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Lands and Natural Resources

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LANDS AND NATURAL RESOURCES

OVERVIEW

The Tenth Circuit Court of Appeals decided a surprisingly small number of controversies involving lands and natural resources during the time period covered by the *Tenth Annual Tenth Circuit Survey*. The subject matter of the few land and resource decisions was also limited. Whereas in recent years the court has considered a wide variety of resource and land issues,¹ the past year is distinguished by its lack of variety. Of the eight land and resource decisions published by the court,² six concerned public lands,³ one involved Indian lands,⁴ and one resolved an environmental law question.⁵ This survey will highlight the issues resolved in each of these cases.

I. PUBLIC LANDS

A. *Boundary Disputes*

In a routine application of established principles, the court resolved a boundary-line dispute concerning privately held lands bordering a national forest.⁶ The interesting aspect of the case, however, is the court's announcement of an additional requirement for establishing estoppel against the government in boundary disputes involving federal land patents.

*Sweeten v. United States Department of Agriculture Forest Service*⁷ was an action to quiet title to a parcel of land bordering a national forest. Although Sweeten believed the land to be hers, a Forest Service survey, which was based on a previous resurvey that reestablished a lost corner of the section encompassing Sweeten's land,⁸ indicated Sweeten's fence encroached on national forest property.⁹ After receiving notice of her alleged encroachment, Sweeten attempted to quiet title¹⁰ by attempting to prove that the resurvey

1. See *Lands and Natural Resources, Ninth Annual Tenth Circuit Survey*, 60 DEN. L.J. 333 (1983); *Lands and Natural Resources, Eighth Annual Tenth Circuit Survey*, 59 DEN. L.J. 335 (1982); *Lands and Natural Resources, Seventh Annual Tenth Circuit Survey*, 58 DEN. L.J. 415 (1981).

2. This discussion of the number of land and resource decisions of the court does not include non-published opinions or cases based on diversity jurisdiction.

3. *Nevada Power Co. v. Watt*, 711 F.2d 913 (10th Cir. 1983); *Stewart Capital Corp. v. Andrus*, 701 F.2d 846 (10th Cir. 1983); *Rocky Mountain Oil and Gas Ass'n v. Watt*, 696 F.2d 734 (10th Cir. 1982); *City and County of Denver v. Bergland*, 695 F.2d 465 (10th Cir. 1982); *Ahrens v. Andrus*, 690 F.2d 805 (10th Cir. 1982); *Sweeten v. United States Dep't of Agriculture Forest Service*, 684 F.2d 679 (10th Cir. 1982).

4. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982).

5. *Johnston v. Davis*, 698 F.2d 1088 (10th Cir. 1983).

6. *Sweeten v. United States Dep't of Agriculture Forest Service*, 684 F.2d 679 (10th Cir. 1982).

7. *Id.*

8. Public lands have been divided on a rectangular grid system since 1785. P. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 64-65 (1968). A section is a square land area containing 640 acres. 43 U.S.C. § 751 para. 3 (1976).

9. 684 F.2d at 680.

10. 28 U.S.C. § 2409a (1982) permits the United States to be joined as a defendant in quiet title actions involving lands in which the United States claims an interest.

impermissibly reduced the rights granted by her original patent,¹¹ and by arguing that the government was estopped to deny that her fence was the true property boundary.¹²

1. Validity of the Resurvey

The location of a disputed boundary is a question of fact.¹³ The circuit court's review was therefore limited to a determination of whether the trial court's findings were clearly erroneous.¹⁴ Because the trial court's determination that the resurvey established the true boundary was based on adequate evidence, this finding was upheld by the Tenth Circuit.¹⁵

Sweeten then argued that the resurvey was invalid as a matter of law because it impaired her ownership rights.¹⁶ The patent to her land conveyed a specific amount of acreage described in metes and bounds.¹⁷ Sweeten contended that the stated acreage reflected the true extent of her ownership rights, and that the resurveys were invalid because they reduced her total acreage.¹⁸ The Tenth Circuit dismissed this argument, observing that a metes and bounds description was generally more persuasive evidence of the scope of a conveyance.¹⁹ Because Sweeten's ownership rights were limited by the metes and bounds description, the Forest Service's accurate resurveys could not impair her ownership rights.²⁰

2. Estoppel

The Tenth Circuit also denied Sweeten's claim that the government was estopped to deny that her fence was the boundary line.²¹ In so doing the Tenth Circuit recognized that in addition to the four traditional elements of estoppel,²² a fifth requirement must be established to estop the government in boundary disputes involving federal land patents.²³ The fifth

11. See 43 U.S.C. § 772 (1976). This statute provides in relevant part that "no . . . resurvey [of public lands] . . . shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey. . . ." *Id.*

12. 684 F.2d at 681.

13. *Id.* Accord *United States v. State Inv. Co.*, 264 U.S. 206, 211 (1924); *United States v. Doyle*, 468 F.2d 633, 636 (10th Cir. 1972).

14. 684 F.2d at 681.

15. *Id.*

16. *Id.* See *supra* note 11.

17. 684 F.2d at 681 n.3.

18. *Id.* at 681-82.

19. *Id.* at 682 & n.4.

20. *Id.*

21. *Id.* at 682. Sweeten also argued that the fence was the basis for a finding of ownership through adverse possession or boundary by acquiescence. *Id.* The court summarily rejected these claims, noting that title to public lands cannot be acquired through doctrines designed to resolve private disputes. *Id.* (citing *United States v. California*, 332 U.S. 19, 39-40 (1947)).

22. The four traditional elements of estoppel are:

1) The party to be estopped must know the facts; 2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; 3) The latter must be ignorant of the true facts; and 4) He must rely on the former's conduct to his injury.

684 F.2d at 682 n.5 (quoting *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979)).

23. 684 F.2d at 682.

element requires the party asserting estoppel to prove affirmative misconduct on the part of the government.²⁴ Because no affirmative misconduct was evident, Sweeten's estoppel claim was denied.²⁵

Judge Barrett disagreed only with the majority's holding that a fifth element, affirmative misconduct, must be proved in order to estop the government in federal land patent boundary cases.²⁶ Judge Barrett stated the traditional elements of estoppel were sufficient in these cases and indicated that the flexibility of the traditional estoppel doctrine would better effect just and fair decisions.²⁷

In summary, it is clear that the Tenth Circuit will hereafter require a showing of affirmative misconduct on behalf of the government in order to estop the government in boundary disputes involving federal land patents. The requirement of proving affirmative misconduct means the government will be estopped in only the most flagrant cases.

B. *Construction of the Federal Land Policy and Management Act of 1976*

1. Mineral Leasing in Wilderness Study Areas

In *Rocky Mountain Oil and Gas Association v. Watt*²⁸ (*RMOGA*) the Tenth Circuit construed the "grandfather clause" of section 603(c) of the Federal Land Policy and Management Act of 1976²⁹ (FLPMA) in order to determine whether the Department of Interior (Interior) interpretation of the section was reasonable.

RMOGA had its inception in a 1978 interpretation of section 603(c) is-

24. *Id.* The additional requirement was first applied in *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979).

25. 684 F.2d at 682.

26. *Id.* at 682 (Barrett, J., concurring in part and dissenting in part).

27. *Id.* at 682-83. Judge Barrett also stated that in some circumstances compelling reasons of public policy might prevent recognition of estoppel against the government. *Id.* at 683. This emphasis echoes Judge McKay's dissent in *Home Sav. & Loan Assoc. v. Nimmo*, 695 F.2d 1251 (10th Cir. 1982) (McKay, J., dissenting), where Judge McKay views separation of powers concerns as a policy limitation on estopping the government. *Id.* at 1260-61.

28. 696 F.2d 734 (10th Cir. 1982).

29. 43 U.S.C. § 1782(c) (1976). Section 603(c) contains the congressionally mandated standards under which the Secretary of Interior (Secretary) is required to manage Bureau of Land Management (BLM) lands under review for designation as wilderness areas. The section states:

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: *Provided*, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 1714 of this title for reasons other than preservation of their wilderness character.

Id.

The "grandfather clause" is that portion of section 603(c) which states that the non-impairment management standard is "subject . . . to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976. . . ." *Id.* See 696 F.2d at 746-47.

sued by the Solicitor of the Department of Interior (Solicitor).³⁰ The Solicitor's opinion stated that all activities that were not protected by the section 603(c) grandfather clause³¹ were to be regulated pursuant to the general nonimpairment standard provided in the section.³² The opinion then interpreted the grandfather clause as applying only to actual, on-the-ground uses as they existed on the date of FLPMA's enactment.³³ Thus, any new uses or modifications in existing uses would only be permitted if the requested use would not impair an area's suitability for preservation as wilderness.³⁴

The Solicitor's opinion, along with stringent Interior Department leasing guidelines promulgated following the opinion, resulted in an almost total cessation of mineral development in Wilderness Study Areas (WSA's).³⁵ The Rocky Mountain Oil and Gas Association challenged the Solicitor's interpretation of section 603(c) as being arbitrary and capricious and contrary to law, and requested declaratory and injunctive relief from Interior's application of the nonimpairment standard to mineral leasing within WSA's.³⁶ The district court granted the requested relief, holding that because section 603(c) unambiguously required active development of mineral leasing,³⁷ Interior's restrictive regulations were an invalid exercise of administrative authority.³⁸

On appeal, the Tenth Circuit reversed the district court and upheld the regulations that were based on the Solicitor's opinion.³⁹ After a preliminary discussion of the overall policy and purpose of FLPMA,⁴⁰ the Tenth Circuit examined the district court's interpretation of section 603(c). The Tenth Circuit disagreed with the district court's characterization of section 603(c) as unambiguous and therefore delved into the section's legislative history to determine which mineral lease activities the grandfather clause exempted

30. 86 Interior Dec. 91 (1978) (formal opinion).

31. See *supra* note 29.

32. 86 Interior Dec. at 99-109. See *supra* note 29.

33. *Id.* at 111-15.

34. *Id.* at 111-12 (interpreting section 603(c)'s grandfather exception for "existing mining and grazing uses" to apply only to activities actually taking place on FLPMA's effective date); *id.* at 114-15 (interpreting section 603(c)'s grandfather exception for "existing mineral leasing" to apply only to lease development activities actually taking place on FLPMA's effective date).

35. *Rocky Mountain Oil & Gas Ass'n v. Andrus*, 500 F. Supp. 1338, 1342 (D. Wyo. 1980), *rev'd sub nom.* *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734 (10th Cir. 1982). Wilderness Study Areas (WSA's) are lands which have been identified as roadless areas of 5,000 acres or more, or roadless islands. See 43 U.S.C. § 1782(a) (1976). Once designated as a WSA an area is evaluated to determine whether it should be designated as a wilderness area under the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1982). See 43 U.S.C. § 1781(a) (1976). Section 603(c), codified at 43 U.S.C. § 1782(c) (1976), is designed to protect the WSA's while they are evaluated for designation as a wilderness area.

36. *Rocky Mountain Oil & Gas Ass'n v. Andrus*, 500 F. Supp. 1338, 1342 (D. Wyo. 1980), *rev'd sub nom.* *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734 (10th Cir. 1982).

37. 500 F. Supp. at 1344-45.

38. *Id.* at 1344.

39. *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 750 (10th Cir. 1982).

40. *Id.* at 738-39. The court ruled on two jurisdictional issues prior to discussing the merits of the case. First, the court held that the case was ripe for decision because the solicitor's opinion was final agency action resulting in significant, ongoing financial harm to RMOGA's members. *Id.* at 741-42. Second, the court held that RMOGA was not required to exhaust administrative remedies because the merits of the case involved a question of statutory interpretation previously ruled on by the agency. *Id.* at 743-44.

from application of the nonimpairment standard. Based on its interpretation of congressional intent, the court ruled that section 603(c)'s grandfather clause exempted mineral lease development in WSA's only "in the manner and degree actually occurring on October 21, 1976."⁴¹ Interior's policy of subjecting new or changed mineral lease activity to the nonimpairment standard was therefore upheld.⁴²

As a result of *RMOGA*, additional mineral leasing development will not—as a practical matter—take place in WSA's. The opinion in effect interprets section 603(c) as permitting stricter land management standards for WSA's than those provided for lands designated as Wilderness Areas, where mineral development was allowed through 1984.⁴³ *RMOGA* therefore interprets FLPMA to require less mineral development in potential Wilderness Areas than was allowed in existing Wilderness Areas.

2. Cost Reimbursement for Right-of-Way Applications

A Department of Interior (Interior) cost reimbursement regulation promulgated under the authority of FLPMA was the subject of a challenge in the consolidated case of *Nevada Power Co. v. Watt*.⁴⁴ The regulation at issue required an applicant for a right-of-way over federal lands to reimburse the government for administrative and other costs incurred in processing the application.⁴⁵ The regulation, on its face, is not contrary to the FLPMA provisions that authorize the Secretary to require reimbursement of reasonable costs associated with the application process.⁴⁶ By Secretarial Order,

41. *Id.* at 750.

42. *Id.* Activity exempt from the nonimpairment standard remains subject to reasonable environmental protection regulations. See 43 U.S.C. § 1782(c) (1976).

43. See 16 U.S.C. § 1133(d)(3) (1982).

44. 711 F.2d 913 (10th Cir. 1983).

45. The challenged regulation provided:

An applicant for a right-of-way grant or a temporary use permit shall reimburse the United States for administrative and other costs incurred by the United States in processing the application, including the preparation of reports and statements pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4347), before the right-of-way grant or temporary use permit shall be issued under the regulations of this title.

43 C.F.R. § 2803.1-1(a) (1983).

46. Two FLPMA provisions authorize the Secretary to collect the reasonable costs associated with processing applications from right-of-way applicants. Section 504(g) provides:

The Secretary . . . may, by regulation or prior to promulgation of such regulations, as a condition of a right-of-way, require an applicant for or holder of a right-of-way to reimburse the United States for all reasonable administrative and other costs incurred in processing an application for such right-of-way and in inspection and monitoring of construction, operation, and termination of the facility pursuant to such right-of-way. . . .

43 U.S.C. § 1764(g) (1976).

Section 304 provides:

(a) Notwithstanding any other provision of law, the Secretary may establish reasonable filing and service fees and reasonable charges, and commissions with respect to applications and other documents relating to the public lands and may change and abolish such fees, charges, and commissions.

(b) The Secretary is authorized to require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to such lands. . . . As used in this section 'reasonable costs' include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any

however, the "reasonable costs" language of FLPMA and the "administrative and other costs" language of the regulation were defined to mean "actual costs".⁴⁷ As a result of this interpretation, right-of-way applicants were being charged the full, actual costs of processing their applications.⁴⁸ *Nevada Power* involved several power company challenges to the practice of requiring reimbursement of actual costs incurred in processing electric transmission line right-of-way applications.⁴⁹

In *Nevada Power* each utility alleged that FLPMA required the Bureau of Land Management (BLM) to consider specifically the factors listed in section 304(b) of FLPMA⁵⁰ when establishing its reasonable reimbursement costs, and that BLM had breached this statutory duty.⁵¹ The utilities also argued that BLM could not, as a matter of law, require reimbursement for the entire cost of any environmental impact statement (EIS) required by a right-of-way application.⁵² BLM, conversely, insisted that application of the reasonableness factors was purely discretionary, and that its regulations were therefore valid even absent consideration of the statutory factors.⁵³ Similarly, they insisted that the full cost of an EIS could be included in the reimbursement charges.⁵⁴

In resolving this conflict, the Tenth Circuit carefully examined the legislative history of section 304(b).⁵⁵ That examination indicated that Congress had included the specific factors in section 304(b) to prevent Interior from routinely assessing the full cost of an application.⁵⁶ Essentially, Congress included the reasonableness factors in the statute to guide the Secretary in his determination of reasonable costs; the Secretary, therefore, was required to consider the factors in determining how much of the actual cost would be charged to the applicant.⁵⁷ Because the reimbursement regulation had not been promulgated after consideration of the statutorily mandated reasona-

authorized facility; or other special activities. In determining whether costs are reasonable under this section, the Secretary may take into consideration actual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the efficiency to the government processing involved, that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs.

43 U.S.C. § 1734 (1976).

47. The Secretarial Order stated in pertinent part:

It is my finding that "reasonable costs" under Sections [sic] 304 of FLPMA for processing applications for rights-of-way over public lands and for monitoring right-of-way holder activity, are the actual costs incurred by the United States in performing statutory responsibilities necessitated by such applications or rights-of-way. The term "reasonable costs" means the same as the term "administrative and other costs" as used in the regulations . . . and includes costs incurred in preparation of environmental impact statements.

Secretarial Order No. 3011, 42 Fed. Reg. 55,280 (1977) (emphasis added).

48. *Nevada Power Co. v. Watt*, 711 F.2d 913, 916 (10th Cir. 1983).

49. *Id.* at 918-19.

50. 43 U.S.C. § 1734(b) (1976). *See supra* note 46.

51. 711 F.2d at 919.

52. *Id.* at 929.

53. *Id.* at 919.

54. *See id.* at 918, 929.

55. *Id.* at 921-25.

56. *Id.* at 924.

57. *Id.* at 925.

bleness factors, the court held that the regulation was invalid.⁵⁸

The Tenth Circuit also held that Interior could not charge the full cost of an EIS to right-of-way applicants.⁵⁹ The benefit of a required EIS inured partially to the applicant and partially to the general public.⁶⁰ Thus, because the statutory requirement to assess only reasonable costs required consideration of the public benefits accruing from bestowing a private benefit,⁶¹ the full cost of an EIS could not be charged to the applicant.⁶²

In summary, the *Nevada Power* decision mandates that Interior consider the statutorily enumerated reasonableness factors when calculating the costs that will be passed on to a right-of-way applicant. Consideration of these factors will usually result in payment of less than full reimbursement costs by the applicant.⁶³ In any case, the right-of-way applicant benefits because Interior cannot assess that portion of the cost of an EIS which results in general public benefit.⁶⁴

C. Oil and Gas Leasing Regulations

The court decided two narrow questions concerning a BLM interpretation of regulations controlling simultaneous filings for noncompetitive oil and gas leases. These regulations set forth the specific procedural and substantive requirements for filing a valid simultaneous lease application.⁶⁵ In *Ahrens v. Andrus*,⁶⁶ the Tenth Circuit rejected a BLM ruling requiring that the date of execution be shown for each separate signature on a lease application (also known as a lease drawing entry card or DEC).⁶⁷

Because the Ahrens DEC's did not have dated signatures, the BLM rejected the applications and issued the leases to the next qualified parties.⁶⁸ In overturning the BLM decision, the court reasoned that a signature date requirement served no important purpose because the only significant date for BLM purposes was the filing date of the DEC.⁶⁹ The court therefore followed a prior Tenth Circuit opinion⁷⁰ which held that denying an applica-

58. *Id.* at 926-27. The court noted, however, that in some instances, consideration of the statutory factors might result in a determination that actual cost reimbursement was reasonable. *Id.* at 925 n.6.

59. *Id.* at 928-29.

60. *Id.* at 928 (citing *Alumet v. Andrus*, 607 F.2d 911 (10th Cir. 1979)).

61. 711 F.2d at 930. *See supra* note 46.

62. The court rejected the utilities' argument that assessing the full cost of the benefit would be an unconstitutional exercise of the taxing power. *Id.* at 929-30. Because the EIS cost was a necessary part of granting a special benefit to the utilities, the agency could constitutionally require full reimbursement. *Id.* at 930 (citing *Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n*, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980)).

63. *See supra* note 58.

64. *See supra* notes 59-62 and accompanying text.

65. See 43 C.F.R. § 3112 (1983). The applications are referred to as "simultaneous filings" because each application is for lease of both oil and gas rights. *See id.* § 3112.2-1.

66. 690 F.2d 805 (10th Cir. 1982).

67. *Id.* at 808.

68. *Id.* at 806.

69. *Id.* at 808.

70. *Winkler v. Andrus*, 594 F.2d 775 (10th Cir. 1979).

tion based on inconsequential defects in the application was inappropriate,⁷¹ and ruled that the Ahrens applications should not have been denied.⁷²

The second case concerning the simultaneous oil and gas leasing regulations also concerned the adequacy of a DEC. In *Stewart Capital Corp. v. Andrus*,⁷³ the DEC's submitted by Stewart on behalf of its clients did not contain a statement of agency required by existing regulations.⁷⁴ For this reason the leases were denied in spite of the fact that Stewart had submitted, and BLM had accepted, applications without the agency statement for over six years.⁷⁵ The BLM's reversal of its policy was based on the retroactive application of the administrative case *D.E. Pack*,⁷⁶ which ruled that DEC's filed without the required agency statement were invalid.⁷⁷

In affirming the trial court's refusal to permit retroactive application of *Pack* to the leases submitted by Stewart,⁷⁸ the Tenth Circuit applied the well-recognized balancing test set forth in *Retail, Wholesale, and Department Store Union v. NLRB*.⁷⁹ After weighing the balancing standards⁸⁰ in light of Stewart's good-faith reliance on prior BLM practices, and in addition considering prior case law denying retroactive application of *Pack*,⁸¹ the Tenth Circuit concluded that the Interior Department had abused its discretion in retroactively applying *Pack* to the Stewart DEC's.⁸²

D. Construction of Right-of-Way

*City and County of Denver v. Bergland*⁸³ adds one more chapter to the never-ending saga that details Denver's attempts to construct the Williams Fork

71. *Id.* at 778.

72. 690 F.2d at 808.

73. 701 F.2d 846 (10th Cir. 1983).

74. *Id.* at 846. Stewart had failed to comply with 43 C.F.R. § 3102.6-1(a)(2) (1981) (amended 45 Fed. Reg. 8545 (1982) (codified at 43 C.F.R. § 3102.4 (1983)). 43 C.F.R. § 3102.6-1(a)(2) stated:

If the offer is signed by an attorney-in-fact or agent, it shall be accompanied by separate statements over the signature of the attorney-in-fact or agent and the offeror stating whether or not there is any agreement or understanding between them or with any other person, either oral or written, by which the attorney in fact or agent or such other person has received or is to receive any interest in the lease when issued.

Id.

75. 701 F.2d at 848.

76. 84 Interior Dec. 192 (1977), *aff'd on reconsideration*, 85 Interior Dec. 408 (1978).

77. 84 Interior Dec. at 196.

78. 701 F.2d at 850.

79. 466 F.2d 380 (D.C. Cir. 1972). *See* 701 F.2d at 848.

80. The standards set forth in *Retail, Wholesale, and Dep't Store Union* are:

1. [W]hether the particular case is one of first impression;
2. [W]hether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law;
3. [T]he extent to which the party against whom the new rule is applied relied on the former rule;
4. [T]he degree of the burden which a retroactive order imposes on a party; and
5. [T]he statutory interest in applying a new rule despite the reliance of a party on the old standard.

466 F.2d at 390.

81. *E.g.*, *McDonald v. Watt*, 653 F.2d 1035 (5th Cir. 1981); *Runnells v. Andrus*, 484 F. Supp. 1234 (D. Utah 1980).

82. 701 F.2d at 850.

83. 695 F.2d 465 (10th Cir. 1982).

Diversion Project.⁸⁴ The case involved a right-of-way across United States Forest Service (USFS) lands granted for water diversion canals that are a part of the Williams Fork Project. Although the court detailed the complete history of the right-of-way,⁸⁵ the basic question addressed was whether the USFS was authorized to order Denver to discontinue construction on the right-of-way in light of Denver's deviation from the right-of-way originally granted.⁸⁶

In order to determine USFS authority over Denver's right-of-way, the court began by defining the nature and scope of the Denver right-of-way. The Denver right-of-way was granted in 1924 pursuant to section 4 of the Act of February 1, 1905.⁸⁷ Under this Act the Secretary of Interior (Secretary) was charged with administering the Denver right-of-way.⁸⁸ Although FLPMA both transferred authority to the USFS to administer rights-of-way across national forest land⁸⁹ and eliminated the Secretary's authority to "grant, issue, or renew" rights-of-way over national forest lands,⁹⁰ the court held that FLPMA did not affect the Secretary's exclusive jurisdiction over existing rights-of-way issued under the Act of February 1, 1905.⁹¹ Thus, FLPMA did not grant USFS authority over Denver's right-of-way.⁹²

The USFS also attempted to rely on the Act of June 4, 1897⁹³ as authority for the stop order issued to Denver. The USFS argued that the Act authorized them to prevent unauthorized construction in order to preserve national forests from destruction, and that Denver's deviation from the right-of-way constituted unauthorized construction.⁹⁴ The Tenth Circuit

84. The Tenth Circuit's detailed history of the Williams Fork project reveals that the project has been under construction since the late 1930's. *See id.* at 469.

85. *Id.* at 467-71.

86. *See id.* at 474, 476-77.

87. 16 U.S.C. § 524 (1982), *partially repealed* by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 (codified at 43 U.S.C. § 1701 (1976)). *See* 695 F.2d at 468. Section 4 of the Act of February 1, 1905 provides:

Rights-of-way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the national forests of the United States, are granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said forests are respectively situated.

16 U.S.C. § 524 (1982).

88. 695 F.2d at 468, 475.

89. 43 U.S.C. § 1761(a) (1976).

90. *See* 43 U.S.C. § 1770(a) (1976).

91. 695 F.2d at 475-76. The court reasoned that because FLPMA expressly stated that it should not be deemed to work repeals by implication, Pub. L. No. 94-579 § 701(f); 90 Stat. 2743, 2786 (1976), revocation of the Secretary's authority to "grant, issue, or renew" rights-of-way did not divest the Secretary of authority to administer existing rights-of-way. 695 F.2d at 475-76.

92. 695 F.2d at 476.

93. 16 U.S.C. § 551 (1982). The statute provides in pertinent part:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests . . . and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction

Id.

94. 695 F.2d at 476. The USFS also argued that Denver's use of steel culverts constituted

recognized that, in the absence of the Secretary's authority under the Act of February 1, 1905, the USFS had the power to issue an order halting construction deviating from a right-of-way.⁹⁵ The court found, however, that Denver's deviation implicated the Secretary's exclusive authority to administer Denver's right-of-way.⁹⁶ Therefore, USFS had no power to issue its stop order.⁹⁷ The court then held that Denver could not continue construction of the project along a path deviating from its original right-of-way without obtaining permission from BLM.⁹⁸

The result of the *City and County of Denver v. Bergland* decision is that the BLM, and not the USFS, has sole authority over administration of the Denver right-of-way. The case did not, however, resolve all the issues raised by Denver. Considering that the court left to BLM the determination of the extent to which the National Environmental Protection Act of 1969⁹⁹ applies to the Williams Fork Diversion Project, this long-running saga may again appear in federal court.

II. ENVIRONMENTAL LAW

A. *Interpretation and Adequacy of an Environmental Impact Statement*

The National Environmental Policy Act of 1969¹⁰⁰ (NEPA) requires the preparation of an environmental impact statement (EIS) to accompany "every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment."¹⁰¹ In effect, NEPA requires federal agencies to consider the environmental consequences of their actions prior to undertaking certain projects. Determining when NEPA applies¹⁰² and the adequacy of federal compliance with the EIS requirements¹⁰³ has led to widespread litigation.¹⁰⁴ During the survey period the Tenth Circuit, in *Johnston v. Davis*,¹⁰⁵ further refined the judicial interpretation of what constitutes an adequate EIS.

Johnston considered the adequacy of the final EIS¹⁰⁶ the Soil Conservation Service (SCS) prepared in conjunction with the Toltec Reservoir Project.¹⁰⁷ Plaintiffs alleged that the Toltec Reservoir Project EIS failed to

unauthorized construction because the original right-of-way permit was limited to construction of canals. *Id.* at 478. The Tenth Circuit agreed that USFS could halt this practice if it was indeed unauthorized, but found that USFS administrative practice justified treating the use of steel culverts as authorized by the right-of-way grant. *Id.* at 478-79.

95. *Id.* at 480.

96. *Id.*

97. *Id.* at 480-81.

98. *Id.* at 481. BLM exercises the Secretary's authority over rights-of-way.

99. 42 U.S.C. §§ 4321-4347 (1976 & Supp. V 1981).

100. 42 U.S.C. §§ 4321-4347 (1976 & Supp. V 1981).

101. 42 U.S.C. § 4332(2)(C) (1976).

102. For a discussion of when NEPA is applicable to federal agency action, see F. ANDERSON, *NEPA IN THE COURTS* 56-141 (1973).

103. For a discussion of the required contents of an EIS, see *id.* at 179-245.

104. For a partial list of cases interpreting NEPA, see *id.* at 298-307.

105. 698 F.2d 1088 (10th Cir. 1983).

106. USDA-SCS-EIS-WS-(ADM)-79-1-F-WY (January 1980).

107. The Toltec Reservoir Project was authorized pursuant to the Watershed Protection and Flood Prevention Act, 16 U.S.C. §§ 1001-1008 (1982). 698 F.2d at 1090 n.1.

consider certain environmental costs¹⁰⁸ and applied an unrealistic discount rate in preparing the required economic evaluation of the project.¹⁰⁹ The Tenth Circuit quickly dismissed Johnston's claim that the EIS inadequately discussed the issues mandated by NEPA.¹¹⁰ The court held, however, that the EIS was inadequate not because an artificially low discount rate had been used, but because SCS had used that rate to improperly represent an unrealistic economic value for the project.¹¹¹

The SCS used a 3.2% discount rate to calculate the present value of the Toltec Reservoir Project, pursuant to a congressional mandate that required an artificial discount rate to be used to evaluate all water resource projects authorized prior to 1970.¹¹² Congress mandated this artificial standard in order to permit construction of certain projects despite their economic inefficiency.¹¹³ The Tenth Circuit recognized that the SCS was obligated to use an artificially low discount rate when comparing alternatives to the Toltec Reservoir Project.¹¹⁴ The court concluded, however, that the mandated use of an artificial discount rate did not authorize the SCS to represent in the EIS that the Toltec Reservoir Project would yield positive economic benefits.¹¹⁵ Failure to mention the use of the artificial rate rendered the EIS misleading because the document would not reflect a reasonable comparison of alternatives to the proposed project.¹¹⁶ The court therefore required SCS to include a discussion of the artificial discount rate in the Toltec Reservoir Project EIS.¹¹⁷ The court also held that the EIS must include an economic evaluation of the project using a realistic discount rate.¹¹⁸

III. INDIAN LANDS

A. *Oil and Gas Leases*

The Tenth Circuit opinion in *Jicarilla Apache Tribe v. Andrus*¹¹⁹ discussed the remedies available to an Indian tribe when the Bureau of Indian Affairs

108. 698 F.2d at 1091-92.

109. *Id.* at 1092. NEPA requires an assessment of a project's projected economic benefits in order to contrast the project's value with the value of alternative actions. *Id.* See 42 U.S.C. § 4332(2)(C)(iii) (1976).

110. 698 F.2d at 1091-92. NEPA requires that an EIS address the following issues:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C) (1976).

111. 698 F.2d at 1094-95.

112. See 42 U.S.C. § 1962d-17 (1976 & Supp. V 1981).

113. 698 F.2d at 1092.

114. *Id.* at 1094.

115. See *id.* at 1095.

116. *Id.*

117. *Id.*

118. *Id.*

119. 687 F.2d 1324 (10th Cir. 1982).

(BIA) failed to comply with the regulation¹²⁰ governing notice of oil and gas lease sales on Indian reservations.¹²¹ Although the Jicarilla Apache Tribe (Tribe) requested cancellation of the leases based on BIA's noncompliance with the regulation,¹²² the Tenth Circuit upheld the district court's determination that the equitable remedy of cancellation was unavailable.¹²³ Cancellation was denied because the extensive exploration and development activities on the leases made it impossible to return all the parties to the pre-lease status quo.¹²⁴ Given the impossibility of granting the requested equitable relief, the Tenth Circuit upheld the district court's award of compensatory damages.¹²⁵

The Tenth Circuit also addressed the propriety of the district court order tolling both the primary lease term and the lessee's payment obligations during the pendency of the litigation.¹²⁶ Although the circuit court agreed that application of the tolling remedy was appropriate,¹²⁷ the circuit court reversed the district court's ruling that the lessee was excused from paying rentals during the pendency of the litigation.¹²⁸ One party to a lease will ultimately suffer the loss resulting from the delay in enjoying lease rights caused by litigation; the Tenth Circuit determined that the equities required payment of rent by the lessees.¹²⁹

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120. The regulation in question provided that:

(a) At such times and in such manner as he may deem appropriate, after being authorized by the tribal council or other authorized representative of the tribe, the superintendent shall publish notices at least thirty days prior to the sale, unless a shorter period is authorized by the Commissioner of Indian Affairs, that oil and gas leases on specific tracts, each of which shall be in a reasonably compact body, will be offered to the highest responsible bidder for a bonus consideration, in addition to stipulated rentals and royalties. . . .

(b) All notices or advertisements of sales of oil and gas leases shall reserve to the Secretary of the Interior the right to reject all bids when in his judgment the interests of the Indians will be best served by so doing, and that if no satisfactory bid is received, or if the accepted bidder fails to complete the lease, or if the Secretary of the Interior shall determine that it is unwise in the interests of the Indians to accept the highest bid, the Secretary may readvertise such lease for sale, or if deemed advisable, with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations. The successful bidder or bidders will be required to pay his or their share of the advertising costs. . . .

25 C.F.R. § 171.3 (1981) (redesignated as 25 C.F.R. § 211.3 (1983)) (emphasis supplied).

121. Both the district court and the court of appeals concluded that Interior's failure to publish a notice describing the specific tracts, stating the stipulated rentals and royalties, and reserving the right to reject all bids constituted a failure to comply with the regulations. 687 F.2d at 1331-32.

122. The Tribe also asserted that the leases should be cancelled because BIA failed to prepare an EIS pursuant to NEPA. *Id.* at 1337. The court rejected this claim, however, based on the Tribe's unreasonable delay in bringing the claim and the Tribe's lack of good faith motivation in asserting the claim. *Id.* at 1338-40.

123. *Id.* at 1333.

124. *Id.* at 1333-34.

125. *Id.* at 1334.

126. *See id.* at 1340-42.

127. *Id.* at 1342.

128. *Id.* at 1343.

129. *Id.* at 1342-43.