uses besides sheep still exist.

Property Clause

Kleppe v. N.M. State and federal governments have concurrent jurisdiction of federal lands. Act protecting wild horses and burros was not an impermissible intrusion on the state's police powers. Fed's could regulate federally protected animals.

U.S. v. Gardner grazed cattle on reseeded area of NF in violation of permit. NFS sought injunction and damages. Gardner claimed that FS land was not property of the US or ti would violate the equal footing doctrine. Court said no, that equal footing doctrine applies only to political standing and sovereignty (also to beds of navigable waters). It is not necessary to state sovereignty. Disclaimer in Nevada's constitution may have been declaratory only, because the US already had title to all lands via the treaty of Hidalgo. Also argued that via 10th amendment (powers reserved to states), that it was an invasion of police powers. Court said no, feds and states have concurrent jurisdiction of federal lands within a state.

Minnesota v. Block BWCAW, 90% of area was owned by feds and remaining 10% (streambeds) owned by state. Feds restricted use of motorboats and snowmobiles via the Wilderness act of 1964. Claimed that congress had exceeded its authority to regulate the state lands and activities affecting those public lands. Court said no, that congress could have rationally reached the conclusion that protection of the wilderness required regulation of inholdings consistent with the general policy for the area. Congress' power must necessarily extend to the regulation of conduct that would threaten the public lands. [here, if ratio of state/federal ownership was reversed, could maybe raise 10th amendment claim that such a ruling would effectively put all western states under federal control].

Ventura City v. Gulf Oil Gulf obtained federal permit (mineral lease from BLM under 1920 act) to drill a well. County had zoned the area as open space and forbade development without a special use permit from the county. Court said that the county ordinance was an obstacle to the accomplishment and execution of the purposes and objectives of congress.

Cal. Coastal v. Granite Rock Granite obtained permits to mine limestone within NF. Under state law, they were also required to get permit from coastal commission. Court said that the state and federal laws were not in conflict, therefore there is no preemption. The regulations were complimentary and it looked like the forest service contemplated state requirements in its permit, including a state certification requirement. Scalia's dissent said that state regulation was clearly a land use control, not for environmental protection, therefore they were not

complimentary. [Granite should have tried to get state permit first. Then it may have been more apparent that the state was attempting to veto the federal approval.]

Are Ventura and Granite Rock consistent? Probably yes, so long as state regulation doesn't exceed the land use activities authorized by the federal statute. Whether a federal agency could exclude state regulation would likely depend on the level of delegation. Granite Rock was perhaps an odd ideological combination, pro-industry, but republicans are generally for states' rights.

Federal Immunities G/R: federal government if immune from state law. G/R: no estoppel against the federal government, otherwise actions by an individual agent might bind the government (one of the few cases where estoppel was granted was Grant v. Hickel).

Western states get a percentage of proceeds and royalties from mineral resource development. Counties get in lieu payments to compensate for lost income of reserved lands. Most states get 50% of the royalties, AK gets 90%. States also assess a severance tax for mineral extraction. In addition, to obtain the lease, bidders will generally give a bonus.

Takings in Public Lands Issues (1) physical appropriation of property by the government = a categorical taking where compensation must be paid (Loretto, Nollan). (2) regulatory taking that denies all economically viable uses = a categorical taking (Lucas). May also be a taking if the regulation does not substantially advance (nexus) a legitimate government purpose (proportionality), or where it denies an owner economically viable uses. (Udell). If not categorical, analyze under Penn Central, see if the regulation interferes with a reasonable investment backed expectation. Penn Central & Keystone Bituminous, the denominator should be the entire property interest, should not allow segmentation. Exception to Lucas, was right to use part of the owner's title to begin with (under state law and nuisance), if not, no taking.

Palazzolo, what is relevant property interest, is 100% destroyed? Palazollo said that token remaining interests are not enough to avoid a take.

Tulare Lake, government restriction resulting from ESA limiting water available to irrigation district was a "physical appropriation" that was compensable.

FLPMA

U.S. v. Locke gravel pit operator in Ely failed to comply with FLPMA requirements to avoid stale mining claims and allow better management by government. There were 2 requirements, that (1) must initially register claim with BLM; and (2) must file annual notice of intention to hold the claim (in addition to $100 work requirement). FLPMA says that failure to comply = conclusive abandonment of the claim (§ 314(c)). Court said that legislature can add a reasonable restriction via regulatory constraints so long as it furthers a legitimate legislative objective. Here, claim could have been retained simply by filing. The type of title at issue here is unique, a possessory interest only until the claim ripens into a fee estate. Fed. government still exercises proprietary rights and can therefore regulate uses that don't interfere with the mineral estate. Due process requirements were satisfied, 3-year grace period after publishing of legislative act. Because it was not adjudicative, no personal notice was necessary.

MSLF v. Hodel wild horses in Rock Springs. Claimed that wild horses from public lands were impacting forage and water on adjacent private lands. Wanted the horses removed and damages – made a 5th amendment takings claim. Argued that horses were an instrumentality of the federal government and by not removing them, their presence = government occupation. Court said that there was no remedy for damages resulting from wildlife. Land use policy that results in diminution of property values does not = a taking.

Sutpack-Thrall v. Glickman MWA restricted motorboats on Crooked Lake. Pre-existing private land bordered on the lake outside of the WA. Claimed prohibition of motorboats was a taking because it would diminish the property values. Act expressly said that it could not regulate in a way that destroyed existing rights. To diminish the owner's rights via restriction on boats contravened the act and was therefore a taking. Here, court included in the valid existing rights riparian rights that extended to use of the entire lake (so part of their bundle of sticks was taken – access to the entire lake in a motorboat, and via Lucas & Nollan, it was a taking). Also, the regulation went too far because it interfered with existing riparian rights.

[phrase "subject to" is generally intended to avoid takings, to avoid having to pay compensation by design]

Delegation

Nat. Parks & Consv. Assoc. v. Stanton Wild and scenic rivers act. Congress delegated management authority to DOI. NFS did an EIS and management plan, delegating management to a committee (the land was substantially owned by private parties). Court said that secretary could not fully delegate where it was not set forth in the statute – interior was still bound to manage where not expressly delegable. Act said that resources would be "administered" by Interior. Also, onerous power to terminate the local committee counsel agreement was not practical as a management tool because it would destroy the management structure.

Judicial Review

Standing adversely affected (must allege specific injury); within scope of protectable interests (may not need APA standing to sue if citizen suit provision gives standing – obviates zone of interest test (still need to show injury)); injury must be redressable by the remedy sought; and must be traceable to the defendant's conduct.

Organizational Standing (1) member must have standing in own right; (2) are claims germane to organization's purpose; (3) relief requested doesn't require participation of individual members (typically when seeking damages, not equitable relief). Hunt v. Wash. Apple.

Lujan v. NWF reclassification of withdrawn lands to open them back up for O&G, mining development. No organizational standing because injury alleged was not specific enough, "in the vicininty" not clear enough to overcome a Rule 56(c) motion. Need to state facts with particularity. If you suspect it will go to a SJ motion, should state with particularity in the pleadings. [It may border on malpractice not to know the facts at the time of filing the complaint.]

Informational Standing injury to a procedural right to notice or access to information. May create standing, may not.

Exhaustion of Admin. Remedies must exhaust unless exhaustion is futile. Agencies typically set strict time limits to file an appeal (and other SOL) or it is foreclosed. If a plaintiff

failed to exhaust administrative remedies because they missed an admin appeal deadline, they don't get to go to court.

Interior Appeals (BLM) Decision from BLM officer appealed to IBLA. Grazing and mining appeals go directly to ALJ. IBLA may also refer cases to ALJ to determine factual issues. IBLA decisions are published and set precedent. Speaks for secretary unless he/she reverses it.

Forest Service Appeals From Dist. Ranger to Forest Supervisor to Regional Forester (usually end of the line) to Chief to Asst. Sec. and Sec. review (optional). All are informal and there is a tendency to affirm.

Ripeness To obtain judicial review must have (1) Fitness for judicial review (a final agency action); and (2) create a hardship if review is denied (like civil penalty would be an undue hardship). Lujan, land withdrawal review wasn't a final decision of any kind.

Ohio Forestry Forest plan didn't authorize cutting any trees, but Sierra Club argued that the existence of the plan would make logging more likely. Court said not a final action because no trees could be cut without subsequent permits. Although FMP is a final agency action, there is no hardship if review is denied. Sierra's new argument that injury would result from OHV use was not raised below and would not be considered on appeal.

Primary Jurisdiction where a claim is originally cognizable in court. Judicial process is usually suspended pending referral to agency for its views.

Sovereign Immunity APA waives in cases not involving money damages, actions against president are not barred because he is not an agency.

Preclusion of judicial Review (1) statutorily precluded; (2) committed to agency discretion by law (Overton Park, no law to apply). Typically deals with enforcement provisions where an agency may impose a fine. Analogized to prosecutorial discretion.

Scope of Review (1) arbitrary and capricious (rulemaking); (2) substantial evidence (formal agency action-adjudicaiton); or de novo where statute requires a de novo review. § 706 APA, FOIA.

Udall v. Tallman EO's withdrawing moose range from entry. Griffin applied for oil leases during period of withdrawal. Land was reopened later and Tallman applied for same leases, claiming that Griffin's were void ab initio whether they predated his or not. Court said that statutory language barring "other dispositions" was directed at fee title alienation. Here, oil leases were not like the kind enumerated as barred.

Wilderness Society v. Morton Pipeline contractors wanted a wider r-o-w to construct and maintain a pipeline. BLM issued a SLUP that extended the r-o-w to accommodate. This was contrary to statute which allowed only 50 feet. Court said that BLM had to wait until congress amended the statute to increase the width. Also, the SLUP was a violation of the DOI regulations anyway.

Deference No deference is owed an agency litigation position. Generally, an agency is not bound by it manual, but are evidence of the agency's policy and procedure (cf. Morton v. Ruiz agency is bound if manual has impact on individuals).

Withdrawals and Reservations § 102(j) of FLPMA defines withdrawal, reservation, and classification (unclear, like zoning concept of land use planning, easily changed via land use processes). Withdrawals are typically by executive action (although congress may designate NP, WA, and W&SR). Only current (main) withdrawal authority other than at § 204, is for antiquities.

§ 204(c)(1) FLPMA withdrawals of >5,000 acres may be made by the secretary for no more than 20 years. Requires public hearing (h). Must obtain consent for withdrawal from another agency if the land is managed by that other agency (i).

§ 204(d) FLPMA withdrawals of <5,000 acres may be made for an unlimited time for a specific resource use; or a period of not more than 20 years for any other use, or a period of 5 years to preserve the tract for specific use then under consideration by congress. And (h) & (i).

§ 204(e) FLPMA emergency withdrawal shall last only 3 years where extraordinary measures must be taken to preserve values that would otherwise be lost.

Proposed withdrawal tolls development for 2 years after notice while study is completed.(b)(1).

NWF v. Burford secretary wanted to use pre-FLPMA land use plans to terminate retention classifications. FLPMA is more rigorous than pre-FLPMA plans, therefore cannot use old studies to terminate plans under FLPMA. The act requires public participation for land use planning and for the management of public lands. [§309(e)

What is required to not allow a particular use (simply refuses to issue a permit or lease under an existing plan) – does that equal a withdrawal? No according to the 9th Cir. In Bob Marshall Alliance v. Hodel, refusal to give oil and gas leases was discretionary under Mineral Leasing Act of 1920 at 30 U.S.C. § 226(a), also at § 202(e)(2) of FLPMA. But in MSLF v. Andrus, the district court in Wyoming said refusal to grant leases was a de facto withdrawal and had to follow requirements of the Act. [Squillace thinks the 9th Cir. is correct.]

The legislative veto in FLPMA is probably unconstitutional via Ins v. Chadha because it violates the bicameralism and presentment clauses of the constitution.

Antiquities Act of 1906 16 U.S.C. § 431, not repealed by FLPMA. Allows an executive to withdraw lands owned or controlled by the government; that possess historic or scientific interest (including "other objects"); and shall be confined to the smallest area possible compatible with the proper care and management of the objects to be protected. Other objects is broadly construed, and owned or controlled by federal government may include submerged lands.

Land Exchanges, Sales & Transfers under FLPMA § 206. May be completed when in the public interest, values of exchanged lands may be equalized by cash payment, non-federal lands acquired shall be automatically segregated from appropriation under the mining laws for 5 years (lands acquired by DOI, subject to valid existing rights) and for 90 days (subject to valid existing rights for lands acquired by DOA). Land sales under § 203 are very rare.

Nat'l Audobon v. Hodel proposed land exchange for lands within ANILCA for lands on St. Matthew's island to allow for oil extraction support. ANILCA required that (1)

lands acquired will be for the purposes of ANILCA; and (2) must further the public interest. Watt cited 7 factors to support #2. Congress didn't specify which factors to consider – he concluded the exchange would result in a net benefit. However, the lands the secretary accepted in the exchange were already protected by ANILCA. Therefore, there would be a net loss. Watt's finding of little impact to island was clear error. Record showed birds and whales would be impacted and the impact would not be temporary. Used arbitrary and capricious review.

Access to and Across Federal Lands

Sierra Club v. Hodel (Burr Trail) r-o-w was created by RS 2477 – how was scope of old r-o-w defined? By state or federal law? State law governed because the regulations referred to state law. Therefore, reasonable and necessary standard set the width, also the capacity to deviate and meet special needs – easement vested each new use as an incident of the r-o-w.

SUWA v. BLM claimed informal adjudication of all roads. Construction had to = mechanized means, highway had to = public use/access. Roads were not reserved for public uses, they were excluded for lands with coal leases and other specific withdrawals.

U.S. v. Jenks whether FS could regulate access (charge for use and require special use permits) for r-o-w across NF to inholdings. Jenks claimed an existing right via patent and common law claims. 1st trial said that FS had to determine prior existing rights. Then, FS granted public road easement to county and mooted the question. Claimed easement by necessity (not necessary because of county easement), and implied easement (but more like a license, revocable at the will of the grantor).

NEPA and Public Lands (land use management statutes). A mitigating EA can undo any impacts to a species.

FLPMA says that BLM must conduct land use planning § 202(a). Plans shall be coordinated with the FS and with tribes § 202(b). Called Resource Management Plan (RMP). Shall be developed regardless of whether public lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses. § 202(a). Plans shall (1)use and observe the principles of multiple use and sustained yield; (2) use a systematic interdisciplinary approach to achieve an integrated consideration of physical, biological, economic, and other sciences; (3) give priority to the designation and protection or areas of

critical environmental concern, (5) consider the present and potential uses; (6) consider the relative scarcity of values involved; (7) weigh the long-term benefits; (8) comply with pollution control laws; and (9) coordinate with planning and management of other federal, state and tribal land resource management programs. § 202(c).

NFMA says that FS shall develop Land and Resource Management Plans (LRMP). 36 U.S.C. § 1604(a). The plans shall use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences. § 1604(b). Plans shall provide for multiple use and sustained yield of the products and services in accordance with the MUSYA including outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness. § 1604(e)(1). Shall determine forest management systems, harvesting levels. § 1604(e)(2).

Water Allocation

American Rule = reasonable use (riparian rights)

Permit System = regulated riparianism (eastern U.S.)

Prior Appropriation = western U.S. developed out of mining laws. Limited to beneficial use (the purposes of the water right). Uses an elaborate system of recordation (priority dates). Right may be lost by non-use.

California v. U.S. Reclamation Act of 1902. Who has ultimate power to manage water in reclamation projects – state or federal agencies? Federal acts (Homestead Act, Mining Act, Desert Land Act), all reserved for the use of the public under the laws of the states and territories.

Arizona v. California waters were reserved for Indian reservation regardless of use (implied reservation doctrine). Similar reservations are equally applicable to other federal establishments such as National Recreation area and National forest. If water is necessary for the purposes of the reservation, then the water is reserved.

Cappert v. U.S. Devils Hole N.M. How much water is reserved? Reservation is limited to the necessity of water for the purposes of the federal reservation. Here, amount reserved was that necessary to maintain the level of the pool to preserve its scientific value.

Indian reserves of water for agriculture are those necessary for "practicably irrigable acreage.

U.S. v. New Mexico U.S. argued that water reserved in national forest were for aesthetic value and for preservation of wildlife. New Mexico argued that the purposes of the reservation were narrower as specified in the 1897 Organic Act. There, only two purposes were specified: (1) preservation of the forest upon which water flows depend; and (2) maintain favorable forest production. Court said that if instream flows for aesthetics and wildlife, they would have been specified in the act.

Are there any Non-Reserved Federal Water Rights?

ESA requires water to preserve critical habitat – enough to fulfill the purposes of the designation. According to the Winters doctrine and Supremacy and Commerce clauses, the requirement does not work a taking.

Mining

Locating a claim: (1) check to see if the land is reserved (BLM office master title plot), make sure that it is open for location. (2) File a location claim in anticipation of rights at BLM and county offices. (3) Secure pedis possessio rights (occupy and physically work the land in pursuit of valuable minerals). (4) Make a discovery of a valuable mineral interest (must physically uncover the mineral, usually by core samples, obtain govt assay). (5) Map the discovery point (stake, monument). Then a claim is valid. You have 30 to 60 days to perfect. Perfection requires that you mark out the corners and sometimes the sidelines of a claim.

For a lode deposit, get 600' by 1500' (20 acres). For a placer deposit you may have 40 acres for a single claim and 160 acres for associated claims.

Castle v. Womble prudent person test: be reasonably justified in expenditure of labor and means with a reasonable prospect of success.

U.S. v. Coleman Marketability Test – Profitability: minerals must be marketed at a reasonable profit. Increased the level of scrutiny for mining claims. Value is determined as of the date of the patent application. Other factors to profitability include labor, water, environmental compliance.

FLPMA Maintenance Formalities (1) $100 dollars of annual assessment work. (2) File affidavit of assessment with county annually (notice of intent to hold). (3) File according to § 314 of FLPMA and pay $35 dollars. (4) pay $100 holding fee to government.

Patent of a mining claim = vested right only to do what is necessary to develop the mineral (it may be necessary to build a home under certain circumstances). A patent can be converted to fee title where (1) a discovery was made; (2) followed certain formalities ($500 work to develop, advertise, government assay, and paid fee for patent).

New patents have been suspended, those are pending under consideration.

Regulation of Mining Claims (not of Patents, patented land is no longer public domain)

United Mining Comparative value test. Value of cut stone to value of land for recreation.

43 C.F.R. § 3809 environmental regulations for mine reclamation and control. Must have a plan of operation (mining and reclamation plan, vague), and meet a bonding requirement (substantial for mine operators).

"M" Opinions (Millsite from Solicitor's office).

M-36988 dependent millsite depends on one or more valid mining claims. Miners assumed that each claim could have a dependent millsite of 5 acres. In 1997, Solictor said that could only have one millsite per mine. Government had discretion to make more lands available, but might limit whether or not a mine went forward because area for ore storage was discretionary. Therefore, may not have valid discovery (may have to pay for ore storage area.

M-36999 Glamis Mine. Proposed leach heap in California Desert Consv. Area (CDCAA). Considered proposed mine and mitigation measures required by NEPA, HPA, ESA, etc. HCP review determined that mine would affect area sacred to tribe. HCP opinion said the tribal values were critical and mine would destroy – no mitigation would prevent destruction. BLM didn't know how to respond. Solicitor said that BLM had authority via FLPMA to prevent degradation, and the CDCAA said that it should prevent undue impairment of resources. Coupling those two together, DOI could deny the permit even where the mining claims were valid.

Mineral Leasing Act of 1920 (O & G, Coal)

O & G is regulated under FOOGLRA (1982). Requires land use planning to determine which lands are available and suitable for O & G leasing. Designates tracts for competitive leasing (2560 acres at a minimum of $2/acre). Conducts oral auction. If no bids, goes to non-competitive bidding and the first qualified taker. Minimum rent is $1.50/acre. Royalties are assessed at 12.5%. Bonus bids are paid upfront. Leases are for 5 years and so long thereafter as O & G is produced in paying quantities. BLM is in charge of leasing program. FS may veto leases on FS lands. Revenues collected are split with the state.

A mining claim contest proceeding is a formal adjudication. Standard of review is substantial evidence.

Copper Valley Machine Works whether ban on summer drilling extended O & G lease term by period of forgone winters. Statute said that suspension of lease, "in the interest of conservation" tolls the lease. Driller argued that conservation included environmental concerns. DOI disagreed, that conservation meant conserving oil preserves. Court said that conservation did include environmental concerns and therefore, the lease was extended.

Coal is leased under the FCLA (1976). The act requires land use planning to ensure that long-tem use is okay. Specifies use of a Regional Sale Activity plan to delineate appropriate tracts for leasing to maximize returns, perform EIS, and enforce reclamation. Also regulates lease sale activities. DOESN'T REALLY WORK THIS WAY: exceptions prevent regional sales activities if (1) there is an emergency or (2) if the lease is located outside of a coal production region. Nearly all coal production regions have been de-classified. Regional coal teams are a federal "advisory committee" comprised of federal and state officials. Revenues are split with states.

NWF v. Burford coal leases must be sold at at least FMV. Entry level bids & minimum acceptable bid. Shift from EAB to ELB was not arbitrary and capricious. Method was acceptable for a declining market and 9 out of 10 bids exceeded DOI's FMV estimate. [Linowes commission found that DOI did not receive FMV.]

Land Use Planning under NFMA and FLPMA for O & G leasing: (1) ID tracts for auction at lease sales. (2) Hold lease sale (oral bidding conducted by BLM). (3) Obtain exploration approvals (for seismic studies and drilling). File APD, agency usually does and EA/EIS. (4) Obtain development approvals (EA/EIS). What does an O & G lease give you? Some right to develop O & G.

Split Estates

Surface rights in private hands, mineral rights to the U.S. The mineral estate is dominant. Gravel is a resource mineral in a split estate (stockraising homestead act), similarly, geothermal steam is a mineral. Federal government may lease out geothermal steam via 43 C.F.R. part 3200.

Common Varieties Act

Includes potash, sodium (trona), phosphates. Obtain a prospecting permit, and utilizes preference rights system. Known deposits are competitively leased through bidding. Unknown deposits are located by the prospecting system, they are non-competitively leased and anyone may apply for a permit to prospect. If commercial quantities are found, the prospector is entitled to preference right/lease.

Watt v. Western Nuclear Gravel is a mineral reserved for purposes of the Stockraising Homestead Act. [Contrasts with most state rules regarding a mineral estate because gravel is usually mined from the surface. Also, language of the reservation for minerals may be squirrelly.]

Timber Resources (Creative Act, Organic Act, FLPMA, NFMA, MUSYA)

FS begins with a forest-wide land use plan (LRMP – like zoning the forest). It then identifies the suitable timber base and determines exclusions. FS identifies the annual sale quantity (ASQ – the maximum annual sustainable yield). FS creates a timber sale schedule over a year (actual sales require NEPA compliance). FS performs a cruise to inspect and quantify actual timber in sale area. FS conducts auction for sale.

Prineville Sawmill FS estimate for bidding was incorrect. One bidder, Prineville made its own cruise and constructed a skewed bidding strategy. Prineville submitted the high

bid and was awarded the sale. FS then surveyed the timber and rescinded the sale. Prineville sued in Court of Claims to get cash. FS claimed that no review as available because it was committed to agency action. Court said no, that bidding must be open and fair, therefore it is subject to arbitrary and capricious review. There was no umbrella rule, but factors to be considered were: (1) bad faith; (2) absence of reasonable basis for agency decision; (3) amount of discretion left to official; and (4) proven violation of pertinent statutes. Here, decision to cancel was bad faith, motivated not by desire to ensure fair competition, but to obtain more money for the sale.

Scott Timber marbled murrellet was designated as "sensitive species" at time of timber sale. Later the bird was proposed for listing and TRO was issued pending listing determination. FS suspended timber contract. Clause allowed suspension to prevent environmental damage. Court said that a contractual suspension must be reasonable. Suspension of contract beyond TRO and consultation period was unreasonable. Contract also required FS to cancel or modify the contract to protect listed species. To meet a SOVEREIGN ACTS DEFENSE must meet two-part test: (1) that it is a sovereign act; and (2) should be discharged under the common law doctrine of impossibility, an event contrary to the basic assumptions of the parties. Here, there was no impossibility because the non-occurrence of listing was not outside the basic assumption of the parties.

NEPA doesn't specifically require a cost/benefit analysis, but if already engaged in one, must be part of the NEPA process.

Northwest Forest Council Northern Spotted Owl. Statute provided for expedited resumption of suspended timber sales. Stemmed from Northwest Timber Compromise. Challenged provisions were: (1) award and release required (for properly offered sales); (2) threatened and endangered species; and (3) alternative offer. Court said that as to award and release, sale must have been properly (validly) offered (bids open). If the sale was enjoined or cancelled thereafter, it was still okay. Failed sales must be released, even to non-high bidders because existing regulations give FS deference. The statute's "known to nesting" requirement was applicable to time tracts were originally offered for sale.

MUSYA, 16 U.S.C. § 528-531 is supplemental to other FS statutes. Sustained yield is defined as "the achievement and maintenance in perpetuity of a hig-level annual or regular periodic output of the various renewable resources ... without impairment of the productivity of the land." § 531(b). Multiple uses include outdoor recreation, range, timber, watershed, wildlife and fish purposes. § 528.

Sierra Club v. Butz FS must give due consideration. Informal reasoning requires FS to consider facts available re. Ecological consequences and alternatives.

RPA, 16 U.S.C. § 1601-1613, was designed to make the FS look nationally at its plans, policies, etc.

W. Virginia Div. of Izaak Walton League claimed that clearcutting of contract sale violated the sales provisions in the Organic Act. Old law didn't allow even-aged management (clearcuts), NFMA does allow.

Cuddy Mountain Alleged that in making sale of 18.8 MMBF, FS failed to consider environmental impacts required by NFMA and NEPA. Pileated woodpecker.

1. NFMA requires a LRMP and EIS. Implementation of LRMP requires a site-specific assessment of old-growth for habitat for management indicator species (MIS). Assessment report did not state with specificity that after the sale, habitat requirements would be met.

2. Under NEPA, FS failed to comply with procedural requirement that cumulative impacts be considered in the EIS (for past, present, and reasonably foreseeable future actions). How cumulative impacts would affect old-growth habitat must be assessed. This requires some quantitative or detailed information. EIS must be completed before an action takes place.

3. Mitigation measures for red-band trout (sedimentation) were insufficient and non-specific to creeks affected by the sale. Also, methods to prevent sedimentation were too general.

Considerations For Timber Harvest: soil type, slope, restocking, water resources. Economic suitability. Diversity of plant and animal communities. Rotation age and culmination

(Non Declining Even Flow) – stable annual harvest good for economies. Clearcutting and below-cost sales.

Range Management on Public Lands

Taylor Grazing Act, 43 U.S.C. § 315 and § 202(c) of FLPMA controls and requires land use planning. TGA § 315 says that Sec. of Interior is to promote the highest use of public lands pending its final disposal ... is authorized to designate grazing districts ... [for lands] which in his opinion are chiefly valuable for grazing and raising forage crops. The secretary may issue permits to graze to settlors, residents, and other stock owners ... [and may give preference] to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlors, or owners of water or water rights as may be necessary to permit the proper use of lands , water or water rights owned, occupied or leased by them." § 315b. May also issue grazing leases on lands not situated within an grazing district – same preference rules apply. § 315m. Practically, the Secretary may dissolve districts and issue leases without making the chiefly valuable determination.

A new permit or lease (10-year term) is subject to NEPA, the assessment required is generally limited to an EA.

FLPMA § 202(c) requires land use planning for (5) present and potential uses; 96) scarcity of values involved, recycling of other sites; and (7) long-term vs. short-term benefits.

Prior existing grazing may continue in a wilderness area. 16 U.S.C. § 1133(d)(4).

What rights does a grazing permit give you? Federal agencies can exchange lands (withdraw) the subject to the permit, banks may take the permit as security, but § 315b of TGA says that a permit doesn't create any "right, title, interest, or estate in or to the lands." Right is not sufficient to raise a 5th amendment takings claim.

U.S. v. Fuller claimed that upon taking of fee lands by govt, value of just compensation should include the attendant leased public lands because it was assessed in FMV. Court said no. Condemnor is not required to compensate for elements of value that the

government has created or destroyed in exercise of governmental authority or by power of eminent domain. Taylor grazing act didn't create any vested property rights, that is explicit in statute.

Can anyone bid on a grazing permit. No. not allowed under TGA (stockraiser, land owner, etc.). But on a secondary sale of a permit to a conservation group, BLM could amend the LUP to protect those values that he willing buyer considers valuable. Make sale contingent upon amendment of plan by BLM.

NWF v. BLM challenged renewal of grazing permit because NEPA and RMP were inadequate. They were devoid of site-specific information or analyses of impacts of grazing on the resource. Didn't even mention the particular grazing allotment. Therefore, because these issues were not dealt with prior to issuing a permit, the BLM must complete a full EIS.

Public Lands Council v. Babbit § 315b of TGA. Whether 3 new regulations exceeded the authority delegated to the secretary. (1) grazing preference is merely a priority right because new definition removes AUMs as attached to the base property, and allocates AUM by the LUP. Court said that was okay, permits are not absolute (create no rights) and secretary is free to determine how grazing privileges shall be safeguarded. (2) Omission of phrase in regulation did not change statutory requirement that grazing permit holders must be stockraisers, and 10th Cir. doesn't allow conservation groups to be eligible for grazing permits. (3) § 315c of TGA requires payment only for temporary, removable improvements (loading chutes, corrals) that the ranchers may still own (as opposed to permanent improvements that stay with the land).

NWF v. BLM whether FLPMA analysis requires cost-benfit. FLPMA does not require an economic cost-benefit analysis, rather BLM must informally and rationally balance competing values.

Idaho Watersheds Project v. Hahn Conditions in resource management area violate BLM regulations for "fundamentals of rangeland health." Court said that BLM not only needed to start evaluation of forage conditions, they had to complete and make limitations before the

next grazing season to achieve ecological standards. [see also FLPMA § 302(b) secretary is to take "any action necessary to prevent unnecessary or undue degredation of the lands."]

Wildlife Resources

Responsibility is split between the states and the feds. Constitutional issues, who owns the wildlife. Feds own and may regulate within a state via the Commerce clause. Also, vai the Treaty clause, the feds have responsibilities to other countries. According to the privileges and immunities clause, different fees for non-state residents are okay.

ESA, § 4 for listing of species and designation of critical habitat (unless not determinable); § 7 requires consultation. Duty of conservation is throughout the act. It is an obligation of all federal agencies. The primary goal of the act is to de-list species through recovery of the populations. The recovery plan is the primary vehicle. § 9 forbids taking a listed species by any person and requires HCPs (some regs may contain minor exceptions – like experimental populations). Take includes "harm or attempt to actually kill or injure wildlife ... may include adverse habitat modification or degradation where it actually kills or injures by significantly impairing." Generally no take of plants except for restrictions on federal lands.

TVA v. Hill snail darter case. Dam nearly complete before ESA was enacted. § 7 requires a procedural and substantive component. Consultation is required to avoid jeopardy to a listed species. TVA argued that ESA was repealed by implication in its funding bill – that ESA should not apply to ongoing projects.

Northern Spotted Owl v. Hodel contrary to biologists opinion, FS decided not to list the northern spotted owl as endangered. If a BA indicates jeopardy, must obtain a BO (formal consultation). May avoid formal consult by doing informal consultation that does not require notice and comment.

Sierra Club v. Clark predator control plan was challenged for "threatened" wolf population in Minnesota. Was public sport trapping consistent with the obligation to conserve? Court said that the statute limited the Secretary's discretion to allow sport hunting. Standard of review was "arbitrary and capricious, and abuse of discretion, or otherwise not in accordance with law."

National Wildlife Refuge System was land is put into the system, it takes an act of congress to remove it. Refuges are generally established for the dominate use, and other uses are tolerated.

Wyoming v. U.S. brucellosis vaccinations at National Elk Refuge by state wildlife officers. Secretary had sole authority to regulate wildlife on the refuge – act did not give Wyoming mutual rights. [should have done general APA waiver of suit.]

Intertribal Bison Coop v. Babbit Yellowstone National park was sort of like a trustee, duties like conservation of wildlife and dominate use theories were important. Interim plan reduced and eliminated the killing of bison that posed no disease threat.

Alaska Wolf Kill Secretary's obligations under NEPA and FLPMA. Court didn't analyze NEPA or APA. However, failure of an agency to act can trigger NEPA. Nothing in FLPMA enlarged or diminished the state's responsibility for managing wildlife.

Wilderness

Wilderness Act of 1964, 16 U.S.C. § 1131-36. Originally did not apply to BLM lands (FLPMA extended). Wilderness may only be designated by congress, and designated lands remain under the authority of the agency who managed prior to the designation. § 1131(b). Purpose is manage land to protect the wilderness values § 1131(a). Definition of wilderness at § 1131(c) is primeval, untrammeled by man, size, etc. § 1132 contains the designation provisions, initial area, review of suitability for roadless areas, primitive areas = study category. § 1133(a) makes the WA supplemental to NF and National Wildlife Refuge statutes. (MUSYA is also supplemental, and in U.S. v. N.M., feds didn't get reserved water rights for supplemental act). To combat, some wilderness laws designate water rights.

§ 1133(b) the managing agency is responsible for preserving the wilderness character of the area. (c) no roads (permanent) or commercial activities are allowed (but commercial services like guides, rafting, are allowed by (d)(5)). (d) special provisions: (1) may control pests, bugs, fire, rescue operations; (2) & (3) mineral activities; (4) presidential power to designate water projects and roads, livestock grazing to continue (maybe greater grazing rights than in non-wilderness areas). Commercial logging is generally prohibited (because no roads, vehicles or motorized machinery). Also, mountain bikes are generally prohibited as mechanized. Inholdings and access to them are generally protected – right of access.

Sierra Club v. Lyng spott cutting in wilderness area to control pine beetle damage to lands adjacent to. Claimed that program was unjustified as a way to protect wilderness (did not protect wilderness). Court said that secretary must justify and explain how the program protected the wilderness character.

Lyng II focused spot control was okay to: (1) protect cockaded woodpeckers; or (2) where it was necessary to protect adjacent wilderness values.