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Everett Ruess was an artist and a writer who wandered throughout the Southwest, and mysteriously disappeared in southern Utah at the age of twenty. His woodblocks, which depict natural scenes in the Sierra Nevada, along the California coast, and in the deserts and canyons of the Four Corners region, were recently discovered, restored, and reprinted. A limited number of prints are available from:

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THE FIRE NEXT TIME: LAND USE PLANNING IN THE WILDLAND/URBAN INTERFACE

Jamison Colburn*

ABSTRACT

Wildfire is a growing threat to suburban and exurban communities, in part because fires have grown more severe and frequent as a result of land use and climatic influences and in part because more people are living in fire prone areas. Unfortunately, the so-called Healthy Forest Restoration Act (HFRA), the federal government’s response to this crisis, is a deeply flawed statute that will likely exacerbate wildfire risks at the same time it makes real ecological restoration even harder. While HFRA took halting, partial steps toward the integration of broad and small scale land use planning, it was clearly still the outgrowth of the dysfunctional legislative process in Washington. Before the governance of public lands adapts too completely to HFRA, this law should be overhauled or repealed.

Wildfire and sprawl are ugly facts of life. Wildfire burns millions of dollars in homes and other structures every year, costs billions of dollars to contain, and kills both firefighters and civilians almost every year.\(^1\) The costs of sprawl—the low-density occupation of landscapes by scattered residential and related uses—are no less familiar.\(^2\) Because of our propensity to sprawl, though, we seem incapable of planning our land uses around wildfire. More troubling still is that public lands law has made virtually no room for fire as an element of the landscape. In fact, the longer our public lands law is shaped by our so-called “Healthy Forests Restoration Act of 2003” (HFRA)\(^3\)—the only federal statute pertaining to fire as a matter of land use—the less likely it is that we will ever plan

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* Professor of Law, Penn State University. This essay began as a talk delivered on October 2, 2007, at the Wallace Stegner Center for Land, Resources and the Environment of the University of Utah S.J. Quinney College of Law. It has since benefited from audiences at Osgoode Hall Law School, Pace Law School, and Penn State University’s Dickinson School of Law, and from conversations with Bob Keiter, Nancy McLaughlin, Jim McLaughlin, and Lincoln Davies. My thanks go to the Cultural Vision Fund for their sponsorship of my visit under the Stegner Center Young Scholar program and to Irene Burkhard for invaluable research assistance.

1 The 2003 fire season is credited with having catalyzed support in Congress for HFRA. See Jacqueline Vaughn & Hanna J. Cortner, George W. Bush’s Healthy Forests: Reframing the Environmental Debate 1 (2005). That year, California watched as 750,000 acres and 3,719 homes burned, 24 people perished, and over $100 million was spent trying to contain the blazes in southern California alone. Id.


for fire as a landscape-scale force of nature. HFRA has encouraged landowners to build their homes in harm’s way, encouraged communities to invest in more wildland sprawl, and increased the risks firefighters must face in trying to contain wildfire. In this article, I make the case for the repeal—or at the very least the substantial overhaul—of HFRA. I make this case reluctantly, though, because HFRA was enacted in full view of its likely consequences. Few surprises have arisen from its implementation and the agencies administering it have behaved just as they did before the law. So the real question is why this statute was enacted at all. Saying who it benefited and how they could secure legislation with such extreme social costs is how our social sciences (and most legal commentators) normally attack such a puzzle. The problem with that approach here is that there really is no public enemy who connived HFRA into existence—unless one counts abstractions like ‘private property’ or ‘local control.’ It was the product of our Congress and Presidency, pure and simple. The dominant accounts of “collective action failures” like HFRA falter when concentrated stakeholders, power elites, iron triangles, Prisoners’ dilemmas, and the like are all negligible-to-nonexistent. This may say more about the state of our social sciences than it does about HFRA, but HFRA has something to teach us about the state of our public lands law and, in particular, about the evolutionary juncture Congress and its agencies have reached in this age of ecology. Unfortunately, those lessons are no cause for celebration.

HFRA was a statutory scalpel. Its cuts were deep and, unfortunately, probably representative of what we should expect from federal conservation law into the foreseeable future. Part I gives a brief overview of public lands law and its history of fire suppression in the United States. Parts II and III describe and situate HFRA within that context as a statute of seemingly modest aims which is shaping up to be extremely problematic. Finally, Part IV argues that HFRA can teach us a great deal about public lands law more generally. Those lessons fall into three categories. First, Americans are divided over what constitutes good land use and a healthy landscape and we do not often heed the expert advice we get on land use when that advice is (characteristically) inconvenient and controvertible. Second, but related to the first, we lack a healthy culture of political argument for resolving our land use disputes, a deficit that is exacerbated enormously at the federal level. Lastly, administrative agencies like the Forest

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6 See generally IAN SHAPIRO, THE FLIGHT FROM REALITY IN THE HUMAN SCIENCES (2005); STEPHEN TOULMIN, THE RETURN TO REASON (2001); infra notes 87-90 and accompanying text.
Service, Bureau of Land Management (BLM), and others, are not structurally suited to land use planning and stewardship in this context because they lack both the institutional capacity and the practical authority needed to do broad scale land planning that actually works. These lessons suggest how HFRA ought to be reformulated. But they do little to show how it can be absent exceptional political courage and leadership.

I. OF FIRE AND PUBLIC LANDS IN THE TWENTIETH CENTURY

By the time public lands law turned to the reservation of land for permanent administration by the United States, fire suppression was already atop the land managers’ priorities. In the 1890s and continuing to the fire season of 1910, the Forest Service—then still in its infancy—struggled to control the fire on its lands. From about 1910 onward, however, the Forest Service, soon to become a model among its peer agencies, became far more serious about, and proficient at, fire suppression across its lands. That organizational evolution progressed in parallel with the rise of modern public lands law and this Part summarizes their co-evolution.

A. Eradicating the Ineradicable

Whether an agency’s mission was the cultivation of a continuous supply of timber or forage, the preservation of sublime wilderness, or the maintenance of preferred game populations for sportsmen, fire was viewed as a threat from the inception of public lands retention in the United States. Different agencies learned from the Forest Service how to structure themselves, their personnel, and their political postures, in order to best carry out broad scale missions like fire suppression. But fire suppression became a priority for agencies like the Forest

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7 HFRA was expressly confined in scope to those lands administered by either the Forest Service or the BLM. See 16 U.S.C. § 6502(1). Of course, the National Park Service, Fish and Wildlife Service and others also have their fire problems in what we now know as the “wildland/urban interface.” See infra Part III.

8 See generally Stephen J. Pyne, Year of the Fires: The Story of the Great Fires of 1910 (2001); Stephen J. Pyne, Fire in America: A Cultural History of Wildland and Rural Fire (1982). In 1910, almost five million acres of Forest Service lands burned and seventy-eight firefighters perished. See Geoffrey H. Donovan & Thomas C. Brown, Be Careful What You Wish For: The Legacy of Smokey Bear, 5 Frontiers in Ecology 73, 74 (2007). According to Donovan and Brown, it was the fire season of 1910, more than any other, that marked the agency’s real turning point on fire suppression. Id.


10 The Department of Agriculture and its component bureaus, like other agencies, began forming an institutional identity at the time, empowering them to develop politically and managerially. See Daniel P. Carpenter, The Forging of Bureaucratic
Service, Park Service, Biological Survey, and others well before the long-term consequences of fire suppression were fully appreciated. By the 1920s, every fire was viewed as a management failure, something to diagnose and prevent. As the agencies became more expert at suppressing fire, the resources they committed to the enterprise grew, improving their effectiveness in the eyes of the public and in the eyes of Congress.

Little did they know, though, that they were stepping onto a treadmill. Eradicating fire from a fire-adapted ecosystem is a temporary achievement at best and, the longer it is absent, the more likely it will return with a vengeance. Fuels are always building in such a system and either they burn periodically or they keep building—presumably to a breaking point of some kind. Our landscapes were altered profoundly in the effort to eradicate the ineradicable, often to differing results depending on local conditions. Some forest types like Southwest ponderosa pine (adapted to frequent, low-intensity surface fires) are amenable to a range of fire suppression tactics. But they are also likely to change significantly as a result of suppression. Overall, the release of species that become uncontrolled, landscape-scale agents of change across our forests, prairies, and deserts is writing another, related chapter. And climate change, of course, is complicating both trends.

Foresters and other land managers came to these realizations years ago, but the general policy of total fire eradication remained in place out of fear that “any admission of a positive role for fire would be confusing; the message that fire was sometimes good and sometimes bad was considered too sophisticated for the public.”


Severe, stand-replacing fires often result in profound habitat disturbance, uniquely disruptive changes to local human communities, watershed damage and surface water quality impacts, and other significant economic losses. See Michael P. Dombeck et al., Wildfire Policy and Public Lands: Integrating Scientific Understanding With Social Concerns Across Landscapes, 18 CONSERVATION BIOLOGY 883 (2004).

In some areas, the reintroduction of fire through prescribed burns has not restarted the natural regime very well, either. See Jon E. Keeley, Fire Management Impacts on Invasive Plants in the Western United States, 20 CONSERVATION BIOLOGY 375, 376-77 (2006) (describing invasions of cheat grass associated with prescribed burning).

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See generally Keeley, supra note 14. The Sonoran desert, for example, is becoming an endangered ecosystem as buffelgrass (an African transplant brought by ranchers that now excludes native cacti and burns routinely) takes it over. See Michelle Nijhuis, Bonfire of the Superweeds, HIGH COUNTRY NEWS Aug. 20, 2007.
general public.”\textsuperscript{16} As early as the 1960s and as a rule by the 1970s, most professionals knew that the policy of wide scale fire suppression had been a serious mistake.\textsuperscript{17} Correcting the mistake was something else entirely, though. Reintroducing fire into disturbed systems was not only an unpredictable proposition; because of the stakes, it was a potentially catastrophic one.\textsuperscript{18}

\subsection*{B. Process, Planning, and Paralysis}

At the same time professional resource managers were accepting the fact that fire suppression had been a monumental mistake, the National Forest System (NFS), National Park System (NPS), and the BLM’s lands were being cemented within a series of “organic” management laws. The NFS alone grew from the relatively modest aims of “securing favorable conditions of water flows, and... furnish[ing] a continuous supply of timber,”\textsuperscript{19} to a 192 million acre, 155 unit aggregate being managed for “the long-term benefit for present and future generations.”\textsuperscript{20} That gradual process of legislative accretion is often overshadowed by its milestones. Looking back on the full sweep of the twentieth century, though, two kinds of legislative prescriptions stand out as constants through the ups and downs. First, Congress repeatedly directed land managers to balance disparate land uses to the best of their abilities and to protect as many uses as they could, place by place.\textsuperscript{21} Second, Congress consistently relied on administrative procedures to resolve or dissolve pitched conflicts over management choices.\textsuperscript{22} Eventually, these two types of legislative mandates

\begin{itemize}
  \item \textsuperscript{16} Donovan & Brown, supra note 8, at 75.
  \item \textsuperscript{17} Dombeck et al., supra note 13, at 886.
  \item \textsuperscript{18} Professor Sellars tells the story of fire’s reintroduction into the Park Service’s management policies, many years before the Forest Service did so, through the use of prescribed burns in Sequoia National Park. See \textit{Richard West Sellars, Preserving Nature in the National Parks: A History} 257-58 (1997).
  \item \textsuperscript{19} Act of June 4, 1897, c. 2, § 1, 30 Stat. 34, codified at 16 U.S.C. § 475 (2007).
  \item \textsuperscript{20} 16 U.S.C. § 1609(a) (2007).
  \item \textsuperscript{22} "Public participation" is one of the most frequently analyzed concepts in forestry today. See William D. Leach, \textit{Public Involvement in USDA Forest Service Policymaking: A Literature Review}, 104 J. FORESTRY 43 (2006). For accounts that collect and emphasize such legislative mandates, see Richard Lazarus, \textit{Environmental Law and the Supreme Court: Three Years Later}, 19 PACE ENVTL. L. REV. 658 (2002); Bradley C. Bobertz &
cornered the agencies into what the Forest Service famously called a “process predicament.” Unable to marshal the expertise needed for all the treacherous balancing and lacking real guidance on what—besides everyone’s exhaustion—all the procedures were really for, the agencies too often found a lowest common denominator of (1) zoning different land uses into discrete districts, (2) trimming and/or avoiding established procedures whenever possible, while (3) underinvesting in monitoring, benchmarking, and organizational reform.

The Bush Administration, of course, aimed to upset this equilibrium. HFRA was its first—and, as it turns out, also its last—legislative salvo in that assault. (The courts have yet fully to decide the fate of all its administrative maneuvers.) Convinced that too much was being spent on appeals and process, determined to continue extractive uses like logging and drilling, and bolstered in 2002 with a Republican majority in both houses of Congress, the Administration pushed hard on its plans to overhaul public lands law. The National Environmental Policy Act (NEPA) was its primary target. NEPA practice has long weathered serious critique from many quarters. Perhaps the most powerful critique, though, is the


27 Extractive uses had, in the decades preceding the second Bush administration, declined significantly across every public land system in the nation. See Jan G. Laitos & Thomas A. Carr, The Transformation on Public Lands, 26 ECOLOGY L.Q. 140 (1999) (gathering the statistical evidence showing a massive shift in all land systems toward recreation as the dominant commodity use of public lands).

28 See, e.g., JAY AUSTIN ET AL., JUDGING NEPA: A “HARD LOOK” AT JUDICIAL DECISIONMAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (2004) (observing significant correlation between judges’ party of appointment and judgments in NEPA litigation). One article in particular that further disenchanted many with contemporary NEPA practice was Bradley C. Karkkainen, Toward a Smarter NEPA, 102 COLUM. L. REV. 903 (2002) [hereinafter Karkkainen, Smarter NEPA]. Karkkainen maintained that the full-dress environmental impact statement (EIS) has become, in essence, a “penalty default” that action agencies typically seek to avoid and that drives them to innovate in doing so. See also Bradley C. Karkkainen, Information-Forcing Environmental Regulation, 33 FLA. ST. U. L. REV. 861 (2006).
simplest: NEPA is a readily enforceable statutory duty requiring prediction, not knowledge production. Its requirement that our agencies conduct analyses of choices and try to forecast possible futures arguably makes us "paper-rich but information-poor." Indeed, the "NEPA process"—wherein planning and project-level decisions both involve mandatory environmental reviews—constituted much of the Forest Service’s "process predicament." Mandating forecasts where little is known is usually a waste of time and energy. It is probably no exaggeration to say that NEPA’s notorious prediction burden is both much of what aligns public land managers (and the Bush Administration) against this icon of conservation, and what makes it such a flawed vehicle for ecological restoration. Our agencies possess many forms of expertise. But even expert predictions must be discounted heavily when complex systems are at issue. Predicting the behavior of ecosystems where fire has been suppressed demonstrates the point unequivocally. Thus, HFRA’s boldest ‘reform’ may have been its abbreviation of NEPA’s analytical requirements with respect to "hazardous fuel reduction projects" (HFRPs), something the Administration had sought even before legislative authorization was given.

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29 NEPA’s approach to uncertainty is perennially debated, some arguing the statute itself is flawed and some arguing the CEQ guidelines and judicial interpretations of the Act are flawed. See Nicholas Yost, NEPA’s Promise—Partially Fulfilled, 20 ENVTL. L. 533 (1990).

30 Karkkainen, Smarter NEPA, supra note 28, at 909. The one retrospective accuracy audit of NEPA documents to date concluded that, from how most are framed, it is impossible to test their accuracy. See PAUL J. CULHANE ET AL., FORECASTS AND ENVIRONMENTAL DECISIONMAKING: THE CONTENT AND PREDICTIVE ACCURACY OF ENVIRONMENTAL IMPACT STATEMENTS (1987).

31 See USDA FOREST SERV., THE PROCESS PREDICAMENT: HOW STATUTORY, REGULATORY, AND ADMINISTRATIVE FACTORS AFFECT NATIONAL FOREST MANAGEMENT 7-10, 32 (June 2002) (copy on file with author) [hereinafter Process Predicament].

32 See, e.g., RUSSELL T. GRAHAM ET AL., THE EFFECTS OF THINNING AND SIMILAR STAND TREATMENTS ON FIRE BEHAVIOR IN WESTERN FORESTS (1999) (Forest Service & BLM PNW-GTR-463) (documenting severe uncertainties about fuel treatment strategies); Sharon Hood & Barbara Bentz, Predicting Postfire Douglas-Fir Beetle Attacks and Tree Mortality in the Northern Rocky Mountains, 37 CANDN. J. FOREST RESTORATION 1058 (2007) (documenting conflicting evidence that tree size and age structure influence vulnerability to post-fire beetle infestations and suggesting that the length of time forests are monitored following a fire event may be the most significant predictor); Keeley, supra note 14, at 379-82 (documenting rise in fire frequency in some ecosystems that is allowing more successful invasions of alien plant species); Julie E. Korb et al., Different Restoration Thinning Treatments Affect Level of Soil Disturbance in Ponderosa Pine Forests of Northern Arizona, USA, 25 ECOLOGY RESTORATION 43 (2007) (discussing studies of various disturbances including fire and mechanical thinning, showing conflicting evidence of effects on soil layer integrity).

33 Some of the Forest Service’s recent uses of categorical exclusions—for example, excluding “salvage” timber harvests of a certain size—have been upheld against challenges. See, e.g., Utah Envtl. Congress v. Bosworth, 370 F.Supp.2d 1157 (D. Utah
Likely its biggest impact, though, will be something less tangible. HFRA is helping change how our land management agencies view themselves and their roles as keepers of public land. As in other fields, the analytical burdens of planning land uses without hard data have steered managers into relying more and more on modeling. Facing a universe of possibilities across vast territories, models generated on limited information are attractive to agencies that cannot actually achieve “comprehensive rationality.” This is rather alarming to many given the tendency of model-based predictions to fail and fail miserably. Still, it is the satisfice our land management agencies have been choosing under their circumstances. Freed of NEPA’s yoke in more and more contexts, the analyses the agencies have been generating when confronting their choices are etiolated, model-driven versions of what they learned from NEPA.

Models, however, have a tendency to disguise uncertainties and to construct superficially tractable pictures of exceedingly complex choice situations. Once the resources are sunk into building a model, moreover, its founding assumptions and predictive aims too often become ends in themselves—they drive behavior as much or more than the uncertainties with which they are supposed to cope. The Forest Service and BLM have been developing wildfire and fuel models for several years, most notably a model-driven system named LANDFIRE, seeking to...
assess and compare risks. Yet they are still not enabling risk-based decision making and, indeed, seem to be departing further and further from that ideal under the organizational umbrellas they have opened. The common denominator is this: these agencies operate at scales that necessitate highly questionable approaches to land planning, even where the stakes are as high as they are in wildfire management. Part II pulls apart the causes of this paradox and what it means for land use planning in the wildland/urban interface (WUI).

II. MORAL DIVERSITY IN THE REGULATORY STATE: ECOLOGICAL RESTORATION TODAY

Legal change is overwhelmingly a legislative phenomenon today. But our legislatures are becoming contrived, even deceptive environments. Our society’s ambivalence about most appeals to virtue, combined with our utter failure to nurture a political discourse that is at once both sincere and able to handle truly divisive issues like sprawl, are creating real troubles for our democracy. These troubles are eased very little by the injection of expertise or expert advice. HFRA is as good a case study as any. Section A traces the path HFRA took to enactment and what it demonstrates about lawmaking on issues like land use and natural resources today, issues that are both complex and morally charged. Section B locates this case study of HFRA in a larger context of our changing conceptions of legal authority and moral diversity as we seek to implement an ecologically restorative agenda.

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39 See GAO REPORT TO CONGRESSIONAL REQUESTERS: WILDLAND FIRE MANAGEMENT 5-6 (GAO-07-655) [hereinafter GAO Report]. See also A Cohesive Strategy and Clear Cost-Containment Goals are Needed for Federal Agencies to Manage Wildland Fire Activities Effectively: Hearing Before the Subcomm. on Nat’l Parks, Forests and Public Lands, Comm. on Natural Resources, Wildland Fire Management, 110th Cong. 6 (GAO-07-1017T) [hereinafter GAO Testimony]. GAO noted, for example, that while agency officials said “they recognize the importance of ensuring that data are periodically updated and are developing a plan to operate and maintain [LANDFIRE],” no such plan has been finalized. Id. The Forest Service’s own Inspector General, auditing its implementation of HFI in September of 2006, concluded that LANDFIRE, even as planned, would not adequately guide line personnel attempting to prioritize between HFRPs and that the current measures for allocating appropriations, i.e., overall number of acres treated, distort the risk/benefit analyses being done. See U.S. DEPT. OF AGRIC., OFFICE OF INSPECTOR GENERAL, AUDIT REPORT: IMPLEMENTATION OF THE HEALTHY FORESTS INITIATIVE 5-7 (Report No. 08601-6-AT) (2006) [hereinafter OIG Report] (copy on file with author).

40 Compare MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996) (critiquing liberalism’s ambition of scrubbing the public sphere of direct appeals to values or virtues), with John Rawls, The Idea of Public Reason Revisited, in JOHN RAWLS: COLLECTED PAPERS 573 (Samuel Freeman ed., 1999) (articulating an ideal of “public reason” in light of the fact of reasonable pluralism and equal concern and respect for persons that does not require any public justification to rest on premises someone could reasonably reject).
A. Deliberate Abstraction: ‘Restoration’ in Reality

Legislation today is more often powered by pragmatism than it is by democratic will. HFRA was enacted in late 2003 by a 2-1 margin in the House (286-140) and a 6-1 margin in the Senate (80-14). But it was hardly the bipartisan sweep of reform that these margins might suggest. Indeed, the margin may have been because 2003 was the high water mark of “Luntz-speak” in Washington—where nothing is as it sounds—more than it was a moment of renewal for public lands law. This legislation, as Section B explains more fully, entwined the administrative and legislative processes in a way that, improbably, made them even more opaque and dysfunctional than normal. First, HFRA stamped congressional imprimatur on an administrative document, “A Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment,” placing it and its subsequent revisions in the role of master plan for fire risk reduction. That HFRA did so perhaps shows a legislature willing to defer to administrators and local people. But the content of this plan—or the lack thereof—inspires little confidence that Congress’s deference was either informed or warranted. The Implementation Plan embodies an agreement to agree reached by an ad hoc “Wildland Fire Leadership Council” (WFLC). It does not record shared priorities among the signatories; the goals it mentions are vague and indeterminate. Indeed, this aspect of HFRA may be the next evolutionary step for legislation in the modern state: in and of itself, HFRA’s investiture of authority in the Implementation Plan decided nothing, planned nothing, guided no one toward definite action and deputized an indeterminate, ad hoc entity to change it all at

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42 Cf. Keiter, Law of Fire, supra note 9, at 344 (“Judging from HFRA’s declared purposes, Congress perceives fire primarily as a political rather than ecological matter.”).
43 See VAUGHN & CORTNER, supra note 1, at 12 (observing that U.S. environmental policy had gone from being inspired by Silent Spring to being sleazed by “Luntz-speak,” named for Frank Luntz, a Republican political consultant famous for “reframing” issues by popularizing tendentious phrasings). Luntz’s anemic version of political discourse is diagramed in FRANK LUNTZ, WORDS THAT WORK: IT’S NOT WHAT YOU SAY, IT’S WHAT PEOPLE HEAR (2007).
44 HFRA requires that all authorized projects be consistent with the “Implementation Plan” (which it defines as including the May 2002 version of the document and its “subsequent revisions”). See 16 U.S.C. § 6511(11) (2003). The stakeholders—banded together in something called a “Wildland Fire Leadership Council” (WFLC)—released a subsequent revision in 2006. See A COLLABORATIVE APPROACH FOR REDUCING WILDLAND FIRE RISKS TO COMMUNITIES AND THE ENVIRONMENT (December 2006) [hereinafter IMPLEMENTATION PLAN] (copy on file with author). This WFLC consists of the Secretaries of Agriculture and Interior and their representatives, various Western governors, tribal leaders, professional foresters, and local officials. Id. at 3.
will.\(^{45}\) The most mature outgrowth of this set-up to date, a so-called “cohesive fuels treatment strategy,” acknowledges that “[f]ires become more costly when homes are involved,” but provides no guidance whatsoever to stakeholders or field personnel on where the WUI should stop and ecosystem “restoration” should begin.\(^{46}\)

Second, the centerpiece of the Act, the HFRP, is defined only by reference to the Implementation Plan’s glossary entry on “appropriate tools.”\(^{47}\) “Fuel reduction” can be anything from pruning trees to prescribed burns to logging burned-over areas on the theory that their full restoration requires it.\(^{48}\) The provable benefits of some of these projects are nil—and perhaps outweighed by their costs.\(^{49}\) Not surprisingly, thus, the “collaboration” this Implementation Plan encourages—which HFRA enables notwithstanding the Federal Advisory Committee Act—\(^{50}\) has already generated ill will and accusations of exclusionary motives.\(^{51}\) What the Implementation Plan says is that the signatories all hope to “improve fire prevention and suppression,” “reduce hazardous fuels,” “restore fire adapted ecosystems,” and “promote community assistance.”\(^{52}\) Where, when, and how they intend to meet these goals, however, remains a mystery.\(^{53}\) Of course,

\(^{45}\) Many have argued that moves like this are the evolutionary perfection of contemporary legislation. See, e.g., DAVID SCHOENBROD, SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE (2005).

\(^{46}\) See FUELS TREATMENT STRATEGY, supra note 12, at B-8. But cf. id. “Urban and suburban community expansion into rural areas placed valuable human improvements across a landscape that now burns much more severely than historically.”


\(^{48}\) This is a “theory” because post-fire regeneration by different tree species and forest types remains enshrouded in considerable doubts. See supra note 31.

\(^{49}\) A principal field of debate concerns the “salvage logging” project wherein a burned area is logged, ostensibly on the theory that restoration by mechanical planting and removal of dead or at-risk trees improves the regenerative prospects of the treated area. The science behind these predictions is nascent, though, and has caused conflagrations of its own. See, e.g., Erin Halcomb, Weathering the Academic Storm, HIGH COUNTRY NEWS, May 28, 2007 (describing the storm over Oregon State Ph.D. student’s fieldwork studying conifer regeneration after Oregon’s Biscuit Fire and finding greater regeneration rates than was normally assumed which resulted in tremendous pressures from the logging industry, the Oregon legislature, and other stakeholders favoring “salvage” logging).


\(^{51}\) See, e.g., Wildwest Inst. v. Bull, 472 F.3d 587, 590 (9th Cir. 2006) (allegations that HFRA project was selected through a “pattern and practice of selective inclusion and exclusion” of stakeholders by Forest Service).

\(^{52}\) IMPLEMENTATION PLAN, supra note 44, at 9-19.

\(^{53}\) HFRA requires all its authorized projects to follow the Implementation Plan. See 16 U.S.C. § 6512(a) (2007) (“As soon as practicable after the date of enactment of this Act, the Secretary shall implement authorized hazardous fuel reduction projects, consistent with the Implementation Plan”); id. at 6513(a) (“In accordance with the Implementation
pursuing such goals across a real landscape is the sort of challenge that the median voter in Congress was unlikely to confront willingly.\textsuperscript{54} How to reduce fuels in the same place one is restoring fire-adapted ecosystems without either excluding people from that landscape or putting them in jeopardy remains deeply unclear even among experts.\textsuperscript{55} And high profile failures like the Cerro Grande fire of 2000—a prescribed burn set by the National Park Service in hopes of restoring the fire regime on its land, which quickly escaped and burned into Los Alamos, New Mexico\textsuperscript{56}—dominate people, cognitively.\textsuperscript{57}

This all goes beyond legislative (or administrative) reactions to bounded rationality. Restoration that entails real risks has precious few advocates. But do the shortcomings of our legislated steps toward ecosystem restoration diminish them in some way? Conceivably, their authority is diminished.\textsuperscript{58} Basic questions like this are hardly ever asked, though. So what is the \textit{practical authority} of a law like HFRA and the agencies implementing it? One could argue that, next to the public lands statutes of the past, HFRA pales by comparison.\textsuperscript{59} This might not be so much of a surprise: “restoration” of damaged ecosystems is an agenda with no beginning, no end, few champions, and mixed moral implications.\textsuperscript{60} When we

\begin{quote}
Plan, the Secretary shall develop an annual program of work for Federal land that gives priority to [projects] that provide for the protection of at-risk communities or watersheds or that implement community wildfire protection plans.
\end{quote}

But the plan itself is a loosely structured framework that mentions “performance measures” and measurable goals without actually setting any. It instead touts a “three tiered organizational structure [that] facilitates collaboration among governments and stakeholders at the local, state, regional and national levels.” \textit{IMPLEMENTATION PLAN, supra} note 44, at 5.

\textsuperscript{54} Legislators familiar with these issues and the trade-offs they entail would be the consummate specialists on any account. How and why nonspecialists vote for bills like HFRA, however, has divided political scientists profoundly. \textit{See} Keith Krehbiel, \textit{Legislative Organization,} 18 J. ECON. PERSP. 113 (2004) (describing and comparing different models of legislative process and modes of organization).

\textsuperscript{55} Even managers who agree that prescribed burning is the preferred restorative technique have proven unwilling to experiment with it where fire means even moderate risks to homes or human life. \textit{See} Lynne A. Maguire & Elizabeth A. Albright, \textit{Can Behavioral Decision Theory Explain Risk-Averse Fire Management Decisions?}, 211 FOREST ECOLOGY & MGMT. 47 (2005). Consequently, “both public forest management organizations . . . and private forest management organizations . . . have fallen far short of their goals for treating forested areas with prescribed fire.” \textit{Id. at 48}.


\textsuperscript{57} \textit{See} Maguire & Albright, \textit{supra} note 55, at 48.

\textsuperscript{58} \textit{Cf.} JURGEN HABERMAS, \textit{BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY} (William Rehg trans. 1998) (arguing that legislation is only legitimate when it is the product of autonomous, informed choice by legitimate electors).

\textsuperscript{59} \textit{See, e.g.,} Keiter, \textit{Law of Fire supra} note 9, at 365-78.

\textsuperscript{60} \textit{Cf.} JULIANNE LUTZ NEWTON, \textit{ALDO LEOPOLD’S ODYSSEY} (2006) (tracing this reality throughout the thought of one of the twentieth century’s principal environmental philosophers, Aldo Leopold).
speak of environmental restoration, we do so without any meaningful consensus on its purpose or point.\textsuperscript{61} Indeed, citizens divide sharply over any environmental philosophy of restoration, usually choosing instead to worship the opposing symbols of “preservation” or “conservation.”\textsuperscript{62} A federal statute purporting to restore “healthy forests” on our public lands would have to reinvent our public lands law and public lands agencies—indeed, reinvent civil society’s whole vocabulary enveloping them.\textsuperscript{63} Such restoration would aim to correct centuries of mistakes and abuse. To do so, it would have to imagine a new institutional architecture that would allow landscape-scale processes like fire to operate on, and possibly reorder, highly fragmented and heavily disturbed landscapes. HFRA, of course, did nothing of the sort. It contorted legislative and administrative authority into a noxious mixture that only our federalism, pinned beneath the shibboleths of “private property” and “local control,” could have generated.

B. A Healthy Forests ‘Initiative’ Into the Healthy Forests Restoration Act

The last three presidents have learned hard lessons about wildfire. In their administrations, the Forest Service and the Interior Department have confronted devastating fire seasons in which human lives have been lost while billions were spent trying to forestall the worst. In the fall of 2000, the Secretaries of Interior and Agriculture presented a report to President Clinton calling for a ten year, $10 billion “National Fire Plan” to cope with the looming crisis of wildland fire.\textsuperscript{64} By 2003, the George W. Bush Administration had adopted a suite of administrative changes,\textsuperscript{65} including new “categorical exclusions” from NEPA for qualified fuels treatment projects\textsuperscript{66} and a new bar on administrative appeals of covered projects,\textsuperscript{67}

\textsuperscript{61} This is not to say that restorationists have yet to articulate its point—only that our society has yet fully to embrace it. See WILLIAM R. JORDAN III, THE SUNFLOWER FOREST: ECOLOGICAL RESTORATION AND THE NEW COMMUNION WITH NATURE (2003). But it remains to be seen whether restorationists can develop “clear, commonly agreed on endpoints” or “simple formulas for judging outcomes” given their conception of nature as inherently dynamic and rearrangeable; Joy B. Zedler, Success: An Unclear, Subjective Descriptor of Restoration Outcomes, 25 ECOL. RESTORATION 162 (2007).

\textsuperscript{62} See Colburn, Habitat and Humanity, supra note 24, at 195-205.

\textsuperscript{63} See generally Colburn, Habitat and Humanity, supra note 24.

\textsuperscript{64} See MANAGING THE IMPACT OF WILDFIRES ON COMMUNITIES AND THE ENVIRONMENT: A REPORT TO THE PRESIDENT IN RESPONSE TO THE WILDFIRES OF 2000 (Sept. 8, 2000) [hereinafter REPORT TO THE PRESIDENT] (copy on file with author). That year, some 123,000 fires burned more than 8.4 million acres (twice the ten year average) and the federal government alone spent over $2 billion fighting the fires. National Environmental Policy Act Documentation Needed For Fire Management Activities; Categorical Exclusions, 67 Fed. Reg. 77038, 77039 (2002) [hereinafter Fuels CE].

\textsuperscript{65} The most significant change was the Administration’s replacement of the planning rules under the National Forest Management Act (NFMA), struck down in Citizens for Better Forestry v. U.S. Dept. Agric., 481 F. Supp.2d 1059 (N.D. Cal. 2007).

and had “streamlined” the consultation process for actions impacting species protected by the Endangered Species Act. These moves all framed the legislation that would become HFRA. Bush’s “Healthy Forests Initiative” was announced at the height of the fire season in 2002 and directed “the Departments of Agriculture and Interior and the Council on Environmental Quality to improve regulatory processes to ensure more timely decisions, greater efficiency, and better results in reducing the risks of catastrophic wildfires by restoring forest health.” This would soon form the core of HFRA: fund fuel reduction projects on public and private lands in areas having the highest potential for catastrophic wildfire and fast track those projects through otherwise applicable legal procedures. The agencies themselves played perhaps the biggest role in publicizing the risks of wildfire and the need for fast track authority.

There are plenty of reasons to question these “reforms.” Lest it be seen as precipitous, HFRA included a cap on the acreage that could be treated with authorized HFRPs (20 million acres) and prohibited HFRPs from wilderness areas and wilderness study areas. The much more daunting prospect, though, is that HFRA solidified a situational strategy into its own feedback loop around wildfire and sprawl. HFRA directed the Forest Service and BLM to target at least half of their wildfire work into the WUI and, within the WUI, to give priority to those communities having “Community Wildfire Protection Plans” (CWPPs). Communities in fire prone areas therefore have a tangible incentive to create a CWPP: it brings them federal dollars for expensive work that ostensibly reduces

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70 See Keiter, Law of Fire, supra note 9, at 344-50 (calling this the core of HFRA).
71 See VAUGHN & CORTNER, supra note 1, at 137-42.
72 Several noted experts have critiqued HFRA from different angles. Professor Keiter puts HFRA together with other Bush Administration initiatives on public lands and concludes that their overall impact is “to reduce environmentally-oriented prescriptive standards, and thus provide agency officials with greater management flexibility by eliminating judicial review opportunities.” Keiter, Law of Fire, supra note 9, at 350. Vaughn and Cortner make the case that a larger agenda was advanced by the Bush Administration in enacting HFRA through deceptive rhetoric and manufactured crises—“[s]ynecdoches... used to generalize from one incident to a pattern of problems, regardless of accuracy.” VAUGHN & CORTNER, supra note 1, at 142.
75 Part III lays out the legal geography of the WUI. The Forest Service has been averaging about 70% of the appropriations for HFRPs to the BLM’s 30%, see GAO Report, supra note 39, and has averaged much more than half of its work in the WUI.
76 See 16 U.S.C. § 6513(d).
their local wildfire risks. Yet HFRA’s only firm requirements of CWPPs is that they be developed “within the context of the collaborative agreements and the guidance of” the WFLC and be “agreed to by the applicable local government, local fire department, and state agency responsible for forest management.” The plans need not have any particular content. HFRA does not require that the plans discourage development in fire prone areas, that they protect local watersheds before enabling more development—nor, indeed, that they strike any balance at all among competing priorities. And, for many, the federal money cannot flow fast enough, leading to shorter and shorter turnarounds on CWPPs and other HFRA deliverables. How CWPPs relate to local land use planning already in place is but another unanswered question.

Still worse is the fact that neither the Forest Service nor BLM seem much interested in the CWPPs, whether as substance or process. Last year, the Government Accountability Office (GAO) found that while 95% of the agencies’ administrative units had completed their own first generation fire plans, neither agency required the plans be updated with new data or that they be linked in any way to the CWPPs in their region. This is a stunning failure of management.

77 The National Association of State Foresters estimates that of the 51,000+ communities in need of CWPPs in 2007, about 4,700 of them had completed any sort of such plan at all. See NATIONAL ASS’N OF STATE FORESTERS, COMMUNITIES AT RISK REPORT FY2007 (Nov. 2007) (copy on file with author). The Society of American Foresters (SAF) developed the handbook the federal government recommends for CWPP-development. SAF reported that, as of March 2006, some 654 CWPPs covering an estimated 2,700 communities at risk (a CWPP may cover more than one community) had been completed and that more than 600 others were in progress. See Steelman & Burke, supra note 41, at 70.

16 U.S.C. § 6511(3)(A). The CWPP is further defined as a plan that “identifies and prioritizes areas for hazardous fuel reduction treatments and recommends the types and methods of treatment on Federal and non-Federal land that will protect 1 or more at-risk communities and essential infrastructure” and “recommends measures to reduce structural ignitability throughout the at-risk community.” Id. at § 6511(3)(B)-(C). Nothing in HFRA or WFLC guidance requires a particular scope or completeness for plans—or any other qualitative or performance criteria for a CWPP whatsoever.

79 See, e.g., John Q. Murray, Senators Grill Bosworth: Use the HFRA Authority, CLARK FORK CHRON., July 20, 2006 (reporting on local pressure to speed up appropriations and approvals for HFRPs and other fuel reduction work); COUNCIL OF WESTERN STATE FORESTERS, COMMUNITY WILDFIRE PROTECTION PLANNING IN THE WEST: A STATUS REPORT 9 (2006) [hereinafter COST MANAGEMENT REPORT] (copy on file with author) (finding that most communities that have completed CWPPs have unreasonably high expectations of the level of federal funding support).


81 See GAO Testimony, supra note 39, at 6.
given how pronounced the connections are between dispersed development and ultra-expensive wildfire incidents.\textsuperscript{82} Indeed, if the government is collecting or monitoring any data at all on the content of CWPPs, their performance, their improvement, etc., it is not saying.\textsuperscript{83} Are the projects and planning of CWPPs actually reducing the wildfire risks within their communities? Are the projects that are being funded contributing in any way to the overall restoration of affected landscapes? We are all left to wonder.

In my view, this is a Potemkin village version of land planning and it illustrates how ill suited federal agencies are to do the real work that could, at least in principle, pursue all four of the Implementation Plan’s goals. That work is, of course, coordinated land use planning at multiple scales. It would be one thing if HFRA’s admixture of legislative and administrative mechanisms were the necessary result of public officials representing their constituents’ best interests. Broad scale legislation is a remarkable achievement and Congress’s approval ratings are, of course, nearing historic lows. And borrowing experts’ credibility and visibility while deferring to local actors who are attacking the problem at smaller scales is hardly a bad thing.\textsuperscript{84} Beneath the superficial appearances, though, HFRA raises suspicion after suspicion—which, unfortunately, may be all we have. Deliberate abstractions have been the norm in broad scale legislation for decades. Most forms of “command and control” regulation by agencies are even more unpopular than contemporary NEPA practice.\textsuperscript{85} Yet social scientists remain split methodologically in explaining the human behaviors that frame these realities. The prevailing paradigm, known as “public choice” or “positive political theory,” presumes public officials maximize their own welfare, not that of their constituents.\textsuperscript{86} Most of that work, though, has generated few (if any) useful predictions—or even propositions that are both true and nontrivial.\textsuperscript{87}

\textsuperscript{82} See INDEPENDENT LARGE WILDFIRE COST PANEL, TOWARDS A COLLABORATIVE COST MANAGEMENT STRATEGY: 2006 U.S. FOREST SERVICE LARGE WILDFIRE COST REVIEW RECOMMENDATIONS (May 2007) [hereinafter COST MANAGEMENT REPORT] (copy on file with author).

\textsuperscript{83} GAO has repeatedly criticized the agencies’ refusal to gather performance-based data and continuing failure to state in tactical detail how its disparate objectives on fire are being realized. See GAO Testimony, supra note 39.


\textsuperscript{85} There are important exceptions. Then-judge Breyer’s call for “a small, centralized administrative group, charged with a rationalizing mission” and having “interagency jurisdiction,” “political insulation” and the authority to “impose its decisions,” was issued only fifteen years ago. See STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 60-61 (1993).

\textsuperscript{86} See, e.g., Matthew D. McCubbins et al., Administrative Procedures as Instruments of Political Control, 3 J.L. ECON. & ORG. 243 (1987).

something as basic as whether or not agencies’ informal bureaucratic structures and routines enable tighter political control of agency function, the evidence is still too mixed to say.\footnote{88} And on an infinitely more complicated (practical) question like what design choices would better enable citizens to deliberate collectively about sprawl and wildfire, our empirical social sciences are virtually useless in their present state.\footnote{89} We cannot say with any meaningful degree of certainty what is possible in the political realm or what would lead to a more productive public debate about healthy land uses in our ‘wildland/urban interface.’\footnote{90} The most consequential legislative guidance given to date remains that included in a Conference Report from a 2001 appropriations bill (guidance that prompted the creation of the Implementation Plan). But all it said was that Congress expected that reducing fire risks in the WUI would “require close collaboration among citizens and governments at all levels.”\footnote{91} The agencies reprint the admonition in many of their administrative documents. Who it actually guides or binds is yet another mystery.

As individuals, more and more of us want to live near and among what is left of the “wild” even while society as a whole absorbs the social costs this freedom is generating. That all ends in a massive paradox: our expert agencies, to which our elected representatives keep deferring and keep delegating power, are incapable of saving us from ourselves in matters as complex and morally ambiguous as sprawl and public lands. Part III locates these failures within the geography of wildland fire—a geography of semi-built landscapes, diluted rationalism, and deference to “local control.”

\footnote{88} See, e.g., Steven J. Balla, Administrative Procedures and Political Control of the Bureaucracy, 92 AMER. POL. SCI. REV. 663 (1998) (relationship between agency process and political control cannot be proven with existing data). Many in the legal academy are undeterred, though. See, e.g., Lisa Schultz-Bressman, Procedures as Politics in Administrative Law, 107 COLUM. L. REV. 1749, 1767 (2007) (“Legal scholars have not adequately considered what positive political theory (PPT) scholars have been saying about administrative procedures for at least the last two decades. . . . [P]rocedures are, or can be, about politics and not simply about law.”) (emphasis added); \textit{but cf.} Pildes & Anderson, \supra note 87, at 2127 (concluding that public choice theory “rests on peculiar conceptions of rationality and of democratic politics” and therefore poses “no significant challenge to the general legitimacy and meaningfulness of democratic decision making”).

\footnote{89} See Joshua Cohen, Deliberation and Democratic Legitimacy, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 68, 84-86 (James Bohman & William Rehg eds., 1997).


\footnote{91} IMPLEMENTATION PLAN, \supra note 44, at i (quoting Conference Report for the Fiscal Year 2001 Interior and Related Agencies Appropriations Act, Pub. L. No. 106-921).
III. THE LEGAL GEOGRAPHY OF THE WILDLAND/URBAN INTERFACE

This Part fills out the legal geography of the wildland/urban interface, a category of space in America that is immense and growing. Section A details HFRA’s different criteria demarcating the WUI, principally as that area attracting the most managerial attention to wildland fire, while Section B compares this whole dynamic to another, earlier example: federal flood control policy. Finally, Section C shows how this area’s immensity will further undermine our faith in expertise as some sort of solution to the challenges of governing public lands.

A. The Geography of ‘Wildlands’

The “wildland-urban interface” (WUI) may sound like a boundary, something similar to the nature/culture divide. But it is actually the fastest growing category of real estate in America. This is in part because the legal definition of the WUI is broad and indeterminate. The most concrete component of the definition is a gargantuan list of virtually every incorporated municipality bordering public lands. But it expands from there to include any bordering areas having “[three] or more structures per acre, with shared municipal services,” and any area “within or adjacent to” one of these places that is identified in a CWPP can be WUI. Where “adjacency” ends, not surprisingly, is quickly becoming the subject of exurban legend. Five miles? Fifteen miles? More? The statutory definition, however, also includes “intermix communities”: any

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92 HFRA defines the WUI as “an area within or adjacent to an at-risk community,” 16 U.S.C. § 6511(16) (2003), and then defines “at risk communities” as an “interface community as defined in the notice entitled ‘Wildland Urban Interface Communities Within the Vicinity of Federal Lands That Are at High Risk From Wildfire’ issued by the Secretary of the Interior . . . or . . . a group of homes and other structures with basic infrastructure and services (such as utilities and collectively maintained transportation routes) within or adjacent to Federal land . . . in which conditions are conducive to a large-scale wildland fire disturbance event” and “for which a significant threat to human life or property exists as a result of a wildland fire disturbance event.” Id. at § 6511(1) (2003) (emphasis added). This makes the WUI a function of two kinds of “at risk” communities: the “interface” and the “intermix” areas surrounding public lands.


94 Id. at 753.

95 16 U.S.C. § 6511(16)(A) (2003). Areas within set buffer zones and/or constituting an evacuation route for such communities are automatically included even in the absence of a CWPP. Id. at § 6511(16)(B).

96 See BO WILMER & GREGORY H. APLET, TARGETING THE COMMUNITY FIRE PLANNING ZONE: MAPPING MATTERS (2005). Interestingly, by focusing on the qualitative dimensions of “community” within the WUI definitions, Wilmer and Aplet argue that most of the highest priority WUI is in California and the East—not the interior West.
group of homes and other structures with basic infrastructure and services... such as utilities and collectively maintained transportation routes” within or adjacent to federal land. 97 Nice questions of degree could easily bog this definition down in many parts of the West, but rationally determinate boundaries were not the point: everyone is erring on the side of inclusion. 98

The combined scope of this WUI is, however interpreted, extraordinarily broad. Potent “market” forces promise to keep it growing too. There is a commonly expressed preference for residences proximate to landscapes which look and feel like nature in a “wild” state. 99 In the only spatially explicit analysis done to date on the WUI, Volcker Radeloff and colleagues estimated that the density definition of WUI characterizes some 9% of the surface area of the 48 contiguous states: over 44 million homes (or about 39% of all the housing units in America) are in the WUI. 100 It is still proximity to public lands that remains most striking about the WUI, though. Over 8 million homes were built within 30 miles of a national forest from 1982–97. 101 If such encroachment is increasingly the norm on all public lands systems, though, fire is its foil.

By the 1970s, fire was occurring on a tenth of the acreage annually that it had been in the 1930s. 102 Just as the interior West was booming and recreation and scenery were becoming the dominant economic uses of public lands, fire seemed a distant threat. 103 The combination of human migration toward forests where fire-
intolerant species were flourishing which rendered the forests more susceptible to insects and disease, which then created large stands and downed piles of fuels that further dried out in long stretches of drought, all led to the break point we find ourselves at today: extreme fire risks and growing vulnerabilities. Totally obscured from view is how “healthy forests” actually function. Assuming we are serious about “restoration,” where do we look for our reference landscape within this pervasive pattern of disturbance?

B. Floods and Fires: Our Land Use Planning Federalism

At least one parallel is worth drawing. The National Flood Insurance Program (NFIP) predates HFI/HFRA by decades. But HFRA is remarkably similar to the NFIP in many respects. “Since the NFIP has been in effect, the regime has arguably enhanced vulnerabilities to flood losses rather than reduced the outcome risk.” Ironically, by conveying a sense of security and federal approval, the NFIP has probably increased our vulnerability to floods in the U.S. by normalizing and thereby enabling flood plain development—which has risen steadily every year since 1968. NFIP spreads the costs of flood risks by requiring flood insurance on any federally insured mortgages in designated flood plains, thereby blunting the market signals against developing risk-prone flood plains. Since 2001, funding for wildfire risk reduction work has increased significantly. Adjusted for inflation, the Forest Service and BLM went from an average of about $1.3 billion annually for fiscal years 1996-2000 to an average of about $3.1 billion annually in fiscal years 2001-05. What are these appropriations accomplishing? As mentioned earlier, their principal focus has been fuel reduction in the WUI—a very costly business.

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104 See generally Pyne, supra note 8.


106 See James Chivers & Nicholas E. Flores, Market Failure in Information: The National Flood Insurance Program, 78 LAND ECON. 515 (2002). Chivers and Flores emphasize that the NFIP’s expectation that mandating insurance within mapped flood plains erroneously assumed buyers would know and understand much more about flood plain risks than they do in fact.


108 Another failure is that quantitative estimates of risk are usually based upon a “finite record of past events . . . [and] the assumption of climate stationarity that necessarily underlies the notion of a ‘100-year’ flood.” Chivers & Flores, supra note 106, at 806.

109 The costs of HFRPs vary significantly. They rise from a low of less than $125 per hectare to a high of $2500. Donovan & Brown, supra note 8, at 76. The overall estimates for HFRPs that most communities seek—the so-called “mechanical” treatments of pruning and removing woody biomass—are daunting.
acres of WUI are treated once, it will almost certainly be time to go back to square one and repeat the process. That is simply no way to serve any broader, system-correcting function.

In its defense, the Forest Service has been creating a database to share local plans, documents, and other outputs and it is working diligently on its LANDFIRE database and mapping system in an effort to identify and prioritize high-risk areas. Third parties who have assessed the LANDFIRE investment, however, remain skeptical. Geospatial data of this kind, especially on fuel conditions (which can vary significantly depending on microclimates), is extremely costly to gather, manage, integrate, and share. Some of those costs may drop with improvements in technology like satellite imagery and various networking solutions but, if so, the agencies are not letting on.

So we probably cannot say with any meaningful degree of certainty what the core of HFRA is accomplishing. The statute certainly reflects a reluctance to dictate land development patterns, whether the federal government has the constitutional authority to do so or not. But by attempting to rationalize the

[T]he cost of a mechanical treatment program of sufficient size to reverse the effects of a century of aggressive wildfire suppression would be prohibitive. Consider that at a cost of $2000 per [hectare], total expenditures to treat just the ponderosa pine in condition class 3 would amount to over $12 billion. The combined fuel management budget of the [Interior Department] and the Forest Service in 2005 was $464 million. Using this entire budget, it would take almost 26 years to thin all ponderosa pine in condition class 3.


The Forest Service has also been experimenting with models that are meant to predict the rates at which acreage is treated to stay current with the natural processes by which fire exclusion alters the ecosystem. See Wendell J. Hann & David L. Bunnell, Fire and Land Management Planning and Implementation Across Multiple Scales, 10 INT’L J. WILDLAND FIRE 389 (2000). Hann and Bunnell, both Forest Service researchers, predicted (based on their modeling) that multi-scalar planning could reduce the acreage treatments needed to keep pace with fuels, but that even an “integrated” scenario suggested treating between 3.7 and 4.9 million acres per year just to stay ahead of fuel buildups on National Forest System lands alone. Id. at 400. That is well in excess of current acreage rates.

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112 See OIG Report, supra note 39, at 6-8; GAO Testimony, supra note 39, at 23-24.

113 GAO Testimony, supra note 39, at 9.

114 Under the Property Clause, U.S. CONST, art. IV, § 3, cl. 2 (“Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .”), the federal government’s protective powers with respect to its lands are vast and not limited by geographic boundaries alone. A variety of cases make the point. See, e.g., United States v. Armstrong, 186 F.3d 1055, 1061 (8th Cir. 1999); Minn. ex rel. Alexander v. Block, 660
market at issue without upsetting it, the law may end up accomplishing only this: masking that market’s (already substantial) failures. Now this is not to say that the agencies are collecting no data about HFRA. But the data they are collecting are cause for more alarm. A team of Forest Service-funded researchers in Minnesota, for example, studied how HFRA/HFI was being covered in the press. The Forest Service is also studying ways of reducing home ignitability when fires do reach the WUI. Not surprisingly, their findings confirm that the “key to reducing WUI home fire losses is to reduce home ignitability.” Modeling, combined with a few case studies, tended to show that “a home’s structural characteristics [nonflammable roof] and its immediate surroundings determine [its] ignition potential in a WUI fire.” To ensure a house will not ignite given the intensity of some crown fires prevalent lately, a buffer zone of up to forty meters around the home and all its structures is often recommended. That will certainly increase the disturbance footprint of wildland development, but its overall utility as risk reduction is far more ambiguous. Finally, the agencies are diligently tracking the number of acres being “treated” with HFRPs.

How communities respond to fuels and plan for wildfire with their CWPPs is, or at least can be, a critical moment for a community. Because of our federalism, it is inherently situational and inherently indexed to local conditions. States assert varying degrees of control over their local governments, both by distributing powers and by interceding in federal/local partnerships, making this type of “collaboration” complex and inherently provisional. Given the federal government’s appropriations on wildfire, its legal authority under HFRA and other federal statutes, and its landscape-scale perspective, the creation of CWPPs could be, if the federal government managed it properly, a series of “information

F.2d 1240, 1251-53 (8th Cir. 1999); United States v. Brown, 552 F.2d 817, 820-21 (8th Cir. 1977).


116 See Jayne Fingerman Johnson et al., U.S. Policy Response to the Fuels Management Problem: An Analysis of the Public Debate About the Healthy Forests Initiative and the Healthy Forests Restoration Act, USDA FOREST SERV. PROCS. (RMRS-P-41 2006) (copy on file with author). Johnson and colleagues located and coded some 2,800 news stories published in the U.S. between August 2002 and December 2004 treating HFI or HFRA, tracking favorable versus unfavorable mentions and comparing the two. Id.


118 Id. at 18. Cohen also shows, however, that the most cost-effective means of reducing ignitability are through wise construction and materials choices. Id. at 20.

119 WILMER & APLET, supra note 96, at 3.

120 Steelman & Burke, supra note 41, at 70. Acres treated, indeed, seem to be the chief performance metric the agencies have created for themselves. See id.

forcing" events.\textsuperscript{122} CWPPs done well could be held up as exemplars, as benchmarks for other communities with similar values to meet or exceed. Mandatory monitoring of actions implemented under CWPPs could gather real data about a project’s value because it would collect information about whole experiences from plan to action.\textsuperscript{123} None of this is being carried out today, though.

\textbf{C. The Practical Authority of the Forest Service, BLM, and HFRA}

The foregoing discussion points to a very different kind of question. What is natural resources legislation for today? What function does it serve? A long time ago it stopped being the source of people’s legal rights and duties on and around public lands. It shifted to being a blueprint the agencies were to follow in specifying such rights and duties by rules and regulations. But it has morphed again and is hardly even that much any longer. HFRA demonstrates this further evolutionary step. One must find the legislative history of a long-gone appropriations bill to locate any direction at all from Congress to the agencies on how to prioritize fuels treatment projects and with whom the agencies should work in doing so.\textsuperscript{124} The leading casebook on federal public lands champions the rise of “organic legislation” as having “thoroughly overhauled . . . all four (park, refuge, forest, and BLM) major land systems.”\textsuperscript{125} But this kind of legislation seems like a prologue today. It seems increasingly unlikely and antiquated when conservation has become just another political football. Legislation remains with us, though, even as its functional role is shifting so dramatically. Its “dignity” hangs on:

the dignity of legislation, the ground of its authority, and its claim to be respected by us, have a lot to do with the sort of achievement it is. Our respect for legislation is in part the tribute we should pay to the achievement of concerted, cooperative, coordinated or collective action in the circumstances of modern life.\textsuperscript{126}

As an achievement, federal conservation legislation is becoming cost prohibitive except in the realm of political opportunism (from which HFRA seems to have emerged). If it is true that you manage what you measure, the agencies’ collection of the data they \textit{are} gathering about HFRA/HFI is worrisome. Bean counters love “progress” like millions of acres treated, but landscapes are far more unique and unpredictable than such measurements allow. No matter what a

\textsuperscript{122} See Karkkainen, Information-Forcing Environment, supra note 28, at 861.
\textsuperscript{123} See Karkkainen, Smarter NEPA, supra note 28, at 936-37.
\textsuperscript{124} See supra note 91 and accompanying text.
\textsuperscript{125} GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 465 (6th ed. 2007).
\textsuperscript{126} JEREMY WALDRON, THE DIGNITY OF LEGISLATION 156 (1999).
project entails, its restorative potential is necessarily limited, perhaps even temporary (appropriations might not grow on trees, but fuels do). Thus, without the restoration of historic fire regimes—something that will not happen in the WUI absent huge investments in the hard work of prescribed burning and a lot of political leadership—so-called fuel reduction is a second-best strategy at most.

Federal efforts to encourage landowners and communities to reduce structural ignitability probably increase the disturbance footprint of our sprawl, but do they really address our basic problem? Our basic problem is that our WUI keeps expanding—as homes are being built throughout our (comparatively) natural areas. Our basic problem is not even being confronted by HFRA and, in fact, it is probably worsening the problem. The problem is deliberative. Why do we refuse to recognize that deeply contentious, emotional issues like good land use are not being resolved at the scale to which our nation has grown? We keep legislating federal jurisdiction into existence only to starve our federal authorities of the resources they need to actually use that jurisdiction and achieve our common ends. I offer three conjectural answers to these questions about ecological restoration in the regulatory state.

First, agencies are never forthcoming about how little they can achieve in the real world. Real expertise would make agency managers admit—broadcast—their own fallibility and few agency actors have any incentive to do that.\(^\text{127}\) Fire suppression in the twentieth century was the experts’ idea originally. The problem is that broadcasting fallibility is usually not much of a career path, whether in the public or the private sector.\(^\text{128}\)

Second, in the context of wildfire where the threat and most imaginable solutions operate at landscape scales, the differentiation of land systems and bureaus and use zones is clearly blocking real progress. This is emblematic of public lands management more generally.\(^\text{129}\) The problem space is so large that the information costs of any operational decision, to say nothing of the stakes, are necessarily immense. The institutional divides simply compound our costs exponentially. The structure of the WFLC decisionmaking process is summit-like, with superpowers who meet at neutral locations first to legislate a neutral vocabulary, then later to establish a decisionmaking procedure, and only finally after that to engage the issues—usually with theatrics and vague allusions to consensus that can never be “imprisoned” in specific terms. Real coordination at these scales on issues engendering deep disagreement is simply too complex, too likely to end in frustration. It is worth noting, by contrast, that working hybrids like “business improvement districts” have proliferated at an astounding rate in local governments across the country—notwithstanding truly divisive legal issues

\(^{127}\) See generally Breyer, supra note 85.

\(^{128}\) See Jody Freeman, The Private Role in Public Governance, 75 N.Y.U.L. Rev. 543, 554-74 (2000) (noting the proliferation of public/private hybrids where firms and agencies take actions that are mutually reinforcing but still not fully cooperative given the incentives each has to avoid revealing its own fallibility).

\(^{129}\) See Colburn, Habitat and Humanity, supra note 24.
that still simmer.\textsuperscript{130} Of course, such experiments are much easier to plan, execute, and improve over time at small scales than they are at immense ones.\textsuperscript{131}

Finally, in what must be his most repeated prose, George Perkins Marsh observed long ago that “Man is a disturbing agent,” and that wherever he sets his foot “the harmonies of nature are set to discords.”\textsuperscript{132} This was a deeply misanthropic view of our predicament. Could Marsh have meant that only landscapes without people are truly healthy? If so, it shows how perverted our concept of “the wild” really is. Not only does it make conservation exceptional by nature. It draws people onto the (exceptional) landscapes worth protecting only to spoil them by making them ordinary. In this, wildness is its own \textit{pharmakon}—a poison and therapy all in one. In a country of so many people with so much wealth, if “the wild” is where land is healthy, then that is where people of means will want to be. \textit{This} is the WUI problem. We are spreading our civilization over this continent so quickly in good part because we do not like our built environments or the way people inhabit them.

Part IV argues that solving this problem will require us to reimagine landscape-scale forces like fire as elements of our land and that this must begin with the substantial overhaul (if not repeal) of HFRA. It cannot stop there, though, because we desperately need enhanced coordination of land uses in the face of so much uncertainty and risk. Part IV proposes targeted reforms that a new administration should work to impose on wildfire and sprawl in the hopes that, ultimately, more information and better sharing of that information will enable real deliberation among the citizen-owners of our landscapes.

IV. TOWARD A LAND USE PLANNING EXPERIMENTALISM?

So what is to be done? We are, it seems, moving gradually into an age in which our ‘expert’ natural resource agencies are receding in their influence. Increasingly, the truly hard and big questions that once were left to agency processes are being funneled back into courts, boardrooms, and elsewhere. Deliberate abstractions in legislation—for public lands law, phrases like “valid existing rights”—are being given determinate meanings by legal actors other than agencies.\textsuperscript{133} The mass media, judges, and citizens are all increasingly skeptical of

\begin{footnotesize}
\item[132] \textsc{George Perkins Marsh, \textit{Man and Nature} 191} (David Lowenthal ed., 1965) (1864).
\item[133] When Congress repealed the ambiguous grant of rights of way known as R.S. 2477, it did so by saving “valid” rights of way that were in “existence” at the moment of repeal in 1976. \textit{See} Sierra Club v. Hodel, 848 F.2d 1068, 1081 (10th Cir. 1988). This, of course, was a massive equivocation on the mode of identifying the rights, their scope and
\end{footnotesize}
public agencies—if not the whole notion of unbiased expertise. Yet, as Karen O’Neill argued in her history of flood control policy, complex, system-wide restorations will remain a practical impossibility so long as broad-scale cooperation throughout the natural system as a whole is missing for the obvious reason that too many parts of these natural systems have too long been deranged to suit our will.\textsuperscript{134} We are long past the time in which tinkering will do. Of course, people are not normally inclined to think about whole natural systems. Our present economy certainly gives them little reason to do so. So what we need are comparable alternatives to the rational centralizing agency and its top-down conceptualization of landscapes in mental-geographic space. And that is a tall order. Part IV begins from the present and works forward into that uncertain future. Section A charts a bottom-up model of integrating large and small scale land planning while Section B argues that critical reforms at the top are vital as well. Finally, Section C briefly considers whether land use planning that presumes mistake and surprise is reconcilable with the rule of law.

A. Avoiding the Tragedies of Centralization

HFRA gets the multiscalar nature of land planning half right. It incentivizes local planning without mandating it, connects local plans loosely to a broader planning process, and makes the broader process innately flexible (at least as a matter of law).\textsuperscript{135} But by leaving specific measures in CWPPs entirely to local

\textsuperscript{134} See KAREN M. O’NEILL, RIVERS BY DESIGN: STATE POWER AND THE ORIGINS OF U.S. FLOOD CONTROL (2006). “Because the health of each reach of a river depends on conditions throughout the river system, restoration projects done in isolation often fail. In a federal system, the central government could be mobilized to coordinate action across localities. Progressives and New Dealers had aimed to do this . . . [but] largely failed.” Id. at 185.

\textsuperscript{135} To be clear, reforming the WFLC process to make it more adaptive and deliberative as a practical matter is not something accomplishable by legal means alone. But a real step toward that end would be forcing the WFLC to communicate its interpretations of restoration, at least in principle, more often and more clearly than it is doing at present. Conceivably, more public discussion of restoration’s point and purpose would force far more productive deliberations among the different constituencies represented and could, as a result, lead to a more textured account of what any central authority can or should be doing to control the risks of wildfire while allowing fire back on to the landscape. Cf. Cohen, supra note 89, at 85 (“At the heart of the institutionalization of the deliberative procedure is the existence of arenas in which
discretion and not requiring that the CWPPs themselves be centrally recorded or widely shared, HFRA misses a rare opportunity to infuse the fruits of directly deliberative local politics into the technocratic abyss that agencies like the Forest Service are becoming.136 Real people confronting trade-offs in their own backyards must imagine and choose practicable solutions to present problems.137 That kind of problem solving, nested as it is within whole experiences, is a unique resource that can be of extraordinary value to subsequent actors.138 HFRA, in short, missed one of the most powerful insights in decades into how public policy can actually shift behavior and markets over time: the use of targeted, mandatory disclosures.139

Counties and municipalities possess the lion’s share of land use planning authority in the United States. Structurally, though, they are competitors with one another.140 To be sure, federal agencies are rightly wary of planning or regulating land uses on private land, if only because of the politics involved.141 If there is a role localities and states have shown little interest in playing, however, it is the

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136 See generally Joshua Cohen & Charles F. Sabel, Directly Deliberative Polyarchy, 3 EUR. L.J. 313 (1997) (describing the challenges of joining these two kinds of institutions into workable hybrids).

137 This is qualitatively different from a federal employee who does so after having taken “comments” or published Federal Register notices. The trappings of office too often separate officials from the communities of which they would otherwise be a part. See ROBERT A. DAHL, AFTER THE REVOLUTION: AUTHORITY IN A GOOD SOCIETY (1970).

138 See, e.g., CWPP STATUS REPORT, supra note 79, at 4 (“Many who have been involved in CWPP development are quick to note that in many cases the process is itself a success. Collaboration among local landowners, local governments, land management agencies and the State for fire planning also creates lasting relationships that extend beyond the immediate task.”).

139 See ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY (2007). The Toxic Release Inventory is the primary example in environmental law, although its real utility to neighbors has been the subject of no little dispute. See, e.g., Shameek Konar & Mark A. Cohen, Information as Regulation: The Effect of Community Right to Know Laws on Toxic Emissions, 32 J. ENVTL. ECON. & MGMNT. 109 (1997). Other, more unambiguously useful disclosures include the disclosure of medical mistakes, nutritional labeling, and those areas where effective intermediaries manage and distribute the information. See FUNG ET AL., supra, passim.

140 Colburn, Localism’s Ecology, supra note 131, at 989-99.

141 See John D. Leshy, Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands, 14 U.C. DAVIS L. REV. 317 (1980). Research on public attitudes toward cooperative land use planning involving the Forest Service and/or BLM, however, is showing that caution should not solidify into categorical refusals to do so. See Andrew O. Finley et al., Interest in Cross-Boundary Cooperation: Identification of Distinct Types of Private Forest Owners, 52 FOREST SCI. 10 (2006) (reporting survey and statistical work indicating that most private forestland owners are amenable to some form of cooperative land use planning with government).
pooling of their experiences and the comparing of their own performances. Normally, information pooling and benchmarking of the sort must be done by a third-party. Indeed, comparing some performance to other, similar performances is its own kind of normativity—something qualitatively different from setting general conduct standards in the abstract. The information collected (if not necessarily the cohort being benchmarked) is nonrivalrous and inherently cumulative. Homebuyers would certainly value such comparative information. Indeed, this form of regulation may be the only kind structured to spur continuous adaptation in the pursuit of complex goals.

Just as importantly, though, if the normal justification for federal governance of natural resources is that the nation as a whole possesses authority over the resource and values it differently from its value in the default, we must not forget that the processes by which federal authority is mobilized allow interested parties unique opportunities to skew the product. One need not share the cynicism of positive political theory to presume that distortions in the political process are real and potentially devastating. Confining the federal role and the frequency at which federal law must change to keep pace is almost certainly an advantage over the long term.

143 See FUNG ET AL., supra note 139, at 28 (noting the rise of “targeted transparency” as a distinct kind of disclosure policy that focuses on disclosures that are able to redress information asymmetries, extend the bounds of rationality, and not be prohibitively costly to generate).
144 See FUNG ET AL., supra note 139, at 31 (“New information has one of the central characteristics of a so-called public good: its consumption is non-rival, meaning that new information can be consumed by one party without diminishing its value to another party.”).
146 Most forms of rulemaking, even some of the most informal, are prone to rutting and ossification as compared to the adaptiveness needed in natural resources management. See J.B. Ruhl, Regulation by Adaptive Management—Is it Possible?, 7 MINN. J.L., SCI. & TECH. 21 (2005); J.B. Ruhl, The Disconnect Between Environmental Assessment and Adaptive Management, 36 TRENDS 1 (July/Aug. 2006).
147 See generally Jason Scott Johnston, The Tragedy of Centralization: The Political Economics of American Natural Resource Federalism, 74 U. COLO. L. REV. 487 (2003). One need not make the assumptions underlying Johnston’s model (or accept Johnston’s proposed solution that courts should “narrowly interpret statutes that federalize natural resource regulation.” Id. at 644) to acknowledge the regrettable patterns he identifies.
148 Ultimately, avoiding the cynical shades of skepticism probably means viewing any assertion of remedial authority—whether legislative, administrative, or injunctive—as inherently provisional and renegotiable “in the light of experience.” Sabel & Simon, supra note 142, at 1098.
So how do we thread this needle? If combined with a more fully assembled (but still corrigible) broad-scale planning process,149 monitoring and benchmarking localities could show how that next fifty acres of “intermix” landscape might compromise a community’s resilience against fire.150 It would draw causal connections between incidents (and the expenditures thereon) and planning successes or failures,151 ideally by way of spatially explicit reports integrating invasive species, microclimatic, use, ownership, and other data.152 Pushing such information out widely would unquestionably be a public service. Indeed, this kind of federal role can propel public values into traditionally private contexts—creating hybrids that, “far from weakening democratic norms of due process, rationality, equality, and accountability, could instead extend these norms”153 significantly. Yet our land management agencies so far seem

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149 Probably the most prominent shortcoming of the WFLC itself is its total failure to assess wildfire risks comparatively. The IMPLEMENTATION PLAN’S fourth goal, promoting community assistance, includes what it labels an “outcome”, that is: “[c]ommunities at-risk have increased capacity to prevent losses from wildland fire and realized economic benefits resulting from treatments and services.” IMPLEMENTATION PLAN, supra note 44, at 19. But this outcome has only nominal measures assigned to it, i.e., whether a community has enacted any fire mitigation/prevention ordinance, not measures designed to assess community performances qualitatively. In other words, it ignores the incremental, pragmatic possibilities that benchmarking risk-prone communities against each other represents. See SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH (2003) (“A characteristic idea of the pragmatic tradition is efficacy in practical application. Pragmatism seeks those solutions that work out most effectively.”). Generating real metrics for CWPPs would be much easier if their performances today were being recorded and studied appropriately.

150 The Josephine County Integrated Fire Plan in Oregon (home of the 2002 Biscuit Fire) is exemplary in this regard. Prepared in 2004 by a watershed program at the University of Oregon, with assistance from regional BLM personnel, the plan integrates emergency management, fuels reduction, education and outreach, and land use-related risk assessment. While Josephine County had critical help from a major research university, there is nothing preventing other localities from finding similar partners to solve their information problems. See JOSEPHINE COUNTY INTEGRATED FIRE PLAN (NOV. 2004), available at http://68.185.2.151/website/jcifpdocs/jcifp.pdf.

151 See COST MANAGEMENT REPORT, supra note 82, at 12-20 (recommending that fire plans and land management plans be better coordinated because one is intimately related to the other causally). There need not be a descent from this form of risk comparison into the turgid vocabulary of “risk assessment” and “risk management” traditionally practiced by the federal government. See BRYAN G. NORTON, SUSTAINABILITY: A PHILOSOPHY OF ADAPTIVE ECOSYSTEM MANAGEMENT 409-39 (2005).

152 Cf. Donovan & Brown, supra note 8, at 77 (“Flood and wildfire risks can be controlled in two basic ways: modify the event itself or reduce the values at risk. . . . Homeowners surrounded by federal forests receive not only the forest amenities but also publicly subsidizes fire protection.”).

uninterested in such possibilities.\textsuperscript{154} With few exceptions, they refuse to play a real role in guiding CWPP development or in prioritizing projects in particular regions.\textsuperscript{155} If anything, thus, federal legislation reforming HFRA—or public lands law more generally—should direct the Forest Service and the Interior Department to better monitor, collect, and benchmark the work put into CWPPs with the federal carrots HFRA creates. More sunlight within the agencies themselves, though, is just as vital a step. Section B explains.

\textbf{B. Improving Transparency from the Top Down}

Our public lands agencies have always conceived of fire as their problem. They know that fire needs heat, oxygen, and fuel to burn and have decided that fuel is the only one they can control.\textsuperscript{156} Much of the learning these agencies still have to do, thus, is more self-critical in nature. Fuels treatments are far less certain than the agencies’ attitudes suggest. Indeed, stand-level treatments are richly complicated: without careful selection from the different techniques based on accurate information, one might actually just exacerbate the fire risks.\textsuperscript{157} The appropriations train that HFRA got moving,\textsuperscript{158} in short, might soon become the next gigantic mistake in good part because of agency structure and culture. If there is one thing these agencies learned over the last generation, it is how to minimize conflict with local communities and property owners—not how to reduce risk.\textsuperscript{159} Now, to some, the fact that governance of the public lands is becoming just another appropriations logroll—just another farm bill—would be

\textsuperscript{154} Federal agencies can tout “collaboration” until faces are blue without changing the fundamental reality that monitoring and continuous adaptation have tended not to be welcome prospects for propertied interests and other stakeholders with investment plans at cross purposes with federal conservation laws. See Alejandro E. Camacho, \textit{Can Regulation Evolve? Lessons From a Study in Maladaptive Management}, 55 UCLA L. Rev. 293 (2007). Perhaps not surprisingly, that has meant an uneven commitment to monitoring and continuous adaptation by the federal agencies themselves. See id. at 323-44; see generally Martin Nie, \textit{The Governance of Western Public Lands: Mapping Its Present and Future} (2008).

\textsuperscript{155} The principal guide for CWPP development was done by the Society of American Foresters (SAF) without the Forest Service’s or BLM’s authority. See SAF ET AL., \textit{PREPARING A COMMUNITY WILDFIRE PROTECTION PLAN} (March 2004). This guide is referenced by the Forest Service on its website but is not an agency document and, indeed, states explicitly that it is “not a legal document” even though its “recommendations” “carefully conform to both the spirit and the letter of the HFRA.” Id. at 2.

\textsuperscript{156} See Jensen, supra note 56, at 971.

\textsuperscript{157} See Graham ET AL., supra note 32, at 15-16.

\textsuperscript{158} See supra notes 108-109 and accompanying text.

\textsuperscript{159} Cf. Shapiro & Glicksman, supra note 149, at 178 (“[A]gencies responsible for implementing [risk reduction] typically engage in a process of decision-making that is complex, multifactored, and multidisciplinary… Thus, “neutral” agency decision-makers are not capable in most instances of ascertaining “correct” solutions through the application of empirical evaluation.”).
unsurprising. The more opaque a political process, the less likely its agents will be accountable. But the actual prioritization of fuels treatment projects has gone so far underground that real accountability is becoming impossible, whatever model of politics one accepts. Of all Washington’s processes, the budget process is its most opaque. Yet that is where most of the hard decisions are being made on wildfire today. Before the federal government can credibly maintain that communities and regions owe each other better transparency about their fire planning in the wildland/urban interface, the government itself will have to be more explicit about its plans and priorities.

The Forest Service and the Department of Interior must make the budget process that annually channels billions of dollars in fuels treatment projects and fire restoration much more public than it is. At present, if there is any coherence to the priority of appropriations and project selection, it is submerged in oceans of patronage and politics-as-usual. Crooked or not, mere appearances can and do undermine public confidence in the governance of public lands.

C. Planning for Unintended, Unforeseen Consequences

The fire risks we know today are largely the unintended consequences of a continental-scale land use policy—fire suppression. That particular policy, it bears mentioning, was a combination of expert advice and expediency. Now mistakes are inevitable in land planning, even with the benefit of expertise. But incorrigible mistakes of immense scale are not inevitable. To be sure, climate change has made plain how expert advice that is inconvenient can be attacked and discounted. It is possible, though, to design institutions around such collective, cognitive biases. It is possible to take institutional design seriously and to build surprise and mistake into any policy planning operation. The much harder question is whether our notions of law and legal process can square up with such institutions. To imagine a “rolling rule regime” in which any single iteration of

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160 Cf. McCubbins et al., supra note 86, at 250-66 (describing the incentives legislators and bureaucrats have to keep confidences when deals are made).

161 See Shapiro & Glicksman, supra note 149, at 188-90; Adrian Vermeule, Mechanisms of Democracy: Institutional Design Writ Small 183-215 (2007). “Some of the least transparent stages of the budget process are those that occur entirely within the executive branch,” id. at 188, which is where incident and most other wildfire budgeting is being done. See Cost Management Report, supra note 82.

162 Cf. Nie, supra note 154, at 184-205 (linking the corrosive effects of “appropriations politics” to the “mistrust” that engulfs the governance of public lands in the West today).

163 See supra notes 8-9 and accompanying text.


165 See Ruhl, supra note 146, at 55.
a norm is merely a further step in its continuous improvement\textsuperscript{166} is not necessarily to imagine the world in which that regime includes the rule of law. Relatively steady, compartmentalized statements of means and ends are an underappreciated constant in our culture’s dominant theories of law. But if our jurisprudential traditions continue migrating away from their focus on interpretation toward a more productive focus on deliberation,\textsuperscript{167} truly adaptive management might become more than a theoretical possibility. There is hope that this migration will continue, but it is far from assured.

The administrative agency by itself is probably incapable of being an adaptive steward of land health over the long term. Bureaucracies do not sustain experimentation for one simple reason: routine is their oxygen.\textsuperscript{168} But the other side of this coin is that the judiciary, an institution able to destabilize the status quo occasionally, has ineradicable limits of its own. “Public law problems invariably result from the complex interaction of conduct by myriad actors. It is highly unlikely that courts could ever command the evidence or methodology necessary to isolate the effects of particular unlawful decisions.”\textsuperscript{169} The time tested palliative is that they check and balance each other. Judging the performance to date, though, that is wide of the mark in this case.

I have argued here (and elsewhere) that the independent variable in this equation is scale. The CWPPs themselves illustrate. It turns out that the scale of the CWPPs being done today varies significantly. In some states, CWPPs are county- or region-wide, while in others each community has its own CWPP.\textsuperscript{170} Getting the requisite buy-in, of course, is the major determinant.\textsuperscript{171} To be sure, any municipality or county that uses its land use controls for the benefit of its wider region is probably the exception. But there is one dynamic where this exception should become the norm: when localities must cooperate to oppose forces more threatening than their neighbors. And wildfire seems to be just such a threat. So if field office staff could gather information on local milestones, deliver that information quickly and to the right local constituencies, benchmark communities’ performances to show who are the leaders and laggards, and even identify “rolling best partnerships” on broader scale issues like watersheds, then we could be hybridizing large and small scale land planning. The good news is

\textsuperscript{167} Id. at 64.
\textsuperscript{168} See Pritchard & Sanderson, supra note 164, at 166 (“Part of the puzzle of adaptive management is how to build a nonbureaucratic bureaucracy. Is it possible to have a legitimate, capable, and responsible management organization that is constantly reforming and reinventing itself, undergoing revolt?”).
\textsuperscript{169} Sabel & Simon, supra note 142, at 1085.
\textsuperscript{170} See CWPP STATUS REPORT, supra note 79, at 10.
\textsuperscript{171} Cf. CWPP STATUS REPORT, supra note 79, at 10 (“Getting signatures from all the fire chiefs in a single county can be a major challenge, especially when the county is large.”).
that taboos against appeals to civic virtue slacken at such scales where community is still a powerful concept (or at least more powerful than it is in the "procedural republic"). The bad news is that too many of our communities are still being built with little or no attention being paid to the collaborative, communicative dimensions of "community."

Truly restorative, adaptive land use policies will entail more than just planning (even multiscalar planning). It will entail creative partnering, perhaps with tools like bridge financing or other subsidies to distressed landowners, restorative work that is labor intensive and of uncertain benefit, and, most especially, collectively derived definitions of desirable future conditions. In my view, if we can do that, a more sustained deliberative dialogue about what makes a landscape "healthy" is possible. It is certainly a more restorative project than just subsidizing more sprawl.

V. CONCLUSION: THE FIRE NEXT TIME

In his prescient 1963 book, The Fire Next Time, James Baldwin made a powerful, poetic argument that America as a collective enterprise has consisted too often in various self-perpetuating delusions. Baldwin’s experiences growing up in Harlem in the 1930s and ‘40s forged his conviction that people, while not "terribly anxious to be equal (equal, after all, to what and to whom?)," do "love the idea of being superior." Another such delusion, he argued, took the form of an ‘American dream’ that allowed us to lead unexamined lives—to, for example,
view something like Soviet Russia as an oppressor without also reflecting on the forms of oppression from which we benefit. Today, Americans are urbanizing their natural areas and ringing up extinction debts at an alarming rate. Individual owners still benefit from how their land was treated in the past whether or not they insure its future health. Ironically, the same preferences and political failures generating more and more of our “intermixed” landscape—part nature, part culture—are gradually extinguishing exactly what we as people seek in occupying that landscape. Wildfire, though, like most risks, presents us with opportunities, too. It is a force of nature that cannot be managed except at scales much larger than individual ownerships. And one silver lining in the mortgage crisis and five-dollar-a-gallon gasoline is that people may soon decide that compact, transit-, bicycle-, and pedestrian-friendly communities are not so bad after all. Building one certainly beats being just another “community at risk.” Whether we are ready to seize the opportunity and start restoring our fire adapted ecosystems to their historic conditions, though, is something else altogether.

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177 "The effects of habitat fragmentation on the species composition of communities may not be immediate . . . [L]ags can exist between the time a habitat is fragmented and the time when a species disappears altogether from all habitat fragments." OSWALD J. SCHMITZ, ECOLOGY AND ECOSYSTEM CONSERVATION 89 (2007).

Revitalizing Zion: Nineteenth-Century Mormonism and Today’s Urban Sprawl

Brigham Daniels*

In the nineteenth century, Mormons planned and built hundreds of communities throughout the West. Time, growth, and redevelopment have begun to erase this history. Like towns and cities across the country, places first settled by Mormons now grapple with urban sprawl’s challenges. This article explores whether the Mormons bold planning effort that permeated the frontier of the Old West of the nineteenth century has any lessons to offer those grappling with the planning challenges facing the New West of today.

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INTRODUCTION

If asked their impression of Mormonism, very few people would bother to discuss how the Mormons helped settle the West. Perhaps given Mormonism's rich and sometimes controversial history, it is hardly a surprise that the Mormon contribution to building cities and towns in the West receives little attention. Yet, the imprint of Mormon planning is found in literally hundreds of communities throughout the West.

Not surprisingly, the Mormon settlements established during the nineteenth century have changed dramatically since their founding. It is hard to imagine, for example, that a Mormon village and fort were the beginnings of a city that markets itself today with the naughty tagline “What happens in Vegas stays in Vegas.” Even for those communities that are still largely populated by Mormons, time, redevelopment, and new development have eroded much of the original Mormon settlement design. So, besides the old cores of these twenty-first century communities—typically with wide streets and set out in a grid—little separates the look and feel of most of these towns and cities from other places across the United States: urban sprawl, booming suburbs, big box retail, parking lots and highways, and declining—or perhaps revitalizing—urban cores.

1 Members of the Church of Jesus Christ of Latter-day Saints (the Mormons) are known for many things. Among the most well known of these are their beliefs in *The Book of Mormon* and modern-day prophets; their abstention from drugs, alcohol, and tobacco; and their history of practicing and then abandoning polygamy. In the spirit of disclosure, it is noted that the author of this article is a practicing Mormon.

2 Note, however, that the contribution of Mormon planning has not been entirely overlooked. In 1996, the American Planning Association presented the Mormon Church its Planning Landmark Award in recognition of the contributions of Joseph Smith and Brigham Young in planning and building many nineteenth-century western settlements. Christopher Smith, *LDS Founder's Blueprint To Build Heaven on Earth Earns Award for Church*, SALT LAKE TRIB., June 2, 1996, at B1.


4 “Urban sprawl” refers to development with the following characteristics: “low density”; suburban growth “that expands in an unlimited and noncontiguous (leapfrog) way outward from the solidly built-up core of a metropolitan area”; “consumption of exurban agricultural and other frail lands in abundance”; “reliance upon the automobile as a means of accessing the individual land uses”; and “the lack of integrated land-use
Yet, much of the stories of Joseph Smith and Brigham Young reflect the struggles of leaders attempting to build and maintain communities. For Smith, it was setting up refuges for his followers: first in New York, then in Ohio, Missouri, and Illinois. In each case, Smith’s settlements became sources of local controversy and eventually targets of persecution: sometimes burned to the ground, often looted by mobs, and in each case for the Mormons, relatively short-lived. Young’s story is much different. After Smith’s death, Young determined refuge was not enough; he wanted isolation. He led his followers across the plains of the Midwest, over the Rocky Mountains, into the arid Great Basin, and ultimately into the valley of the Great Salt Lake.

In Mormon history, the arrival of the Mormons to what is now Salt Lake City is a matter of great consequence. As Young gazed from his wagon—smitten with a disease that his fellow settlers coined “Mountain Fever”—onto the fairly desolate landscape where Salt Lake City now sits, Young reportedly said, “It is enough. This is the right place. Drive on.” Within days, the groundwork for a new city was planned and construction of Young’s first major settlement began soon thereafter. This was the first of about five hundred settlements built by the Mormons in the West, including many throughout Utah, Arizona, New Mexico, Nevada, and Idaho, and to a lesser extent in California, Mexico, and Canada.

However, by the turn of the twentieth century, Mormon planning efforts had dissipated. So with more than a century between this period of Mormon city building and today, this experiment might not even seem to have much modern relevance even to today’s Mormons—even if they find it a curiosity. However, putting religious affiliation aside, can we glean anything from Mormon urban planning policy that may prove valuable to confronting planning challenges today? This is the central question this article addresses.


7 Lynn Rosenvall, Joseph Smith’s Influence on Mormon City Planning, ENSIGN, June 1974, at 26.

8 In this article, the term “policy” is used very loosely. It may seem odd to think of a church having a “policy” on things such as land use, housing, or open space. The Mormon Church used its influence to direct its followers. For example, Young and other influential Mormons affected land use policy in ways just as striking (if not more so) than any contemporary local or state government in the modern United States: determining the design and location of hundreds of settlements, instructing individual members not only in which settlement but even which parcel to inhabit, and even minutia like the setback of each house, the direction it faced, and the material of which it was made. This article works from the perspective of Lawrence Friedman, that “law” and “policy” is the “reflection] of the goals... of those who call the tune” in a given society. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 19 (Simon & Schuster 2d ed. 1985) (1973). While formally, Mormon leaders had no legal authority to build communities (at least none recognized by the federal government), time and circumstance allowed the Mormons
It is an understatement to say that Mormons had very high hopes in building their frontier communities. They literally aspired to build "Zion"—which they conceived as a Utopia that would ultimately become "a dwelling place of [Jesus] and of human beings perfected after the order of the Christian tradition."\(^9\) The Mormons hoped to develop a place "free from greed, selfishness, and vanity."\(^10\) As one Mormon scholar put it, "Zion is the great moment of transition, the bridge between the world as it is and the world as God designed it and meant it to be."\(^11\)

Granted, the ideal of Zion is a much loftier goal than those seriously entertained by any United States planning entity today. Even Portland, which has become the Mecca for urban planners, is merely held up as a pre-eminent example due to its "livability" and "quality of life." Nineteenth-century Mormons believed that their settlements should be "holy" and "beautiful."\(^12\) Perhaps today, requesting city planners for holiness is asking too much. However clearly, asking for more than we are getting in most cases is not.

Urban sprawl has become the dominant land use pattern across the United States and has done so by the unwitting inertia of neglect.\(^13\) Sprawl growth comes at a significant cost: urban blight, isolation of the poor, consumption of open spaces, increased water and air pollution (including greenhouse gases), and decreasing the effectiveness and/or increasing the cost of providing a wide range of public infrastructure (e.g., roads and utilities) and public services (e.g., police, fire, and emergency services).\(^14\)

Looking at our urban and suburban landscapes, the need for change and planning is apparent. Perhaps we have set our sights too low. Perhaps we ought to follow the lead of nineteenth-century Mormons: planners who looked across the beautiful setting of the Interior West, with its rugged mountains and red-rock bluffs—including those now called Zion—and took seriously what Wallace

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10 Id.
13 Myron Orfield, Metropolitics: A Regional Agenda for Community and Stability 2 (Brookings Institution Press 1997).
14 *Infra* Part III (discussing the costs of sprawl).
Stegner has described as the West’s greatest challenge: to build a “civilization to match its scenery.”

Part I addresses the primary guiding principles nineteenth-century Mormon leaders used while building settlements: vision, cooperation, stewardship, and care for the poor.

Part II briefly describes how Mormon communities—particularly among those in the Interior West—transformed from Mormon settlements into the sprawled communities of today.

Part III provides an introductory discussion as to why urban sprawl poses challenges worthy of our attention.

Part IV looks at the principles sustaining urban sprawl, and does so with particular reference to Utah—the major destination of nineteenth-century Mormon settlers. This discussion contrasts the principles governing sprawl with those of nineteenth-century Mormon planning efforts.

Part V addresses how to employ the land-use principles pursued by nineteenth-century Mormons in society today and how doing so might help address the challenges posed by urban sprawl.

I. PRINCIPLES OF ZION

By the close of the nineteenth century, Mormons had colonized approximately five hundred settlements. The workings of these settlements stand in striking contrast not only with other contemporary western settlements but also with America today: Mormons relied on a theocracy as their political mechanism and often muted the free market to meet the ends of the church and the public. Yet, behind these peculiarities, we find the foundational principles that while perhaps are equally as rare, resonate much more clearly today. Mormons sought the ideal of Zion, which simply sought to promote society’s collective interests over narrower self-interests:

We all concede the point that when this mortality falls off, and with its cares, anxieties, love of self, love of wealth, love of power, and all the conflicting interests . . . , that then, when our spirits have returned to God who gave them, . . . we shall then live together as one great family;

16 See Rosenvall, supra note 7.
our interest will be a general common interest. Why can we not so live in this world?19

This Part highlights and discusses four foundational principles the nineteenth-century Mormons employed in pursuit of Zion: vision, cooperation and interconnectedness, stewardship, and care and integration of the poor.

A. Vision

If the Mormon experiment in community building claimed anything, it claimed to be visionary. This is true at the local and the regional level. At the local level, every settlement was based on a plat that Smith claimed came to him in revelation from God.20 Church leadership took interest in the details of settlement design, and settlers structured their settlements according to the design and approval of church leaders.21 The Plat of the City of Zion, as it is called, and the attentiveness of Mormon leaders left a unique imprint on the built landscape of the West.

At the regional level, Young also claimed to have divine guidance as he built settlements to further goals of the church leadership. The church leaders pursued some settlements to take advantage of a particular natural resource—a stream or particularly fertile soil; others were designed to give the Mormons a particular political or economic advantage—dotting the trail of an important trade route or diversifying the church’s ability to grow specific crops and thereby increasing their independence from the rest of the West.

From many religious perspectives, it may seem odd that religion would have such an active hand in something as temporal as community planning. However, for the nineteenth-century Mormons, this would not have come as a surprise. Mormon theology teaches that “all things unto [God] are spiritual.” 22 Additionally, from their perspective, it was very clear that God had an interest in how they built their settlements because they were building Zion.23 Wilford Woodruff, the fourth President of the church, described the work of building settlements as an important religious duty:

[W]e can’t build Zion sitting on a hemlock slab singing ourselves away to everlasting bliss; we are obliged to build cities, towns, and villages, and we are obliged to gather the people from every nation under heaven to the Zion of God, that they may be taught the ways of the Lord.24

19 Brigham Young, in JOURNAL OF DISCOURSES 12:153 (Church of Jesus Christ of Latter-day Saints 1886).
21 FIRMAGE & MANGRUM, supra note 8, at 294.
22 DOCTRINE AND COVENANTS, supra note 12, at 29:34.
23 See supra notes 9-12 and accompanying text.
To Brigham Young, the importance of this task was paramount: "I have Zion in my view constantly. We are not going to wait for angels, or for Enoch and his company to come and build Zion, but we are going to build it."  

1. Zoning in Zion

Joseph Smith first used the Plat of Zion in his attempts to organize followers in Jackson County, Missouri. The Plat provided quite detailed instructions:

The village plot was to be one mile square, with each block or square containing ten acres. With twenty lots to the block, each lot would be a half acre in size. Moreover, the lots were laid off alternately in such a way that no house would be exactly opposite another house. Uniform regulations would assure that there would be only one house to a lot, and that each house would be at least twenty-five feet from the street. A large block in the center was set aside for such public buildings as the bishop’s storehouse, meetinghouses, temples, and schools. Streets would run north-south and east-west and would be wide. The city would contain about 1,000 family units, each with a respectable garden space and grove, lawn, or orchard. Outside the city would be the farms. And when this city is filled up, wrote Joseph Smith, “lay off another in the same way, and so fill up the world in these last days.”

While the plan is not followed precisely in every Mormon settlement, it served as a starting point and its footprint is clearly embedded in each Mormon settlement. Throughout the West, it is easy to find evidence of this: wide roads, the grid-like street patterns, the homes set back a considerable distance from the street, attention to preserving a feel of openness, and a center block devoted to religious infrastructure—temples, tabernacles, churches, and other important church buildings.

The introduction of the Plat of Zion to the Interior West came with dramatic flair. Within days of coming to the valley of the Great Salt Lake, while Young was walking north of the Mormon encampment, he stopped suddenly and stabbed his cane into the ground and declared that the settlers would build the temple at that spot. Once the site of the temple was known, the heart of the Plat of Zion, figuring out where to build the rest of the city was just a matter of extrapolation.
With the plan firmly in place, the building of Salt Lake City began within days of arrival to the valley.

As church leaders applied the Plat of Zion throughout the West, these leaders somewhat embellished it. For example, while many settlers made their livelihoods as farmers and, to a lesser extent, factory workers, some extent Mormon land use anticipated Euclidian zoning and attempted to separate the settlements from the nuisances created by that work.\textsuperscript{31} Church "[z]oning regulations required that factories and farms be beyond the town boundaries."\textsuperscript{32} This also helped farmers and factory workers to remain active participants in settlement communities.

The command from God that "Zion must increase in beauty and in holiness"\textsuperscript{33} was thought to apply both at the city level and at the individual property level. Young pressed his followers to maintain and enhance their properties. Each "individual plot of ground was viewed as an integral part of the larger concept of ‘sacred space,’ or a piece of Zion."\textsuperscript{34}

George A. Smith, a church leader who had some familiarity with the design of Philadelphia, proposed the idea of public squares where the community could provide for "the collective needs of the [church members]... at different locations in the city."\textsuperscript{35} This idea was incorporated into Salt Lake City, the first western Mormon city, and many others that followed.

Smith's original plat limited a settlement's population to roughly one thousand families. He thought that once a city grew to this size, another satellite city should be built, and through this method the Mormons would create settlements to "fill up the inland stretches of the North American continent from the Missouri to the Pacific."\textsuperscript{36} In principle, Young and other church leaders incorporated that vision, although not necessarily the same population limit. By the end of the nineteenth century—as almost a fulfillment of Smith's vision—

\textsuperscript{31} Euclidian zoning—at least in principle—separates uses in order to reduce predictable friction among neighbors. See Daniel P. Selmi & James A. Kushner, Land Use Regulation: Cases and Materials 68 (1999). The Supreme Court first upheld this sort of zoning, in the landmark case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Somewhat appropriately, the Euclid opinion was written by Justice Sutherland, a Utahn though not a Mormon. Euclidian zoning in application is often taken to what is seen as an unhealthy excess, and in fact, has often been cited as a contributor to urban sprawl. See James Howard Kunstler, Home from Nowhere: Remaking Our Everyday World for the Twenty-First Century 43 (1996); Francesca Ortiz, Biodiversity, the City, and Sprawl, 82 B.U.L. Rev. 145, 179 (2002); Nicolas M. Kublicki, Innovative Solutions to Euclidian Sprawl, 31 Env'l L. Rep. 11,001, 11,003 (2001); Rolf Pendall, Do Land Use Controls Cause Sprawl?, 26 Env't & Plan. B: Plan. & Design 555, 563, 568-69 (1999).

\textsuperscript{32} Richard D. Poll et al., Utah's History 135 (1989).

\textsuperscript{33} Doctrine and Covenants supra note 12, at 82:14.

\textsuperscript{34} Hamilton, supra note 26, at 23.

\textsuperscript{35} Id. at 26.

more than five hundred towns were founded by Mormons and each relying somewhat on the concepts established in the Plat of Zion.\textsuperscript{37}

2. Regional Growth Strategy: Self-Sufficiency

While the Mormons found great satisfaction in first laying down roots in the valley of the Great Salt Lake—hundreds of miles away from any large concentration of those who Mormons believed desired to do them harm—their sense of independence from the outside world was short lived. While the Mormons had achieved spatial isolation, their need for goods almost immediately required them to look outward for provisions. Trading companies responded to demand and quickly found their way to Mormon settlers to do business. While there is little doubt that Mormon consumers appreciated goods, it caused the leadership to worry that excessive business dealings with “outsiders” would distract from the vision of building Zion. The leaders believed that by not spending money within the Mormon economy, those Mormons doing business with trading companies were draining Mormon society of some prosperity.\textsuperscript{38} In fact, the church leaders viewed self-sufficiency as the key to prosperity.\textsuperscript{39} Young and other church leaders put forth zealous efforts to persuade the Mormons not to patronize the shops of these traders. For example, Brigham Young pled with the settlers using this high rhetoric:

Let the calicoes be on the shelves and rot. I would rather build buildings every day and burn them down at night, than have traders here communing with our enemies outside and keeping up a hell all the time and raising devils to keep it going. . . . We can have enough hell of our own, without their help. . . . We sincerely hope that the time is not far distant when the people will supply their own wants and manufacture their own supplies; then and not until then will we become independent of our enemies.\textsuperscript{40}

The church leaders, when necessary, were willing to intervene in the market and ask church members to look beyond individual benefit derived from a market transaction and rather to give notice to how such decisions might affect the broader Mormon community.\textsuperscript{41} Church leaders were committed to inspiring

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\textsuperscript{37} See Rosenvall, supra note 7 at 26; HAMILTON, supra note 26, at 14.
\textsuperscript{38} ARRINGTON, supra note 18, at 83.
\textsuperscript{39} HAMILTON, supra note 26, at 25.
\textsuperscript{40} ARRINGTON, supra note 18, at 196.
\textsuperscript{41} While these efforts served quite different purposes, they do have a familiar feel to today’s efforts to use purchasing decisions to spur social change, such as community supported agriculture, fair trade, union made, made in the USA, or organic marketing and other green labeling, and shopping locally. In fact, as Utah has considered how to reduce its carbon footprint, one of the strategies identified by Governor Jon Huntsman, Jr.’s Blue Ribbon Advisory Council on Climate Change was for Utah to promote a “Buy Local
followers to rely on Mormon labor, even when inconvenient. For example, when Young came to understand that it was common to send Mormon wheat to non-Mormon mills to grind into flour, he responded:

To send out wheat away for other men to grind and take a toll off, and then send it back to us manufactured into flour, why it is suicidal! . . . You are paying your money to sustain communities afar off while your own people are suffering for want of labor.\(^{42}\)

Getting Mormons to stop patronizing businesses ran by those who did not belong to the church was often difficult because the self interest associated with getting cheaper and/or better products often stood in conflict with the broader collective Mormon interest of promoting Mormon labor.\(^{43}\) Not surprisingly, in such cases, church leaders admonished members to build up Zion by relying on Mormon labor even when inconvenient.\(^{44}\)

While the church participated directly in the market mainly through attempting to persuade Mormons to buy only from Mormons and through establishing Mormon-run cooperatives and to a lesser extent church-owned businesses,\(^{45}\) Mormon leaders also used land use and community planning to further this goal. The best example of this is in their efforts to build what became known as the "Mormon Corridor," a series of Mormon settlements that would dot the trail from Salt Lake City to San Diego.\(^{46}\)

The corridor, it was thought, would assist Mormons in two ways. Most obviously, establishing a corridor between Salt Lake City and California would at the very least allow Mormons to act as the middlemen traders. Second, it was thought that the diversity of landscape and spatial separation would help the Mormons produce and secure a wide range of goods: environments conducive to particular crops or landscapes endowed with particular minerals. The latter rationale became a driving feature in the determination of Mormon settlements throughout the West.

Mormons worked aggressively to expand the reach of their settlements. The Mormons also sent exploring parties throughout the West to identify places for additional settlements. In 1849, two years after arriving in the Salt Lake Valley, church leaders sent fifty settlers 300 miles south (what is now the Utah/Aziza boarder) to identify settlements.\(^{47}\) The expedition took three months, and the party kept a detailed record of topography, vegetation, water, timber, and even

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Program."\(^{42}\) BLUE RIBBON ADVISORY COUNCIL ON CLIMATE CHANGE, REPORT TO GOVERNOR JON M. HUNTSMAN, JR. VIII-5 (2007).

\(^{42}\) JOURNAL OF DISCOURSES, supra note 19, at 16:8.

\(^{43}\) See supra notes 38-40 and accompanying text.

\(^{44}\) See JOURNAL OF DISCOURSES, supra note 19, at 19:349.


\(^{46}\) ARRINGTON, supra note 18, at 86.

\(^{47}\) Id.
favorable locations for forts. It did not take Young long to attempt to colonize virtually every one of the settlement recommendations provided by the exploration party. The goals relating to building these settlements, and many others to come, mainly revolved around producing specific goods. Young’s mantra became, “We can produce them or do without them.” Church leaders asked many of the communities to take advantage of a certain natural resource or produce a certain good or crop—most frequently fruits and vegetables that one would expect to thrive in the arid climate and several others that one would suspect would not do as well (and often did not do as well), such as, cotton, grapes, rice, and sugar cane. And, some settlements were designed to build up the Mormon Corridor. By 1855—less than a decade after the Mormons determined to settle Salt Lake City—the Mormons had established twenty-seven communities along the route between Salt Lake City and San Diego.

3. Integration of Land Use Policies with Other Community Policies

The push toward a Zion community often required self sacrifice, or at least a broader awareness of how one’s actions affect society. Before the westward migration, Smith preached that Zion is “every man seeking the interest of his neighbor, and doing all this with an eye single to the glory of God.” Young reaffirmed that theme, teaching that in Zion, individuals are instructed to “[work] for the good of the whole more than for individual aggrandizement.” To fulfill what Smith and Young seemed to require, church leaders often asked settlers to take into account both collective interests and individual interests.

While this Part has already identified the primary goals of nineteenth-century Mormon planning, the settlers recognized a number of additional benefits of their

\[48\] Id.
\[49\] Id. at 223.
\[50\] Id. at 222.
\[51\] Id.
\[52\] DOCTRINE AND COVENANTS, supra note 12, at 82:19.
\[53\] JOURNAL OF DISCOURSES, supra note 19, at 12:153.
\[54\] Of course, asking individuals to put the collective interest ahead of their more narrow self interest is asking a lot. See Garrett Hardin, The Tragedy of the Commons, 152 Sci. 1243 (1968). The thrust of such a request also seems to get to the heart of Christian theology: loving your neighbor as yourself. See Matthew 22:37. While the efforts of the settlers certainly reflect a momentous attempt to live up to this standard, it is quite easy to anticipate the difficulties of delivering on such a request. See KARI BULLOCK AND JOHN BADEN, COMMUNES AND THE LOGIC OF THE COMMONS 1977 (“One of the most successful institutions in the world today is the Mormon church. This organization has experimented with various institutional designs. Through a gradual process of testing, modification, abandonment, and change, the church has evolved to its present form. One of the earliest Mormon efforts was the development of a communal organization in Jackson County, Missouri, during the years 1831 to 1834. This effort, like many others throughout America at that time, was destined to fail. The logic of common pool resources will be useful in understanding the reasons for this failure.”).
community designs. For example, the relatively compact settlements envisioned by the Plat of Zion enhanced community life. As Smith explained:

The farmer and his family, therefore, will enjoy all the advantages of schools, public lectures and other meetings. His home will no longer be isolated, and his family denied the benefits of society, which has been, and always will be, the great educator of the human race; but they will enjoy the same privileges of society, and can surround their homes with the same intellectual life, the same social refinement as will be found in the home of the merchant or banker or professional man.55

This somewhat urban design also served as an investment in Mormon settlers’ cultural and intellectual lives. It is no accident that even the earliest Mormon communities had cultural amenities that were anomalous for settlements deep within the American Frontier: theater, orchestras, bands, and, of course, the Tabernacle Choir.56 Additionally, Mormon society attempted to foster education and appreciation of literature, science, and the arts.57

The more compact community design helped spur civic involvement. While the church did not welcome aggressive political dissent, it did encourage the settlers to invest by mobilizing to better the community. Young encouraged settlers to pursue avenues to improve the Mormon settlements as they saw fit:

Let every man and woman be industrious, prudent, and economical in their acts and feelings, and while gathering to themselves, let each one strive to identify his or her interests of this community, with those of their neighbor and neighborhood, let them seek their happiness and welfare in that of all, and we will be blessed and prospered.58

And, settlers in fact did this in significant ways. For example, communities cooperated to improve their drinking water, create parks, and clean and light up streets.59 Community lobbying resulted in Salt Lake City creating parks and designating canyons as “bird sanctuaries sacred to the life and growth of birds of all species for all time.”60

Mormon urban design provided settlers some protection from harassment from those who might do them harm in the rugged Western Frontier. The Mormons’ primary concern related to attacks from Native Americans—who the Mormons often displaced with their settlement efforts; however, the design also

56 LINDA SILLITOE, WELCOMING THE WORLD: THE HISTORY OF SALT LAKE COUNTY 29-31 (1996); Galli, supra note 30, at 120.
59 ALEXANDER & ALLEN, supra note 57, at 174-75; Galli, supra note 30, at 125.
60 ALEXANDER & ALLEN, supra note 57, at 176.
shielded them any other hostile parties. Additionally, Mormons attempted to defend themselves by building forts within a day’s travel of each other. These investments in defense also facilitated travel and trade by providing Mormons a safe resting place after each day’s travel before nightfall.

To at least some extent, Mormon planning attempted to integrate land use planning with transportation planning. For example, the plat of Zion called for very wide streets for the time (132 feet) which helped accommodate transportation and delivery of produce and other items of commerce with very little hassle with horse-drawn carriages or the oxen carts often used in agrarian settlements because these streets were wide enough to allow for these carriages and carts to turn around without backing up. At a more global scale, as mentioned previously, the church established settlements to secure strategic advantage along trade routes, particularly along the Mormon Corridor. Finally, once the church saw that a transcontinental railroad was inevitable, it transferred its energies from the building of the Salt Lake Temple to assist in finishing the rail, which allowed future emigrants to come by train and would assist in transporting materials needed for the temple.

B. Cooperation and Interdependence

The vision of Zion promoted by church leaders required the cooperation and work of believers to build settlements, grow crops, and beautify Zion. In the arid West, church members banded together. Whether one were to compare them to an army of ants, as Wallace Stegner did, a military, or bees in a hive, as on Utah State seal, the point is the same: Mormons worked together to bring about their shared vision. In a time where the West is often symbolized by the independent cowboy, the hard-nosed land speculator, or the rugged gold miner, the symbols evoked to describe Mormons stand in stark contrast.

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61 Nelson, supra note 9, at 44.
62 Id.
63 Arrington, supra note 18, at 45.
64 See Part II.A.2.
65 Arrington, supra note 18, at 236.
66 Some have gone so far as to claim that mere survival of Mormons during their first years in the desert came through “central planning and collective labor.” Id. at 45.
68 Arrington, supra note 18, at 89.
69 When Utah was granted statehood at the close of the nineteenth century, the symbol chosen for the seal of the state included a beehive accompanied by the single word: “industry.” See Public Pioneer, Utah Symbols – State Motto and Emblem, http://pioneer.utah.gov/utah_on_the_web/utah_symbols/motto.html (last visited Apr. 9, 2008).
70 I am not suggesting that Mormons were unique in cooperating, just that this was an ideal of the culture. Cooperation was often necessary for survival of Mormons and their counterparts particularly in the West. Friedman, supra note 8, at 370 (“The land encouraged courage; yet curiously it also fostered dependency. . . . What traveled west,
Even before the Mormon settlers set foot in the Great Basin, they had been galvanized into a cohesive, cooperative community. The teaching of church leaders sought to inspire cooperation of believers. Joseph Smith taught them that the idea of Zion required believers to be “of one heart and one mind,” in what he purported to be revelation, Smith told the settlers that God in fact commanded cooperation: “[B]e one; and if you are not one, ye are not [God’s].”

Certainly, the shared experience before coming to the West had also created social capital and mutual appreciation. In addition to the settlements that they had banded together to build in Ohio, Missouri, and Illinois, they had suffered together at the hands of mobs in each of these places, and employed systematic cooperation along the trek from Illinois to Utah, including building a temporary settlement for refuge during the winter of 1846-47.

On the cusp of the first Mormon settlers ending their migration to the Rocky Mountains, these settlers cooperated to erect the foundation of needed infrastructure, such as canals, roads, fences, public buildings, and later mills and the infrastructure needed for industry. Cooperation did not end once the foundations of a settlement were laid. Mormons commonly practiced collective farming and other shared labor; they often were involved in the on-going building of public or church (which for the settlers were one and the same) infrastructure. For example, it took sacrifice from nearly every Mormon in the area and more than forty years to complete the Salt Lake City temple. Moreover, Mormon participation in the market often came in the form of cooperatives and shared labor.

Additionally, while new settlers represented a large portion of the population of new settlements, some settlers were asked by church leaders to uproot more important that form, was general legal culture, the general ways of thinking about the law. This included a notion quite the antithesis of primitive democracy. The notion was: organize or die; and it was the theme of American law, East and West, in the last half of the 19th century, in every arena of life.”

See generally STEGNER, supra note 67. In general terms, social scientists have well documented that cooperation is much easier to achieve in tight-knit and/or homogeneous societies. See ARUN AGRAWAL, GREENER PASTURES: POLITICS, MARKETS, AND COMMUNITY AMONG A MIGRANT PASTORAL PEOPLE 59-60 (1999); JEAN-MARIE BALAND & JEAN-PHILIPPE PLATTEAU, HALTING DEGRADATION OF NATURAL RESOURCES: IS THERE A ROLE FOR RURAL COMMUNITIES?, 302 (1996); ROBERT WADE, VILLAGE REPUBLICS: ECONOMIC CONDITIONS FOR COLLECTIVE ACTION IN SOUTH INDIA 189-90 (1988); RUSSELL HARDIN, COLLECTIVE ACTION 38-49 (1982).

ARRINGTON, supra note 18, at 54-55.


See ARRINGTON, supra note 18, at 86 and accompanying text.

HAMILTON, supra note 26, at 30 (stating that “[a]s new companies of Mormon pioneers entered Salt Lake City, Young often sent them to other settlements or to establish new ones.”).
repeatedly from stable settlements and help with the establishment of new settlements.\textsuperscript{78} The church tried to match the challenges facing each new settlement with people that had the necessary skills.\textsuperscript{79} While not all such requests were joyously received, most members did as they were asked, even when it proved difficult. Consider a couple of colorful examples:

John D. Lee, called to leave Salt Lake Valley with the Iron Mission, told Brigham Young: “The whole idea is repugnant to me! If I could pay as much as two thousand dollars in money or goods, if I could furnish and fit out a family to take my place, I would rather do it than go.” But he went, and he moved many times thereafter. Elijah Averett told how his father came home after a hard day in the fields to learn that he had been called to Utah’s “Dixie.” He dropped in his chair and said: “I’ll be damned if I’ll go!” After sitting a few minutes with his head in hands, he stood up, stretched, and said, “Well, if we are going to Dixie, we had better start to get ready.”\textsuperscript{80}

The vision of the church, accompanied by the cooperation of its members, produced what seems aptly labeled “the most impressive colonizing program in the history of the American West.”\textsuperscript{81}

The environment of the Great Basin augmented the Mormons’ desire to cooperate by making it almost a necessity of survival of the community. For example, Mormons relied on and encouraged cooperative farming, which helped maximize the use of water, often a very scarce resource.\textsuperscript{82} “The survival and growth of each community obviously depended upon the maximum use of available land and water resources, and therefore speculative withholding of land from use was prohibited by common consent.”\textsuperscript{83} The common pasturing and farms encouraged community investment in infrastructure, particularly in common fences.\textsuperscript{84} These villages “had been experimented with in Ohio, Missouri, and Illinois, and it proved to be particularly well adapted to the arid Great Basin.”\textsuperscript{85}

\textsuperscript{78} See POLL ET AL., supra note 32, at 136.
\textsuperscript{79} Id. at 135 (detailing the exactness used to determine the colonizers that would be asked to grow cotton— in the desert!—a task that was thought to require a population with a diverse set of skills).
\textsuperscript{80} Id. at 136.
\textsuperscript{81} Id. at 133.
\textsuperscript{82} While the Mormons did much to change the face of natural resources law, particularly water law, it could be argued that the landscape itself demanded such changes. See, e.g., FRIEDMAN, supra note 8, at 365.
\textsuperscript{83} ARRINGTON, supra note 18, at 90.
\textsuperscript{84} See NELSON, supra note 9, at 181.
\textsuperscript{85} Id. at 44.
C. Stewardship

Nineteenth-century Mormons believed that everything they had represented a gift of God and that they should treat everything that they had as a stewardship from God. This meant that Mormons believed God would hold them accountable for how they used that which God had given to them. Smith preached to his followers that God had “built the earth” and that “all things therein” belong to God. However, God had given His children the Earth and on this basis God would “make every man accountable, as a steward over earthly blessings.” Mormons conceived their stewardships in very broad terms, including one’s time, talents, relations, property, and influence. This article, however, examines only those elements of stewardship most relevant to Mormon community-building: stewardships over private property and over community property.

1. Individual Stewardships

Typically, when Mormon settlers arrived in the West, they had few—if any—possessions of much worth. Generally speaking, they had left all that their wagons could not carry, many had devoted much of what they had to building past settlements and temples, and some had watched what little they had be destroyed or taken by mobs in Missouri and Illinois. Because they did not arrive with much, the vast majority of an individual’s stewardship over physical property initially came in the form of land, something abundant in the frontier of the Interior West. Land was commonly “given” from the church to its members. According to Mormon custom, each piece of property was treated as a “piece of Zion.”

Despite the poverty commonly found among these settlers, the idea of stewardship was not taken lightly. For example, the church asked each member to deed all of his or her property, both real and personal, to the bishop of the church. The bishop would then grant an “inheritance” or “stewardship” to every family out of the properties so received, the amount depending on the wants and the needs of the family, as determined jointly by the bishop and the prospective steward. It was expected that in some cases the items deeded to the bishop would exceed the stewardships returned to the church members. Out of the “surplus,” the bishop would grant stewardships to the poorer and younger members of the church. This treatment of possessions made the line between spiritual and temporal even thinner.

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86 DOCTRINE AND COVENANTS, supra note 12, at 104:14.
87 Id. at 104:13.
88 See POLL ET AL., supra note 32, at 93.
89 LUCAS & WOODWORTH, supra note 45, at 92.
90 HAMILTON, supra note 26, at 23.
91 Id. at 15. See also DOCTRINE AND COVENANTS, supra note 12, at 42:32 ("And it shall come to pass, that after they are laid before the bishop of my church, and after that he has received these testimonies concerning the consecration of the properties of my church,
While all goods were deemed God's, land—being one of few abundant resources—was particularly important. The federal government did not begin to distribute land to Mormon settlers until years after the arrival of the Mormons to the Salt Lake Valley. This did not, however, stop the church from attempting to distribute the land itself. The day after Young came to the Salt Lake Valley, he announced: "No man should buy or sell land. Every man should have his land measured off to him for city and farming purposes, what he could till. He might till it as he pleased, but he should be industrious and take care of it." The church distribution of land basically became de facto law wherever Mormon settlements sprung up for the next several decades. In significant ways, the church members' compliance with the church's assertion over real property gave the church a great leg up in its efforts to build settlements as it saw fit.

As the church distributed land, it attempted to balance individual preferences with what was couched as Zion's welfare in several ways. First, land speculation was discouraged, and at times not permitted as a per se violation of one's stewardship: "[N]o man should hold more land than he could cultivate; and if a man would not till his land, it should be taken from him." Land speculation had proved problematic in other Mormon settlements in the east, particularly Ohio, where those who arrived first attempted to profit at the expense of settlers who arrived subsequently.

Second, land was generally distributed in a manner that put a premium on equity. Often church leaders assigned parcels by drawing of lots. Properties were often reserved for those who would subsequently arrive, allowing them to enter "the community on the same terms as the original settlers." Third, the church would redistribute land if it was not put to productive use. This redistribution largely relied on an honor system (not infrequently pushed that they cannot be taken from the church, agreeable to my commandments, every man shall be made accountable unto me, a steward over his own property, or that which he has received by consecration, as much as is sufficient for himself and family.").

ARRINGTON, supra note 18, at 5 ("Preaching and production, work and worship, contemplation and cultivation—all were indispensable in the realization of the Kingdom.").

FIRMAGE & MANGRUM, supra note 8, at 294.

Id. at 295-94. This notion was applied to other resources. While the Mormon Church's influence over resource distribution has not been in force for more than a century, remnants of this policy are still seen in western water law. One of the bedrock principles of prior appropriations system is this notion of use it or lose it. See, e.g., ARIZ. REV. STAT. ANN. § 45-141(c) (2006) ("[W]hen the owner of a right to the use of water ceases or fails to use the water appropriated for five successive years, the right to the use shall cease..."); IDAHO CODE ANN. § 42-104 (2006) ("[W]hen the appropriator or his successor in interest ceases to use it for such purpose, the right ceases."); Steven J. Shupe, Waste in Western Water Law: A Blueprint for Change, 61 OR. L. REV. 483, 499 (1982).

See FIRMAGE & MANGRUM, supra note 8, at 294.

See ARRINGTON, supra note 18, at 45.

Id. at 90.
to its outer limits), where settlers returned unused land to the church. At a high-water mark of church power, some church leaders even confiscated land to redistribute.

2. Public Stewardships

Individual actions were also seen affecting a broader stewardship. Young counseled, "Keep your valley pure, keep your towns as pure as you can, keep your hearts pure[]." To the extent that the church had power over natural resources (great when the Mormons arrived in 1847 and waning as the nineteenth century progressed), the church sought to treat these as part of the members' stewardships. Even before the settlers arrived in the Salt Lake Valley, Young tried to teach his followers "not to kill... buffalo or other game until the meat was needed." Similarly, Smith had convinced followers not to kill snakes found within a campsite. Just as the church had attempted to control the distribution of land in a largely equitable fashion, the same is true of both allocation of timber and surface water: "There shall be no private ownership of the streams that come out of the canyons, nor the timber that grows on the hills. These belong to the people: all the people."

The church often allocated irrigation rights to groups of settlers, which were overseen by bishops to ensure the equitable distribution of water; in fact, ditches often served as demarcation of congregation boundaries. The Utah Territorial Legislature, at the time largely an arm of the church, passed a regulation prohibiting the harvest of green timber. To some extent, the church even advocated resource protection: "The soil, the air, the water are all pure and healthy. Do not suffer them to become polluted with wickedness." Church leaders were clear in staking out the position that "[i]t is not our privilege to waste the Lord's substance."

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98 ARRINGTON ET AL., supra note 36, at 35.
99 As Mormon settlements became more interconnected with the United States, due largely to the completion of a transcontinental railroad, much of the church's power to curb speculation and redistribute land ended, and even the symbolic deeding of property sputtered out and eventually ceased. ARRINGTON ET AL., supra note 36, at 153.
100 JOURNAL OF DISCOURSES, supra note 19, at 8:80.
102 See ROBERTS, supra note 56, at 2:71-72.
103 See Part II.
104 See ROBERTS, supra note 56, at 3:269.
105 ARRINGTON ET AL., supra note 36, at 51.
107 JOURNAL OF DISCOURSES, supra note 19, at 8:79.
108 Id. at 11:136.
The efforts in building the community reflected an acknowledgement of the importance of improving society and looking out for the interests of those who would inhabit these communities in the future. This explains the emphasis on building societal, cultural and educational amenities in budding Mormon settlements.\textsuperscript{109} This ethic is seen in the common practice of leaving vacant lots so that newcomers could enter with the same benefit as the original settlers; the same can be said of the discouragement of land speculation.\textsuperscript{110} The sacrifices of the community in building community and religious infrastructure while themselves living in the most modest of circumstances speaks volumes not only of the power of church leaders but also of the importance settlers placed on seeing the community vision of Zion come about.

\textit{D. Integration and Care of the Poor}

Nineteenth-century Mormon settlers believed that in the ideal of Zion, poverty would disappear.\textsuperscript{111} While the Mormons did not abound with wealth, they used their modest means to fight poverty primarily in two ways. First, the poor benefited from community welfare programs. When a church member had wealth in excess of his or her needs, this was sometimes redistributed to the poor.\textsuperscript{112} Under the law of stewardship, if a settler used more property than needed, it was essentially thought of as stealing from God and the poor.\textsuperscript{113} The Mormons also set up a revolving loan program called the “Perpetual Emigration Fund” that gave converts to the church, particularly those in Europe, money necessary to migrate to Zion. This program assisted tens of thousands of immigrants during the nineteenth century.\textsuperscript{114} Second, the church tried to assist the poor by integrating them into the larger Mormon society. While both types of assistance certainly benefited the poor, this article focuses on the latter.

For nineteenth-century Mormons, assisting the poor at least in part meant integrating the poor into society and providing inroads that would allow for meaningful participation in the economy.\textsuperscript{115} The poorest of the poor were often those who had most recently arrived. This was particularly the case once the church made the Perpetual Emigration Fund available, making the migration possible to those who before could not make it on their own means.\textsuperscript{116} Through community building and land use policies, the community integrated the poor into society.

\textsuperscript{109} See supra notes 56-60 & 74-75 and accompanying text.
\textsuperscript{110} See supra notes 93-99 and accompanying text.
\textsuperscript{111} \textit{PEARL OF GREAT PRICE, supra} note 71, at Moses 7:18.
\textsuperscript{112} Excess was used “to administer to those who have not” and for “building houses of worship.” \textit{DOCTRINE AND COVENANTS, supra} note 12, 42:33, 35.
\textsuperscript{113} See \textit{Nibley, supra} note 11, at 50.
\textsuperscript{114} See \textit{Arrington, supra} note 18, at 79.
\textsuperscript{115} See \textit{Lucas & Woodworth, supra} note 45, at 93.
\textsuperscript{116} See \textit{Arrington, supra} note 18, at 99-108.
One of the key strategies used by the Mormons was to distribute the newest emigrants widely throughout society. This was often done by church leaders identifying a broad range of existing settlements where newcomers would settle. As mentioned earlier, when settlements were established, some lots were left vacant to allow new settlers to move into a community on equal footing with prior settlers in that community. In this way, entire settlements would share the pain of integrating newcomers. A second strategy was to incorporate new settlers into a party founding a new settlement. These parties included people with a broad range of skills, which the church had deemed necessary to fulfill its proscribed purpose to found a particular settlement. As mentioned, in each of these settlements the Plat of Zion was used to determine the community’s spatial layout, and land parcels were distributed most frequently on a lottery system. Thus, there were really no slums in nineteenth-century Mormon settlements. People were mixed in society in a way that allowed most people the opportunity to build up the skills necessary to participate fairly self-sufficiently.

II. FROM THEOCRATS TO SUBURBANITES

Not surprisingly, from the time the Mormons established settlements in the Interior West until today, the places settled by the Mormons have changed remarkably. What once were isolated enclaves well within the American Frontier are now suburban/metropolitan communities interconnected with the country’s interstate highways and railroads. Whereas the federal government was notably absent in 1847, over time it asserted more control over the region. For example, in 1869, the federal government opened a land office and began issuing settlers rights to land, which even among its members undermined the Mormon Church’s legitimacy to control property allocation and strictly oversee land use. Furthermore, the coming of the railroads made the Interior West much more accessible, less isolated, and more religiously diverse. State and local governments and society as a whole became increasingly less reliant on—and oftentimes less welcoming of— influence of the Mormon Church.

As the church’s influence waned in the nineteenth century, the church also faced significant problems as an institution. Of course, even from the beginning, the challenge proved immense. For example, getting Mormons to stop patronizing people outside of the church proved difficult. However, as more and more settlers arrived who had no connection with the Mormon Church, it became increasingly untenable to run government as a theocracy.

Additionally, the Mormon Church came under significant pressure due to its practice of polygamy. Most of this came from pressure from the federal government. The metaphorical shot across the bow occurred in 1856, when the

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117 See id. at 90; see also ARRINGTON ET AL., supra note 36, at 46.
118 See JOURNAL OF DISCOURSES, supra note 19, at 18:353.
119 See ARRINGTON, supra note 18, at 45.
120 See supra notes 41-44 and accompanying text.
Republican Party included in its platform an attack on polygamy, grouping it with slavery as one of the “twin relics of barbarism.” The high water mark of this pressure came in 1887, when Congress passed the Edmonds-Tucker Act banning polygamy. With the passage of this Act, church leaders faced threats of prosecution and even actual imprisonments. In attempting to deal with this pressure, the church took on significant political and legal battles, which entailed significant financial commitments. With the church’s ability to control Mormon members waning, some of its investments in infrastructure began to sour somewhat. With the church on the verge of bankruptcy and Utah’s statehood contingent on Mormon compliance with the Edmonds-Tucker Act, the church officially condemned the practice of polygamy.

With the Mormon Church’s influence in decline, much of the control the church once exerted over community building fell out of the hands of church leaders and back into the invisible hand of the private market. Slowly, this laissez faire approach was slowly supplemented with limited local government regulation.

At the close of the nineteenth century, Mormon Church leaders witnessed migration from the established villages. While the allure of land for the taking proved too much for the church to fight, it did not stop the church from trying. Wilford Woodruff begged church members to continue to retain settlement patterns based on the Plat of Zion:

> We hear that a good many of our young men are leaving this valley ... to secure for themselves large tracts of land ... in places remote from their own homes. ... We have been called to gather, not to scatter; we have been called by the Lord to build up Zion[,] ... not to spread out all over creation and become so thin and weak that there is no strength or power with us. ...

> We should concentrate ourselves and combine our efforts, and not look to the ends of the earth and see how much is going to waste that we are missing. ...

> [T]here are a great many people who seem to have the idea in earnest, and because there are large tracts of land which they hear in remote valleys they are anxious to strike out and take possession for fear that somebody else will get them. This is not wise. Let us be governed by wisdom in our movements. That is the way to build up Zion. ... We can

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121 RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 86 (2d ed. 1989).
123 See THOMAS G. ALEXANDER, THINGS IN HEAVEN AND EARTH: THE LIFE AND TIMES OF WILFORD WOODRUFF, A MORMON PROPHET 261-65 (1991); see also ARRINGTON, supra note 18, at 378.
124 ARRINGTON, supra note 18, at 384-86.
125 DOCTRINE AND COVENANTS, supra note 12, at Declaration 1.
grow fast enough right along here in these valleys which are already occupied, by making use of the facilities within our reach.\textsuperscript{126}

In large measure, these pleas went unanswered: many people sold their “land of inheritance.” As time rolled on, the land use patterns established by the church began to dissolve as suburbs began cropping up around these settlements: little distinguished this first phase of suburbanization from the land use patterns commonly found encircling many older urban cores.\textsuperscript{127} In this way, these Mormon settlements became increasingly similar to communities all over the country: dominated primarily by sprawling growth and built with very little consideration of how this impacted land use at the regional level.

The Mormon Church, in turn, came to occupy a much more traditional role as a religious institution. It only rarely directly entered into the public debate and even then, carefully and generally only when political issues directly affected its evangelic mission, its property holdings, or its core political interests.\textsuperscript{128}

The coming of the intercontinental railroad was followed by the development of rail along the Wasatch Front.\textsuperscript{129} A regional rail spur from Salt Lake City to Ogden was completed by the Utah Central Railroad in 1870, and the last spike had engraved on it the words inscribed on nearly every significant church edifice: “Holiness to the Lord.”\textsuperscript{130} By 1920, the Wasatch Front had regional rail that extended as far north as Ogden and as far south as Payson (separated by approximately one hundred miles), Salt Lake City had 150 miles of track, and Logan, Provo, and Ogden had smaller streetcar systems.\textsuperscript{131} Like many other places around the country at this time, the development of rail facilitated the development of “street car suburbs,” increasing the movement outside of historical settlements.\textsuperscript{132} During the 1920s, “trackless trolleys” and gasoline-powered buses came on to the scene and proved enormously successful.\textsuperscript{133} By the end of the 1920s, many dirt roads were replaced with asphalt to accommodate buses and automobile traffic.\textsuperscript{134} This in turn pushed new development further and

\textsuperscript{126} \textit{COLLECTED DISCOURSES} 246-47 (George Q. Cannon ed. 1987).
\textsuperscript{127} \textit{See} JOHN S. McCORMICK, THE GATHERING PLACE: AN ILLUSTRATED HISTORY OF SALT LAKE CITY 93 (2000).
\textsuperscript{128} This is not to say that the Mormon Church abandoned the principles outlined above, but rather, that the church did not attempt to pursue these values by building and maintaining settlements.
\textsuperscript{129} The Wasatch Front includes Box Elder, Davis, Juab, Morgan, Salt Lake, Summit, Tooele, Utah, Wasatch, and Weber counties.
\textsuperscript{130} ALEXANDER & ALLEN, \textit{supra} note 57, at 72.
\textsuperscript{131} McCORMICK, \textit{supra} note 128, at 92-93; Galli, \textit{supra} note 30, at 117-18; C. W. McCullough, \textit{The Passing of the Street Car}, \textit{24 UTAH HIST. Q.} 123 (1956).
\textsuperscript{132} For a classic discussion of the growth of streetcar suburbs, see SAM BASS WARNER, JR., \textit{STREETCAR SUBURBS: THE PROCESS OF GROWTH IN BOSTON}, 1870-1900 53 (2nd ed. 1978).
\textsuperscript{133} \textit{See} Galli, \textit{supra} note 30, at 117.
\textsuperscript{134} \textit{Id.}
further from the historic urban cores. Automobiles fully outmoded the trolley system: in 1941, Salt Lake City’s last trolley street car was decommissioned and the Wasatch Front’s regional rail system stopped operating.\textsuperscript{135} In the 1950s, construction commenced on two major interstates through the heart of the Wasatch Front, I-80 and I-15; as was the case all over the country, the interstate freeway system continued to fuel growth in the suburbs.\textsuperscript{136} Building roads and building suburbs fed off each other, each nudging the other on throughout the twentieth century.\textsuperscript{137}

During this period, suburbanization melded many Mormon settlements into each other. Additionally, new incorporated cities cropped up in order to allow citizens neighboring a development with a significant commercial tax base to reap the benefit of having such neighbors.\textsuperscript{138} As city boundaries began to seem more and more meaningless, it became increasingly difficult for local governments to govern local land use without neighboring jurisdictions posing a threat to undercut progress by pursuing contrary goals, or in some instances goals specifically designed to free ride off the sacrifices made by neighboring jurisdictions.\textsuperscript{139}

Additionally, as was common across the country, cities began using zoning power not only to segregate land uses (e.g., residential, commercial, and industrial) but also to segregate residential areas by factors highly correlated with income: lot sizes, barring multifamily units, and requiring particular amenities on housing units. Commonly, certain suburbs housed the affluent and other areas (particularly urban cores and inner ring suburbs) housed those with less means.\textsuperscript{140}

The consequence of all this was that as the twentieth century came to a close, growth patterns in the historic Mormon settlements in substantial part resembled

\textsuperscript{135} McCullough, supra note 131, at 123.
\textsuperscript{136} U.S. GEN. ACCOUNTING OFFICE, COMMUNITY DEVELOPMENT: EXTENT OF FEDERAL INFLUENCE ON “URBAN SPRAWL” IS UNCLEAR 41 (1999); PETER KATZ, THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY xii (1993).
\textsuperscript{137} See Robert Cervero, Road Expansion, Urban Growth, and Induced Travel: a Path Analysis, 69 J. AM. PLANNING ASSOC. 145 (2003) (discussing the mutually reinforcing feedback between roads and suburban development).
\textsuperscript{138} See Laura Hancock, S.L. County Debates Annexation Rules, DESERET NEWS, July 16, 2001, at B3 (discussing financial incentives for annexation); Phil Miller, Wall-to-Wall Cities Proposal in S.L. County Isn’t Dead, SALT LAKE TRIB., Mar. 9, 1999, at B2 (discussing problems posed to unincorporated areas due to annexation of those areas with high tax bases).
\textsuperscript{139} See Heather May, Wasatch Front Cities Spar Over Beck St. Open Space, SALT LAKE TRIB., Dec. 14, 2004, at C2 (discussing tension between conflicting visions of how to utilize land at municipalities’ shared boarder); Kristen Moulton, Farmington Residents Gather To Oppose Gravel Scoop Plan, SALT LAKE TRIB., Sept. 7, 2001, at C10 (exploring Farmington citizens’ resistance to a mining operation designed to facilitate a major highway proposal that would serve much of Davis County). For a more general discussion of free riding, see MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 27 (1965).
those across the United States. In 1997, the year that marked the sesquicentennial of the coming of the Mormons to the valley of the Great Salt Lake, then-Utah Governor Mike Leavitt stated:

This year marks the 150th anniversary of the first party of pioneers entering the Salt Lake Valley. On their second morning in the valley, ten settlers rode to the foot of a dome-shaped peak just behind where the Capitol is today. With field glasses they surveyed the valley. …

On Saturday last, I left the Capitol and hiked to that same peak, now known as Ensign Peak. One still sees the glimmering lake, and the streams that flow. Valleys, then barren, are now very much alive.

From that same peak, there now winds a black ribbon of asphalt from every direction, automobiles carrying people into a stream of vitality that now is the state of Utah. …

As I stood, gazing down into the Salt Lake Valley, I felt I had a clearer view of our greatest challenge and opportunity: growth. 

Growth does pose a significant challenge. Part of the problems Utah faces are the direct result of choices already made. Of course, the way future growth occurs will dramatically affect the area’s future economy and quality of life. The fact that many choices lay ahead underscores the importance of making thoughtful decisions rather allowing inertia to dictate the world we will inherit. The next Part examines the type of growth the Interior West might expect if it allows inertia to choose for it.

III. THE CHALLENGEPOSED BY URBAN SPRAWL

While the contention that sprawl growth is the dominant form of urban and suburban growth is not really in dispute, it is certainly fair to question whether or not this is a problem and if so, to what extent. This Part briefly discusses the dominant rationales for defending sprawl growth and the reasons that many treat sprawl as a serious environmental and social problem.

When viewing urban development at the micro level, sprawl might not look so bad. On one level, sprawl is nothing more than homeowners being lured to the

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141 JOHN H. FINDLAY, MAGIC LANDS: WESTERN CITYSCAPES AND AMERICAN CULTURE 1940 28-32 (1992) (referencing national trend in growth patterns similar to that described here for the Greater Wasatch).

outskirts of the urban fringe by the rural amenities. In fact, despite the prevalence of sprawl, Americans generally like their own neighborhoods. Additionally, zoned sprawl growth often excludes multifamily homes from many residential neighborhoods and often includes relatively large lot sizes, and, in fact, many people oppose mixing single-family homes and higher densities within their own neighborhoods. While these generalizations would not go unchallenged within the sprawl debate, certainly there is little doubt that at least on some level many Americans oppose living in or near higher density housing than that already present within their neighborhoods.

While certainly there is a substantial theme in the sprawl literature that sprawl is tacky or ugly, this does not explain the primary reason many oppose sprawl. Rather than aesthetics, the most substantial reasons relate to how sprawl affects the costs of public services, the environment, and society more generally.

In 1974, three federal government agencies released a report titled The Cost of Sprawl. The report detailed the effects of sprawl and found that “sprawl is the most expensive form of residential development in terms of economic costs, environmental costs, natural resource consumption, and many types of personal costs.” Since the release of that report, a rich body of literature has emerged that has attempted to verify and quantify many of the claims made in this report. Within this literature, several themes emerge regarding the costs of sprawl: sprawl increases the costs of government services and infrastructure; sprawl takes a toll on the environment; sprawl hurts the general public; and sprawl harms the poor. This Part addresses each of these themes in turn.

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143 This is something that has been recognized for a long time. See WARNER, supra note 132, at 53.

144 See NATIONAL ASSOCIATION OF HOME BUILDERS, SMART GROWTH: BUILDING BETTER PLACES TO LIVE, WORK AND PLAY 14 (2000), available at http://www.nahb.org/fileUpload_details.aspx?contentTypeID=7&contentID=192 (surveying 2,000 randomly selected households and finding that 89% of those responding said they were very or somewhat “satisfied with the quality of life in [their] own neighborhoods” and that 85% of respondents preferred single-family detached houses to other housing options).

145 See id. at 15 (finding that survey respondents opposed to having single-family homes in higher densities—77%, townhouses—54%, and apartments—78%—built in their own neighborhoods.).

146 See, e.g., WILLIAM FULTON & PETER CALTHORPE, THE REGIONAL CITY 126 (2001) (“When average citizens are allowed to understand the aggregate effects of differing forms of development, they have a dramatically different reaction to the politics of growth than when confronting it project by project.”).


149 Id. at 7.
A. Sprawl and Meeting the Costs of Government

Sprawl development increases the cost of government in two ways. First, as distances between developments increase, a host of public services and infrastructure becomes more expensive: more street between houses and business; more utility wires between customers; more ground for police, fire, and trash collectors to cover. Another reason that sprawl is expensive for governments is because as people abandon the urban core and inner ring suburbs, they leave behind public investments that often then go under-utilized while at the same time increasing demand for new infrastructure on the urban fringe: more streets, more utilities, more schools, more recreational facilities, more libraries, and more government buildings.

B. Sprawl Takes a Toll on the Environment

The literature has illustrated that sprawl negatively impacts the environment. Some of these costs flow from the tendency of sprawl to increase reliance on automobiles as the primary mode of transportation along with the spread-out distances between travel destinations. Obviously, more driving and gasoline consumption leads to more air pollutants, including the greenhouse gases that contribute to global climate change. Using vehicles as the primary form of transportation means more roads, parking lots, and other impervious surfaces, all of which add to urban storm water runoff, a major contributor to water pollution. Automobiles are also a major contributor to noise pollution, which harms people and animals, and are responsible for many wildlife mortalities. Beyond those impacts related to automobiles, sprawl also consumes much more

land than more densely designed areas, which eats away at plant and animal habitat and fragments undeveloped lands.\textsuperscript{156}

\textbf{C. Sprawl Hurts the General Public}

Sprawl development affects people in important and at times unexpected ways. For example, as compared to denser development patterns, sprawl increases commute times.\textsuperscript{157} Increases in traffic and time on the road lead to somewhat proportional increases in traffic accidents, and increases incidents of vehicle collisions into pedestrians.\textsuperscript{158} Traffic and the distances between developments in sprawl can make it more difficult for fire fighters, emergency workers, and police officers to respond effectively.\textsuperscript{159}

\textbf{D. Sprawl Harms the Poor}

Sprawl growth—particularly with the aid of exclusionary zoning—can segregate the poor into enclaves, which only adds to social problems and the barriers of getting out of poverty.\textsuperscript{160} Additionally, the lure of the suburbs can cause mass migration from the urban core and inner-ring suburbs. However, due to a lack of resources, the poor are often left behind.\textsuperscript{161} Isolating the poor can create pressure for businesses to relocate to areas with richer residents (i.e., potential customers) and fewer social problems. Potentially, this may create a domino effect that leads to increased crime, thus reinforcing this negative trend.\textsuperscript{162} Furthermore, flight can create a spatial mismatch between the poor and viable employment opportunities.\textsuperscript{163} Once an area begins to decline, the housing market often reinforces the decline because sinking housing prices lure more poor people to declining areas.\textsuperscript{164}

\textbf{IV. PRINCIPLES GOVERNING SPRAWL}

It is apparent that time has resulted in significant changes for the greater Wasatch Front. The politics, social structure, and economics of society have

\textsuperscript{157} See ANTHONY DOWNS, STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION 79-81 (1992); ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS, 27 (1999).
\textsuperscript{158} See generally BRIAN A. COHEN, ET AL., MEAN STREETS (1997).
\textsuperscript{159} See Schmidt, supra note 155, at 274-79.
\textsuperscript{161} See ORFIELD, supra note 13, at 15-38.
\textsuperscript{162} See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 276 (1985); Mann, supra note 156, at 1376-77.
\textsuperscript{163} See ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA 45-59 (1994); ORFIELD, supra note 13, at 27-28; Owen Fiss, What Should be Done for Those Who Have Been Left Behind, 27 BOSTON REV. 4-9 (Summer 2000), available at http://bostonreview.net/BR25.3/issue.pdf.
\textsuperscript{164} See DOWNS, supra note 163, at 60-94.
shifted broadly. Given all the change that has occurred over the past century along
the Wasatch front, it is fair to ask, what values govern today’s planning efforts?

This Part attempts to answer that question by contrasting today’s values with
those of the nineteenth-century Mormons. While not the only sort of growth, sprawl still represents the current predominant land use pattern in most of the
towns and cities originally settled by the Mormons. Given the continuing
prevalence of sprawl, this Part focuses particularly on sprawl growth as the
relevant baseline for comparison, and where possible, focuses the discussion with
specific references to the Wasatch Front, the home of those first communities
founded by the Mormons in the Interior West.

A. Nearsighted Vision

A decade ago, Utah celebrated the sesquicentennial of the first Mormon
settlers arriving to the state. As part of the attention focused on that event, then-
Governor Mike Leavitt announced the State intended to build a highway that
would traverse more than one hundred miles. He framed this as a “big picture,
long term proposal.” After giving a nod to the contribution of the Mormon
settlers, he then added that “quality of life is our heritage in Utah, and it must also
be our ‘legacy.’” As the proposal materialized, many organizations and
individuals opposed the project, primarily based on the premise that the highway
would actually detract from the region’s quality of life. This opposition did not
subside as the proposal progressed. Ultimately, the project proposal found its way
to court. The federal judge that first heard the matter seemed to agree that
transportation planners could have taken a broader view approach: “Some
plaintiffs seek a broader vision from the decision makers and, indeed, a broader
overlook of the whole geographic area may have been wise. Without vision, the
people perish.” While the Tenth Circuit eventually remanded the decision to
build the highway to the state department of transportation, and while the state
eventually settled with the plaintiffs and built a much more environmental
sensitive road than the one proposed, the fact that the state considered building
a highway in an environmentally sensitive area as a “bold vision” to address the

165 Press release, Governor Mike Leavitt, State of Utah, Governor announces Legacy
Project (June 17, 1996) (on file with author).
166 Id.
167 Brigham Daniels, A Legacy of Conflict: Utah's Growth and the Legacy Highway,
168 Utahns for Better Transp. v. United States Dep’t of Transp., 180 F. Supp. 2d
1286, 1292 (D. Utah 2001).
169 See Utahns for Better Transp. v. United States Dep’t of Transp., 305 F.3d 1152
(10th Cir. 2002).
170 Robert W. Adler, In Defense of NEPA: The Case of the Legacy Parkway, 26 J.
challenges of growth is endemic of the lack of vision that often accompanies planning efforts in the Interior West.

Perhaps in part because big picture planning is often seen as a political can of worms, planning along the Greater Wasatch occurs in an ineffective—or, at times, even dysfunctional—manner. The major challenge is that growth often occurs without any meaningful regional recognition of tradeoffs and often without any coherent vision. For example, very rarely do planning efforts recognize that the Greater Wasatch, despite its varied geographic features, is at its heart one landscape, and its people are part of one large community. Planning is piecemealed into many forums (i.e., federal and state agencies, counties, and municipalities) and is often segregated even further by treating geographic elements and societal uses as distinct (i.e., land use, air quality, water quality, wetlands, wildlife, recreation, and transportation). A disturbing theme emerges from the reams of planning documents: neighboring and overlapping government agencies often charge ahead without having to consider the big picture or only doing so in a cursory way. This type of planning has often proven ineffective along the Greater Wasatch, just as it has led to problems elsewhere where such practices are commonplace:

The problems of open space preservation, affordable housing, highway congestion, air quality, and infrastructure costs are treated independently ... as if there were no linkages. Policy makers have persisted in unsuccessfully treating only the symptoms of these integrated problems rather than addressing the development patterns at their root.  

Even worse, failing to consider the regional picture has often resulted in agencies undercutting each other. Consider the example of open space preservation in Park City. Park City has adopted stringent regulations for the development of hillsides, particularly along slope lines. However, neighboring jurisdictions have no such regulations. Summit County, being one of these, has allowed hillside development, essentially reducing and even free riding on the value derived from Park City’s regulation. Similar examples abound: Salt Lake City is pursuing a more walkable community while other municipalities build sprawl growth that make their residents more auto-dependent, including when commuting to work—often to Salt Lake City; the Utah Transit Authority has

172 Karl Cates, Resort Area Growing Itself to Death, SALT LAKE TRIB., Feb. 15, 2000, at B1 (describing Summit County’s growth and its associated problems for it and its neighbors); Jim Woolf, Park City Looking to the Future, SALT LAKE TRIB., Mar. 12, 2002, at C1 (referring to Park City’s undeveloped area as a “moat” from development of Summit County’s Snyderville Basin).
173 A former mayor of Salt Lake City ended up suing over this very issue, framed as a violation of NEPA. See Utahns for Better Transp. v. United States Dep’t of Transp., 305 F.3d 1152 at 1175.
worked diligently to increase ridership, but with more and more people living in sprawl development, it gets increasingly difficult to effectively serve large portions of the population.\footnote{174}{See generally Utah Transit Authority, Planning for Transit (2002) (encouraging municipalities to plan ahead for transit due to the difficulty of retrofitting communities to accommodate transit and the challenge of providing services for land use patterns characterized by large lots and segregated uses).} Salt Lake County used taxpayer funds to encourage development of the Fort Union Shopping Center to increase its tax base,\footnote{175}{Tony Semerad, S.L. County Attaches Strings to Fort Union Plan, Salt Lake Trib., Apr. 27, 1993, at B4.} and the City of Midvale later annexed this development to capture the same tax base;\footnote{176}{Joe Baird, Shortfall May Trigger New S.L. County Tax Hike, Salt Lake Trib., Sept. 12, 1999, at C1.} state wildlife managers attempt to manage wildlife populations by regulating hunting only to find that local land use and transportation policy has proven a more significant threat.\footnote{177}{See Donna Kemp Spangler, Oh Deer! Wild Woes Increasing, Deseret News, Apr. 19, 2002, at A1 (detailing conflicts between suburban growth and deer populations); Tom Wharton, DWR Seeks New Revenue Sources for Wildlife Funding, Salt Lake Trib., Jan. 4, 2000, at C3 (stating urban sprawl and other development posing permanent threat to much land and water critical to wildlife).} These scenarios are not unique; rather, they reflect the problem of agencies that have overlapping and often competing jurisdictions. Rather than grappling with the difficulties of the challenges we face, too often we deal with problems with blinders on and give detailed attention to particular trees while ignoring the proverbial forest.

Another problem associated with piecemealing is that some issues are not adequately addressed in any forum. Instead of an entity consciously making a policy, neglect foreordains a particular solution. For example, very little is done to direct the population to conserve water. Utah, one of the driest states in the Union, has traditionally had one of the lowest water rates due to subsidies.\footnote{178}{The Way We Tax, Governing Mag. (Feb. 2003) at 90 (quoting Lynne Ward, State of Utah Budget Director, “We’re about the second driest state in the nation. But we also have the lowest water rates.”).} The result is that water districts often see consumption of water rising at a rate that puts society on a crash course for a water crisis. The reoccurring response is that such consumption requires more water development. The failure of planning that leads to a mandated solution is all too common across many policy areas along the Greater Wasatch. Too often, there is very little—if any—accounting for the regional or long-term costs and benefits of the way that growth occurs. To the extent that anything is done at all, it comes in the form of treating the symptoms related to failing to plan.
A common mantra in Utah politics dealing with growth is “local control, regional coordination.” While in principle this seems like a workable solution, very rarely has this approach proved adequate. Rather, what has happened is that the design of our built landscape has been almost entirely controlled by the whims of the market with little thought to what sort of community these discrete development choices will produce. While it is hard to imagine a system whereby the use and nature of each developed parcel is determined by a central authority, as was the case for the Mormon settlers, a system that tries to iron out some of the collective action problems through creating modest regulations seems workable, and indeed desirable.

As mentioned previously, sprawl has various costs, but it is important to recognize that these costs are not evenly distributed. Perhaps the most apparent cost for the suburbanite is the development of open space and seemingly perpetual traffic problems. On the other hand, the poor feel the pinch most acutely when it comes to urban decline and concentrated poverty. Given that sprawl impacts different groups differently, it creates an interesting challenge when it comes to promoting cooperation. So, for example, cooperation may leave society better off, but those living comfortably in the suburbs may not see a pressing need to make sacrifices. Not surprising, because local governments make most of the land use decisions, these decisions often take the tack that serves local interests regardless of whether it proves problematic in the bigger picture.

C. Lack of Accountability for Growth

Unlike the nineteenth-century Mormon planning efforts, developments today seem to crop up without reference to a stewardship or, as suggested above, even how the larger community will be impacted. The public sphere has diminished significantly, and seemingly individual preference is paramount. For example, whereas at one time open space was preserved publicly (e.g., public parks or community farms), now for many people the need for open space is met through fenced in backyards. While there are some notable exceptions to this, very often along the Greater Wasatch, very little attention is paid to how things look in the bigger picture. However, in many instances, not only do we find a system that

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179 Ironically, sprawl is built on an illusion that moving out in the suburbs will provide great access to undeveloped open space. This has been recognized as occurring for years. One study of nineteenth-century Boston observed this phenomenon then: “Each homeowner want[s] to believe that his new house [is] in the country, or at least near it, though in fact in ten to fifteen years his house and land [will] be lost in a great plan of new streets and homes.” WARNER, supra note 132, at 53.

180 Notable exceptions to this—discussed much more in Part V—are the Envision Utah process, the debate around several major transportation projects (i.e., the Legacy Highway and rail), and the private development of Daybreak.
puts narrower self interests above community interests, but also we often find that many would argue passionately that this is how things ought to be.

This does not mean a lack of land use regulation. To the contrary, very often we find communities with intricate zoning regulations. However, these regulations are not just used to prevent neighbors from creating foreseeable nuisances. Rather, by zoning out multifamily housing, less expensive building designs, and requiring certain lot sizes, these regulations often exacerbate auto-dependence and stratify neighborhoods. In this way, zoning becomes a contributor to sprawl. Critics of such land uses have labeled this type of zoning “planned sprawl.”\(^{181}\) In the context of the Greater Wasatch Front, this sort of growth has been found to increase air pollution, require more physical costs of infrastructure, gobble up more open space, and make it more difficult for the poor to acquire housing.\(^{182}\) What is striking is that all of these costs are incurred without ever really evaluating whether these trade-offs are worth it. Rather, we often fumble along and fail to account for the consequences of our actions and ignore any sense of stewardship.

### D. Exclusion and Concentration of the Poor

Whereas Mormon planning took pains to help the poor, current land use planning reflects exclusion and isolation of the poor. For example, the Salt Lake Valley is striking in this respect but not unusual for the area:

Today, the city resembles an amphitheatre designed for the benefit of the upper-middle class. Their homes are perched on the mountain sides, almost in concentric arcs and below them lie the homes of the less wealthy, and the core city. Further to the west are the poorest citizens.\(^{183}\)

Isolation and segregation of the poor is common in sprawl communities: blight is the opposite side of the coin of flight. The exodus from the urban core to the suburbs that is common in sprawl not only gobbles up open space on the urban fringe but also dramatically affects those areas being abandoned. As suburbia has grown by adding to its number all who can afford to leave urban areas (both

\(^{181}\) See RANDALL ARENDT ET AL., RURAL BY DESIGN 24 (American Planning Association 1994) ("As understood by most zoning practitioners, the ‘incompatibility’ issue has referred to uses whose external characteristics would conflict, such as industrial odors wafting into nearby residential areas. Unfortunately, the use of this narrow definition has resulted in a different type of incompatibility: conventional zoning and the livable, walkable community. Ironically, the uncritical adoption of conventional suburban zoning and subdivision regulations has created a virtual sea of standardized, sprawling development incompatible with other equally important aspects of traditional towns: their ambience, character, and vitality.").


\(^{183}\) ALEXANDER & ALLEN, supra note 57, at 6.
individuals and businesses), those people left behind in the abandoned urban areas are left living in more concentrated poverty. So, all too often, an outgrowth of competition among jurisdictions is exclusionary zoning of low income developments.

In a system that rewards communities that have a higher tax base, such as the system along the Greater Wasatch, every community has an incentive to exclude the poor. Two of the most important factors for municipalities weighing the value of a development include how the proposal affects the tax base and the need for public services. Low income housing does not add much to a tax base and is often thought of as a liability in terms of the public services required (particularly human services).

Blighted areas face many problems. Due to the concentration of poverty, agitated by the flight of the middle and upper classes, abandoned areas face the seemingly impossible task of dealing with an increased demand for social services while simultaneously suffering a decline in their tax base. Competition among areas also makes it increasingly difficult to repair the damage done: “We cannot revitalize inner cities without changing the patterns of growth at the periphery of metropolitan regions; it is a simple matter of the finite distribution of resources.” Segregating people by income level also makes it increasingly difficult for people who are most able to help to assist those with the most need. Urban out-migration “isolate[s] and concentrate[s] the most disadvantaged, and through this very isolation the concentration perpetuate[s] and magnifi[es] that disadvantage.”

While Salt Lake City along with other cities in the Interior West are in the process of revitalizing, Salt Lake City still has felt the squeeze of some of its major retail tenants relocating to the suburbs. In fact, many of the more urban areas along the Greater Wasatch show symptoms of flight: “neglect, blight, [and]
An obvious consequence of the relocation of business from the urban abandoned areas is that the low income residents left behind are isolated from employment and from social contacts that include a significant number of potential employers. This increases hurdles to securing employment and makes it much less likely that social contacts of those left behind will lead to gainful employment. Despite these barriers (and possibly because of them) some cities have invested funds, with some success, in revitalizing these areas. While these abandoned urban areas present problems, due to the potential tax base that can be realized in revitalizing a downtown area, it seems there will always be an incentive—and therefore hope—for revitalization.

The decline of inner ring suburbs seems to pose a more difficult problem. As the poor become more and more concentrated, what can be done to change the tide? Take the example of the largely residential neighborhood of Rose Park, located due west of downtown Salt Lake City, which seems to be such an area. While income growth of the area lags behind the state as a whole (five percent growth compared to thirty percent growth over the past ten years), its high school dropout rates are on the upswing and the number of people living below the poverty line in the area have doubled (up to nearly eighteen percent over the same time period). The community is facing some racial tensions as the minority populations have seen substantial growth. It is difficult to see how neighborhoods like Rose Park will revitalize. It also poses significant problems in determining where the poor will live if the neighborhood ever turns around. A long-term strategy that seeks to integrate the poor within the broader society seems much preferable to the roller coaster ride of boom/bust neighborhoods.

193 WILSON, supra note 140, at 42-45.
195 Stephen Speckman, The Main Event: Downtowns Making Strides, DESERET NEWS, Apr. 22, 2003, at A1. Salt Lake City currently is not only investing money, but also is reinforcing this with policies to promote walkability, smart growth land uses, and attempting to cooperate with other municipalities to do the same.
197 Id.; note that communities of color are often the hardest hit by this phenomenon. See generally MASSEY & DENTON, supra note 194; WILSON, supra note 140.
198 NELSON, supra note 184.
V. APPLYING THE MORMON PLANNING ETHIC IN SPRAWLED COMMUNITIES

It is hard to imagine that today a religious leader like Smith or Young could dictate land use patterns or control a whole society in the way it was done among nineteenth-century Mormons. In fact, it is quite likely that many people—even among members of the church—would find the prospect of a church wielding such power over the public quite unsettling. Still, at a more basic level, it is worth giving some thought to whether we could breathe renewed life to those principles that sustained Mormon settlement building: vision, cooperation, stewardship, and care for the poor. This Part addresses how this may be done.

A. Finding a Vision

Under sprawl growth, planning generally either occurs myopically or not at all. Yet, sometimes, we deviate from this characterization and understanding when this occurs presents a window of opportunity.

Most of the time, when robust land use planning occurs, it does so on a project-by-project basis. This means that most public debates over planning—to the extent that they occur at all—relate to particular proposals rather than the bigger picture. This unfortunately means that the land use planning dialogue is often dominated by NIMBY-ism (acronym for “not in my backyard”). The participation of those with only a narrow interest often means that opposition to proposed projects is dominated by relatively inexperienced citizens who often otherwise would not be involved in local politics.

However, when a project proposal is controversial enough or of a large enough scale, such proposals have the potential to capture the attention of the broader public. For example, in the context of the Wasatch Front, the practice of tearing down older homes and rebuilding larger homes that really do not fit the community’s character has resulted in a good deal of public outcry, at least in more historic neighborhoods. This outcry is presumably fueled by the prevalence and the visibility of the practice. Similarly, the public gave its attention to the conflict over building the Legacy Highway.

This is not uncommon for large-scale transportation projects. Often, proposals surrounding large-scale commercial developments capture the public’s attention. For example, the two largest revitalization projects in Salt Lake City—the Gateway and particularly the church’s redevelopment of two malls adjacent to Temple Square—both came with intense public scrutiny. While controversy raises public interest in planning,

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often it results in better projects. Additionally, by focusing the public’s attention and thereby getting better projects, we often save ourselves from future problems and fights down the road.

The government does not hold a monopoly in creating public visions for our growth. Two examples found along the Wasatch Front deserve particular attention in this regard: Envision Utah and the Daybreak Development. The most significant step taken in building a community vision along the Wasatch Front is that of the grassroots planning process called Envision Utah. Envision Utah is a long-term project of a Utah nonprofit, the Coalition for Utah’s Future. The project began in 1995, when the Greater Wasatch Front had a population of 1.6 million (at the time 80% of the State’s population)—an area that was estimated to grow to 2.7 million in 2020 and to 5 million by 2050. After looking to examples in public land use campaigns in other states (e.g., California’s Beyond Sprawl Report and Portland’s Metro 2040 process), Envision Utah began to engage state lawmakers and other key decision makers. With the help of government entities, Envision Utah created a baseline growth projection that quantified costs and benefits related to the region’s transportation infrastructure costs, air quality, land use, and water use and development.

When Envision Utah and the Governor’s Office presented this data to decision makers, policymakers were dismayed. Envision Utah began to engage key leaders, planners, and interest constituencies within the community through workshops that allowed participants to consider the real trade-offs of different visions: different densities of growth, different transportation choices, and options to protect or sacrifice an array of values. As an outgrowth of these workshops, Envision Utah developed four alternative growth scenarios and quantified costs and benefits for each. Envision Utah then took on a robust public information campaign to solicit the public’s input. As a result, nearly 17,500 people responded to Envision Utah’s survey. From this process, Envision Utah came up with a preferred alternative growth scenario that called for denser, mixed-use, transit-oriented development. In the year 2020, as compared to the baseline scenario, the alternative growth scenario would result in significant advantages:

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202 See ENVISION UTAH, supra note 182.
203 See generally BANK OF AMERICA ET AL., supra note 188.
204 ENVISION UTAH, supra note 182, at 3-5.
205 Id. at 15.
206 Id. at 16.
207 Id. at 17-18.
208 See id. at 36-38 (explaining how Envision Utah held press conferences, secured substantial radio and television ads, a newspaper insert, and an hour-long documentary that aired on public television all presenting these issues; conducted fifty public meetings; and put up an interactive website on the internet).
209 Id.
171 square miles of undeveloped open space; much wider choices of housing types; 2.4 million fewer vehicle miles traveled (VMT) on a yearly basis; nearly a doubling of transit use; a reduction of 93,000 acre feet of water use per year; and $4.5 billion of savings in total infrastructure costs, primarily due to the reduced need of highway development.\footnote{13} While efforts to fulfill the vision have come slower than one might have hoped, still some positive changes have come out of the process. Envision Utah played a critical role in promoting light rail in Salt Lake County and Commuter Rail along the Wasatch Front, which has proven incredibly popular.\footnote{12} For example, based on the success of the current light rail line, cities throughout the Greater Wasatch have clamored and schemed to bring rail transit to their communities.\footnote{13} In fact, in large measure to secure light rail and commuter rail (which just recently came on line), four counties in Utah have—at times grudgingly—paid for these improvements by voting to increase their own taxes.\footnote{14}

Probably the biggest gap between the vision and reality is that municipalities have been slow to alter their land use plans to reflect Envision Utah’s goals. This is true even though there have been spots of progress: Salt Lake City along with some major property owners—primarily the Mormon Church—has taken great pains to attempt to revitalize downtown Salt Lake City. Some of the communities with light rail stations and now commuter rail stations have attempted to build walkable, mixed use developments around stations.\footnote{15}

The gem of these walkable communities, however, is a product built by Kennecott Copper (a major property owner on the west side of Salt Lake County), which represents one of the most the robust smart growth developments in the country. This development, called the Daybreak development, which sits on more than 4,000 acres is planned to include parks, trails, open space, more than 13,000 homes, and several million square feet of office and retail space.\footnote{16} Other cities

\footnote{13} Id. at 13.
\footnote{12} See, e.g., Jerry Stevenson and Alan Matheson, Utah in Transportation Crisis, DESERET NEWS, Sept. 6, 2006.
along the Greater Wasatch, such as Ogden, Tooele, and Payson, have also invested funds into decaying Main Streets.\footnote{217}

While the Wasatch Front is far from reaching its vision, many communities are at least working in the right direction and at least discussing these important issues. The challenge is getting the political apparatus to make Envision Utah more than a process but a changed reality. During the nineteenth century, Mormon leaders built settlements effectively because they had such great control over the Interior West’s society. It is possible that to obtain the growth scenario that Envision Utah has identified, it will take more political control over land use and planning decisions. While questions remain as to whether today this is politically achievable, this difficulty is not insurmountable. Particularly for Mormons considering working to revitalize the place once known as Zion, they should remember the first words of what has virtually become an anthem of Mormonism, “Come, come ye Saints, no toil or labor fear[.]”\footnote{218}

\textbf{B. Working toward Working Together}

The Mormon settlers realized the benefits of cooperation when facing collective action problems and attempting to create community infrastructure and amenities. Mormons accomplished a great deal by suppressing individual desires for the good of the whole.\footnote{219} Whether this meant foregoing buying superior items in order to support Mormon producers, building community infrastructure and planting crops for collective farms before focusing on improvements on personal property, or moving across the arid West to establish a new community that would give the church some advantage, “Mormonism [was] remarkably successful in teaching individuals to sacrifice their own interests for those of the group.”\footnote{220}

While today we do not need to go as far as the nineteenth-century Mormons did in curbing self interest, modern urban planning efforts would benefit greatly if we could find ways to put collective interests ahead of individual interests. Within the context of the Wasatch Front, Envision Utah is at least a first step in the right direction. It has identified the community’s shared stake to pursue sensible planning, which at least to some degree seems to have inspired the Wasatch Front to work together. Specifically, Envision Utah has helped communities see that most of us have similar values when it comes to the stakes of growth: the fate of our remaining open space, surface water and air shed; the size of our tax base and tax bill; and the range of choices offered to the community in regards to housing and transportation.\footnote{221} For majoritarian policies to materialize, such as those


\footnote{218}William Clayton, \textit{Come, Come Ye Saints}, in \textsc{Hymns of the Church of Jesus Christ of Latter-Day Saints} (1985) at 30.

\footnote{219}See Part II.B.

\footnote{220}ARRINGTON ET AL., \textit{supra} note 36, at 13.

\footnote{221}ENVISION UTAH, \textit{supra} note 210, at 1.
identified by Envision Utah, it often requires a leader who can capture the attention of the public and its decision makers. Envision Utah may indeed be this agent of change.

Sometimes the larger good requires sacrifice. During the nineteenth century, Mormons were often asked to sacrifice for the greater good. A move away from sprawl will require some individuals and governmental units to sacrifice some advantage from which they currently benefit. One example of this that has a great impact on our built infrastructure is the competition between Utah’s sister transportation agencies. Utah currently separates its roads departments (Utah Department of Transportation) and its transit department (Utah Transit Authority). This competition is particularly disturbing in light of the fact that the roads department is so much more politically powerful than the transit department, which biases transportation solutions towards roads and away from transit. Such needless bickering has led to few if any positive public policies and to a host of problems.

There are other rifts as well. For example, some localities have done better than others in sprawl: South Jordan and Alpine, for example, attract expensive new residential developments; the tax bases of some communities are flush due to cherry picking by incorporated cites of unincorporated areas; some downtown centers and suburbs have often eroded as nearby municipalities have benefited. Stopping sprawl is a real difficulty because some communities owe some of their prosperity to the dismal lot of other communities. How could this be done? One solution that is often floated in solving such regional disparities is empowering a regional government.

However, this solution is often met by opposition. Up to

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223 Problems of segregating transit and roads into two different departments are many. For example, this is a barrier to coordinating projects, which as Denver has realized often leads to substantial savings of tax dollars and construction times. It also inhibits discussions of the best sequence of improvements. This is particularly important because the land use patterns that are facilitated from different improvements may make subsequent improvements in other modes less effective. For example, highways and roads often facilitate to developments reliant on automobiles (lower densities and more segregated uses); transit fares much better with high densities and mixed-use developments. UTA has attempted to dampen this effect by asking municipalities to figure transit into account when making land use decisions. UTAH TRANSIT AUTHORITY, supra note 174, at 183. This is an issue that several citizen groups litigated and won in the recent litigation over the proposed Legacy Parkway. See Utahns for Better Transp. v. United States Dept. of Transp., 305 F.3d at 1170. This separation also makes it difficult to integrate improvements into current projects, e.g., highways and park-and-ride lots. This is also an issue that the State lost on in the Legacy Parkway litigation. See id. at 1170-71.

this point, probably in attempt to avoid controversy, Envision Utah has not advocated for this position.\textsuperscript{225} A solution that would lessen the balkanization of municipalities would certainly promote progress. Whether it is through a regional government, or through a surrogate for it,\textsuperscript{226} finding ways to pursue the good of the larger community seems essential.

\textit{1. Reclaiming a Sense of Stewardship}

The vision that has emerged from the Envision Utah process is one where a sense of a broader stewardship is an important factor in the decision making process. In fact, a theme of this process is the need to understand how choices made today will affect our children and grandchildren. Part of this is the taxpayer price tag needed to maintain different infrastructures, the difference of $4.5 billion by the year 2020.\textsuperscript{227} Another part of this is determining the amenities of future societies, for example, amounts of open space, differences in the air quality, and the range of housing and transportation choices available.\textsuperscript{228} This same sense of commitment has accompanied Envision Utah in its more recent 2040 regional visioning process.\textsuperscript{229} While the overwhelming response from Utah’s residents is that policy makers and planners need to take into account the interests of the Greater Wasatch’s future society to a much greater degree than they have in the past,\textsuperscript{230} the policies of the municipalities lag well behind this public mandate. It seems much greater strides are warranted in this regard. The question is how to transform the vision into reality.

Another challenge of our current planning system is that a myriad of small decisions ultimately add up to define the type of communities we are creating. While the public’s attention might be captured for large visioning exercises and large-scale construction projects, it is still a matter of concern that the massive number of micro decisions may make a new vision nothing more than a mirage, something not uncommon in Utah’s arid landscape. Several reforms may help us

\textsuperscript{225} See ENVISION UTAH, supra note 210 (summary addressing “Local Control, Regional Coordination”).

\textsuperscript{226} “If not regionalism, what?” is a difficult question. It is possible to imagine a weaker form of regionalism as a compromise, such as consolidating the tax base but allowing municipalities to retain power over land use decisions. Some scholars have proposed local government reforms that would allow for more permeable borders that would even result in limited cross-border voting in certain instances. Richard Thompson Ford, supra note 192, at 1909-10; Jerry Frug, Decentralizing Decentralization, 60 U. Chi. L. REV. 253, 324-30 (1993). Another alternative might be a regional body that has no authority over local powers but that would provide a forum “for inter-local negotiations about how to decentralize power.” Id. at 297.

\textsuperscript{227} See ENVISION UTAH, supra note 210, at 13.

\textsuperscript{228} Id.

\textsuperscript{229} See generally WASATCH FRONT REGIONAL COUNCIL, ET AL., WASATCH CHOICES 2040 (2005).

\textsuperscript{230} Id. See also UTAH, supra note 210.
maintain our stewardship.\textsuperscript{231} One policy tool that Utah might use to make sure that small decisions conform with larger decisions is the adoption of a grand vision master plan and the requirement that subsequent decisions conform to that plan. A second tool may be better disclosure of a project’s impact. For major projects requiring federal participation, this is already accomplished at least somewhat through the National Environmental Policy Act\textsuperscript{232} Some states, notably California and New York,\textsuperscript{233} have required such information disclosure for projects requiring local government approval as well. Finally, some state constitutions have been amended to require decision makers to balance current needs with those of the future. The Montana Constitution, for example, makes the “right to a clean and healthy environment” an “inalienable” right.\textsuperscript{234} It also provides that “[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”\textsuperscript{235} While it is uncertain how much protection these provisions actually provide, they at least seem to point us in the right direction.

2. Building Integrated Communities

The Mormon Church’s First Presidency in 1936 said of the church’s welfare program: “Our primary purpose was to set up, in so far as it might be possible, a system under which the curse of idleness would be done away with... and independence, industry, thrift and self respect be once more established among our people.”\textsuperscript{236} What could be done to promote this ethic in society more generally? And more specifically, given the theme of this article, is there anything to be said about how community design might promote this ethic?

Currently, much of what passes as land use planning seems the antithesis of this ethic. With municipalities competing for the wealthy and commercial developments, the unaccounted consequence of this is the de facto exile of the poor into abandoned enclaves—a far cry from fostering “independence, industry, thrift, and self respect.”

\textsuperscript{231} Granted, there is much that could be done to curb sprawl, build communities, protect the environment, and keep tax liabilities. The policies suggested here are not exhaustive.


\textsuperscript{233} California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE § 21000. (West 1998); New York Environmental Quality Act (SEQRA), N.Y. ENVTL. CONSERV. LAW §§ 8-0101. (McKinney 1997). For descriptions of other states with similar laws, including Minnesota and Washington, see 5 ZONING AND LAND USE CONTROLS §§ 28.01, 28.02 (Patrick J. Rohan ed. Supp. 1999).

\textsuperscript{234} MONT. CONST. ART. IX, SEC. 1.

\textsuperscript{235} \textit{Id.}

Such isolation is commonplace along the Greater Wasatch. For example, as a
generality, the poverty line separates the east and west side of Salt Lake County.
This rubs directly against the grain of the Mormon Church’s efforts to build Zion,
integrated for the time being and working toward a city with “no poor among
them.” As one author stated, “There should be no East Bench and ‘west side of the
valley’ in Zion.”

What can be done to remedy this? Envision Utah’s goal to create mixed-use,
mixed-income neighborhoods that provide housing choices is certainly a step in
the right direction. In fact, this is a major contention of the planning movement
often referred to as New Urbanism. Unlike the growth patterns in urban sprawl
that segregate and segment according to the cost of neighborhood housing units,
this would lead to more integrated neighborhoods. Such land use patterns may
reintegrate low-income residents back into society. This may reintroduce some of
the “social buffer” that has been lost from years of migration from abandoned
areas, including the strengthening of cultural institutions, increase of economically
useful social contacts, and visibility of more positive role models in the
community. This also begins to mitigate the spatial mismatch between low-
income residents and employment and the problems that accompany this. To the
extent that such neighborhoods were located in struggling areas, this may slow or
even reverse the eroding tax base.

In the event that such policies lead to businesses returning to declining areas,
increased densities, or a more vibrant area, this may lead to increased public
transit investments. This would not only serve the area but would be a boon to the
poor. Investments in transit and mixed-use, higher density housing are likely to
reinforce and magnify the positive effect of such policies.

In addition to these community design policies, Envision Utah’s goal could
be supplemented with an outright ban on exclusionary zoning. Such a measure has
successfully accompanied smart growth policies in other communities across the
country. Municipalities and regions may also choose to incorporate incentives,
such as density bonuses, that provide developers a carrot for incorporating some
low-income housing stock into other projects.

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237 LUCAS & WOODWORTH, supra note 45, at 98.
238 ENVISION UTAH, supra note 210, at 1.
239 See Nicole Stelle Garnett, Ordering (and Order in) the City, 57 STAN. L. REV. 1,
32-34 (2004); James A. Kushner, Smart Growth, New Urbanism and Diversity:
Progressive Planning Movements in America and Their Impact on Poor and Minority
240 See WILSON, supra note 140, at 56.
241 Fiss, supra note 163, at 7 (noting that any adequate remedy to concentrated
poverty must address the spatial mismatch between low-income residents and
employment). See also Part II.A.
242 Carl Abbott, The Portland Region: Where the City and Suburbs Talk to Each
Other—And Often Agree, 8 HOUSING POL’Y DEBATE 12, 38-44 (1997).
243 For example, this measure was included in Portland’s growth boundary enactment
and is regularly used in California.
One would not expect all the answers to come from government either. Public and nonprofit entities may also choose to invest funds in securing low-income housing. Housing cooperatives, something that would have particular relevance in Utah due to its long history of Mormon cooperatives, may be another strategy that could help build up a stock of low-income housing in reviving areas. It seems such a broad-based strategy would result in more stable neighborhood structures. And, all of these strategies would assure that low-income tenants would benefit, along with society generally, as sprawl declines and abandoned areas revive.

CONCLUSION

Much can be learned from the Mormon experiment to build Zion. Yet, in today’s interconnected world, those isolated Mormon settlements seem very distant. Most of the 500 Mormon-built communities throughout the West, particularly along the Greater Wasatch Front, still stand; some thrive, and some struggle. Many of these communities have changed; however, each is in some way still a monument to those settlers. Former President of the Mormon Church, Harold B. Lee, reminded an audience: “[The Mormon pioneers] were driven into the desert; they were starving and they were unclad; they were cold. We are the inheritors of what they gave to us. But what are we doing with it?”

The question exposes the heart of the matter, not only for Mormons but also for all of us. We all have a common connection to our past and a stake in our future and that of our descendants. Asking what we are doing with the world should cause us to reflect on how we treat the world we have, how we treat those living on the margins of society, and how we will set the stage for a society yet to come. These choices also reflect our feelings for the people and sacrifices made in settling our communities, which is something that should resonate with us all and sink particularly deep into to Mormons living in places settled by Mormons. This question of what we are doing with what we have been given helps us recognize that what becomes of our communities will serve as our credit or fault. It reflects our sense of the importance of our day, the seriousness with which we treat our stewardship, the depth of our vision, and our ability to put petty interests aside and work together for the greater good.

Granted, we today will rely on the leadership of those inspired to make a difference rather than leaders of a church or any other institution. This is apparent to planners and others drawn to community design. For Mormons, this point has seemed to miss the mark. This is of particular concern.

244 DUNCAN KENNEDY & LEOPOLD SPECHT, Limited Equity Housing Cooperatives As a Mode of Privatization, in A FOURTH WAY? PRIVATIZATION, PROPERTY AND THE EMERGENCE OF NEW MARKET ECONOMIES (1994).
245 RUDD, supra note 236, at 45 (quoting Harold B. Lee’s Christmas Devotional for Church Employees, Dec. 1973—days before his death).
To those in the Interior West who have a tie to Mormonism but do not spend much time thinking along these lines, it is these people that need to reflect on history and on the consistent voice and policies of the Mormon Church concerning the importance of building communities that show a measure of respect for today's society, for those of the future, and for what we have been given. Mormons may not have an exact blueprint about how to do this, but Mormons have principles to base their decisions upon—those of vision, cooperation, stewardship, and care for the poor. As Mormons still believe: It is not necessary for people to be "command[ed] in all things" and that "should be anxiously engaged in a good cause, and do many things of their own free will...."

Mormon leader J. Reuben Clark once offered this plea: "Our fathers and grandfathers, our mothers and grandmothers were fashioned in heroic molds; they were built of the virtues that make mighty enterprises. It is not too much to hope and pray that we of our day may measure to their stature."

May the Interior West, and all of us, embrace the reality that the measure of each of us extends well beyond our own homes and even our neighborhoods. May we all—regardless of our religion and background—come to embrace the challenge of building a modern Zion. For the West, this is the only way that we will measure up to its greatest challenge: to build a "civilization to match its scenery."

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246 DOICTRINE AND COVENANTS, supra note 12, at 58:26-27.
247 Cecil McGavin, Grain Among the Latter-day Saints in IMPROVEMENT ERA 186 (Mar. 1941) (quoting J. Reuben Clark, Jr. on the Church's building of a grain elevator used to store wheat for the poor) (on file with author).
248 STEGNER, supra note 15, at xv.
CLAIMING THE SHIELDS: LAW, ANTHROPOLOGY, AND THE ROLE OF STORYTELLING IN A NAGPRA REPATRIATION CASE STUDY

Debora L. Threedy*

INTRODUCTION

On August 16, 1926, a man named Ephraim Portman Pectol and his wife were out looking for “cliff dwellings” in an area just west of what would become Capitol Reef National Park in south central Utah. As they were starting home at dusk, they rounded a large rock and found the mouth of an alcove, “perhaps 30 feet long and 13 feet wide, and 4 feet high.”

Beginning to dig in the alcove, Pectol discovered “a cover apparently of some sort of rawhide.” They decided to let their children share in the discovery, so they went home and returned later with them, as well as three neighbors who decided to tag along. Pectol later described what happened next:

We returned, built a bonfire in front of the cave, and at 10 o’clock at night we unearthed three of the most wonderful shields ever seen by man. As we raised the front shield, the design on two shields came to view. For the space of what seemed to me two or three minutes, no one seemed to breathe; we were so astonished. We felt we were in the presence of the one who buried the shields...  

The three shields had been stacked one on the other, with layers of juniper bark between each of the shields. Beneath the shields was another layer of bark,

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2 Id.
3 Id.
4 Lawrence L. Loendorf & Stuart W. Conner, The Pectol Shields and the Shield-Bearing Warrior Rock Art Motif, 15 J. CAL. & GREAT BASIN ANTHRO. 216, 216 (1993). The source says “cedar bark,” but there are no true cedars in the area, and that name is often applied to juniper trees, which are common in the area and which resemble in some respects cedar trees.
covering a "cone of earth" on which the shields had been placed to retain their shape. Nothing else was found in the alcove.

The shields are made of bison hide. They are large in size; they would cover the bearer from the shoulder to the knees. All have arm bands or slings by which the shield was held. Because of their size, it is assumed that they were carried while walking, and not by men mounted on horseback. All were originally circular, although all three have in varying degrees been damaged around the edges. All three of the shields have been painted.

After some odd twists and turns by the end of the twentieth century the shields were in the possession of Capitol Reef National Park. At that point, three

5 Id.
6 Two of the shields are convex; one is concave, at least in its present condition. Id. at 218-19.
8 Id.
9 Loendorf & Conner, supra note 5, at 218-19.
10 Id. at 222-23; Kreutzer, supra note 8, at 107.
11 Loendorf & Conner, supra note 5, at 218-19.
12 One shield has been divided into "four roughly equivalent triangular" sections. Id. at 218. One section is painted red, one is rust, one is black, and the last has a design that resembles feathers painted in colors of green, red and black. There is also a figure in the shape of an arch across the center part of the shield.

Another shield was painted on both sides. As this shield also has a tear that was repaired, apparently before it was buried, it has been suggested that the back of this shield was once the front, which would explain why it was painted on both sides. Id. at 219. The current "back" of the shield has red paint with two triangular designs. The "front" is also painted red, with a triangular, fan-shaped design with green and red bands on it.

The most complex and impressive pattern appears on the third shield. One part of the shield is covered with unpainted dots on a black background, while the other part is covered with a pattern of alternating rows of green lines and unpainted dots on a rust background. The unpainted dots were formed by painting over a circular stencil with the background color. Id. at 218. The overall effect is dazzling.

13 In 1932, the federal government received a complaint that individuals in Wayne County, Utah (where the shields were found) were collecting valuable artifacts from public lands, which make up approximately ninety-seven percent of the county. An agent was sent to investigate and Pectol admitted that he had collected the shields from public land. The agent formally "seized" the shields and other artifacts by placing a tag indicating federal ownership on them, but because he judged them of little value (he was a geologist, not an archaeologist) he left them in the physical possession of Pectol. In the late thirties, Pectol lent his collection of Native American artifacts, including the shields, to the Temple Museum in Salt Lake City. In the fifties, the federal government reclaimed the shields and two of them were eventually placed on display in the visitor center at Capitol Reef National Park. A detailed recounting of the shields' journey from Pectol's discovery to Capitol Reef National Park is set out in Shane A. Baker, In Search of Relics: The History of the Pectol-Lee Collection from Wayne County, in RELICS REVISITED: THE PECTOL-LEE ARTIFACTS FROM CAPITOL REEF: NEW PERSPECTIVES ON AN EARLY TWENTIETH-CENTURY COLLECTION 21, 28, 36-45 (Marti L. Allen ed., 2002).
claims were filed for repatriation of the shields under the auspices of the Native American Graves Protection and Repatriation Act (NAGPRA or the Act).  

In this paper, I use the controversy surrounding the repatriation of the three shields as the basis for examining the question of who owns the past. In particular, I examine how the repatriation process under NAGPRA addresses that question. I do this through the methodology of a case study. Because of the fact-intensive inquiry required under NAGPRA, and because NAGPRA repatriation cases are not typically resolved through court litigation, a case study seems an appropriate way to proceed with this examination.

The paper is structured in this way. It begins in Part I with a brief overview of NAGPRA and a recounting of how the dispute moved through the NAGPRA process. Part II focuses on the disconnect between the two disciplines of anthropology and law which is built into the structure of the Act. Part III examines the problem of competing tribal claims of cultural affiliation and the unintended consequence that the Act might create or exacerbate inter-tribal tensions. The final section focuses on the role of storytelling in the repatriation decision, an example of how the metaphoric and literal meanings of owning the past came together in this case.

I. REPATRIATING THE SHIELDS UNDER NAGPRA

A. A Brief Overview of NAGPRA

This section will describe the purpose and structure of NAGPRA in very broad terms, as others have provided a thorough history and description of NAGPRA.

For over two hundred years, white Americans have assumed rights of ownership over Native American human remains and other cultural items. In the


15 The official NAGPRA website lists over a thousand repatriation notices. Conversely, only a handful of repatriation cases have resulted in published judicial opinions. See, e.g., C. Timothy McKeown & Sherry Hutt, In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After, 21 UCLA J. ENVT'L. L. & POL’Y 153, 180 (2002-03) (noting that, to date, nine civil cases involving repatriation had been filed in federal court).


17 There are over two hundred articles dealing with various aspects of and issues under NAGPRA. Two especially thorough overviews are found in Kelly E. Yasaitis, NAGPRA: A Look Back Through the Legislation, 25 J. LAND, RESOURCES, & ENVT'L. L. 259 (2005) (giving legislative history, overview, and summary of major litigation involving NAGPRA), and McKeown & Hutt, supra note 16.

18 In his 1787 treatise, Notes on the State of Virginia, Thomas Jefferson described what was probably the first scientific archaeological project in the United States: the
second half of the nineteenth century, a period described as “America’s Golden Age of Natural History,” public and private museums collected human remains of all races and ethnicities. Included in these collections were Native American remains. Indeed, government agents, military personnel, and private collectors aggressively sought out Native American remains, recent as well as ancient.

In 1868, the U.S. Surgeon General directed army personnel to collect Indian crania for the Army Medical Museum. That order resulted in the collection of more than four thousand Native American heads. One army surgeon recounted how he had obtained the skull of an elderly Sioux man:

[The man] died at this post on the seventh day of Jan. 1869 and was buried in his blankets and furs in the ground about a half mile from the Fort, within a few rods of the tippets [sic] occupied by his friends. I secured the head in the night of the day he was buried. From the fact he was buried near these lodges, [I suspected] it was their intention to keep watch over the body. Believing that they would hardly think I would steal his head before he was cold in the grave, I early in the evening with two of my hospital attendants secured this specimen.

Other “specimens” were collected alive. Admiral Peary returned from one of his Arctic explorations with six Eskimos from Greenland. Within a year, four of them had died of tuberculosis. One of the men, Qisuk, had brought his six year old son along. When Qisuk died, a funeral was held for him and he was supposedly buried. What his son would learn some ten years later, however, was that the grave contained no body; after Qisuk’s death, an autopsy was performed on his body, his brain was removed and preserved, and his bones were defleshed, numbered, and archived in the American Museum of Natural History.

Sixteen years ago Congress took steps to redress this history of cultural insensitivity and abuse by passing NAGPRA. A common misperception is that NAGPRA applies to anything Native American, but this is not the case. Initially, the Act only applies to remains and items found on federal or tribal lands, or held excavation of an earthen mound on his property that was found to contain human remains. See David Hurst Thomas, Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity 32-35 (Basic Books 2000).

19 Id. at 56.
20 Id. at 119. See also James Riding In, Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians, 24 ARIZ. ST. L. J. 11, 17-18 (1992) (discussing craniology and phrenology).
22 Id.
23 Thomas, supra note 19, at 57.
24 Id. at 80.
25 Id. at 77-78.
by federal agencies or federally-funded museums. Consequently, the Act does not apply to remains or items found on private property or those that are currently held by private individuals or organizations, unless it can be proven that the individual or organization illegally obtained the items.

Moreover, the Act only applies to “cultural items,” which includes five categories. The first is human remains. The Act also applies to two classes of “funerary objects,” meaning objects placed with individual human remains as part of a death rite or ceremony. Funerary objects can be either “associated,” which means that the individual is known and the remains are in the custody or control of a federal agency or federally-funded museum, or “unassociated,” which means that, while it can be shown that the items were removed from a specific burial site, the objects have been separated from the individual human remains and the remains are not in the custody or control of a federal agency or federally-funded museum. The Act also applies to two classes of items not connected with burials. It applies to “sacred objects.” This category is narrowly defined as including only “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.”

The final category is objects of “cultural patrimony.” An object of cultural patrimony is one which has “ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned

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27 The limited scope of NAGPRA has been criticized by some. E.g., REBECCA TSOSIE, Indigenous Rights and Archaeology, in NATIVE AMERICANS AND ARCHAEOLOGISTS: STEPPING STONES TO COMMON GROUND 64, 71 (Nina Swidler et al., eds., AltaMira Press 1997). Indeed, the whole concept of “ownership” as applied to human remains and sacred objects is rejected by some. Id. at 66.
29 43 C.F.R. §10.2(d)(2)(2005) (defining funerary objects as “[I]tems that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains. Funerary objects must be identified by a preponderance of the evidence as having been removed from a specific burial site of an individual affiliated with a particular Indian tribe or Native Hawaiian organization or as being related to specific individuals or families or to known human remains.”).
30 The definition of unassociated funerary objects is as follows: “[T]hose funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency.” 43 C.F.R. § 10.2(d)(2)(ii).
31 25 U.S.C. § 3001(3)(c). See also 43 C.F.R. §10.2(d)(3) (defining sacred objects as “[I]tems that are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. While many items, from ancient pottery shards to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony.”).
by an individual” and which cannot be “alienated, appropriated, or conveyed by any individual.”

The operative part of NAGPRA consists of two major sections, one of which is forward looking and one of which addresses the past. The first section, the forward looking section, addresses the ownership of human remains and other cultural objects found on federal or tribal lands after the effective date of the Act, which was November 16, 1990. The second section of the Act, the one looking to the past, addresses the issue of repatriation to Native American claimants of human remains and other cultural objects found prior to the passage of the Act and now held by federal agencies and museums that receive federal funding.

The first section, dealing with the ownership of human remains and cultural objects found post-1990, applies to both “intentional excavation,” in which case a permit and consultation are required, and “inadvertent discovery.” In either case, the Act prioritizes claims of ownership. Priority varies depending upon the category of the item claimed and the location of the find. For human remains and associated funerary objects, first priority is given lineal descendants. In the absence of lineal descendants, and in all cases involving unassociated funerary objects, sacred objects, and objects of cultural patrimony, if the remains or objects are found on tribal land, first priority goes to that Native American tribe. Second priority goes to the Native American tribe “which has the closest cultural affiliation.” If the cultural affiliation cannot be “reasonably” ascertained and the

32 25 U.S.C. § 3001(3)(D). See also 43 C.F.R. § 10.2(d)(4) (defining objects of cultural patrimony as “[I]tems having ongoing historical, traditional, or cultural importance central to the Indian tribe or Native Hawaiian organization itself, rather than property owned by an individual tribal or organization member. These objects are of such central importance that they may not be alienated, appropriated, or conveyed by any individual tribal or organization member. Such objects must have been considered inalienable by the culturally affiliated Indian tribe or Native Hawaiian organization at the time the object was separated from the group. Objects of cultural patrimony include such items as Zuni War Gods, the Confederacy Wampum Belts of the Iroquois, and other objects of similar character and significance to the Indian tribe or Native Hawaiian organization as a whole”). To my mind, this category is the most problematic under NAGPRA. The first part of the definition is potentially very broad; almost any archaeological artifact could be said to have historical importance. The second part of the definition, the requirement of inalienability, can be interpreted as a significant narrowing of the category, but it includes background assumptions of concepts of ownership that may or may not be appropriate for Native American groups. The definition has been challenged twice for vagueness, but has so far been upheld. See U.S. v. Corrow, 119 F.3d 796 (10th Cir. 1997) (upholding antiquities dealer’s conviction for selling Navajo ceremonial masks); and U.S. v. Tidwell, 191 F.3d 976 (9th Cir. 1999) (upholding dealer’s conviction for selling Hopi ceremonial masks and robes).

33 NAGPRA also includes an often overlooked criminal section.

34 25 U.S.C. §§ 3002 (c)-(d).


cultural items are found on federal land that has been adjudicated the aboriginal land of some Indian tribe, then the next priority is given to that tribe, unless another tribe shows, by a preponderance of the evidence, that it has a "stronger cultural relationship" with the items, in which case, that tribe has the next priority.\textsuperscript{38}

Claims for repatriation of cultural items obtained prior to 1990 but now held by federal agencies and federally-funded museums are handled differently than claims of ownership of post-1990 discoveries. Initially, to facilitate the making of such claims for repatriation, federal agencies and federally-funded museums are required to compile and disseminate two types of notices. For human remains and associated funerary objects, the agencies and museums are required to produce an item-by-item inventory providing detailed information about each item.\textsuperscript{39} For the other categories of cultural items—unassociated funerary objects, sacred objects and objects of cultural patrimony—the agencies and museums are only required to produce a more general summary for each collection.\textsuperscript{40}

Once a claim for repatriation is made, NAGPRA provides a much simpler prioritization scheme than that for ownership claims to post-1990 discoveries, although the scheme is not without ambiguities. Where cultural affiliation is established in the process of preparing the inventory or summary, then repatriation of human remains, associated funerary objects, and sacred objects is made to a lineal descendant or to the tribe.\textsuperscript{41} In the case of a claim to an unassociated funerary object or object of cultural patrimony, if the survey establishes cultural affiliation with a particular tribe, then repatriation is made to that tribe.\textsuperscript{42}

Repatriation gets more complicated if the inventory or summary was not able to establish cultural affiliation. In such cases, repatriation is made to the tribe that “can show cultural affiliation by a preponderance of the evidence” based upon a variety of factors such as geography, linguistics, oral tradition or expert opinion.\textsuperscript{43} If there are competing tribal claimants, then a section on competing claims would govern.

In the case of competing claims for repatriation under NAGPRA, the federal agency involved must determine who is the “most appropriate claimant.”\textsuperscript{44}

\begin{footnotesize}
\begin{enumerate}
\item[38] 25 U.S.C. § 3002(a)(2)(C).
\item[40] 25 U.S.C. § 3004(a).
\item[41] 25 U.S.C. § 3005(a)(1), (4) and (5). But see 43 C.F.R. § 10.10(a) and (b). The regulations provide that all cultural items, including objects of cultural patrimony, may be repatriated to either a lineal descendant or the tribe.
\item[42] 25 U.S.C. § 3005(a)(2). But see 43 C.F.R. § 10.10(a) and (b), which provide for repatriation to a lineal descendant as well as the tribe. In the case of unassociated funerary objects, it seems appropriate to include lineal descendants, if they can be determined. But as the definition of objects of cultural patrimony states that to qualify as such the object cannot be the personal property of any individual, including lineal descendants as appropriate claimants is problematic.
\item[44] Section 3005(e) of the Act provides, “[W]here there are multiple requests...”
\end{enumerate}
\end{footnotesize}
Presumably, this means the tribe with the closest cultural affiliation to the cultural item, although the Act does not explicitly set out the standards to be used in making this determination. Regulation 10.14(d) does provide that cultural affiliation should be “based upon an overall evaluation of the totality of the circumstances.” The statute and the implementing regulations also set out the types of evidence to be considered: geographical, kinship, biological, archeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion. The standard of proof to be applied is that of “a preponderance of the evidence.” The regulations specifically state that a finding of cultural affiliation does not require “scientific certainty.”

The Act does anticipate, however, that there may be cases in which “the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant.” In that situation, the Act provides that the agency or museum may retain the item until one of three alternative scenarios occurs: 1) “the requesting parties agree upon its disposition”; 2) “the dispute is otherwise resolved pursuant to the provisions of this chapter”; or 3) the matter is resolved by a court.

Finally, the Act and its implementing regulations do not deal with the situation where cultural items are “culturally unidentifiable.” The legislative history of the Act suggests that the drafters considered the problem but were unable to agree on how to address this situation and so left it for the regulations to address. But to date no regulations on the subject have been adopted.

B. Repatriating the Shields

As the shields were rediscovered by Pectol many years prior to the passage of NAGPRA, it is the second section of the Act dealing with repatriation that applies. The shields were not originally included in the Park’s NAGPRA inventory or summary. It was known that they were not found in a burial; thus, they were not funerary objects. They were not considered as either sacred objects or objects of cultural patrimony because it was assumed they comprised an individual’s and... the federal agency or museum cannot clearly determine which... is the most appropriate claimant, the agency or museum may retain such an item until the requesting parties agree... or the dispute is otherwise resolved pursuant to the provisions of this chapter or by a court of competent jurisdiction.” 25 U.S.C. § 3005(e). See also 43 C.F.R. §§ 10.10(c)(2) and 10.17.

45 The section provides: “A finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed should not be precluded solely because of some gaps in the record.” 43 C.F.R. § 10.14(d).


47 Id.

48 43 C.F.R. § 10.14(f).


50 Id.
personal armaments and not a ceremonial object. Thus, the shields remained on 
display at the Park visitors’ center through the mid-1990s. It appears to have been 
serendipity that, while the shields were on display, someone recognized their 
significance.51

At some point, the Park archaeologist received an inquiry about the shields 
from one of the Pueblos. This prompted the Park to contact representatives of all 
of the tribes that might have an interest in the shields.52 A series of consultations 
with tribal representatives confirmed that there were likely to be competing claims 
to the shields, so the Park also commissioned three experts to prepare analyses of 
the cultural affiliation of the shields.53 Later, a fourth report was commissioned 
when additional funding became available.54

Ultimately, on June 11, 2001, the Navajo Nation formally requested 
repatriation of the shields.55 The Navajo claim alleged that the shields were 
sacred objects needed for the proper practice of the Protection Way Ceremony, as 
well as objects of cultural patrimony.56 The filing of the Navajo claim prompted 
other tribes to make repatriation requests. Eventually, several of the tribes 
submitted two additional, collaborative requests. One request came from the Ute 
Indian Tribe of the Uintah and Ouray Agency,57 the Paiute Tribe of Utah, and the 
Kaibab Band of Pauite Indians (the “Ute/Paiute claim”).58 The other claim was

51 This is speculation, but perhaps a case that arose in Arizona contributed to this 
recognition. In 1990, the Hopi Tribe requested the Heard Museum in Phoenix “to return a 
very old shield believed to be associated with the sacred Soyal ceremony at Old Oraibi” 
and which the Hopi had reported as stolen in 1982. Martin Sullivan, A Museum 
52 The Notice of Intent to Repatriate lists 37 tribes that were contacted and or 
consulted.
53 Benson L. Lanford, Tribal Attribution of the Pectol Shields, Capitol Reef National 
Park, Utah (2001) (manuscript on file with author); Lawrence Loendorf, The Pectol 
Shields: A Repatriation Study (2001) (manuscript on file with author); Barton A. Wright, 
Professional Evaluation of Cultural Affiliation of Three Buffalo Hide Shields from Capitol 
54 Polly Schaafsma, The Pectol Shields: A Cultural Evaluation (2002) (manuscript on 
file with author).
55 Lee Kreutzer, Summary of Historical Research and Evaluation of the Repatriation 
Request Submitted by the Navajo Nation, for the Capitol Reef Shields 1 (July 1, 2002).
56 Id. at 2-3.
57 Although in casual conversation references are often made to the “Utes,” after 
whom the state of Utah is named, in the mid 1800s there were at least eleven separate 
bands identified as Ute. Today, there are three separate federally recognized Ute tribes. 
See T. J. Ferguson, Ethnographic Study of Ten Tribes: Cultural Affiliation with the Uinta 
and Great Salt Lake Variants of Fremont in Northern Utah 1, 23-25 (2003) (manuscript on 
file with the author).
58 Both of these Paiute tribes belong to what anthropologists call the Southern Paiute. 
Historically, there were sixteen bands within the Southern Paiute. Today, both of these 
groups are separate, federally recognized tribes. Id. at 26-28.
made by the Southern Ute Tribe and Ute Mountain Tribe (the "Southern Ute claim"). Thus, the Park was faced with the problem of resolving competing tribal claims for repatriation of the shields.

Because tribes were making the request for repatriation and not a direct lineal descendant, the Park was required first, to determine whether any of the tribes had a "cultural affiliation" with the shields, and secondly, if more than one tribe did have such a cultural affiliation, to attempt to determine which tribe had the closest cultural affiliation with the shields. On July 1, 2002, the Park archaeologist recommended repatriation to the Navajo Nation. Administrative appeals were taken by the Pectol family and the Southern Ute claimants. These appeals were denied. In August of 2003, the shields were turned over to the Navajo Nation. It was reported that they are now being stored in a vault in the tribal museum at Window Rock and are available for traditional healers' use.

The repatriation of the shields reveals three inter-related issues that the remainder of this paper will address. First, the repatriation process in this case reveals a fundamental disconnect between law and archaeology. Second, it highlights an unintended consequence of NAGPRA, the creation or exacerbation of tensions between different Native American groups. Finally, the case presents an opportunity to examine the role of storytelling in the repatriation process.

II. THE DISCONNECT BETWEEN LAW AND ANTHROPOLOGY

The controversy surrounding the repatriation of the shields puts into stark relief the fundamental disconnect between anthropology and law.

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59 These are the other two federally recognized Ute tribes.

60 It appears that John Holiday, the singer or medicine man who provided the oral history in support of the Navajo claim, could have individually requested repatriation, as the administrative decision states that "he has established... that he is a lineal descendant of one of the last owners of [the shields]." Kreutzer, supra note 56, at 39.

61 Id.

62 The Pectol family was disturbed by the decision because they wished to see the shields remain in a museum, preferably in display at Capitol reef National Park. Their progenitor, Ephraim Portman Pectol, had lobbied for the creation of the Park. The Review Committee, however, determined that the Pectol family had no legal standing under NAGPRA.


64 Robert Begay, Navajo Historic Preservation Department, and Timothy Begay, Navajo Cultural Specialist, Relics Revisited Seminar, February 7, 2004. The continued use of fragile artifacts such as the shields gives some preservationists pause. "Objects curated in museums for as long as a century are not likely to hold up to any significant use. For example, a nineteenth-century medicine bundle, curated in a temperature and humidity-controlled environment, probably will deteriorate rapidly if put back into active use." Thomas H. Boyd & Jonathan Haas, The Native American Graves Protection and Repatriation Act: Prospects for New Partnerships Between Museums and Native American Groups, 24 ARIZ. ST. L.J. 253, 265 (1992).
Anthropologically speaking, it is not possible to assign a cultural affiliation for the shields. Arguably, however, the legal standard for cultural affiliation is less rigorous than that used in anthropology. Under NAGPRA, cultural affiliation need only be established by a preponderance of the evidence. It does not require scientific certainty.

The identity of the makers of the shields has “been the subject of debate since their discovery” in the mid 1920s.\(^65\) Because of his belief in *The Book of Mormon*, which recounts the story of a pre-Columbian Hebrew people originally from Israel who lived on the American continent,\(^66\) Pectol thought they were about 3,000 years old and perhaps carried by these people from Egypt to Peru, and then to Utah.\(^67\) He attributed religious significance to the designs on the shields: “He interpreted their designs as representing creation, the peopling of the earth, and the conflict between good and evil.”\(^68\)

The first two archaeologists to inspect the shields believed that they were historical, i.e., post-Columbian artifacts.\(^69\) They based this judgment upon several factors: the uniqueness of the shields in the archaeological record; their resemblance to modern Apache shields;\(^70\) and their resemblance to post-Columbian pictographs of shield-bearing warriors that appear with figures of horses at rock art sites in Utah.\(^71\) Later archaeologists disagreed.\(^72\) Several different origins were postulated: one of the Plains tribes; one of the Puebloan tribes; or perhaps the Fremont, who inhabited the area from approximately 1 A.D. to approximately 1300 A.D.\(^73\)

In 1967, one of the shields was radiocarbon-dated and the results indicated that the shields were 300 years old, or from circa 1650, or possibly of even more recent manufacture.\(^74\) This date removed the possibility of the shields being Fremont in origin, using 1300 as the end date for the Fremont life way. Another of

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\(^{65}\) Loendorf & Conner, *supra* note 5, at 218.


\(^{67}\) Loendorf & Conner, *supra* note 5, at 216.

\(^{68}\) Busk, *supra* note 2.

\(^{69}\) Loendorf & Conner, *supra* note 5, at 216.

\(^{70}\) This noted resemblance with Apache shields is interesting, as Apaches and Navajos are both Athabaskan speakers and it is believed that both tribes descended from the same Athabaskan ancestors. *NANCY MARYBOY & DAVID BEGAY, THE NAVAJOS IN A HISTORY OF UTAH’S AMERICAN INDIANS* 265, 271-72 (Forrest S. Cuch ed., Utah State University Press 2000).

\(^{71}\) One such site, which has been attributed to Utes, appears in Capitol Reef National Park, within ten miles of the alcove where the shields were found.

\(^{72}\) Loendorf & Conner, *supra* note 5, at 216-17.


\(^{74}\) Loendorf & Conner, *supra* note 5, at 217.
the shields was again radiocarbon-dated in 1992 and, while the dates obtained were earlier, circa 1500, the results again indicated the shields were of post-Fremont manufacture, using the generally accepted dates for the Fremont lifeway.\(^{75}\) It should be pointed out, however, that some researchers argue that the ending date for the Fremont culture might be as recent as 1500, which would overlap with the second set of radiocarbon dates for the shields.\(^{76}\) Thus, as of the mid-1990s, the issue of the cultural affiliation of the shields remained unresolved.\(^{77}\)

Two factors primarily contribute to this uncertainty. One factor is the uniqueness of the shields in the anthropological record. There are simply no other shields at all like them, so it is not possible to deduce their origin based on similarities with known equivalent objects—because there are none.

The other factor contributing to this inability is that too little is known about the various groups in the Four Corners area during the period of the shields’ manufacture. The shields have been dated to approximately 1500. That was a time of transition. Up until approximately 1300, southern Utah had been inhabited by two groups, often called the Anasazi and the Fremont.\(^{78}\) For reasons that are not completely understood, by about 1300 these two groups had abandoned their settlements. At about that same time two separate language groups were entering the area: Athabaskan speakers were migrating into the area from the north, and Numic (a branch of the Uto-Aztecan language family) speakers were migrating into the area from the south and west.\(^{79}\) Eventually, the Athabaskan speakers would form what today we recognize as the separate tribes of Navajo and Apache, but the timing and process for that separation is still unresolved. Similarly, the Numic speakers evolved over time into what we today recognize as the Ute and the Paiute tribes.\(^{80}\)

In other words, at the time of the shields’ manufacture, the social groupings in the Southwest were in a state of flux, making it impossible, given the incomplete state of our knowledge today, to attribute the shields authoritatively to one group or another. Moreover, there is evidence that these groups intermarried.\(^{81}\) There is a real possibility that the shields were manufactured by someone who was both Navajo and Ute or Paiute.

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\(^{75}\) Id. at 221-22.  
\(^{76}\) Id. at 223.  
\(^{77}\) Kreutzer, supra note 8, at 108.  
\(^{78}\) ROBERT S. MCPHERSON, Setting the Stage: Native America Revisited in A HISTORY OF UTAH’S AMERICAN INDIANS 3, 12-13 (Forrest S. Cuch ed., Utah State University Press 2000).  
\(^{79}\) Id. at 14-16.  
\(^{80}\) RONALD L. HOLT, BENEATH THESE RED CLIFFS: AN ETHNOHISTORY OF THE UTAH PAIUTES 4 (Utah State University Press 2006).  
Given the uncertainties surrounding the cultural affiliation of the shields, the question arises why the Park did not opt to invoke Section 3005(e) of the Act:

where there are multiple requests... and... the federal agency or museum cannot clearly determine which... is the most appropriate claimant, the agency or museum may retain such an item until the requesting parties agree... or the dispute is otherwise resolved pursuant to the provisions of this chapter or by a court of competent jurisdiction.\(^{82}\)

The section thus provides a loophole that allows the federal agency or museum in essence to throw up its hands and pass the problem onto someone else.

While at first blush, this provision may appear attractive; especially in a case such as this where the question of cultural affiliation is politically charged due to pre-existing tensions between the claimants, as a practical matter it poses some problems. If the agency or museum cannot determine cultural affiliation, the artifacts will remain in bureaucratic limbo. The agency or museum "may" retain possession, but if it does, it will also retain the expense and liability of storing the artifact.\(^{83}\) The more fragile and unique the artifact, the more expensive that storage will be. Moreover, due to the sensitive nature of artifacts covered by the Act, the agency or museum most likely will refrain from displaying the item until the repatriation claim is resolved one way or the other. The Act does not require the agency or museum to retain an artifact where the cultural affiliation cannot be determined, but in the politically-charged arena of competing repatriation claims, it is hard to imagine that the artifact would be turned over to one of the claimants without that action giving rise to an outcry from the disfavored claimant.\(^{84}\)

In the case of the shields, the Park archaeologist, while acknowledging that the issue could not be definitively resolved, determined that the Navajo Nation’s submission had met the legal standard of establishing them as “clearly” the most appropriate claimant. The repatriation decision provided: “Given the detail and specificity of the Navajo claim, in addition to historical and ethnographical evidence that is consistent with (though not proof of) that claim, I consider the Navajo claim to be clearly superior to the competing claims currently under review.”\(^{85}\)

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\(^{82}\) 25 U.S.C. § 3005(e).

\(^{83}\) Artifacts composed of organic materials, such as the bison-hide shields, must be stored in temperature, light, and humidity controlled environments. When the shields were removed from display at the Park’s visitor center, the nearest facility capable of providing such storage was outside of Tucson, Arizona.

\(^{84}\) In the dispute between two Oneida tribes over repatriation of a wampum belt, the belt was left with the Field Museum of Chicago (which had possession of the belt at the time repatriation was requested) until the two claimants could work out a settlement of the dispute. See McKeown & Hutt, supra note 16, at 193; see also, Lawrence Hart, Indigenous Renaissance: Law, Culture & Society in the 21st Century, 10 ST. THOMAS L. REV. 7, 11-13 (1997).

\(^{85}\) Kreutzer, supra note 55, at X.
This decision has been highly controversial. Dissatisfaction with the decision may be related to the critic's own preferred outcome. Some critics want to see the shields reburied, while others want the shields placed in a museum; both groups are unhappy that the shields have been turned over to the Navajo. To some extent, however, criticism of the decision may reflect a lack of understanding of the differences between an anthropological attribution of cultural affiliation and a legal decision.

III. INTER-TRIBAL TENSIONS: PITTING TRIBE AGAINST TRIBE

Up to this point in time, the most notorious case under NAGPRA is that of Kennewick Man, a nearly complete skeleton that has been radiocarbon dated at more than nine thousand years of age. The skeleton was discovered eroding out of a bank of the Columbia River and was the subject of a lawsuit, Bonnischen v. Army Corps of Engineers, brought by a group of scientists seeking to prevent repatriation of the skeleton to coalition of Northwestern tribes, which had stated its intent to rebury the remains.

As a result of the widespread attention paid to this case, it is easy to assume that all NAGPRA controversies are between Native Americans seeking to reaffirm their traditional beliefs and scientists seeking to further the goals of Western knowledge. This assumption, however, would be erroneous. NAGPRA disputes can also arise among competing Native American claimants.

Indeed, this has caused some to criticize the design of NAGPRA. These critiques argue that the concept of "ownership" legalized in NAGPRA is both contrary to Native American beliefs and has the potential to pit tribe against tribe.

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86 See Joe Bauman, Navajo Custody of Shields Fueling Discontent, DESERET MORNING NEWS, October 10, 2005, at B1.

87 The Park archaeologist on more than one occasion expressed discomfort with her role of mediating the two disparate standards. She referred to the whole experience as "Death by NAGPRA."

88 See Thomas, supra note 19, at xix-xxi.

89 357 F.3d 962 (9th Cir. 2004), amended on reh 'g, 367 F.3d 864 (9th Cir. 2004).

90 For example, the Goshute have argued some cultural items covered by NAGPRA cannot be "owned" by a human, as they belong to the spiritual beings. Kreutzer, supra note 63. See also Tsosie, supra note 28, at 66.

91 For example, the Hopi once occupied a much larger area than their current reservation. As a result of actions by the United States, much of their ancestral land lies within the Navajo reservation and it contains thousands of archaeological sites. NAGPRA's provisions give "ownership rights and the determination of the final treatment and disposition of Hopi ancestral human remains and cultural items to a culturally unrelated tribe." Kurt E. Dongoske, NAGPRA: A New Beginning, Not the End, for Osteological Analysis, in A HOPI PERSPECTIVE IN REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS? 282, 285 (Devon A. Mihesuah ed., University of Nebraska Press 2000).
Three examples not covered by NAGPRA illustrate how goals and attitudes can differ from tribe to tribe. In the GE Mound case, the controversy involved artifacts found on privately owned land. In that case, pothunters had looted a Hopewell burial mound. When many of the artifacts were recovered, the property owner (General Electric) offered to repatriate the items. However, the connection between the Hopewell culture and modern tribes is not currently understood. Various tribes claimed the items; some of them wanted the items reburied while others wanted them placed in a museum. Ultimately, the items were reburied in the mound.

The controversy surrounding Ishi’s brain also implicated tensions within the Native American community. Ishi was the last known member of his tribal group, which anthropologists have called the Yahi. After his death, his brain was removed and preserved, despite his wish to be cremated. In the late 1990s when it was discovered that the Smithsonian still had possession of Ishi’s brain, two different Native American groups sought repatriation, a group from the Maidu and another group claiming descent from the northern Yana.

In the absence of direct lineal descendants, the next priority is the tribe with the closest cultural affiliation, and that is where the controversy arose. Anthropologists have concluded that the Yahi were linguistically related to several other tribal groups called, collectively, the Yana, with subdivisions into northern, central, and southern Yana. One group claiming the right to repatriate Ishi’s brain were descendants of the northern Yana.

But because Ishi lived at a time when his tribal group had been horribly decimated, the possibility exists that one of his parents may have belonged to another nearby group. Ishi recorded a number of songs and stories; most of them were Yahi, but four belonged to the Atsugewi and another four belonged to the Maidu. And when Ishi finally surrendered to the whites, he had left his ancestral

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93 This was a voluntary repatriation, as NAGPRA does not apply to remains and artifacts found on private property. See text accompanying notes 27-28, supra.
95 The Smithsonian’s repatriation obligations are governed, not by NAGPRA, but by a similar, earlier legislative act, which like NAGPRA gives first priority for repatriation of human remains to lineal descendants. Ishi has no known direct descendants, although the possibility exists that there are other descendants of Ishi’s tribal group, as there are historical accounts of Yahi children being adopted by whites and, in one case from the 1880s, being sent to a reservation. Stam, supra note 94 at 207-09.
96 Kroeber, supra note 94, at 14-17, 24-26 & 28.
97 Stam, supra note 94, at 213-14.
territory and was in the territory of the Maidu. The other group claiming the right to repatriate Ishi's brain were Maidu.

The Maidu, and in particular a man by the name of Art Angle, were the first to seek repatriation, starting in 1997. They knew that Ishi's ashes were in a cemetery outside of San Francisco (his body had been cremated), but they also knew of a rumor that his brain had been removed and had not been cremated with his other remains. They wanted to bring Ishi “home” to the Sacramento Valley and bury him on his ancestral lands, but they did not want to do that until his brain was reunited with his ashes. Art Angle joined up with Orin Starn, an anthropologist who was researching Ishi's life and who ultimately tracked down Ishi's brain at the Smithsonian. The publicity surrounding that event led the Yana descendants to also claim repatriation.

Ultimately, the Smithsonian decided to repatriate to the Yana descendants. This decision has been criticized as ignoring the Smithsonian’s own guidelines, which “allowed for and even encouraged” joint repatriation where multiple claimants had a legitimate basis for repatriation. Unlike the situation in the GE Mound case, both groups wanted the same outcome: reburial. Nevertheless, the Smithsonian’s decision left bad feelings between the two groups. The case seems to confirm the fear that federal involvement in repatriation will only serve to drive a wedge between Indian communities.

In another case, filed in Montana U.S. District Court, self-identified descendants of a group of Native Americans killed at Fort Robinson, Nebraska, opposed the Smithsonian’s repatriation of the remains to the Northern Cheyenne Tribe and sought an injunction prohibiting reburial of the remains.

Although none of the preceding cases involved NAGPRA, there have been instances of competing tribal claims for repatriation under NAGPRA. For example, in 1994, the Marine Corps Base Hawaii sought to repatriate the remains of some 1,582 individuals which had been recovered from the Mokapu peninsula on the island of O'ahu. The Corps “found the NAGPRA procedures of little help in resolving multiple competing claims from culturally affiliated Native
Hawaiian individuals and organizations." It took over four years "of intensive effort" to bring the twenty-one claimants to agreement on the ultimate disposition, which was reburial on the peninsula.

Another inter-tribal dispute involved an Oneida Wampum Belt that was in the possession of the Field Museum of Chicago. The wampum belt consisted of purple and white shells that had been woven into a panel about three feet long by a half a foot wide, bound with buckskin and having buckskin fringe at each end. In 1995, the Field Museum filed a Notice of Intent to repatriate the belt to the Oneida Nation of New York. That tribe's right to the belt was contested by the Oneida Tribe of Wisconsin. Historically, both federally recognized tribes had been one nation, the Oneida Nation. The dispute was referred to the NAGPRA Review Committee, which urged the two tribes to work out a solution. Until that time, the belt would remain in the possession of the Field Museum.

Currently ten tribes have claimed Northern Fremont remains and cultural items that are held by the Bureau of Reclamation in Utah. At present, archaeologists are unsure whether the culture we call "Fremont" was a single group, several groups, or just a regional adaptation of the Anasazi or Ancestral Puebloan culture. Moreover, the relationship between the Fremont (whoever they were) and modern tribes is unclear.

In the case of the shields, it would be inaccurate to say that the case created division; rather, it exacerbated existing divisions. Historically, the Navajo and the Utes have more often been enemies than allies, and both groups have a history of preying upon or exploiting the Paiutes. Southeastern Utah was territory

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105 Id.
106 Id.
107 See Notice of Intent to Repatriate a Cultural Item in the Possession of the Field Museum of Natural History, Chicago, IL, 60 Fed. Reg. 11,109 (Mar. 1, 1995). See also Hart, supra note 84, at 11-13 (discussing the dispute from the perspective of a Cheyenne Peace Chief and member of the NAGPRA Review Committee).
108 Hart, supra note 84, at 11 n. 54.
109 Id. at 12.
110 Id. at 13.
111 McKeown & Hutt, supra note 16, at 193.
112 Ferguson, supra note 57, at 1. This is not the first time, and probably will not be the last, that multiple tribes have claimed cultural affiliation with the Fremont, who inhabited much of Utah and parts of Nevada, Idaho, Wyoming and Colorado from approximately 100 A.D. to 1300-1500 A.D. In 1998, the U.S. Forest Service had determined that there was a shared group identity between the Fremont and the Hopi, Paiute, and Uintah-Ouray Ute tribes, and the Pueblo of Zuni. Id. at 15. Francis P. McManamon, Notice of Inventory Completion for Native American Remains from Gooseberry Valley, Utah in the Control of the Fishlake National Forest, Federal Register 63 (92): 26623. In all, twenty modern tribes claim descent from the Fremont. Marti Allen, Highlights of the Pectol-Lee Collection, at Relics Revisited Seminar, February 7, 2004 (BYU).
113 McPherson, supra note 81, at 7-11.
114 Id. at 7 (noting Ute slave raids against the Paiutes) and 11 (noting that Navajo
claimed and used by all three tribes, and oral history records many skirmishes and slaving raids involving the tribes. Add to this historical bad blood the fact that the Navajo Nation today is one of the largest, best organized, and most politically powerful Native American tribes, and it is easy to understand why the Utes and Paiutes might feel some resentment towards the Navajo.

For example, “the Navajo Nation was the first tribe in the country to establish a historic preservation program . . . , which has grown to become larger than the historic preservation program of any state.” It established one of the first tribal archaeology programs in the 1950s to prepare for and litigate its claims before the Indian Claims Commission. In 1996, the Navajo Historic Preservation Department had a staff of seventy and an annual budget of more than four million dollars.

The Park had to decide the disposition of the shields based on the claims presented to it, and the Navajo claim was the best supported, but the relative resources available to the claimants leads one to wonder if the Utes and Paiutes were simply out-litigated by an opponent with more resources. It is certainly possible that, whether that is the case or not, some might perceive it to be. As the Park archaeologist noted in one of her reports, some tribes, for economic reasons, will always be disadvantaged in multiple-claim NAGPRA disputes.

IV. TELLING NAGPRA STORIES

The question of who owns the past has both a metaphoric and a literal meaning. We have come to realize that the official version of the past—that is, history—is written by those in power, which for the last two thousand years or so has meant white males. As marginalized groups, such as women and ethnic minorities, have grown in consciousness and political involvement, they have begun the task of reclaiming their histories. This task has involved both rediscovering the ignored history of the marginalized, and rewriting or correcting

looked down on Paiutes and bought Paiute children to be used for labor).

115 Id. at 6-7 (area used by Utes, Navajos and Paiutes).
116 Id. at 2-19.
117 The Navajo reservation covers some 250,000 square miles and is the largest in the country, comprising approximately one fourth of all tribal lands in the lower forty-eight states. At approximately 200,000 members, it is also the largest tribe. Alan S. Downer & Alexandra Roberts, The Navajo Experience with the Federal Historic Preservation Program, 10 NAT. RESOURCES & ENV’T 39 (1996).
118 Downer & Roberts, supra note 117 at 39.
119 Id.
120 Id.
121 Kreutz, supra note 63, at 11.
122 Thomas, supra note 19, at xxxvii.
the official history. Metaphorically, then, “owning the past” has become a way of telling one’s story.

But “owning the past” has a literal meaning as well. It involves the legal and ethical question of who “owns”—that is, has rights of possession and control over—the material remnants of the past, be they human remains or artifacts. Societies have not always agreed on the basic principles that should govern this question.

The case of the shields presents an instance in which the two meanings of “owning the past” come together, the metaphoric “owning” of the past through the telling of one’s story and the literal “owning” of a venerable artifact. The dispute as to the legal ownership of the shields is ultimately resolved on the basis of the persuasiveness of the story the Navajos told about the shields.

This section of the paper will address the role of stories in the context of NAGPRA. First the role of stories as evidence in NAGPRA disputes will be examined. Then, the role of the specific story told by John Holiday, a Navajo elder and singer, or medicine man, is examined in light of the theory that a story’s persuasiveness is evaluated in the context of its internal consistency and its external corroboration. Finally, the other two claims are examined from a narrative perspective.

A. Telling Stories as Evidence under NAGPRA

One of the most interesting aspects of thinking about the role of stories under NAGPRA is that the statute explicitly incorporates storytelling into the adjudicative process. In their influential study of how juries decide cases, Bennett and Feldman offer support for their theory that storytelling is the basis for judgment in our system of adjudication. In other words, they posit that the best description of what goes on in a trial is storytelling. But this is an implicit use of storytelling, as the means of organizing the evidence in a coherent manner.

NAGPRA does something different. The Act lists oral tradition as a relevant category of evidence. In fact, the Act lists oral tradition along with “scientific” evidence, such as linguistic, historical, archaeological, and genetic evidence, with no indication that one type of evidence is worth more weight than any other. The Act thus incorporates as evidence the stories that indigenous peoples tell one another outside of the courtroom.

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125 25 U.S.C. 3005(a)(4) and 43 C.F.R. §10.14(e). The Act also lists folklore as another category of competent evidence. The difference between oral tradition and folklore is beyond the scope of this paper, as only oral tradition is relevant to the shields controversy, but much of what is said here would be equally applicable to folklore.
The Act, by doing this alters a basic rule of evidence in the adversarial system of justice. An axiom of traditional evidentiary hearings is that “hearsay” is excluded and is not considered competent evidence.\textsuperscript{126} "Hearsay" is testimony that is based on what someone told the witness out of court, offered to prove the truth of the matter asserted.\textsuperscript{127}

The justification for excluding hearsay is that there is no opportunity to test the credibility of the out-of-court speaker. The trier of fact can assess the credibility of the witness, to be assured that the witness is not misrepresenting either intentionally or inadvertently what the witness was told, but the trier of fact cannot assess the credibility of the out-of-court speaker whose speech the witness will recount. Accordingly, A cannot testify that B said, “I saw Johnny do it,” because the trier of fact observing A can only assess A’s credibility, that is, whether A is honestly and accurately recounting what B said. But B herself must testify, “I saw Johnny do it,” if the trier of fact is to be able to assess B’s honesty and ability to accurately observe Johnny’s actions.\textsuperscript{128}

NAGPRA, however, explicitly incorporates a certain type of hearsay as competent evidence, contrary to the traditional prohibition. NAGPRA provides that, in assessing the strength of a claim of cultural affiliation, the decision maker must consider “oral tradition.” Oral tradition, of necessity, is hearsay. It is information based, not on what the witness saw or experienced first hand, but on what someone else told the witness. Moreover, oral tradition is proffered to prove the truth of the matter asserted. That is, with oral tradition, A testifies as to what B told A for the express purpose of proving that what B said is true.

A fundamental purpose of NAGPRA is to redress historic wrongs done to Native Americans.\textsuperscript{129} It has been said that the Act “is concerned not with non-Indian science or federal property, but predominantly with Indian civil rights, cultural preservation, and statutory entitlements.”\textsuperscript{130} Recognizing oral tradition is a way of respecting the culture of a non-literate people. But does it undermine truth seeking?

There are two ways of looking at oral tradition and oral history. On the one hand, proponents will argue that oral history “is premised on fact rather than

\begin{footnotes}
\item[126] FED. R. EVID. 802.
\item[127] FED. R. EVID. 801.
\item[128] The hearsay prohibition does not exclude all out-of-court statements, but only those that are proffered to prove the truth of the matter asserted in the out-of-court statement. Thus, in the above example, if A’s statement is proffered, not to prove the truth of the matter asserted, namely, that Johnny did it, but for some other purpose, it may be admissible. For example, it may be admissible to prove that B knows Johnny, if B’s knowledge of Johnny is in dispute.
\item[129] “The Act was in part an effort to reverse past injustices towards indigenous minority cultures.” John Alan Cohan, \textit{An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One)}, 27 ENVIRONS ENVTL. L. & POL’Y J. 349, 417 (2004).
\end{footnotes}
imagination, and that both the nature and necessity of accurate recounting within oral societies makes these histories invaluable indicators of the past.” On the other hand, critics will point out that, depending on the age of the oral tradition, it may have been “conveyed through perhaps hundreds of intermediaries over thousands of years” and that the “opportunity for error increases when information is conveyed through multiple persons over time.” Such inadvertent errors must be combined with changes in language that can alter the meaning of the story and the incorporation of religious beliefs into the narrative that can blur the line between historical fact and myth, resulting in narratives “of limited reliability.”

B. Telling the Story of the Shields

This section will focus on the specific story that was determinative in the decision to repatriate the shields to the Navajo Tribe. The park archaeologist who resolved the repatriation dispute surrounding the shields did so in significant part on the basis of the persuasiveness of the story told by John Holiday. In this section, the story is analyzed in light of two factors that affect credibility and thus persuasiveness: story structure and the existence of corroborating evidence. Moreover, the story told by the Navajo is contrasted with the stories told by the other two groups claiming the shields.

1. The Navajo Story

There are actually several slightly different versions of the story, as the teller, John Holiday, has been interviewed on different occasions by different interviewers. Moreover, John Holiday is a traditional Navajo singer or medicine man, speaking in Navajo to Anglo interviewers through an interpreter. He is, however, considered a man of impeccable integrity and highly respected both by Navajos and anthropologists. Here, I am going to focus on the story as told to and understood by the archaeologist who made the repatriation decision, as this was the story that mattered in terms of the outcome of the controversy.

The shields were made by a man called Many Goats White Hair, nine generations ago. The shields were sacred ceremonial objects. When the Navajos

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131 Id.
132 Cohan, supra note 129, at 396.
133 Id.
134 See Kreutzer, supra note 55, at 18. See also HOLIDAY & MCPHERSON, supra note 123, at 191-92 and n. 22 at 352-54 (where two more versions appear). Yet, another version of the story appears in Kreutzer, supra note 55, at 19-20, but this version was told by a different speaker, based on his understanding of John Holiday’s story.
135 This version of the story was based on a personal interview conducted on May 7, 2002, with translation by Timothy Begay and Marklyn Chee. Kreutzer, supra note 55, at 18.
136 On another occasion John Holiday described the shields this way: “These shields were huge and had strings attached to them on the inside. The earth shield had the
were being rounded up by war parties, the shields were in the care of two men, Man Called Rope (perhaps also known as Ropey) and Little Bitter Water Person. Man Called Rope was John Holiday’s grandfather. Concerned about the shields’ safety, the two men decided to hide the shields “in the area we call the Mountain With No Name [Henry Mountains] and Mountain With White Face [Boulder Mountain].” The location of the hidden shields was then lost.

a. Story Structure

According to Bennett and Feldman, we can assess the persuasiveness of a story by examining its structure. Specifically, the more ambiguities in the connections between the central action of the story and the key symbols for the elements of the story, the less persuasive the story is. “The hypothesis is that as structural ambiguity increases, story credibility decreases.”

Mountains and vegetation depicted on it. The mountain shield had lightning, sunrays, and rainbows, while the sky shield had all the heavenly bodies and stars on it. These shields were big, and nothing could penetrate them — neither bullets and arrows, nor evil and witchcraft. They are shields against all things that can harm a person.”

HOLIDAY & MCPHERSON, supra note 123, at 352-53 n. 22. I do not know whether this description of the shields was recorded before or after John Holiday viewed the shields.

137 During the 1860s, the U.S. Army rounded up some 8,000 Navajos (estimated at about half of the tribe) and drove them to Fort Sumner in New Mexico, where they were incarcerated until 1868. MCPHERSON, supra note 81, at 6-11.

138 Kreutzer, supra note 55, at 18.

The Capitol Reef archaeologist recounts this version: “There was some confusion over who actually placed the shields in the cache, but evidently it was Little Bitter Water Person. Before the shields could be recovered, Mr. Holiday said, Little Bitter Water Person grew sick and died. Nobody knew how to find the shields.” Id. at 18. In another version told to a historian, John Holiday suggests that “Ropey,” perhaps another version of the name of Man Called Rope, hid the shields: “When he went back to get it, he could not find it, so it was lost.” HOLIDAY & MCPHERSON, supra note 123, at 353 n.22.

John Holiday also relates the loss of a sacred buffalo-hide object, which he said acted like a “protective shield.” At one point he refers to it as a “round shield.” Id. at 191-92. It is not clear to me whether this is another way of referring to the three shields or whether it relates to a separate object. This object was in the safe keeping of a man, named Yellow Forehead, who had hidden it during the Fort Sumner years near White-Face Mountain but when he went to retrieve it, he could not find it. Id.

There is some indication that there were two separate sacred objects, the shields and a “sacred bundle,” which was also lost or stolen near White-Face Mountain during the Fort Sumner years. Id. at 352 n. 19. According to John Holiday, Little Bitter Water and Ropey were suspected of taking this bundle. Id. However, at one point John Holiday seemed to refer to the shields as a sacred bundle. Id. at 353 n. 22. So it is ultimately unclear whether there were two instances of sacred objects being lost under similar circumstances, or whether all of these versions are referring only to the shields.

140 BENNETT & FELDMAN, supra note 124, at Ch. 4

141 Id. at 72.
In the Navajo’s story, the central action is the shields being hidden. As I understand the authors’ use of the term “key symbols,” it is referring to discrete statements about events in the story, what lawyers might refer to as “facts.” Feldman and Bennett suggest that these symbols can be organized by the elements of a story: scene, agent, act, agency, and purpose. They then suggest examining the connections between the central action and the key symbols surrounding that action, as well as between the various symbols, to assess their internal consistency and completeness. Those connections are labeled ambiguous where there is a lack of consistency or incompleteness. Finally, they posit that ambiguities between peripheral symbols are less significant than ambiguities between the central action and key symbols.

The following figure maps out the connections between the central action and the various story elements:
The diagram reveals that there are only three ambiguous connections out of a total of seventeen connections, and that none of the ambiguous connections relate to the central action, which is the hiding of the shields. The ambiguities relate to the exact identity of the Navajos who hid the shields and the reason they couldn’t be found again by Man Called Rope.

What is not ambiguous, however, are the relations between hiding the shields (the central action) and the various other story elements: the Navajos (the agents) do it to protect the shields during the round-up (purpose) because the shields are important ceremonial objects (agency) and they choose the area because it is far from the Army war parties (scene).

As Bennett and Feldman caution, however, determining whether a connection is ambiguous is not an exact science and depends upon the interpretive skills and knowledge of the audience for the story. It could be argued that there is an ambiguous connection involving the central action, and that is the connection with the scene. In other words, it could be argued that there is a lack of information as to why the Boulder Mountain area was chosen over any number of other locales that were also “safe” from the Army search parties. Whether a listener found this connection to be ambiguous may explain why some who heard this story have not been persuaded by it. As will be discussed below, the park archaeologist found this link to be consistent and unambiguous due to external corroboration for Navajo presence in the Capitol Reef area in the 1860s.

In summary, analyzing the story using the methodology proposed by Bennett and Feldman suggests that the story structure was primarily unambiguous, which in turn provides an explanation for why the story was persuasive. It must be pointed out, however, that the research done by Bennett and Feldman also indicated that there is no necessary correlation between truth and persuasiveness. That is to say, just because a story is persuasive does not mean that it is true and, conversely, a poorly constructed story is not necessarily a false story.

b. Corroborating Evidence

Bennett and Feldman posit that, in addition to assessing the internal consistency and completeness of a story, listeners will consider whether the story is consistent with what is known about how the world works. In the case of the shields, the question thus becomes whether the Navajo account of the hiding of the shields is consistent with what is known about the Navajos from the anthropological and historical perspectives.

This question is one to which the written decision justifying repatriation to the Navajos devotes much attention. The analysis of anthropological and historical sources to determine whether they corroborate or call into question the Navajo’s story of the shields can be organized around two subsidiary questions: Were there “Navajos” in 1500? Were the Navajos in the area where the shields were hidden in the 1860s?
c. Did the Navajos exist as a tribe in 1500?

The short answer to this question is maybe. According to anthropologists, both Navajos and Apaches are Athabaskan language speakers who are descended from the Northern Athabascans of Canada and Alaska. Recent linguistic analysis suggests the Athabascans reached the Southwest by about 1400 A.D. The archaeological evidence of early Athabaskan habitation in the Southwest is meager and there is no consensus as to its interpretation among archaeologists.

The subsidiary question of when these Southern Athabascans split into Navajos and Apaches is also subject to debate. Linguistically, the Navajo dialect may have begun diverging from other Athabaskan-speakers around the same time, 1400 A.D. Historically, the first Spanish reference to the Athabascans may have been in 1541, when a Spanish report referred to the nomadic “Querechos.” By 1608, the Spanish were referring to the nomadic, non-Puebloan inhabitants of the Southwest as “Apaches.” It is not until 1626 that the Spanish distinguish a sub-group of the Apaches; they refer to this sub-group as the “Apaches del Nabaxu,” meaning Apaches of the Cultivated Fields, the source of the tribe’s current name, Navajo.

Thus, due to the unsettled state of current anthropological knowledge, the question of when the Navajos came into existence as a separate tribal group cannot be definitively answered. However, such evidence does not negate the possibility that Navajos or at least the Athabaskan ancestors of present-day Navajos were in the area by the time the shields were made. That the makers of the shields may have been Athabaskan ancestors of both the Navajo and Apache is irrelevant in this controversy, as none of the Apache tribes filed a claim for the shields.

d. Were the Navajos in the Capitol Reef Country in the 1860s?

The location of the hidden shields in Wayne County in south-central Utah, just outside of Capitol Reef National Park, is a primary source of doubt for those
who question the decision to repatriate the shields to the Navajo. The area is not considered part of the aboriginal or traditional lands occupied by the Navajo, which are located in the southeast corner of the state, primarily in San Juan County, and in Arizona and New Mexico. Conversely, the Capitol Reef area is considered part of the traditional use area of both the Utes and the Paiutes.¹⁴⁷ There is no prehistoric evidence that conclusively establishes a Navajo presence in the area.

There is, however, historic evidence that puts Navajos in the Capitol Reef area in the 1860s. From 1863 through 1867, a Ute chief known as Black Hawk led groups of Ute, Paiute and Navajo warriors on a series of raids against the Mormon settlers. In 1866-67, a skirmish between Black Hawk’s men and Mormon militiamen occurred less than ten miles from where the shields were buried.¹⁴⁸

The Navajo story does not claim that the shields were buried in Navajo territory; to the contrary, the story is that the shields were taken away from Navajo territory for safe-keeping. The historical record tends to corroborate the Navajo claim in that it establishes the transitory presence of Navajo in the area, which is all that the story requires. Moreover, the round-up of the Navajos given in the story as the reason for the hiding of the shields is indisputably supported by the historic record.

2. The Southern Utes Claim: A Less Persuasive Story

So far the focus has been on the Navajo claim and the oral tradition that made up the basis for that claim. I will now examine the competing claim from the Southern Utes. This claim was based upon several strands of evidence, the strongest of which is that the shields were recovered from traditional Ute territory.¹⁴⁹ In addition, there was evidence that Utes traditionally used buffalo-hide shields in hunting and raiding, and that the design elements of the shields were not inconsistent with Ute traditions.

In assessing this claim, the Park archaeologist concluded that the Southern Utes had made a “plausible claim” of cultural affiliation, that the Southern Utes’ claim was “superior” to the Ute/Paiute collaborative claim, and that were the claim the “only” claim the ultimate decision might have been favorable to the Southern Utes.

The tribes’ claim is based on the fact that the dating and location of the shields are consistent with Ute/Paiute occupation, and that some favorable comparisons have been made between the shield motifs and known Ute shield pictographs. No link to particular individuals, groups, or specific ceremonies has been offered. While such generalities might

¹⁴⁷ Kreutzer, supra note 55, at 12.
¹⁴⁸ Id. at 14.
¹⁴⁹ Lee Kreutzer, Summary of Historical research and Evaluation of Repatriation request Submitted by the Southern Ute Tribe and the Ute Mountain Tribe, for the Capitol Reef Shields 20 (July 1, 2002).
be acceptable were this collaborative claim the only claim for the shields, they do not outweigh the specific and detailed information provided by the Navajo Nation regarding these shields.\textsuperscript{150}

Although it had been argued in support of the Southern Utes’ claim that “[t]he lack of Ute oral traditions in regard to the shields means nothing,”\textsuperscript{151} and even though the Park archaeologist concurred with that statement to some extent, when contrasted with the detailed and specific oral tradition put forward by the Navajos, the absence of comparable narrative evidence damaged the Southern Ute claim.

3. The Ute/Paiute Claim and the Problem of the Unspeakable

Consideration of the Ute/Paiute story of the shields reveals what I call the problem of the unspeakable. Not all stories can be told. What if a tribe is forbidden to talk about the evidence necessary to document their claim?\textsuperscript{152}

A recent highly-publicized case from Australia exemplifies the problem. In 1994, under the Aboriginal and Torres Strait Islander Heritage Protection Act,\textsuperscript{153} a group of Ngarrindjeri\textsuperscript{154} women sought to prevent the construction of a bridge from the Australian mainland over the Murray River to Hindmarsh Island.\textsuperscript{155} The women claimed that the island was the site of secret/sacred women’s business.\textsuperscript{156} The then Federal Labor Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner, was faced with the problem of determining the legitimacy of the Ngarrindjeri claim even though the sacredness of the site precluded the women from discussing the site, except with authorized women.

This was not the first time that Australian legal proceedings had to contend with the problem of the unspeakable. According to some scholars, in land claim hearings and civil suits, there was an established policy of accommodating “the

\textsuperscript{150} Id. at 22.
\textsuperscript{151} Id. at 19.
\textsuperscript{152} See, e.g., Tsosie, supra note 28, at 72: (process of proving eligibility for protection under NHPA “raises concerns for Native American people, who are often held to norms of secrecy and confidentiality when dealing with sacred information”).
\textsuperscript{153} Aboriginal and Torres Strait Islander Heritage Protection Act, 1984 (1984) (Austl.).
\textsuperscript{155} Hindmarsh Island is a small island in Lake Alexandria on the southern Australian coast. Cordova, supra note 154, at 131.
protocols of secrecy associated with Australian sacred sites” through closed hearings and unpublished opinions. He later issued a protective order prohibiting the construction of the bridge for twenty-five years. On appeal by the developers who wanted to build the bridge, the Federal Court quashed the protective order. According to Justice O’Loughlin, if the Aboriginal claimants wanted the protection of the Heritage Act, they had to abide by the requirements of the Act.

The idea that to obtain the protection promised by the government for sacred sites the claimants had to violate the sacredness of the site can be criticized as creating a Hobson’s choice: maintain the secrecy of the sacred knowledge associated with the site and lose the protection of the site itself, or protect the site by disclosing the secret knowledge that makes the site sacred, thereby profaning the sacred. At best, what this conundrum reveals is incommensurability between Western law and indigenous law. The legal system is unable to accept indigenous truth claims on their own terms, without restructuring them according to legal narrative conventions.

A similar conundrum arose with the Ute/Paiute claim to the shields. Originally, the archaeologist investigating the competing claims to the shields was rather dismissive of the Ute/Paiute claim:

The [Ute/Paiute] tribes have constructed a plausible, but not persuasive or even adequate, claim of original Ute/Paiute control of the shields... This claim is seriously lacking in credibility. In fairness to other claimants and the general public, the National Park Service cannot simply accept a tribe's unexplained, unelaborated, and unjustified request for repatriation. That is where this joint claim stands at present.

157 Id. at 159.
158 Cordova, supra note 154, at 133.
159 Id. at 133-34.
160 Meanwhile, allegations had arisen that the claim of sacredness had been fabricated, and a royal commission was appointed to investigate the allegations. The Ngarrindjeri women boycotted the hearings because they refused to divulge the secret sacred knowledge, even though it had been leaked to the press by the opponents of the Labor Party. Ultimately, the commissioner upheld the charge of fabrication, despite the fact that the secret sacred knowledge itself was never put in evidence. Pritchard, supra note 156, at ¶3; Cordova, supra note 154, at 135.
161 Pritchard, supra note 154, at ¶5.
162 Lee Kreutzer, Summary of Historical Research and Evaluation of Collaborative Repatriation Request Submitted by the Paiute Tribe of Utah, Ute Indian Tribe of the Uintah and Ouray Agency, and the Kaibab Band of Paiute Indians, for the Capitol Reef Shields 22-23 (July 1, 2002).
After the Park determined to repatriate the shields to the Navajo, and while administrative appeals were proceeding, the Park received further information pertinent to the Ute/Paiute claim to the shields. In late 2002, the Skull Valley Goshute Tribe contacted the Park and in early 2003 submitted a report from Goshute Tribal Historic Preservation Director Melvin Brewster. The Goshutes were not themselves submitting a claim, but they consider themselves closely related to the Paiute and Ute tribes, as all are Numic-speaking groups, and they were supporting the Ute/Paiute claim. Because the report contained sensitive cultural information, however, the tribe did not want to make it part of the public record. The Park resolved the impasse with a process akin to that used by the Minister deciding the Ngarrindjer claim regarding Hindmarsh Island. The Park archaeologist read the report, made notes, and then returned the document to the Goshute tribe.

The report, according to the archaeologist’s notes, made the argument that the shields were a permanent, on-going prayer offering, and that disinterment interrupted that on-going ceremony. The Goshute information both clarified the Paiute position and illuminated a NAGPRA problem:

Mr. Brewster’s discussion of Punown religion thought clarified for me what Southern Paiute consultants tried to communicate to me earlier in the process. Most would confide no information whatsoever, except that the shields should be repatriated to the Utes and the Paiutes; they responded negatively when asked for information that could be weighed against the Navajo claim. For instance, one consultant replied that her people are not Navajos and unlike them do not share any information about their religion. Another consultant, however, told me directly that the shields were not Paiute, Ute, or Navajo, and needed to be reburied. Whereas I originally thought he was conceding that the shields are not culturally affiliated with the Utes or Paiutes (as affiliation is defined by NAGPRA), I now understand that he was trying to tell me, without divulging confidential details of his religious belief, that objects belonging to the sacred realm cannot legitimately be claimed by any particular tribe or individual. . . . Even though the consultants might be convinced that the shields and offering were created by a direct ancestor, they refuse to objectify or diminish the shields’ spiritual significance by claiming them on that basis.163

Added to the refusal to claim ownership of the shields, as they belong to the spirits, is the problem that traditional Paiutes and Utes “may not speak the names of deceased relatives” because they are in a different realm and to do so would be to interfere with that realm.164 In other words, assuming the Paiutes or Utes knew who manufactured and buried the shields (and also assuming that NAGPRA

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163 Kreutzer, supra note 63, at 8.
164 Id. at 9.
would recognize such a static offering as either a sacred object or an object of cultural patrimony), that information could not be shared. Both the report and the Park archaeologist note “the drafters of NAGPRA and its implementing regulations do not appear to have taken this kind of complexity into consideration.”

CONCLUSION

The repatriation dispute surrounding the shields reveals a number of competing stories. From Pectol’s perspective, the story is one of discovery: the finding of these remarkable objects through his own diligence and knowledge of the area. From the perspective of his descendants, however, the story is one of loss. Not the loss of the shields themselves, as the family recognizes that they do not “own” the shields. They mourn, however, the loss of the shields from the public eye, the loss of the opportunity for future generations of visitors to the Capitol Reef area to view the shields and appreciate them culturally and aesthetically, and to appreciate their progenitor’s role in the preservation of the shields. Similarly, some archaeologists see the story of the shields as a loss, of potential information arising from future study of the shields.

The disappointed claimants, the Southern Utes and the Northern Utes and the Paiutes, also understand the story of the shields as a story of loss times two. They lost in the administrative proceedings under NAGPRA, that is, their claims to the shields as part of their culture were ultimately rejected. Moreover, they lost the shields themselves and the right to do with them as they saw fit, whether to rebury them, as the Utes and Paiutes wished to do, or to place them in a museum, as it is rumored the Southern Utes proposed to do.

Conversely, from the Navajo point of view, the story of the shields is a story of redemption and restoration. From this point of view, the shields, or the power embodied in the shields, can be seen as an active participant in the return of the shields, consenting to be found by a man who appreciates their power and preserves them rather than selling them for profit. This story is one of vindication of the sacredness of the shields and their power to protect the People.

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165 Id. at 7.
FINDING COMMON GROUND: MORAL VALUES AND CULTURAL IDENTITY IN EARLY CONFLICT OVER THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT

Sarah F. Trainor*

I. INTRODUCTION

The south rim of the Grand Canyon in Arizona was bustling with activity on the morning of September 18, 1996. President Bill Clinton was about to officially announce that he was using his power under the Antiquities Act of 1906 to reserve 1.7 million acres in southern Utah as the new Grand Staircase-Escalante National Monument (hereafter GSENM or “the monument”). It would be the first national monument to be managed under the jurisdiction of the Bureau of Land Management rather than the National Park Service. Amidst the crowd, wilderness advocates and environmentalists assembled in support of the new monument, the designation of which would essentially stymie development of the Kaiparowits coal field and the Andalex mine. Representatives of regional Indian tribes were invited to join the celebration, but few attended.

The following day in Kanab, Utah, one of the communities on the periphery of the new GSENM, black balloons decorated the town and mannequins of President Clinton and then Secretary of Interior Bruce Babbit were hung in effigy. Expressing widely felt disdain that Clinton had minimal communication or consultation with Utah’s state government or Congressional delegation regarding the GSENM and had chosen a location outside of Utah to announce the new monument, the billboard on a local fast food restaurant reportedly read “Clinton Special—100% Chicken.” Widely considered to be a political move to gain environmentalist favor in an election year, Clinton’s declaration of GSENM incensed local governments and residents. Monument designation and management and the construction of GSENM visitor and science centers in the towns of Kanab and Escalante were hotly contested by vocal local residents.

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3 Personal communication with Sidney B. Dietz, III to author (Apr. 6, 1998).
4 Kanab is approximately 200 road miles from the Grand Canyon South Rim. Direct distance, “as the crow flies,” is only approximately seventy-five miles.
5 See, e.g., Utah Ass’n of Counties v. Clinton, 255 F.3d 1246 (10th Cir. 2001); See also, e.g., Dixie Brunner & Carol Sullivan, Commission gets public reaction to National...
Kanab community leader Jim Matson described GSENM designation as "the straw that broke the camel's back." The local violence, protest and outrage over GSENM designation and management were influenced by past events, perceptions and relationships. Following on the heels of decades, if not a century, of perceived stymies to prosperity in the hands of the federal government and environmentalists, the declaration, planning and management of the GSENM sent many local residents "over the edge."6

Natural resources are valued by different groups, individuals, agencies and institutions in many different ways. The GSENM conflict illustrates how one parcel of land can simultaneously be attributed scientific, aesthetic, recreational, preservation, economic development, and access values.7 These contrasting values are often at the heart of conflict over land and resource management. While the National Environmental Policy Act, Multiple-Use Sustained Yield Act and Federal Land Policy and Management Act require that multiple forms of value are "considered" in federal land management and administration, substantial latitude is granted and little guidance is offered in assessing the appropriate

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6 Monument designation, SOUTHERN UTAH NEWS, Sept. 18, 1996, at 1-2; Letters to the Editor: Ron Hamblin, Don't put it in Park Service hands, Jim Pardee, Spend money on kids-not monument, SOUTHERN UTAH NEWS, Sept. 18, 1996, at 4-5; Carol Sullivan, Frustrated officials and citizens hold "Loss Of Rights" rally, SOUTHERN UTAH NEWS, Sept. 25, 1996 at 3; Dixie Brunner, Commission declares war over National Monument designation, SOUTHERN UTAH NEWS, Oct. 9, 1996, at 1. Both proposed GSENM visitor's centers were attempts to integrate the monument into the community by combining BLM-managed interpretive center with city-managed visitor center and local history museum. In Kanab, the proposal was to construct a GSENM interpretive center on city land in collaboration with Kanab City government and a tourist visitor center. Vocal local opposition to this plan occurred on the basis that Kane County was contemporaneously party to a lawsuit contesting the legality of the GSENM designation under the authority of the Antiquities Act of 1906 and on the basis that such a joint venture was a conflict of interest.

In the town of Escalante, local history, theater and arts enthusiasts had been working to establish a museum and arts center for several years. The Escalante Center was an attempt to fund this effort by combining it with a BLM-affiliated scientific laboratory and public interpretive center focused on scientific investigation of GSENM. Part of the goal of this joint venture was to provide hands-on scientific educational experiences for local elementary and high school students. A vocal group of local GSENM opponents stymied this effort with protests of BLM involvement. Interview with Suzanne Winters, (June 22, 2000); see also “The Escalante Center” (on file with author).

7 See Andrew Brennan, Moral Pluralism and the Environment, 1 ENVTL. VALUES 15-33 (1992); J.B. CALLICOTT, IN DEFENSE OF THE LAND ETHIC, ESSAYS IN ENVIRONMENTAL PHILOSOPHY Ch. 3 (1989); see generally ROBERT B. KEITER, ET AL., VISIONS OF THE GRAND STAIRCASE-ESCALANTE, EXAMINING UTAH'S NEWEST NATIONAL MONUMENT (1998); see also Sarah F. Trainor, Realms of Value: Conflicting Natural Resource Values and Incommensurability, 15 ENVTL. VALUES 3-29 (2006).
significance and magnitude of diverse values. Furthermore, accounting for these multiple divergent values can defy quantitative comparison and as a result, they are often dismissed, overlooked or omitted from consideration.

In response to the special issue of the *Journal of Land, Resources & Environmental Law* dedicated to discussion of lessons learned from designation and planning of the GSENM, this paper traces the historical, moral, cultural and religious values of three groups with a stake in the management of the landscape and resources within the GSENM: the Kaibab Paiute Indians, wilderness advocates, and local practicing Mormons, especially those with close ties to their pioneer heritage. This paper then discusses how understanding these valued histories can facilitate the initial steps in productive alternative conflict resolution.

My goal is not to present a comprehensive update on legal, political or community activity since the 2000 conference upon which the 2001 special issue of the *Journal of Land, Resources & Environmental Law* is based. Rather, I use the GSENM case to illustrate and underscore three points. First, according to principles of successful conflict resolution and executive order on federal consultation and coordination with Indian tribal governments, American Indian tribal governments should be formally consulted in federal land management when they have a stake in the outcome. The tribal liaison position on staff of the Grand Canyon Parashaunt National Monument provides one example of how this can be accomplished. Second, moral, cultural and religious values should be

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8 The National Environmental Policy Act, 42 U.S.C. § 4332 (1969) ("... to the fullest extent possible (1) the policies, regulations and public laws of the United States shall be interpreted and administered ... and (2) all agencies of the Federal Government shall ... (B) identify and develop methods and procedures ... which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations."); see also The Multiple-Use Sustained-Yield Act, 16 U.S.C.A. §531 (1960) ("... with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."); The Federal Land Policy and Management Act, 43 U.S.C.A. § 1702 (1976) ("The term “multiple use” means the management of the public lands and their various resource values ... with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.").


11 See, e.g., Utah Ass'n of Counties and Mountain States Legal Found. v. Bush, 455 F.3d 1094 (Utah 2004).

acknowledged in resolving conflict over federal land management, including wilderness designation. I provide suggestions for accounting for these values. Finally, I suggest that acknowledging and understanding the moral, cultural and religious values at play and identifying where the values of different stakeholders converge and diverge can be one way to build trust and work toward identifying common ground in wilderness and land management conflict. By providing an avenue for addressing value conflicts and including all stakeholders, the results of this paper are directly relevant to federal land management issues in Utah and throughout the American West.

The conclusions of this paper are based on eighty-one open-ended, semi-structured interviews, observations of public meetings, and archival analysis all conducted between 1997-2004 in Kanab, Escalante, Boulder, Cedar City, St. George and Salt Lake City, Utah, and in Pipe Springs, Arizona.13

II. CULTURAL HISTORY, MORAL VALUES, AND IDENTITY

Economic stability is vital for Utah’s rural communities.14 Yet while economic values tend to dominate policy debate, they are only one of the many ways in which land and resources are valued. The GSENM proclamation15 for example, emphasizes the scientific value of the landscape, as in its potential to contribute to the advancement of geologic, archeological, paleontological and ecological discovery and knowledge. In the GSENM case, cultural and moral values are rooted in historical relationships to the landscape and are also central to the identities of parties engaged in conflict.

In this section, I briefly outline the cultural histories of three groups affected by and interested in the GSENM management plan and its implementation and discuss how these historical and cultural values were reflected in early conflicts over monument designation and management. While not the only, nor perhaps even the most visible stakeholders, I focus on the Kaibab Paiute Indians, descendents of Mormon pioneers, and wilderness advocates because the conflicting values held by these three groups are both integral to understanding conflict over GSENM designation and management and relevant to land and resource conflict throughout the American West.16

16 See DALE L. MORGAN, THE STATE OF DESERET (1987); In the Light of Reverence (Bullfrog Films 2001); DANIEL KEMMIS, THIS SOVEREIGN LAND: A NEW VISION FOR
A. Paiute Values and the Importance of Government-to-Government Relationships

Although none of the 6,800 citizen letters received by the GSENM planning team in response to the draft management plan were sent by members of an Indian tribe, Paiute Indians have a legitimate seat at the GSENM planning and management table and the BLM in Utah could have done a better job interacting with tribal entities on a government to government basis in the GSENM planning process.

Seven tribal groups have an interest in the management of the land and resources within the GSENM. Of these, the Kaibab Paiute and Paiute Tribe of Utah presence in present-day GSENM is most recent and most closely overlapping geographically and temporally with the monument boundaries and with historical Mormon pioneer settlement in the area. Furthermore, the reservation and tribal headquarters for these two tribes are geographically closest to GSENM and the surrounding communities. For these reasons and due to limited space, I focus here on the Kaibab Paiute and Paiute Tribe of Utah.

The Paiute have a cultural and spiritual connection to the landscape now within the GSENM that constitutes a significant part of their identity. Prior to white settlement, the Paiute relied directly on plants, animals and minerals in the region for survival. The traditional Paiute relationship with nature is one of respect and honor. Morally, the Paiute view the plants, animals and rocks on par with humans.

Within the lives of Southern Paiute, there is an inherent understanding that all things are placed on this land with a breath of life, just as humans. This land is considered to be their home, just as it is for man, and it is taught that one must consider the rocks, trees, animals, mountains and all other things are on the same level as man. Each has a purpose in life, and the one who created every living thing on this earth placed all living things here to interact with one another... . It is said that the plants, animals, and in fact, everything on this land, understands the Paiute language and when one listens closely and intently enough, there is affirmation and a sense of understanding.
This intimate connection with the landscape including plants, animals, water and land is an integral part of the Southern Paiute identity, especially that of the Kaibab Band.

We, the Kaibab Paiute people, were placed here by the Creator. We remain connected to this land that has sustained us from the beginning of time. We have been able to survive because we live with nature and respect the land—its plants, animals and water. These precious resources will continue to provide life to the People as long as we care for these gifts from the Creator. Living in harmony with the environment provides security, happiness and well being in our lives. We care for this land and thank the Creator for all that surrounds us.\footnote{Id.}

In this view, humans are neither part of nor separate from but in relation to nature. In terms of GSENM management, the Kaibab Paiute would like access to their traditional homeland and co-management of resources, and they oppose resource damage or destruction.\footnote{Id.; see also FORREST S. CUCH, INTRODUCTION, in A HISTORY OF UTAH'S AMERICAN INDIANS xi-xx (2000); see generally LAVAN MARTINEAU, THE SOUTHERN PAIUTES: LEGENDS, LORE, LANGUAGE AND LINEAGE (1992); VAL PLUMWOOD, WILDERNESS SKEPTICISM AND WILDERNESS DUALISM, in THE GREAT NEW WILDERNESS DEBATE 652-90 (1998); see generally R. W. STOFFLE, A. K. CARROLL, A. EISENBERG AND J. AMATO, ETHNOGRAPHIC ASSESSMENT OF KAIBAB PAIUTE CULTURAL RESOURCES IN GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT (2001) (on file with author); interview with Angelita Bulletts (June 15, 2000).}

The place name for the Kaiparowits Plateau is a Paiute word meaning “seed valley people.” The Kaiparowits Band of Paiute once inhabited this plateau. Mormon settlers provided many Southern Paiute people with refuge from Ute, Navajo, and Mexican slave traders. Yet, as the Mormon settlements were established, the Paiute were denied access to traditionally used springs and water sources and to their traditional food and resource base, effectively losing their autonomy and traditional way of life. Members of different bands migrated to be with other Paiutes and are among those that are now members of the Kaibab Paiute Tribe and Paiute Tribe of Utah. By the early twentieth century, entire bands, including the Kaiparowits Band who lived most prominently within the
boundaries of present day GSENM, had been decimated by disease and loss of access to resources.\textsuperscript{21}

In this way, the Southern Paiute relationship with Mormon settlers and Euro-American institutions (i.e. the The Church of Jesus Christ of Latter-day Saints (LDS Church or the Mormons) and U.S. Federal Government) evolved into one of domination, "dependency and paternalism."\textsuperscript{22} Ironically, Holt describes the powerlessness of the Paiute during white settlement in terms that echo contemporary criticisms of federal agency decision-making.

The opinions or preferences of the Paiutes were seldom elicited and, when they were consulted, they were generally offered only a series of preconceived alternatives one of which they were forced to accept.\textsuperscript{23}

With federal policies that terminated the tribal status of Paiute in Utah in the mid-1950s, Southern Paiute population dropped considerably as people lost access to healthcare and income to meet their basic needs. Federal recognition of tribal status was restored for Utah bands in 1975.\textsuperscript{24} Since that time, access to housing and healthcare has improved, yet tribal members continue to confront education,
unemployment and chronic health problems. Paiute people have had to uproot from the land and adapt to white settlement. A history of colonization, forced assimilation, termination and restoration has left Paiutes with diminished access to land and resources of traditional use now within GSENM.\textsuperscript{25} Since restoration of the Paiute Tribe of Utah in 1979, many Paiute in Utah are trying to regain traditional ways and connection with Paiute heritage.\textsuperscript{26}

The Hopi, Zuni, Navajo, Ute, San Juan Paiute, Kaibab Paiute and Paiute Tribe of Utah all trace some claim as contemporary descendants of American Indians who once inhabited lands now within the GSENM. Yet, with the exception of NUMKENA 1998, members or governments of these tribes are rarely mentioned as interested and affected parties in GSEM designation and planning.\textsuperscript{27} Although they had been contacted repeatedly by the planning team cultural lead, none of the tribes identified as having cultural affiliation with GSENM submitted comments on the draft management plan.\textsuperscript{28} In the case of the Kaibab Paiute, the lack of participation in the monument planning process does not reflect disinterest in the decision outcome, but frustration with what they consider to be insufficient action on the part of the BLM to consult in a government-to-government relationship.\textsuperscript{29}

\textsuperscript{25} The resources that Paiutes originally relied on are now both on federal and private land. See generally RONALD L. HOLT, BENEATH THESE RED CLIFFS, supra note 21; R.W. Stoffle et al., supra note 20; GARY TOM \& RONALD HOLT, THE PAIUTE TRIBE OF UTAH, supra note 21.


\textsuperscript{28} See GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT PROPOSED MANAGEMENT PLAN FINAL ENVIRONMENTAL IMPACT STATEMENT § 2.72, supra note 17; interview with Marietta Eaton (Dec. 17, 1998).

\textsuperscript{29} Personal communication with Angelita Bulletts (Nov. 22, 2002); interview with Carmen Bradley, Kaibab Paiute Tribal Chairwoman (April 13, 2004); see also the following letters, all on file at the Paiute Tribal office in Pipe Spring, Ariz.: letter from C.M. Bradley, Chairperson Kaibab Paiute Tribal Council, to Jerry Meredith, Monument Manager (Jan. 21, 1997); C.M. Bradley to A.J. Meredith, Monument Manager (Feb. 27, 1997); letter from A.J. M. M. Meredith to Carmen Bradley (Feb. 7, 1997); letter from C.M. Bradley to President William Jefferson Clinton (April 7, 1997); letter from C. M. Bradley to Ron Allen, President National Congress of American Indians (April 7, 1997); see also Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227 (1980). While multiple tribes claimed historical or ancestral affiliation with the landscape now within GSENM, I focus here on the Kaibab Band of Southern Paiute Indians because their connection with the landscape and resources is, relatively speaking, contemporaneous with
Written policy and tribal consultation manuals do not necessarily lead to on-the-ground implementation. For example, at the time that the GSENM planning team was assembled and began their work, the BLM had a published manual for guidance on the tribal consultation process. In practice, however, GSENM planning team cultural lead Marietta Eaton reports that when she began her work on the planning team, “no clear [or consistent] protocol existed” for tribal consultation. Neither did the agency have a current list of contacts for tribes with historical affiliation with BLM lands now within GSENM. Thus, in spite of previously published tribal consultation manual, there is no evidence that the BLM had a previously established relationship with tribal entities in the GSENM area.

Archeologists are often tasked with tribal consultation for federal agencies, yet these scientists, who are trained to objectively analyze material remnants of past peoples’ cultures, are ill prepared to interact in government-to-government relations with present day tribal governments and “may not have the appropriate skills or sensitivities to attend to the task of consultation.” A trained archeologist, Ms. Eaton did the best she could. She explains, “with only a handful of federal employees responsible for consultation it remains difficult for other staff members to relate to the concerns brought forth by the tribes. More federal managers need to be involved in consultation so they can understand the complexity of the issues and the sensitivity of some of the discussions.” The GSENM case highlights a need for federal agencies to put more attention and resources toward training for tribal consultation, government-to-government relations, and being sensitive to the needs of tribes.

Furthermore, tribal consultation has typically occurred in cases of repatriation or reburial of ancestral remains and/or specific archeological artifacts of significance (i.e. pottery shards, arrow heads, etc.). This type of site specific issue that can be addressed in near-term finite time period and requires isolated, discrete decisions is very different from on-going, long-term consultation regarding land and resource management on large land areas such as GSENM. While both require building mutually trusting relationships, the latter requires that the land management agency view and work with tribal governments as partners in decision-making. For example, the Kiabab Paiute were not merely interested in obtaining permits from the BLM that would ensure they could continue to harvest food, medicinal and other plant materials. They were interested in establishing a partnership, in having a seat at the table in decision-making about land and resource management within the monument; not just once in the planning process.

the Mormons and wilderness advocates and their desire to participate in monument planning is well-documented.


32 Id. at 31.

33 Id.
stage, but in an on-going basis. As their cultural home and location of cultural identity, the Kiabab Paiute want more than just use permits for specific resources. They want a government-to-government relationship with the BLM on par that gives them a role in decision-making. One way to achieve this would be to dedicate a seat on the monument advisory board for a tribal representative, just as there are seats for government representative from Kane and Garfield Counties and from Kanab municipality/school district. The current board has a seat for EITHER a tribal representative OR a state representative, but not both.\textsuperscript{34}

In a December 4, 1996 letter to President Clinton, Carmon Bradley, then Chairperson of the Kaibab Paiute Tribal Council, highlights that “the monument holds special significance for the Southern Paiute Nation,” and declares, “it continues to be the desire of the Kaibab Paiute people to have a voice in the decision-making process in regard to our traditional land.”\textsuperscript{35} The federal intent to engage American Indian tribes in government-to-government relations is clearly stated in President Clinton’s 1994 Memorandum.

Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments...\textsuperscript{36}

This memorandum further instructs executive departments and agencies to “design solutions and tailor Federal programs, in appropriate circumstances, to address specific or unique needs of tribal communities.”\textsuperscript{37} In an April 10, 1996 Department of Interior press release sent to the Kaibab Paiute, Secretary Babbitt declares, “we are equally committed to working with tribes on a government-to-government basis in recognition of the sovereign powers of tribal governments...”\textsuperscript{38}

Based on verbal communications with then Secretary of Interior Bruce Babbitt and these written documents, the Kaibab Paiute Tribe understood that they would be given a place on the monument planning team, however this did not happen. Monument Manager, Jerry Meredith “offered to have the Tribe appoint

\textsuperscript{34} Id. at 33.
\textsuperscript{35} See supra note 30, letter from C. M. Bradley, Chairperson Kaibab Paiute Tribal Council, to President William Jefferson Clinton via Bruce Babbitt, Sec’y of Interior (Dec. 4, 1996).
\textsuperscript{37} Id.
an official liaison to coordinate" tribal interests with the GSENM planning team, but this position never materialized.  

Tribal leaders and representatives participated in the preparation of monument cultural interpretive displays and, like all other U.S. citizens, were given the opportunity to submit written comments to planning documents. However, BLM Manual H-8160-1, General Procedural Guidance for Native American Consultation (11/4/94) clearly states that

... [f]ederal agencies' official interactions with Native Americans, including consultation, are distinguished by unique legal relationships. Sovereign status of Indian tribes and special provisions of law set Native Americans apart from all other U.S. populations and define a special level of Federal agency responsibilities.  

It is not clear that these responsibilities were met in the GSENM case. In contrast, the Kaibab Paiute were consulted more directly in management and planning for the Grand Canyon Parashaunt National Monument in Northern Arizona, also declared by President Clinton via the Antiquities Act, in January 2000. The tribal liaison position at Grand Canyon Parashaunt reports directly to the BLM Arizona Strip District Manager and consults with all tribes impacted by the district’s planning and land management decisions. Kaibab Paiute leaders reported greater respect from BLM officials and greater opportunity for involvement in BLM planning in Arizona than in Utah. Innovative positions and tactics in Arizona such as the tribal liason position, may thus serve as a fruitful model for land managers in Utah in government-to-government relations with tribes. In addition, an exclusive seat on the BLM and/or GSENM resource advisory council should be dedicated to members of tribal governments. In summary, the Southern Paiute have an historical and cultural relationship with the landscape and resources of GSENM and, like Kane and Garfield Counties, their governments have a political interest in how the land and resources are managed. While the GSENM planning team provided the Paiute and other tribes opportunities for input in visitor center interpretive displays and programs,

39 Letter from Bruce Babbitt, Secretary of Interior, to Carmen Bradley, Chairwoman Kaibab Band of Paiute Indians (May 20, 1997) (on file with the Kaibab Paiute Tribal Counsel, Pipe Spring, Ariz.).


41 Interview with Angelita Bullets (June 15, 2000); interview with Gloria Bullets Benson (Jan. 15, 2005); see also PAUL LARMER, GIVE AND TAKE 122 (2004) (describing that overall, National Monuments in BLM jurisdiction declared by President Clinton via the Antiquities Act subsequent to GSENM, included more public participation in their designation, planning and management).  

protocols for consultation with the tribes on government-to-government basis were not readily available to monument planning staff and, counter to established BLM procedure, opportunities for tribal input in the planning process did not significantly differ from those available to the general public.

The GSENM innovative planning process was designed to include the perspectives of multiple stakeholders, encourage state and federal cooperation and account for a wide range of resource and community perspectives. Including all interested and affected parties is key to the success of such an effort. The Paiute have a tangible interest in the outcome of GSENM planning and management. The Kaibab Paiute reticence in the public participation phase of GSENM planning reflects their frustration with the planning process and the disrespect of their sovereign status, not a lack of concern for how the lands and resources are managed. The position of tribal liaison at the Grand Canyon Parashant National Monument is one model for successful tribal consultation in monument management.

B. Mormon Values and Local Opposition to GSENM and Wilderness Designation

The GSENM and the surrounding communities that protested so vehemently against monument designation lie within what is known as the “Mormon Culture Region” and the contemporary and historical Mormon presence in the communities surrounding GSENM is inescapable. Many of the people in southern Utah link their heritage back three, four, or more generations to the first Mormon pioneers in the area. This cultural history connects the people and their identity to the landscape through the religious mission to settle the desert. Natural resource values as expressed and reproduced in the re-telling and practice of Mormon cultural heritage, religious history and doctrine are relevant in local controversy over GSENM management, including distrust of the federal government and the sentiment that GSENM designation intruded on established property uses and rights.

43 See supra note 17.
44 See generally RICHARD V. FRANCAVIGLIA, THE MORMON LANDSCAPE: EXISTENCE, CREATION AND PERCEPTION OF A UNIQUE IMAGE IN THE AMERICAN WEST (1978); see also STEVEN L. OLSEN, Pioneer Day, in UTAH HISTORY ENCYCLOPEDIA 423-24 (1994). See generally MARTHA SONNTAG BRADLEY, A HISTORY OF KANE COUNTY (1999); DAVID E. MILLER, HOLE IN THE ROCK (1959); SARAH F. TRAINOR, CONFLICTING VALUES, CONTESTED TERRAIN: MORMON, PAIUTE AND WILDERNESS ADVOCATE VALUES OF THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT Ch. 4 (2002); NETHELLA GRIFFIN WOOLSEY, THE ESCALANTE STORY (1964). Members of the Church of Jesus Christ of Latter-day Saints (LDS) are known as “Mormons.” I use these terms interchangeably. Also, in my research, I did not set out to probe Mormon religious values. Yet, as an “outsider” conducting field work in the region, the Mormon presence in the area was prominent and the extent to which many local elected officials, business people and residents self-identify with their Mormon heritage as a source for their values was a conspicuous feature that demanded further investigation.
Of course, not all opponents to GSENM designation and management, nor to wilderness designation in Utah, are Mormon. Neither do all members of LDS Church nor all people with LDS heritage oppose wilderness preservation. Thus, religious heritage is not the only, nor necessarily a determining factor of contemporary values. However, there are strong indications that exploration of the normative human/nature models inherited by contemporary rural residents from early Mormon settlers can help outsiders understand why so many local people value the resources as they do, resist government control of the land and roads, and fight so tenaciously against wilderness preservation.

Few places or regions in the United States demonstrate as strong an association between religious influence, political power, and geography as the LDS Church has with the state and landscape of Utah. Led by Brigham Young, successor to church founder and prophet Joseph Smith, the Mormons claimed the lands now within the state of Utah and surrounding states as their promised-land and they worked hard to transform the mountain valleys and arid desert plateaus into a re-creation of the Garden of Eden. Contemporary Mormons are proud of their history and their heritage. The ties to previous generations, pioneer heritage and history are particularly strong in rural communities such as Escalante, Boulder, Tropic and Kanab that were geographically isolated for many decades. Although long-time residents in these towns are no strangers to cell phones, the Internet, and cable TV, many of the values, attitudes, and practices that allowed their great-grandparents to survive in the desert as the region's original white settlers are still vibrant today.

The majority of residents in Kane and Garfield Counties are members of the LDS Church. Although Ute and Southern Paiute people inhabited the region prior to Mormon settlement and each community surrounding GSENM has a unique settlement history, the cities and villages surrounding GSENM as we know them today were all originally founded by Mormon settlers. In addition during

49 See J.C. ROUNDY, supra note 48; see also GLENMARY RESEARCH CENTER, RELIGIOUS CONGREGATIONS AND MEMBERSHIP IN THE UNITED STATES (Dale E. Jones et al., eds., 2000).

50 LEONARD J. ARRINGTON, ORDERVILLE, UTAH: A PIONEER MORMON EXPERIMENT in ECONOMIC ORGANIZATION 44 (1954); see also BRADLEY, supra note 44, at Ch. 3-5; J. C. ROUNDY, supra note 48, at Ch. 2; WOOLSEY, supra note 48.
the mid- to late-1990s during GSENM declaration and planning in the communities surrounding GSENM, many of the county commissioners, mayors, local ranchers, business owners and founders and leaders of local wise-use organizations were active members and leaders of the LDS church. When asked to discuss their values, attitudes and opinions regarding conflict over GSENM designation and management, many people, both Mormon and gentile, made unsolicited reference to the Mormon history in the area.\textsuperscript{51}

Agriculture is an important part of the cultural heritage of the communities surrounding GSENM. The Mormon colonists in Utah, known as Saints, had a deliberate and explicit religious mandate to make “the desert blossom as the rose,”\textsuperscript{52} “transforming”\textsuperscript{53} the valleys, canyons, and arroyos into a re-creation of The Garden of Eden.\textsuperscript{54} In Mormon-teaching agricultural work, historically including extensive irrigation systems, wheat crops, vegetable gardens, fruit orchards and silk trees, is key to the redemption of both landscape and people and is esteemed as a culturally favored occupation.\textsuperscript{55} Even though ranching is the primary source of income for only a handful of allotment holders on the Monument, agricultural practice (i.e. farming and ranching) may mean much more to them than just the economic contribution to their income.

Animosity between the LDS Church and the U.S. federal government has brewed throughout Mormon history. The most overt of these tensions centered on the practice of polygamy and began with conflict over appointment of the Utah Territorial Governor in 1857. The Mormons felt further victimized by the 1862 Morrill Anti-Bigamy Act outlawing polygamy, the force of which was strengthened in 1882 by the Edmunds Act. The Poland Act of 1874 then moved criminal case jurisdiction from probate to federal courts, allowing for potent prosecution of plural marriage. With active persecution of polygamists, church leaders and other prominent community members went into hiding for years at a time to escape arrest. In addition, six petitions for Utah statehood were submitted between 1849 and 1887; all were denied. According to historian Dean May, passage of the 1887 Edmunds-Tucker Act was “designed to destroy the Mormon church economically and politically.” In response and with the recognition that enforcement of this law “would bring the church to its knees,” church president

\begin{thebibliography}{99}
\bibitem{note51} TRAINOR, supra note 44, at 400.
\bibitem{note52} This often-cited phrase was used by Brigham Young in his directorate to establish Zion and the State of Deseret; its origin is Isaiah 35:1. T. G. Alexander, The Brotherhood of All Creatures: Mormon Attitudes toward Nature, in \textit{WIRTH FORUM ON RELIGION AND THE ENVIRONMENT} 6 (unpublished manuscript, on file with author).
\bibitem{note53} See T.G. Alexander, supra note 52, at 8.
\bibitem{note54} See RICHARD V. FRANCAVIGLIA, supra note 44, at 84.
\bibitem{note55} See EDWARD A. GEARY, GOODBYE TO POPLARHAVEN Ch. 11, 16 (1985); MARK STOLL, PROTESTANTISM, CAPITALISM, AND NATURE IN AMERICA 108-15 (1997); JOHN A. WIDTSOE, HOW THE DESERT WAS TAMED 31-2 (1947).
\end{thebibliography}
Wilford Woodruff eventually officially ended the church sanction of plural marriage. Tensions between the church and the federal government eased slightly and statehood was finally granted to Utah in 1896. While patriotic and supportive of the American constitution, the bitterness and resentment that many long-time residents of Kane and Garfield counties express toward the federal government and federal land managers in particular may originate in this cultural history of animosity between the church and the federal government.

In addition, current attitudes, values and conflicts about GSENM management are influenced by past conflicts between local people and environmentalists in the region. Three incidents are particularly relevant: the expansion of Capitol Reef National Monument in 1971 and associated seizure of private property, the closure of the Kaibab Forest Products Company in 1995, and multi-decadal conflicts over development of the Kaiparowits coal field and construction of a coal fired power plant.

First, like GSENM, Capitol Reef National Monument, located on the northeastern border of what is now GSENM, was established in 1937 under authority of the Antiquities Act of 1906. The monument was expanded and redesignated as a National Park in 1971, a process that involved acquiring property in and around the town of Fruita, seventy-five miles north of Escalante along State Route 12. Fruita’s last residents moved out in 1969 losing their homes, agricultural land and community. Many of the homestead and farm structures were demolished and removed from the park. While land owners were financially compensated, the community memory of loss of private property in the redesignation from National Monument to National Park remained vivid in the memories of long-time residents of southern Utah and many believed it is just a matter of time before they lose private property to GSENM expansion. This fear, based more on historical precedent than contemporary threat, exacerbated local opposition to GSENM designation and magnified animosity toward environmentalists who, in the eyes of these local residents, the monument was clearly designed to appease.

Second, for nearly fifty years the Kaibab Lumber Company, later known as the Kaibab Forest Products Co. was one of the region’s major employers, hiring hundreds of workers, many of whom were Kanab residents. Downward economic

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58 Interview with Scott Truman (July 14, 1999); see also TRAINOR, supra note 44, at Ch. 2, 8.
trends in the 1960s and 70s caused temporary closures. While some attributed mill closure to unwise management in the face of external economic factors, mill workers, managers and local politicians blamed the environmentalists and the fight for endangered Mexican Spotted Owl habitat for the mill's shut-down. The mill closure was presented to members of the Senate's Energy and Natural Resources Committee in 1995 as "an example of unchecked environmental regulations strangling a community's sole industry."

Third, the Kaiparowits plateau is rich in coal minerals. In the late 1960s and early 1970s a consortium of southern California power companies set its sights on Kaiparowits coal with plans for mineral extraction, an electricity generating station, and new town of 15,000. A decade later Andelex Resources, Inc. began a permitting process with the BLM to mine Kaiparowits coal near Smokey Hollow. Both of these proposals carried hope for economic development and prosperity. Both galvanized local residents in battles against large energy corporations for local control of resources and against outside environmentalists, who were perceived to be responsible for thwarting economic dreams.

Previous incidents of federal take-over of private land and economic loss from endangered species habitat conservation catalyzed contemporary fears, misunderstandings, and animosity, which in turn propagated distrust especially of federal government and environmentalists by local long-time residents. When GSENM was designated in 1996, local people remembered feeling deceived and overpowered in the past and felt that they had been tricked and violated. These past events and their vivid memories exacerbated the public conflict over GSENM management. Learning of these past events and their legacy in public memory can help other stakeholders understand the origin of deep seated emotion. However, dwelling on these past events can also impede finding solutions in the present.

In summary, many people living in communities surrounding GSENM identify with Mormon pioneer heritage. The cultural and religious values of Mormon pioneers have been taught and learned by the intervening generations of Saints. These values include: reverence for agriculture as an occupation, emphasizing transformation of the desert into a garden, perceiving nature as a dangerous force to be conquered, and considering resources as meant to be utilized for human benefit. Monument or wilderness designation not only imposes a federal mandate, it requires a change in how these people relate to the land and a perceived abrogation of rights. Preservation as a model of the human relationship

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59 Bradley, supra note 44, at 301; see also Cutback set by Kaibab, Southern Utah News, Mar. 19, 1970.


61 Interview with Grant Johnson (June 23, 2000); see also Katherine Bill, Mega Coal Mine Proposed Again in Utah, High Country News, July 25, 1994; Ken Rait, Monumental Moment for Southern Utah, A new level of protection for the Colorado Plateau, Southern Utah Wilderness Alliance Newsletter 13(4) 4-7 (1996).
to the land is fundamentally different from the LDS religious and cultural model that has been reproduced for generations in southern Utah. These differences extend across time and space back to the Mormon pioneers and the State of Deseret. Understanding the historical and cultural context of rural Mormon values can also help explain why local wilderness and GSENM opponents felt threatened by urban environmentalists. For long-time residents in the GSENM region, visceral opposition to wilderness protection is not just a matter of economic development; a way of life, historical religious identity, and community cohesion are threatened by new comers, new ideas, and new ways of managing the land.

C. Beyond Economic Values; Wilderness Advocates

On the local level more than just economic values were at stake in GSENM designation and management. Like their Mormon pioneer ancestors, many long-time residents of southern Utah are “self-reliant,” determined, diligent and distrustful of federal presence in their promised land. Garfield County refused to accept federal payments for planning and infrastructure related to GSENM, commonly referred to as “blood money.” As Matson notes, local residents were not willing to trade independence for economic benefit.

The people of deep rural Utah are fine people. They are troubled now by the issues on the table with the federal government. These people consider themselves to be self-reliant, tough minded, and hard working, and they can do with very little...Right now they would rather not deal with the federal government, even if it means losing an economic opportunity.

While former Garfield County Commissioner Louise Liston entitles her comments, “Sustaining Traditional Community Values,” she discusses very few values beyond access rights, and local economic impact of the monument, translating these cultural, moral and political values into almost exclusively economic terms.

Given the disproportionate emphasis on economic resource values in policy debate and analysis, this strategy is understandable. However, veiling moral and cultural values in economic terms can eliminate them from political dialogue and in so doing significantly reduce opportunities to build the mutual respect and trust

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63 See generally LARMER, supra note 2.
64 Matson, supra note 14, at 557, 560.
65 Liston, supra note 14, at 585-92.
required for productive conflict resolution. Environmentalists and American Indians rarely hesitate to explicitly discuss the moral and cultural values that they see as integral to their identity and relationship with land and resources. Investigating the extent to which cultural and moral values are engaged in local opposition to monument management may lead to new and fruitful avenues of dialogue that may be important in resolving land management conflict.

Cultural, moral and religious values are embedded within the highly polarized wilderness conflicts in Utah and resolutions to these conflicts must acknowledge and confront these diverse values. From the historical beginnings of recognition of wilderness value, prominent writers have described a spiritual and moral value in wilderness and marshaled these values in defense of wilderness preservation. Early American colonists and settlers viewed the American continent and the Native people who lived there as wild, dangerous, hostile and uncivilized and perceived their survival to depend upon the taming and civilizing of both land and people. However, appreciation for religious and moral values of wilderness preservation evolved with advancing civilization and industrialization. Expressions of the moral and social value of wilderness are prominent in the nineteenth and early twentieth centuries in the writings of the Romanticists and Transcendentalists such as Henry David Thoreau and Ralph Waldo Emerson who describe the spiritual and sublime in wild nature, honoring wild places and "uncivilized" nature. For them, the wilderness is not a place to be tamed, but a treasured gift from God to be exalted, revered and protected from the evils of civilization.

Sierra Club founder and wilderness activist John Muir highlights the significance of spiritual values in wilderness in debates over damming Hetch Hetchy. Here he clearly articulates the political conflict as a tension between spiritual and economic values of the valley.

Everybody needs beauty as well as bread, places to play in and pray in, where Nature may heal and cheer and give strength to body and soul alike . . . . These temple destroyers, devotees of ravaging commercialism, seem to have a perfect contempt for Nature, and, instead of lifting their eyes to the God of the mountains, lift them to the Almighty Dollar . . . . Dam Hetch Hetchy! As well dam for water-tanks the people's cathedrals

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and churches, for no holier temple has ever been consecrated by the heart of man.\textsuperscript{69}

Muir’s sentiment and explicit elevation of moral and spiritual values of wild nature over the economic values of resource development are echoed in contemporary arguments for wilderness preservation, including those in southern Utah.

Above I discussed how Mormon religious doctrine and cultural heritage emphasize and reproduce values that place humans in hierarchical relation above nature, revering agriculture as an occupation and a way to get closer to God. Yet Mormon religious values have also influenced and inspired wilderness supporters. Thus, cultural, religious and moral values are relevant on both sides of the GSENM conflict.\textsuperscript{70}

Raised in Utah as a practicing Mormon, writer and activist Terry Tempest Williams articulates the tensions between economic, spiritual and cultural values in debates over GSENM and wilderness designation in Utah. In her plea for passage of America’s Redrocks Wilderness Act, she uses examples from Mormon religious teachings to justify time spent in wilderness as a sacred experience.

Wilderness courts our souls. When I sat in church throughout my growing years, I listened to teachings about Christ walking in the wilderness for forty days and forty nights, reclaiming his strength, where he was able to say to Satan, “Get thee hence.” And when I imagined Joseph Smith kneeling in a grove of trees as he received his vision to create a new religion, I believed their sojourns into nature were sacred. Are ours any less?\textsuperscript{71}

Williams cites from the Mormon Doctrine and Covenants that she “carries with” her as inspiration in her wilderness advocacy and is co-editor of a volume entitled New Genesis, in which practicing Mormons draw from their religious values in support of wilderness preservation and environmental protection.\textsuperscript{72}

Williams sees relationship as central in the wilderness conflicts in Utah and explicitly juxtaposes spiritual and economic values of the landscape. To her, spiritual relationship with the land is at the heart of conflict over wilderness designation. She writes,

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\begin{itemize}
\item \textsuperscript{69} \textit{John Muir, The Yosemite} 255–57, 260–62 (1912).
\item \textsuperscript{71} \textit{Terry Tempest Williams, Red: Passion and Patience in the Desert} 77-78 (2001).
\item \textsuperscript{72} \textit{Terry Tempest Williams, West of Eden in New Genesis}, \textit{supra} note 45, at 211-16.
\end{itemize}
\end{flushleft}
This is not about economics. This is not about the preservation of ranching culture in America. And it is especially not about settling a political feud once and for all. This is about putting ourselves in accordance with nature, of *consecrating these lands by remembering our relationships to them.*

Williams expresses the spiritual and cultural values of Utah wilderness as follows:

As the world becomes crowded and corroded by consumption and capitalism, this landscape of minimalism will take on greater significance, reminding us through its blood red grandeur just how essential wild country is to our psychology, how precious the desert is to the soul of America.

Larry Young, a practicing Mormon, former Executive Director of the Southern Utah Wilderness Alliance, and descendent of LDS Church former president Brigham Young, also invokes religious values in his defense of the wilderness. He explains that, "love for the land transcends economic interests." Environmental historian, former President of the Mormon History Association and practicing member of the LDS church, Thomas Alexander emphasizes the religious value of land of stewardship, tracing an historical tension between stewardship and the "secularized business enterprise," or entrepreneurial tradition. Alexander attributes the deviation from teachings of stewardship and "the fellowship of all living things" to the secularizing of entrepreneurship. Led by the second generation of Mormon leaders in Utah, this emphasis on entrepreneurship was in turn catalyzed and promoted by pressure from the federal government for LDS Church leaders to disengage from political and economic affairs and impetus from the Church itself to separate "business enterprise" from "moral sanctions." Thus, transformation of the desert into a garden carried the obligation of care for nature through stewardship. As Alexander describes it, the normative model of the relationship between humans and nature involves transformation of the desert, mediated by stewardship, not enterprise. While early Mormon teachings intimately linked humans in relation to nature, Alexander explains that, over time, Mormons have forgotten this link, overlooking the spiritual values and stewardship ethic and focusing on the economic realms of environmental value. He thus describes an evolution of Mormon value that can be characterized as a shift from seeing humans in intimate and spiritual relation with

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73 Williams, supra note 71, at 76 (emphasis added).
74 Id. at 6.
75 Interview with Larry Young (May 17, 2001).
76 See generally Alexander, supra note 70.
77 Id. at 362.
78 Id. at 358.
nature to an emphasis on "enterprise" and the economic realm of natural resource values.

Moral, cultural and religious values are integral to the ways in which people live on, recreate in, and otherwise relate to the landscape of southern Utah and as such, they are significantly relevant to GSENM management. In addition to economic considerations, moral, cultural, and religious values are embedded in the value systems that form the foundation of the Southern Paiutes as well as both pro- and con- arguments related to GSENM designation and management.

III. DISCUSSION

What can we learn from this historical analysis of moral, cultural and religious values in the GSENM context that can aid in resolving contemporary conflict over wilderness designation and land management in Utah and throughout the American West? The answer can be found through exploration of two fundamental principles of conflict resolution and collaborative decision-making: 1) establish mutual trust and strong communication; and 2) develop a common conflict assessment and framing.79

Greater public involvement in collaborative land management is a growing trend in the American West that has strong supporters.80 As the first National Monument managed by the BLM, the innovative planning process for GSENM was explicitly structured to include state and federal cooperation, interdisciplinary collaboration, and public feedback and has been deemed as successful in averting controversy and including multiple views.81 Yet, many local Indian and non-Indian people have been distrustful of and some even hostile toward monument management and federal control of resources.82 Elaborating the cultural histories and values of the stakeholders will not necessarily directly resolve land management conflict, but as illustrated in the GSENM case, it may foster the development of pre-requisite mutual trust and respect by identifying implicit values and uncovering common ground.

79 Deutsch, supra note 12, at Ch. 8; see generally Roger Fisher et al., Getting to Yes (1981); Roy Lewicki et al., Making Sense of Intractable Environmental Conflicts (2003); Lawrence Susskind et al., The Consensus Building Handbook (1999).
80 See generally Robert Keiter, Keeping Faith with Nature (2003); Daniel Kemmis, This Sovereign Land: A New Vision for Governing the West (2001).
81 See generally Bureau of Land Mgm't, supra note 17; Robert Keiter, The Monument, the Plan, and Beyond, 21 J. LAND RESOURCES & ENVTL. L. 521-33 (2001)
82 See Utah Association of Counties v. Clinton, 255 F.3d 1246 (10th Cir. 2001); J. Judd, County Collaboration with the BLM on the Monument Plan and Its Roads, 21 J. LAND RESOURCES & ENVTL. L. 553-56 (2001); Matson, supra note 14; interview with Thayne Smith (Dec. 16, 1998); interview with Norris Brown (Dec. 16, 1998); interview with Norm Cram (Dec. 16, 1998).
A. Establish Mutual Trust and Strong Communication

Theories of conflict resolution predict that mutual trust, respect and collective consideration are procedural requirements for a truly inclusive collaborative process. On the local level, each of these prerequisites was weak in the first several years of GSENM planning and management as well as in concurrent conflict over wilderness designation state-wide in Utah. Mutual respect and trust are central elements in cooperative human relationship. Without them communication falters and mistreatment is likely. Trust requires making oneself vulnerable and can be hard to re-establish once it has been broken. Prior relationships between the parties in conflict is important in the GSENM case. As noted earlier, pro- and anti-wilderness factions have a history of antagonism and an established rapport of distrust and hostility and while significant exceptions exist, distrust was a prominent characteristic of relationships between stakeholders in GSENM initial planning and management. In addition, while collaboration efforts have been made, since federal land managers have ultimate decision-making power in planning and management, their job can be done in the absence of a certain degree of trust from other parties.

Distrust between local residents and wilderness advocates escalated in a self-reinforcing feedback loop. “They’ve always been secretive to us,” one long-time resident of Escalante said of environmentalists. “How do we know, we may all be fighting for the same stuff.” This comment carries both an explanation of heightened distrust over time, as well as a hint of willingness to hear the other side’s perspective. She elaborated, “we don’t know what they are doing … we feel like they pull away from us … they pull back … before long you figure out who doesn’t want to be bothered.” This quote illustrates not only the polarity of the parties, but also how distrust and lack of communication reinforce each other. Wilderness advocates may be “secretive” because they distrust local people; indeed some have been verbally and physically assaulted. Yet long-time residents are suspicious of this lack of communication, making them even more distrustful and prone to antagonistic attitudes and behavior. In this way, both parties in conflict feel defensive and unwittingly contribute to a feedback of distrust.

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83 DEUTSCH, supra note 12, at Ch. 7, 8; see also Goodman & McCool, supra note 67, at 236-54; Dan McCool, Grand Staircase-Escalante National Monument: Lessons for a Public Lands Peace Process in Utah, 21 J. LAND RESOURCES & ENVTL. L. 613-18 (2001); see generally LAWRENCE SUSSKIND ET AL., BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES (1987); SUSSKIND ET AL., supra note 79.

84 CONTESTED LANDSCAPE, supra note 67, at Ch. 3, 4, 5, 7, 8, 14.

1. Finding Common Ground

Focusing exclusively on conflicting moral and cultural values, or what Forester calls “deep value differences,” will be no more effective than ignoring them in arriving at a mutually agreeable solution to land management conflicts such as that over GSENM management or the wilderness gridlock in Utah.\(^{86}\) However, if each party can acknowledge, respect, and understand the origin of the moral and cultural values engaged in the conflict, their own as well as those of their rivals, we will be one step closer to building trust, identifying common ground, and achieving resolution of this long-standing, deeply polarized conflict.\(^{87}\) Despite the early conflict surrounding designation and management of GSENM, common ground may exist between wilderness advocates, local private property advocates and Southern Paiute Indians. As the historical analysis reveals, members of all three of these groups derive individual and collective identity through relation and interaction with the landscape.

For example, the following story recounted by a former mayor of Escalante illustrates that, though differences exist, local residents and wilderness supporters, two groups who are generally antagonistic toward each other, hold in common a deep appreciation for the solitude and beauty of the canyons and desert.

*I'll tell you, you get attached to these areas. We have one word and you'll never see it in the dictionary, but in Escalante every year we go Eastering. And the idea is that, rather than sitting around and have your little party and roll eggs on the lawn and whatever people else do, all the good people of town load up, they drive out to these remote spots. You have your picnic. You go and do your thing. And we love to do that. And I love to go see these little remote areas and go driving a little trail that nobody has been on for two weeks. And you know that you're not going to meet anybody... that you're out there alone and have a little bit of solitude and peace and quiet.*\(^{88}\)

While the Eastering experience necessarily involves motorized travel, it clearly also fosters appreciation of and connection with the land; a connection that is ritualized in the celebration of a religious holiday.\(^{89}\) A similar deep personal

\(^{86}\) Forester, *supra* note 67, at 463-93.
\(^{88}\) Interview with Lenza Wilson, Former Mayor of Escalante (Dec. 19, 1998) (emphasis added).
\(^{89}\) See generally DAVID G. HAVLICK, NO PLACE DISTANT: ROADS AND MOTORIZED RECREATION ON AMERICA'S PUBLIC LANDS (2002) (for documentation and discussion of the ecological damage, historical context and political repercussions of motorized
connection to the land was expressed by a life-long resident of Kanab as she tearfully described her experience of homecoming after several years absence: "The red dust just kind of gets in your soul."\(^{90}\)

While there may be historical or other reasons why long-time local residents and wilderness advocates find it difficult to trust each other, identifying this common value would help build mutual respect on a local level. While common ground among stakeholders may appear to have been absent in the GSENM conflict and wilderness conflict state-wide in Utah, consideration of the moral and cultural values embedded in the cultural heritage of different groups helps to show that, at least on the local level, each group engaged in conflict shares a deep connection to and identity with the landscape, even if these are very different identities stemming from very different cultural relationships to the land.

2. Understanding Value Differences

Paradoxically, while common ground can be found in apparent conflict, so too can value differences underlie apparent consensus. We have seen how for each group: the Southern Paiute, descendents of Mormon pioneers, and wilderness advocates, moral and cultural values of the landscape constitute an integral part of the identity of group members, both individually and collectively. Yet, each group has a different cultural and moral narrative for the relationship between humans and nature. The Paiute narrative views humans in intimate relation with the plants, animals, rocks, wind, water and other elements of nature. These elements have moral standing on par with humans, and will be abundant as necessary for survival on the land only if humans treat them with proper respect. In this view, humans are an integral part of a closely interrelated system or family that includes non-human nature. In contrast, the Mormon narrative places humans separate from nature. With a moral imperative to transform the desert into a garden, resources are intended for human consumption and benefit, and nature is a dangerous force to be conquered and tamed. Alexander describes the Mormon view as having a strong stewardship ethic that for some has been subsumed by entrepreneurial values for economic benefit. The wilderness preservation narrative also sees humans as separate from nature in that it advocates setting aside large tracts of land to be protected from human development; places where humans visit, but do not reside. The preservation ethic of this narrative is motivated by the deep personal relationships that individuals have with nature and by non-monetary values such as ecosystem, scientific, intrinsic and aesthetic values and the healing, restorative power of untrammeled wilderness.\(^{91}\)

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\(^{90}\) Interview with life-long Kanab resident (Jan. 2005).

\(^{91}\) Trainor, \textit{supra} note 13, at 3-29.
For members of each group, the parameters of this relationship with nature is integral to how they view themselves in the world and influences the character of their relationships with other people and with society as a whole. It is part of their individual and collective identity. In this way, conflict over federal land management and over designation and management of GESNM in particular, is incomplete and oversimplified when characterized as conflict over jobs versus nature or over private versus public rights to access. On a very deep level, these conflicts are rooted in the divergent moral and cultural values that generate differing views of the relationship between humans and nature.

One way in which divergent values can underlie apparent consensus is illustrated in the public’s expressions of their vision for the new monument. Even with conflicting values in the GSENM case, members of the monument planning team cited a common thread in written public planning comments, viz. to keep the landscape as it is. While this appears to be ground for common interests, understanding the moral, cultural and religious values can help to understand how this common directive to keep the landscape as it is may hold different meanings for different groups. For descendents of Mormon pioneers, it may mean maintaining their multi-generational obligation to utilize resources and tame the desert. For locals and private property rights advocates, it may mean continued access and continued economic development based in resource extraction. For preservationists, it may mean protection of ecological, archeological areas and physiographic features from degradation and development.92 Hidden within this apparent common ground (i.e. keep as is) are contrasting meanings and assumptions. As discussed below, understanding the cultural and moral values of the stakeholders in conflict can help land managers identify these different assumptions and understand how the same statement can mean different things to different stakeholders.

For some keeping the lands as they are means “maintain motorized access” or “maintain access to traditionally used resources;” for others it means “preserve and protect from road building and other modern human artifacts;” yet common appreciation for the landscape may exist. For example, written comments frequently expressed the sentiment of appreciation for the unencumbered nighttime star-scape. Related was the overwhelmingly shared interest in locating facilities such as interpretive centers, developed campgrounds and gas stations outside the monument boundaries in local communities.93

B. Develop a Common Conflict Assessment and Framing

For successful conflict resolution, the parties involved must concur on both the substance and nature of the disagreement. The very first step in consensus

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92 As noted earlier, the American Indian tribes did not submit written comments in the planning process.
93 Interview with Kathleen Truman (Dec. 17, 1998); interview with Marietta Eaton (Dec. 17, 1998).
building is the “initial identification of an issue.” If parties do not even agree on the problem, a mutually approved solution is beyond reach.\textsuperscript{94}

In the first several years after monument designation, the parties in conflict over GSENM designation and management were stuck at this initial stage. Wilderness advocates and in some respects also the Utah congressional delegation, framed the issue as one of federal land management: protection versus consumptive resource development. In contrast, local residents in communities surrounding GSENM, framed the issue in terms of control over resources, local autonomy from federal mandates, and overcoming a sense of powerlessness with respect to both federal land managers and what are perceived to be powerful environmentalist lobbies. Furthermore, the unique religious, social, cultural and economic history of Utah gives the battle a crusade-like air wherein use of resources and freedom from federal control have strong religious history. The Paiute Indians framed the problem as continued disregard for their sovereignty and marginalization of their historical and cultural relationship with the land. They were invited to participate in the GSENM planning process as concerned citizens with no more or less consideration than any other citizen of the United States. While they were given a leading role in designing interpretive exhibits in the main GSENM visitor’s center, they were denied a place on the monument planning team and were not consulted in government-to-government relationship.\textsuperscript{95} Thus, among the interested and affected parties in GSENM planning and management, there were at least three different conceptions of the problem.

These different framings roughly parallel different meanings of the term “wilderness.” For each party, “wilderness” is infused with connotation. For wilderness supporters, “wilderness” is a place of freedom both in the sense of possibilities for “unconfined recreation”\textsuperscript{96} and where nature is respected on its own terms. For local wilderness opponents, wilderness is synonymous with “lock out,” “land of no use,” and perceived loss of control and freedom. For the Paiute, “wilderness” is an artificial management scheme imposed on a landscape.\textsuperscript{97} In an interview, two long-time residents of Escalante reflected on their understanding of “wilderness”:

“Wilderness is supposed to be an area untouched by humans.”

“We don’t have any of that ... we’ve been everywhere.”

\textsuperscript{94} S. McCrea\textbf{r}y et al., Facilitating and Mediating Effective Environmental Agreements: Coursebook 12 (1999); see also Roy Lewicki et al., Making Sense of Intractable Environmental Conflicts (2003).

\textsuperscript{95} See generally Stoffle et al., supra note 20; A. K. Carroll et al., supra note 20; see also interview with Angelita Bullets, Paiute Tribal Administrator (June 15, 2000).

\textsuperscript{96} Wilderness defenders often perceive wilderness in the terms and language of the Wilderness Act, 16 U.S.C. 1131 (1964).

\textsuperscript{97} Interview with Angelita Bullets, Paiute Tribal Administrator (June 15, 2000).
Based on theories of conflict resolution, I suggest the following steps as a process by which cultural and moral values can be considered in conflict over natural resource management. First, acknowledge and identify all values, including economic, moral & cultural. While economic arguments can be politically potent, moral and cultural values are engaged in natural resource and wilderness conflicts in Utah and throughout the American West and should not be denied. Consideration of the ways in which these values build personal and cultural identity may help to establish communication, trust and common ground. Second, identify irreconcilable “deep value differences” as well as common ground. It is important to acknowledge moral and cultural values in order to foster mutual respect. However, resolution of conflict originates from identification of common interests, not from dwelling on different positions. It may be necessary to identify deep value differences in order to acknowledge them, build mutual respect, and set them aside as an area upon which parties agree to disagree. Third, move forward with focus on common ground and trust building. This final step also requires openness to other viewpoints and willingness and ability to collaborate. As one representative from an environmental organization noted, if it were up to just him and one of the long-time ranchers and leaders in the local area, they could easily work out an amenable solution to conflict over GSENM management.

IV. CONCLUSION

“Utah—where ethics and values are among our most prized possessions.” Accompanied by a photograph of Arches National Park, this slogan faced motorists on interstate 80 in Salt Lake City in April of 2004. The billboard, advertising the Salt Lake Tribune, reveals the significance that moral and cultural values have for Utahns. While demographics in the northern state capitol differ from those in the south, this simultaneous appeal to the aesthetic and preservation value of national treasures and the strongly held and deeply rooted religious values of the Mormon population, underscores not only the significance of moral values in the public psyche, but also the common ground between these potentially conflicting values.

In response to the special issue of Journal of Land, Resources, & Environmental Law (Vol. 21, No. 2B 2001) dedicated to discussion of lessons learned from designation, planning and the resulting conflict of the Grand Staircase-Escalante National Monument, this paper has used an historical approach to illustrate ways in which cultural and moral values of landscape and resources are non-trivial factors in conflict over federal land withdrawal and management in southern Utah and to demonstrate that, in spite of many differences, people who live in southern Utah and have a stake in the management

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98 Forester, supra note 67, at 463-93.
99 See generally Fisher et al., supra note 79.
of its federal lands have in common a deep connection to the land through their cultural history and identity.

What can this historical view of cultural and moral values teach us about conflicts over federal land management and wilderness designation in Utah and the American west? First, although they may not participate in public feedback processes, Indian tribes have a legitimate stake in how their traditional lands are managed and special efforts should be made to consult on a government-to-government basis with tribal governments. Their lack of participation in a public planning process is not necessarily indicative of indifference to the decision outcome, but may be a sign of offence and perceived disrespect. With a tribal liaison on staff, the Grand Canyon Parachant Monument model illustrates one way to effectively communicate with tribal governments and members in planning and management decision-making. Second, economic values are important, but they are only one of many forms of value that are engaged in natural resource conflict. Professor Keiter emphasizes the importance of ecosystem values and democratic process in federal land management. This paper shows that cultural, religious and moral values are also significant for groups in conflict over federal land management, including American Indians who too often in Utah are overlooked or given only cursory attention as stakeholders. Finally, acknowledging moral, cultural and religious values and understanding their historical origin can help develop trust and respect between parties in conflict. A view of the cultural history of groups engaged in conflict may facilitate communication and mutual respect by revealing the origins of values, beliefs, perceptions and biases. When viewed with self-reflexive and mutual respect, misinformation and misunderstandings can then be more easily corrected and cultural identities with the landscape revealed.

The procedural challenge of fairly weighing moral, cultural, economic and scientific values in an unbiased and inclusive way is significant. The first step in accomplishing this task is to identify and acknowledge the moral and cultural values that are necessarily embedded in political issues, noting their connection to the cultural heritage and identity of people engaged in conflict. While making these different realms of value transparent and explicit may initially complicate the political process, it can be an important step in identifying shared goals and interests and in building trust and open communication.

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100 See generally Keiter, supra note 80.
101 Forester, supra note 67 at 463-93; see generally Weston, supra note 67.
Angelitta Bulletts, Grant Johnson, Jerry Roundy, Michael Noel, Kathleen Truman, Deon Alvey, Marelene Haws, Karen Alvey, Ken Sizemore, Clare Ramsay, and many more, too numerous to list. In addition, I am grateful to Richard Stoeffle for welcoming me to temporarily join his research team and to Dave and Joyce Huntsaker for sharing their perspective on my ideas. Funding for this research was provided by Phi Beta Kappa Research Grant and the University of California Berkeley’s Chancellor’s Dissertation Year Fellowship, Humanities Research Grant, Vice-Chancellor Research Fund Grant and block grant from the Energy and Resources Group. Also instrumental in shaping this work were Richard Norgaard, Carolyn Merchant, Timothy Duane, Lori Gruen and Denis Kelso. Thank you.
The challenge of providing water to all people in the arid Western states becomes increasingly more difficult as the population in these states continues to grow exponentially. Meanwhile, drought constantly threatens the already strained sources, forcing communities to confront the shortage through conservation efforts and mandated restrictions. Even so, Native American tribes who have called this land home for hundreds of years seek to stake a claim in the fight for economically valuable water rights in the West. Unfortunately, entering so late into the game of water appropriation means that less water is available since many sources are already fully appropriated.

In the West, groundwater often serves as a primary source of water for residents; so naturally, Native American tribes are seeking to appropriate groundwater sources. However, at the present time, no federal doctrine supports the appropriation of groundwater through reservation by Native American tribes, and the Supreme Court has not yet confronted the issue. Courts of two states in the West, Arizona and Wyoming, have both decided the issue—one held groundwater sources were reservable, while the other held groundwater was not reservable. Thus, whether Native Americans can claim groundwater for reservations through the traditional means of accomplishing such appropriation is left unanswered in several Western states where surface water is scarcest. It appears possible that Native Americans may be left without water for their already economically depressed reservations.

Groundwater reservation raises several issues: first, the seeming economic unfairness and discrimination against tribes who have no economic livelihood to purchase water, coupled with the simultaneous requirement for them to support themselves on their reservations; second, the effect of groundwater reservation on already fully appropriated and strained wells and aquifers, and the possibility of litigation by private water right holders affected by the potentially large quantities of water granted to tribes; third, the groundwater question affects the ability of states to settle federal reserved water rights claims, and potentially limits settlement options; and fourth, intertwined in the groundwater reservation issue,
the possibilities for utilizing alternative methods of quantification of water in order to obtain a more accurate amount of water owed to the tribe.

As the West becomes more and more populated, the issue of groundwater reservation takes on an increased urgency since current inhabitants already struggle to maintain their appropriated water rights while simultaneously facing the demands of the inevitable development of the West. Throughout the struggle, the federal government is obligated to consider the rights of Native Americans who occupied the land long before the creation of current water struggles. Ultimately, the future of Native American reserved water rights rests on the ability to reserve groundwater in order to help reservations progress with society and technology.

II. BACKGROUND

A. Native American Reserved Water Rights

Common law has long interpreted contracts involving Native Americans in favor of the Indian tribe, under the assumption that it is fair to interpret the contract in favor of the party who possesses less bargaining strength or knowledge and understanding of the contract against them. Additionally, this presumption is supported by the belief of protectionism by the federal government towards Native Americans. The landmark case of *Winters v. U.S.* held that in documents concerning the rights of Indians, the interpretation should be granted in favor of Indians, due largely to their inability to defend themselves against the language of the government.

In *Winters*, the Supreme Court stated that implied in the creation of an Indian reservation are the rights of the reservation to the water necessary to maintain and survive on the land given to it by the government, even if these rights were not explicitly stated in the language of the document creating the reservation. Subsequently, the Supreme Court determined the amount of water available for appropriation by reserve right was “the water... intended to satisfy the future as well as the present needs of the Indian Reservations and... that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations.” The Supreme Court has additionally clarified that “a reserved right in unappropriated water... vests on the date of the reservation and is superior to the rights of future appropriators.” This priority date is inevitably earlier than most current appropriations, and enables the tribe to obtain sufficient water to support the reservation. However, the *Supreme Court has only explicitly applied the Winters*
Doctrine to surface water sources, and the reservation of groundwater remains technically undecided.

B. The Groundwater Issue in Native American Reserved Rights

There is a split among state supreme courts concerning the ability to reserve groundwater. The Arizona Supreme Court has held:

[A] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.8

Thus, Arizona noted that because Indians are granted water for the purpose of maintaining their reservation, both presently and in the future, it is necessary in some cases for the tribe to utilize groundwater; and the court permitted the reservation of water rights in groundwater under the limitations specified in the adjudication.

In contrast, in In re General Adjudication of All Rights to Use Water in the Big Horn River System, the Wyoming Supreme Court acknowledged the logic supporting the reservation of groundwater for use by Indian tribes, but they declined to apply the Winters doctrine to groundwater because of the U.S. Supreme Court’s failure to speak directly to the issue.9

Traditionally, separate laws controlled groundwater and surface water; however, the Supreme Court has indicated groundwater may be subject to reservation because of the hydrologic connection between sources.10 In Cappaert v. U.S., the Supreme Court noted: “since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater,” thus indicating the Supreme Court’s understanding of the interconnected hydrological nature of surface and groundwater.11

The reserved water rights doctrine is a federal doctrine, and as discussed earlier, “[is] established by reference to the purposes of the reservation, rather than to the actual, present use of the water... [and] [t]he basis for an Indian reserved

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10 Cappaert, 426 U.S. at 142.
11 Id. at 143.
On the other hand, state appropriative water rights are based on actual use and are governed by state law. However, the nature of State water rights is nonetheless important, specifically, in determining if the same substantive laws govern surface and groundwater. It is a compelling argument favoring the federal reservation of groundwater sources if States govern groundwater and surface water under the same regulations, although not a requirement. In *Cappaert*, the Supreme Court looked to the statutory laws of the state governing appropriation of surface and groundwater sources in formulating their decision.

III. ANALYSIS

A. Supreme Court’s Decision in *Cappaert*

The Supreme Court’s most notable encounter with the topic of groundwater reservation occurred in 1976, in *Cappaert*, establishing the groundwork for the ensuing litigation involving Native American reserved water rights. *Cappaert* involved Devil’s Hole, a cavern located on federal land in Nevada that was home to a unique species of desert fish. Pumping at a nearby ranch, of the same hydrologic source that fed Devil’s Hole, had reduced the water level of Devil’s Hole. The Ninth Circuit court held “[i]n our view the United States may reserve not only surface water, but also underground water.” However, the Supreme Court affirmed the decision of the lower court, but declined to fully endorse the above statement and instead only recognized the interconnected hydrology between surface and groundwater sources.

The Supreme Court acknowledged the statutory Nevada state law relationship between groundwater and surface water, and considered it in the decision: “[i]t appears that Nevada itself may recognize the potential interrelationship between surface and groundwater since Nevada applies the law of prior appropriation to both.” This indicates a possible preference of the Supreme Court to utilize state law in assessing a federal water right.

The Supreme Court affirmed the district court determination that the purpose of Devil’s Hole was to preserve a pool of water home to a scientifically valuable species of fish, and the water level of the pool should not drop to a level detrimental to the fish. In its decision, the Court stated “since the implied-
reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." Though the Supreme Court clearly recognizes the hydrologic connection between reserved surface water rights found on a federal monument and nearby groundwater sources, the Court has expressly declined to directly state that groundwater alone was reservable for a federal purpose.

B. Wyoming, Big Horn River

The Big Horn decision involved the general adjudication of the Big Horn River, and discussed the water rights available to the Shoshone and Arapahoe tribes. The Wyoming Supreme Court discussed the Cappaert decision and stated: "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." However, although the Wyoming court looked to Tweedy v. Texas Co., which stated, "whether the [necessary] waters were found on the surface of the land or under it should make no difference," it ultimately elected not to recognize the reservation of groundwater. Additionally, Wyoming continues to utilize different laws to govern surface water and groundwater, respectively. The Wyoming court refused to extend the reaches of the Winters Doctrine to groundwater due to the lack of controlling law in support.

Interestingly, the case was appealed to the Supreme Court, which affirmed the decision per curium, with a split court and without a written opinion. This reluctance indicates the Supreme Court's unwillingness to explicitly extend the Winters doctrine to groundwater sources, and also demonstrates the split of beliefs regarding the subject.

C. Arizona, Gila River

The Arizona Supreme Court adopted the same legacy of reasoning applied by the Big Horn court, noting the terse history of language involving groundwater reservation. The court acknowledged some reservations created in the arid desert states in the West were without even perennial streams, and it must have

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21 Id. at 143.
23 Big Horn, 753 P.2d at 85-86.
24 Id. at 99.
26 See WYO. STAT. ANN. §§ 41-3-902, 906 (2007).
27 Big Horn, 753 P.2d at 99.
29 Gila River III, 989 P.2d at 746.
been within the intent of Congress to imply groundwater reservation for the use of
the reservation. The Arizona court states:

We find a similar guidepost in Arizona v. California, where the Court declared it “impossible to believe” that those who created the Colorado River Indian Reservation “were unaware that most of the lands were of
the desert kind-hot, scorching sands-and that water from the [Colorado River and its tributaries] would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.”

The Arizona Court continues by rejecting the oft-stated argument for denying groundwater reservation—because it was not an accessible source when the reservations were created, by relying on the statement from Winters that “federal reserved water rights are by nature a preserve intended to ‘continue through years.’” The Arizona court emphasized that the “continuation” of reserved rights implies the ability to employ new technology or utilize other sources if current sources were depleted.

Arizona’s statutory regulation of water relies on a bifurcated system of water rights:

Rights associated with water found in lakes, ponds, and flowing
streams—surface water—have been governed by the doctrine of prior appropriation... On the other hand, underground water has been
governed by the traditional common law notion that water percolating
generally through the soil belongs to the overlying landowner, as limited
by the doctrine of reasonable use.

However, despite the bifurcated system, Arizona recognized the importance
of providing water to reservations located in areas without surface water. The
court stated, “[i]t is apparent from the case law that we may not withhold
application of the reserved rights doctrine purely out of deference to state law. Rather, we may not defer to state law where to do so would defeat federal water rights.” This is more progressive than the groundwater reservation in a state
with laws recognizing the hydrological connection between groundwater and
surface water.

Ultimately, the Arizona Supreme Court appealed to logic and fairness in
stating federal reserved rights applied to groundwater. However, the ability to
reserve groundwater sources is limited to reservations without a surface water

30 Id. at 746 (citing Arizona v. California, 373 U.S. 546, 599 (1963)).
31 Id. at 748 (citing Winters v. U.S., 207 U.S. 564, 577 (1908)).
32 Id.
33 Id. at 743.
34 For a more in depth discussion of the Gila River adjudication, see generally Joseph
35 Gila River III, 989 P.2d at 747.
source adequate to support the needs of the reservation. Additionally, the holding was created in a vacuum, without application to a specific demand or tribe, leaving the issue of quantification or possible challenges undecided. While the Arizona court is progressive in creating just Native American policy, the limitation in the holding indicates the continued reluctance to fully support the unfettered extension of the Winters doctrine to groundwater. The court relied on the fairness-based stance, emphasizing the belief that a reservation is useless to Native Americans without water. This holding, although limited, is important in the context of arid Western states and providing direction for reservations without any viable surface water options.

D. Additional Cases

As mentioned in the discussion of the history of groundwater reservation relied upon in Wyoming and Arizona, a handful of other cases confront the issue of groundwater reservation. However, these cases provide little useful dicta or insight as to their decision to make such a monumental holding, and generally passed over the issue without much discussion.

For example, in U.S. v. Washington, the district court in western Washington boldly stated: “the reserved water rights doctrine extends to... groundwater even if groundwater is not connected to surface water.” The Washington court extended the progression of groundwater reservation by acknowledging the holding from Arizona, but determined that groundwater reservation should not be limited to reservations lacking adequate surface water sources. However, it is interesting to note that western Washington does not face the same challenges for supplying residents with water because of the State’s copious water supply. The abundance of water makes the issue less controversial and water less valuable, factors that may have effected the decision of the district court. Nonetheless, although not in the arid Western states, the district court in Washington pushed the decision beyond necessity and fairness or hydrological connection, and determined groundwater reservation as a matter of law.

E. The Future of the Debate

After close analysis of the major cases involving groundwater reservation, there is no clear common law path for the debate to follow. It is evident from the behavior on the state level, that the holding in Cappaert did not settle the issue of groundwater reservation. The two state supreme court decisions offer contrasting policy considerations for their decisions. Wyoming declined to hold that groundwater was reservable on the grounds of tradition and a lack of clear

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36 Id. at 748.
37 Id.
39 Id. at 1068.
acceptance by the Supreme Court, a view that might be readily adopted by courts unwilling to accept the possible complications and negative implications of reserving groundwater. On the other hand, Arizona appealed to logic and sought to interpret the intent of Congress in other decisions, pushing the debate forward on the grounds of fairness, but nonetheless limiting the holding. However, both states' decisions rest on tenuous foundations, leaving other states to reexamine the same foundations as relied upon by both Wyoming and Arizona. Additionally, the district court in Washington casually accepted groundwater as reservable without offering much justification for the decision or acknowledging the apparent significance of the holding.40

Some legal articles make note of the ambiguity towards the reservation of groundwater sources by Native American reservations, and the significance of the question. Most of these articles mention the Cappaert decision with certainty as to its effect on groundwater reservation, briefly mentioning the decision and stating the holding as allowing Native American reservations to reserve groundwater.41 However, a closer examination of the case indicates the extreme reluctance of the Supreme Court to make such a holding, and inferring such is inappropriate, given the subsequent decisions of state courts and their inability to interpret Cappaert.

One commentator has stated that groundwater, though not officially reservable, should be considered settled law.42 The author cites the trend of state statutory law recognizing surface and ground water sources as interconnected and thereby governable by the same laws, as well as the recognition of the interconnected nature of surface and groundwater sources by federal agencies, including the United States Geographical Survey.43

The judicial trend is an acceptance of the fairness towards the tribes in reserving groundwater, but a failure to fully support the decision without the backing of the approval of the Supreme Court. In order to protect the economic vitality of Native American reservations, it is vital for the Supreme Court to support the reservation of groundwater.

F. Quantification Standard Used

Another issue related to the implications of whether or not to permit the federal reservation of groundwater is the standard used to determine the amount of water granted to the tribe. The traditional standard used in determining the minimum amount of water necessary to support a reservation is the Practically Irrigable Acreage ("PIA") standard, which permits enough water as would be

40 Id.
43 Id.
necessary to irrigate all of the irrigable land located on a reservation. However, often in situations where tribes are seeking to appropriate groundwater, the reservation land is not conducive to agriculture. For example, extremely arid or mountainous land is likely to be both devoid of ample surface water sources and not easily irrigated or suitable for agricultural purposes. Thus, not only are tribes on these reservations unable to obtain sufficient water quantification based on the lack of irrigable acres, they are unable to utilize the most realistic sources of water available to them.

In another Gila River adjudication case, the Arizona Supreme Court listed several reasons why the PIA standard is not necessarily the most effective measure of the quantity of water rights, especially for tribes with reservations with topography unsuitable for agriculture. The Gila River V court utilized the “permanent homeland” theory, and emphasized that this theory “allows for flexibility and practicality... the purpose of a federal Indian reservation is to serve as a permanent home and abiding place to the Native American people living there.” The court offered several factors to consider for establishing the amount of reserved water necessary to support the “permanent homeland” of the Indians on the reservation, including: the tribe’s history, the daily affairs of the tribe, the geography, topography and natural resources of the reservation, the economic basis for the requested water, the past water use, and the future needs and population of the tribe. The Arizona court determined the “permanent homeland theory” was a more accurate determination of the water needs of a reservation. Adopting a more reasonable method of water quantification is beneficial both for tribes seeking groundwater sources, and for states wary of permitting appropriation of precious groundwater sources. The homeland theory enables tribes on non-irrigable reservations to appropriate an accurate amount of water needed to support the reservation, while limiting the unnecessarily high amount of water awarded to tribes with a large number of irrigable acres. The permanent homeland theory creates a more fair policy, preventing some tribes from appropriating huge quantities of unusable water, but still granting tribes the water necessary for economic survival. Adopting a more realistic quantification system is an integral element of extending the Winters doctrine to groundwater, because none of the cases permitting the reservation of groundwater have quantified the amount available, and traditional standards could generate water amounts unrealistic for the sources in question.

46 Id. at 76.
47 Id. at 79-80.
48 Id. at 81.
IV. POLICY ARGUMENTS SUPPORT ALLOWING NATIVE AMERICANS TO RESERVE GROUNDWATER

The looming question of the ability to reserve groundwater is a matter of fairness to the Indian tribes seeking to appropriate sources. Ultimately, the federal government has a duty to provide Native Americans the water necessary to support their reservations. Water is an essential element in creating and maintaining economically viable reservations. Denying Native Americans the right to reserve groundwater is another example oppressing a group of Americans with a long history of discrimination and economic depression. Congress is obligated to protect and provide for Native Americans, and provide them with the resources to maintain a reservation that will help tribes survive in modern society. A reservation created in a location without necessary surface water, should be permitted to utilize whatever water resources are available, including groundwater. Native American tribes are typically unable to select the location of their reservations, and the reservation land is typically more limited than the vast territories historically occupied by most tribes, especially nomadic tribes. Historically, Native American tribes established domicile in areas in which water was readily available, because it was impossible for a tribe to survive without sufficient water. Thus, forcing a modern tribe to live in a location without adequate water sources is inconsistent with the nature of the tribe, and is unjust to deny water to a tribe on the grounds of lack of surface water on a reservation not selected by the tribe.

Ever the same, it is difficult to predict the holding of the Supreme Court if directly faced with the issue. The Supreme Court has hitherto avoided deciding the particular issue of reserved groundwater rights in Cappaert and in Wyoming, but it is aware of the potential for the issue to present itself. Speculatively, the Supreme Court is concerned about the implications of creating the policy of reserving groundwater, just as the state courts are hesitant to tackle the politics associated with valuable water rights. One possible reason for the Supreme Court’s reluctance for deciding the issue of groundwater reservation is the desire to allow the individual states to determine the issue of groundwater reservation based on the state water laws, understanding the water located within the state as property of each state. However, allowing each individual state to decide the issue of groundwater reservation creates considerable discrepancies between the individual states, and adds to the oppression of Native Americans. Leaving the decision to the States favors tribes located in states permitting groundwater reservation, while disadvantaging tribes located in non-groundwater reservation states. In order to promote fairness and uniformity among states, the question of groundwater reservation needs to be decided in a federal context, either by the Supreme Court, or statutorily by Congress.

Perhaps the most compelling argument for permitting the reservation of groundwater for tribes is that the purpose of creating a reservation was to provide an environment conducive to the physical and economic survival of Native Americans. Tribes contend that the reservations given to them were designated
for the purpose of providing a place for the tribe to live, sustain, and support itself physically and economically. More specifically, tribes granted reservations within the last several decades have been granted the reservations with the specific purpose of commercial development and creation of income for tribe members. For example, tribes are often interested in benefiting from proximity to well traveled roads, or creating incentives for visitors to the reservation. However, without water, the possibilities of creating an economically viable reservation are nearly impossible. Thus, logically, following the tradition of Indian law, groundwater should be reservable for tribes seeking water.

V. NATIVE AMERICANS MAY HAVE OTHER OPTIONS IF GROUNDWATER CANNOT BE RESERVED

Naturally, there are arguments in opposition to extending the Winter's doctrine to groundwater. For example, at the time most reservations were created, utilizing groundwater resources was not possible for the tribes inhabiting the land, and thus, impermissible for tribes to utilize sources with a priority date for a time when they would not have been able to access the water in question. Opponents argue allowing the reservation of groundwater unfairly entitles Native American reservations to utilize water that would not have been available to them at the time the reservation was created. However, as noted earlier, the Arizona court reasoned that reserved water rights also implied to change as technology progressed, perhaps rebutting this argument.

The strongest argument in opposition is that allowing reservations to utilize groundwater sources through a reserved right claim displaces right holders who have already appropriated water from the sources in question. Allowing for the large quantities of water necessary to support a reservation to be reserved from groundwater sources severely impacts current appropriations, forcing the state to either pump more water than sustainable from the source or sever existing water rights, leading to possible litigation both by environmental groups and private parties affected by the reservation. The threat of litigation is certainly a significant factor in the reluctance to extend the Winter doctrine to groundwater.

In her symposium article in the Kansas Journal of Law and Public Policy, while ultimately agreeing that the judicial trend appears to be moving in the direction of reservation of groundwater, Judith Royster emphasizes several criticisms of the limitation of the Arizona Supreme Court decision to only permit groundwater reservation when surface water sources are "inadequate." Royster asserts that the Winter's doctrine, while the most widely accepted and traditionally used outlet, is perhaps not the most appropriate or singular tool for insuring adequate water for Native American reservations because of the ambiguous and

50 Gila River III, 989 P.2d at 748 (citing Winters v. U.S., 207 U.S. 564, 577 (1908)).
inconsistent case precedent has generated. She suggests alternative approaches to asserting Native Americans' rights to groundwater, including the “Shoshone Rights,” which derive from United States v. Shoshone Tribe (1938) and extend tribal rights to “resources” contained within the soil of the reservation. Royster also examines the possibility of exercising traditional state laws for obtaining groundwater for native American reservations, although establishing that the variation in state laws make them an unreliable avenue for developing applicable policy.

If the Supreme Court were to decline to extend the Winters doctrine to groundwater, Native Americans would be forced to utilize other options for obtaining water. First, if a tribe is unable to sustain itself on its reservation due to insufficient surface water, the Bureau of Indian Affairs should purchase water for the tribes through state appropriation laws. A tribe seeking to appropriate water could work through state laws in order to utilize rights or purchase options it might have. For example, if a tribe has a reserved surface water source on an undesirable section of the reservation, it could apply for a change application, or sell the water rights from the surface source and purchase water from the desired groundwater source. Second, the denial of federally reserved water rights could lead to innovative and cooperative settlement agreements between states and Native American tribes. In accordance with recognized Native American law, States could work with tribes in collaborative agreements involving water appropriation. Discussion and collaboration between states and tribes might lead to successful development opportunities, and promote a variety of different solutions for tribes to become involved in economic or beneficial opportunities. Additionally, states could work with tribes to create water-use plans in order to ensure sustainable use of potentially strained sources.

Despite the mixed case precedent, the trend appears to be shifting towards permitting the federal reservation of groundwater. This trend, combined with the sentiment of fairness towards Indian tribes, leads to the conclusion that if the Supreme Court were faced with the issue, it would permit the federal reservation of groundwater sources for Native American reservations. The fruited plains

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52 Id. at 494.
53 Id. at 495.
54 Id. at 498-501.
55 For a discussion involving a major river adjudication and the options presented for accounting for the rights of Native American tribes also seeking to use the source see generally Joseph M. Feller, The Adjudication that Ate Arizona Water Law, 49 ARIZ. L. REV. 405 (2007). See also Anne MacKinnon, Historic and Future Challenges in Western Water Law: The Case of Wyoming, 6 WYO. L. REV. 291 (2006) (An analysis of the subsequent impacts of the Wyoming Supreme Court decision limiting Native American reserved rights suggests settlements and various other solutions are more successful than mass adjudications).
56 For an example of an Arizona settlement with the Papago tribe and their water management plan see PETER W. SLY, RESERVED WATER RIGHTS: SETTLEMENT MANUAL 27 (Island Press 1988).
associated with Native American reservations are simply not the reality for states in the arid west, and inhabitants of the inhospitable southwest are deserving of the same rights and opportunities as Native Americans with ample surface water and irrigable land. Tribes populating the arid West have long been forced to survive under the challenges of the environment; however, the confinement to a reservation, especially one lacking a surface water source, and then subsequently denying the tribe the right to appropriate water from a groundwater source is simply unjust. A shift in the nature of Native American reserved water rights both in the method of appropriation and in the ability to reserve groundwater sources benefits tribes in need of water, and sets fair policy towards strained state water sources.

VI. CONCLUSION

The necessary progression of the *Winters* doctrine is to extend water reservation for Native American tribes to groundwater. Enabling tribes to reserve groundwater priority dated to the creation of their reservation is the next step in ensuring the survival of Native Americans and the preservation of their heritage in an increasingly technologically-driven society. Water is the essential element of a reservation, and permitting groundwater to be utilized by the tribe is the only fitting option considering fairness and protectionism of Native Americans.
DIFFUSING THE PROBLEM: HOW ADOPTING A POLICY TO SAFELY STORE AMERICA’S NUCLEAR WASTE MAY HELP COMBAT CLIMATE CHANGE

Bentley Mitchell*

I. INTRODUCTION

Over the past several years, the problem of climate change (also known as global warming)\(^1\) has received significant attention from the public, media, and policymakers. In connection with this increased attention, numerous proposals have been introduced to reduce the amount of carbon dioxide and other human-produced greenhouse gases that contribute to climate change. One common proposal—both in the United States and internationally—is to move towards greater reliance on energy produced by nuclear power plants because of the fact that, unlike most traditional energy sources, nuclear energy results in the emission of little or no carbon dioxide. One example of such a proposal is President George W. Bush’s call for an increase in the production of nuclear energy and the construction of new nuclear power plants, which he states will reduce carbon emissions and promote energy independence.\(^2\)

Despite this increasing support, there has been substantial reluctance in the United States to move ahead with proposed plans to construct new nuclear power plants. In this note, I first discuss the background and history of nuclear power in America, including some of the reasons why Americans may be reluctant to support the construction of new nuclear power plants. I then focus on the problem of how and where the radioactive waste generated by nuclear power plants should be stored, which is a question that must be definitively answered before

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\(^1\) Frequently, the terms “climate change” and “global warming” are used interchangeably but actually have varying definitions. For the purposes of this note, the term “climate change” is used, which is defined as: “[A] change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.” United Nations Framework Convention on Climate Change, Article I (May 9, 1992), available at http://unfccc.int/resource/docs/convkp/conveng.pdf. See also IPCC, 2007: CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS. CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 943-44 (Susan Solomon et al., eds., 2007), available at http://unfccc.int/resource/docs/convkp/conveng.pdf (reaffirming the 1992 definition and distinguishing it from “climate variability,” which refers to naturally occurring changes in climate).

proceeding with any large-scale construction of new nuclear power plants—and is a question that is highly controversial, especially in the Western United States.

II. BACKGROUND

A. Nuclear Power in the World

Now that most of the world has accepted that climate change is a reality, international leaders have undertaken serious efforts to reduce the emission of greenhouse gases that contribute to elevated temperatures worldwide. In most cases, the primary focus is to move away from "dirty" sources of energy, such as coal and fossil fuels that result in emissions of carbon dioxide particles, which

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ultimately become trapped in the Earth’s atmosphere and increase the problem of climate change. However, because worldwide demand for energy is increasing, not decreasing, nations must develop “clean” sources of energy that result in lower greenhouse gas emissions before completely abandoning the older, “dirty” sources of energy. Currently, solar, wind, hydro, and nuclear power are the major clean sources of energy that are potentially viable options for addressing the climate change problem while still providing the energy needs for most countries.

Some of the benefits associated with nuclear energy include the relatively inexpensive operating costs for nuclear power plants (after a larger initial investment to build a new plant), increases in higher-paying technical jobs in communities surrounding nuclear power plants, greater energy independence for nations that currently rely on importing fossil fuels, and—perhaps most significantly—a reduced impact on the environment. Although many international organizations oppose the development of new nuclear power plants (and the continued operation of many existing nuclear plants), the environmental benefits associated with nuclear energy, as well as the economic benefits and the potential for energy independence in some nations, have led many international policymakers to increase their reliance on nuclear power. In fact, nuclear energy

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7 See generally id.; see also INTERNATIONAL ENERGY ASSOCIATION [IEA], KEY WORLD ENERGY STATISTICS 2007 (2007) [hereinafter IEA, KEY STATISTICS]. Some experts have debated nuclear power’s inclusion as a “clean” source of energy because of the potentially negative impact of radioactive waste generated by nuclear power plants. However, for the purposes of this note, I include nuclear power as a “clean” source of energy because it results in virtually no greenhouse gas emissions.
10 See 60 Minutes: France: Vive Les Nukes (CBS television broadcast Apr. 8, 2007); Interview with Alan McDonald, supra note 8; WORLD NUCLEAR ASSOCIATION, NUCLEAR ENERGY IN ITALY (2007), available at http://www.world-nuclear.org/info/inf101.html. See also Daniel C. Rislove, Global Warming v. Non-proliferation: The time has Come for
is one of the fastest-growing sources of electricity in the world, now accounting for approximately 11% of the total electricity worldwide—up from 1.3% in 1973.\textsuperscript{11}

\section*{B. Nuclear Energy in the United States}

Although the United States is the world’s leading producer of nuclear energy—accounting for 29% of all nuclear energy production in the world\textsuperscript{12}—nuclear energy in America has received only mixed support during the past two decades. Despite the prevalence of nuclear power in the United States and the potential benefits of nuclear power (not to mention President Bush’s stated support for an increased reliance on nuclear energy\textsuperscript{13}), there have been no new nuclear power plants constructed in the United States in the past quarter of a century.\textsuperscript{14} Perhaps several factors explain why the United States moved away from developing new nuclear energy sources, but the Three Mile Island Incident is a main reason why Americans decided to cease development of nuclear energy.

\section*{C. The Three Mile Island Incident}

Beginning at 4:00 a.m. on March 28, 1979, the nuclear power plant reactor Three Mile Island Unit 2 (TMI-2), near Middletown, Pennsylvania, experienced problems with the cooling system. The problems with the cooling system eventually led to a partial meltdown of the reactor core and the significant release of radioactive material into the atmosphere. Although studies showed that no human deaths were attributable to the incident, it did provoke widespread concern about the safety of nuclear power in the United States and vastly increased the public’s distrust of the government’s regulation of nuclear reactors.\textsuperscript{15}

Following the Three Mile Island Incident, governments at both the state and federal levels became increasingly reluctant to allow construction of new nuclear

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\textsuperscript{11} By contrast, oil has fallen from 53% in 1973 to just less than 40% in 2005. See IEA, \textit{Key Statistics}, supra note 7 at 1 (2007).
\textsuperscript{12} The United States leads with 29% of the world’s nuclear energy production, followed by France, which accounts for 16%, and Japan, which accounts for 11%. These three countries alone account for almost 57% of the world’s nuclear energy production. See id. at 16-17.
\textsuperscript{13} See George W. Bush, President of the U.S., State of the Union (Feb. 2, 2005); George W. Bush, President of the U.S., State of the Union (Jan. 31, 2006).
power plants, and several states instituted moratoriums on the construction of new plants. In order to address the immediate need of ensuring the safety of existing plants, the federal government re-evaluated their safety standards, instituted stricter regulations for plants, and strengthened the newly-established Nuclear Regulatory Commission (NRC) to oversee the safety regulation of nuclear power plants. These actions, combined with improved technology, have made nuclear power plants safer in America—although many Americans remain skeptical of how safe nuclear plants really are.

D. The Safety of Nuclear Energy Compared to Other Energy Sources

While initially understandable in light of the Three Mile Island Incident, America’s continued lack of support for nuclear energy based on operational safety concerns is likely an overreaction, and is probably not justified when the safety records of nuclear power plants are compared with the safety records of other energy producers.

Although there were some problems prior to the Three Mile Island Incident, there have been no significant operational safety problems reported at any of America’s nuclear power plants since that time. Even more significantly, according to some experts, the technological advances that would be implemented in new nuclear power plants would make these plants significantly safer—perhaps even “100 times safer than current plants,” according to one nuclear energy executive. The validity and accuracy of such statistics may rightly be

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17 Cass Peterson, supra note 15.

18 While no operational safety incidents have been reported since the Three Mile Island Incident in 1979, some other safety concerns, such as groundwater contamination, have been raised. See, e.g. Press Release, Office of the Illinois Attorney General, Madigan, Glasgow File Suit for Radioactive Leaks at Braidwood Nuclear Plant (Mar. 16, 2006), available at http://www.illinoisattorneygeneral.gov/pressroom/2006_03/20060316.html. Additionally, there have been operational safety incidents at international nuclear plants—including the Chernobyl incident—that could possibly be cited as examples of continuing problems with plant safety.


questioned, and any new American nuclear power plant technology is unproven (due in part to the lack of new plants in the past quarter century). However, it is a reasonable assumption that any new nuclear plants would be at least as safe as—if not safer—than existing plants in America, which have been relatively problem-free for a quarter of a century.

In contrast, other major energy sources in America have had numerous safety incidents during the time since the Three Mile Island Incident. In 2006 alone, forty-seven coal miners died in mining accidents in the United States, with 400 total deaths reported by the Mine Safety and Health Association between 1996 and 2007. Internationally, thousands more coal miners have died, including in China, where 5,986 miners died in 2005, and more than 36,000 miners have died in the time from 2000–2005.

Similarly, there have been a number of deaths at oil refineries in the United States since the Three Mile Island Incident. The exact death toll for oil and refinery workers in the United States is unclear, due to concerns over the reporting of deaths to the U.S. Bureau of Labor Statistics (BLS). Confirmed deaths include at least twenty people killed in refinery accidents between 2003 and 2005, and scores more have likely died in other accidents that may not have been included in BLS reports.

Based on these statistics, it is clear that, in terms of operational safety, nuclear power plants in the United States may actually be safer than other energy producers. It is also clear that concerns about operational safety at nuclear power plants, standing alone, would not justify the moratorium on constructing new nuclear power plants in the United States.

E. Regulation of Nuclear Energy in the United States

One of the main reasons that, in terms of operational safety, nuclear power plants are safer than other sources of energy is the fact that the government has imposed myriad regulations on nuclear plants. Although the Three Mile Island Incident spurred extensive new regulation of nuclear power plants, the regulation of nuclear power first began in 1954, with the passage of the Atomic Energy Act

21 Id. (stating that the “100 times safer” statistic is “not strictly true,” but is “a measure of goodness.”).
25 Id.
(AEA) of 1954, for the primary purpose of promoting the use of nuclear power.

Among other things, the AEA officially authorized private ownership of nuclear power plants and established the Atomic Energy Commission (AEC), granting them the authority to promote and regulate the use of nuclear power. Congress subsequently amended the AEA in 1959 to clarify that the Federal government had the sole authority to regulate nuclear power, providing that states could only regulate certain aspects associated with nuclear plants.

In several instances, courts have held that the AEA pre-empted the ability of states to regulate nuclear power, and that the Federal government has the exclusive power to regulate radiological matters such as the licensing, operations and construction of nuclear power plants, while the states only have the authority to regulate nonradiological matters connected to nuclear power plants. Courts have not explained why the line has been drawn at radiological matters, but they have made it clear that states can regulate nonradiological matters like nuisances in connection with nuclear power plants, and that states may impose some conditions for locating a plant at a particular site. However, state regulatory efforts that would impermissibly encroach into radioactive safety efforts and effectively prohibit nuclear facilities—including facilities for the disposal of radioactive waste—have been struck down on the grounds that the AEA pre-empts state law.

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28 Id.
29 Id. See also 82 A.L.R. 3d 751 (1978).
33 E.g. Ass’n. to Preserve Bodega Head & Harbor, Inc. v Public Utilities Comm’n. 390 P.2d 200 (Cal. 1964) (holding that states may impose restrictions on the siting of a proposed nuclear power plant because of the safety concerns associated with particular plant locations).
34 See Skull Valley Band Of Goshute Indians v. Nielson, 376 F.3d 1223 (10th Cir. 2004) (holding that the AEA pre-empted Utah laws which established state and county licensing requirements for nuclear power plants, banned certain types of companies from owning plants, gave the state regulation of roads around plants, and imposed restrictions on employees working at plants).
The governing statute also gives the Nuclear Regulatory Commission (NRC), the federal agency responsible for overseeing nuclear power plants—the ability to enter into agreements with states, wherein the NRC discontinues its regulation of certain types of nuclear materials, while the individual state takes over the regulation of the materials. However, the statute expressly prohibits the NRC from giving up or sharing its regulatory authority over other matters such as the construction and operations of facilities, the export and import of nuclear materials, and the disposal of nuclear materials. For example, in Skull Valley Band of Goshute Indians v. Nielson, the 10th Circuit Court of Appeals held that Utah regulations having the effect of regulating a proposed storage facility were pre-empted by federal law. In their ruling, the court stated that the federal government could not delegate their regulatory authority over nuclear waste disposal.

F. Regulating the Disposal of Nuclear Waste

As one of several measures following the Three Mile Island Incident, Congress passed the Nuclear Waste Policy Act of 1982 (NWPA), which requires the Department of Energy (DOE) to select a site to serve as a permanent repository for radioactive waste generated by nuclear power plants and other sources. The NWPA required the DOE to enter into contracts for the disposal of radioactive waste, and to begin accepting spent nuclear fuel (SNF) at the repository by January 31, 1998. However, various delays in the selection and construction of a permanent repository led the DOE to interpret the statute loosely, stating that before they have a duty to accept SNF, they must first have an operating repository.

35 The initial federal regulatory body was the Atomic Energy Commission (AEC), but the AEC has now been superseded by the Nuclear Regulatory Commission (NRC), which oversees, among other things, the licensing, design, and inspections of nuclear power plants. The NRC has all the same authority as the AEC, and is established as an “independent regulatory commission,” with members of the NRC appointed by the President with the advice and consent of the Senate. See 42 U.S.C. §§ 2021, 5841-5842 (2004).


38 376 F.3d 1223 (10th Cir. 2004).

39 Id. at 1254.


41 See id.

42 42 U.S.C. § 10222 (2004). It should be noted that one court has held as unconstitutional the portion of this statute dealing with fee collection procedures. However, the court left the remainder of the statute untouched, including the requirement to begin accepting waste. See Alabama Power Co. v. U.S. Dep’t of Energy, 307 F.3d 1300 (11th Cir. 2002).

The expressly stated requirement that the DOE must begin accepting SNF at permanent repositories has met with substantial resistance, particularly in Utah and Nevada, where groups have proposed or started constructing repositories. The Utah site (which Congress claimed would only be a temporary storage facility) is no longer being considered as a possible location for a repository. At Yucca Mountain—the Nevada site—significant planning and construction activities have already occurred. Even though the Utah site is no longer under serious consideration for use as a repository, many Utahns and others in the Western United States have joined Nevadans in opposing the Yucca Mountain repository.

As will be discussed later in this note, there are many reasons why Westerners oppose the DOE’s plans for Yucca Mountain. While some of the opposition is probably a typical “not in my backyard” (NIMBY) reaction, those opposed to the Yucca Mountain plan have also raised several legitimate concerns, including the safety of the site, the safety of transporting the waste to the site, and the potential of terrorist attacks.

G. The Push for Increased Nuclear Power

As discussed already, the federal government and all fifty states have refused to approve the construction of new nuclear plants in the United States since the Three Mile Island Incident—largely because of safety concerns and lingering skepticism regarding government regulation of nuclear power plants and the storage of radioactive waste. However, that may be changing, as there has been a noticeable push recently—due in large part to concerns about climate change and reducing greenhouse gas emissions in the United States—to move forward with the planning, development, and construction of new nuclear power plants in the United States.

Several states have considered lifting their moratoriums on new nuclear plants. President Bush included nuclear energy as a key component of his energy plan, and Congress passed the Energy Policy Act of 2005, which included

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45 Steve Tetreault, Yucca Funding Advances, LAS VEGAS REV. J., May 12, 2006, at 14A; A rare victory over Energy Department, LAS VEGAS REV. J., Sept. 6, 2007, at 6B.
47 Supra note 16. See also Joe Bauman, Utah is stepping closer to N-Plant, DESERET NEWS, Jul. 19, 2007, at A1 (reporting on efforts in the Utah Legislature to approve the construction of a new nuclear power plant in the state).
48 See supra note 13
various incentives for activities connected with the construction of new nuclear power plants in the United States. Among other things, these incentives include an annual budget of $1.25 billion for research and development into new nuclear power technology, and the construction of new nuclear power plants.

With all of these incentives and increasing political pressure to combat climate change, it seems that building new nuclear power plants is an idea whose time has come. Yet, there are still several obstacles that must be overcome before the United States can proceed with an energy policy that includes large-scale construction of new nuclear power plants.

First, despite the government’s assurances that nuclear energy can be produced safely, many Americans remain skeptical about the safety of nuclear power plants. The operational safety issue has already been addressed in this note so I will not discuss it again here. Second—and the focus of the remainder of this note—is the question of how and where to store SNF and other radioactive waste generated by nuclear power plants safely. This question presents a significant obstacle in the way of any pro-nuclear energy policy, and the development of new nuclear power plants in the United States can proceed only after determining how and where radioactive waste generated by nuclear plants will be safely stored.

III. FINDING A SOLUTION FOR STORING NUCLEAR WASTE

As briefly mentioned already in this note, there has been significant opposition to the idea of using a single, concentrated, permanent repository (i.e. Yucca Mountain) for SNF and other radioactive waste. To date, the only viable storage alternative that has been presented is to store nuclear waste on-site at

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50 Id.
52 See supra, section II. D.
53 Even if the problem of how and where to store SNF and other radioactive waste is solved, there are other policy questions that also need to be answered before the development of new nuclear power plants can proceed. For example, lingering concerns from the Three Mile Island Incident about the overall safety of nuclear power production may not yet be fully addressed in the public’s mind. Additionally, the potential benefits of alternative, renewable sources of energy—such as wind power—have been advocated by many people as more effective, and less damaging to the environment than nuclear power. While those arguments have only briefly been touched upon here, it is clear that they need to be considered and addressed if a national policy in favor of nuclear power is going to be adopted. Furthermore, this note does not foreclose consideration of alternative solutions to nuclear power or address other safety concerns associated with the development of new nuclear power plants. Rather, this note primarily discusses the problems associated with storage of SNF and radioactive waste, which is only one of several critical issues that need to be considered in answering the larger question of whether large-scale development of nuclear energy should be adopted as part of a comprehensive national energy policy.
54 See supra Section II. D.
nuclear power plants (nonviable options include shooting the waste into outer space\textsuperscript{55}). In this section, I discuss the arguments for and against each of these two proposals, and make some recommendations. The single, concentrated repository option is addressed first, followed by the diffused, on-site storage option. Finally, I draw conclusions about the viability of these proposals and make recommendations about which option is likely to be the best solution for the storage problem.

\textbf{A. The Single, Concentrated Repository Alternative}

The leading choice for the storage and disposal of SNF and other radioactive waste—as adopted in NWPA and favored by President Bush—has been to construct a permanent, concentrated repository where radioactive waste from existing and new nuclear power plants would be stored. Under the terms of NWPA, nuclear power plants currently employ temporary storage of SNF and other high-level radioactive waste (HLW) on-site at nuclear power plants until a permanent repository is established. Under the permanent repository plan, radioactive waste would be sealed and buried for hundreds of years, until the waste would lose its radioactivity.

Yucca Mountain in Nevada was selected as the permanent repository for the nation’s SNF and HLW, and Congress has now spent hundreds of millions of dollars to prepare the site to receive the waste.\textsuperscript{56} The State of Nevada has fought this through various court processes, but has been turned down virtually every time—for reasons ranging from standing to federalism,\textsuperscript{57} and the NRC has repeatedly approved different portions of the Yucca Mountain project.

Despite NRC approval and the support of many political leaders, the opposition to building the Yucca Mountain repository—and other concentrated repositories—has been substantial. In addition to numerous lawsuits, the Yucca Mountain plan has come under fire for being inherently unsafe because the proposed transportation routes would take SNF through metropolitan cities, and would be stored in large quantities only a few miles from Las Vegas, where


\textsuperscript{56} Tetreault, \textit{supra} note 45 (reporting that Congress has already appropriated more than $544.5 million for the Yucca Mountain project).

\textsuperscript{57} See, \textit{e.g.} Nevada v. United States Department of Energy, 133 F.3d 1201 (9th Cir. 1997); Nevada v. United States Dep't of Energy, 993 F.2d 1442 (9th Cir. 1993); Nevada v. Watkins, 943 F.2d 1080 (9th Cir. 1991) (Watkins III); Nevada v. Watkins, 939 F.2d 710 (9th Cir. 1991) (Watkins II); County of Esmerelda v. United States Dep't of Energy, 925 F.2d 1216 (9th Cir. 1991) (Esmerelda); Nevada v. Burford, 918 F.2d 854 (9th Cir. 1990) cert. denied, 500 U.S. 932 (1991) (Burford I); Nevada v. Watkins, 914 F.2d 1545 (9th Cir. 1990), cert. denied, 499 U.S. 906 (1991) (Watkins I); Nevada v. Herrington, 827 F.2d 1394 (9th Cir. 1987) (Herrington I); Nevada \textit{ex rel.} Loux v. Herrington, 777 F.2d 529 (9th Cir. 1985) (Herrington II).
millions of people live. The State of Nevada has also criticized Yucca for its proximity to numerous earthquakes and other seismic events, calling the earthquake risk a "safety concern" that the DOE has failed to address at Yucca Mountain. It should be noted that similar safety concerns (as well as political pressure and extensive public comment in opposition to the proposed repository) led the federal government to reject a temporary repository approximately fifty miles west of Salt Lake City, Utah. In approving the Yucca Mountain plan, the NRC has addressed some of these site-specific concerns, but final approval is still far from assured, as other agencies could also deny approval—as in the case of the Utah repository, where the Bureau of Indian Affairs and the Bureau of Land Management had the ability to effectively veto the NRC's approval.

In addition to the specific safety concerns associated with the Yucca Mountain plan, scholars have criticized the concentrated repository plan for its violation of state sovereignty principles. Although courts have historically held that federal law pre-empts state law in the area of nuclear and radioactive waste regulation, one scholar argues that allowing the federal government to site a concentrated repository in a state without that state's approval "would clearly violate Tenth Amendment and federalism principles."

Proponents of a concentrated repository have answered that the original reasoning of courts—that issues associated with nuclear power plants and the storage of SNF are a matter of national concern, and are thus not appropriate for state regulation—remains valid today. In addition to the need for national safety regulations of nuclear power plants, proponents also point to the national interest in establishing energy independence, the threat of terrorism in the United States, and, of course, the need to find a solution to the storage issue so that the

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59 Earthquakes In The Vicinity Of Yucca Mountain, State of Nevada (2007), (on file with author).
61 See id.
63 See supra note 31 and accompanying text.
64 See Swazo, supra note 62, at 143.
United States can develop new energy sources without increasing the problem of climate change. One scholar also argues that the failure to establish a concentrated repository may hurt the United States policy favoring nuclear nonproliferation, because it severely limits the country's ability to accept foreign waste and remove HLW from countries who could otherwise use the materials to build nuclear weapons.\textsuperscript{68} Furthermore, even those who do not necessarily favor a concentrated repository point out that the interests of sovereign Indian nations may outweigh state sovereignty interests where, as in the case of the now-rejected Utah site, the repository is proposed to be built on an Indian reservation.\textsuperscript{69}

Despite these legitimate arguments and the largely successful efforts of concentrated repository proponents, the political landscape has recently changed, making it more likely that construction on the Yucca Mountain project will be halted—and that a single concentrated repository is unlikely to be built in the near future. With the Democratic takeover of Congress after the 2006 elections, Senate Democrats elected Senator Harry Reid (D–Nev.) as Senate Majority Leader. This gives him the power to shape the legislative agenda and use the threat of a filibuster to ensure that there will be no additional funding allocations for the Yucca Mountain repository. Further, several leading presidential candidates have also expressed their opposition to the Yucca Mountain project, and have promised to eliminate the project if elected.\textsuperscript{70} Since significant time and resources have already been committed to the project, there may be some resistance to these efforts, but with Senator Reid's new political power and the growing opposition to the project, it appears likely that the Yucca Mountain project will be halted, and along with it, the plans for a concentrated repository.

B. The Diffused, On-Site Storage Proposal

The only realistic alternative to storing SNF at a concentrated repository is to store the SNF on-site at nuclear power plants. One of the leaders internationally

\begin{itemize}
    \item See Busby, supra note 65.
    \item In fact, all of the Democratic candidates for president have voiced their opposition to the Yucca Mountain project and promised to eliminate funding for it if elected. See Democratic Presidential Candidates Oppose New Yucca Bill, US FED. NEWS, May 31, 2007 (on file with author).
\end{itemize}
in on-site storage is France, which is second only to the United States in their production of nuclear energy.\textsuperscript{71} Under the French system, SNF is initially reprocessed (or partially recycled) to extract all the fission energy possible out of spent fuel rods. The remaining material is then stored on-site in secure concrete casks.\textsuperscript{72} While this method has generated some controversy,\textsuperscript{73} the French have adopted reprocessing and on-site storage as their preferred way of storing SNF and HLW generated by nuclear power plants, and now receive a higher percentage of their power from nuclear sources than any other nation in the world.\textsuperscript{74}

Despite France's success with their on-site storage program, few other nations have adopted similar programs. As outlined earlier, the official United States policy under NWPA is to transfer all SNF and HLW to a single, concentrated repository as soon as it is completed—although the current practice is for nuclear power plants to store SNF on-site in temporary casks (usually in pools of water).\textsuperscript{75}

Proponents of a large-scale on-site storage policy point to the fact that SNF and HLW have been successfully stored on-site for several decades as evidence that on-site storage is safe. Critics of the on-site storage plan cite growing terrorism threats, and maintain that on-site storage would give terrorists multiple targets to attack, rather than a single target under a concentrated repository plan.\textsuperscript{76} However, what critics fail to note is that nuclear power plants are already likely to be terrorist targets, and that on-site storage would not significantly increase the risk of a terrorist attack on the plants if adequate security measures are in place. Further, one scholar maintains that a diffused, on-site storage policy helps reduce the overall risks by spreading them across the country, thereby avoiding the possibility of an "enormous disaster."\textsuperscript{77} He also adds that on-site storage would allocate the costs evenly throughout the country, rather than having only one state bear the costs associated with a concentrated repository, and that the allocation of risk and costs allows consumers nationwide to make a more informed assessment of the real costs and benefits of nuclear energy.\textsuperscript{78}

An additional concern for opponents of on-site storage is the environmental damage that exists with storage of SNF and HLW. This is of particular concern

\begin{itemize}
\item \textsuperscript{71} Key Statistics, supra note 12.
\item \textsuperscript{72} As outlined in Frontline: Nuclear Reaction (PBS television broadcast April 1997). See also Charlton, supra note 55.
\item \textsuperscript{73} See, e.g., Nuclear, supra note 9.
\item \textsuperscript{74} Charlton, supra note 55.
\item \textsuperscript{76} See supra note 67 and accompanying text.
\item \textsuperscript{78} Id.
\end{itemize}
because the health effects of indirect exposure to radioactive material can be severe.\(^79\) In one instance, the Illinois Attorney General alleged that stored SNF and HLW leaked out of its storage casks and contaminated area groundwater, increasing the risk of cancer and other diseases in the surrounding towns.\(^80\) However, past problems are not necessarily indicative of future problems because, until recently, existing on-site storage was designed to be temporary rather than permanent. Thus, whether permanent on-site storage facilities are environmentally safe is a question that has not been conclusively answered.

Another component of the French on-site storage program is their reprocessing of the radioactive waste. To date, the United States has prohibited reprocessing, due in part to concerns about nuclear proliferation, since reprocessing produces plutonium that can be used in nuclear weapons.\(^81\) The most significant advantage to reprocessing is that it greatly reduces the volume of SNF or HLW that must be stored,\(^82\) but reprocessing is also quite expensive—often costing even more than the initial production of nuclear energy\(^83\)—which helps explain why only a few nations have embraced reprocessing. If new technologies could help defray the costs of reprocessing, and if adequate security measures are implemented, reprocessing could be part of the solution to the storage problem—as part of either the diffused or concentrated storage proposal—in the United States. However, it is not necessarily a required element of either storage plan.

Because of the advantages of the French on-site storage program, Sen. Harry Reid (D–Nev.) and Rep. Jim Matheson (D–Utah) introduced companion bills\(^84\) during the 109th Congressional Session requiring permanent storage of all SNF on-site at nuclear power plants, with the DOE (rather than the individual nuclear power plants) responsible for security, maintenance, and management of the waste.\(^85\) Past versions of the bill have enjoyed a measure of bipartisan support,\(^86\) but have not made it out of committee. Senator Reid introduced a similar bill in 2007,\(^87\) and his new version of the bill is more likely to pass because of his election as Senate Majority Leader, and with Democrats now comprising a

\(^{79}\) See Charlton, supra note 55.


\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) See id.; Interview by the International Atomic Energy Agency [IAEA] with Alan McDonald, supra note 8; FOULKE & BURNETT, supra note 8.


\(^{85}\) Id.

\(^{86}\) Suzanne Struglinski, House, Senate Bills Call for On-Site Nuclear Waste Storage, DESERET NEWS, Dec. 14, 2005, at B1 (noting that several Republican senators supported Reid’s bill).

majority in both the House and Senate. However, as of this writing, the bill remains in committee, where no action has been taken yet.

In the meantime, the DOE has recognized that Yucca Mountain or another concentrated repository may never be built,88 and some nuclear power plants are already implementing changes to make their on-site storage facilities permanent, rather than temporary.89

C. Recommendations

There are benefits and drawbacks to both the concentrated and diffused storage options, with valid arguments existing in favor of both options. However, the current political winds seem to be blowing in favor of the on-site storage option. Assuming that the political landscape remains the same in the near future, the Yucca Mountain/single concentrated repository will not be completed soon enough to meet the current need for permanent storage, let alone accommodate any new nuclear power plants. At the same time, the temporary storage facilities on-site at nuclear plants across the United States are nearing the end of their intended lifespan, and the waste needs to be permanently stored. Policymakers are also advocating nuclear energy as a way to address climate change, so there is a growing sense of urgency to settle on a storage option that would allow the construction of new nuclear power plants.

Based on these factors, it is a reasonable conclusion that permanent on-site storage is the most viable option to address nuclear energy needs in the United States. However, nuclear power plants have not demonstrated that SNF and HLW can be safely stored on-site over an extended period. Proponents of on-site storage have not definitively answered questions about the environmental safety of permanent on-site storage, nor have they fully answered questions about protecting on-site facilities from terrorism and other security threats. Because a failure to address these questions would carry with it severely negative consequences, a large-scale policy of on-site storage would be unwise until these questions are adequately addressed.

Inasmuch as those questions cannot be fully addressed until the technology is observed in real-world situations, I would recommend that the DOE select several existing nuclear power plants as test facilities to determine whether SNF and HLW can be stored permanently on-site. Because several existing plants have temporary storage facilities that are nearing the end of their intended life spans, they would likely be prime candidates for the test construction of new, permanent on-site storage facilities. Other selection criteria might include the surrounding population, potential environmental and safety risks, and the facilities that already

88 Busby, supra note 67 at 459 n. 86 (quoting the Secretary of Energy as saying that on-site storage may become America’s waste storage policy by default).
89 Id. at 458.
exist at specific plants. \(^9\) Furthermore, existing plants must also be required to take the steps necessary to ensure the safety of all SNF and HLW that is stored on-site until the testing period is complete, and it becomes clear whether permanent on-site storage is viable. If on-site storage proves viable, the remaining money allocated for Yucca Mountain could then be diverted to existing power plants in the form of grants or low-interest loans to help defray the costs associated with constructing permanent on-site storage facilities.

In addition to addressing the storage issue at existing plants, accommodations must also be made for the construction of new nuclear power plants (if the United States decides to embrace an energy policy that includes the promotion of nuclear energy), in order to meet future needs and address the effects of climate change. To accommodate these new plants, I would recommend that the NRC require new plants to have facilities designed to store SNF and HLW permanently on-site. Even if the diffused, on-site policy proves unworkable in the long-term, it may take several years—if not decades—to complete Yucca Mountain or another concentrated, permanent repository, and all new plants need to be prepared to store their waste on-site indefinitely. However, because on-site storage would still be unproven, and because alternative clean sources of energy may ultimately prove more viable, it would also be wise to limit the approval and construction of new nuclear power plants to the amount required to address current energy needs, and those that will exist in the foreseeable future.

The ultimate goal of this plan is to develop clean sources of energy in a way that will be safe, environmentally sound, and viable, both economically and politically. Thus, this plan balances and takes into account current political realities, the environmental and public safety concerns associated with on-site storage of SNF and HLW, and the need for new clean sources of energy—including the potential for non-nuclear sources of clean energy that may be more viable.

**IV. CONCLUSION**

The increased attention given to global warming has caused policymakers in the United States to consider nuclear power as a source of clean energy. Normally, the debate on nuclear energy focuses on the threat of reactor meltdown—as in the Three Mile Island and Chernobyl incidents. However, that debate ignores the equally significant problem of how and where to store SNF and HLW generated by nuclear power plants.

This note has discussed the two leading solutions to the problem of how and where to store that waste: (1) Storing the waste in a single, concentrated

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\(^9\) As noted earlier, some plants are already designing their on-site storage facilities to be permanent. See Busby, *supra* note 67 at 458-59 (discussing the measures plants have already taken to make their storage facilities permanent and the Department of Energy’s recognition that “on-site storage may become the permanent solution for waste management”).
permanent repository; or (2) Storing the waste in a diffused manner in permanent facilities on-site at nuclear power plants. In light of the current political climate and the urgent need to settle on a storage alternative, it is clear that permanent on-site storage is the better, more viable option. However, many of the assumptions underlying on-site storage are unproven in the real world. For these reasons, the best policy the United States can adopt is to cautiously proceed with on-site storage and ensure that it is safe, while allowing for some construction of new nuclear power plants, but also encouraging the development of other clean energy alternatives that may also be viable solutions to the problem of climate change.
SITLA and Legislative Oversight—Wise Long-term Direction under Evolving Charitable Trust Duty, or Shortsighted Micromanagement?

Jan McCosh-Hilder*

I. INTRODUCTION

Imagine that your third-grader has to share a math text book because there are not enough to go around. Imagine your pristine state-owned undeveloped hillside view, for which you paid a premium, has become cluttered with backhoes and bulldozers. One or both scenarios may provoke outrage. Either circumstance frames this question: to what extent should the lands granted in trust for the benefit of the State’s school children be developed and consumed to support a public school system that ranks lowest in the nation for school funding per child?¹ This is the dilemma facing Utah’s legislature as School and Institutional Trust Lands Administration (“SITLA”), Utah’s entity for managing school trust lands, engages in its fiduciary duties to its beneficiaries, the state’s school children.

SITLA’s mandate to “generate maximum profits” while exercising prudent trust administration is a balancing act, not uncommon to state trust lands administrators. Unfortunately, SITLA cannot simply look to other states for a definitive rule on school trust land management, since land grants and trusts vary among those states with school trusts, and case law and policies have developed differently. For example, Texas is rich in oil and gas reserves but has the least land holdings of any state school trust, though it returns the highest revenue per acre.² Of its original 2.7 million acre grant, Nevada retains approximately 3,000 acres,³ which represents a tiny fraction of the originally granted lands. Colorado has retained fifty-eight percent of its original land grant, but has altered the terms of its trust to use its lands in conservation.⁴ By amending its state’s constitution

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³ Id. at 54.

⁴ Id. at 49 (quoting COLO. CONST. (Amendment 16), §10(1)(b)(1)).
and creating a “Stewardship Trust,” Colorado has effectively minimized a portion of its lands for further development.\(^5\) Opting to include “protecting beauty, natural values, open space, wildlife habitat for this and future generations”\(^6\) as part of the trustee’s stewardship, Colorado’s Board identifies its mission “to manage the assets in its care... to produce a reasonable and consistent income... while providing responsible environmental stewardship to ensure the conservation of natural resources.”\(^7\)

Utah’s legislature has not articulated or directed a firm policy on school trust land use, giving SITLA broad discretion in managing the lands.\(^8\) Rather than refining a land-use policy or addressing concerns with SITLA’s board composition, Utah’s Legislature is focusing on whether SITLA should be a public or quasi-public entity and upon the narrow issue of “appropriate” employee compensation for SITLA administration under a public or private business model, frustrating business operations and dissuading development.

SITLA had a record year in 2006, returning more than $162 million in revenues and increasing trust assets by $166 million.\(^9\) SITLA attributes the record year in part to several maturing development projects, success of land auctions, and improved management of resources.\(^10\) Development projects returned over $36 million in 2006\(^11\) and continue to comprise a significant portion of revenues. Development generated over $25 million in 2007.\(^12\) The record return in 2006 was approximately twelve times the development returns in 2000, when SITLA made changes to its business model and became a hands-on-player in real estate development.\(^13\) SITLA’s entrepreneurial development efforts have stirred up controversy in local communities inciting community members, local public officials, and rival developers.\(^14\) SITLA is keenly aware its development efforts are controversial.\(^15\) In 2007, SITLA’s director claimed SITLA is “very much

\(^5\) See id. at 50.
\(^6\) COLO. CONST. (Amendment 16) §10(1)(b)(1).
\(^8\) School and Institutional Trust Lands Management Act, 1994 Utah Laws 294 (codified as amended at Utah Code Ann. § 53C-1-201(5) (1953)).
\(^9\) SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION, STATE OF UTAH SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION FISCAL YEAR 2006 12TH ANNUAL REPORT (July 1 2005 to June 30, 2006), 9.
\(^10\) Id. at 4.
\(^11\) Id. at 19.
\(^12\) SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION, STATE OF UTAH SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION FISCAL YEAR 2007 13TH ANNUAL REPORT (July 1 2006 to June 30, 2007), 9.
\(^13\) SITLA, supra note 9 at 19.
\(^15\) Id.
The legislature has approved an interim committee to study SITLA issues, including “the preservation of lands for public purposes, SITLA compensation and other issues.” After a legislative audit, the report to the Utah legislature recommended reducing or eliminating incentive pay because management of the fund “lacks the factors that are conducive to having a significant bonus program.” The report suggests public salaries are in line with the requirements of SITLA’s management’s duties.

This note suggests that Utah’s legislature should forbear from micromanaging compensation, one of the key components of professional business operation and maximization of profitability. Utah’s legislature should leave the Board to make its decisions consistent with the discretion it specifically grants. If the legislature’s desire is to dissuade land development, it should either (1) amend Section 53C-1-102 of Utah Code to clearly recognize conservation as a duty; (2) amend Section 53C-1-202 of Utah Code, directing an enhanced conservation representation on the Board of Trustees; or (3) study state-wide land conservation needs and designate, by constitutional amendment, a change to the purpose of the trust, recognizing stewardship and conservation as an important intergenerational duty of loyalty to its future beneficiaries to protect trust property. This note does suggest fiduciary duty of charitable trusts is evolving to include preservation, consistent with public policy. It does not reach the question of whether the trustee of state school lands has a fiduciary duty to remedy the low funding per child in the state’s public school system.

II. BACKGROUND

A. Congressional Land Grants

Beginning in 1803, as the country expanded west and states joined the union, Congress began granting lands for the benefit of public education. The grants were made primarily because the western states contained significant parcels of federal lands and Congress feared states would lack the revenues from a tax base to fund a state public education system. The grants to each new state varied in the language of the federal grant and the enabling language of the states who received the grant. There are “four central aspects of the grant program: (1) how much land was granted; (2) to whom; (3) for what purpose; and (4) how the lands were

\[16\] Id.

\[17\] SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION BOARD OF TRUSTEES, MINUTES OF THE MEETING OF THE SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION BOARD OF TRUSTEES, 4 (Mar. 8, 2007).


\[19\] Id. at 42.
to be administered. With the exception of the New Mexico and Arizona land grants, little direction is given by Congress in this fourth aspect, administration of the trust lands. As a result, administration of the granted lands has evolved differently among the states, as each has been left to devise its own system of governance within the confines of its individual grant and enabling language. The authority to dispose of trust lands has been an on-going issue in trust land administration. By the mid-1830s a lease-only policy gave way to sales, followed in time by gradual restrictions on sales. Early in their statehoods, several of the states sold much of their original grant lands. By the time New Mexico and Arizona received land grants, a trend toward retention re-emerged. In the mid-1970s some states recognized retention as their official policy. Utah’s law and policy is consistent with disposal, rather than retention.

B. Utah’s Land Grant

When Utah became a state in 1896, Congress granted Utah nearly six million acres of land for the support of public schools, granting “sections numbered two, sixteen, thirty-two, and thirty-six in every township... for the support of common schools.” Utah’s Constitution directed that the lands “shall be held in trust for the people, to be disposed of as may be provided by law, for the respective purposes for which they have been... granted.” Approximately half of Utah’s land grant was sold into private ownership, with most of the sales happening within the first thirty-five years of statehood. Utah’s original grant accounted for approximately thirty percent of what constitutes privately held land in the state today, with seventy percent of Utah’s land belonging to the federal government.

Utah’s checkerboard pattern of land holdings, sometimes referred to as the “Blue Rash,” presents challenges to management because much of the land falls within federally owned property. In addition to the lack of contiguous borders amongst the one-mile square parcels, the federal ground surrounding much of the school lands is managed under public-land use directives, which tend to be

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21 Culp, supra note 2, at 14.
22 See Fairfax, supra note 20, at 820.
23 Id. at 822-23.
24 Id. at 823-24.
26 UTILITY CONST., art. XX §1 (1894), (emphasis added; subsequently amended in 1998, clarifying the school trust).
27 SITLA, supra note 9 at 39.
28 Id.
29 Bruce M. Pendery, Utah’s School Trust Lands: Constitutionalized Single-Purpose Land Management, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. NO. 2, 319, 321 (1996) (attributed to the state lands color scheme used in standard map-making coupled with the spotty distribution) (internal quotation marks omitted).
oriented to preservation and sustainable use. This land-use policy is inherently in conflict with the school trust mandate of maximizing the profitability of the land.

Utah has successfully completed two land exchanges with the federal government. To facilitate these exchanges, Congress enacted Public Law 103-93 in 1993. Six years later, the federal government and the state of Utah completed the largest land transaction in the United States since the Louisiana Purchase and ended a sixty-year conflict over trust lands. The exchange allowed Utah to exchange some of its lands held in national parks, Indian reservations, national forests and other federal lands for consolidated parcels of ground that have a greater financial potential for development. A second exchange was completed in 2001, when parcels in proposed federal wilderness areas were traded for blocks of BLM lands.

C. Utah Establishes a Quasi-Public Land Board

As land exchanges became a policy utilized in Utah’s trust management and the lands increased in their availability for development, the potential for abuse in management of the trust assets increased. State lands were governed by The Division of the State Lands and Forestry and there was a perception that they were subject to indirection and corruption. Rumors of the state granting “sweetheart deals” abounded. The author of a Salt Lake City newspaper article claims that prior to the state’s legislature stepping in to reorganize the administration, “bad deals were being made at the cost of education... [and] some estimates say $300 million was lost through what is euphemistically called poor management practices.” In the 1980s, Utah’s legislature shifted funds from the trust to support the higher education system, resulting in a significant reduction to the

30 See Fairfax, supra note 20, at 834.
32 Id. at 573-74.
33 Id. at 574.
35 See Jerry D. Spangler and Donna M. Kemp, Investigators Find Problems in 8 Utah Land Deals, Appraisals too High, They Say; Landowners, State Officials Disagree, DESERT NEWS, May 14, 2000 at A1, available at http://www.westlx.org/investigators.pdf (referencing the efforts required to restore the public confidence due to prior sales conducted below market).
36 See SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION BOARD OF TRUSTEES, MINUTES OF THE MEETING OF THE SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION BOARD OF TRUSTEES, 17 (Mar. 8, 2007). See also Katharine Biele, How Dave Terry Fought His Way Out of the Cushy SITLA Director’s Chair, SALT LAKE CITY WEEKLY, June 14, 2001 (referencing lingering suspicions from the days when the state lands division was cutting sweetheart deals with the Division of Wildlife Resources).
37 See Biele, supra note 36.
trust’s permanent fund. Even though the permanent fund balance was almost depleted, the Supreme Court upheld the legislature’s actions applying the Jones Act of 1927 to another issue in the case.\textsuperscript{38} Utah’s Constitution was amended in 1988 to stem this practice. With a permanent fund balance of $94.5 million in 1994,\textsuperscript{39} “[t]he School and Institutional Trust Lands Administration was created and told to reverse what some call a century of mismanagement.”\textsuperscript{40}

Aware Utah’s trust lands produced less per acre than trust lands in surrounding states, the legislature formed an advisory group of citizens to increase the funding for the Utah educational system through increasing the returns on school trust lands.\textsuperscript{41} The advisory group proposed changes to the trust’s management to ensure reasonable independence from the state’s bureaucratic structure.\textsuperscript{42} As a result of the group’s efforts, Utah’s legislature enacted the School and Institutional Lands Management Act (the “Act”) in 1994, which changed the governance of trust lands from the Division of State Lands and Forestry to a quasi-public entity, the State and Institutional Trust Lands Administration (“SITLA”),\textsuperscript{43} with a mandate to “manage the lands. . . in the most prudent manner possible, and not for any purpose inconsistent with the best interests of the trust beneficiaries.”\textsuperscript{44} The trust is comprised of two portfolios, the real estate portfolio and the financial portfolio. The real estate portfolio is managed by SITLA.\textsuperscript{45} The financial portfolio contains the money generated by the lands and is managed by the State Treasurer.\textsuperscript{46}

Management details are included in a fifty-seven page act, codified in 1994 Utah Laws 294. The Act includes significant detail on how funds generated by the trust are to be managed and distributed but leaves significant discretion to the Board and the Director on how the lands should be managed for the exclusive benefit of its trust beneficiaries.

Consistent with fiduciary duty under modern trust doctrine of prudent administration, SITLA has begun to structure it’s portfolio of assets to maximize return while limiting risk—all while balancing its duties under a perpetual trust. After professional consultation, SITLA increased its involvement in development of state lands.\textsuperscript{47} The Legislature changed the law to facilitate development and

\textsuperscript{38} See Jensen v. Dinehart, 645 P.2d 32 (Utah 1980).
\textsuperscript{39} SITLA, \textit{supra} note 9, at 9.
\textsuperscript{40} Jennifer Toomer-Cook, \textit{Audit Focuses on Trust Lands}, \textit{DESERET MORNING NEWS}, Jan. 20, 2006, at B02.
\textsuperscript{41} \textit{SCHOOL AND INSTITUTIONAL TRUST LANDS ADVISORY BOARD, REPORT TO THE LEGISLATURE, available at http://www.le.utah.gov} (follow link for legislative history of HB 250).
\textsuperscript{42} \textit{Id}.
\textsuperscript{43} \textit{Id}.
\textsuperscript{44} \textit{UTAH CODE ANN. \S 53C-1-101(2)(B) (2007)}.
\textsuperscript{45} SITLA, \textit{supra} note 9, at 39.
\textsuperscript{46} \textit{Id}.
\textsuperscript{47} \textit{Id.} at 19.
SITLA’s Board adopted policies for development. SITLA is currently considering careful changes to maximize return of surface and mineral resources as well as oil and gas by increasing its direct involvement as a market participant in those activities.

Changes to the business model have been financially rewarding. Development efforts returned $3 million in 2000 and $36 million in fiscal year 2006. Total trust assets grew from $641 million to $807 million in 2006. SITLA’s 2006 annual report stated a goal to reach $1 billion in total trust assets by 2010, with an ultimate goal of making the “school lands trust a major source of public school funding.” The financial goal of $1 billion in trust assets was met in 2007.

In 2006, the legislature became concerned that the salaries paid to SITLA’s administration were too high and ordered a legislative audit. The auditor concluded, among other things, that the employees of SITLA should be paid at a level consistent with public entities and should “have either a very small bonus program or none at all because [SITLA] lacks the factors that are conducive to having a significant bonus program.” Neither the legislative auditor nor the legislators appear to have yet looked beyond the compensation issue to the more critical questions regarding the needs of schools and to what extent the trust lands may be converted to non-land assets that benefit the schools, and what competing tensions must be addressed as the legislature balances school needs against the demands of Utah’s overall environment, land development, natural beauty, and general conservation of open space. Though approximately one-quarter of SITLA’s 2007 annual report is dedicated to “conservation” and “stewardship,” the Director’s message states “[i]t is the duty of the Trust Lands Administration to manage Utah’s trust lands in the financial interests of the trust beneficiaries. There are only two ways to do that: [1] Put the lands into production [2] Sell the lands.”

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49 See SITLA, supra note 9, at 10-16.
50 SITLA, supra note 9, at 19.
51 Id. at 4.
52 SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION, STATE OF UTAH SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION FISCAL YEAR 2006 12TH ANNUAL REPORT (July 1 2005 to June 30, 2006), 40.
53 SITLA, supra note 12, at 10.
54 OFFICE OF THE UTAH LEGISLATIVE AUDITOR GENERAL, Legislative Audit, supra note 15, at 43.
55 E-mail from Emily Brown, Esq. Office of Legislative Research and General Counsel, to author (Sept. 18, 2007 11:15 MST) (on file with author). Though a financial audit was conducted, the Natural Resources, Agriculture, Environment Interim Committee, and Education Interim Committees do not plan to study SITLA issues this year.
56 SITLA, supra note 12, at 4 (emphasis added).
III. SCHOOL LAND ADMINISTRATION’S FIDUCIARY DUTY UNDER UTAH LAW

A. Utah’s Enabling Act and Constitutional Provisions

With the exception of California, almost all of the Western states rely on the trust doctrine for management of their state trust lands. However, trust asset management approaches amongst the states vary widely, since Congress gave little or no direction in the language of the land grants. Some scholars claim that the diversity in trust land management programs that has developed due to the differences in state enabling acts and state constitutions, “makes it difficult, and perhaps irresponsible, to generalize about the management of state trust lands in the West.” However, one important theme among the states is the trust responsibility. Utah’s Enabling Act mandates that “the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools.” Utah accepted these lands and agreed to hold them in trust for the purpose for which they were given in its Constitution. Utah’s Constitution provides that the lands “shall be held in trust... for the respective purposes for which they have been... granted.” Three cases discussed below are particularly important in understanding Utah’s trustee doctrine with respect to the school lands.

B. Evolving Trustee Duty Under Utah’s Case Law

In Duchesne County v. State Tax Commission, the Utah Supreme Court determined that the state’s constitutional language together with the enabling language established an express charitable trust. Justice Larson stated that the school land trust embraced “all the elements of an express trust, with the state [as] the trustee, holding title only for the purpose of executing the trust. . . . The trust estate is definite, the trustee is certain, and the purpose of the trust and the use of the fund is definite, certain and particularly characterized.” As such, under the trustee doctrine, the proceeds from a foreclosure were not taxable because the loan

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58 Culp, supra note 2, at 15.
59 Id.
61 UTAH CONST. art. XX §1 (1894).
62 Id.
63 Duchesne County v. State Tax Commn., 140 P.2d 335, 338 (Utah 1943).
64 Duchesne, 140 P.2d 335, 338 (Utah 1943).
was an asset of the permanent fund held in trust for the beneficiaries and limited in amounts and purposes for which it could be expended.\textsuperscript{65}

In \textit{National Parks and Conservation Ass’n v. Board of State Lands} the Utah Supreme court established that the trustee doctrine logically extended to land held by the trust.\textsuperscript{66} In \textit{National Parks}, the court relies on its prior holding in \textit{Duchesne} and Article X, section 5 of the Utah Constitution, which provides:

\begin{quote}
[T]he proceeds from the sale of school lands shall be placed in the State School Fund, which is to “be safely invested and held by the state in perpetuity,” and that “[t]he interest of the State School Fund only shall be expended for the support of the public elementary and secondary schools.” Further, “[t]he State School Fund shall be guaranteed by the state against loss or diversion.”
\end{quote}

The court concluded “[i]t must follow that the state holds the school lands and the proceeds flowing from them as a trustee of an express trust, limited in the amount that can be expended, and the purposes and uses thereof.”\textsuperscript{67} In further defining the state’s trust duties, the court held the fiduciary duties imposed on the state by virtue of the school trust are “the duties of a trustee and not simply the duties of a good business manager.”\textsuperscript{68}

In \textit{District 22 United Mine Workers of America v. Utah}, the United States Court of Appeals for the Tenth Circuit addressed the issue of whether lands granted to the State for a particular purpose through the Enabling Act created a trust with respect to those lands. The Tenth Circuit determined that the Enabling Act alone did not create a trust, but that the Enabling Act granted discretion to the State in managing the lands. The court expressly determined “a trust was created by the Utah Constitution... with regard to the Lands in question.”\textsuperscript{69} When miners in Utah brought suit against the State, claiming that the State violated its fiduciary duty when it had not provided a miner’s hospital, the court stated, “we find a trust here under the Utah Constitution, rather than under the Utah Enabling Act and 1929 Act.”\textsuperscript{70} The Constitutional provision applies to State School lands.

\textit{National Parks}\textsuperscript{71} points out the relationship of the state and the managing entity of the trust lands. Consistent with the discretion granted under the Enabling Act, “[t]he Legislature has delegated the management of the school trust lands to the Board and Division of State Lands and Forestry. In administering the school trust lands, the state, through the [managing entity], acts as a trustee.”\textsuperscript{72}

\begin{flushright}
\footnotesize
\textsuperscript{65} Id.
\textsuperscript{66} National Parks & Conservation Ass’n v. Board of State Lands, 869 P.2d 909 (Utah 1993).
\textsuperscript{67} Id. at 917.
\textsuperscript{68} Id. at 918 (quoting Gladden Farms Inc. v. State, 633 P.2d 325, 329 (Ariz. 1981)).
\textsuperscript{69} 229 F.3d 982 at 992 (U.S. App. 2000).
\textsuperscript{70} Id. at 987.
\textsuperscript{71} National Parks, 869 P.2d 909 (Utah 1993).
\textsuperscript{72} Id. at 917.
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The court continued, “All trustees owe fiduciary duties to the beneficiaries of the trust. The duty of loyalty requires a trustee to act only for the benefit of the beneficiaries and to exercise prudence and skill in administering the trust.” Consistent with this, regardless of whether the trust obligations derive from the Enabling Act, or from the Utah Constitution, it is settled that the State’s relationship to the lands implicates the fiduciary duties of a trustee to the trust’s beneficiaries.

C. Application of Utah’s Trust Theory to School Lands Administration

In National Parks, the Utah Supreme Court relied on Ervien v. United States and Lassen v. Arizona. In doing so, it applied the law established by New Mexico and Arizona’s Enabling language, not necessarily Utah’s. Though the end result would likely have been the same, at least one critic has pointed out that the Utah Supreme Court should have used modern charitable trust doctrine to decide National Parks, rather than a “conventional wisdom” approach established by Ervien and Lassen. Although the Utah Supreme Court relied on the traditional school trust doctrine of income maximization to justify the result, the court recognized that income maximization could harm future beneficiaries of the school land trust.

Although the primary objective of the school land trust is to maximize the economic value of school trust lands, that does not mean that school lands should be administered to maximize economic return in the short run. The beneficiaries of the school land trust, the common schools, are a continuing class, and the trustee must maximize the income from school lands in the long run.

In her concurring opinion in National Parks, Justice Durham points out that undivided loyalty in managing trust lands would lead to absurd results if taken to its logical extreme. “It would require the state to allow any use of any tract of trust land, free from all regulation, as long as the trust received enough money.” In illustration, she offers an applicant who proposes to build a toxic waste disposal facility on trust land at the head of a major water source; and claims it would be ludicrous to force the state to make the sale and allow the project, simply because

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73 National Parks, 869 P.2d at 918 (quoting WILLIAM F. FRATCHER, SCOTT ON TRUSTS §170 (4th ed. 1987)).
74 Id.
75 See Tacy Bowlin, Rethinking the ABCS of Utah’s School Trust Lands, UTAH L. REV. 923 (1994). See also Sally K. Fairfax, et. al., The School Trust Lands: A Fresh Look at Conventional Wisdom, 22 ENVTL. L. 797, 797 (1992). The basic notion of conventional wisdom can be summarized as “any derived benefit from the school trust lands must be used in support of schools and may not be used to support or subsidize other public purposes.”
76 National Parks, 869 P.2d at 920-21.
77 Id. at 923.
the approval would prove the greatest monetary return to the school trust fund.\textsuperscript{78} The hypothetical is especially poignant when considering a 2003 legislative initiative pushed by a St. George legislator, less than ten years after the National Parks decision, dubbed Plan B.\textsuperscript{79} Plan B was an initiative for SITLA to pursue a competitive bid for the location of a high-level nuclear waste facility (planned for the Skull Valley Goshute Reservation) on state trust land to earn money for Utah schools.\textsuperscript{80} "The Goshute facility, estimated at $3.1 billion, would be big enough to hold 44,000 tons of lethally radioactive spent power-plant fuel."\textsuperscript{81} Claiming "[t]he revenue we might get from this would make it more palatable to a lot of people," the St. George Legislator gained behind-the-scenes support from Republican legislators.\textsuperscript{82}

As one scholar points out, the Utah Supreme Court could have determined in National Parks that the Division had an affirmative duty to "consider aesthetic, scenic, and recreational values in land management decisions" under traditional trust law, and then reached the merits of "whether the Division properly considered such values in deciding to make the... exchange."\textsuperscript{83} Specifically, consistent with its holding in Duchesne County v. State Tax Commission, the Utah Supreme Court could have applied charitable trustee duties, applying principles to maximize the land into perpetuity.\textsuperscript{84} However, these options all preceded the legislature's 1994 enactment.

\section*{D. Trustee Duty Codified by Utah Legislature}

\subsection*{1. Statutory Establishment of a Charitable Trust}

Utah's legislature enacted the School and Institutional Trust Lands Management Act (the "Act") in the 1994 general session to ensure compliance with its fiduciary duties. The legislature's mandate acknowledges the duties of a perpetual trust established by Utah's Constitution.

\textsuperscript{78} Id. at 923-24.
\textsuperscript{79} Judy Fahys & Dan Harrie, 'Plan B' Aims to Outbid Goshutes' N-Waste Site; Legislators See Little Hope to Stop Toxic Materials, Want to 'Deal with Reality,' Lawmakers Push Alternative to Goshutes' Site, SALT LAKE TRIB., Feb. 6, 2003, at A1.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id. State trust lands continue to be a target of nuclear projects. A 2006 Report to the Legislature recommends that a nuclear study be coordinated and funded by Energy Advisor and SITLA, since SITLA lands would "likely be the location of any [nuclear power] project." Public Utilities and Technology and Natural Resources, Agriculture and Environment Interim Committee, 2006 Energy Advisor Report to the Utah Legislature: Energy Policy and Development in Utah 18 (Oct. 18, 2006).
\textsuperscript{83} Bowlin, supra note 75, at 945.
\textsuperscript{84} 140 P.2d 335 (Utah 1943).
The purpose of this title is to establish an administration and board to manage lands that Congress granted to the state for the support of common schools under the Utah Enabling Act.

This grant was expressly accepted in the Utah Constitution, which imposes upon the state a perpetual trust obligation to which standard trust principles are applied.\textsuperscript{85}

2. Specific Trustee Duties

The statutory language is more restrictive of the trustee’s duties as defined by Utah case law but gives administration liberal discretion. The Utah Code addresses SITLA’s duties as a trustee and reads in pertinent part:

(2)(a) The trust principles... impose fiduciary duties upon the state, including a duty of undivided loyalty to, and a strict requirement to administer the trust corpus for the exclusive benefit of, the trust beneficiaries.

(b) As trustee, the state must manage the lands and revenues generated from the lands in the most prudent and profitable manner possible, and not for any purpose inconsistent with the best interests of the trust beneficiaries.

(c) The trustee must be concerned with both income for the current beneficiaries and the preservation of trust assets for future beneficiaries, which requires a balancing of short and long-term interests so that long-term benefits are not lost in an effort to maximize short-term gains.

(d) The beneficiaries do not include other governmental institutions or agencies, the public at large, or the general welfare of this state.

(3) This title shall be liberally construed to enable the board of trustees, the director, and the administration to faithfully fulfill the state’s obligations to the trust beneficiaries.\textsuperscript{86}

3. Statutory Composition of SITLA’s Board of Trustees and Board Duties

The Act is specific in defining membership of SITLA’s Board of Trustees and assigns broad responsibilities for policymaking to the Board.\textsuperscript{87} Under the Act, the Governor and the State Board of Education appoint a nominating

\textsuperscript{86} Id. §102.
\textsuperscript{87} Id.
committee comprised of members from different geographical areas of the state representing interests in natural resources, industries, public lands, and education.\textsuperscript{88} The Senate must consent to the Governor’s selected seven-member nonpartisan board, which must include at least six members nominated by the committee. Each member is to possess outstanding professional qualifications “pertinent to the purposes and activities of the trust” and the Board membership must represent renewable and nonrenewable resource management/development and real estate.\textsuperscript{89} The Board is expressly charged with a role in policy development. “The Board of Trustees shall provide policies for the management of the administration and for the management of trust lands and assets.”\textsuperscript{90}

The Act is specific that policies of the Board “shall... seek to optimize trust land revenues and increase the value of trust land holdings consistent with the balancing of short and long-term interests, so that long-term benefits are not lost in an effort to maximize short-term gains.”\textsuperscript{91} “Broad discretion” is specifically granted to the Board for developing policies for the long-term benefit of the trust.\textsuperscript{92}

The Act specifies that the Board, with the consent of the Governor, is responsible for selecting the Director and the oversight of the Director’s performance, including compensation and removal.\textsuperscript{93}

4. Statutory Duties of the Director

The Director is given the “broad authority” to “[e]stablish procedures and rules” for the day-to-day management of the administration, “consistent with general policies prescribed by the Board.”\textsuperscript{94} The mandate, shared by the Board, that procedures and rules “shall seek to optimize trust land revenues consistent with the balancing of short and long-term interests, so that long-term benefits are not lost in an effort to maximize short-term gains” is clearly specified.\textsuperscript{95}

IV. THE CONTROVERSY

Under charitable trust doctrine, is the State violating its fiduciary duties to its trust beneficiaries, the State’s school children, when SITLA permanently disposes of land by engaging in real estate development?

\textsuperscript{88} Id. §203.
\textsuperscript{89} Id. §202.
\textsuperscript{90} Id. §201(5).
\textsuperscript{91} Id. §201(5).
\textsuperscript{92} Id. §204.
\textsuperscript{93} Id. §301.
\textsuperscript{94} Id. §302(1)(a)(ii).
\textsuperscript{95} Id. at 302(2).
A. Fiduciary Duties of the Trustee and the Perpetual Trust Obligation

Utah generally adopts the The Restatement (Second) of Trusts, and has adopted provisions relating to trustee duty. Under common law, trustees are charged with a series of fiduciary duties to the beneficiary of the trust. These duties include a duty to manage the trust in accordance with the instructions of the settlor; a duty of good faith, which requires the trustee to put the best interests of the trust ahead of his own; a duty of prudence, which requires the trustee to manage the trust property with the same degree of skill that a prudent person would exercise in his or her own affairs; and a duty to preserve and protect the trust assets, or trust corpus, to satisfy both present and future claims against the trust. In administering charitable trusts, trustees’ duties are similar to those of private trusts.

One would be hard-pressed to argue the SITLA is violating its duties to its trust beneficiaries, Utah’s school children, when SITLA permanently disposes of land by engaging in real estate development because its actions are consistent with Utah’s statutory law codified in the Act and with fiduciary duties under the Restatement. However, it is less clear whether the development of state lands is consistent with the fiduciary duty of a charitable trust under evolving public policy. An argument for a breach of duty is that the disposal of state land through real estate development violates the fiduciary’s duty of “protecting trust assets” to preserve the land for future beneficiaries’ enjoyment of undeveloped open-space. As discussed below, (A) Real estate development is consistent with the legislative mandate to maximize the profitability of the trust (B) the settlor’s instructions do not preclude real estate development, (C) the establishment of a quasi-public management entity gives reasonable independence from the bureaucratic structure of the state, (D) SITLA’s actions are within the prudent investor realm, and (E) the exchange of land assets for other income bearing assets is not in violation of preserving and protecting the corpus of the trust under modern trust doctrine. Whether the fiduciary duty of “preserving and protecting” should be redefined in our present-day world, where greenhouse gasses and carbon footprints are of utmost concern, is a significant issue and is addressed below in Section V of this note.

97 RESTATEMENT (SECOND) OF TRUSTS §§ 2, 3.
98 Id. at §170.
99 See RESTATEMENT (SECOND) OF TRUSTS §379 (duties of trustees of charitable trusts ordinarily are not enforceable by individual beneficiaries but are enforceable by suit brought by the Attorney General).
100 RESTATEMENT (SECOND) OF TRUSTS §§ 2, 3, 170.
B. Real Estate Development is Consistent with Maximizing Profitability

Utah's legislature is clear that the trust lands are to be held in a perpetual trust and managed under trust law. The statutory language specifically identifies the "compact between the federal and state governments... imposes upon the state a perpetual trust obligation to which standard trust principles are applied." The trust obligation is made more restrictive in Utah Code Annotated §53C-1-102(2), which provides in part:

(B) As trustee, the state must manage the lands and revenues generated from the lands in the most prudent and profitable manner possible, and not for any purpose inconsistent with the best interests of the trust beneficiaries.

... 

(D) The beneficiaries do not include other governmental institutions or agencies, the public at large, or the general welfare of this state.

If sub-sections (B) and (D) are construed narrowly, revenues must be generated in the most "profitable manner possible" without considering the "general welfare of this state." Under this mandate, SITLA is not only justified in real estate development but precluded from considering the broader impact of its actions, adopting a pro-development approach, along with avoidance of any actions inconsistent with maximization of the asset fund is likely consistent with the present trustee duty. Further, if maximization of fund assets for the sole benefit of public schools is the purpose of the grants and the will of the legislature, then market level private salaries and bonuses are intuitively necessary to achieve such a result. Not to offer compensation sufficient to compete with talent in the private market would be a seeming breach of fiduciary duty.

C. The Settlor's Instructions Do Not Preclude Real Estate Development

The instructions of the settlor are typically those of Congress in the original land grants. However, as the Tenth Circuit held in United Mine Workers, it is Utah's Constitution that establishes the trust, so the enabling language and the Constitution must be read together to understand the intent of the settlor. Utah's enabling language reads, "the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools." The Constitutional language accepting the Congressional grant and establishing the trust, Article XX §1 reads, "[the lands] shall be held in trust... to

101 Utah Code Ann. §53C-1-102(1)(b).
102 Utah Enabling Act §10 (1894).
be disposed of as may be provided by law, for the respective purposes for which they have been granted.

The Act provides that the proceeds of land sales are placed into the permanent fund. Together with the statutory language enabling disposal of the lands, SITLA is not in violation of the intent of the settlor when it sells land for real estate development at fair market value.

D. SITLA Meets the Duty of Good Faith

The duty of good faith requires the trustee to put the best interests of the trust ahead of his own. SITLA was created in part to provide management that was reasonably independent from the state’s bureaucratic structure at a time when rumors of sweetheart deals were prevalent. Statutory law requires that land sales follow a specific procedure to ensure sales are conducted at fair market value. Though the current administration is not immune from legislative pressures, the structure established by the Act gives reasonable independence from the State’s competing interests, whether those interests are for the public good or for an individual, as illustrated by example.

In 2006, the State put pressure on SITLA to sell Tabby Mountain for $40 million, if half of the funds could be raised through appropriation. The Governor’s plan was to acquire the property for preservation and public recreational use. Since Tabby Mountain was not on the market at the time of the State’s offer, the property had not gone through the competitive bid process and the Board concluded that “Tabby Mountain is not on the market.” When asked in a Board meeting if the Department of Natural Resources (“DNR”) would be willing to participate in a competitive process, DNR’s Director stated “they are at the Board’s mercy and will have to play by the rules.” Ms. Bird, representing the beneficiary, thanked the Board for their high level of integrity, claiming the “beneficiaries are very grateful for their standing up for the schoolchildren of Utah. That is why this agency was recreated.”

E. SITLA’s Real Estate Development is Compliant with the Duty of Prudence

The Act’s explicit language to manage the assets for maximum profitability, together with instructions to the Board and Director to balance short-term gains

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103 UTAH CONST. art. XX §1 (1894) (emphasis added).
104 UTAH CODE ANN. 53C-3-102 et seq.
105 Id.
107 See SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION BOARD OF TRUSTEES, MINUTES OF THE MEETING OF THE SCHOOL & INSTITUTIONAL TRUST LANDS ADMINISTRATION BOARD OF TRUSTEES, 8 (Jan. 25, 2007).
108 Id. at 12.
109 Id.
with preservation of the assets in the long-term in a perpetual trust, supports the views that the trust should move to a more modern administration of its assets under the prudent man rule articulated in § 227 of the Restatement 3d of Trusts.\textsuperscript{110}

The trustee has a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.\textsuperscript{111} This standard requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation, but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.\textsuperscript{112} In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so. In addition, the trustee must:

(1) conform to fundamental fiduciary duties of loyalty and impartiality;
(2) act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents; and
(3) incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship.\textsuperscript{113}

In the absence of a contrary statutory provision, a trustee may generally invest in such properties and in such manner as expressly or impliedly authorized by the terms of the trust.\textsuperscript{114} It is clear from the State’s Constitution, “disposal” of trust lands is not precluded by the trust. SITLA’s changes to its business model by hiring top talent and becoming a hands-on-player in real estate development are consistent with making the assets productive while exercising caution. SITLA had a record year in 2006, returning more than $162 million in revenues and increasing trust assets by $166 million.\textsuperscript{115} Those gains were achieved by the Board’s efforts in carefully selecting skill in the area of real estate development and paying bonus compensation consistent with market rates for that talent.

The Act specifies, “the board shall establish the compensation of the Director to include a salary within [a specified range].\textsuperscript{116} Though compensation in the form of bonuses is not specifically addressed in the Act, the Prudent Man Rule supports the Board in incurring reasonable costs that are appropriate to the investment responsibilities of the trusteeship. When harmonizing the legislature’s mandate to manage the assets in the “most prudent and profitable manner,” it would violate

\textsuperscript{110} Utah has adopted sections of \textsc{Restatement (Third) of Trusts}. \textit{Compare Restatement (Third) of Trusts} §227 (1992), \textit{and} Utah Code Ann. §§7-5-10, 33-2-1-4 (2007).
\textsuperscript{111} \textsc{Restatement (Third) of Trusts} §227 (1992).
\textsuperscript{112} \textit{Id}.
\textsuperscript{113} \textit{Id}.
\textsuperscript{114} \textit{Id}.
\textsuperscript{115} SITLA, \textit{supra} note 9, at 4.
\textsuperscript{116} \textsc{Utah Code Ann.} 53C-1-301(4)(a) (2007) (emphasis added).
the duty of prudence to offer less than market compensation to a real estate developer, exposing the trust to the unnecessary risk in inherent in reliance on inexperienced talent with a likely wasting or diversion of precious trust assets.

F. The Exchange of Land Assets for Cash or Other Income Bearing Assets is Within the Duty to Preserve the Trust Corpus into Perpetuity

Under the Prudent Man Doctrine, real estate development as a part of an "overall investment strategy" does not violate the duty to preserve the corpus of the trust as long as the investing increases the overall value of the trust corpus. The overall investment strategy SITLA announced in 2006, to increase the trust's portfolio value to over $1 billion by 2010, combined with careful selection of skillful employees, is consistent with the Prudent Man Doctrine. The significant financial gains, which actually exceed the 2006 goal, and most significantly as SITLA has engaged in real estate development, evidence that over-all, trust assets are not being wasted.

Further, the Utah Supreme Court’s holding in National Parks could be construed to support an argument for disposal of less-profitable lands into higher-returning assets in consideration of future beneficiaries. Holding “[t]he beneficiaries of the school land trust, the common schools, are a continuing class, and the trustee must maximize the income from school lands in the long run.” The Court emphasizes the law's focus on long-term income maximization, not long-term land conservation.

If maximizing the profitability of the trust is the goal of the legislature, selling trust lands in favor of more profitable enterprises is supportable. Texas' school trust provides a model of efficient land use. As mentioned previously, Texas returns significant revenues on a relatively minimal amount of land. Texas relies on its rich resources of oil and gas, making extremely efficient use of land held in trust for the benefit of its public school system. Like Texas, Utah has oil and gas resources in addition to many other natural resources. As Utah's population increases and developable lands become increasingly scarce, the value of developable lands increase. A careful plan to sell high-valued developable lands to invest in further development of state-rich natural resources, for example, would be consistent with the Prudent Man Doctrine of trustee duty.

Those in favor of real estate development constituting a breach of the State’s fiduciary duty to preserve the corpus of the trust could argue consistent with Justice Durham’s concurring opinion in National Parks, “in some situations it is permissible for the state to give priority to factors besides economic gain to the school trust.”

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117 RESTAURATI0N (THIRD) OF TRUSTS §80 (Draft No. 4).
118 SITLA, supra note 9, at 4.
119 National Parks, 869 P.2d at 920-21.
120 CULP, supra note 2, at 56.
121 Id.
Utah’s legislature specifically identifies in the purpose section of the Act, that the “compact between the federal and state governments... imposes upon the state a perpetual trust obligation...” As land resources become increasingly scarce, the question remains to what extent land should be preserved to benefit future beneficiaries under a perpetual trust. Scholars have pointed out that modern trust doctrine and perpetual trust management does not necessarily bear out an interpretation that the trustee has a “requirement to pursue the highest monetary returns possible for trust beneficiaries, regardless of other considerations.” “Rather, a more flexible theory of “portfolio management” that incorporates concepts of balanced risk and return and management for long-term sustainability has emerged.”

The Restatement (Third) of Trusts provides that a trust is beneficial in designing beneficial interest over time, but that societal and individual advantages are to be balanced against other social values and the effects of “deadhand control on the subsequent conduct or personal freedoms of others...”

The Act provides:

As trustee, the state must manage the lands and revenues generated from the lands in the most prudent and profitable manner possible, and not for any purpose inconsistent with the best interests of the trust beneficiaries.

It could be argued real estate development is inconsistent with the best interest of the trust beneficiaries because it is inconsistent with long-term sustainability and intergenerational equity, affecting the personal freedom of future generations. As the scarcity of undeveloped land increases, that undeveloped land could theoretically have a higher value to future beneficiaries than the anticipated future income generated by disposing of that land today.

However, the Act clearly articulates that the “state must manage the lands and revenues generated from the lands in the most prudent and profitable manner possible.” This legislative mandate, together with the holding in National Parks concluding that undivided loyalty requires that the state as a trustee has a duty to maximize the income “for the exclusive benefit of the beneficiaries” poses a substantial counter to those who argue that SITLA’s involvement in real estate development violates the state’s fiduciary duty to preserve the trust corpus.

124 Id. at 48.
125 Restatement (Third) of Trusts §29 cmt. c, illus. i (2003).
127 Id. at §102 (2)(a).
128 National Parks, 869 P.2d 909.
V. IS IT TIME TO REDEFINE FIDUCIARY DUTY WITHIN THE CONTEXT OF STATE CHARITABLE TRUST MANAGEMENT?

Even if the requirement to achieve maximum financial return is a proper element of the modern trust mandate, the charitable trust designation of state trusts sets them apart from private trusts.\textsuperscript{129} Charitable trusts, unlike the majority of private trusts, are intended to endure essentially in perpetuity. By necessity, this requires trust managers to look beyond revenue maximization, and obligates trust managers to embrace notions of intergenerational equity by investing portfolios in sustainable management strategies that will maintain a healthy trust corpus for future generations.\textsuperscript{130} “[S]ome trust managers and trustees may be proceeding under a set of assumed management restrictions that are actually far narrower than those that are commonly applied in the private sector.”\textsuperscript{131} Equitable charitable trust principles can and should be applied to state land trusts.

Standing to bring a suit is an area for further consideration. It is possible a municipality could obtain the court’s approval in a \textit{cypres} proceeding. In today’s society in which protection of the environment has become a moral issue, raising pollution even to the level of sin,\textsuperscript{132} conservation an important consideration for the entire human race, including trust administrators.

VI. CONCLUSION

Under the current statutory construction of SITLA, and the present common-law definition of fiduciary duty, it is likely that SITLA’s real estate development does not violate the duty to protect and preserve the trust corpus, and the legislature should forebear from micromanaging the day-to-day business activities of SITLA as it is discharging its present obligations. A more worthy objective is the development of a sustainable land-use policy. The legislature could advance this goal by either (1) amending Section 53C-1-202 of Utah Code Annotated, the statute directing the composition of the Board of Trustees, or (2) completing a study of state-wide land conservation needs and designating by Constitutional amendment, a portion of school trust lands protected from development for the benefit of future generations of the State’s school children.

Utah’s constitutionally/statutorily created trust is of great significance, since unlike many states, it gives Utah’s legislature the ability to unilaterally alter the terms of the trust.\textsuperscript{133} Whether the reason is to preserve future income possibilities or natural values, open space and wildlife habitat for this and future generations,

\textsuperscript{129} See CULP, supra note 2, at 21.
\textsuperscript{130} Id. at 48.
\textsuperscript{131} Id.
\textsuperscript{133} See CULP, supra note 2, at 36.
the state could validly conserve a portion of the land, designating a portion undevelopable.

The State’s fiduciary duties to its beneficiaries, Utah’s school children, derive directly from Utah’s Constitution. In accordance with its fiduciary duties as a trustee of a perpetual trust, the Legislature has enacted the School and Institutional Trust Land Management Act, giving management authority to a quasi-public entity, SITLA. Though this paper suggests it is time to redefine fiduciary duty, as long as SITLA’s Board is in compliance with the Act and current common law fiduciary duty, it is technically in compliance with the best interest of the beneficiaries. Business decisions such as compensation to management fall within the discretion of the Board of SITLA and legislature’s meddling in such decisions is destructive of the prudent administration of the trust. Because a conflict of interest is inherent, the duty of good faith would be difficult or impossible to achieve if the Legislature became directly involved in business decisions.
NEW CHANGES TO 30 C.F.R 100.3(c): WEAKNESSES AND SUGGESTED IMPROVEMENTS IN THE ASSESSMENT OF A MINE OPERATOR’S HISTORY OF VIOLATIONS

Andrew Morgan*

I. INTRODUCTION

The mining disasters of recent years, culminating in Utah’s Crandall Canyon collapse,¹ have brought to the public’s attention the dangers that face miners everyday. We lament the lack of safety that leaves so many families without fathers, sons, brothers and uncles; typical media viewers ask themselves, “How is it, that today, when we can successfully launch a spacecraft for a nine-month voyage to Mars, when we can communicate electronically even outside the gravitational pull of our planet, we still can’t dig some rocks out of the earth without killing those that go down to get them?”² As is so often the case, public exasperation leads our politicians to act. On April 23, 2007 the Mine Safety and Health Administration (MSHA) began to enforce the regulations it amended in response to the Mine Improvement and New Emergency Response (MINER) Act,³ and not more than a year later there is already pending legislation to again strengthen the authoritative statute.⁴

One of the provisions MSHA amended in response to the MINER Act was how an operator’s history of violations of mandatory health and safety regulations is assessed to determine the ultimate amount of a penalty under 30 C.F.R. 100.3(c). This note analyzes the potential weaknesses of that important civil penalty provision and suggests how the provision might be made more effective in securing miners’ safety.

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II. A GENERAL HISTORY OF MINE SAFETY

As is often the case with regulation of an American industry, the first laws regulating the safety of miners appeared in the states and territories, not the federal government. Generally, these laws were purposely made weak because it was thought that strong regulation would hamper economic growth. Only when there were major mine disasters did any meaningful state or territorial law make its way past the local legislatures.

One of the first federal measures taken on behalf of miners’ safety was the proposal of a Federal Mining Bureau in 1865. Twenty-six years later Congress passed the “Protection of the Lives of Miners in the Territories” Act of 1891, which required annual inspections of ventilation and safety equipment by a territorial mining inspector. Noncompliance or failure to correct a violation was punishable by fines. This act was originally intended to apply to all the states and territories, but in order to get it passed, its final version applied only to the states and territories that had no effective local laws in place.

The following quotes from the floor debate of the Act’s passage are indicative of the competing interests at play then and that still exist to a large extent today: Rep. Joseph G. Cannon of Illinois, a coal mining state, stated that “although he had ‘every sympathy with any legislation which will protect human life,’ he was nonetheless suspicious of any law creating new offices and did not ‘see that the necessity is apparent in this case.’” In contrast, Rep. Henry Stockbridge, of Maryland, who was also the chairman of the House Committee on Mines and Mining, stated that “he and his committee ‘thought it wise to close the stable door before the horse was out,’” meaning that they shouldn’t wait until a disaster occurred to take protective measures for miners.

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6 Id.
7 Id. at 66, 69-71. There are some exceptions to this, like the Colorado coal mine legislation of 1883, id. at 57, and the New Mexico legislation of 1882, id. at 62.
9 WHITESIDE, supra note 5, at 63-64. It should be noted that the standards of this act were far below what one would consider adequate today; it covered only the very basics to guard against the most obvious risks inside the mine.
10 Id. at 64.
11 Id. at 63, 65-66. Utah was one such state to which the federal regulation applied, at least until similar local measures were passed when statehood was granted. Id. at 68. See also id. at 62-66 (describing how the nearly complete lack of enforcement authority for New Mexico’s local regulations resulted in the application of the federal default regulations).
12 Id. at 63.
13 Id. at 63-64.
The next major development in the regulation of mining was in 1910 when, in response to a string of mining disasters, Congress established the Bureau of Mines in the Department of the Interior.\textsuperscript{14} This entity had the responsibility of:

Diligent investigation of the methods of mining especially related to the safety of miners and the appliances best adapted to prevent accidents, the possible improvement of conditions under which mining operations are carried on, the treatment of ores and other mineral substances, the use of explosives, the prevention of accidents, and other inquiries and technological investigations pertinent to said industries.\textsuperscript{15}

The existence of such an organization had the potential to become an important step toward increasing the safety of miners, but the agency’s formation was merely symbolic in that its purpose was limited to the investigation of what could be done, and only at the invitation of the mine owners.\textsuperscript{16}

Congress sought to give the Bureau more power in 1941 with the passage of Public Law 49, 77th Congress, by authorizing federal inspectors to enter and inspect mines for health and safety hazards.\textsuperscript{17} This action still left gaping holes in the Bureau’s effectiveness because it didn’t have the power to “establish standards for coal mines or to enforce compliance with the standards and recommendations of the Secretary of the Interior.”\textsuperscript{18}

Ironically, but not surprisingly given the trend, it was the death of 119 West Frankfort, Illinois miners in 1951 that spurred Congress to the enactment of Public Law 552, 82nd Congress, in 1951, which bolstered the bureau’s means for approaching mine safety.\textsuperscript{19} However, as President Truman recognized:

This measure is a significant step in the direction of preventing the appalling toll of death and injury to miners in underground mines . . . Nevertheless, the legislation falls short of the recommendations I submitted to the Congress to meet the urgent problems in this field.\textsuperscript{20}

Over the following years there were several mediocre efforts made to address the failings to which Truman referred, and then on November 20, 1968, there was a mine explosion in Farmington, West Virginia that killed 78 miners.\textsuperscript{21} Between that day and October 13, 1969 there were 120 more miners who died from various other mining accidents.\textsuperscript{22} In total there were 222 miner deaths in 1967, and 311

\begin{thebibliography}{9}
\bibitem{14} H.R. REP. No. 91-563, at 1 (1969) (Conf. Rep.).
\bibitem{15} S. REP. No. 95-181, at 1-2 (1977) (Conf. Rep.).
\bibitem{16} Id.
\bibitem{17} H.R. REP. No. 91-563, at 1 (1969) (Conf. Rep.).
\bibitem{18} Id.
\bibitem{19} Id.
\bibitem{20} Id.
\bibitem{21} Id.
\bibitem{22} Id.
\end{thebibliography}
such deaths in 1968. These tragedies were the principle impetus for Congress’ passage of the Federal Coal Mine Health and Safety Act of 1969 (the Coal Act).

The Coal Act made significant improvements in the way of inspection and enforcement authority and it transferred such powers to the Mine Enforcement and Safety Administration (MESA), an independent agency within the Department of the Interior, to carry out these tasks. Some of the improvements included provisions that required mines to be inspected at least four times annually without advance warning; mines deemed to be “usually hazardous” had to be inspected more often, to the extent of inspecting every five working days; upon inspection, violations would be written down by reference to the specific provision violated and reported to the independent agency. Finally, and perhaps most significantly:

[If the inspector found that] a condition or practice in a mine which could place miners in an imminent danger of death or harm before such condition or practice [could] be abated, the inspector [was] required to determine the areas of the mine affected by such condition or practice and order the miners in that area removed until the condition or practice [was] abated.

The Coal Act was more effective at accomplishing its goals than any other previous regime, but there were still problems that needed to be dealt with. On May 16, 1977 the Senate Committee on Human Resources declared that a “[r]eview of the . . . six years of enforcement of the Coal Act, requires the Committee to report that fatalities and disabling injuries in our nation's mines are still unacceptably and unconscionably high.” Further, the Department of Interior, under which MESA operated, had as one of its goals the “maximiz[ation of] production in the extractive industries, which was not wholly compatible with the need to interrupt production which is the necessary adjunct of the enforcement scheme under the . . . Coal Act[].” Thus, Congress sought to remedy these flaws in the Federal Mine Safety and Health Act of 1977 (the Mine Act) by removing the responsibilities of MESA from the Interior Department and establishing an independent regulatory body within the Department of Labor, stating:

[N]o conflict could exist [between the mine regulatory body and its mother agency] if the responsibility for enforcing and administering the

23 Id.
26 Id. at 5.
27 Id. at 5-6.
28 Id.
29 Id. at 6.
30 Id. at 7.
31 Id. at 5.
mine safety and health laws was assigned to the Department of Labor since that Department has as its sole duty the protection of workers and the insuring of safe and healthful working conditions.\textsuperscript{32}

This new administration is the one we recognize today as the Mine Safety and Health Administration (MSHA). Shortly after the passage of the Mine Act, MSHA began promulgating its rules, including its civil penalty assessment regime.

Again spurred on by a mine disaster, this time at the Sago Mine in West Virginia, Congress passed the Mine Improvement and New Emergency Response Act of 2006 (the MINER Act), the purpose of which is:

\[\text{[T]o further the goals set out in the [Mine Act] and to enhance worker safety in our nation's mines. The bill amends the 1977 act to require incident assessment and planning, harness new and emerging technology, enhance research and education, improve safety-related procedures and protocols and increase enforcement and compliance to improve mine safety.}\textsuperscript{33}\]

It was this amendment to the Mine Act that prompted MSHA to amend the assessment procedure for a mine operator's history of violations, which is the concern of this paper. There is also currently a new amendment to the statute pending before Congress, the Supplemental-Mine Improvement and New Emergency Response Act\textsuperscript{34} (the S-MINER Act), which attempts to protect miners' safety through strengthening MSHA's authority to shutdown mines that fall far short of meeting health and safety standards.

III. THE DEVELOPMENT OF 30 C.F.R. 100.3(c): A CIVIL PENALTY FOR A PRODUCER'S HISTORY OF VIOLATIONS

The first inklings of a civil penalty for a producer's history of violations began to appear upon implementation of the Federal Coal Mine Health and Safety Act of 1969;\textsuperscript{35} the 1972 Code of Federal Regulations imposes a penalty for "repeated unwarrantable failure violation[s]."\textsuperscript{36} The following issue, 1973, simply included a subsection "(c)," and quoted the language of the 1969 Act, saying that an operator's history should be considered, \textit{inter alia}, when assessing civil penalties.\textsuperscript{37} The next change, which went into effect in August of 1974\textsuperscript{38} and was

\begin{itemize}
  \item \textsuperscript{32} Id.
  \item \textsuperscript{34} Supplemental-MINER Act, supra note 4.
  \item \textsuperscript{35} Pub. Law 91-173, Sec. 109(a)(1), 83 Stat. 742, 756 (1969).
  \item \textsuperscript{36} 30 C.F.R. § 100.3(a)(2) (1972).
  \item \textsuperscript{37} 30 C.F.R. § 100.3(c) (1973); Pub. Law 91-173, Sec. 109(a)(1), 83 Stat. 742, 756 (1969).
  \item \textsuperscript{38} 39 Fed. Reg. 27558, 27559 (July 30, 1974).
\end{itemize}
codified in the 1975 edition of the Code of Federal Regulations,\(^{39}\) came as a companion to the adoption of a structured point system.

Under Subsection 100.3(c), a twenty-four month period was established for the assessment of a producer's history of violations.\(^{40}\) Violations were assigned points according to the average number of violations per year (of the two years) and the average number of violations per inspection day (VPID) over the two year period.\(^{41}\) The maximum amount of penalty points that could be imposed under this two-pronged assessment was twenty.\(^{42}\) Violations that counted toward a producer's history encompassed any and "all assessed violations which had not been vacated or dismissed, and included those under appeal."\(^{43}\)

This assessment regime went undisturbed until 1982 when MSHA sought to distinguish mine operators from independent contractors. It abolished the regime that assigned points to mine operators according to the annual average of total violations but established a separate structure that implemented the same against independent contractors.\(^{44}\) It also restricted counted violations to include only those that were paid or finally adjudicated.\(^{45}\) The total number of penalty points that could be assigned under the new rule was still limited to twenty, and the period of time assessed was still two years.\(^{46}\) Thus, mine operators' points were assigned with total reference to the average number of violations per inspection day, and independent contractors' to the average of total violations per year.\(^{47}\)

No substantive changes were made to 100.3(c) until the most recent set that went into effect in April of 2007; it now reads:\(^{48}\)

\(^{39}\) 30 C.F.R. § 100.3(c)(1) (1975).
\(^{40}\) Id.
\(^{41}\) 30 C.F.R. § 100.3(c)(1), (2) (1975).
\(^{42}\) 30 C.F.R. § 100.3(c) (1975).
\(^{43}\) 47 Fed. Reg. 22286, 22288 (May 21, 1982).
\(^{44}\) Id. at 22288, 22294 (May 21, 1982).
\(^{45}\) Id. There was also a change that distinguished significant and substantial (S&S) violations from other less serious violations which were assessed under a single penalty provision; if these were "paid in a timely manner" they were not counted in a producer's history. However, this change was deleted in 1992. 57 Fed. Reg. 2968, 2969 (Jan. 24, 1992).
\(^{46}\) Id.
\(^{47}\) Id. at 22294.
\(^{48}\) 30 C.F.R. 100.3(c) (2007).
(c) History of previous violations. An operator's history of previous violations is based on both the total number of violations and the number of repeat violations of the same citable provision of a standard in a preceding 15-month period. Only assessed violations that have been paid or finally adjudicated, or have become final orders of the Commission will be included in determining an operator's history. The repeat aspect of the history criterion in paragraph (c)(2) of this section applies only after an operator has received 10 violations or an independent contractor operator has received 6 violations.

(1) Total number of violations. For mine operators, penalty points are assigned on the basis of the number of violations per inspection day (VPID)(Table VI). Penalty points are not assigned for mines with fewer than 10 violations in the specified history period. For independent contractors, penalty points are assigned on the basis of the total number of violations at all mines (Table VII). This aspect of the history criterion accounts for a maximum of 25 penalty points.

<table>
<thead>
<tr>
<th>Mine Operator's Overall History of Violations per Inspection Day</th>
<th>Penalty Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 to 0.3</td>
<td>0</td>
</tr>
<tr>
<td>Over 0.3 to 0.5</td>
<td>2</td>
</tr>
<tr>
<td>Over 0.5 to 0.7</td>
<td>5</td>
</tr>
<tr>
<td>Over 0.7 to 0.9</td>
<td>8</td>
</tr>
<tr>
<td>Over 0.9 to 1.1</td>
<td>10</td>
</tr>
<tr>
<td>Over 1.1 to 1.3</td>
<td>12</td>
</tr>
<tr>
<td>Over 1.3 to 1.5</td>
<td>14</td>
</tr>
<tr>
<td>Over 1.5 to 1.7</td>
<td>16</td>
</tr>
<tr>
<td>Over 1.7 to 1.9</td>
<td>19</td>
</tr>
<tr>
<td>Over 1.9 to 2.1</td>
<td>22</td>
</tr>
<tr>
<td>Over 2.1</td>
<td>25</td>
</tr>
</tbody>
</table>
TABLE VII -- HISTORY OF PREVIOUS VIOLATIONS - INDEPENDENT CONTRACTORS

<table>
<thead>
<tr>
<th>Number of Violations</th>
<th>Penalty Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 to 5</td>
<td>0</td>
</tr>
<tr>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>8</td>
<td>3</td>
</tr>
<tr>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>10</td>
<td>5</td>
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<td>11</td>
<td>6</td>
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<td>12</td>
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<td>28</td>
<td>23</td>
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<tr>
<td>29</td>
<td>24</td>
</tr>
<tr>
<td>Over 29</td>
<td>25</td>
</tr>
</tbody>
</table>

(2) Repeat violations of the same standard. Repeat violation history is based on the number of violations of the same citable provision of a standard in a preceding 15-month period. For coal and metal and nonmetal mine operators with a minimum of six
repeat violations, penalty points are assigned on the basis of the number of repeat violations per inspection day (RPID) (Table VIII). For independent contractors, penalty points are assigned on the basis of the number of violations at all mines (Table IX). This aspect of the history criterion accounts for a maximum of 20 penalty points (Table VIII).

TABLE VIII -- HISTORY OF PREVIOUS VIOLATIONS - REPEAT VIOLATIONS FOR COAL AND METAL AND NONMETAL OPERATORS WITH A MINIMUM OF 6 REPEAT VIOLATIONS

<table>
<thead>
<tr>
<th>Number of Repeat Violations Per Inspection Day</th>
<th>Final Rule Penalty Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 to 0.01</td>
<td>0</td>
</tr>
<tr>
<td>Over 0.01 to 0.015</td>
<td>1</td>
</tr>
<tr>
<td>Over 0.015 to 0.02</td>
<td>2</td>
</tr>
<tr>
<td>Over 0.02 to 0.025</td>
<td>3</td>
</tr>
<tr>
<td>Over 0.025 to 0.03</td>
<td>4</td>
</tr>
<tr>
<td>Over 0.03 to 0.04</td>
<td>5</td>
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<td>Over 0.04 to 0.05</td>
<td>6</td>
</tr>
<tr>
<td>Over 0.05 to 0.06</td>
<td>7</td>
</tr>
<tr>
<td>Over 0.06 to 0.08</td>
<td>8</td>
</tr>
<tr>
<td>Over 0.08 to 0.10</td>
<td>9</td>
</tr>
<tr>
<td>Over 0.10 to 0.12</td>
<td>10</td>
</tr>
<tr>
<td>Over 0.12 to 0.14</td>
<td>11</td>
</tr>
<tr>
<td>Over 0.14 to 0.16</td>
<td>12</td>
</tr>
<tr>
<td>Over 0.16 to 0.18</td>
<td>13</td>
</tr>
<tr>
<td>Over 0.18 to 0.20</td>
<td>14</td>
</tr>
<tr>
<td>Over 0.20 to 0.25</td>
<td>15</td>
</tr>
<tr>
<td>Over 0.25 to 0.3</td>
<td>16</td>
</tr>
<tr>
<td>Over 0.3 to 0.4</td>
<td>17</td>
</tr>
<tr>
<td>Over 0.4 to 0.5</td>
<td>18</td>
</tr>
<tr>
<td>Over 0.5 to 1.0</td>
<td>19</td>
</tr>
<tr>
<td>Over 1.0</td>
<td>20</td>
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</table>
TABLE IX -- HISTORY OF PREVIOUS VIOLATIONS -
REPEAT VIOLATIONS FOR INDEPENDENT CONTRACTORS

<table>
<thead>
<tr>
<th>Number of Repeat Violations of the Same Standard</th>
<th>Final Rule PenaltyPoints</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 or fewer</td>
<td>0</td>
</tr>
<tr>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>8</td>
<td>6</td>
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<tr>
<td>9</td>
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<td>10</td>
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The rule is analyzed first by reviewing the detrimental effect that the assessment period reduction (from twenty-four months to fifteen months) will have on compliance incentives, and then by suggesting ways in which MSHA could provide greater compliance incentives, like allowing more general categories of repeat violations and excluding repeat violation penalties from the good faith penalty reduction.

IV. REDUCTION OF THE TWENTY-FOUR MONTH ASSESSMENT PERIOD

As stated above, the twenty-four month period for assessing a producer’s history of violations, along with the point system that allowed for such an assessment, went into effect in August of 1974\(^{49}\) and was codified in the 1975 edition of the Code of Federal Regulations.\(^{50}\)

As evidenced by the minimal treatment the twenty-four month period received in the rule proposal,\(^{51}\) and the virtually non-existent treatment it received after the public comment period in the final rule adoption,\(^{52}\) it seems safe to assume that at the outset there was no significant dispute as to whether twenty-

\(^{49}\) 39 Fed. Reg. 27558, 27559 (July 30, 1974).
\(^{50}\) 30 C.F.R. 100.3(c)(1) (1975).
\(^{51}\) 39 Fed Reg. 16145, 16146 (May 7, 1974).
\(^{52}\) 39 Fed. Reg. 27558 (July 30, 1974). The only time the twenty-four month period is mentioned is in the statement of the rule itself, which comes after any discussion of disputing commenters, etc.
four months was the proper amount of time to consider when assessing a producer’s history of violations.

In fact, when MSHA sought to distinguish between mine operators and independent contractors in the 1982 amendment, it also considered and rejected a shortened time period for assessing past violations.\(^53\) Ironically, it used the same reasoning that is cited in the most recent changes as an opposing comment;\(^54\) in 1982, speaking of “mines which [sic] are inspected on a less frequent basis,” MSHA stated that “[i]nformation accumulated over a shorter period may not provide sufficient data to accurately reflect safety and health trends in many mining operations.”\(^55\)

There were no substantive changes made to this particular part of Subsection 100.3(c) until the latest amendment that went into effect in April 2007, which shortened the time period from twenty-four months to fifteen months.\(^56\) In the rule proposal, MSHA stated:

MSHA is proposing to reduce the 24-month review period to a 15-month review period because the agency believes that a period of 15 months would more accurately reflect an operator's current state of compliance. This change would provide MSHA with sufficient data to appropriately determine an operator's compliance record, including any trend, even for mining operations that are inspected on a less frequent basis. This change would provide an incentive for improving safety and health to an operator that has a deteriorating safety and health record in the recent past.\(^57\)

In the final rule adoption report MSHA again reiterates its belief that the fifteen-month period will provide “sufficient data to accurately evaluate an operator’s compliance record,” which, it clarifies, includes “seasonal or intermittent operations.”\(^58\) It goes on to offer an explanation for the seemingly arbitrary number of fifteen, saying that, really, a full year is all that is needed to assess history, but because it takes “approximately three months for a penalty assessment to become a final order of the Commission” fifteen months is the optimal time period.\(^59\) The rule adoption report also bolsters another idea found in the rule proposal, saying:

The shortened timeframe of 15 months provides MSHA with a more recent compliance history than the 24-month period under the existing rule. In addition, MSHA believes that operators who violate the Mine

\(^{53}\) 47 Fed. Reg. 22286, 22288 (May 21, 1982).


\(^{55}\) 47 Fed. Reg. 22286, 22288 (May 21, 1982).

\(^{56}\) Compare 30 C.F.R. 100.3(c) (2006) with 30 C.F.R. 100.3(c) (2007).


\(^{59}\) Id. at 13604.
Act and MSHA's health and safety standards and regulations should receive penalties for those violations as close as practicable to the time the violation occurs in order to provide a more appropriate incentive for changing compliance behavior.\(^60\)

Finally, MSHA provided specific examples of the impact the adopted change will have on producers:

MSHA analyzed the data for operator violations that were assessed in 2005 to determine the impact of changing to a 15-month period. For coal and metal and nonmetal operator violations that were assigned history penalty points in 2005, and had a minimum of 10 violations during the 15-month period, the average penalty points using a preceding 24-month period was 7.5 per violation. Using a preceding 15-month period, the average was 7.6 penalty points per violation.\(^61\)

A similar comparison revealed that the new standard would have nearly as negligible effect on independent contractors as this one did on coal, metal, and nonmetal operators.\(^62\)

While MSHA did give some acknowledgement to the new standard's critics by briefly mentioning some of the concerns expressed during the public comment period,\(^63\) what MSHA failed to do was effectively apply the critiques to the justifications it gave for the time reduction and to other, very probable hypotheticals.

MSHA's claim that reducing the time period to fifteen months will provide an incentive for producers to change compliance behavior is counterintuitive; it cannot provide a greater compliance incentive than would the twenty-four month period because, simply, there will be less time accounted for in the producer's history. If a producer has a particularly large amount of violations on an inspection day (whether they be general or repeat violations), as time passes and that day moves further toward the end of the time included in a producer's history of violations, it keeps the average number of violations per inspection day higher, providing the producer an incentive to have good inspections days to offset the bad one that is still included in the history period. Alternatively, if a producer has a particularly good inspection day, the lower number serves as a reward (incentive toward compliance) for as long as it is counted in the history period. Thus, the further back in time violations are counted, the greater the producer's incentive will be to comply right now because good days will help him longer and bad days will hurt him longer.

\(^{60}\) Id. (emphasis added).
\(^{61}\) Id.
\(^{62}\) Id.
\(^{63}\) Id. at 13603.
Admittedly, MSHA's comparison of the two different standards, as applied to the particular twenty-four and fifteen month periods, showed a negligible difference,\(^\text{64}\) but therein is the flaw; the standards were only applied to one fifteen month period and one twenty-four month period. It is not at all improbable that the hypothetical described in the previous paragraph would happen in some other fifteen or twenty-four month period, whether in the past or in the future. Basing the time reduction on only one set of fifteen and twenty-four month periods is at best a shortsighted estimation, at worst, a presumptuous and misguided extrapolation.

Moreover, MSHA's wholesale rejection of its own argument, which was used in the 1982 rule amendments to not reduce the history assessment time period, further undermines any attempt to use its analysis of the new and old standards to justify the reduction now. MSHA fails to mention any new development or new assessment procedure that would allow it to provide "sufficient data" to accurately evaluate a seldom inspected, seasonal operator's compliance record where it could not in 1982. It simply ignores its previous rationale for not reducing the time period and states the opposite. The only difference is that this time the rationale is propped up by a narrow statistical analysis that could very likely be invalid when applied to different respective time periods or future circumstances.

Further, MSHA's purported aim to "more accurately reflect an operator's current state of compliance"\(^\text{65}\) is at odds with the very purpose and intent of Congress that MSHA assess "civil monetary penalties . . . [according to, inter alia,] . . . the operator's history of previous violations."\(^\text{66}\) Even MSHA's desire to penalize "violations as close as practicable to the time the violation occurs,"\(^\text{67}\) while certainly laudable in general, is utterly out of place in a provision that has as its purpose the punishment of a producer's past violations.

In sum, the reduction of the twenty-four month assessment period to fifteen months diminishes producers' compliance incentives and is based on a comparison of the old and new standards that was obtained through an application both narrow and limited. MSHA blatantly contradicts its own previous rationale based on this narrow application and gives no other testable reason for the reduction. The other justifications, such as the agency's desire to "more accurately reflect an operator's current state of compliance," are inconsistent with the spirit and intent of the statute authorizing the imposition of civil penalties that Congress adopted. Indeed, the reduction is misguided and is destructive of the incentives that keep miners safe.

\(^{64}\) Id. at 13604.


The new repeat violation penalty is a great step toward increasing incentives for miner safety. In principle, it bridges a divide that separated miners’ safety from the effect of civil penalties. The rule proposal states that:

MSHA is proposing this new provision because the Agency believes that operators who repeatedly violate the same standard may indicate an attitude which has little regard for getting to the root cause of violations of safe and healthful working conditions. The Agency believes that these operators show a lack of commitment to good mine safety and health practices by letting cited and corrected hazardous conditions recur . . . MSHA believes that this new proposal will encourage greater operator compliance with the Mine Act and MSHA’s safety and health standards and regulations, which is consistent with Congress’ intent.68

The final rule adoption further describes the need for a repeat violation penalty by reporting that operators are often issued citations for the same safety and health hazards within a specific period of time.69 From this data, the Agency deduced that “these operators are correcting that particular condition without addressing the root cause of the problem. This new provision is aimed at preventing these types of occurrences and thereby providing a systemic improvement to miner safety and health.”70

The reasoning is sound and the purpose commendable, which make it all the more regrettable that the Agency failed to give the new rule the teeth necessary to induce greater compliance than was induced by the previous rule. Most of the supposed additional incentive that would be placed upon producers to avoid repeat violations is undermined by the inflation of the point to dollar table in Subsection 100.3(g), and by MSHA’s insistence on limiting its definition of repeat violations to specific citable violations.

VI. POINT TO DOLLAR CONVERSION TABLE

At first blush, it appears that the point assessment under the new rule greatly increases a producer’s compliance incentive by more than doubling the potential amount of assignable points; under the old 100.3(c), a producer’s history of violations could be assessed only 20 points,71 compared to the new rule’s potential assessment of 45.72 However, this significant increase in point assignment is but an illusion when it comes to application of fees because the point to dollar

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70 Id.
71 30 C.F.R. § 100.3(c) (2006).
72 30 C.F.R. § 100.3(c) (2007).
conversion table has also been significantly altered. A 20 point assessment under the previous chart would yield a $72 penalty,\textsuperscript{73} while a 45 point assessment under the new chart only yields a $112 penalty.\textsuperscript{74} If MSHA had left the old point to dollar conversion table intact, a 45 point assessment would yield a $463 penalty.\textsuperscript{75} Granted, an increase from $72 to $112 is substantial, but not nearly as significant as indicated by the more than double correlative point increase. This is one aspect of the rule that would only require MSHA to make a slight (re)alteration to have a profound effect on producers’ compliance incentive.

VII. THE DEFINITIVE SCOPE OF “REPEAT VIOLATION”

This part of the new rule says that two (or more) violations that are being assessed for a penalty must fall under the same citable provision in order to qualify as repeat violations;\textsuperscript{76} if they are different by even one subsection (i.e. 30 C.F.R. 75.202(a) instead of 75.202(b)) then they cannot be considered repeat violations.\textsuperscript{77} The justification for the narrowness of this definition was given by MSHA when it addressed several of the public comments that criticized its limited nature:

MSHA does not agree that the repeat provision should include broader categories of violations. MSHA analyzed violation data for the 15-month period from January 1, 2005, through March 31, 2006. MSHA’s analysis, interpreting “same standard” to mean “same citable provision,” showed that 698 of the 10,227 mines with violations had at least 6 violations [the threshold number for imposition of repeat penalties] of the same citable provision of a standard. Further, 99 of the 698 mines had more than 20 violations of the same citable provision during the 15-month period. Limiting repeat violations to the same citable provision targets those operators who show a repeated lack of commitment to miner safety and health; this is precisely the type of behavior that the Agency seeks to change.\textsuperscript{78}

The last sentence of this excerpt is representative of the assertions that MSHA seems to rely upon to justify its narrow definition, which is odd considering the statement’s message is, much like those supporting the time reduction assessment, counterintuitive. How is it that adhering to a narrower definition, which results in less repeat violations, “targets those operators who show a repeated lack of commitment to miner safety and health”? Would not a

\textsuperscript{73} 30 C.F.R. § 100.3(g) (2006).
\textsuperscript{74} 30 C.F.R. § 100.3(g) (2007).
\textsuperscript{75} 30 C.F.R. § 100.3(g) (2006).
\textsuperscript{76} 30 C.F.R. § 100.3(c)(2) (2007).
\textsuperscript{78} Id. (emphasis added).
broader definition more effectively incentivise greater compliance toward “precisely the type of behavior that the Agency seeks to change,” which, MSHA has said, is “[the] operators[’] practice of correcting [a] particular condition without addressing the root cause of the problem”? Simple adjustments to the definition and perhaps an increase in the penalty threshold (as six would probably be unfairly low if the number of repeat violations increased) are all that would be needed in order to significantly strengthen the repeat violation provision and actually fulfill MSHA’s desire to provide “a systemic improvement to miner safety and health.”

By way of illustration, I include the following provision and analysis:

Communication wires and cables; installation; insulation; support.
(a) All communication wires shall be supported on insulated hangers or insulated J-hooks.
(b) All communication cables shall be insulated as required by §75.517-1, and shall either be supported on insulated or uninsulated hangers or J-hooks, or securely attached to messenger wires, or buried, or otherwise protected against mechanical damage in a manner approved by the Secretary or his authorized representative.
(c) All communication wires and cables installed in track entries shall, except when a communication cable is buried in accordance with paragraph (b) of this section, be installed on the side of the entry opposite to trolley wires and trolley feeder wires. Additional insulation shall be provided for communication circuits at points where they pass over or under any power conductor.
(d) For purposes of this section, communication cable means two or more insulated conductors covered by an additional abrasion-resistant covering.79

Under MSHA’s narrow definition, if a certain mine gets cited for violating (a) five times, (b) five times, and (c) five times, all over the span of 15 months, none of the citations in themselves are enough to constitute a repeat violation because the threshold for qualifying is six violations; this, even though the total amount of violations related to communications would make it very clear that there is a more fundamental “root cause” to all the problems. In this way, the narrow definition fails to “correct[] [a] particular condition [by] addressing the root cause of the problem,” which is “precisely the type of behavior that the Agency seeks to change.”

If, however, the same number of violations occurred under a more broad definition, such as one that only referred to 30 C.F.R 75.516-2 (the whole provision above), there would be a much greater compliance incentive for operators because each additional violation that had to do with communications support would be counted as a ‘repeat,’ regardless of the subsection classification.

Even if MSHA decided to slightly increase the threshold above six violations, a broader definition would still more directly address MSHA’s valid concern for the underlying “root cause” that gives rise to the sub-section violations. This is because there would be greater potential for repeat violations under the general provision, making it more economically efficient for the mine operator to address the root cause than to pay for the growing number of violations.

In contrast, under the narrow definition, the incentives stemming from repeat violations are made impotent by segregating them into subsections; besides it being more economically efficient to simply pay for the depreciated amount of individual subsection fees than to address the root cause of the problem, by basing repeat violations on subsections instead of the whole provision, the operator’s focus is unwittingly diverted from the “root cause” in a general way; this unintentionally encourages the operator to give an unwarranted amount of attention to the particular sub-section problem rather than the “root cause” that continually gives rise to the problem.

Thus, when analyzed, it becomes clear that a broader definition would more likely serve as a greater incentive for mine operators’ compliance with MSHA’s health and safety standards because it would more directly address the Agency’s desire to identify and eradicate the root causes of sub-section violations, and because a broader definition would avoid unintentionally diverting the operator’s attention away from the violation of a system (i.e. a communications system), rather than the outgrowth of that problem in the form of a narrow sub-section violation.

VIII. CONCLUSION

In light of these analyses, one is left to wonder what rationale MSHA is using to unite its seemingly blank assertions to the actual effects of the changes it made to its assessment procedure. Perhaps time and application to real life mine operation will enlighten the rest of us as to what MSHA must already have ascertained, but not shared.
WHY HAS STATE V. HUTCHINSON BEEN IGNORED? AN ANALYSIS OF WHY UTAH CITIES LACK AUTHORITY TO EXACT WATER

Benjamin P. Cloward*

I. BRIEF INTRODUCTION OF SCARCITY PROBLEM

The wisdom of Will Rogers is invoked for the proposition that, in the West, whiskey is for drinking and water is for fighting over.¹

"Although overall water consumption is not increasing significantly in the United States, the demand for water in certain sectors is rapidly growing."² Specifically, demand for water in the West has always been high due to the arid landscape and drought cycles.³ "The West," as understood in the context of water use and management is typically identified as the seventeen coterminous states located west of the Hundredth Meridian and exclusive of California, Oregon, and Washington.⁴ The Hundredth Meridian is used because precipitation rates east of that boundary average forty inches or more per year, while rates west average less than twenty inches.⁵ Oregon, Washington, and California are excluded because of their relationship with the Pacific Ocean which creates rainfall in excess of 100 inches in certain areas within those states.⁶

II. THE PROBLEM OF WATER SCARCITY IS LINKED TO RESIDENTIAL DEVELOPMENT AND URBAN GROWTH

Western water demand in recent years has dramatically increased due to the "nation’s burgeoning population . . . settling primarily in metropolitan areas, with the fastest growing cities located in the arid Southwest."⁷ People in the West consume much more water than the rest of America.⁸ The average American

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³ A. DAN TARLOCK, JAMES N. CORBRIDGE, JR. & DAVID H. GETCHES, WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY, 1 (5th ed. 2002) [hereinafter TARLOCK ET AL.,].
⁵ TARLOCK ET AL., supra note 2, at 17.
⁶ Id.
⁷ Id. at 1.
consumes about 80 gallons of water per day, whereas Westerners consume around 120 gallons.\footnote{9}

Utahns use more water per capita than any other state in the nation—293 gallons of water per person per day.\footnote{10} In addition to the high consumption, some of the fastest and most explosive growth in recent years has occurred in Utah.\footnote{11} For instance, St. George, located in the southwestern part of the state, was the fastest-growing metro area in the nation between the years of 2000 and 2006.\footnote{12} St. George had a growth rate of 39.8\%, which increased the population to 126,000, as of July 1, 2006.\footnote{13} Another major metropolitan area in Utah, the Provo-Orem area was also listed in the top ten with a growth rate of 29.9\%.\footnote{14} This extreme growth would most likely not present the same type of problems in a metropolitan area in the eastern United States; however, Utah is the second most arid state in the nation.\footnote{15}

In order to sustain this growth and consumption, the West must realize that water is a precious commodity that must be planned for and protected.\footnote{16} It can be argued that until recently, when the demand and competition for the existing limited supplies of water has dramatically increased, the majority of westerners have ignored the scarcity issue.\footnote{17} Unfortunately, many people think that western water is rigidly accounted for and never wasted.\footnote{18}

In the West, much of the water is accounted for by shares represented by certificates of stock, known as “paper rights.”\footnote{19} An accounting of these paper rights seems to indicate a sufficient supply of water.\footnote{20} However the misunderstood truth is that the paper rights are vastly disproportionate to the actual water rights.\footnote{21} This “wet water” versus “paper water” dichotomy occurs when users have paper water rights that allow them to use a certain amount of water, but when the time

\textsuperscript{9} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Spangler, supra note 10.
\textsuperscript{17} Id.
\textsuperscript{18} Leshy, supra note 1, at 2005.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
comes to use that water, the stream or lake supplying the water is dry.\textsuperscript{22} This imbalance occurs even when users have “priority dates reaching back into the 1800s.”\textsuperscript{23} This gap between actual and paper rights is misunderstood by many westerners.\textsuperscript{24}

Withdrawal and consumption percentages are also often misleading and may in reality reflect amounts lower than the actual amounts consumed because many non-agricultural uses return water back into the system to be used again and again, while agricultural uses lose most of the water to evaporation, evapotranspiration, and plant transpiration, which ultimately leaves little to return back into the system.\textsuperscript{25}

In Utah, cities are allowed to require exactions of water from developers as a condition precedent to developing within a specific city’s boundaries.\textsuperscript{26} A water exaction is a requirement by a city of a developer, which forces the developer to turn over a certain amount of water to the city as a condition of receiving the city’s approval of the development. These exactions are usually in the form of water shares from irrigation companies. As will be discussed, these exaction requirements for the most part are determined solely at the city level. This note in part seeks to challenge the authority of Utah cities to make such exactions, and identifies the problems with continuing to allow cities to establish these water exactions. Special attention will be paid to the evolution of caselaw appearing to give cities the power to authorize such requirements, with an emphasis on whether they actually have been granted this authority.\textsuperscript{27} Additionally, early caselaw will be examined which sets forth the requirements and standards to be used by cities if they want to avoid constitutional taking challenges.\textsuperscript{28}

The broad powers granted to cities within Utah announced in \textit{State v. Hutchinson},\textsuperscript{29} coupled with the “reasonableness” approach as set forth by \textit{Child v. City of Spanish Fork},\textsuperscript{30} has created a panoply of exaction approaches being used by Utah cities. The \textit{Nollan-Dolan} cases provided further refining of the exaction standards, which have since been incorporated into the legislative code.\textsuperscript{31} However, the damage has already been done and with the great variation from city

\begin{itemize}
\item \textsuperscript{24} Leshy, \textit{supra} note 1, at 2005
\item \textsuperscript{25} TARLOCK ET AL., \textit{supra} note 2, at 17.
\item \textsuperscript{26} See generally, \textit{Child v. City of Spanish Fork}, 538 P.2d 184 (Utah 1975); But see S.B. 279, 2008 Gen. Sess. (Utah 2008) (This proposed bill will among other things prevent cities and counties from conditioning approval on water exactions).
\item \textsuperscript{27} State v. Hutchinson, 624 P.2d 1116 (Utah 1980).
\item \textsuperscript{28} \textit{Child}, 538 P.2d at 186.
\item \textsuperscript{29} 624 P.2d at 1116.
\item \textsuperscript{30} 538 P.2d at 184.
\end{itemize}
to city, a wide spectrum of exaction requirements has been established. This spectrum has created inefficiencies and will inevitably lead to future problems for Utah residents. For instance, currently there are cities requiring little or no water, which will inevitably lead to water shortages. On the other end of the spectrum, there are cities requiring double the amount of neighboring cities.

III. THESIS INTRODUCTION: UNDER HUTCHINSON, UTAH CITIES LACK THE POWER TO ENACT WATER EXACTION ORDINANCES BECAUSE WATER IS AN ISSUE OF “STATE-WIDE” CONCERN AND SHOULD BE REGULATED AS SUCH

Most developers and city planners will agree that from a common sense approach, some water exaction requirement is necessary to further responsible growth within the state. The central focus of this note is to suggest that cities lack the power to enact such exaction requirements and instead, a uniform state standard is necessary to ensure reasonable, responsible, and realistic growth far into the future.

There will be four sections to the note. The first section will examine the history of the current process including an analysis of the roles played by legislative and judicial decisions within Utah. Second, this note asserts that under Hutchinson, if a matter is considered “state-wide” in nature, a city may not regulate that matter. This section provides five reasons why water is an issue of “statewide concern,” including: A) the enactment of a comprehensive statewide water code; B) specific provisions within the Utah code suggesting cities are limited in this area; C) how the characteristics of water are inherently statewide and/or federal in nature; D) the inadequate long-term planning or protection of water at the local level; and E) the non-specific nature of current city exaction requirements.

The third section will provide potential solutions, including a brief outline under the Hutchinson framework for judicially challenging a city’s power to exact, and a new concept, the imposition at the state-level of a statewide “development template.” The fourth section will briefly address problems that may arise from either a judicial challenge under Hutchinson, or from implementation of the “development template.”

A. Illusion of Power—History of How Cities Gained Power to Exact Water

1. Statutory Authority

Actors at the state level are imbued with broad powers, and have inherent sovereign authority to act. Historically, “[states] need not look to positive sources such as state or federal statutes or constitutions [for authority to act]...[s]tate constitutions, therefore, are limitations on state governments, [whereas]...
the federal constitution is a *grant* of power to the federal government."\(^{33}\) This power is known as the plenary power principle and has been endorsed by courts throughout the United States.\(^{34}\)

As early as 1920, states armed with plenary power set out to regulate land use and granted cities within their borders the power to control such use through zoning ordinances and other similar instruments.\(^{35}\) Many states adopted the Standard State Zoning Enabling Act, ("SZEAA") which was passed by the U.S. Department of Commerce in 1922 as a template for local entities to use to address the growth throughout the nation.\(^{36}\) The Act was passed as a way of providing local governments, who chose to adopt it, with the power to enact comprehensive zoning ordinances and additionally, gave those local governments' insight and direction as to how they should properly structure their ordinances.\(^{37}\) Modern-day zoning such as SZEAA has been upheld as constitutional by the United States Supreme Court.\(^{38}\) Utah passed a version of SZEAA entitled, The Municipal Land Use Development and Management Act.\(^{39}\)

The Municipal Land Use Act essentially grants cities and municipalities the authority to adopt "General Plans" that deal with the present and future needs of

\(^{33}\) Id. (emphasis in original) (citation omitted) (As Professor Martinez succinctly noted).

\(^{34}\) MARTINEZ & LIBONATI, supra note 30.

\(^{35}\) See generally JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 36.03(B)(3) (Lexis Publishing 2000).

\(^{36}\) SPRANKLING, supra note 35, § 36.03(B)(3).

\(^{37}\) Id.

\(^{38}\) Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (Where the constitutionality of modern day zoning as we know it, often termed Euclidean zoning, was upheld by the United States Supreme Court. The Court held specifically that zoning ordinances, in general, will be considered valid unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare [of the municipality]"; see also Nectow v. City of Cambridge, 277 U.S. 183, 187-188 (citing Village of Euclid, Ohio v. Ambler Realty Co.) (1928) (Which for the most part followed the Euclid holding regarding the validity of zoning ordinances, but clarified and distinguished Euclid by announcing that a zoning ordinance as applied to a particular parcel might be considered unconstitutional if the zoning restriction "does not bear a substantial relation to the public health, safety, morals, or general welfare [of the municipality]")); see also SPRANKLING, supra note 35, §§ 36.03(C), 38.01 (Following these two early cases, federal and state courts took a very deferential standard of review and routinely upheld zoning ordinances, choosing not to engage in questioning the local government's wisdom for enacting such zoning ordinances. Courts were willing to take a deferential view because early zoning ordinances were primarily enacted to enforce nuisance-control, but as time progressed, other important goals came into view requiring additional judicial review. Additional goals included a desire: 1) to protect property values, 2) to preserve the character of neighborhoods, 3) to prevent environmental degradation, 4) to enhance the property tax base, and 5) to encourage tourism and other economic development.).

\(^{39}\) UTAH CODE ANN. § 10-9a-101 et. seq. (2005).
the municipality, as well as addressing growth and development. The plans also provide for the health, general welfare, safety, energy conservation, transportation, prosperity, civic activities, aesthetics, recreational, educational, and cultural opportunities of the city. In order to accomplish the goals of the general plan, this chapter of the Utah Code provides that cities and municipalities through their "legislative body may enact a zoning ordinance establishing regulations for land use and development that furthers [the interest of the city or municipality]."

2. Evolution of Common Law Authority

As early as 1891, Courts in Utah recognized that cities had some form of power to require water from their citizens. In City of Springville v. Fullmer, the respondent was diverting water from certain sources and was ordered by the City of Springville to cease the diversion. The court held that the city had the authority to pass ordinances for the "peace, benefit, good order, regulation, convenience, and cleanliness" of the city so long as those laws were necessary for that purpose, and were not "repugnant to the constitution of the United States or the laws of this territory." Although the Fullmer case was not an exaction-type case, it laid the groundwork for future cases by establishing the broad powers and justifications for actions being taken by Utah cities regarding water.

A water exaction case did not arise until 1975 when the Utah Supreme Court decided Child v. City of Spanish Fork. Here the city had been requiring developers who wished to annex into the City of Spanish Fork to turn over a specific amount of water shares before the city would approve the annexation of the development. The city had followed this policy in the past, and believed the plaintiffs should also be required to comply. The plaintiffs disagreed with the policy and challenged the exaction requirement as a violation of their equal protection rights and sought judicial intervention, claiming the exaction created an unlawful classification of property owners and that the classification caused them to be treated unequally.

The city required the exactions due to the increased burden and stress on the existing municipal services, which were provided for the use and enjoyment of the annexed development as well as the already existing residents. The court held that there was "nothing inequitable, unjust or unlawful about requiring the

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41 Id.
43 City of Springville v. Fullmer, 27 P. 577 (Utah 1891).
44 Id. at 578.
45 Id.
46 538 P.2d 184 (Utah 1975).
47 Id. at 185.
48 Id. at 185-186.
49 Id. at 187.
50 Id.
plaintiffs to make a reasonable contribution to the bearing of these additional burdens."\(^{51}\) The court found there was no unlawful classification or unfair treatment of the developers and reasoned that when new developments created an additional burden on an existing infrastructure, it was acceptable for cities to require such exactions, so long as they were reasonable.\(^{52}\)

This idea of reasonableness was officially accepted by the Utah Supreme Court in \textit{Call v. City of West Jordan}, when the court was asked to determine the validity of an ordinance passed by the City of West Jordan that required developers to either dedicate a certain percentage of land or pay a cash equivalent amount to the city as a condition for approval of their subdivision developments.\(^{53}\) In turn, the city would use the dedication or cash equivalent amount "for the benefit and use of the citizens of the City of West Jordan," using it for "flood control and/or parks and recreation facilities."\(^{54}\)

The plaintiffs claimed that the dedication or cash requirement should fail because it did not solely benefit the subdivision in question.\(^{55}\) The court stated that there must be a reasonable relationship between the dedication imposed and the needs created by the new subdivision, but also recognized the difficulty in allocating a percentage of need to the new development and those already existing.\(^{56}\) Ultimately, the court held that as long as the imposition of the dedication benefited the general welfare of the whole community as well as the subdivision in question, the ordinance would be valid.\(^{57}\)

In 1981, the Utah Supreme Court further explained the "reasonableness test" when it decided \textit{Banberry Development Corp v. South Jordan City.}\(^{58}\) In this case, the court was asked to determine whether it was valid for a city to require developers, as a condition precedent for approving their development, to pay park improvement and water connection fees.\(^{59}\) The Court in \textit{Banberry} separately addressed the reasonableness of park improvement fees and water connection fees coming to the same conclusion that "although the benefits derived from the exaction need not accrue solely to the subdivision... the benefits derived... must be of 'demonstrable benefit' to the subdivision."\(^{60}\)

\(^{51}\) \textit{Id.}
\(^{52}\) \textit{Id.}
\(^{53}\) 606 P.2d 217, 218 (Utah 1979).
\(^{54}\) \textit{Id.} at 220.
\(^{55}\) \textit{Id.}
\(^{56}\) \textit{Id.}
\(^{57}\) \textit{Id.}
\(^{58}\) 631 P.2d 899 (Utah 1981).
\(^{59}\) \textit{Id.} at 901.
\(^{60}\) \textit{Id.} (quoting \textit{Call v. City of West Jordan}, 614 P.2d 1257, 1259). It is worth noting that there were three \textit{Call} decisions. \textit{Call I} mainly addressed the issue of whether cities have the authority or "power" to enact ordinances regulating land use issues. \textit{Call II} was concerned with the constitutionality of such ordinances. The preceding discussion was concerned with the latter inquiry, whereas the "power" question will be addressed later in
Although Banberry and Call dealt with improvement and connection fees, as well as dedication requirements, they are analogous to water exaction requirements, with the analytical approach being one in the same. Based on these court decisions and later amendments by the legislature incorporating language from the Nollan-Dolan cases, cities began imposing water exaction requirements on developers. Because of these cases, some city councils and city attorneys might improperly feel at ease regarding their ordinances. However, even when exactions and impact fees are based on Nollan-Dolan, to be successful, they must also be consistent with and based on state law.

This note will discuss in the next section why the approach taken for water exactions should be treated differently than that of improvement and connection fees.

3. Critical Distinction Regarding Power

There must be a critical distinction drawn regarding the “power” concept when talking about improvement or connection fee-type exactions, and water-exactions. Historically, although states possess inherent sovereign power, or “plenary power,” no such power exists at the city level. At common law, in order for a city to act in any way, the power authorizing those actions must have been specifically and expressly authorized by the state legislature. This has become known as the “Dillon Rule.” At one point, the Dillon Rule was used widely

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61 Sam D. Starritt & John H. Mcclanahan, Land-Use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West After Dolan v. City of Tigard, 114 S. Ct. 2309 (1994), 30 LAND & WATER L. REV. 415, 456 (1995). The authors of this article draw no meaningful difference between water exaction requirements and impact fee-type requirements.

62 See infra notes 107-115 and accompanying text.

63 Utah League of Cities and Towns, Advisory Memo from Attorney David Church, (on file with the author).


66 JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 3.7 (2d ed., 2007).

67 State v. Hutchinson, 624 P.2d 1116, 1119 (Utah 1980). Dillon’s rule requires strict construction of city authority assuming they had to be assigned from the state to the municipality. Specifically, the rule states that a “municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation against the existence of the power.” John F. Dillon, Commentaries on the Law of Municipal Corporations § 237 (5th ed. 1911).
throughout the nation to control city authority because of an untrusting and critical attitude toward local governments.  

However certain areas of regulation such as land use and school finance have historically been delegated to local governments. The justification for this delegation is mainly due to the characteristic of the subject matter being delegated—that being local in nature. Zoning for instance, is uniquely local in nature. When a municipality institutes a zoning decision, although it can have a regional impact, it normally is implemented to advance “local parochialism” to preserve “community character.” These types of regulations generally only impact the city that advances them.

Zoning is a unique area which has enjoyed a hall pass to roam freely without fear of recourse from the Dillon Rule. Unfortunately, water exactions have been lumped into the broad zoning category, and cities have taken full advantage. However, due to the statewide and federal nature of water, it should have been distinguished and not been given the same free pass. Although the Dillon Rule was widely followed through the middle of the twentieth century, it has been abandoned by many states.

Utah formally abandoned the rule in State v. Hutchinson. The court in Hutchinson stated:

In sum, the Dillon Rule of strict construction is not to be used to restrict the power of a county [or city] under a grant by the Legislature of general welfare power or prevent counties [or cities] from using reasonable means to implement specific grants of authority. County [or city] ordinances are valid unless they conflict with superior law; do not rationally promote the public health, safety, morals and welfare; or are preempted by state policy or otherwise attempt to regulate an area which by the nature of the subject matter itself requires uniform state regulation.

70 Id. at 19.
71 Id. at 23.
72 Id. at 46.
73 Id. at 58. Professor Briffault suggests that many zoning decisions made by local governments are to control the type of citizenry whom occupy the city. This is accomplished by imposing restrictions on homes, apartments, or rentals that are unlike and do not conform to an expensive, luxurious home occupied by “the affluent people who can afford to own them.”
74 Briffault, supra note 69, at 8.
75 See generally State v. Hutchinson, 624 P.2d 1116 (Utah 1980).
76 Hutchinson, 624 P.2d at 1127 (emphasis added).
Although *Hutchinson* broadly expanded cities’ authority to act by shifting the presumption, it also limited the scope of what matters were acceptable for cities to regulate. Additionally, *Hutchinson* was decided after the majority of the landmark land use decisions concerning city ordinances requiring exactions, dedications, or other impact fee-type requirements. Before *Hutchinson*, the courts looked at the power question in great detail. For instance, even before statehood the Utah Territorial court, as early as 1881, referred to the Dillon Rule. Whether in the context of a Dillon-analysis or in another form, Utah courts have first looked to the power question when determining the validity of any exaction-type ordinance. In significant land use cases, the power question was closely examined. For instance, in *Call I* nearly the entire discussion was focused on the power question. Justice Wilkins strongly dissented from the majority pointing out that the majority, for the first time, “impermissibly expand[ed] municipal power.”

One can speculate that due to the proximity in time between the two cases, and the strong dissent provided by Justice Wilkins that *Hutchinson* was decided as a result of *Call I*. However after *Hutchinson*, as evidenced by *Banberry* (the first major land use/municipal power decision post-*Hutchinson*) the inquiry into the power question was no longer so closely scrutinized.

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78 *Hutchinson*, 624 P.2d at 1120. The court discussed the application of the Dillon Rule and the evolution before *Hutchinson* was decided.

79 *Levy v. Salt Lake City*, 3 Utah 63, 1 P. 160 passim (Utah Terr. 1881).

80 *City of Springville v. Fullmer*, 27 P. 577, 577 (Utah 1891). The court looked to early territorial laws to determine that “[t]he city council shall have power and authority to make such ordinances, not repugnant to the constitution [sic] of the United States or the laws of this territory, as they may deem necessary for the peace, benefit, good order, regulation, convenience, and cleanliness of said city, for the protection of property therein from destruction by fire or otherwise, and for the health and happiness thereof.” (quoting 1 Comp. Laws Utah 1888, §§ 1045, 1050).

81 See *Child*, 538 P.2d at 186. Here the court looked to the state legislative code to determine a positive source of power regarding the city’s authority to require water. Specifically, the court looked at *UTAH CODE ANN.* § 10-7-4 (1953) when determining the validity of the city’s actions.

82 See generally *Call*, 606 P.2d at 217.

83 *Call*, 606 P.2d at 222 (Wilkins, J., dissenting).

84 *Hutchinson* was decided 348 days after *Call I*. It is also worth noting that the *Hutchinson* court cited to *Call I* and specifically the arguments made by Justice Wilkins regarding the Dillon Rule before finally sweeping it aside. See *Hutchinson*, 624 P.2d at 1123.

85 *Banberry Dev. Corp. v. South Jordan City*, 631 P.2d 899, 901 (Utah 1981). The *Banberry* court devoted approximately three paragraphs to the power question, and spent the remainder of the opinion expanding the “reasonableness” analysis as set forth in the *Call* line of cases. However, it is interesting to note that Justice Howe dissented and stated that he “concur[red] with the reasoning of Justice Wilkins in his dissenting opinion in
This note is not intended to assert that cities lack the power to enact ordinances requiring land dedication or land impact fees. Historically, courts have seemed more than willing to concede this type of power to municipalities due to the character of this form of regulation, that of local concern. Rather, the focus of this note is to suggest that matters of water regulation including city exaction requirements are not of local concern, but actually are matters of state and even national concern. Consequently, cities should be limited in their power to require such exactions. More succinctly stated, according to Hutchinson, water exactions should be treated differently because water matters, by their very nature, “require uniform state regulation.”

**B. Why Water is a Statewide Concern**

As Hutchinson sets forth, when a matter is one of statewide concern, or has been preempted by state policy, cities are forbidden from regulating that matter. This section provides five factors why cities are not authorized to regulate this area.

1. **Enactment of a Comprehensive Water Code**

First is the enactment of a comprehensive statewide code. Until 1847, the only large scale irrigation that had been attempted was undertaken by Native Americans in the Southwest. When the Mormons entered the Salt Lake Valley in Utah in the summer of 1847, they brought with them the vision of large scale irrigation. An early Mormon leader, Orson Pratt stated, “[w]e appointed various committees to attend to different branches of business, preparatory to putting in crops, and [within] two hours [of] our arrival we began to plough... [and] built a dam to irrigate the soil which... was exceedingly dry.” In only a span of ten years from 1850 to 1860, the total acreage being farmed grew by 60,886 acres. By the year 1902, roughly fifty-six years after the Mormons entered Utah, “they

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Call.” As the author pointed out earlier, Justice Wilkins dissented strongly in *Call* because of the lack of power and the Dillon-Rule. Consequently, it appears that the Court still was cognizant of this developing area of law, but unfortunately, the majority had slammed the door and were no longer willing to address this particular aspect.

87 Briffault, *supra* note 69, at 3.
88 *Hutchinson*, 624 P.2d at 1127.
90 See id.
92 See Davidson, *supra* note 89 (citations omitted).
had made a Mesopotamia in America between the valleys of the Green River and the middle Snake... [and] had six million acres under full or partial irrigation."\textsuperscript{93}

Most of the water in Utah is provided by irrigation organizations, with 77% of all freshwater withdrawal from rivers, streams, and lakes being used for agricultural irrigation.\textsuperscript{94} Regionally, irrigation is a high consumption practice accounting for 90% of all western water consumption.\textsuperscript{95} Utah has an irrigation withdrawal of approximately 80%.\textsuperscript{96} Additionally, various estimates indicate that anywhere from 67.5% to 116.8% of irrigated acreage in Utah is provided by water institutions.\textsuperscript{97} Estimates also vary regarding the amount of irrigation water being provided by mutual irrigation companies, with amounts ranging from up to 99.7% being provided by mutual irrigation companies, and only 7.1% coming from public water districts.\textsuperscript{98} Obviously the percentages are somewhat misleading because the total amounts greater than 100%. However, regardless of the exact amounts, the percentages demonstrate the vast proportion of water being provided by water institutions, particularly mutual irrigation companies.

Due to the prevalence of mutual irrigation companies, state water law evolved from local practices.\textsuperscript{99} However, states quickly assumed control of the local irrigation companies and districts by passing legislation that ensured they operated under the supervision of the state engineer.\textsuperscript{100} Utah created the State Engineer’s Office in 1897, and enacted a complete “water code” in 1903, which was subsequently revised and reenacted in 1919.\textsuperscript{101}

Professor Tarlock suggests that when a state enacts a comprehensive water management code administered by a state official such as the state engineer, this serves as “evidence of an express intent to displace local regulation.”\textsuperscript{102} Enactment of this comprehensive code demonstrates the legislature’s intent to regulate water on a statewide level. The \textit{Hutchinson} court specifically warned that an ordinance is not valid when it has been “preempted by state policy.”\textsuperscript{103}
2. Conflicts and Limitations within Other Sections of the Code

The second factor prohibiting cities from regulating this area are the specific provisions within the Utah Code that place limitations on a city’s authority to act in this setting. The Utah Municipal Code grants cities the general power to “acquire, purchase or lease” water.\textsuperscript{104} This is the specific area of the code that the \textit{Child} court looked at when determining whether Spanish Fork City had the authority to act.\textsuperscript{105} The court viewed the statute as one of authorization rather than limitation or restriction when interpreting the meaning.\textsuperscript{106} The court could see no reason why a municipality could not acquire water by other means such as by “gift, assignment, or even by prescriptive use or easement.”\textsuperscript{107}

\textit{Child} was decided in 1975, and the version of the Utah Code viewed by the \textit{Child} court was the 1953 version.\textsuperscript{108} The legislature amended this particular section in 2004.\textsuperscript{109} The legislature did not add the language used by the court in \textit{Child}, but instead, the revision contained language regarding condemnation proceedings being undertaken by municipalities.\textsuperscript{110} Had the legislature intended to give the cities the power to “exact” water rights, it would most certainly have included the proper language governing this area of jurisprudence, namely the language from the \textit{Nollan-Dolan} cases, or at a minimum would have incorporated the language used by the Supreme Court in \textit{Child}.\textsuperscript{111}

There is a special rule to apply when dealing with exactions.\textsuperscript{112} The rule is formulated by combining portions of the \textit{Nollan-Dolan} cases and states that in order for an exaction-type ordinance to withstand a constitutional challenge, there must be an “essential nexus” between the exaction and a legitimate state interest that it serves,\textsuperscript{113} and the exaction must be “roughly proportional” to the nature and extent of the project’s impact.\textsuperscript{114} It is clear that had the legislature wanted cities to have the power to exact water, they would have included the \textit{Nollan-Dolan} language in section 10-7-04, especially when the Utah Supreme Court looked to this specific section when it determined a city’s authority to act when imposing water exaction requirements.\textsuperscript{115}

\textsuperscript{104} UTAH CODE ANN. § 10-7-4 (2004).
\textsuperscript{105} Child v. City of Spanish Fork, 538 P.2d 184, 186 (Utah 1975).
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id. The Utah Supreme Court viewed UTAH CODE ANN. § 10-7-04 (1953).
\textsuperscript{109} UTAH CODE ANN. § 10-7-4 (2004).
\textsuperscript{110} Id. (specifically, the revisions gave instruction on how to properly compensate under a condemnation proceeding, and what factors to consider).
\textsuperscript{112} SPRANKLING, supra note 35, § 40.08.
\textsuperscript{113} Nollan, 483 U.S. at 836-37.
\textsuperscript{114} Dolan, 512 U.S. at 391.
\textsuperscript{115} Child, 538 P.2d at 186.
The Utah Legislature recently added a specific section within the Land Use Ordinance Section of the Municipal Code dealing with land exactions that incorporated the Nollan-Dolan language. If the legislature would have wanted municipalities to have the power to exact water, they could have easily added the Nollan-Dolan language in the section of the Utah code which historically has been examined by courts when dealing with water-type exactions. The failure to do so provides evidence of the legislature’s intent to retain this power.

There are other portions of the code that place limitations on water-type exaction and regulation requirements. For instance, the code provides that, “[u]nless otherwise provided by law, nothing contained in this chapter may be construed as giving a municipality jurisdiction over property owned by the state or the United States.” The waters in Utah have been declared as property of the state. Because water is considered the property of the state held in trust for the use of the public, municipalities do not have jurisdiction over it. Even when the form of ownership is in an irrigation company, the water is subject to reversion to the public when abandonment or forfeiture for nonuse occurs. The limitation on the ability to transfer and restrictions on the use of water provides evidence that water use matters have been subjected to much more stringent regulation and control than land use matters.

118 Utah Code Ann. § 73-1-1 (1953). (“All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof.”).
119 Utah Code Ann. § 73-1-4 (2007). (“(1) (a) In order to further the state policy of securing the maximum use and benefit of its scarce water resources, a person entitled to the use of water has a continuing obligation to place all of a water right to beneficial use. (b) The forfeiture of all or part of any right to use water for failure to place all or part of the water to beneficial use makes possible the allocation and use of water consistent with long established beneficial use concepts. . . . (2) As used in this section, ‘public water supply entity’ means an entity that supplies water as a utility service or for irrigation purposes and is also: (a) a municipality, water conservancy district, metropolitan water district, irrigation district, or other public agency; (b) a water company regulated by the Public Service Commission; or (c) any other owner of a community water system. (3) (a) When an appropriator or the appropriator’s successor in interest abandons or ceases to use all or a portion of a water right for a period of five years, the water right or the unused portion of that water right ceases and the water reverts to the public. . . .”).
120 Leshy, supra note 1, at 1994. (Professor Leshy provides a great example demonstrating how water rights have been treated differently than land rights. He states, “[a] landowner’s right to make new uses of land is generally presumed unless the government affirmatively restricts it. If land were comparable to water, this would be the result: Your property right in your land might be no more than a right to grow cotton or another crop; it would not include a right to switch to an industrial use of land without government permission. If you stopped growing cotton and didn’t get government permission to use the land in some other endeavor, your property right could be extinguished, and no compensation would be owed you.”).
Additionally, although the Utah Municipal Code provides that a municipality may set forth a comprehensive, long-range general plan providing for factors such as growth and development, "the efficient and economical use, conservation, and production of the supply of... food and water," when the "plan of a municipality involves territory outside the boundaries of the municipality, the municipality may not take action affecting that territory without the concurrence of the county or other municipalities affected."

This places cities that require water exactions in direct conflict with the Utah Code. If cities within the same geographical area or drainage basin do not at least work together when establishing their zoning ordinances which require water exactions, they will be in violation of Utah Code. A brief survey of several Utah cities showed that when these types of ordinances are enacted, neighboring city councils are not consulted. The regional and statewide nature of water warrants such coordination, and the lack of coordinating such efforts provides evidence of why water should be regulated at the state level rather than at the local level. Furthermore, as noted the code itself does not provide cities with the authority to make decisions that affect other municipalities.

3. Characteristics of Water are Inherently Statewide and/or Federal in Nature

The third reason that water exactions should be viewed as a matter of statewide rather than local concern is that water has statewide or federal characteristics. The following hypothetical is illustrative. Assume several cities located within the same drainage basin are receiving the majority of their water from the same sources. Further, assume that each city has enacted its own version of a comprehensive land use plan and accompanying ordinances. Suppose that one of the cities, City A, requires developers to provide water exactions before granting approval of new subdivisions, but the other cities, Cities B and C do not require any water exactions but instead only impose impact fees.

To further complicate matters, suppose now that City A requires approximately double the amount of water that is used by other cities throughout Utah before approving developments. In order to satisfy City A's requirement, it is not sufficient for the developer to turn in the water that is appurtenant to the land, but the developer must actually try and purchase water from landowners in neighboring cities. The problem is not immediately realized, but rather in the future when Cities B and C experience the same growth as City A and start imposing similar water exaction requirements. Now the landowners in Cities B

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121 UTAH CODE ANN. § 10-9a-401 (2005).
123 Telephone Interview with Richard J. Heap, City Engineer/Public Works Director, Spanish Fork City (Oct. 5, 2007) [hereinafter Heap]; Telephone Interview with Dan Johnson, City Engineer, West Valley City, Utah (Oct. 9, 2007); Telephone Interview with Jon Wells, Planning and Zoning, Smithfield City, Utah (Oct. 8, 2007).
and C who sold their water will face difficulties when they seek to develop their land. 125

Another problem that can arise is improper apportionment. For instance, suppose you have a City that will accept water that is used to irrigate lands located in an unincorporated part of a neighboring county. This means you have water being transferred from the unincorporated area into the city. When the unincorporated area decides to incorporate and landowners choose to develop their land, they will have no water available to do so due to the earlier transfers. 126 Consequently, there will be no water available to serve those residents.

The problem becomes more complex when you have a federal source such as the Central Utah Project ("CUP") that provides water to municipalities located within several counties. 127 The CUP was created as a way for Utah to use its allotted share of the Colorado River. 128 The CUP currently provides water to municipalities along the Wasatch front. 129 The CUP contracts with many agencies

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125 This hypothetical is not uncommon in Utah. Take for example the City of Smithfield, Utah, where the City actually requires one acre/foot of water for every building lot, whereas neighboring cities like Hyde Park or North Logan only require impact fees. Compare Smithfield, Utah, Code § 16.16.050, available at http://66.113.195.234/UT/Smithfield/index.htm (requiring one acre-foot of usable water per dwelling unit or residential lot as a condition of approval for annexation), with City of North Logan, Utah, Code § 6-400, available at http://www.ci.north-logan.ut.us/City%20Code/Title06%20-%20Finances%20and%20Taxation.pdf (requiring only impact fees, but no water exaction requirement), with City of Hyde Park, Utah Subdivision Ordinance, Appendix B, available at http://utahreach.org/library/news/P100-092507.pdf (requiring only impact fees, but no water exaction requirement).

126 This hypothetical is not uncommon either. For example, in the City of Spanish Fork ("SF City") there are four main classifications of irrigation company stock that SF City will recognize for development purposes. They include, East Bench Canal, Southfield Irrigation, Westfield Irrigation, and South East Irrigation. All four sources come from the Spanish Fork River system. A problem arises, however, because Southfield and Westfield Irrigation Companies service land that is outside SF City boundaries, and actually in unincorporated Utah County. So suppose Farmer A in unincorporated Utah County sells his water to Developer B for his subdivision in SF City. Farmer A will not immediately realize a problem until his land is either annexed into SF City, or becomes incorporated into a new city. The most likely result is that it will be annexed into SF City as part of a new development. However, either Farmer A or the developer seeking annexation of Farmer A's land will face major obstacles when trying to meet the city's exaction requirement. However, suppose incorporation takes place instead. The problems are still present. The new city will struggle to find the water to serve its residents because the source has been fully appropriated and transfers have previously been made to SF City.


128 Bureau, supra note 127.

129 Id.
to provide this service.\textsuperscript{130} Generally, agencies like this were created under the imetus of state statutes and the national reclamation movement.\textsuperscript{131} The principle goals varied from the generation of electricity and providing municipal and industrial water, to as well as supplying water for irrigators.\textsuperscript{132} In Utah, Water Conservancy Districts were created as the local entities that would contract with federal projects.\textsuperscript{133} The CUP is vast covering approximately ten counties in Utah.\textsuperscript{134} The complex and immense nature of sources such as the CUP indicate that water is inherently a statewide concern rather than local.

This idea is not unique to Utah; other states have recognized that certain matters have statewide impact and should not be controlled at the local level.\textsuperscript{135} Water allocation normally is exclusively a statewide function.\textsuperscript{136} Chief Justice Cardozo set forth a useful test to determine whether a regulatory matter was statewide or local in nature.\textsuperscript{137} Judge Cardozo set out three main categories: "(1) matters of state concern; (2) matters of local concern; and (3) matters that fall into the area where state and local concerns overlap."\textsuperscript{138} Regarding the third category, Judge Cardozo instructed that a matter is a state concern when there is a "substantial" state interest in the matter.\textsuperscript{139} It could easily be argued that there is a substantial state interest in the protection and preservation of Utah’s scarce water resources. Water clearly is state-wide in nature.

4. Inadequate Long-Term Planning

The fourth reason water should be treated as a statewide concern is that some municipalities and improvement districts are not taking adequate steps to protect the State’s precious water sources for future use by her residents. This note is not intended to claim that cities are doing nothing to protect the resources, just that more could certainly be done. Additionally, the author must admit that a

\textsuperscript{130} Id. Agencies include, Central Utah Water Conservancy District, Salt Lake County Water Conservancy District, Uintah Water Conservancy District, and Jordan Valley Water Conservancy District.

\textsuperscript{131} TARLOCK ET AL., supra note 2, at 713.

\textsuperscript{132} Id.


\textsuperscript{134} Id.

\textsuperscript{135} John R. Nolan, The Erosion of Home Rule Through the Emergence of State-Interests in Land Use Control, 10 PACE ENVTL. L. REV. 497, 502 (1993). The article notes that there were at least nine states that have adopted a state-wide management plan, which directs local governments in their planning decisions. In addition to the direction, it helps coordinate public expenditures and requires consistency among local and regional plans.

\textsuperscript{136} Tarlock, supra note 99.


\textsuperscript{138} Id.

\textsuperscript{139} Id.
comprehensive study was not undertaken of all cities, conservancy districts and other participators throughout the state when formulating this view. \(^{140}\) Finally, due to the range of conservation methods and the difficulty of addressing each of them, this note will only address one method, recharge, and use it as an illustrative example.

In Utah, the legislature passed the Groundwater Management Plan, which ensures that users do not withdraw groundwater in excess of “safe yields.” \(^{141}\) A safe yield is defined as “the amount of groundwater that can be withdrawn from a groundwater basin over a period of time without exceeding the long-term recharge of the basin or unreasonably affecting the basin’s physical and chemical integrity.” \(^{142}\) Additionally, the legislature enacted the Groundwater Recharge and Recovery Act (“GRRA”) to provide a mechanism for “artificially recharging” \(^{143}\) sensitive areas. \(^{144}\)

Cities vary in their level of understanding and implementation of “recharge” as an important tool of conservation. Some cities have considered utilizing recharge methods, but ultimately have decided against doing so due to cost-benefit determinants. \(^{145}\) However, other cities feel that recharge efforts are currently unnecessary. Some participants seemed to misunderstand the purpose of recharge altogether and felt that, “their wells are immune from going dry” because their depth is in excess of 1,000 feet. \(^{146}\) Although there are some participants who may

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\(^{140}\) The view of inadequate planning was formulated from brief conversations which were held with approximately five city authorities ranging in position from planner, engineer, or mayor; two improvement district authorities; and two water conservancy districts authorities.

\(^{141}\) See generally UTAH CODE ANN. § 73-5-15 (2007).


\(^{143}\) UTAH CODE ANN. § 73-3b-101(1) (1991) “As used in this chapter: (1) ‘Artificially recharge’ means to place water underground by means of injection, surface infiltration, or other method for the purposes of storing and recovering the water.”


\(^{145}\) Heap, supra note 123. Mr. Heap stated that Spanish Fork City has recognized that although the current water system with regards to their culinary water will sustain future growth, the secondary system has some foreseeable problems. To combat the problems, the city had considered groundwater recharge methods, but ultimately chose not to implement a recharge system due to the burden of meeting the requirements of the Groundwater Recharge and Recovery Act.

\(^{146}\) Telephone Interviews with Jon Wells, Planning and Zoning, & Jim Glass, Manager/City Engineer, Smithfield City, Utah (Oct. 8, 2007). Smithfield uses culinary wells as a source of water which supplement springs which are used from April to mid-October. The springs must be supplemented because of the seasonal agricultural use during this period, and because the Smithfield Irrigation Company’s rights are senior to those of Smithfield City. To remedy this problem, Smithfield City and Smithfield Irrigation Company entered into an agreement many years ago, that allowed the City to trade shares of Logan Hyde-Park Smithfield Canal Company to Smithfield Irrigation Company, in exchange for continued use of the springs during the summer irrigating months. The Logan Hyde-Park Smithfield Canal Company shares are then turned into
not completely understand the importance of this tool, there are others who do and who use it in their arsenal to implement conservation efforts.\textsuperscript{147}

Participants should not be faulted for not applying recharge efforts due to the heavy burdens imposed by the state, regardless of the level of understanding. For instance the GRRA requires that a "recharge permit"\textsuperscript{148} be obtained before any recharge efforts are undertaken.\textsuperscript{149} Other requirements include, "the applicant ha[ving] the technical and financial capability to construct and operate the project" and the project must be "hydrologically feasible, not cause unreasonable harm to the land, not impair any existing water right within the area of hydrologic impact, and [] not adversely affect the water quality of the aquifer."\textsuperscript{150} Lastly, once the aquifer has been "artificially recharged," the user cannot withdraw the water without a "recovery permit."\textsuperscript{151}

The author is careful to point out that this discussion of the note was not intended to point fingers or be critical, but rather to show that even when cities are cognizant of conservation methods, they are not always used. Furthermore, the difficulty imposed by the GRRA shows that cities have not been properly equipped with the necessary tools to deal effectively with the growth and provides yet another reason for statewide regulation of this precious resource.

5. Non-Specific Exaction Requirements

The fifth and final reason providing evidence that cities lack the power to regulate this area is that existing exaction requirements are non-specific and too generalized in nature. Another hypothetical is illustrative. Suppose for new developments, City A requires one acre/ft of water per residential lot, and City B

Summit Creek, which has allowed continued summer use of the springs for Smithfield City for culinary use, as well as use, by the Smithfield Irrigation Company for summer irrigation purposes. This arrangement is not necessary, nor is the withdrawal of the groundwater wells, during the winter months, because Smithfield Irrigation Company's use of the springs is only seasonal, whereas the city's use is year-round. Because of this arrangement Smithfield feels comfortable with its ability to deliver water to its residents. Additionally, the city has been banking shares and water rights in order to develop a new well for future use. (On file with author).

\textsuperscript{147} Telephone Interview with Alan Packard, Assistant General Manager/Chief Engineer, Jordan Valley Water Conservancy District, Utah (Oct. 10, 2007). The Jordan Valley Water Conservancy District monitors the groundwater sources and is cautious to only withdraw water at a rate that is within the natural recharge of the aquifers. Additionally, the Groundwater Management Plan is consulted to ensure this natural process is adhered to by not withdrawing water in excess of the safe yields.

\textsuperscript{148} \textit{UTAH CODE ANN.} § 73-3b-102(3) (1991) "Recharge permit means a permit issued by the state engineer to inject water into an underground aquifer for the purpose of storing the water."

\textsuperscript{149} \textit{UTAH CODE ANN.} §§ 73-3b-103-402 (1991).

\textsuperscript{150} \textit{UTAH CODE ANN.} § 73-3b-202 (1991).

\textsuperscript{151} \textit{UTAH CODE ANN.} §§ 73-3b-102-103 (1991).
also requires a one acre/ft dedication. Suppose further that City A allows residential lots ranging from 10,000 sq. ft. to 20,000 sq. ft., but City B only allows lots that are greater than 32,670 sq. ft. At first glance, this might seem acceptable posing no significant problems.

However, upon closer look at just one factor such as lawn irrigation, the drastic difference between the cities' ordinances becomes apparent. Consider the general presumption that "1 inch of water applied over a 1,000 square foot area equals 624 gallons," and that the average lawn requires between one to two inches of water per week. This means a developer subdividing a ten acre parcel in City A, pursuant to the minimum densities allowed would have forty-three lots. Each lot would require approximately 3,120 gallons of water per week. The entire development would consume approximately 134,160 gallons of water per week.

In comparison, suppose that a developer in City B also develops a ten acre parcel. Under City B's ordinances, her parcel would yield a thirteen lot development. Each lot in this development would consume approximately whatever.

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152 Compare Smithfield, Utah, Code § 16.16.050, available at http://66.113.195.234/UT/Smithfield/index.htm (requiring “one acre-foot of usable water per dwelling unit or residential lot” as a condition of approval), with Huntsville, Utah, Code § 15.27.3(C), available at http://huntsvilletown.com/documents/Huntsville%20Title%202015.pdf (stating “the general guideline of one (1) acre foot of water per residential building permit will be a minimum standard” for new developments).

153 Compare Smithfield, Utah, Code § 17.56.030, available at http://66.113.195.234/UT/Smithfield/index.htm (setting forth three acceptable zones, R-1-10 or 10,000 sq. ft.; R-1-12, or 12,000 sq. ft.; and R-1-20, or 20,000 sq. ft.), with Huntsville, Utah, Code § 15.2.1, 15.6.3, available at http://huntsvilletown.com/documents/Huntsville%20Title%202015.pdf (establishing R-1 as the only available residential zone, and defining R-1 as having a “minimum lot area [not less than thirty-two thousand six hundred and seventy] square feet”).


155 http://en.wikipedia.org/wiki/Acre (last visited Jan. 12, 2008) (defining an acre as 43,560 sq. feet). So that would mean the development would have a total area of 435,600 sq. ft. divided by 10,000 sq. ft. lots for a total of forty-three lots.

156 See supra note 148. This is calculated taking 5,000 sq. ft. as the irrigable area, (which was roughly approximated using the Author’s general knowledge that on average, 50% of a lot is typically irrigated or at least open, due to the other 50% being attributed to footprint of the house, the driveway, sidewalks, planters and other similar things) divided by 1,000 sq. ft. to determine how many “inches” would be necessary to irrigate a 5,000 sq. ft. lawn as provided above, then finally multiplying 5 by 680 to get 3,120.

157 This was calculated taking the approximation of 3,120 gallons per lot multiplied by forty-three lots. It is worth noting that some cities are aware that larger lots consumer more water, and require dedications of water to compensate for the higher consumption.

158 See supra note 149. Taking ten acres multiplied by 43,560, which equals 435,600, and then dividing by the applicable zoning of City B which was minimum lot sizes of 32,670 to get thirteen lots.
10,880 gallons of water per week. The consumption would be approximately 141,440 gallons of water per week for the entire development. So the development in City A is consuming approximately 134,160 gallons per week and the development in City B is consuming approximately 141,440 per week. This seems pretty insignificant until you remember that City A received forty-three shares of water, whereas City B only received thirteen shares. From a water consumption standpoint, it appears that City A is in a much better position to provide the water to her residents. From a monetary standpoint, it appears that the developer in City B got a huge discount. Assuming water shares were $1,500 in both cities, one developer surrendered approximately $19,500, whereas the other developer surrendered approximately $64,500, a difference of $45,000! The preceding hypothetical was given to illustrate the non-specific water policies which are present throughout Utah. The hypothetical was not meant to be an exact representation of what actual consumption is or would be in Utah. Even though Utahns consume nearly 350% more water than the average American, the typical suburban lawn in American only consumes approximately 10,000 gallons per year. Rather, the example was presented to demonstrate why this issue should be regulated at the state level, rather than local. Additionally, there are numerous other factors to consider when calculating actual consumption such as the income of the user, climate, temperature, 

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159 This was calculated taking the presumption noted above that 50% of a total lot generally will be irrigated. Consequently, of a 32,670 sq. ft. lot, approximately 16,335 sq. ft. will be irrigated. This means there will be 16 units of 1,000, or 16 inches of rain per week to cover the entire lawn.

160 Calculated by multiplying 10,880 by 13 lots.

161 Please assume that each share represents one acre/ft of water. Generally speaking, the actual amount of water that is conveyed with a share of water will vary among irrigation companies. This variation depends on many factors including the duty assigned to the area the shares service, the priority of the shares, the reliability of the source and many other factors. However for simplicity, assume that any share discussed throughout this note represents one acre/ft of water.

162 See supra note 153 and accompanying text.

163 Calculated by multiplying the assumed market share amount of $1,500 per share by the number of shares required for each development—thirteen in City B, and forty-three in City A.

164 See supra notes 9-10.

165 VICKERS, supra note 155, at 140.
precipitation, evapotranspiration rates,\textsuperscript{166} the landscaping method used\textsuperscript{167} such as Xeriscape,\textsuperscript{168} soil, length of the irrigation season, and other factors.\textsuperscript{169}

Because cities generally do not contemplate all of these factors when establishing their water policies, they should not be allowed to regulate this area. Another factor to consider is voluntary conservation. In Las Vegas, a program called Water Smart Landscapes offers $1 per square foot to homeowners willing to convert traditional lawns to drought-tolerant landscapes using Xeriscape techniques.\textsuperscript{170} In 2005, the Las Vegas program had converted 50 million sq. ft. of landscape.\textsuperscript{171} Although the program had reduced water demand by 2.8 billion gallons a year, it came with a $40.7 million price tag.\textsuperscript{172} Cities in Utah neither have the incentive nor the funding to encourage such conservation efforts, whereas the State has both. This is yet another reason why the State should take-back control of this critical issue.

\textbf{C. Solutions}

\textit{1. Challenge under Hutchinson}

For a successful challenge to be brought under \textit{Hutchinson} the challenger should make every effort to separate and distinguish land-type exactions and water-exactions, as courts have readily conceded the power regarding land-type exactions.\textsuperscript{173} By focusing on the statewide character of water decisions and the local character of land use decisions, a challenger might persuade the court to treat them separately.\textsuperscript{174}

If successful in convincing the court that the two types of exactions \textit{should} be treated differently, a challenger should next focus on the presumption set forth in \textit{Hutchinson}. The presumption is that city ordinances are valid unless preempted

\textsuperscript{168} VICKERS, supra note 154, at 146. Vickers states “Xeriscape\textsuperscript{TM}, a trademarked term pronounced `zera-scape,’ is derived from the Greek words ‘xeros’ (dry) and ‘scape’ from landscape.” Vickers points out that there are seven principles incorporated into the Xeriscape concept to promote conservation and protection of the environment: 1) proper planning and design, 2) soil analysis, 3) appropriate plant selection, 4) practical turf areas, 5) efficient irrigation, 6) use of mulches, and 7) appropriate maintenance.
\textsuperscript{169} Id. at 154.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} See supra notes 70 & 71.
\textsuperscript{174} A challenger could use the five characteristics listed above to persuade the court.
by or conflict with state law, do not promote health and safety concerns, or attempt to regulate a subject matter which by its very nature requires a uniform state regulation. 175

By doing this, the challenger will have shifted the court’s focus to the critical power question. 176 It is unsure whether the court would then determine that because the municipality was trying to regulate a statewide matter that the ordinance was facially deficient, or whether the court would apply some sort of quasi-Dillon analysis. 177 If the court applied a Dillon-type analysis, the next step would be to determine whether power had been expressly granted. 178 The court would then closely examine the code to determine if such express authority exists. 179

Once here, the main hurdle faced by the challenger would be to argue that the recently added exaction section was only meant to apply to land-type exactions. 180 In doing this, it would be helpful to provide a history of the exaction cases and draw a meaningful distinction between the court’s analysis of those cases paying special attention to the specific portions of the code that prior courts examined when determining constitutionality and power questions. 181 Drawing this distinction is important because the next step would be to discuss the recent changes in the code including the addition of the exaction section and its specific placement in the land use section of the code which has been historically been used when viewing land-type dedications rather than water dedications. 182 Additionally, the failure to add correlating provisions in the water portion of the code, and the importance of such “special language” should be addressed. 183

Finally, the challenger should discuss any other ambiguities within the code and argue that the legislature never intended for municipalities to have the power over this specific area. 184

175 See supra note 76.
176 See supra notes 75-8570 and accompanying text.
177 See generally State v. Hutchinson, 624 P.2d 1116 (Utah 1980). The court did not reach this in their decision, but rather ended the analysis after providing an alternative to Dillon.
178 See supra notes 65 & 66.
179 Id.
181 Child v. City of Spanish Fork, 538 P.2d 184 (1975), Call v. City of West Jordan, 606 P.2d 217, 220 (Utah 1979). Noting specifically that the Call court took a “health, safety, welfare” approach and looked to UTAH CODE ANN. § 10-9-1 (1953), whereas the Child court looked at UTAH CODE ANN. § 10-7-4 (1953) in making their inquiry.
182 See supra notes 104-111 and accompanying text.
183 See supra notes 112.
184 See supra notes 88, 100-103, 108-111, 115-124.
2. Development Template

Most of the discussion has been devoted to the discussion of why cities lack the power to regulate matters of statewide concern. This section will briefly address possible solutions to the problem by setting forth a new concept developed by the author called a development template. In addition to expressly revoking cities' authority to regulate water, a section would be added incorporating the development template into the Utah Municipal Code. The code would mandate that cities implement and utilize the template as part of their development process, and would give cities the express authority to exact water, according to the established template. The main purpose of the development template is to help cities specifically tailor any water requirements being imposed on new developments. The template will ensure the most reasonable and realistic growth for Utah and her residents. Additionally, developers will be able to look to the template when planning and proposing subdivisions, and will benefit, up front, from knowing the specific requirements that will be imposed on their development. The template will ensure that water is used by all players in the most responsible and reasonable way.

As noted earlier, there are many factors that determine consumption amounts for a particular development. To ensure that each development accounts for these particular considerations, the state should provide a matrix (development template) which has identified several of the most important consumption factors, and the specific water requirements that should be imposed for those factors. Once the consumption amounts were determined, a city could input the proposed development into the template and use a formula to calculate a more precise amount of water.

For example, suppose a development in City A has 10,000 sq. ft. lots, has sandy soil, has an average summer temperature of ninety degrees, and the developer has imposed a fifty percent Xeriscape requirement. You would take those factors, and input them into a formula to compute the specific amount that development would consume. Alternatively, suppose another development in City B has 43,560 sq. ft. lots, has clay soil, has the same average temperature, but has no Xeriscape requirement. The second development would obviously consume different amounts of water than the first, but if City B plugged it into the development template, the specific consumption would be identified and properly required of the development.

D. Problems with Implementation or Challenge under Hutchinson

Several problems exist with regard to the implementation of either a development template or an attempt to successfully challenge under Hutchinson. This section will briefly address those difficulties.

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185 See supra notes 167-170 and accompanying text.
In order for the development template to be successful if implemented, consumption trends and characteristics would have to be identified. The initial cost of performing the research and gathering the data would be the largest cost. However, once the data has been gathered, and the template created, the cost thereafter would be relatively low.

The State Engineer’s office indicated that if something like this were passed, the burden of implementation and cost therein would most likely become their responsibility. Due to expanding responsibilities and already limited resources, the State Engineer’s office feels that this additional burden would be difficult to manage. One way to implement the template successfully would be to spread the cost to many users. If the legislature decided to incorporate the template into the planning process, it could impose a development fee on each new home buyer. That fee would then go into a state-fund that was dedicated to maintaining and updating the template.

The legislature must recognize the importance of and need for this template or a similar solution and should provide adequate funding to whatever department is chosen to implement the desired solution. The importance of taking control of the water in Utah cannot be overstated, and regardless of the cost, the legislature must step to the plate and make it happen.

In addition to the cost, another obstacle which may prevent any significant changes is that annexation is generally at the city’s discretion. Cities cannot be forced into providing services through the annexation process. Consequently, a city may make the decision that if it cannot require water exactions, it simply will not annex new developments. This obviously would be more troublesome to developers than the current system which requires developers to provide water to cities as a condition to annexation. Similarly, cities may get around the exaction dilemma through the use of annexation or development agreements. When a city chooses to use an agreement such as this, it may impose aggressive exaction requirements without worrying about takings claims by developers. The reason for this is because these types of agreements are viewed by courts through the lens

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186 Interview with Boyd Clayton, Assistant State Eng’r., Utah Div. of Water Rights, in Salt Lake City, Utah (Sept. 4, 2007).
187 Id.
188 Telephone Interview with Bob Fotheringham, N. Region Eng’r., Utah Div. of Water Rights (Approximately Aug. 16, 2007). (Mr. Fotheringham suggested that as an alternative to having the Division of Water pay for it that developers or end users could pay for implementation.).
189 Id. (This was suggested as a possible method of implementation by Mr. Fotheringham.).
190 Id.
191 Starritt & Mcclanahan, supra note 61, at 456.
192 Id.
193 Id.
194 Id.
of contract law rather than constitutional law. So for instance, even if the exaction power was strictly enforced through a development template, a city could simply require developers to enter into private development agreements and thus circumvent the proposed changes.

A recently proposed Senate Bill which, if passed, will restrict cities and counties from conditioning annexation upon water rights. Likely the Bill will be received with great resistance by Utah cities. These cities likely will require private development agreements for all developments in order to circumvent the new Legislation. If the Bill does pass, developers might long for the old system due to the increased use and aggressive imposition of private development agreements by Utah Cities.

Finally, there is concern that aggressive water policy changes may impede new housing growth in Utah. Studies have shown that depending on the specific water policy being implemented, a local government may experience growth impediments, or higher property values. Although the higher property values would benefit existing homeowners, they would be an impediment to individuals looking to purchase a home. Regarding the growth impediments, many of them occur in rural areas because not many water supply alternatives exist. This suggests that some growth impediments are unique to rural areas. Additionally, it has been shown that certain policies, such as the aggressive use of impact fees, do not significantly deter housing growth.

Regardless of whether a change in Utah water policy slows housing growth or not, when viewed through a long-term lens, growth speed really seems insignificant; if Utah runs out of water due to poor planning, housing growth will not only slow down, but will cease.

IV. CONCLUSION

The Hutchinson court broadly expanded cities authority to act. Hutchinson was a welcome change to Utah cities, because it rejected the Dillon rule which had required that before cities could act, they must have been given the express authority to do so by the Utah Legislature. Although Hutchinson expanded cities authority, it also clearly announced when a matter is statewide in nature or has been preempted by state policy, cities are forbidden from regulating the matter. Any ordinance attempting to do so, will be invalid. This note has

195 Id.
198 Id. at 106.
199 Id.
200 See generally State v. Hutchinson, 624 P.2d 1116 (Utah 1980)
201 See supra notes 65-68, 75-76 and accompanying text.
202 See supra note 76.
203 Id.
shown ample evidence demonstrating why water matters are both statewide in nature and how such matters have been preempted by state policy. 204

Although the Hutchinson court did not suggest or give guidance of how an exaction challenge would be treated, it seems logical that a Dillon-type analysis would be taken. The court would first look to see whether a city had received express authority from the legislature. This note has shown that the Utah legislature has never expressly given cities the authority to exact water, and arguments can be made that they have never impliedly granted authority either.

The first step in protecting Utah water is for the legislature to expressly disallow cities to exact water, and implement a statewide process of regulation. If the Utah legislature does not step up to the plate and take back the regulation of all aspects of water use, this valuable resource will not be available to sustain Utah’s projected growth. Utah is expected to add more than one million residents by the year 2020. 205 In addition to Utah, other states are also experiencing dramatic growth and are competing for Utah water. 206 The Bureau of Reclamation announced long ago that the era of government subsidized big water and power projects is officially over, and that the new focus is that of conservation. 207 The legislature must take action now and implement a statewide system of controls, or live with the consequences. After all, water is worth fighting for. 208

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204 See supra notes 89-180 and accompanying text.
208 See supra note 1 (emphasis added).
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