

The Public Trust Doctrine in Public Land Law

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The 700 million acres of federal land—almost one-third of all land in the country¹—have come to play an increasingly central role in the nation's economy and society. These public lands and the resources on and under them contain economic wealth that is literally beyond our capacity to measure. Hardrock minerals—gold, silver, uranium, molybdenum and many others—are being produced at accelerating rates from federal holdings.² Federal coal, oil and synthetic fuel minerals such as oil shale have

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¹ See BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 10 (1977) [hereinafter cited as PUBLIC LAND STATISTICS]. The characterization that one-third of the nation's land is federal land may be misleading, since public lands are heavily concentrated in the West. Breaking down the gross statistics, public lands constitute 90.5% of the land in Alaska; 47.9% of the land in the "eleven western states" (Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming); and 4.3% of the land in the remaining 38 states. *Id.*

² *E.g.*, OFFICE OF TECHNOLOGY ASSESSMENT, MANAGEMENT OF FUEL AND NONFUEL MINERALS IN FEDERAL LAND 5 (1979):

[T]he Federal land is concentrated in the areas considered to be most favorable for the occurrence of economic mineralization. Most domestic nonfuel mineral production has come from federal land areas, which contain the bulk of the known domestic resources of a majority of the metallic minerals.

See also U.S. GENERAL ACCOUNTING OFFICE, MINING LAW REFORM AND BALANCED RESOURCE MANAGEMENT 2 (1979):

[P]resent knowledge about the geological content, combined with the geographic pattern of established mining districts, indicates that the public land areas of the West generally hold greater promise for future [hardrock] mineral discoveries than any other region. From the standpoint of current and projected mineral availability in the United States, the Federal Lands play a vital role.

recently come to be viewed as integral to any reasoned solution to our energy problems.³ Federal range lands provide a significant part of the forage for livestock in the West.⁴ The public timber inventory includes over half of the nation's softwood timber,⁵ and the annual harvest from these lands, some of them among the most productive in the world, has multiplied several

³ Because of the concentration of many fuel minerals on the public lands, the rate of exploitation of public land resources will be a critical issue in our national energy policy. For example, "About half of Alaska's undiscovered potential crude oil and natural gas resources are estimated to be on Federal land. Approximately 28 percent and 31 percent of the identified crude oil and natural gas resources, respectively, in the 11 western states are on Federal land." See OFFICE OF TECHNOLOGY ASSESSMENT, MANAGEMENT OF FUEL AND NONFUEL MINERALS IN FEDERAL LAND 314 (1979). The public lands also contain 35% of the nation's coal supply. *Id.* at 298. Coal production on the public lands has increased dramatically in recent years, from 7,059,093 short tons in 1967, BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 84 (1967), to 50,196,779 short tons in 1977. PUBLIC LAND STATISTICS, *supra* note 1, at 104. "As of September 30, 1979, there were 546 federal coal leases which were estimated to contain approximately 17 billion tons of recoverable reserves." SECRETARY OF INTERIOR, U.S. DEP'T OF THE INTERIOR, FEDERAL COAL MANAGEMENT REP., App. A, at A-1 (1980) (ANNUAL REPORT under § 8 of the Federal Coal Leasing 1980 Amendments Act of 1976).

Fully 80% of the nation's most valuable oil shale deposits are located on public lands. "Approximately seventy-five percent of the known U.S. oil shale deposits are concentrated within a 1,350-square-mile area of the Piceance Creek Basin in the Parachute Creek member of the Green River Formation in northwestern Colorado. Within this area, federally owned land contains 1.1 trillion barrels of oil." Moffett, *Federal Oil Shale Policy: An Analysis of Development Alternatives*, 13 Hous. L. Rev. 701, 703 (1976).

For an analysis of the increased emphasis on coal and oil shale as a result of former President Carter's energy program, see Comment, *Environmental Implications of a Synthetic Fuel Industry*, 4 HARV. ENV'T'L L. REV. 391 (1980).

⁴ In 1976 the Bureau of Land Management (BLM) reported that 7,981 grazing leases were in force involving 17,121,676 acres of federal land. This land accommodated 2,322,669 head of cattle, 2,976,321 sheep and goats and 15,715 horses. PUBLIC LAND STATISTICS, *supra* note 1, Table 60 at 89, Table 65 at 93. The public lands account for about three percent of all the forage consumed by livestock in the United States. The greatest impact is in the West, where public lands supply 12% of the total forage. See PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 105 (1970) [hereinafter cited as PL-LRC REP.].

⁵ The national forests contain only 18% of the nation's commercial forest land but, due to dense, old-growth stands of large trees, account for 51% of the softwood timber inventory. Other federal agencies, principally the BLM, hold another 12% of our softwood saw timber inventory. U.S. DEP'T OF AGRICULTURE, FOREST SERVICE STATISTICS OF THE U.S., Table 13 at 40 (1977).

times over during the last quarter of a century.⁶

The non-economic resources on the public lands are no less important. Many species of wild animals depend on the prime wildlife habitats found on the federal lands.⁷ Most of the snow pack in the western United States is on the public lands, providing scarce water supplies for all of the economic and non-economic resources.⁸ The national scenic wonders, many so famous that they need not even be identified, attract several times more visitors today than even a generation ago.⁹ Congress, which in

⁶ Historically, the public forest lands have made a relatively modest contribution to the nation's timber harvest. In 1920 the national forests provided only 1.4% of the 59.2-billion-board-foot national harvest. In 1940 the national forests supplied only 3.2% of the nationwide timber production of 54.3 billion board feet. Since the Second World War, however, the national forests have provided an increasing share of the total national softwood production. In 1970 the national forests accounted for 18% of the domestic timber production of 59.1 billion board feet. See generally G. ROBINSON, *THE FOREST SERVICE* 14 (1975); D. BARNEY, *THE LAST STAND* 18-19 (1974); West Virginia Div. of the Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945, 955 (4th Cir. 1975).

It has been suggested that the "central policy issue" for meeting future demand for wood is the rate at which "old growth inventory on the national forests [should] be converted to well-managed new stands to meet both current and future timber needs." REPORT OF THE PRESIDENT'S ADVISORY PANEL ON TIMBER AND THE ENVIRONMENT 9 (1973).

⁷ The BLM estimates that the public lands are used by 45,290 bighorn sheep, 230,000 caribou, 104,283 elk, 82,151 moose, 8,235 mountain goats, and 1,196,739 deer. PUBLIC LAND STATISTICS, *supra* note 1, Table 56 at 83. Professor Swanson has stated that without public lands the future of wildlife in the United States would be "very grim." Swanson, *Wildlife on the Public Lands*, in WILDLIFE AND AMERICA 428 (H. Brokaw ed. 1978).

⁸ Because federal reservations are normally found in the uplands of the Western States rather than the flatlands, the percentage of water flow originating in or flowing through the reservations is even more impressive [than the percentage of land owned by the federal government]. More than 60% of the average annual water yield in the 11 Western States is from federal reservations.

United States v. New Mexico, 438 U.S. 696, 699 n.3 (1978).

⁹ Between 1960 and 1978, for example, visits to the national park system increased by 357%. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 239, Table 398 (1979). See generally J. SAX, *MOUNTAINS WITHOUT HANDRAILS* (1981); Twight & Cotton, *The Politics of Images: Forest Managers vs. Recreation Publics*, 15 NAT. RESOURCES J. 297 (1975); Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709. See also U.S. OFFICE OF TECHNOLOGY ASSESSMENT, *supra* note 2, at 5: "Initially as a result of historical accident and subsequently

the 19th century pioneered an international movement to set aside national parks for recreation,¹⁰ has now gone a step farther: during the last seventeen years the United States has established far and away the largest governmentally designated system of wild areas in the world.¹¹

The last ten years have been marked by a burgeoning number of conflicts among the many groups that compete for the finite quantity of federal land and resources. Pressure from these conflicts focuses most directly on the four major resource agencies that administer the bulk of the federal holdings. Three are in the Department of Interior. The Bureau of Land Management (BLM) is responsible for most of the public lands—about 450 million acres. The U.S. Fish and Wildlife Service is also housed in the Department of the Interior, as is the National Park Service. The oldest land management agency, the Forest Service, is located in the Department of Agriculture and has responsibility for about 187 million acres.

The Fish and Wildlife Service and the National Park Service have had, and will continue to have, their share of controversy. Their dominant-use statutes, however, provide relatively specific management standards.¹² The greatest challenge for coordinated management of economic and non-economic resources occurs on the multiple-use lands held by the Forest Service and the BLM. It is there, where even recently enacted statutory guidance

by design, the federal government became the owner (in trust for the public) of the Nation's most important and unique nonmineral resources, particularly the non-commercial ones. The Government's holdings of such resources are now among the most significant in the world."

¹⁰ The world's first large-scale reservation of lands for public recreation occurred in 1872 when Yellowstone National Park was withdrawn from settlement and reserved as a "pleasuring ground for the benefit and enjoyment of the people." Act of March 1, 1872, ch. 24, 17 Stat. 32. See generally R. NASH, *WILDERNESS AND THE AMERICAN MIND* 108-21 (1967). See also R. CARRINGTON, *GREAT NATIONAL PARKS OF THE WORLD* 14-15 (1967): "The concept of national parks as we know them today, and all the most energetic and effective pioneering work in establishing human attitudes towards them, is one of the many debts the world owes to the United States. . . . Since 1872 the national park movement has spread to all countries."

¹¹ J. HENDEE, G. STANKEY & R. LUCAS, *WILDERNESS MANAGEMENT* (1978).

¹² E.g., National Park Service Organic Act of 1916, 16 U.S.C. §§ 1-18f (1976); National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee (1976 & Supp. III 1979).

remains comparatively opaque,¹³ that the crunch will come. But on all of the land systems, litigants of every stripe can be expected to turn with increasing frequency to the public trust doctrine to resolve the close questions.

The federal public lands are at the outer reaches of the public trust doctrine. Analysis should fairly begin with a statement by the Supreme Court in *Illinois Central Railroad Co. v. Illinois*.¹⁴ The Court said that the doctrine, in its classic form, operates as a bar against the large-scale disposition of lands under navigable waterways.¹⁵ In dictum, the Court added that title to land under navigable waterways is "different from the title the United States holds in the public lands which are open to pre-emption and sale."¹⁶ That language amounts to a clear finding that the classic public trust doctrine does not operate on the inland public lands.¹⁷ Put another way, inland federal lands are not "trust

¹³ National Forest Management Act of 1976 (NFMA), Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600-1614 (1976) and scattered sections of 16 U.S.C.); Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-1782 (1976) and scattered sections of 7, 16, 30 & 40 U.S.C.).

¹⁴ 146 U.S. 387 (1892).

¹⁵ *E.g., id.* at 455-56:

The trust with which [lands under navigable waterways] are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

This statement, like others in the opinion indicating that trust resources could not be alienated by the legislature, was dictum. The Court did not have to rule on the validity of the original grant to the railroad; Illinois had revoked the grant, and the Court upheld the revocation. For a full discussion of the case, see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489-91 (1970).

¹⁶ *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892). By "sale" the Court was probably referring to the several homesteading laws; "pre-emption" in this context is the preferential right, based on various statutes, of a settler to a patent based on his or her good-faith squatting on land before the area was opened for homesteading. See authorities cited in note 101 *infra*.

¹⁷ The phrase "inland public lands" is used here to describe all public lands not under navigable watercourses. In practical terms, almost all public lands are inland public lands, since former public lands under navigable watercourses were transferred to new states at the time of statehood pursuant to the equal footing doctrine. See text accompanying notes 38-41 *infra*. The United States has since reacquired some lands under navigable watercourses, however, to which the doctrine presumably applies. See note 145 *infra*.

resources" according to the classic formulation of the doctrine.¹⁸

The *Illinois Central* dictum is due in part to the fact that the public lands can be distinguished from other lands on which trusts have traditionally been impressed. Lands analogous to the modern federal public lands were not impressed with a trust at common law.¹⁹ The inland lands of the Crown were not trust resources.²⁰ They were not limited by the restraints of the *jus publicum*, the public right, and were subject only to the *jus privatum*, the right of the Crown to manage them, to own them and to convey them without the restrictions of the trust.²¹ Thus the common law trust is not direct authority for the existence of the public trust on the inland public lands.

Although the United States holds Indian lands in trust,²² a

¹⁸ A major part of the expansion of the public trust doctrine has occurred in the evolution of what might be called "trust resources." At common law the trust applied only to tidal waters. See generally H. ALTHAUS, PUBLIC TRUST RIGHTS 1-70 (1978). See also note 20 *infra*. In this country the doctrine was first expanded to include all navigable waterways as trust resources. See *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892) (public trust doctrine applies to land under navigable lakes); *Shively v. Bowlby*, 152 U.S. 1, 46 (1893). In some jurisdictions the doctrine has also been found to protect resources such as parklands, wildlife, nonnavigable watercourses and air. See generally W. RODGERS, ENVIRONMENTAL LAW 170-86 (1977).

This article uses the phrase "classic public trust doctrine" to refer to the doctrine as applied in *Illinois Central*, *i.e.*, as a limitation on the transfer by states of large amounts of land under navigable watercourses.

¹⁹ See note 18 *supra*.

²⁰ Upon the Norman conquest in 1066, the title to all English lands in effect vested in the new king, William. Both inland and coastal lands were routinely granted by the Crown to private owners. As to the coastal grants, however, a presumption arose that the Crown's conveyance did not include title to lands under tidal waters. See H. ALTHAUS, *supra* note 18, at 37; 1 WATERS AND WATER RIGHTS 246 (R. Clark ed. 1967); Sax, *supra* note 15, at 475.

²¹ The Crown was recognized as holding two interests in its tidelands: an alienable private right or *jus privatum*, as well as an inalienable public right or *jus publicum*. This public right guaranteed the people interests such as navigation, commerce and fishing. No analogous public right attached to the inland lands of the Crown. See *Shively v. Bowlby*, 152 U.S. 1, 11-13 (1893); 1 WATERS AND WATER RIGHTS, *supra* note 20, at 246-47; Fraser, *Title to the Soil Under Public Waters—A Question of Fact (pt. 1)*, 2 MINN. L. REV. 313, 319-22 (1918). See also *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 466 (Shiras, J., dissenting).

²² The United States holds legal title to most tribal lands, but the right to the beneficial use and occupancy of these lands is in the respective tribes. *E.g.*, *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938). In some cases land is held in fee by the tribes, but a trust relationship still exists, and alienation is subject to the consent of the United States. *United States v. Candelaria*,

number of factors make those lands very different from the public lands. The Supreme Court has recognized the special obligations to Indian tribes in opinions dating at least to 1831.²³ Also, the trust obligations to Indians trace to specific documents: Indian relations were normally established by bilateral treaties or other negotiations.²⁴ Finally, Indian lands are not public lands.²⁵ Congress, although a public body, has essentially private obligations toward Indian lands, and those private obligations run to specific parties — Indian tribes and individuals.²⁶ There

271 U.S. 432 (1926); 25 U.S.C. § 177 (1976).

In arguing for the public trust doctrine in public land law, some have analogized the public lands to Indian lands. *E.g.*, *Sierra Club v. Department of Interior*, 376 F. Supp. 90, 95 (N.D. Cal. 1974), *discussed in notes 62-79 and accompanying text infra*; Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586, 591 (1977).

²³ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), was the first Supreme Court case to speak of the federal government's trust responsibilities to Indian tribes. In *Cherokee Nation* the Court, in an opinion by Chief Justice Marshall, held that Indian tribes are not "foreign states" within the meaning of the judicial review provisions of art. 3, § 2 of the Constitution. Rather, Marshall said, tribes are best described as "'domestic dependent nations' whose relation to the United States resembles that of a ward to his guardian." 30 U.S. at 17; *see, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 541 (1974). *See generally* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975). The Indian trust obligation ultimately derives from the special place of aboriginal people in international jurisprudence. *See generally* McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests*, 13 HARV. C.R.-C.L. L. REV. 357, 360-65, 367-76 (1978).

²⁴ *See, e.g.*, *Winters v. United States*, 207 U.S. 564 (1908) (agreement negotiated between tribe and administrative officials later approved by Congress in the form of a statute); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (treaty). The Indian trust relationship was sometimes established by unilateral executive order. *E.g.*, *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973).

²⁵ F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, Ch. 3, Sec. A n.19 (3d ed. 1981). In *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919), the Supreme Court indicated that lands held by the United States in trust for a tribe are not public lands and that therefore they are not subject to disposition under the general public land laws. *Id.* at 113. *But see* *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972), where the court, in holding that Indian lands are subject to the National Environmental Policy Act, appeared to confuse Indian lands with public lands. *Id.* at 597.

²⁶ *E.g.*, *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973).

is no general public obligation. The differences run too deep for the Indian trust to be more than an analogue for the public trust doctrine on the public lands.

In addition to the lack of direct support in either common law or Indian law, there are a number of compelling policy reasons supporting the conclusion that the public trust doctrine, at least in its classic form, does not apply to the public lands. First, the history of public land policy denies the existence of any prohibition against disposition of federal lands. Until recently, the public lands were sold or otherwise transferred away as the central method of opening the American West for settlement.²⁷ No serious suggestion could be made that private title to some 1.4 billion acres is clouded due to the United States' inability to convey clear title. Second, public land law is a heavily statutory field.²⁸ The legislative matrix is sufficiently comprehensive that doubts can fairly be raised as to whether there is room for a broad, common law doctrine to operate.

Another basis for objection arises from the diversity of the public lands. These resources fill the spectrum of geographical characteristics found in North America: the public lands are high and low, wet and arid, hot and cold, coastal and inland, mineral and non-mineral, scenic and plain, timbered and barren, checkerboarded and contiguous.²⁹ In addition to geographical diversity, the four major land-management agencies have substantially different organic acts.³⁰ For example, it is one thing to refer to the dominant-use National Park Service as a trustee; it is a far different matter to place traditional trust obligations on the BLM, which must reconcile the congressionally sanctioned multiple-use tug and pull among economic and non-economic uses. This range of geographic and legal diversity makes it difficult to apply a single, unitary doctrine to all of the public lands.

Finally, while there may be majesty aplenty on the public lands, there are many, even in these land-appreciative days, who would say that most of the public land holdings are common, even mundane.³¹ Historically, there is justification for such a

²⁷ See generally G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 43-119 (1981).

²⁸ See notes 101-129 and accompanying text *infra*.

²⁹ *E.g.*, PLLRC REP., *supra* note 4, at 22.

³⁰ See notes 12-13 *supra*.

³¹ In terms of acreage, the largest amounts of public lands are remote lands

conclusion. Most of the public lands are literally leftovers—lands no one wanted to homestead, stake a mining claim on, or set aside for the value of their scenery or wildlife. Logically, such lands may not be a proper subject for a trust.

In spite of these factors, there is an imposing and growing body of case law suggesting that the public trust doctrine applies to the public lands.³² Many of these cases use trust language

in Alaska. The area between the Sierra Nevada and the 100th Meridian was often described by early settlers as “the Great American Desert.” See R. ATHEARN, *HIGH COUNTRY EMPIRE* 18-23 (1965). For a considerably more loving perspective, see T. WATKINS & C. WATSON, *THE LAND NO ONE KNOWS: AMERICA AND THE PUBLIC DOMAIN* (1975).

³² See *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294-95 (1958); *Alabama v. Texas*, 347 U.S. 272, 273-74, 277 (1954) (*per curiam*); *United States v. California*, 332 U.S. 19, 40 (1947); *United States v. City & County of San Francisco*, 310 U.S. 16, 28-29 (1940); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Causey v. United States*, 240 U.S. 399, 402 (1916); *Light v. United States*, 220 U.S. 523, 536-37 (1911); *Camfield v. United States*, 167 U.S. 518, 524 (1897); *Knight v. United States Land Ass'n*, 142 U.S. 161, 178, 181 (1891); *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890); *United States v. Beebe*, 127 U.S. 338, 342 (1888); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 448 (1856); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 221-22, 224 (1845); *United States v. Hughes*, 626 F.2d 619, 621 (9th Cir. 1980); *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1283-84 (9th Cir. 1980); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1083 (9th Cir. 1979), *aff'd*, 100 S. Ct. 1593 (1980); *Massachusetts v. Andrus*, 594 F.2d 872, 890, 892 (1st Cir. 1979); *Edwards v. Carter*, 580 F.2d 1055, 1067 n.8 (D.C. Cir. 1978); *United States v. Ruby Co.*, 588 F.2d 697, 704-05 (9th Cir. 1978); *West Virginia Div. of Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945, 955 (4th Cir. 1975); *Wilderness Soc'y v. Morton*, 479 F.2d 842, 891 (D.C. Cir.) (*en banc*), *cert. denied*, 411 U.S. 917 (1973); *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972); *Hannifin v. Morton*, 444 F.2d 200, 202 (10th Cir. 1971); *Beaver v. United States*, 350 F.2d 4, 8 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966); *Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 655 (10th Cir. 1960); *United States v. West*, 232 F.2d 694, 696-99 (9th Cir. 1956); *Forbes v. United States*, 125 F.2d 404, 408 (9th Cir. 1942); *United States ex rel. Roughton v. Ickes*, 101 F.2d 248, 252-53 (D. C. Cir. 1938); *In re Stuart Transp. Co.*, 495 F. Supp. 38, 39-40 (E.D. Va. 1980); *Friends of Yosemite v. Frizzell*, 420 F. Supp. 390, 393 (N.D. Cal. 1976); *Sierra Club v. Department of Interior*, 398 F. Supp. 284, 287 (N.D. Cal. 1975); *Sierra Club v. Department of Interior*, 376 F. Supp. 90, 93, 95-96 (N.D. Cal. 1974); *Stewart v. Penny*, 238 F. Supp. 821, 827 (D. Nev. 1965); *United States v. Blaylock*, 159 F. Supp. 874, 877 (N.D. Cal. 1958); *United States v. Thompson*, 41 F. Supp. 13, 15-16 (E.D. Wash. 1941).

In addition to this body of case law, two articles have analyzed the question of whether the public trust doctrine applies to the federal lands. See Montgomery, *The Public Trust Doctrine in Public Land Law: Its Application to*

only in passing and with little analytical content. Nevertheless, the teaching of existing law seems to be that public land law has borrowed important components from the public trust doctrine. Although the obligations of Congress and federal agencies are plainly different from the duties of states when they act as trustees of navigable waterways, public trust notions have charged and vitalized public land law, particularly in the modern era.

This article will first discuss whether or not the trust exists on the public lands. It will then examine the scope and content of the doctrine in public land law and suggest some likely applications of the doctrine in the future.

I. THE EXISTENCE OF THE TRUST

A. *Judicial Precedent*

The disparate opinions on the existence of the trust can be grouped into three historical eras, each with different characteristics. In effect, there have been different public trusts at different times, as trust notions have evolved to meet changing needs and attitudes.

1. The Public Trust Doctrine as an Obligation to the States

The original states reserved title to lands within their borders, so that the first major federal acquisitions of land were by way of cessions by the original states of claims beyond their western boundaries.³³ Federal land holdings were viewed primarily as a potential source of revenue. Auctions were held to generate funds for the treasury.³⁴ Scrip entitling veterans and others to homesteads was used in lieu of cash payments.³⁵ It was always anticipated that new states would be created in the western areas where the public lands were located.³⁶ In this context it was natural that the courts in the mid-19th century, in developing legal doctrine in public land law, would stress the obligations of

the Judicial Review of Land Classification Decisions, 8 WILLAMETTE L.J. 135 (1972); Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586 (1977).

³³ P. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 49-57 (1968).

³⁴ See B. HIBBARD, *A HISTORY OF PUBLIC LAND POLICIES* 1-6 (1965).

³⁵ *Id.* at 117-29.

³⁶ P. GATES, *supra* note 33, at 73-74.

the federal government and the primacy of state and private interests.

The Supreme Court in *Pollard v. Hagan*³⁷ took such a position. The case involved a title dispute, with the plaintiff claiming land below the high watermark of a navigable freshwater river. The land was within the state of Alabama, having earlier been ceded to the United States by Virginia and Georgia. Plaintiff's title was based on a federal patent issued after statehood. The Court, invoking the equal footing doctrine, concluded that the lands below the high water mark of navigable watercourses passed to the new states at statehood.³⁸ Thus the federal government had no title to convey, and its patent to the plaintiff was a nullity.

The Court also expounded upon the nature of title to the public lands. As to lands under navigable waterways, the United States held only temporary possession during territorial days, since such lands were to be transferred upon statehood.³⁹ As to the inland public lands, which did not pass from federal ownership at statehood, the Court said that the United States held such lands in "trust."⁴⁰ The object of the trust was to

convert the land into money for the payment of the debt, and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.

Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new state will be complete

...⁴¹

While the analysis in *Pollard* involved land subject to cessions from Virginia and Georgia to the United States, the dictum concerning the inland public lands does not seem to be limited to those cessions. In fact, later cases failed to distinguish between lands ceded from the original states and lands ceded from for-

³⁷ 44 U.S. (3 How.) 212 (1845).

³⁸ *Id.* at 229. See also 1 WATERS AND WATER RIGHTS, *supra* note 20, at 250-52.

³⁹ *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 221 (1845).

⁴⁰ *Id.* at 222.

⁴¹ *Id.* at 224. This reasoning is reflected in cases before and after *Pollard*. See *Weber v. Harbor Commissioners*, 85 U.S. (18 Wall.) 57 (1873); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836); *Hicks v. Bell*, 3 Cal. 219 (1853).

ign nations, and applied these trust notions to all inland federal lands, however acquired.⁴³ The United States was thus considered merely a temporary custodian and trustee in the mid-19th century. Its trust duty was to sell off the lands for the common benefit so that new states, with land in private ownership, could operate as sovereigns on an equal footing with the original states and not as "colonies."⁴³

2. The Public Trust Doctrine as a Source of Federal Power

During the last quarter of the 19th century, federal policy toward the public lands began to take on a new cast. The former premises were revised, at least in part. Separate movements began to keep some recreation, timber, water, grazing and mineral resources in federal hands. A consensus developed that those particular lands and resources should not be subject to random disposal but rather should be protected and managed by the United States for future generations.⁴⁴ As Congress and the

⁴³ In *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), for example, the Supreme Court, in discussing the government's power to acquire land from foreign nations and to govern new territories, said:

The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony

Id. at 447. Further, the Court noted that new territory is "acquired by the General Government, as the representative and trustee of the people of the United States, and it must therefore be held in that character for their common and equal benefit . . ." *Id.* at 448. See also Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 293-96 (1976); Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 50 (1949).

⁴³ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 447, 448 (1856).

⁴⁴ See notes 109-113 and accompanying text *infra*. See generally S. DANA & S. FAIRFAX, *FOREST AND RANGE POLICY* 69-119 (1980); G. COGGINS & C. WILKINSON, *supra* note 27, at 119-39. The beginning of the policy of reservation may have been the establishment of Yellowstone National Park in 1872. Act of March 1, 1872, ch. 24, § 1, 17 Stat. 32 (1872) (codified at 16 U.S.C. § 21 (1976)). This shift in federal policy has been recognized by the Bureau of Land Management:

During our years as a Nation, the attitude toward the public lands has moved from a philosophy of disposal and settlement to a con-

administrative agencies took action in this new direction, the courts were required to fashion new rules to fit a more assertive policy and legal framework. Again the courts turned to the trust concept.

During this second era, from about 1888 through 1970, there were some eighteen opinions⁴⁵ in public land law using trust language to describe the role of the United States. These opinions, most of them by the Supreme Court, are especially pertinent to an understanding of modern doctrine because courts have recently applied the trust language in these older opinions to contemporary issues.⁴⁶

In each of these older cases, the trust duty to the public was used to justify plenary federal power to protect the public lands. But while the trust vested power in the United States, it did not seem to impose any reciprocal duties or obligations.

The use of the public trust to justify broad federal authority over the public lands was reflected in the development of several

cept of retention and multiple-use management. It seems certain that these trends are going to continue. The public lands were once counted only in terms of mineral, timber, and grazing values. While these values will be treasured even more in future years, the land's greatest potential may likely be a wealth of yet to be discovered opportunities, as well as acknowledgment of historical, cultural and scientific values, or even isolation and outdoor recreation. The very existence of these lands, held in trust for all the people, and for all time, may be their greatest value.

BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PROMISE OF THE LAND 36, 37 (1979).

⁴⁵ *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294-95 (1958); *United States v. California*, 332 U.S. 19, 40 (1947); *United States v. City & County of San Francisco*, 310 U.S. 16, 28-29 (1940); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Causey v. United States*, 240 U.S. 399, 402 (1916); *Light v. United States*, 220 U.S. 523, 536-37 (1911); *Camfield v. United States*, 167 U.S. 518, 524 (1897); *Knight v. United States Land Ass'n*, 142 U.S. 161, 178, 181 (1891); *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890); *United States v. Beebe*, 127 U.S. 338, 342 (1888); *Beaver v. United States*, 350 F.2d 4, 8 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966); *Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 655 (10th Cir. 1960); *United States v. West*, 232 F.2d 694, 696-99 (9th Cir. 1956); *Forbes v. United States*, 125 F.2d 404, 408 (9th Cir. 1942); *United States ex rel. Roughton v. Ickes*, 101 F.2d 248, 252-53 (D.C. Cir. 1938); *Stewart v. Penny*, 238 F. Supp. 821, 827 (D. Nev. 1965); *United States v. Blaylock*, 159 F. Supp. 874, 877 (N.D. Cal. 1958); *United States v. Thompson*, 41 F. Supp. 13, 15-16 (E.D. Wash. 1941).

⁴⁶ See, e.g., notes 62-79 and accompanying text *infra*.

discrete principles of public land law. First, and perhaps most basic, federal land management agencies were viewed, in the formative years of administrative law, as being proper recipients of broad-based delegations of authority from Congress. The leading case is *Light v. United States*,⁴⁷ which involved Forest Service regulations requiring the issuance of a permit and the payment of a fee before grazing would be allowed in national forests. Justice Lamar reasoned that "the public lands are held in trust for all the people of the United States"⁴⁸ and that "the Government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation."⁴⁹ The Court upheld the regulations and ruled that an injunction to prevent a rancher from violating these regulations would properly issue.

Light is a cornerstone of broad federal management authority over the public lands. The opinion is especially noteworthy, particularly considering the era in which it was handed down,⁵⁰ because it gave effect to federal regulations that were directly contrary to state law.⁵¹ It thus foreshadowed recent cases establishing federal preemptive authority over state law on the public lands under the Property Clause.⁵² At the time of the decision in *Light*, however, the Property Clause had been infrequently relied upon, and the Court invoked the public trust doctrine as a source of congressional power over the public lands.

Trust language was also used as the philosophical basis for the development of the rule that the doctrines of laches and estoppel do not ordinarily apply as against the federal government.⁵³

⁴⁷ 220 U.S. 523 (1911). See also *United States v. Grimaud*, 220 U.S. 506 (1911).

⁴⁸ *Light v. United States*, 220 U.S. 523, 537 (1911).

⁴⁹ *Id.* at 536.

⁵⁰ See Engdahl, *supra* note 42, at 288-310.

⁵¹ *Light v. United States*, 220 U.S. 523, 535 (1911). As was common in western states, Colorado, where *Light* arose, required that ranchers erect fences to keep other ranchers' stock out. The Court's ruling in *Light* allowed federal law to override local law by upholding a trespass action by a landowner, *i.e.*, the United States, without fences.

⁵² U.S. CONST. art. IV, § 3, cl. 2; see, *e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd*, 100 S. Ct. 1593 (1980).

⁵³ *United States v. California*, 332 U.S. 19, 40 (1947) (estoppel cannot prevent the United States from asserting its superior title to lands under the Pacific Ocean); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409

The rationale was that, since lands were held in trust for all of the people, the conduct of a single federal official should not result in harm to the public.⁵⁴

In addition to these substantive uses of trust language, several cases during this period used the trust concept incidentally in developing other doctrines supporting federal power. For example, trust notions were used to permit relief against persons who were blocking access to, or otherwise damaging, the federal lands.⁵⁵ Courts also upheld a broad right on behalf of the United States to protect the public interest by contesting land patents procured by fraud.⁵⁶ The trust was employed in cases allowing the United States to institute trespass actions.⁵⁷ Finally, there

(1917) (no estoppel against government when it is suing to enjoin unauthorized use of the public lands); *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890) (maxim that those who seek equity must do equity not applicable to a government action to set aside a fraudulently obtained patent); *United States v. Beebe*, 127 U.S. 338, 341, 343 (1888) (no estoppel against government when it is suing to set aside a fraudulently obtained patent); *Beaver v. United States*, 350 F.2d 4, 8 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966) (federal government's title to land formed by accretion cannot be lost through laches or neglect of duty); *United States v. Blaylock*, 159 F. Supp. 874, 877 (N.D. Cal. 1958) (laches cannot prevent the federal government from reforming a patent).

⁵⁴ See, e.g., *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917), in which the Court rejected an estoppel argument saying, "As a general rule laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest." *Id.* at 409. The Court reasoned that "[a] suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane . . . from the ordinary private suit to regain the title to real property or to remove a cloud from it." *Id.* at 409.

⁵⁵ *Camfield v. United States*, 167 U.S. 518, 524 (1897) (upholding authority of Congress to prohibit the erection of fences on private land that would have the effect of enclosing public lands); *United States v. West*, 232 F.2d 694, 696-99 (9th Cir. 1956) (government could enjoin grazing that had not been statutorily authorized); *Forbes v. United States*, 125 F.2d 404, 408 (9th Cir. 1942) (Secretary of Interior had authority to order an abandoned well, located on public lands, to be capped at the expense of a permittee); *United States v. Thompson*, 41 F. Supp. 13, 15-16 (E.D. Wash. 1941) (Secretary of Interior had authority to promulgate regulations governing grazing of livestock on the public lands).

⁵⁶ E.g., *United States v. Beebe*, 127 U.S. 338, 342 (1888) (government had authority to sue patentee to set aside fraudulently obtained patent). See also *Causey v. United States*, 240 U.S. 399, 402 (1916); *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890); *Pan Am. Petroleum Corp. v. Pierson*, 284 F.2d 649, 655 (10th Cir. 1960).

⁵⁷ *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) (up-

were several miscellaneous uses of trust language to support federal prerogatives.⁵⁸

Thus the cases during this second era stand for a variety of specific propositions. The common thread is that the trust concept was used to reach results in favor of the United States, that is, to create and reinforce federal powers.

3. The Public Trust Doctrine as a Source of Public Rights

The third era, which began in about 1970, stands in marked contrast to the first two.⁵⁹ It involves the direct or indirect use of the public trust doctrine to limit federal power and to justify rights of the public against the federal government. The heart of the public trust doctrine, however it may be articulated, is that it imposes limits and obligations on governments.⁶⁰ Several mod-

holding injunction against unauthorized use of public lands for the generation and distribution of power); *Light v. United States*, 220 U.S. 523, 536, 537 (1911); see notes 47-52 and accompanying text *supra*.

⁵⁸ *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294-95 (1958) (Congress can constitutionally limit the acreage to which federal reclamation project water may be applied); *United States v. City & County of San Francisco*, 310 U.S. 16, 28, 29 (1940) (Congress can require power generated on the public lands to be sold directly to consumers); *Knight v. United States Land Ass'n*, 142 U.S. 161, 178, 181 (1891) (Secretary of Interior, as guardian of the public lands, has authority to set aside a land survey); *United States ex rel. Roughton v. Ickes*, 101 F.2d 248, 252-53 (D.C. Cir. 1938) (Secretary of Interior cannot be compelled to issue oil and gas prospecting lease); *Stewart v. Penny*, 238 F. Supp. 821, 827 (D. Nev. 1965) (Secretary of Interior has broad discretion to grant land patents).

⁵⁹ Federal cases using trust language after 1970 include *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976); *United States v. Hughes*, 626 F.2d 619, 621 (9th Cir. 1980); *United States v. Curtis-Nevada Mines*, 611 F.2d 1277, 1283-84 (9th Cir. 1980); *Massachusetts v. Andrus*, 594 F.2d 872, 890, 892 (1st Cir. 1979); *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1083 (9th Cir. 1979), *aff'd*, 100 S. Ct. 1593 (1980); *Edwards v. Carter*, 580 F.2d 1055, 1067 n.8 (D.C. Cir. 1978); *United States v. Ruby Co.*, 588 F.2d 697, 704-05 (9th Cir. 1978); *West Virginia Div. of Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945, 955 (4th Cir. 1975); *Wilderness Soc'y v. Morton*, 479 F.2d 842, 891 (D.C. Cir.) (*en banc*), *cert. denied*, 411 U.S. 917 (1973); *Davis v. Morton*, 469 F.2d 593, 597 (10th Cir. 1972); *Hannifin v. Morton*, 444 F.2d 200, 202 (10th Cir. 1971); *In re Stuart Transp. Co.*, 495 F. Supp. 38, 39-40 (E.D. Va. 1980); *Friends of Yosemite v. Frizzell*, 420 F. Supp. 390, 392 (N.D. Cal. 1976); *Sierra Club v. Department of Interior*, 398 F. Supp. 284, 287 (N.D. Cal. 1975); *Sierra Club v. Department of Interior*, 376 F. Supp. 90, 93, 95-96 (N.D. Cal. 1974).

⁶⁰ These limitations are illustrated by *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1966) (lease by a state park manage-

ern cases in public land law have dealt squarely with this concept in a way that the older cases did not.⁶¹

The leading authorities in support of the public trust doctrine as a limit on the government are the first two opinions by the district court in the *Redwood National Park* litigation.⁶² The lit-

ment agency for large commercial skiing development struck down because the agency had exceeded its statutory authorization); and *City of Berkeley v. Superior Court of Alameda County*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, cert. denied, 101 S. Ct. 119 (1980) (statute authorizing the transfer of lands strictly construed to protect the public's interest in tidelands). See also, e.g., *Sax*, supra note 15, at 477 (listing traditional types of restrictions imposed by the public trust on governmental authority); W. RODGERS, supra note 18, at 180-82 (characterizing limits of doctrine as amounting to "no significant deterioration of public rights in public resources").

⁶¹ See, e.g., *Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979); *West Virginia Div. of Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975); *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973). On the other hand, several of the recent cases used the trust as in the second era, i.e., to support federal prerogatives. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, (1976) (broad federal preemptive power); *United States v. Ruby Co.*, 588 F.2d 697 (9th Cir. 1978) (no estoppel against federal administrative officials).

⁶² *Sierra Club v. Department of the Interior*, 376 F. Supp. 90 (N.D. Cal. 1974); *Sierra Club v. Department of the Interior*, 398 F. Supp. 284 (N.D. Cal. 1975), *Sierra Club v. Department of the Interior*, 424 F. Supp. 172 (N.D. Cal. 1976). The litigation involved a Sierra Club request that the Department of Interior, acting through the National Park Service, use its powers to prevent damage allegedly caused by logging operations occurring on lands adjacent to and upstream of the park.

The first *Redwood National Park* decision was in response to defendant's motion to dismiss Sierra Club's amended complaint and, alternatively, for summary judgment. The court found that the Secretary of Interior had general fiduciary obligations over the public lands and specific statutory directives, both in the National Park Service Organic Act of 1916, 16 U.S.C. §§ 1-18f (1976), and the Redwood National Park Act, 16 U.S.C. §§ 79a-79j (1976 & Supp. III 1979), to preserve the park's resources. 376 F. Supp. at 93-94. The court denied defendant's motions on the ground that the plaintiff had stated a claim for relief to the effect that the Secretary's inaction violated these trust and statutory obligations. *Id.* at 95-96.

The second *Redwood National Park* decision went to the merits of the case. The opinion surveyed the statutory provisions for park protection in the Redwood National Park Act and discussed the five studies conducted by the Department of Interior on the actual and threatened damage to the park by logging operations on adjacent lands. The studies concluded that there was considerable potential for destruction of park resources in the immediate future because of the natural characteristics of the park and the effect of logging practices in the vicinity of the park. The studies made many suggestions to

igation involved logging operations on private lands adjacent to Redwood National Park in Northern California. The position of the Sierra Club, the plaintiff, was that the National Park Service should take various actions to protect the parklands from the effects of the logging.

On one level, the *Redwood National Park* opinions stand for a strong and vigorous public trust doctrine, imposing strict obligations on the United States. The Park Service, which was held to be a trustee on behalf of the public,⁶³ was ordered to use all of its powers to protect the lands from adjacent logging, to attempt to negotiate contracts with private loggers and to consider acquiring private lands.⁶⁴ The court even ordered the Park Service to lobby Congress for funds to buy out some of the private landowners.⁶⁵ Further, the court took two steps that have been

alleviate further park damages. They included (1) the establishment of buffer zones around the perimeter of the park; (2) the adoption of a landscape or master plan for the park; (3) the purchase of additional lands or less than fee management easements; and (4) the negotiation of cooperative agreements with lumber companies, so that logging practices most detrimental to the park could be mitigated by more sensitive road placement and maintenance, use of cable logging rather than bulldozers, reduction in the size of clearcut parcels, and replanting where regeneration was difficult. 398 F. Supp. at 286-91.

The court found that Interior's response, which consisted of three attempts to negotiate cooperative agreements with timber companies, was inadequate. The court held that the Secretary had failed to perform duties imposed by the National Park System Act and the Redwood National Park Act and by the trust obligations of the Secretary over the public lands. *Id.* at 293.

In the third *Redwood National Park* decision, the court ruled that the Department of Interior had complied with its statutory and trust duties, and dismissed the action. 424 F. Supp. at 175. The court took note of the Department of Interior's five progress reports, its submission to Congress of five alternative proposals for park protection, its request for additional appropriations and authority for park protection, and its attempts to obtain from major timber companies voluntary compliance with guidelines aimed at reducing the impact of logging operations on adjacent lands. *Id.* at 173-74.

In 1978 Congress added 48,000 acres to the Redwood National Park. Pub. L. No. 95-250, 92 Stat. 163 (1978) (codified in scattered sections of 16 U.S.C.).

See generally Hudson, *Sierra Club v. Department of Interior: The Fight to Preserve the Redwood National Park*, 7 *ECOL. L.Q.* 781 (1979).

⁶³ See note 62 *supra*.

⁶⁴ *Id.* The authority to purchase additional interests in lands on the periphery of the park to protect the timber, soil and streams within the park from logging operations on those adjacent lands was contained in the Redwood National Park Act, 16 U.S.C. § 79c(e) (Supp. III 1979).

⁶⁵ *Sierra Club v. Department of Interior*, 398 F. Supp. 284, 294 (N.D. Cal.

hallmarks of much of the complex civil litigation during this last decade:⁶⁶ the court kept continuing jurisdiction⁶⁷ and ordered the Park Service to report periodically back to the court.⁶⁸

But the holdings of the *Redwood National Park* cases can be read in a more limited way regarding the public trust. The doctrine was invoked by relying on older cases decided during the era when the doctrine was used to support federal power.⁶⁹ As noted, those older cases used trust language, but their impact was exactly the opposite of the propositions advanced by the court in the *Redwood National Park* cases. The older cases uni-

1975). The court's order, that the National Park Service lobby Congress for additional funding, finds some precedent in prison reform cases where resort to the legislature for additional funding to implement the changes mandated by the court was necessary. *See, e.g., Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Frug, *The Judicial Power of the Purse*, 126 U. Pa. L. Rev. 715 (1978); *cf. Griffin v. School Bd.*, 377 U.S. 218, 233 (1964) (district court had authority to compel county supervisors to levy taxes to raise adequate funds to reopen public schools).

⁶⁶ *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976), in which Professor Chayes argues that the traditional adjudicative model, where private parties resolve private disputes, does not account for much of the civil litigation in the federal courts. He says that federal litigation increasingly involves questions of public law, so that the adjudicative process operates in a different fashion. The characteristics of public law litigation include an amorphous party structure rather than a bilateral one; an inquiry into legislative rather than adjudicative facts; relief that is not in the form of compensation for prior wrongs or confined to the immediate parties, but rather is forward looking and fashioned *ad hoc* on flexible and broadly remedial lines; a court decree that requires continued judicial participation in the administration of the remedy rather than termination of judicial involvement; and, finally, a subject matter that concerns the operation of public policy, rather than a dispute between private individuals about private rights. *Id.* at 1302. The *Redwood National Park* litigation and many contemporary public lands cases fit Chayes' description of the public law litigation model. Another example is *Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir.), *cert. denied*, 427 U.S. 913 (1976), in which the BLM programmatic environmental impact statement with respect to its livestock-grazing permit program was held to violate NEPA. The court retained jurisdiction to see that adequate, site-specific environmental impact statements were prepared within a court-sanctioned time schedule. *Id.* at 842.

⁶⁷ *Sierra Club v. Department of Interior*, 398 F. Supp. 284, 294 (N.D. Cal. 1975).

⁶⁸ *Id.*

⁶⁹ *See* Section I(A)(2), "The Public Trust Doctrine as a Source of Federal Power," *supra*.

formly upheld federal agency action.⁷⁰ The *Redwood National Park* litigation constrained such action. Judge Sweigert also relied on authority from Indian law⁷¹ which, as noted, is not directly applicable to public land law.⁷²

The *Redwood National Park* cases can be limited in other ways as well. The court relied not just on the public trust doctrine but also on the National Park Service Organic Act⁷³ and the Redwood National Park Act,⁷⁴ both of which contain strong and specific provisions.⁷⁵ In addition, the case dealt with an especially compelling factual situation. Redwood National Park is not one contiguous park; it has many separate parcels. Many of them are small, some including only one stand of redwoods or an area along a particular stream. Some areas of the park are so narrow that they may be "almost as tall as they are wide."⁷⁶ One such area was involved in this case. The "Worm," a little finger of the park extending southeast along Redwood Creek, was extremely vulnerable to logging on lands adjacent to the federal lands.⁷⁷ The creek was susceptible to changes in water quality and water temperature. The trees in this delicate area were sub-

⁷⁰ The court relied on two older cases to support its contention that the Secretary of Interior held the public lands in trust. In *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917), the Court held that the United States was not subject to state law concerning estoppel, laches and adverse possession. Although there is language in the opinion that the United States holds the lands in trust, *id.* at 409, the trust imposed carried with it no limitations on the power of the federal government over the lands.

In *Knight v. United States Land Ass'n*, 142 U.S. 161 (1891), the principal case cited by Judge Sweigert as authority for the trust, the Supreme Court stated that the Secretary of Interior was guardian of the public lands with obligations to "see that the law is carried out and that none of the public domain is wasted or is disposed of to a party not entitled to it." *Id.* at 181. Given the federal policy of disposition of the public lands in effect at the time, *see* notes 100-108 *infra*, the trust conceived of in *Knight* imposed little restraint upon the Department of Interior.

⁷¹ *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972), *discussed in* note 25 *supra*.

⁷² *See* notes 22-26 and accompanying text *supra*.

⁷³ 16 U.S.C. §§ 1-18f (1976).

⁷⁴ 16 U.S.C. §§ 79a-79j (1976 & Supp. III 1979).

⁷⁵ *See* note 64 *supra* & note 96 *infra*.

⁷⁶ *See generally* Wayburn & Wayburn, *Last Chance for Redwood National Park*, 62 SIERRA CLUB BULL., Apr., 1977, at 10.

⁷⁷ *Sierra Club v. Department of Interior*, 398 F. Supp. 284, 290-91 (N.D. Cal. 1975).

ject to substantial erosion and blowdown from the logging.⁷⁸ For all these reasons, along with the very presence of the extraordinary coast redwood,⁷⁹ the *Redwood National Park* cases presented an unusually strong case for judicial intervention. Thus, while the importance of the *Redwood National Park* cases should not be understated and while the public trust doctrine was invoked in a vigorous form, these opinions are by no means a definitive statement. Their use of the public trust doctrine can

⁷⁸ In 1971 the National Park Service prepared a report stating:

Without application of special forest management practices to control present clearcutting methods, remaining old growth redwood within the Park will be subject to wind throw. Steep slopes will erode severely producing major slides in unstable soils known to exist in the area. Water quality of the Park streams will deteriorate as a result of the siltation.

It is essential therefore that a buffer zone comprising about 10,000 acres be established to protect the Redwood Creek area of the Park.

Id. at 289.

⁷⁹ There are two species of redwood. The Sierra redwood or giant sequoia (*Sequoia gigantea*) is found in scattered locations in the Sierra Nevada at altitudes between 4,000 and 8,000 feet. The coast redwood (*Sequoia sempervirens*), at issue in the *Redwood National Park* litigation, is found in dense, fog-shrouded groves from San Francisco north to southern Oregon in areas near the coast. The coast redwood is highly desirable for lumber, and approximately 90% of all virgin stands has been logged.

The coast redwood is the tallest living thing in the world. Some trees in the Redwood National Park exceed 300 feet in height. Although not as old as the Sierra redwoods, the coast redwoods are among the oldest living things; some specimens alive today were young trees when Christ was born. While the coast redwoods do not reach as great a diameter as their relatives in the Sierra Nevada, their girth is nonetheless great enough to have inspired storied deeds:

The 19th-century millionaire William Waldorf Astor once made a \$25,000 wager with an English gentleman, General Williams, that "he could seat 27 guests around a table made from a single cross section of a great California redwood tree." Astor placed his order . . . , and a tree was selected and cut on Lindsay Creek. It provided a clear section over 15 feet in diameter and three feet thick. After shipment around Cape Horn in 1897, the polished slab of redwood provided a sumptuous base for a dinner party and decided the bet. Unfortunately for Astor, the cost of acquiring his table was nearly as great as the amount he won.

P. PALMQUIST, *FINE CALIFORNIA VIEWS: THE PHOTOGRAPHS OF A. W. ERICSON* 83 (1975).

See generally H.R. REP. NO. 581, 95th Cong., 1st Sess. (1977); S. REP. NO. 641, 90th Cong., 2d Sess. (1968); J. ISE, *OUR NATIONAL PARK POLICY: A CRITICAL HISTORY* 98-102 (1961).

be restricted in too many ways.

The leading authority against the existence of a public trust on the public lands is the federal district court opinion in *Sierra Club v. Andrus*.⁸⁰ The Sierra Club sought an order requiring the Department of Interior to take action protecting alleged federal reserved water rights in Southern Utah and Northern Arizona from proposed energy projects, highly water-intensive uses.⁸¹ It was a difficult case for the Sierra Club by any standard. No water was being taken out of the streams by the energy projects at the time the case was filed.⁸² In addition, the Department of Interior was studying the question of reserved rights with considerable diligence.⁸³ These factors, the court said, when read against the National Park Service Organic Act⁸⁴ and the relevant BLM legislation,⁸⁵ raised no statutory duty for Interior to take action at this time to protect its alleged reserved rights.⁸⁶

The Sierra Club also contended that the public trust doctrine required protective action by the Department of Interior. In determining the existence of the public trust, the court analyzed the 1978 amendments to the Redwood National Park Act,⁸⁷ which included an amendment to the National Park Service Or-

⁸⁰ 487 F. Supp. 443 (D.D.C.), *appeal docketed*, No. 80-1674 (D.C. Cir. June 18, 1980).

⁸¹ The projects are described *id.* at 445-46.

⁸² *Id.* at 451.

⁸³ An Interagency Task Force on Federal Non-Indian Reserved Water Rights was created to organize and implement President Carter's water policy. Leadership of the Task Force was delegated to the Solicitor of the Department of Interior. The Task Force issued its final draft report on June 15, 1979, recommending that all federal land management agencies begin the process of establishing priorities, principles and standards for quantification of their respective water rights. The agencies, as the court noted, had begun that process. *Id.* at 452.

⁸⁴ 16 U.S.C. §§ 1-18f (1976).

⁸⁵ 43 U.S.C. §§ 1701 & 1782(c) (1976).

⁸⁶ The court found that there was a rational basis for the Department of Interior to refrain from litigating the alleged federal water rights for three reasons: (1) federal reserved water rights could not be lost or harmed by non-assertion at this time; (2) none of the proposed energy projects had acquired any vested water rights in the subject water courses; and (3) the relief sought by the Sierra Club, the identification and quantification of alleged federal reserved water rights, was currently being pursued through administrative means. 487 F. Supp. 443, 450 (D.D.C. 1980).

⁸⁷ Act of March 27, 1978, Pub. L. No. 95-250, 92 Stat. 163.

ganic Act.⁸⁸ Holding that any trust duties must be found on the face of a statute,⁸⁹ the court found that the amendment to the Organic Act, plus language in a Senate committee report,⁹⁰ showed that Congress intended to eliminate any separate public trust doctrine in the National Park system. The court also concluded, without further analysis, that the BLM, like the Park Service, had no trust duties independent of statute.⁹¹

⁸⁸ The amendment added the following language:

Congress further reaffirms, declares and directs that the promotion and regulation of the various areas of the National Park System, as defined in section 2 of this Act, shall be consistent with and found in the purpose of the Act of August 25, 1916, to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these areas have been or shall be directly and specifically provided by Congress.

Id. § 101(b), 92 Stat. 163, 166, amending 16 U.S.C. § 1a-1 (Supp. III 1979).

⁸⁹ *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C.), appeal docketed, No. 80-1674 (D.C. Cir. June 18, 1980).

⁹⁰ The court found that the 1978 amendment to the National Park Service Organic Act eliminated any distinction between trust and statutory responsibilities in the management of the National Park System. Judge Richey concluded that the legislative history from the Senate Committee on Energy and Natural Resources specifically addressed the trust issue, citing the following language:

The committee has been concerned that litigation with regard to Redwood National Park and other areas of the system may have blurred the responsibilities articulated by the 1916 Act creating the National Park service

S. REP. No. 528, 95th Cong., 1st Sess. 14 (1977).

[T]he committee strongly endorses the Administration's proposed amendment to the Act of August 18, 1970, concerning the management of the National Park System to refocus and insure the basis for decisionmaking concerning the system continues to be the criteria provided by 16 U.S.C. § 1 This restatement of these highest principles of management is also intended to serve as the basis for any judicial resolution of competing private and public values and interest in . . . areas of the National Park System.

Id. at 7-8. The court disposed of the trust issue by holding that Congress intended any judicial resolution of national park management issues to be based upon the statutory standard contained in 16 U.S.C. § 1a-1 (1976). 487 F. Supp. at 449.

⁹¹ Judge Richey found that 43 U.S.C. §§ 1701 & 1782(c) (1976) contained the "entire duty and responsibility to manage and protect Bureau of Land Man-

Judge Richey's conclusions are difficult to support. The language of the 1978 amendments is simply not clear; if anything, it seems implicitly to impose trust obligations on the National Park Service by referring to "the high public value and integrity of the National Park System."⁹² Similarly, the committee reports are brief and ambiguous and do not support any limitation on the public trust doctrine.⁹³ Further, the issues involving the

agement lands" 487 F. Supp. at 449.

⁹² See note 88 *supra*.

⁹³ The 1978 amendment to the National Park Service Organic Act was given little consideration in the legislative history. The amendment was contained in legislation that added 48,000 acres to the Redwood National Park. The legislation also contained a number of measures to mitigate any adverse economic impact that might be caused to the local economy. As a result, the primary concern of the legislative history was the necessity of acquiring additional acreage to protect the park, the impact of the acquisition on employment in the region, the programs to be implemented to assist those who lost their jobs due to the park's expansion and the issue of just compensation for the lands purchased. The amendment was discussed in one paragraph in the House report:

Subsection (b) of section 101 amends the General Authorities Act of 1970 by adding a declaration by Congress that the promotion and regulation of the National Park System is to be consistent with the Organic Act for the National Park Service. The protection of the units of the system is to be carried out in accordance with the maintenance of the integrity of this system, and management of these areas shall not compromise these resource values except as Congress may have specifically provided. Thus, the Secretary is to afford *the highest standard of protection and care* to the lands within Redwood National Park.

H.R. REP. NO. 581, 95th Cong., 1st Sess. 21 (1977) (emphasis added).

The Senate Report does little to clear the water. The language relied on by the court is set out in note 90 *supra*. But that is not all the Senate Report said.

The Report states that the primary purpose of the amendment is to refocus and insure that the basis for decisionmaking concerning the National Park System continues to be the criteria provided by 16 U.S.C. § 1—that is, to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

S. REP. NO. 528, 95th Cong., 1st Sess. 13-14 (1977). Later the brief analysis of the amendment is concluded with the following language: "The Secretary is to afford the highest standard of protection and care to the national resources within Redwood National Park and the National Park System. No decision shall compromise these resource values except as Congress may have specifically provided." *Id.* at 14.

Thus it is difficult to find language in either of these reports to support Judge Richey's conclusion that the 1978 amendment eliminated trust notions

public trust doctrine and the 1978 amendments were hardly briefed at all by the Government or the Mountain States Legal Foundation, which intervened on the side of the United States.⁹⁴ Like the *Redwood National Park* opinions, *Sierra Club v. Andrus* does not provide a definitive resolution of these public trust issues.

B. Statutory Precedent

One threshold issue is whether or not the public trust can exist in public land law independent of statute.⁹⁵ To be sure, none of the major public land management statutes uses the word "trust." Nevertheless, the National Park Service Organic Act of 1916⁹⁶ and the Wilderness Act of 1964⁹⁷ expressly create high

in National Park System management. Although the Senate committee expressed general "concern" over the role of the public trust in the *Redwood National Park* litigation, both reports use language that seems to impose strong trust responsibilities upon the Secretary of Interior. No proponent of the public trust would be unhappy to learn that the National Park Service Organic Act had been amended with legislative history from both houses of Congress requiring the Secretary of Interior to afford the "highest standard of protection and care" to lands within the National Park System.

⁹⁴ The brief filed by Intervenor Mountain States Legal Foundation in support of defendant's motion for summary judgment attempted no analysis of the trust issue. The public trust cases cited by the Sierra Club were never discussed. The legislative history of 16 U.S.C. § 1a-1 (1976) was not mentioned. In addition, the analysis of 16 U.S.C. § 1a-1 (1976) and 43 U.S.C. § 1701 (1976) was conclusory. The brief concludes by arguing that the statutes do not mandate any duty *at all* on the Secretary of Interior to define, assert or protect federal reserved water rights. How the public trust may have influenced or received content by these statutes was ignored. Memorandum in Support of Motion for Summary Judgment, at 7-8 (filed July 16, 1979).

Similarly, the Department of Justice brief did not address the public trust issue. The Government argued that no mandatory duty to protect federal reserved water rights existed in the statutes governing the administration of the parks or in the National Park Service Organic Act, 16 U.S.C. §§ 1-18f (1976). Memorandum in Support of Defendants' Motion for Summary Judgment and Motion to Dismiss, at 26-27 (filed July 16, 1979).

⁹⁵ *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C.), *appeal docketed*, No. 80-1674 (D.C. Cir. June 18, 1980).

⁹⁶ *E.g.*, 16 U.S.C. § 1 (1976) provides that national park lands are to be managed "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

⁹⁷ *E.g.*, 16 U.S.C. § 1131(a) (1976):

duties that set standards not dissimilar to those imposed on private trustees. On the other hand, the two largest agencies, the Forest Service and the BLM, operate under modern laws that set rigid standards in several respects but that still are best characterized as multiple-use, sustained-yield enactments.⁹⁸ A review of the evolution of statutory law in the field of public land law is instructive in determining the extent to which public lands legislation imposes, or is compatible with, trust responsibilities.⁹⁹

In the 19th century, the inland public lands and resources were used as inducements to subsidize the opening of the West. Ranchers were allowed to graze their stock on the open public domain at no cost and without federal regulation.¹⁰⁰ Free land

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas," and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this chapter or by a subsequent Act.

⁹⁸ National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600-1614 (1976) and scattered sections of 16 U.S.C.); Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-1782 (1976) and scattered sections of 7, 16, 30 & 40 U.S.C.)

⁹⁹ Leading sources on the history of public land law are P. GATES, *supra* note 33, B. HIBBARD, *supra* note 34, and S. DANA & S. FAIRFAX, *supra* note 44. The last-cited work is a revision of S. DANA, *FOREST AND RANGE POLICY* (1956), which remains useful because not all of the early history contained in the first edition is included in the revised edition.

¹⁰⁰ In *Omaechevarria v. Idaho*, 246 U.S. 343 (1918), a state law denying shepherders access to public grazing land previously grazed by cattle was found to be valid because no federal laws were applicable. It was not until 1934 that the passage of the Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified at 43 U.S.C. §§ 315-315r (1976)), provided for federal regulation of grazing

was made available to settlers through various preemption and homesteading laws.¹⁰¹ Timberlands were available for homesteading¹⁰² and through railroad land grants.¹⁰³ Public minerals,¹⁰⁴ water¹⁰⁵ and wildlife¹⁰⁶ were readily available to the first takers. The United States did not manage its timberlands, even

on the public domain. In national forests the Forest Service began charging minimal grazing fees in 1906, but no fees were charged on public domain grazing lands until after the Taylor Grazing Act was enacted in 1934. U.S. SECRETARY OF INTERIOR & U.S. SECRETARY OF AGRICULTURE, STUDY OF FEES FOR GRAZING LIVESTOCK ON FEDERAL LAND, 2-1 to 2-3 (1977).

¹⁰¹ *E.g.*, Homestead Act of 1891, ch. 561, 26 Stat. 1097 (codified at 30 U.S.C. § 35 (1976) and scattered sections of 43 U.S.C.); Enlarged Homestead Act of 1909, ch. 160, 35 Stat. 639 (codified at 43 U.S.C. § 218) (*repealed* 1976). See generally P. GATES, *supra* note 33, at 219-47, 387-434.

¹⁰² *E.g.*, Mineral Land Free Timber Act, ch. 150, 20 Stat. 88 (1878) (codified at 16 U.S.C. §§ 604-606 (1976)). See generally P. GATES, *supra* note 33, at 485-86.

¹⁰³ See generally S. DANA & S. FAIRFAX, *supra* note 44, at 19-20.

¹⁰⁴ General Mining Law of 1872, ch. 152, 17 Stat. 91 (codified at 30 U.S.C. §§ 22-49 (1976) and scattered sections of 30 U.S.C.). In addition to minerals, hardrock miners were entitled to obtain in fee 20 acres of land overlying the deposit. See generally G. COGGINS & C. WILKINSON, *supra* note 27, at 334-467. A leasing system of fuel minerals was not established until 1920 when the Mineral Leasing Act of 1920 was passed, ch. 85, 41 Stat. 437 (codified at 30 U.S.C. §§ 181-187 (1976 & Supp. III 1979)).

¹⁰⁵ In an early case, the California Supreme Court upheld appropriations of water pursuant to state law and local custom. *Irwin v. Phillips*, 5 Cal. 140 (1855). Thus the law of prior appropriations originally developed through the acts of persons who were technically trespassers on the public domain. *Basey v. Gallagher*, 87 U.S. (20 Wall.) 670 (1874). Congress later validated water rights based on local law and customs. See Act of July 26, 1866, ch. 262 § 2, 14 Stat. 253; Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218. As a result, water rights have traditionally been established on the public lands according to state law with little federal intervention. See *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). See also I W. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 254-58 (1972).

¹⁰⁶ "Before 1969, federal wildlife law existed only in unrelated bits and pieces. Most matters pertaining to wildlife regulation were generally thought to be the exclusive prerogative of the state." Coggins, *Federal Wildlife Law Achieves Adolescence: Developments in the 1970s*, 1978 DUKE L. J. 753, 760. See also Lund, *Early American Wildlife Law*, 51 N.Y.U.L. REV. 703 (1976). An exception existed in the national parks where hunting has been traditionally prohibited. See, *e.g.*, Act of May 7, 1894, ch. 72, 28 Stat. 73 (1894). The older notion that wildlife was the property of the state and not subject to federal legislation was brought to an end with *Kleppe v. New Mexico*, 426 U.S. 529 (1976), and *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (*overruling* *Geer v. Connecticut*, 161 U.S. 519 (1896)).

in the loosest sense, until 1905,¹⁰⁷ and the General Land Office existed almost exclusively to divest the United States of land and resources—not to manage them.¹⁰⁸ Trust notions were antithetical to the public lands policies that prevailed during these early days.

During the late 19th and early 20th centuries, Congress haltingly began to reserve land and to take a new approach. Some land was set aside from development to be held for future generations.¹⁰⁹ The range¹¹⁰ and timber¹¹¹ resources were more actively managed on a sustained-yield basis. Fuel minerals were removed from the “self-initiation” concept of the General Mining Law of 1872¹¹² and in 1920 were placed under a leasing system allowing for an ordered federal disposition of such minerals.¹¹³ Although these statutes were rudimentary compared with modern legislation, they established general responsibilities that guided public lands agencies until well after World War II.

Since the early 1960's, and especially during the 1970's, the pressure on all resources has increased so much that Congress has resorted to a wholly different management approach. The National Environmental Policy Act,¹¹⁴ passed in 1970, applies on all the public lands. Several pieces of wilderness legislation have established a burgeoning preservation system beyond anyone's

¹⁰⁷ See S. DANA & S. FAIRFAX, *supra* note 44, at 79-83 (creation of Forest Service).

¹⁰⁸ See P. GATES, *supra* note 33, at 127-28. See generally P. FOSS, *POLITICS AND GRASS* (1960); M. CLAWSON, *THE BUREAU OF LAND MANAGEMENT* (1971). In 1946 the General Land Office and the Grazing Service were merged to form the Bureau of Land Management.

¹⁰⁹ *E.g.*, Yellowstone National Park Establishment Act of 1872, 16 U.S.C. § 21 (1976); National Park Service Organic Act of 1916, 16 U.S.C. §§ 1-18f (1976).

¹¹⁰ Taylor Grazing Act, 43 U.S.C. §§ 315-315r (1976). See E. PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN* 214-24 (1941). See also notes 100 & 108 *supra*.

¹¹¹ Forest Service Organic Act of 1897, 16 U.S.C. §§ 473, 482 (1976). The Forest Service was engaged in active management and land-use planning long before the Multiple Use Sustained Yield Act, 16 U.S.C. §§ 528-531 (1976), was passed in 1960. Wilson, *Land Management Planning Processes of the Forest Service*, 8 ENV. L. 461 (1978). That Act in effect ratified prior Forest Service practice. *Id.*

¹¹² See note 104 *supra*.

¹¹³ See Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1976 & Supp. III 1979).

¹¹⁴ 42 U.S.C. §§ 4321-4370 (1976 & Supp. III 1979).

vision when the original Wilderness Act was passed in 1964.¹¹⁵ The Forest Service has been the subject of two major acts, the Resources Planning Act of 1974¹¹⁶ and the National Forest Management Act of 1976.¹¹⁷ The BLM received an Organic Act in 1976.¹¹⁸ Legislation concerning endangered species¹¹⁹ coal leasing¹²⁰ and other public lands issues¹²¹ has also been enacted during this period.

In regard to land ownership, Congress has turned four-square from a policy of disposition to a policy of retention.¹²² Indeed, the policy of disposition has not only been halted but reversed. Recent federal acquisitions of land and interests in land have

¹¹⁵ See The Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1976). Later acts include The Eastern Wilderness Act of 1975, Pub. L. No. 93-622, 88 Stat. 2096 (codified at 16 U.S.C. § 1132 nt (Supp. III 1979); The Boundary Water Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, 92 Stat. 1649 (codified at 16 U.S.C.A. §§ 1132nt-1133 (1981); The Endangered American Wilderness Act of 1978, Pub. L. No. 95-237, 92 Stat. 40 (codified at 16 U.S.C.A. § 1132 (1981)). As to the expansion of the wilderness system, see generally G. COGINS & C. WILKINSON, *supra* note 27, at 791-839. In 1980 Congress multiplied the wilderness system more than three-fold by designating nearly 57 million acres of public lands in Alaska as wilderness. See Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified in scattered sections of 16 U.S.C.).

¹¹⁶ The Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1600-1610 (1976), as amended by the National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949.

¹¹⁷ Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600-1614 (1976) and scattered sections of 16 U.S.C.).

¹¹⁸ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1976) and scattered sections of 7, 16, 30 & 40 U.S.C.

¹¹⁹ The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1976).

¹²⁰ Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. §§ 191, 201, 202, 204, 207, 208 (1976). See also Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.A. §§ 1201-1328 (Supp. I 1977).

¹²¹ See, e.g., The Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1976).

¹²² In the Declaration of Policy in FLPMA, Congress made express its policy of retaining public land in federal ownership:

The Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest

43 U.S.C. § 1701 (a)(1) (1976). FLPMA allows a congressional veto of the disposal of parcels of public land in excess of 2,500 acres. *Id.* § 1713.

been most impressive in scope.¹²³

Today, then, there is a new generation of public lands statutes. This statutory matrix uses entirely new mechanisms: land use planning,¹²⁴ long-range planning,¹²⁵ citizen involvement,¹²⁶ interdisciplinary planning¹²⁷ and citizen access to information.¹²⁸ Further, the modern statutes set on-the-ground standards for management¹²⁹—a new concept. As discussed in the next section, these extraordinary developments are fully compatible with the public trust doctrine.

C. Summary

The statutory developments just recounted help explain why some thirty-six court opinions over the years have described the inland public lands as being held in trust and why the judicial formulations have varied in different eras. During the three eras of judicial decisions described above, the courts have quite precisely tracked and reflected congressional action. In the 19th century, the congressional conception was that public lands should be sold and placed under state jurisdiction.¹³⁰ The con-

¹²³ As of September 30, 1977, the Forest Service had over 187 million acres, of which 27,325,464 acres were acquired land. PUBLIC LAND STATISTICS, *supra* note 1, at 14. The BLM administers some 450 million acres, including 2,363,623 acres of acquired lands. *Id.* at 20. The Fish and Wildlife Service manages approximately 31 million acres, having acquired 4,184,434 acres. *Id.* at 19. The National Park Service manages 26,281,496 acres, of which 5,869,718 acres were acquired. *Id.* See generally Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709. The Public Land Law Review Commission expressed concern that acquisition programs might erode the state and local tax base, PLLRC REP., *supra* note 4, at 267. This problem is addressed in FLPMA, where it is declared to be a congressional policy to compensate state and local governments for burdens created as a result of the immunity of federal lands from state and local taxation. 43 U.S.C. § 1701(a)(13) (1976). For criticism of the acquisition policy, see COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, THE FEDERAL DRIVE TO ACQUIRE PRIVATE LANDS SHOULD BE REASSESSED, CED-80-14 (Dec. 14, 1979).

¹²⁴ See, e.g., 16 U.S.C. § 1604(d) (1976); 43 U.S.C. § 1712 (1976).

¹²⁵ E.g., 16 U.S.C. § 1601 (1976).

¹²⁶ See, e.g., 16 U.S.C. § 1604(d); 43 U.S.C. § 1712(f) (1976).

¹²⁷ E.g., 16 U.S.C. § 1604(h) (1976); 43 U.S.C. § 1712(c)(2) (1976).

¹²⁸ See The Freedom of Information Act, 5 U.S.C. § 552 (1976); National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

¹²⁹ E.g., 16 U.S.C. § 1604(g) (1976); 30 U.S.C. §§ 1239, 1258, 1262, 1265, 1266, 1267, 1272 & 1281 (1976).

¹³⁰ See notes 33-36 and 100-108 and accompanying text *supra*.

temporary judicial opinions reflected that policy.¹³¹ Later, when Congress began tentatively to protect and manage the federal lands,¹³² the courts upheld Congress' newly asserted power.¹³³

The modern statutes are premised on the high station that today's society accords to the economic and environmental values of the federal lands and resources.¹³⁴ They are rigorous laws designed to protect the public's interest in the public's resources. The legislation requires that public lands and resources not be sold, except in limited and exceptional circumstances; that the public resources are to be nurtured and preserved; that the public is to play a measured but significant role in decision-making; and that the lands and resources are to be managed on a sustained-yield basis for future generations.

The whole of these laws is greater than the sum of its parts. The modern statutes set a tone, a context, a milieu. When read together they require a trustee's care. Thus we can expect courts today, like courts in earlier eras, to characterize Congress' modern legislative scheme as imposing a public trust on the public resources.

The fact that the public trust doctrine in public land law must rest on implication should surprise no one. The doctrine has always rested on implication. No legislation imposed it at common law, though the Magna Carta made reference to eliminating obstructions in coastal rivers.¹³⁵ The doctrine was applied to the original states, and later to the western states through the equal footing doctrine, by implication.¹³⁶ Thus *Illinois Central*¹³⁷ itself rested on an implied trust. While it might be argued that the comprehensive statutory scheme in modern public land law leaves no room for implied doctrines,¹³⁸ that conclusion is belied

¹³¹ See Section I(A)(1), "The Public Trust Doctrine as an Obligation to the States," *supra*.

¹³² See notes 109-113 and accompanying text *supra*.

¹³³ See Section I(A)(2), "The Public Trust Doctrine as a Source of Federal Power," *supra*.

¹³⁴ See notes 2-11 and accompanying text *supra*.

¹³⁵ See H. ALTHAUS, *supra* note 18, at 23.

¹³⁶ *E.g.*, *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); see notes 37-43 and accompanying text *supra*.

¹³⁷ *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); see notes 14-16 and accompanying text *supra*.

¹³⁸ See text accompanying note 28 *supra*.

both by implied doctrines that already exist in public land law¹³⁹ and by state cases that have based results on the implied public trust doctrine in spite of statutes covering the same subject matter.¹⁴⁰

Further, there is a strong tradition of applying trust notions in public land law. In a few instances trusts have been imposed by express legislative action, but most often the trust obligations have been implied. Trusts in public land law have involved school lands,¹⁴¹ swamp lands¹⁴² and miners hospitals,¹⁴³ among other things.¹⁴⁴

Finally, although little land under navigable waterways is now in federal ownership,¹⁴⁵ the classic public trust doctrine seems to

¹³⁹ See note 194 and accompanying text *infra*. Modern courts might properly look to federal common law as the source of the public trust doctrine. See Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967), in which Professor Hill argues that there are areas where federal courts create substantive law without the guidance of statutory or constitutional standards and that federal courts have the same range of judicial powers that state courts possess. See also Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964). For a brief but comprehensive review of the issue, see C. WRIGHT, *LAW OF FEDERAL COURTS* § 60 (1976). Professor Wright concludes that section by stating: "It may be, as Justice Brandeis said, that there is no federal general common law, but there remains a substantial area for the application of federal common law." *Id.* at 286.

¹⁴⁰ See, e.g., *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457 (N.D. 1976); *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1966).

¹⁴¹ See, e.g., *Alabama v. Schmidt*, 232 U.S. 168 (1914); *Cooper v. Roberts*, 59 U.S. (18 How.) 173 (1855). For a discussion of the federal purpose behind these school grants, see *State of Utah v. Kleppe*, 586 F.2d 756 (10th Cir. 1978), *rev'd on other grounds*, 100 S. Ct. 1803 (1980).

¹⁴² *Mills Co. v. Burlington & Mo. River R.R.*, 107 U.S. 557 (1882), negated a trust as to these lands. Later cases, however, indicate that a trust exists, but that it can be enforced only by the United States—not by private parties or the states. *Stearns v. Minnesota*, 179 U.S. 223, 231-32 (1900); *United States v. Des Moines Navigation & R.R.*, 142 U.S. 510, 541-42 (1891).

¹⁴³ E.g., *United States v. New Mexico*, 536 F.2d 1324 (10th Cir. 1976), in which the court reviewed two land grants for miners' hospitals. Although only one of these grants contained trust language, the court found that a trust existed as to both.

¹⁴⁴ Other examples are trusts for park lands, *Hutchings v. Low*, 82 U.S. (15 Wall.) 77 (1872); local improvements, *United States v. Des Moines Navigation & R.R.*, 142 U.S. 510 (1892); and, in some instances, railroads, *Stearns v. Minnesota*, 179 U.S. 223 (1900).

¹⁴⁵ Although lands beneath navigable water courses passed to the states at

have applied to navigable waterways before they passed out of federal hands. That is, before new states took lands under navigable watercourses at statehood, the United States was bound by the limitations imposed by the public trust doctrine in much the same way that states have been limited by the trust since statehood.¹⁴⁶ Just as Illinois was limited in the disposition of the

statehood, see notes 17 & 38-41 and accompanying text *supra*, the United States has since acquired some such lands, including, for example, coastal areas in the Point Reyes National Seashore in California, the Gateway National Recreation Area in New York and the Golden Gate National Recreation Area in San Francisco. See Futrell, *Parks to the People: New Directions for the National Park System*, 25 EMORY L.J. 255 (1976).

¹⁴⁶ After the colonies broke away from England, navigable waterways in the United States were generally subject to the same restrictions that had existed at common law:

[W]e hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law . . . , and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 436-37 (1892). In the original 13 states, such lands never became federal property but rather remained in state ownership when the Union was formed. Thus the original states—not the United States—were charged with the trust obligations. See, e.g., *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). When the United States later acquired western lands by cession from the states or by treaties with foreign nations, navigable waterways were viewed as being held by the United States for future states, which would receive those lands at statehood so as to put them on an equal footing with the original states. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223-24 (1845); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 434-35 (1892).

No case has struck down a federal transfer of lands under navigable waterways before statehood, so that there is no holding that the classic public trust doctrine applied to the United States. The Court's opinion in *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 409-14 (1842), suggests that the United States had the same trust obligations as the Crown and the states, but the clearest exposition that the United States was limited by the classic public trust doctrine in dealing with navigable watercourses before statehood is in *Shively v. Bowlby*, 152 U.S. 1 (1894). The issue in that case was whether a federal homestead patent, issued before Oregon statehood, transferred lands below the high-water mark on a navigable river. The Court, recognizing that Congress was bound to hold such lands for future states, *id.* at 48-49, construed the homestead patent strictly so as to exclude lands below the high-water mark. *Id.* at 50. After describing the trust obligations of the Crown and the original states, the Court said that, as to public lands not within any state, "the same title and dominion passed to the United States." *Id.* at 57. Such a result was logically necessary since the United States was "the only government which [could] impose laws upon" public lands before statehood. *Id.* at 48. In recognizing a limited right to

Chicago Harbor by the reasoning in *Illinois Central*, so too was Congress limited before statehood in its ability to transfer navigable watercourses located in federal territory. This means that the classic public trust doctrine had a dramatic potential impact on public land law until 1959, since navigable watercourses in Alaska were subject to the public trust when the United States held such lands in territorial status before Alaska statehood.¹⁴⁷ Trust concepts are thus no stranger to public land law.

The shifting notions of trust responsibility reflect fundamental changes in legal perceptions of the government's role in public land law. As recently as the 1950's, the courts conceptualized the United States as a proprietor in regard to the public lands. The public lands were viewed as capital assets over which federal control could be asserted, much as if Congress and the land management agencies were private parties managing private affairs.¹⁴⁸ This conceptualization of the government as a proprie-

convey trust resources, the Court indicated that territorial lands under navigable waterways were held in trust and that such lands could be alienated only under exigent circumstances:

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government, but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals, as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.

Id. at 49-50. See also *id.* at 58.

¹⁴⁷ See Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339. See also *United States v. Alaska*, 423 F.2d 764 (9th Cir. 1970).

¹⁴⁸ The apex of this notion may have been reached in *Camfield v. United States*, 167 U.S. 518 (1897), in which the Court stated that Congress "may deal with such lands precisely as a private individual may deal with his farming

tor was the source of a range of doctrines with broad consequences. For example, public participation in rulemaking was not considered appropriate because public land management was an internal affair.¹⁴⁹ Standing was narrowly construed to restrict public access to the courts.¹⁵⁰ Sovereign immunity barred a considerable amount of litigation.¹⁵¹ The doctrine of "committed to agency discretion by law" was invoked to deny judicial review.¹⁵² When judicial review was available, it was sharply circumscribed by numerous decisions giving broad sway to agency discretion.¹⁵³

These developments, of course, have been almost completely reversed by recent statutes and judicial decisions.¹⁵⁴ It is now

property." *Id.* at 524. See also, e.g., *Alabama v. Texas*, 347 U.S. 272 (1954); *United States v. Gratiot*, 39 U.S. 526 (1840). See generally Montgomery, *The Public Trust Doctrine in Public Land Law: Its Application in the Judicial Review of Land Classification Decisions*, 8 WILLAMETTE L. J. 135, 146-51 (1972).

¹⁴⁹ 5 U.S.C. § 553(a)(2) (1976) provides that one of the exemptions to rulemaking is "a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts." "Public property" was defined by the Attorney General to embrace

rules issued by any agency with respect to real or personal property owned by the United States or by any agency of the United States. Thus, the making of rules relating to the public domain, *i.e.*, the sale or lease of public lands or of mineral, timber or grazing rights in such lands, is exempt from the requirement of section 4.

U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 27 (1947). For a discussion of the application of this exemption, see Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540, 557-61 (1970).

¹⁵⁰ See, e.g., *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1937). For a discussion of the standing issue in public lands litigation before the modern era, see Comment, *The Conservationists and the Public Lands: Administrative and Judicial Remedies Relating to the Use and Disposition of the Public Lands Administered by the Department of the Interior*, 68 MICH. L. REV. 1200, 1200-22 (1970).

¹⁵¹ See, e.g., *Dugan v. Rank*, 372 U.S. 609 (1962). See also Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public Lands Cases*, 68 MICH. L. REV. 867 (1970).

¹⁵² 5 U.S.C. § 701(a)(2) (1976); see, e.g., *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964). See generally Comment, *supra* note 150, at 1237-38.

¹⁵³ See, e.g., *Udall v. Tallman*, 380 U.S. 1 (1965) (broad authority to issue oil and gas leases); *Dorothy Thomas Foundation, Inc. v. Hardin*, 317 F. Supp. 1072 (W.D.N.C. 1970) (broad authority to provide for timber sales).

¹⁵⁴ See G. COGGINS & C. WILKINSON, *supra* note 27, at 226-34.

established that the United States acts as a sovereign government—not just as a proprietor—in regard to the public lands.¹⁵⁵ This has had two major ramifications. First, Congress has the power, under the Supremacy Clause,¹⁵⁶ to preempt state law on the federal lands.¹⁵⁷ Second, and of greater moment for our purposes, the shift to a conceptualization of the federal role as governmental rather than proprietary focuses attention on duties to the public. Rulemaking is required, records are open, decision-making is shared, and the courts are available because public lands business is public business. It is the public to whom public lands managers are ultimately accountable.

These various trends merge in the longstanding tendency of the courts to describe the public lands as being held in trust. It is the product of a search of two centuries to articulate the government's duties and responsibilities. The trust concept has been properly invoked as the best available formulation of the central doctrinal forces in public land law—that increasingly tough strictures are required, and have been imposed, on land management officials; that land management is not a private business; that ultimate accountability is to the public; and that over time the public and Congress have come to place ever greater importance on the nation's public natural resources.

The trust notion, as a generic concept, is an appropriate description of the federal role in public land law. It is a common-sense description that has evolved in regard to the inland public lands just as it has developed in closely related subject areas. The more difficult issue, as discussed in the next section, is determining the scope and content of the trust.

II. SCOPE AND CONTENT OF THE TRUST

The policies behind the classic public trust doctrine have been manifested in several different specific rules. The doctrine has operated as a limit on disposition of resources, as a requirement that agency authority to change trust uses be narrowly construed, as a basis for a requirement for comprehensive planning and in other ways.¹⁵⁸ An essential characteristic of the doctrine

¹⁵⁵ *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

¹⁵⁶ U.S. CONST. art. VI, cl. 2.

¹⁵⁷ *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

¹⁵⁸ See *Johnson, Lake Surface Users v. Water Extractors, A Public Trust Issue?* this issue at 233.

is the flexibility with which it applies to different resources and resource uses.¹⁵⁹

Several possible variations of the public trust doctrine are unlikely to be utilized in public land law. The branch of the doctrine placing limitations on dispositions of trust resources is almost certainly inapplicable to the inland public lands.¹⁶⁰ The disposition of public lands is longstanding policy¹⁶¹ and has been affirmed in numerous cases.¹⁶² Further, the sale and trade of inland public lands are already governed by statutes placing strict limits on such dispositions.¹⁶³ Similarly, the branch of the doctrine requiring comprehensive planning when trust resources are developed has little practical application to public land law. The rule in *United Plainsmen Association v. North Dakota State Water Conservation Commission*¹⁶⁴ has far-reaching potential in water resources development, where most western states have only rudimentary planning procedures. But such a rule, so legitimately important in its own context, is an irrelevancy in public land law. The skeletal planning required by the North Dakota Supreme Court¹⁶⁵ is far outstripped by federal lands statutes such as NEPA, FLPMA and the NFMA.¹⁶⁶

Finally, it is unlikely that courts would find that Congress has trust obligations to transfer public lands from federal ownership. The legal arguments of those supporting the Sagebrush Rebellion would lead to such a result.¹⁶⁷ Although dictum in *Pollard v.*

¹⁵⁹ See Sax, *supra* note 15, at 556-57.

¹⁶⁰ For a suggestion that extraordinary dispositions by Congress might be prohibited, see note 183 *infra*.

¹⁶¹ See notes 101-108 *supra*.

¹⁶² See, e.g., *Shively v. Bowlby*, 152 U.S. 1 (1894), discussed in note 146 *supra*.

¹⁶³ See, e.g., 43 U.S.C. § 1713 (1976).

¹⁶⁴ 247 N.W.2d 457 (N.D. 1976).

¹⁶⁵ The court said only that "some short and long-term planning" was required before a permit could issue for appropriations of water for development of substantial coal-related power and energy production facilities. *Id.* at 462.

¹⁶⁶ See notes 114 & 124-127 *supra*.

¹⁶⁷ On the legal basis of the Sagebrush Rebellion, compare Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, this issue at 317, with Note, *The Property Power, Federalism and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980); Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?* 1980 UTAH L. REV. 505. The Solicitor's Office has not published a formal legal opinion on the Sagebrush Rebellion, but the efficacy of the arguments of Nevada and other states was discounted in a recent memorandum. See ASSOCIATE SOLICITOR, ENERGY AND RESOURCES, NE-

*Hagan*¹⁶⁸ does support such a trust obligation, *Pollard* has not been followed on that issue.¹⁶⁹ Any broad trust obligation to dispose of federal lands would necessarily be bottomed on an overruling of *Kleppe v. New Mexico*,¹⁷⁰ a unanimous 1976 Supreme Court case recognizing broad federal sovereign powers over the public lands under the Property Clause.¹⁷¹ But *Kleppe* is consistent with earlier cases,¹⁷² is similar to developments under the Commerce Clause¹⁷³ and has since been cited with approval by the Court.¹⁷⁴ Thus, while the Sagebrush Rebellion may have important political repercussions, its legal premises are unlikely to be accepted by modern courts.

Some branches of the public trust doctrine, therefore, do not bear on the public lands. The following sections, however, discuss other applications of the doctrine that more properly apply in public land law.

VADA'S CLAIM TO OWNERSHIP OF THE PUBLIC LANDS (Dec. 6, 1979).

¹⁶⁸ 44 U.S. (3 How.) 212 (1845). See notes 37-43 and accompanying text *supra*.

¹⁶⁹ A few early cases followed the dictum in *Pollard*, see note 41 *supra*, but the language concerning the inland public lands has not been approved in well over a century. The holding in *Pollard*—that states acquire lands under navigable watercourses in trust at statehood under the equal footing doctrine—remains good law. See, e.g., *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

¹⁷⁰ 426 U.S. 529 (1976).

¹⁷¹ *Id.* at 539.

¹⁷² E.g., *Camfield v. United States*, 167 U.S. 518, 526 (1897) (congressional authority “may . . . involve the exercise of what is ordinarily known as ‘the police power’ . . .”); *Light v. United States*, 220 U.S. 523 (1911), discussed in notes 47-52 *supra*. But see *Engdahl*, *supra* note 42, at 349-58.

¹⁷³ U.S. CONST. art. I, § 8, cl. 3. For example, the Commerce Clause can be employed to reach activities outside of interstate commerce if the intrastate commerce competes with goods in interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942). Similarly, the Property Clause may be invoked to regulate activities off public lands if there is a direct impact on activities on public lands. *Camfield v. United States*, 167 U.S. 518 (1897); *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979); *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977). On the evolution of the Commerce Clause as a basis for preemption of state law, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 376-89 (1978). For examples of the generally parallel development of the Property Clause, see the authorities cited in note 172 *supra* and *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

¹⁷⁴ *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 393 (1978).

A. A Constraint on Congressional Action

One possible use of the public trust doctrine is as a limit on the powers of Congress, just as the classic doctrine has been found to restrict state legislatures. If the doctrine is to be so used, the source of the limitation must be found in the Constitution.

There is ample reason to believe that the Property Clause does not include an implied trust, since there is nothing in the constitutional debates to indicate such a trust.¹⁷⁵ Rather than finding a constitutional footing for the trust, the Supreme Court might be more likely to tie the trust to a comprehensive statutory scheme.¹⁷⁶ Thus the Court might conclude that Congress had established a trust duty on itself and on the agencies, but only as a matter of statutory policy. Yet just two years ago, the Ninth Circuit—citing the Property Clause—referred to “the Constitutional precept that public lands are held in trust by the federal government for all the people.”¹⁷⁷

¹⁷⁵ See 2 RECORDS OF THE FEDERAL CONVENTION 466 (rev. ed. 1937); A. PRESCOTT, DRAFTING THE FEDERAL CONSTITUTION 478 (1941). In some states the public trust doctrine is constitutionally based and cannot be overridden by the legislature. See, e.g., *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928); *People ex rel. Director of Conservation v. Babcock*, 38 Mich. App. 336, 196 N.W.2d 489 (1972). For a comprehensive review of environmental provisions in state constitutions that could provide support for the public trust doctrine, see Frye, *Environmental Provisions in State Constitutions*, 5 ENVIR. L. REP. 50028 (1975). See also W. ROGERS, *supra* note 18, at 182-84.

¹⁷⁶ The Court has traditionally avoided constitutional interpretations if a statutory basis for decision is available. E.g., *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-75 (1947). In public land law, one noteworthy opinion in which the Court avoided constitutional issues is *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), where the Court based presidential withdrawal authority upon the implied acquiescence of Congress rather than upon inherent executive authority.

¹⁷⁷ *United States v. Ruby Co.*, 588 F.2d 697, 704-05 (9th Cir. 1978). The court held for the Government in a title dispute, declining to find estoppel against the Government. The court used the existence of the trust as a basis for explaining that the equities in estoppel cases run not only to the parties at bar but also to the general public, which is the ultimate beneficiary of the trust. Thus the trust was used to justify federal prerogatives—not to place limits on Congress. The only authority cited in *Ruby* to support the conclusion that Congress is a constitutional trustee was *United States v. California*, 332 U.S. 19 (1947), which stands only for broad federal power. Hence the language in *Ruby* does not by itself suggest that a constitutionally based trust, if it exists, acts as a limit on congressional power.

We know that courts have said with some regularity that public lands are held in trust for the people.¹⁷⁸ Although no congressional action was involved, the Supreme Court was willing, at least in *Illinois Central*,¹⁷⁹ to overturn state legislative action. The Property Clause is dynamic and expanding in scope; *Kleppe*¹⁸⁰ tells us that. In addition, our society has come to place a new primacy on the remaining public lands, including both their economic and non-economic resources.¹⁸¹ The Constitution is an evolving document that must respond to changing conditions in our society.¹⁸² It is entirely possible, therefore, that

¹⁷⁸ See note 32 *supra*.

¹⁷⁹ *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); see text accompanying notes 14-18 *supra*.

¹⁸⁰ *Kleppe v. New Mexico*, 426 U.S. 529 (1976). Although *Kleppe* can be viewed as being based on existing precedent, see note 172 *supra*, the case was plainly the first Supreme Court opinion to uphold the sweeping exercises of federal power found in modern public lands legislation.

¹⁸¹ See text accompanying notes 2-11 *supra*.

¹⁸² This interpretation of the Constitution has existed since Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which he stated, "[W]e must never forget that it is a *constitution* we are expounding," *id.* at 407 (emphasis in original), "a constitution intended to endure for ages to come, and, consequently, to be adopted to the various crises of human affairs," *id.* at 415. Justice Frankfurter described Marshall's analysis as "the single most important utterance in the literature of constitutional law — most important because most comprehensive and comprehending." Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 218 (1955). See also L. LEVY, *JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 17-18 (1972); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?* 77 COLUM. L. REV. 1029, 1058-59 (1977). For subsequent decisions articulating this view, see, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966); *United States v. Classic*, 313 U.S. 299, 316 (1941); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442-43 (1934); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926); *Missouri v. Holland*, 252 U.S. 416, 433-34 (1920).

Karl Llewellyn suggested that the great common law judges did not look principally at the past for guidance, but rather looked at the times in which they lived — at the social values and needs which had current existence— saving from the past only broad principles and basic values. K. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* (1960). Jerome Frank espoused a similar philosophy:

New instruments of production, new modes of travel and of dwelling, new credit and ownership devices, new concentrations of capital, new social customs, habits, aims and ideals — all these factors of innovation make vain hope that definitive legal rules can be drafted that will forever after solve all legal problems. When

courts today would find that the Property Clause includes some general trust notions and that Congress is a constitutional trustee. That is perhaps the most logical way to explain the language in the court opinions.

But a constitutionally based trust doctrine is probably not enforceable against Congress for several reasons.¹⁸³ The tradition of transferring public lands is too deeply ingrained.¹⁸⁴ Congressional power under the Property Clause is very broad.¹⁸⁵ The statutory decisions that Congress makes are too complex, techni-

human relationships are transforming daily, legal relationships cannot be expressed in enduring form. The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions.

J. FRANK, *LAW AND THE MODERN MIND* 12-13 (1930). See also A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 20 (1970); Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 10-15 (1934).

¹⁸³ Congress has never been found to have exceeded its broad constitutional authority under the Property Clause, see note 185 *infra*, but there may be at least hypothetical limits, even in the area of land dispositions. Justice Black had "trouble also in thinking Congress could sell or give away the Atlantic or Pacific Oceans." *Alabama v. Texas*, 347 U.S. 272, 280 (1954) (dissenting opinion). Professor Sax has asked whether a national park, such as the Grand Canyon, could be sold to private parties. Sax, *supra* note 15, at 480.

¹⁸⁴ *E.g.*, *Shively v. Bowlby*, 152 U.S. 1 (1894); see text accompanying notes 100-108 *supra*.

¹⁸⁵ *E.g.*, *Alabama v. Texas*, 347 U.S. 272, 273-74, 277 (1954) (*per curiam*). In *Kleppe v. New Mexico*, 426 U.S. 529 (1976), the Court stated, "[W]hile the furthest reaches of the power granted by the Property Clause have not yet been definitely resolved, we have repeatedly observed that '[t]he power over the public lands thus entrusted to Congress is without limitations.'" *Id.* at 539. This language should probably not be taken literally. The 10th Amendment may provide some limits, see Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 86 COLUM. L. REV. 817, 828-33 (1980), and a rational basis test is likely to be employed, as it has been in other areas, if Congress exercises extraordinary powers. Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 11-13 (1980). Thus hypothetical actions, such as the adoption of national probate or child welfare laws applying to all the public lands, would probably be struck down, either as infringing on states' rights under the 10th Amendment or as exceeding the ambit of the Property Clause. See also note 183 *supra*, suggesting limits on extraordinary dispositions. But it is difficult to imagine congressional authority being limited in the area of resource management in any practical way.

cal and policy-oriented for the courts to review.¹⁸⁶ Thus, even if the public trust doctrine does have constitutional dimensions, the result is not likely to be that statutes would be overturned by the courts. Nevertheless, a constitutionally based public trust doctrine can make a difference, as will be discussed below.

B. A Limitation on Federal Agencies

The public trust could also operate as a limitation on the discretion of administrative agencies. First, it might be used, as it has been in several states,¹⁸⁷ to require express legislative authority when public resources are being unreasonably used by administrative agencies to promote private gain. Second, it would provide the basis for an ultimate "hard look" doctrine for reviewing administrative action.¹⁸⁸ As such, it would be a doctrine advanced by environmentalists and by industry and would have no ideological content. The doctrine could be invoked by industry, for example, to emphasize the high standard of care incumbent on the Forest Service if it mishandled a timber sale, or on the BLM if it unreasonably delayed the processing of competitive bidding on a mineral lease.

Several of the major public lands cases in the last decade have used trust language to reach results sharply curtailing administrative discretion. The *Alaska Pipeline* case,¹⁸⁹ the *Monongahela* case,¹⁹⁰ the *Georges Bank* case,¹⁹¹ and the *Redwood Na-*

¹⁸⁶ See Wilkinson, *supra* note 185, at 24.

¹⁸⁷ See, e.g., *City of Berkeley v. Superior Court of Alameda County*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, cert. denied, 101 S. Ct. 119 (1980). *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410, 215 N.E.2d 114 (1966).

¹⁸⁸ See, e.g., W. RODGERS, *supra* note 18, at 177-80.

¹⁸⁹ *Wilderness Soc'y v. Morton*, 479 F.2d 842, 891 (D.C. Cir.) (*en banc*), cert. denied, 411 U.S. 917 (1973).

¹⁹⁰ *West Virginia Div. of Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945, 955 (4th Cir. 1975).

¹⁹¹ *Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979). This case involved a prime fishing and oil-drilling area off the New England coast. The United States exerted control over the area under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (Supp. II 1978), subject to multiple-use policies similar to those covering inland public land. The issue in the case was the nature of the duty of the Department of Interior on the continental shelf. The court cited the *Redwood National Park* cases and characterized the Secretary as the "guardian" of the public domain. 594 F.2d at 890. In summary, the court said:

The task [of balancing interests] is committed to the Secretary,

tional Park cases¹⁹² are leading examples. In each of these cases, the trust language was used only as a backdrop; the *Redwood National Park* decisions could have been based on separate grounds,¹⁹³ and in the other decisions the trust was mentioned only briefly. But the invocation of the trust concept served to set a general context for the litigation and provided a benchmark with which to measure the obligations of the administrative agencies.

C. A Rule of Construction

The public trust doctrine could also well serve the public lands as a rule of construction.¹⁹⁴ Let us assume that the doctrine is bottomed in the Property Clause¹⁹⁵ or that Congress has

and so long as he carries it out rationally and in conformity to the law, the courts may not intervene. There can be no question, however, that his legal duty embraces a solemn responsibility to see that the great life systems of the ocean are not unreasonably jeopardized by activities undertaken to extract oil and gas from the seabed.

Id. at 892. Recognizing that Congress views wildlife as a resource entitled to equal dignity with leasable minerals, *id.* at 889, the court remanded for further agency consideration of the granting of oil leases. While trust notions were not the sole basis for the court's holding, the general trust language plainly was used to set a high standard for judicial review.

¹⁹² See notes 62-79 and accompanying text *supra*.

¹⁹³ See text accompanying notes 69-75 *supra*.

¹⁹⁴ Examples of court-made rules of construction are legion. See, e.g., Wilkinson, *supra* note 185, at 22. On the necessary power of federal judges to develop federal common law, see note 139 *supra*. Several public trust doctrine cases in the state courts have invoked rules of construction that are highly protective of public resources. See Johnson, *supra* note 158, this issue at 233.

In public land law, judicially developed canons of construction have been employed to construe the homestead laws liberally in favor of entrymen, see, e.g., *Stewart v. Penny*, 238 F. Supp. 821, 831 (D. Nev. 1965), and to presume congressional acquiescence to executive withdrawals of land. See, e.g., *Portland Gen. Elec. Co. v. Kleppe*, 441 F. Supp. 859 (D. Wyo. 1977). Rules of construction have also been utilized to develop the fundamental principle that federal grants will be construed in favor of the United States. See, e.g., *Andrus v. Charleston Stone Prod. Inc.*, 436 U.S. 604 (1978); *United States v. Union Pac. R.R.*, 353 U.S. 112 (1957); *United States v. Union Oil Co.*, 549 F.2d 1271 (9th Cir. 1977), *cert. denied*, 435 U.S. 911 (1978). *But see* *Leo Sheep Co. v. United States*, 440 U.S. 668, 682-83 (1979) (Court declined to apply rule with full vigor because railroad grants are "quasi-public" and stand on a higher plane than private grants).

¹⁹⁵ See notes 175-186 and accompanying text *supra*.

adopted the doctrine as a matter of policy.¹⁹⁶ If either is true, then all public lands statutes should be read in light of the trust obligation. Legislation should be construed in a manner consistent with Congress' intent to protect the public resources. If there are unresolved questions on the face of the statutes, courts should assume that Congress intended to protect and preserve the public resources as a trustee would.

The construction of statutes against the background of a duty to the public would affect the interpretation of a number of statutes. For example, the question of impliedly reserved water rights has been largely resolved on National Forest lands,¹⁹⁷ but the extent of protection afforded to wildlife and public recreational and aesthetic opportunities by other land-management systems has not been determined.¹⁹⁸ The courts may also have to decide whether or not existing statutes are broad enough to authorize federal land agencies to establish minimum stream flows, based on non-reserved rights with a recent priority date as of the date of the designation, in states that do not allow for the setting of instream flows.¹⁹⁹ And while the Supreme Court has held that federal agencies do not have the reserved right to construct rights of way across patented private lands to reach checkerboarded public lands without payment of compensation,²⁰⁰ the right of the public to hike across such lands to use federal lands seems not to have been resolved; the question is whether or not the statutes authorizing transfers to private parties impliedly reserved a right of access to the public for hiking, mining, fishing, ranching or hunting.²⁰¹ Finally, major federal statutes, such as the Taylor Grazing Act,²⁰² have not been construed to determine whether or not subsurface mineral rights under patented land remain in federal ownership.²⁰³ The an-

¹⁹⁶ See notes 130-134 and accompanying text *supra*.

¹⁹⁷ *United States v. New Mexico*, 438 U.S. 696 (1978).

¹⁹⁸ *E.g.*, FEDERAL WATER RIGHTS OF THE NATIONAL PARK SERVICE, FISH AND WILDLIFE SERVICE, BUREAU OF RECLAMATION & THE BUREAU OF LAND MANAGEMENT, 86 I.D. 553 (1979).

¹⁹⁹ *E.g.*, Note, *Federal Acquisition of Non-Reserved Water Rights After New Mexico*, 31 STAN. L. REV. 885 (1979).

²⁰⁰ *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).

²⁰¹ See Wilkinson, *supra* note 185, at 33.

²⁰² 43 U.S.C. §§ 315-315r (1976).

²⁰³ See Ames, *The Expansion of Mineral Reservations in Federal Patents—The Taylor Grazing Act's Exchange Provisions*, 6 J. CONTEMP. L. 93

swers to all of these questions would be affected if the courts construed the acts to effectuate Congress' intent to act as a trustee charged with the duty of protecting and preserving the public resources.²⁰⁴

D. An Action-Forcing Mechanism

Another use of the public trust doctrine in regard to public lands is what might be called the action-forcing cases. The injunction in the *Redwood National Park* litigation, for example, went beyond prohibitory commands; the court also required the agency to take affirmative action to protect the park's resources.²⁰⁵ In *Sierra Club v. Andrus*,²⁰⁶ the plaintiff sought an order, which the district court denied, requiring the Department of Interior to appear in state administrative proceedings to assert federal reserved water rights. As pressures from population and development have increased, several other instances have arisen in which public lands and resources have been jeopardized by private actions.²⁰⁷ The questions arise whether public land managers can be compelled to take affirmative action, including litigation, to protect federal lands, and whether the public trust doctrine can play a part in such determinations.

Take, for example, the recent case in Montana involving an Anaconda Aluminum smelter.²⁰⁸ The smelter, which was located in Columbia Falls, was emitting 4,000 pounds of fluoride pollutants a day. The maximum under Montana state law was 800 pounds of fluoride pollutants a day, but the state had granted a variance and had waived the ceiling for this particular smelter. Federal studies showed that the emissions had killed trees and other vegetation in Glacier National Park and Flathead National

(1979).

²⁰⁴ One court has already used the public trust doctrine in reaching the conclusion that the public has access to mining claims located after the passage of the Surface Resources Act of 1955, 30 U.S.C. §§ 611-612 (1976). *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1283-84 (9th Cir. 1980).

²⁰⁵ See notes 63-68 and accompanying text *supra*.

²⁰⁶ 487 F. Supp. 443 (D.D.C.) *appeal docketed*, No. 80-1674 (D.C. Cir., June 18, 1980); see notes 80-91 and accompanying text *supra*.

²⁰⁷ See Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976); G. COGGINS & C. WILKINSON, *supra* note 27, at 730-56.

²⁰⁸ *United States v. Atlantic-Richfield Co.*, No. 78-80-M (D. Mont., filed Jan. 3, 1979).

Forest²⁰⁹ and that the dead trees constituted a fire hazard.²¹⁰ Federal officials also claimed that the pollution injured wildlife on the federal lands by causing skeletal fractures, tooth disintegration and severe fluorosis.²¹¹

The United States requested that the pollutant emissions be reduced, but Anaconda refused. The United States sued, seeking an order that the daily pollutants be reduced to 200 pounds a day.²¹² After the court issued a memorandum opinion ruling on some of the issues,²¹³ the case was settled.²¹⁴

Suppose, however, that the United States had refused to move against the Anaconda smelter and that various users of the Montana public lands had brought suit to require the United States to take action against Anaconda. Such a procedural setting may be increasingly common in years to come. On one hand, administrative officials are afforded broad prosecutorial discretion, and a decision not to institute suit will ordinarily be upheld by the courts.²¹⁵ Presumably, however, the courts would give considerably greater scrutiny if the National Park Service, Forest Service and Justice Department were viewed as trustees. In fact, the trust obligation in Indian law has been the basis for ordering the government to sue or take other action when Indian trust resources were jeopardized.²¹⁶ The Anaconda situation also serves as a reminder of the public to whom the duty is owed: affected members of the public would include not only recrea-

²⁰⁹ Complaint at 2, *id.*

²¹⁰ *Id.* at 3.

²¹¹ *Id.*

²¹² Two hundred pounds a day was more stringent than the applicable requirements of the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1976), but the United States proceeded on a nuisance theory, arguing that its common law nuisance rights had not been taken away by the Clean Air Act.

²¹³ See Opinion and Order (Nov. 1, 1979), *discussed in note 217 infra.*

²¹⁴ Order of Dismissal with Prejudice, *id.* (Aug. 4, 1980).

²¹⁵ See, e.g., *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

²¹⁶ See, e.g., *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (United States ordered to file suit or take other action to protect tribal land claim under 25 U.S.C. § 177 when statute of limitations was about to run); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) (Secretary of Interior ordered to take action to protect tribal water rights). See also *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*) (Department of Health, Education & Welfare ordered to commence enforcement actions, and take other action, against school districts not in compliance with laws relating to racial desegregation). See generally Note, 75 COLUM. L. REV. 131 (1975).

tionists but also commercial concessionaires in Glacier National Park and timber companies and grazers dependent upon the trees and forage in Flathead National Forest. The public trust doctrine could thus serve as a mechanism for requiring active administrative protection of resources that serve many different segments of the public.²¹⁷

CONCLUSION

The public trust doctrine is rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles. This is an accepted process in our law: Anglo-American jurisprudence is rife with judicially developed doctrines that reflect the deeply held convictions of our society. In natural resources law generally, the unique qualities of some resources have impelled courts to apply the public trust doctrine as a flexible, loosely connected set of rules that allow maximum public utilization. The increasing use of trust language in public lands cases indicates an awareness that the special values of the federal lands, like other resources on which the trust has been impressed, have been gradually but indelibly imprinted on our national consciousness.

The public trust doctrine does not exist to allow judges to act as roving ambassadors on behalf of a "public" consisting mainly of environmentalists. Rather, the doctrine protects the resources themselves. To be sure, application of the public trust doctrine may prohibit development of a resource by a single private commercial entity, but that result allows the resource to remain

²¹⁷ The public trust doctrine could also operate in the Anaconda situation as a canon of construction affecting the merits of the case. The substantive question in the litigation was whether the Government's common law nuisance cause of action against Anaconda's emissions survived the passage of the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1976). The district court, employing the rule that preexisting federal rights will not impliedly be abrogated by subsequent legislation, held that the Clean Air Act did not extinguish the common law nuisance remedy. Opinion and Order, *United States v. Atlantic Richfield Co.*, No. 78-80-M, at 5-7 (D. Mont. Nov. 1, 1979). The court could have reinforced this reasoning by noting that Congress, as a trustee, has a duty to act protectively and with due care toward the public lands, see notes 194-204 and accompanying text *supra*, and that Congress would not have intended to eliminate the existing nuisance cause of action since to do so would damage the public lands and resources.

open for use by a much wider range of interests—commercial and non-commercial. In *Illinois Central*, for example, the waterfront resource did not pass to the railroad but was preserved for a diverse public that included commercial shipping and fishing interests as well as recreationists.

So viewed, the public trust doctrine has a measured, carefully delineated role to play in public land law. The doctrine does not prohibit the transfer of public lands, but the limitation on transfers is only one branch of the doctrine. The trust concept can be useful as a backdrop for judicial decisionmaking, as an aid in determining legislative intent and as a yardstick in assessing administrative action or inaction.

Operating in this fashion, courts are not called upon to act according to some ill-defined “public interest.” The focus of the doctrine is on the resources themselves. Such a value-neutral approach is but one component in the body of statutory and common law rules designed to bring wisdom and care to the stewardship of the federal lands and resources.