Lands and Natural Resources

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INTRODUCTION

The Tenth Circuit Court of Appeals considered a wide variety of cases dealing with public lands and natural resources during the period covered by this survey. The decisions reflect a changing environment for the natural resource practitioner, for it is clear that public land and natural resource law is no longer relegated to the confines of property law. Nearly all of the Tenth Circuit decisions involve statutory and regulatory schemes embodying both economic and social significance. Perhaps no other opinion highlighted the significance of these policies as well as the court's consideration of favored nations clauses in natural gas sales contracts.

I. OIL AND GAS

A. Favored Nations Clauses

Among the common features of natural gas sale and purchase contracts are escalation clauses, which provide for increases in the price of gas purchased and sold upon the happening of a specified event. Escalation clauses generally fall within the category of two-party favored nations clauses, in which the buyer agrees to increase the price paid to the seller to match any higher price paid by the buyer to other sellers in the same field or area, or third-party favored nations clauses, in which the buyer agrees to increase the price paid to the seller to match any higher price paid by any other buyer in the same field or area. The Tenth Circuit, in a diversity of cases, has addressed the implications of favored nations clauses.

2. Examples of two-party favored nations clauses may be found in Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981); Superior Oil Co. v. Western Slope Gas Co., 604 F.2d 1281 (10th Cir. 1979); Eastern Petroleum Co. v. Kerr-McGee Corp., 447 F.2d 569 (7th Cir. 1971); Lone Star Gas Co. v. Howard Corp., 556 S.W.2d 372 (Tex. Civ. App. 1977), error ref'd n.r.e., 568 S.W.2d 129 (Tex. 1978).
3. The difference between a two-party and third-party favored nations clause is explained in Lone Star Gas Co. v. Howard Corp., 556 S.W.2d 372 (Tex. Civ. App. 1977): "A three-party favored nations clause enables a vendor to receive the benefit of a higher than contract price paid by any purchaser. A two-party favored nations clause restricts the vendor to the benefit of higher than contract price paid by his contract purchaser." Id. at 374 (emphasis in original).


Clauses that tie price increases to the highest price allowed by government regulation are also referred to as area rate clauses:

An area rate clause is a price escalation provision in a natural gas purchase and sales contract between a producer and interstate pipeline. It authorizes an escalation in the contract price whenever there is an increase in the applicable just and reasonable wellhead ceiling price for the category of gas involved.
action arising in Wyoming, upheld such a third-party favored nations clause in *Kerr-McGee Corp. v. Northern Utilities, Inc.* 4 against a three-pronged attack in which the clause was asserted to be contrary to federal policy under the Natural Gas Policy Act of 1978 (NGPA),5 violative of Wyoming law regarding public policy, and unconscionable. Challenges to favored nations clauses in gas sales contracts are not new; however, the challenge in *Kerr-McGee Corp.* is among the first of its kind in many years. Although restricted to Wyoming law,6 the Tenth Circuit's diversity holding suggests that favored nations clauses may be ripe for similar challenges in other states.

In 1957 and 1958 Northern Utilities, Inc. entered into agreements with Kerr-McGee Corporation, Phillips Petroleum Co., and a predecessor in interest of Amoco Production Co. to purchase natural gas from the Beaver Creek Field in Fremont County, Wyoming. The contracts obligated Northern Utilities, an intrastate public utility regulated by the Wyoming Public Service Commission, to purchase natural gas from the three producers for a period of twenty years. Each of the original contracts contained a two-party favored nations clause whereby Northern Utilities agreed to pay the three producers as high a price as Northern Utilities paid other producers in Wyoming for gas.7

In April 1970, Amoco, acting as unit operator of the Beaver Creek Field,8 notified Northern Utilities of the availability of excess gas from the Beaver Creek Field. On October 1, 1970, Amoco and Northern Utilities entered into a supplemental agreement extending the original 1957 contract to December 31, 1990. The supplemental agreement, while retaining the original two-party favored nations clause, added a new paragraph, 6(b), which called for an increase in the contract price whenever any producer in Wyoming received a higher price for the sale of interstate gas.9

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4. 673 F.2d 323 (10th Cir.), cert. denied, 103 S. Ct. 344 (1982).
6. 673 F.2d at 325.
7. The favored nations clause stated that:
   If, at any time during the term of this agreement, Northern pays a producer of gas in the State of Wyoming a price per one thousand (1,000) cubic feet that is higher than the price being paid or otherwise payable under this contract, due consideration being given to the quality of the gas, bases of measurement and conditions of sale, Northern shall, commencing on the date of delivery of such gas at such higher price, and continuing so long as such price is in excess of the price otherwise payable under this contract, increase the price being paid or otherwise payable to Pan American [predecessor in interest] hereunder to equal such higher price. It is the intention hereof that the price to be paid Pan American hereunder shall at all times be equal to the higher of the following: (a) the price payable under Article 5 of this contract, as such price may have been changed by Article 7, or (b) the highest price paid by Northern to a producer of gas in the State of Wyoming.

*Id.* at 324 n.2.
9. The paragraph stated that:
   (b) From and after January 1, 1976, when the price to be paid by Northern to Pan American [predecessor in interest] pursuant to the other provisions hereof is less
McGee entered into similar supplemental agreements in 1973.

Prices received by other producers in the area were expected to exceed the contract price beginning January 1, 1976, thereby triggering the provisions of the new clause. The price increases were the result of actions by the Federal Power Commission (FPC) and Congress. Amoco agreed to phase in the new higher prices until July 1, 1978, when the clause would be fully enforced. Kerr-McGee refused a phased installment of new prices and filed suit against Northern Utilities; Northern Utilities, in turn, sued Amoco and Phillips to enforce the price-triggering provisions of the contract.

The district court determined that the provisions of paragraph 6(b) promoted "an inequitable result, causing rate payers buying gas at retail to be charged exorbitant prices for the natural gas involved in this case grossly beyond any reasonable expectation of Northern as one of the contracting parties." Neither Northern Utilities nor the three producers had contemplated at the time the supplemental agreement was executed that regulatory and legislative actions would substantially change the terms of the contract and obligate Northern Utilities to pay rates "greatly different or exorbitant in comparison to rates incorporated in the contract between the parties."

The new rate paid by Northern Utilities increased the contract price tenfold in slightly more than four years, causing consumer monthly gas bills to rise from $30 to $250.

Summoning its equitable powers in a vitriolic tone, the district court held paragraph 6(b) unconscionable under Wyoming statutory law and void as against public policy. The long-term nature of the contract and the

than the sum of the price received for gas being sold in interstate commerce, by any producer within the State of Wyoming, except in the counties of Uinta and Lincoln, plus three cents per one thousand cubic feet (3[cents]/Mcf), then Northern shall increase the price to be paid Pan American hereunder to a price equal to the price being received by such producer plus three cents per Mcf.

Kerr-McGee Corp., 673 F.2d at 325 n.4. Testimony from Amoco indicated that this clause was not commonly used in the industry. Kerr-McGee Corp., 500 F. Supp. at 628.


Kerr-McGee Corp., 673 F.2d at 325-26 n.7.

11. 673 F.2d at 325.


13. Id.

14. Id. at 633.

15. WYO. STAT. § 34-21-219 (1977) provides:
inability of Northern Utilities to reduce the impact of the price increase by selling surplus gas on the interstate market placed Northern Utilities in a position from which no relief could be obtained. Also, paragraph 6(b) removed all price restraints from the contract, providing windfalls to the producers and "unjustly burdensome and harsh results to the consumers." Finally, the court ruled that because the price escalation clause operated to increase prices without reference to the economics and circumstances of the particular gas field, it could not be upheld.

The Tenth Circuit, per Judge Seymour, upheld paragraph 6(b) as compatible with federal policy as set forth in the NGPA, and not unconscionable or violative of Wyoming public policy. The court found the price increases triggered under the escalator clause to be within the confines of maximum rates established by the NGPA. These rates, although high, were consistent with federal policy to promote energy conservation; Congress had weighed the benefits of such rates against the effect on consumers when enacting the legislation.

Relying on an earlier Wyoming decision upholding a favored nations clause and the Wyoming legislature's decision not to restrict the operation of indefinite price escalator clauses as permitted under the NGPA, the appellate court held indefinite price escalator provisions to be in accord with Wyoming public policy. Using a four-part test not relied on by the trial court, the Tenth Circuit concluded that paragraph 6(b) was conscionable under Wyoming law.

(a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

18. Id. at 326.
19. The court focused its attention on Amoco Prod. Co. v. Stauffer Chem. Co., 612 P.2d 463 (Wyo. 1980), where the Wyoming Supreme Court addressed the issue of whether vintage was to be taken into account in triggering a favored nations clause operational on ceiling prices set higher than the contract price by regulatory agencies. The district court in Kerr-McGee concluded that because no argument was made in Stauffer that the clause involved was unconscionable or void as against public policy, the decision was not controlling. 500 F. Supp. at 636. The Tenth Circuit noted that regardless of the absence of public policy argument in the Stauffer briefs, the Stauffer court had upheld the clause as a well-recognized contractual provision. 673 F.2d at 327-28.

The term "vintage" is used to indicate the period during which a gas sale contract was made. See 8 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW MANUAL OF OIL AND GAS TERMS 811 (1981).
20. The NGPA provided that states may establish price restrictions on the sale of natural gas produced within the state below the maximum price levels established by the NGPA: "Nothing in this chapter shall affect the authority of any State to establish or enforce any maximum lawful price for the first sale of natural gas produced in such state which does not exceed the applicable maximum lawful price, if any, under subchapter I of this chapter." 15 U.S.C. § 3432 (Supp. IV 1980). See Energy Reserves Group, Inc. v. Kansas Power & Light Co., 230 Kan. 176, 630 P.2d 1142 (1981), aff'd, 103 S. Ct. 697 (1983) where the effect of such a restriction was at issue.
vation of a meaningful choice in deciding whether to enter into the contract; 2) the party’s compulsion to accept the terms; 3) the existence of an opportunity for meaningful negotiation; and 4) the existence of a gross inequality of bargaining power.\(^2\) Citing evidence of lengthy negotiations engaged in by all parties to the contract, statements made to the Wyoming Public Service Commission by Northern Utilities regarding the difficulty in obtaining long-term gas commitments, and the advantages of entering into the subject contracts, the Tenth Circuit held that the evidence failed to demonstrate unconscionability under Wyoming law. Furthermore, the court held that unconscionability is determined at the making of the contract; a subsequent increase in value or price will not serve to render a contract unconscionable under Wyoming law.\(^2\)

Because the Tenth Circuit’s reasoning promises to raise serious conflicts in the future regarding operation of indefinite price escalation clauses in gas sales contracts, a brief history of legal challenges in this area will be helpful.

The purpose of favored nations clauses in gas sales contracts is to induce producers to commit supplies to long-term contracts by assuring that they will be able to take advantage of current prices.\(^2\)\(^3\) While most challenges to favored nations clauses dispute whether the clause has been triggered, giving rise to higher prices,\(^2\)\(^4\) a few early cases questioned whether price escalation

\(^2\) Kerr-McGee Corp., 673 F.2d at 329.
\(^3\) Id. at 329. The court relied upon Bernina Distrib., Inc. v. Bernina Sewing Mach., 646 F.2d 434 (10th Cir. 1981) and In re Estate of Frederick, 599 P.2d 550 (Wyo. 1979).
\(^4\) As stated in Louisiana-Nevada Transit Co. v. Woods, 393 F. Supp. 177 (W.D. Ark. 1975):

The Favored Nations Clause obviously is not a buyer’s clause since it can only have the effect of increasing the buyer’s cost of gas. . . .

Obviously, a seller has no interest in committing his gas to long term contracts at a fixed price in the face of such rapidly increasing prices. The Favored Nations Clause is a tool to enable a buyer to induce a seller to commit gas reserves to the buyer for a long period of time. It is the buyer’s assurance to the seller that the seller will always be receiving a price for his gas equal to the current price.

\(^5\) Id. at 184.

In Hall v. Arkansas Louisiana Gas Co., 359 So. 2d 255 (La. Ct. App. 1978), amended and remanded, 368 So. 2d 984 (La. 1979), aff'd in part, vacated in part, 453 U.S. 571 (1981), the court stated that “[t]he basic purpose of a price adjustment or Favored Nations clause is to protect a seller from discrimination by the pipe-line purchaser of gas under a long-term contract.” 359 So. 2d at 262. Finally, the Wyoming Supreme Court, in Amoco Prod. Co. v. Stauffer Chem. Co., 612 P.2d 463 (Wyo. 1980) noted that “[t]he nature of the product and its questionable availability engenders reluctance on the part of producers to enter into long term contracts at the price prevailing at the time of the contract. Yet purchasers require long term commitments to insure an adequate supply of gas.” Id. at 468.

clauses violated public policy. These challenges generally were of little significance.

Then, in 1961 the FPC issued Order No. 232 proscribing the use of indefinite price escalation clauses in gas sales contracts within its jurisdiction. The order declared all indefinite price escalation clauses, including favored-nation, redetermination, and spiral escalation clauses, to be "un-desirable, unnecessary, and incompatible with the public interest," having "contributed to instability and uncertainty concerning prices of gas." The order went on to provide all such clauses in new contracts within the Commission's jurisdiction to be inoperative and of no effect at law.

Order No. 232 was accompanied by a FPC decision in *Pure Oil Co.*, in which the Commission discussed the reasoning behind its determination that indefinite price escalation clauses were contrary to the public interest. Although the Commission recognized the necessity of long-term contractual relations for the sale of natural gas and the need to maintain investment values for producers in the face of rising costs, it deemed indefinite price escalation clauses to result in price increases unrelated to factors bearing on the value of gas, such as cost of production. The clauses were found to result in gas price increases without economic or other substantial justification.

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S.W.2d 129 (Tex. 1978) (gas involved in other sales was comparable enough to trigger clause); Amoco Prod. Co. v. Stauffer Chem. Co., 612 P.2d 463 (Wyo. 1980) (vintaging not a factor in triggering clause).

25. *See In re Lexia Buchanan*, 14 FPC 831 (1955), where the Brooklyn Union Gas Co. and Long Island Lighting Co. sought to intervene in FPC proceedings concerning a certificate of public convenience and necessity to strike price escalation clauses as being against the public interest.


27. *See supra* note 3.


29. Commissioner Kline, concurring in part and dissenting in part, stated that although he believed indefinite price escalation clauses to be contrary to the public interest, he did not think all such clauses as defined within the FPC order should be proscribed. In particular, Kline said clauses allowing price renegotiation strike a proper balance between the interests of producers and purchasers:

> [A] producer should have a contractual right to renegotiate his contract price at some time in the future in order to protect himself against inflation or other unforeseen contingencies. He should not be compelled to agree at the beginning of his contract to a fixed price for the gas twenty or fifty years in the future, when conditions may be wholly different.

A contract providing for renegotiation of the price at some future date, and for arbitration in event the parties fail to agree, merely gives the producer the right to file for such price. The Commission will, of course, disallow it in event it is not a just and reasonable price. Since the gas is already committed to the pipeline, the producer will not have any distinct bargaining advantage.

*Id.* at 381 (Kline, Comm'r, concurring in part, dissenting in part).

30. 25 F.P.C. 383 (1961), aff'd, 299 F.2d 370 (7th Cir. 1962). The decision involved an interpretation of a two-party favored nations clause between *Pure Oil Co.* and *El Paso Natural Gas Co.* The Commission extended its decision to apply to all indefinite price escalation clauses.

31. The Commission concluded:

*U*nder Pure's provisions, the company's prices are subject to triggering if El Paso pays any other producer within the specified area a higher price. There need be no economic or other substantial justification for the increase; the mere fact that a higher price is paid to some other producer would be sufficient to activate the increase. In our view, such an artificial ground for a proposed increase, operating in such a mechanical and arbitrary manner, and lacking any substantial relationship to the fac-
Finally, the Commission found that indefinite price escalation clauses had simply outlived their usefulness:

Assuming that indefinite escalation clauses in producer contracts had some justification years ago, when a lack of purchaser outlets and lack of consumer demand forced prices to abnormally low levels, this justification no longer exists today, when purchasers of gas are numerous, consumer demand is strong, and buyers are competing eagerly for available supplies of gas. In our judgment, in the light of continuing increases in the price of gas in recent years and the present high level of prices, escalation clauses such as Pure's have by now outlived whatever economic function they may have had. Order No. 232 was amended within a month to allow for limited price-rede
termination provisions within contracts subject to FPC jurisdiction. In 1962 the FPC ordered that contracts within its jurisdiction containing indefinite price escalation clauses be rejected. Then, in 1966, the FPC issued Order No. 329, allowing for area rate escalations to operate. Thus, escalation clauses were permissible if they did not exceed the applicable ceiling rate established by the Commission. Escalations below the ceiling rate prescribed by the FPC were deemed to be within the public interest because the ceiling rate was based on a cost-based methodology having economic... tors which bear on the value of gas or on a determination of a reasonable level of rates
for it, does not constitute a proper basis for filing proposed increased rates. 

**Id.** at 389. The Commission also rejected arguments by Pure Oil Co. that indefinite price escalation clauses further the free market system:

> [I]t is fallacious to assume that the price for only one or a few sales, which is all that is needed to activate a large number of producer prices under escalation provisions, is representative of market conditions generally. In fact, escalation provisions such as Pure's are the opposite of giving effect to prevailing market prices; instead, the prices for sales of one or a few particular producers apply to and increase the level of market prices generally.

**Id.** at 391. The basis of FPC producer rate regulation was the cost-based methodology for utility rate regulation. Pennzoil Co. v. FERC, 645 F.2d 360 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982).

32. 25 F.P.C. at 391. The Commission also dismissed comparisons and benefits occurring from indefinite price escalation clauses used in other industries, such as cotton, as having little relationship to natural gas contracts:

> [P]ricing practices appropriate to such commodities and businesses, which are either unregulated or are subject to a type of regulation wholly unlike the regulation provided for by the [Natural Gas] Act, have little applicability in determining proper pricing practices for the regulated producer segment of the natural gas industry.

**Id.**


significance to the gas in question.\textsuperscript{36}

Essentially, the same reasoning was employed in 1979 after the Federal Energy Regulatory Commission (FERC) took over the duties of the FPC\textsuperscript{37} and the NGPA\textsuperscript{38} established new gas ceiling rates. FERC ruled in Order 23\textsuperscript{39} that indefinite price escalation clauses could operate within the confines of the ceiling rates established by the NGPA, since those rates had been deemed just and reasonable by Congress.\textsuperscript{40}

Challenges to indefinite price escalation clauses based on the issues of public policy and unconscionability resurfaced shortly after passage of the NGPA, despite the FPC and FERC's position that the clauses could operate within rate ceilings. The first judicial expression on the matter was in Superior Oil Co. v. Western Slope Gas Co.,\textsuperscript{41} where Tenth Circuit Judge Barrett, in a concurring opinion, reiterated earlier rejections of such clauses as being against public policy because they bore no relationship to production costs or other economic justification.\textsuperscript{42}

In Amoco Production Co. v. Kansas Power & Light Co.,\textsuperscript{43} the District Court of the United States District of Kansas considered whether a windfall price increase triggered by a favored nations clause was unconscionable and void for public policy reasons, even though the price remained below the highest ceiling rate. The subject favored nations clause was tied to FPC and FERC pricing activities, which triggered the clause, permitting Amoco to recognize a 263\% increase in the price of its gas.\textsuperscript{44}

The district court, relying on Superior Oil Co., concluded that such clauses are not \textit{per se} unconscionable and against public policy, and upheld the clause by distinguishing the circumstances surrounding the Amoco-Kansas Power & Light Co. favored nations clause from those before the district court in Kerr-McGee Corp. Kansas Power & Light Co.'s participation in drafting the contract and knowledge that the clause could cause sizeable price increases weighed against the unconscionability arguments.\textsuperscript{45} Furthermore, no inequality in bargaining power that would evidence unconscionability

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\item \textsuperscript{36} Pennzoil v. FERC, 645 F.2d 360, 366 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982). See Watson, \textit{The Natural Gas Policy Act of 1978 and Gas Purchase Contracts}, 27B ROCKY MTN. MIN. L. INST. 1407, 1418-19 (1982) (where an area rate was by definition just and reasonable, the Commission was prevented from asserting that the collection of area rates was against public policy). Until 1974, the FPC prescribed rates for gas within particular areas based on locational values. The FPC then adopted nationwide rates of general applicability. 51 F.P.C. 2212 (1974).
\item \textsuperscript{37} 42 U.S.C. \textsection 7172 (1976 & Supp. IV 1980).
\item \textsuperscript{38} 15 U.S.C. §§ 3301-3432 (Supp. IV 1980).
\item \textsuperscript{39} 44 Fed. Reg. 16,895 (1979). The order reserved to state law the determination of whether such clauses operate in intrastate contracts.
\item \textsuperscript{40} For a discussion on the limitations placed upon indefinite price escalation clauses by the NGPA, see Pennzoil Co. v. FERC, 645 F.2d 360, 376-78 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982).
\item \textsuperscript{41} 604 F.2d 1281 (10th Cir. 1979).
\item \textsuperscript{42} \textit{Id.} at 1295-96 (Barrett, J., concurring). Apparently, Judge Barrett would have declared such clauses void against public policy regardless of whether they operated within legislatively defined price ceilings.
\item \textsuperscript{43} 505 F. Supp. 628 (D. Kan. 1980).
\item \textsuperscript{44} \textit{Id.} at 636.
\item \textsuperscript{45} \textit{Id.} at 639.
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was established. The court stressed that supply and demand, not production costs, should determine the price of gas.\textsuperscript{46}

Finally, \textit{Energy Group, Inc. v. Kansas Power \& Light Co.} \textsuperscript{47} considered the validity of a state law that limited the effect of favored nations clauses by graduating the introduction of higher natural gas prices into the Kansas economy.\textsuperscript{48} The Kansas Supreme Court upheld the restrictions imposed on such clauses. Quoting the trial court, the opinion noted that states have "a bona fide interest in addressing, and hopefully controlling, the serious economic dislocations that a sudden introduction of significantly higher energy costs would produce."\textsuperscript{49}

The foregoing decisions, although not fully applicable to \textit{Kerr-McGee Corp.} and the intrastate contract involved, demonstrate the nature and vigor of the challenges to favored nations clauses based on arguments of public policy and unconscionability. Similar challenges are certain to arise in the future, particularly as conflicting interests between producers and consumers continue to intensify.

Several issues merit further consideration. The first concerns the unconscionability argument. In determining the conscionability of the favored nations clause in \textit{Kerr-McGee Corp.}, one factor the Tenth Circuit examined was the expertise of the negotiators for both parties to the contract,\textsuperscript{50} thus weigh-

\textsuperscript{46} \textit{Id.} The court recognized that the price increases would be borne by Kansas Power \& Light Co.'s customers, some of whom lack the resources to pay the higher costs, but found that a low-income energy assistance program operated by the State of Kansas and funded by the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 (codified in scattered sections of 17, 19, 26, 31, 42 U.S.C.), mitigated the impact of the favored nations clause upon the public. 505 F. Supp. at 639-40.


\textsuperscript{48} The NGPA grants states the authority to establish price restrictions on the sale of natural gas produced within a particular state below the maximum price levels established by the NGPA. 15 U.S.C. § 3432 (Supp. IV 1980); see supra note 20.

\textsuperscript{49} 230 Kan. at 188, 630 P.2d at 1152. The court relied heavily upon legislative intent and the evils sought to be regulated:

Proponents believe that as a result of this legislation, many producers of natural gas, especially those whose contracts contain indefinite price escalator clauses, will reap unanticipated, windfall financial benefits. These benefits bear no real relationship to the cost of production of new gas, and are not even remotely related to old gas production costs. They accrue solely because of the reversal of federal policy.

... The producers will benefit beyond any expectations that they might have had only a few years ago and the consumers, already buffeted by rapidly increasing inflation, including spiraling utility costs, will pay.

The majority of the Committee is strongly convinced that the single issue of the benefits to be derived by the affected Kansas consumers of natural gas clearly outweighs any adverse effects the gas producers or royalty owners said the bill might have.

\textit{Id.} at 187-88, 630 P.2d 1151-52 (emphasis in original).

The United States Supreme Court agreed, stating that the state could reasonably have found that higher gas prices attributable to the escalation clauses would mean hardship on persons with fixed incomes who use gas heat. Moreover, the Court said, the state had a legitimate interest in eliminating unforeseen windfall profits. Finally, the Court found significant the fact that the parties were already operating in a heavily regulated industry and did not expect the advent of deregulated prices at the execution of the contracts in holding that the state had not impaired any contract by restricting the escalator clauses. \textit{Energy Group, Inc.}, 103 S. Ct. at 706-09.

\textsuperscript{50} 673 F.2d at 330.
ing the parties’ bargaining power.\textsuperscript{51} While consideration of equality of the parties at the bargaining table is appropriate to determine unconscionability, it ignores the power of producers who command great control over diminishing natural resources, such as natural gas.\textsuperscript{52} Since gas is a basic commodity, with limited supplies and substitutes, assertions that size and experience of bargaining parties are conclusive as to the equitable nature of the contract ignores the economic realities of the industry.

Also, the unconscionability issue can be restated: should a heightened demand by one consumer be allowed to trigger gas prices for consumers whose demand is less great?\textsuperscript{53} Favored nations clauses may actually distort the concept that demand determines value.

The second area of consideration is public policy. Recent cases dealing with favored nations clauses and public policy demonstrate that administrative and legislative acceptance of such clauses does not automatically shield favored nations clauses from challenges based upon public policy.\textsuperscript{54} These challenges are certain to resurface with renewed vigor following the deregulation of certain natural gas pricing in 1985,\textsuperscript{55} when conflicting interests of producers and consumers are certain to reach a zenith.

The Tenth Circuit in Kerr-McGee Corp. suggests that because Congress took these interests into account in enacting the NGPA with its deregulation provisions, Congress also acted in the public interest by allowing indefinite price escalation clauses to operate once deregulation occurs.\textsuperscript{56} The court’s suggestion comports with earlier decisions which recognize Congress as act-

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\item Gross inequality of bargaining power is a characteristic of an unconscionable bargain. See \textit{In re Estate of Frederick}, 599 P.2d 550 (Wyo. 1979), \textit{cited in Kerr-McGee Corp. v. Northern Util., Inc.}, 673 F.2d 323, 328-29 (10th Cir. 1982); see also Amoco Prod. Co. v. Kansas Power & Light Co., 505 F. Supp. 628, 639 (D. Kan. 1980) where the court considered the bargaining power of the parties in determining whether the favored nations clause involved was unconscionable.
\item Northern Utilities relied upon the Beaver Creek Field for 85% of its total supply of gas. \textit{Kerr-McGee Corp.}, 673 F.2d at 324. The Tenth Circuit stressed the difficulties expressed by Northern Utilities in obtaining long-term gas commitments and the advantages it would derive from the amended contract, as evidence of an equitable bargain. Id. at 329-30. The same circumstances may, however, be evidence of a contract entered into out of fear of diminishing supplies and competition with larger utilities.
\item See supra note 31.
\item Judge Barrett’s concurring opinion in Superior Oil Co. v. Western Slope Gas Co., 604 F.2d 1281 (10th Cir. 1979) suggests that favored nations clauses should be void against public policy regardless of whether they operate within the confines of maximum lawful rates which have been deemed reasonable through the regulatory process. Also, the court in Amoco Prod. Co. v. Kansas Power & Light Co., 505 F. Supp. 628, 636 (D. Kan. 1980), considered the question of whether a 283% increase in the price of gas, triggered by a favored nations clause, was enough in itself to render the clause void as unconscionable and against public policy, regardless of the fact that the increase fell below maximum rates.
\item The court stated: One of the primary purposes of the NGPA is to promote energy conservation. Congress believed that allowing producers to recover high prices for their gas helps implement this goal. “High energy prices provide one motivation to conserve energy. Because of these prices, an enormous range of energy conserving improvements are
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[1]In the Natural Gas Policy Act of 1978 (Pub. L. No. 95-621), Congress expressed a policy of eventually allowing prices to go unregulated by the year 1985. . . . By 1985, the price of deregulated natural gas will assuredly seem exorbitant, and since it is such an essential commodity for most of the public, hardship will result. Nevertheless, this Court must be cognizant of these developments in public policy. The price of deregulated gas will be determined by supply and demand rather than the cost of production.}

As a result of the court's decision, indefinite price escalation clauses, once allowed to operate only within the confines of ceiling rates founded on justness and reasonableness, will be allowed to operate in a free market system because that system has been deemed to be in the public interest. The holding, however, will not preclude challenges that the operation of favored nations clauses within the system must also be in the public interest.

B. Federal Leases

In Kirkpatrick Oil & Gas Co. v. United States,\footnote{58} the Tenth Circuit held that a state communitization order may not bind federally-owned land or extend leases of federally-owned land within the unit absent consent from the Secretary of the Interior. Kirkpatrick Oil & Gas Co. had acquired oil and gas leases on federally-owned land in Oklahoma for a primary term of ten years, extendible upon production in paying quantities. When Kirkpatrick failed to drill on the leases within the primary term, the United States sought to terminate the leases. Kirkpatrick resisted, claiming that the leases had been extended by virtue of a state drilling and spacing order that placed the federal lands and nearby non-federal lands in the same unit. The company asserted that its oil and gas production on the non-federal land served to extend the federal leases in the same unit. The government contended that state communitization orders are binding upon federal lands only when approved by the Secretary of Interior.\footnote{59}

The court agreed with the government, relying upon the test articulated in Wallis v. Pan American Petroleum Corp.\footnote{60} to determine whether application of state law to federal mineral lease issues poses a "significant threat to any identifiable federal policy or interest."\footnote{61} The court found that state-imposed acreage requirements and unit boundaries could conflict with the Secretary of Interior's judgment regarding acreage and boundary standards for conservation under the Mineral Lands Leasing Act of 1920.\footnote{62} The court also held that federal lessees should not be able to circumvent the requirement for the
Secretary’s approval by securing a state pooling order.\textsuperscript{63}

In another oil and gas decision, \textit{True Oil Co. v. FERC},\textsuperscript{64} the Tenth Circuit construed the clause, “produced in commercial quantities,” as requiring either a capability to market, or a means of transportation of the product from the producer to the consumer.\textsuperscript{65} The interpretation was adopted in a determination of whether natural gas qualified as “new natural gas” under a provision of the NGPA.\textsuperscript{66}

\section*{II. MINING LAW}

\textbf{A. Stock-Raising Homestead Act}

The Tenth Circuit, in \textit{Western Nuclear, Inc. v. Andrus},\textsuperscript{67} addressed the question of whether gravel is a mineral reserved to the United States in patents granted under the Stock-Raising Homestead Act of 1916 (Act).\textsuperscript{68} In a decision with the potential of affecting 70,362,406 acres of land,\textsuperscript{69} the court held that gravel is not a reserved mineral under the Act and consequently, passed to the patentee.

In 1926, the United States conveyed a tract of land in Wyoming to Western Nuclear’s predecessor-in-interest by patent issued under the Act. The patent, in accordance with the Act, reserved all coal and other minerals to the United States.\textsuperscript{70} After Western Nuclear purchased a portion of the patented land in 1975, it sought a permit from the Wyoming Department of Environmental Quality for a gravel pit. The department notified the Bureau of Land Management of Western Nuclear’s intentions and then granted the permit. Western Nuclear removed some gravel before being served with a Notice of Trespass under the Materials Act of 1947 and the Surface Resources Act of 1955.\textsuperscript{71}

The Interior Board of Land Appeals of the Department of Interior upheld the Bureau of Land Management, finding that gravel was reserved to the United States as a mineral under the Act, and any disposition of the gravel other than through the Surface Resources Act of 1955 constituted

\textsuperscript{63} 675 F.2d at 1126.
\textsuperscript{64} 663 F.2d 75 (10th Cir. 1981).
\textsuperscript{65} \textit{Id.} at 78.
\textsuperscript{67} 664 F.2d 234 (10th Cir. 1981), cert. granted sub nom. Watt v. Western Nuclear, Inc., 102 S. Ct. 2266 (1982).
\textsuperscript{70} 664 F.2d at 235. The patent reserved the following: “Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916.” \textit{Id.}
tresspass.\textsuperscript{72} Reviewing legislative intent and contemporaneous history, the trial court determined that even though the term "mineral" had no definite meaning in 1916, gravel is a reserved mineral under the Act.\textsuperscript{73} The court then reaffirmed the construction rule that mineral reservations are to be decided in favor of the government when a question exits.\textsuperscript{74} In so holding, Judge Kerr noted: "The mineral estate is a flexible entity which expands with the development of the arts and sciences to include more minerals."\textsuperscript{75}

The Tenth Circuit addressed both the Bureau of Land Management's jurisdiction to issue the trespass notice and the definition of mineral within the Act. Western Nuclear had argued that because the Surface Resources Act of 1955 authorized disposition of gravel from public lands only, the Bureau of Land Management had no jurisdiction over the subject lands, which passed to private ownership by patent. Judge McWilliams, writing for the court, rejected Western Nuclear's argument, saying that although the land itself passed into private hands by patent, under the Act, the minerals reserved to the United States remain subject to disposal in accordance with the coal and mineral laws in force at the time of the disposal.\textsuperscript{76} The disposal provisions contemplate that the Department of Interior maintain continuing jurisdiction over reserved minerals.\textsuperscript{77}

Turning to the definitional issue, the Tenth Circuit examined congressional intent. Central to the court's holding was the 1910 decision, \textit{Zimmerman v. Brunson},\textsuperscript{78} in which the Department of Interior, "in the absence of specific legislation by Congress,"\textsuperscript{79} refused to classify gravel as a mineral because standard authorities had failed to recognize such deposits as minerals.\textsuperscript{80} The court found the \textit{Zimmerman} decision to be the keystone of congressional intent at the time the Act was enacted,\textsuperscript{81} and regarded the Department of Interior's subsequent overruling of \textit{Zimmerman} as inconse-

\textsuperscript{73} 475 F. Supp. at 656-60.
\textsuperscript{74} \textit{Id.} at 662.
\textsuperscript{75} \textit{Id.} at 663.
\textsuperscript{77} 664 F.2d at 237.
\textsuperscript{79} 39 Pub. Lands at 313.
\textsuperscript{80} \textit{Id.} at 312. The department said:
A search of the standard American authorities has failed to disclose a single one which classifies a deposit [of gravel] as mineral, nor is the Department aware of any application to purchase such a deposit under the mining laws. This, taken into consideration with the further fact that deposits of sand and gravel occur with considerable frequency in the public domain, points rather to a general understanding that such deposits, unless they possess a peculiar property or characteristic giving them a special value, were not to be regarded as mineral.
\textit{Id.}
\textsuperscript{81} As the Tenth Circuit noted, "[w]hen enacting the Stock-Raising Homestead Act of 1916, we presume that Congress was aware of the fact that the Department of the Interior had determined that gravel was not a mineral for the purposes of either the mining laws or previous homestead laws." 664 F.2d at 240.
quential to determining congressional intent in 1916.\textsuperscript{82}

The court then reviewed judicial opinions on the issue of gravel as a mineral, arising after passage of the Act. Particularly revealing to the court was the case of \textit{Bumpus v. United States},\textsuperscript{83} in which the government had taken the position that gravel was not a mineral because it was so much a part of the surface that it should be considered part of the surface estate.\textsuperscript{84} Also of significance was \textit{State ex rel. State Highway Commission v. Trujillo},\textsuperscript{85} in which the New Mexico Supreme Court held that gravel was included within the mineral reservation of the Act.\textsuperscript{86} The court found the reasoning in \textit{State Land Board v. State Department of Fish & Game},\textsuperscript{87} to be persuasive on the issue of whether gravel is to be construed as a mineral. In \textit{State Land Board}, the State of Utah had conveyed property to its Fish and Game Department, reserving all coal and other minerals. The Utah Supreme Court held that sand and gravel deposits are so common in the Rocky Mountain region that a reservation of such deposits as minerals would nullify a grant of the surface estate.\textsuperscript{88} The Tenth Circuit adopted this reasoning from \textit{State Land Board} as support that gravel is not a reserved mineral under the Act.\textsuperscript{89}

Although the court relied on \textit{Zimmerman} and \textit{State Land Board} in determining that gravel was passed to all patentees under the Stock-Raising Homestead Act, the opinion in \textit{Western Nuclear, Inc.} fails to reconcile these earlier cases' assertions that in some circumstances, gravel may have the requisite special value to be classified as a mineral.\textsuperscript{90} Indeed, the court in \textit{Zimmerman} simply held that the close proximity of a gravel deposit to a town or

\textsuperscript{82} The Department of Interior held gravel to be a locatable mineral in \textit{Layman v. Ellis}, 52 Pub. Lands Dec. 714 (1929).

\textsuperscript{83} 325 F.2d 264 (10th Cir. 1963).

\textsuperscript{84} Unlike reservations under the Stock-Raising Homestead Act of 1916, the reservation in \textit{Bumpus} involved condemnation proceedings by the United States in which “all oil, gas and other minerals” were reserved to the private landowners, who subsequently sought to remove gravel pursuant to their reservation. \textit{Id.} at 265-66.

\textsuperscript{85} 82 N.M. 694, 487 P.2d 122 (1971).

\textsuperscript{86} The court noted that although the New Mexico Supreme Court disagreed with earlier Tenth Circuit interpretations of the Act, the discrepancies were not essential to the definitional issue. \textit{Western Nuclear, Inc.}, 664 F.2d at 241.

\textsuperscript{87} 17 Utah 2d 237, 408 P.2d 707 (1965).

\textsuperscript{88} \textit{Id.} at 239, 408 P.2d at 708. The Utah Supreme Court recognized, however, that gravel may be so scarce in some areas as to have extraordinary value within the area. In such circumstances, gravel may properly be considered a mineral subject to reservation. \textit{Id.} at 240, 408 P.2d at 709.

\textsuperscript{89} [T]he gravel lying under and upon appellant’s land is so closely related to the surface estate, that it is a part and parcel of it. If such common substances were considered to be included within the mineral reservation, then under all the many patents issued pursuant to the Stock-Raising Homestead Act, the patentees would own only the dirt, and little or nothing more. Such would be at odds with the nature of the terrain in the Rocky Mountain region, where rocks abound. And if ordinary rocks are not reserved minerals, it follows that gravel, a form of fragmented rock, also is not a reserved mineral.

\textsuperscript{90} See supra notes 80 and 88 and accompanying text.
city, and whose sole use is for building, does not qualify gravel as a mineral. 91 Subsequent decisions, such as State Land Board, suggest the determination must be made according to the facts of the case. 92 Western Nuclear, Inc., however, suggests no such ad hoc consideration. Thus, patentees may now be entitled to full development of gravel under their patent, without accounting to the federal government.

B. Mineral Lands Leasing Act of 1970

In two decisions, Rosebud Coal Sales Co., Inc. v. Andrus, 93 and California Portland Cement Co. v. Andrus, 94 the Tenth Circuit strictly enforced the time period under which the Department of Interior can readjust the terms of a lease under the Mineral Lands Leasing Act of 1920. 95 This Act allows the federal government to readjust the royalty terms and other terms of leases issued under the Act at the end of every twenty-year period. 96

Rosebud Coal Sales, Inc. and California Portland Cement Co. were issued coal leases in 1935 providing for readjustment at the end of 1975. 97 Neither lessee received notice of the government's intent to readjust the terms of its lease until 1977, although the Bureau of Land Management began considering readjusting Rosebud’s coal lease seven months prior to the readjustment date. 98

The Tenth Circuit, per Chief Judge Seth, rejected the government’s argument that it was too preoccupied with basic coal leasing policy to give notice before the end of the lease period. The court held that the government must act to readjust terms of its leases before the end of the twenty-year period established under the Act, unless the government can demonstrate that the giving of notice before or at the anniversary date is not feasible. 99

III. PUBLIC LANDS

A. Trespass

United States v. Miller 100 presented the Tenth Circuit with the unusual situation of the use of criminal prosecution to settle a property dispute. The court, recognizing the circumstances as involving merely a question of right to possession, held the prosecution to be an abuse of process.

92. [W]e note that the holding herein is not intended to exclude the possibility that there might be some area where sand and gravel are so scarce and difficult to obtain that a deposit of those materials would have such an extraordinary value within that area that they could properly be considered as coming within the definition of "mineral" as we have hereinabove set out ....
17 Utah 2d at 239-40, 408 P.2d at 709.
93. 667 F.2d 949 (10th Cir. 1982).
94. 667 F.2d 953 (10th Cir. 1982).
96. Id. § 207(a).
97. Rosebud Coal, 667 F.2d at 950; California Portland, 667 F.2d at 954.
98. Rosebud Coal, 667 F.2d at 953; California Portland, 667 F.2d at 954.
99. Rosebud Coal, 667 F.2d at 953.
100. 659 F.2d 1029 (10th Cir. 1981).
In 1905, the Shoshone and Arapahoe Tribes, now known as the Wind River tribes, ceded about half of the Wind River Indian Reservation in Wyoming to the United States for homestead entry. Non-Indians, including the Miller family, were issued patents to land within the reservation boundaries until 1939, when the remaining unsold land was given back to the tribes. The Millers homesteaded within the reservation in the early 1900's, and in 1929 purchased several other homesteads not far from their homesite, adjacent to and outside the western boundary of the reservation. Access to the outer property is limited to two routes: a three-quarter-of-a-mile drive across reservation property, and a drive across private property. The private property is barred to travelers; as a result, the Miller family crossed the reservation for fifty years to gain access to their land.

In September 1978, defendant Larry Miller received a notice from the Bureau of Indian Affairs that further trespass on tribal lands would be subject to prosecution under the Wyoming criminal trespass statute. The government argued that as trustee of the Indians, it had a duty to establish Indian sovereignty over the property. The government decided to file the action pursuant to the criminal trespass statute, believing that a civil remedy was unnecessary where a statute provided an express remedy. The defendant took the position that he had a colorable claim of right to use the road for access to his property. The trial court, chastising the Bureau of Indian Affairs for its "administrative ineptitude" and failure to arrive at a compromise by which Miller could reach his property, nonetheless sentenced Miller under the statute.

The Tenth Circuit, noting that both parties and the trial court recognized the issue to be whether Miller was entitled to cross the reservation to reach his land, distinguished between acts of trespass with an intent to remain upon the property of another without lawful authority and those acts of entry made in good faith under a claim of right. The court held that to apply a criminal trespass statute to the latter act is an abuse of process in which "a legal procedure is perverted to accomplish an ulterior purpose for which it was not designed." In so holding, the court relied on the same

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101. Id. at 1030.
102. Id.
103. Indian regulations required that a one-day permit be obtained before the Millers could drive cattle across the reservation; the defendant sought an annual permit to avoid traveling fifty miles one way to obtain a daily permit, but was told that annual permits were against Indian regulations. Id. at 1031. The Tenth Circuit mentioned in passing that the daily permit requirements should be abolished as a possible infringement upon a landowner's due process rights not to be denied access to his property without an opportunity to be heard. Id.; see Dry Creek Lodge v. Shoshone and Arapahoe Tribes, 515 F.2d 926 (10th Cir. 1975).
105. Id. at 1031-32.
106. Id. at 1032.
107. Id. at 1030. The trial court fully recognized that the dispute did not involve a criminal law question. The government claimed that civil proceedings would delay the outcome. Id. at 1031.
108. Id. at 1033.
109. Id.
distinction made in People v. Johnson,\textsuperscript{110} in which the court held that the requisite criminal intent to remain on the lands of another without lawful authority is lacking where a claim of right is asserted. The Tenth Circuit regarded as irrelevant the government's emphasis upon the fact that ownership of the property was undisputed; appropriate governmental action was a civil proceeding.

In another trespass action, United States v. Osterlund,\textsuperscript{111} the Tenth Circuit held that courts cannot award damages as an alternative to issuing orders enjoining continued occupancy of government land by a trespasser. The United States had sought to enjoin Osterlund's occupancy on federal land when it discovered that his residence was located within the boundaries of the Arapahoe-Roosevelt National Forest. The trial court found for the government as a matter of law and ordered Osterlund to vacate the property.\textsuperscript{112}

In his appeal to the Tenth Circuit, Osterlund argued that the trial court, in its equitable discretion, should have awarded the government damages and permitted continued occupancy. The Tenth Circuit rejected Osterlund's argument, holding that courts have no power to adjust equities against the federal government in title disputes involving federal lands because Congress' trust powers over the public land are unlimited; courts cannot infringe upon the trust powers by saying how the trust is to be administered. If the court had granted relief in the form of damages, it essentially would have forced the sale of a portion of the national forest and prescribed conditions for the continued occupancy of the land, actions that courts are powerless to undertake under the United States Constitution.\textsuperscript{113}

\section*{III. Indian Lands}

A. Sovereign Powers

Two decisions reinforced tribal authority over non-Indians within reservation boundaries. The first decision upholds the sovereign powers of tribes to enforce tribal zoning ordinances against non-Indian fee owners of land within a reservation. The second decision upholds the power of tribes to prevent states from enforcing state game laws against non-Indians within a reservation.

In Knight v. Shoshone and Arapahoe Indian Tribes,\textsuperscript{114} defendants James and Karen Knight, both non-Indian fee owners of land within the Wind River Indian Reservation in west-central Wyoming, sought to develop two subdivisions on their land. After the Knights discussed their plans with Bureau of Indian Affairs officials, the tribal government enacted a zoning code that expressly applied to all lands within the reservation boundaries, including

\begin{itemize}
  \item \textsuperscript{111} 671 F.2d 1267 (10th Cir. 1982).
  \item \textsuperscript{112} \textit{Id.}
  \item \textsuperscript{113} \textit{Id.} at 1268.
  \item \textsuperscript{114} 670 F.2d 900 (10th Cir. 1982).
\end{itemize}
those held in fee by non-Indians. The code was neither recorded in Fremont County records where the land is located, nor published in the Federal Register. The Fremont County Planning Commission approved the subdivision plats in early 1979, and the Knights proceeded to plat, subdivide, and sell lots. When the tribes sought to enjoin development in September 1977, a number of residential sites were near completion.

The trial court addressed two issues: 1) whether the tribes had the authority to regulate land held in fee by non-Indians within reservation boundaries, and, if so, 2) whether the zoning code was a proper exercise of that power. The trial court held in favor of the tribes on both issues.

Affirming the trial court, the Tenth Circuit followed recently enunciated Supreme Court principles in Merrion v. Jicarilla Apache Tribe, and Montana v. United States, and recognized that Indians have inherent sovereign power over their territory and tribal members. This power allows them to exercise some forms of civil jurisdiction over non-Indians on fee lands within the reservation. One valid exercise of the power may be to restrict "conduct [which] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." In Knight, the court determined that the tribes' interest in preservation of their homeland, and the code's protective purpose, was sufficient, absent the exercise of land use controls by other authoritative bodies, for the tribes to invoke their "inherent sovereign rights of self-government and territorial management" and enact the zoning ordinance. The court further recognized the zoning code's purpose of preserving the rural character of the reservation as a legitimate objective, commonly recognized under the police power. In addition, the court held that the code could be enforced against all persons whose land use activities affected tribal lands; therefore, even non-Indians who cannot participate in tribal government could be subjected

115. Arapahoe and Shoshone Tribal Ordinance 38 applied to: "[A]ll lands within the exterior boundaries of the Wind River Reservation, whether held in trust by the U.S. for the benefit of individual Indians, or for the Shoshone and Arapahoe Tribes, or held in fee by Indians or non-Indians." 670 F.2d at 901.
116. Id. at 902.
117. Id.
118. 455 U.S. 130 (1982).
120. 670 F.2d at 902.
121. Id. (citing Montana v. United States, 450 U.S. 544, 566 (1981)).
122. Among the factors cited as demonstrating significant interest in the subject land was the proximity of traditional tribal ceremonial grounds, two major pow wow sites, two predominantly Indian schools, two Indian cemeteries, an Indian activity hall, and 241 Indian-occupied dwellings. 670 F.2d at 903.
123. The purpose of the zoning code was expressed as follows: Uncontrolled use and development of land within the Wind River Reservation poses a threat to the use of the Reservation as a homeland for the Shoshone and Arapahoe Tribes for whom the Reservation was established and jeopardizes the value of the land and water, impairs the economic benefits of the natural resources and damages the environment. All residents of the Reservation are affected. To protect the interests of the Tribes and all persons on the Reservation this Code is adopted.
124. 670 F.2d at 903.
125. Id.
to the tribe’s zoning authority.126

The Tenth Circuit’s decision forecasts continued testing of the scope of tribal authority to regulate non-Indian activities on fee lands within a reservation under the principles in Montana. The Supreme Court held in Montana that the general principles of retained inherent sovereignty, as defined in United States v. Wheeler,127 apply only where the activity sought to be regulated bears a clear relationship to tribal self-government or internal relations.128 Applying this test, the Court held that the Crow Tribe of Montana was without authority to enforce its hunting and fishing regulations against non-Indians on fee lands within the Crow Reservation because hunting and fishing did not bear the requisite relationship to tribal self-government or internal relations.129

However, the Montana Court noted that “Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.”130 Thus, the Court recognized limited sovereign control for activities that do not bear a clear relationship to self-government and internal relations.

Among the activities a tribe may regulate under this retained inherent power are those undertaken by non-Indians who enter into consensual relationships with the tribe or its members through commercial dealings, contracts, leases, or other arrangements.131 The Court asserted such power may be exercised over non-Indians on fee lands within a reservation when the activity sought to be regulated “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”132 This exception to the general principle of retained inherent sovereignty was specifically relied on by the Tenth Circuit in upholding the authority of the Shoshone and Arapahoe Tribes to enforce their zoning codes against non-Indians owning land in fee within the Wind River Indian Reservation.

Knight illustrates the potential discrepancies that may arise under the Montana clear relationship test, and suggests that the exception to the general principle of retained inherent sovereignty formulated by the Montana Court may eventually dilute the test. To enforce tribal regulations over non-Indians on fee lands, Montana requires a clear relationship to tribal self-government or internal relations. The Tenth Circuit circumvented this test in Knight by finding that the tribal regulation fell within the broad exception articulated in Montana for protection of the economic security and welfare of

126. Id. at 903.
127. 435 U.S. 313 (1978). The court in Wheeler held that, in general, the ability of Indian tribes to exercise sovereignty over the relations between the tribe and non-members has been divested, while the inherent power of self-government in regulating the relations of members of a tribe has been retained. Id. at 326.
129. Id. at 557. See Lands and Natural Resources, Eighth Annual Tenth Circuit Survey, 59 DEN. L.J. 335, 357 (1982).
130. 450 U.S. at 565.
131. Id.
132. Id. at 566.
the tribe.\textsuperscript{133}

The breadth of this exception may undermine the \textit{Montana} clear relationship test. For example, it is possible to imagine circumstances where hunting and fishing activities could "so threaten the tribe's political and economic security as to justify tribal regulation, thereby creating an exception to the \textit{Montana} holding."\textsuperscript{134} Hunting regulations might be enacted for the purpose of preserving game whose habitat is on Indian lands within reservation boundaries but whose migratory routes cross non-Indian fee land. Under these circumstances, the "clear relationship" test provides little guidance, in light of the economic and welfare arguments that could be made in support of regulation, and the substantial interests of tribes in preserving reservation wildlife.

Finally, \textit{Knight}'s acceptance of zoning as a legitimate exercise of police power\textsuperscript{135} suggests that any regulatory activity justifiable under tribal police power may meet the welfare exception of \textit{Montana}. Under the broad definition of police power, retained tribal sovereignty over non-Indian owners of fee land within reservations will be greatly expanded.

The issue of tribal inherent sovereignty also arose in \textit{Mescalero Apache Tribe v. New Mexico}.\textsuperscript{136} The question was whether a state may enforce its game laws against non-Indians hunting and fishing on reservation land held by the tribe. The Tenth Circuit held that where state game laws interfere with tribal self-governance, Indian game laws prevail. Read in conjunction with \textit{Montana}'s denial of Indian sovereignty over non-Indian hunting and fishing on fee land within the reservation boundaries, \textit{Mescalero} suggests that Indian game laws prevail on reservation lands, and state laws prevail over non-Indians on fee land.

\textit{Mescalero} involved a challenge to New Mexico's attempt to enforce its game laws within the boundaries of the Mescalero Apache Reservation. The Tenth Circuit first considered the issue in 1980\textsuperscript{137} when the court determined that state attempts to exercise regulatory powers within an Indian reservation are "precluded if the subject matter has been preempted by federal law or if the state regulations infringe on the Tribe's rights of self-government."\textsuperscript{138} The court, reviewing sources of tribal sovereignty and statutory grants of power, found six sources of preemption: 1) the treaty with the Apaches,\textsuperscript{139} 2) the Enabling Act for New Mexico,\textsuperscript{140} 3) the Indian Reorganization Act of 1934 (IRA),\textsuperscript{141} 4) the tribal constitution and ordinances en-

\begin{itemize}
\item \textsuperscript{133} 670 F.2d at 903.
\item \textsuperscript{134} 450 U.S. at 566.
\item \textsuperscript{135} \textit{Knight}, 670 F.2d at 903.
\item \textsuperscript{136} 677 F.2d 55 (10th Cir.), cert. granted, 103 S. Ct. 371 (1982).
\item \textsuperscript{137} \textit{Mescalero Apache Tribe v. New Mexico}, 630 F.2d 724 (10th Cir. 1980), vacated and remanded, 450 U.S. 1036 (1981); see Lands and Natural Resources, Eighth Annual Tenth Circuit Survey, 59 DEN. L.J. 335, 353 (1982).
\item \textsuperscript{138} 630 F.2d at 728.
\item \textsuperscript{139} 10 Stat. 979 (1852).
\item \textsuperscript{140} Ch. 310, 36 Stat. 557 (1910) (amended 1942).
\item \textsuperscript{141} 25 U.S.C. § 476 (1976).
\end{itemize}
acted pursuant to the IRA, extensive federal development assistance, and the negative inferences from Public Law 280, under which New Mexico had the option until 1968 of unilaterally asserting civil and criminal jurisdiction over the Mescalero Apache Reservation, but failed to do so. The court further determined that state attempts to enforce its game laws within the reservation would infringe upon the tribe's significant interest in governing game within the reservation and deprive the tribe of game revenues from its own conservation system. As a result, the state was precluded from attempting to regulate game within the boundaries of the Mescalero Apache Reservation.

The United States Supreme Court vacated the Tenth Circuit's judgment and remanded the case for further consideration in light of . On remand, the Tenth Circuit determined the issue to be whether a state has the authority to regulate non-Indian hunting on Indian-owned land within a reservation. The court distinguished as involving tribal authority to regulate non-Indian hunting and fishing on land held in fee within a reservation. The court instead relied upon the Supreme Court's holding in that an Indian tribe has the authority to impose a severance tax on non-Indian mining activities on reservation land as an inherent power necessary to tribal self-government and territorial management. The Tenth Circuit then reaffirmed its earlier finding that the tribe's management of wildlife resources on reservation lands for economic return constituted a matter involving self-government and internal relations, with which state game regulations would interfere. Tribes have preemptive authority to regulate non-Indian hunting and fishing within reservation boundaries except for non-Indian hunting and fishing on fee land.

B. Oil and Gas Leases

involved the scope of the Secretary of Interior's discretion to approve or disapprove communitization plans for oil and gas leases from Indians within a reservation and the reviewability of the Secretary's decision. The Tenth Circuit held that the Secretary or his designate may refuse communitization agreements if they do not serve the best economic interests of Indian lessors, and that this decision is subject to judicial review.

In 1971, entered into several oil and gas leases with

142. , 630 F.2d at 731 (chng Mescalero Apache Tribe Revised Const., art. 11, § 1(c)).
144. 630 F.2d at 733-34.
147. 677 F.2d at 56.
149. 677 F.2d at 57.
150. 671 F.2d 383 (10th Cir. 1982).
151. Id. at 388.
Ute Indians on lands in the Uintah and Ouray Indian Reservation in Utah. The leases, approved by the Bureau of Indian Affairs, were to expire in ten years unless the wells on each lease were producing oil or gas in paying quantities. Shortly before the leases expired the lessee had drilled producing wells on only some sections of its tribal leases and had one producing well on non-tribal land within a proposed communitized area.\(^{152}\) Kenai Oil and Gas sought to include their non-producing leases on Indian land in a communitized area with at least one producing well, thereby extending the non-productive leases beyond the primary term. The Superintendent of the Bureau of Indian Affairs, acting as the Secretary of Interior’s designate, exercised his discretionary authority and refused to approve the plan on the ground it did not serve the best economic interests of the Indians.\(^{153}\)

The district court held that the discretion authorized in the statutory and regulatory provision rendered the Secretary and his designates immune from judicial review under the Administrative Procedure Act (APA).\(^{154}\) The court further held that, if reviewable, the actions were not an abuse of the Secretary’s discretion, nor arbitrary or capricious.\(^{155}\)

The Tenth Circuit affirmed the district court’s determination that the refusal to approve the proposed communitization plans was within the Superintendent’s discretion, but held his action to be subject to judicial review. Citing *Citizens To Preserve Overton Park, Inc. v. Volpe*\(^{156}\) for preclusion of judicial review only “in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply,'”\(^{157}\) the court recognized a presumption of judicial review. The court found the exercise of the Secretary of Interior’s discretion to be governed by the fiduciary responsibilities vested in the United States as trustee of Indian lands.\(^{158}\) As such, the Secretary and his designate are charged with the duty of administering and supervising oil and gas leases on Indian lands in a manner to return a

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\(^{152}\) As described by the court: “Under a communitization agreement, operations conducted anywhere within the unit area are deemed to occur on each lease within the communitized area and production anywhere within the unit is deemed to be produced from each tract within the unit.” *Id.* at 384.

\(^{153}\) Communitization approval is required under 25 U.S.C. § 396(d) (1976):

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of sections 396a to 396g of this title shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

The regulations are contained in 25 C.F.R. § 211.21(b) (1982):

All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.


\(^{156}\) 401 U.S. 402 (1971).

\(^{157}\) *Id.* at 410 (quoting S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945)).

\(^{158}\) 671 F.2d at 386.
profit to the Indians, and in a fiduciary capacity, to provide for the economic interests of Indian lessors by maximizing lease revenues. The court held that these standards of conduct provide the requisite guidelines necessary for judicial review.

The Tenth Circuit also held that the regulatory provisions under which communitization plan review is made are broad enough to encompass considerations of the Indians' economic interests. Thus, the Superintendent acted within his discretion when he rejected the communitization plan for higher royalty payments and bonuses. Kenai Oil and Gas had argued that the Secretary could consider only matters involving production and conservation of tribal resources, and was bound to approve those plans that furthered the protection and preservation of tribal natural resources. The court emphasized that any such limitation upon the Secretary's deliberations would be inconsistent with his trust responsibilities, which require broad discretion to consider all factors affecting the Indians' interests.

The court rejected arguments that the Superintendent's decision was procedurally defective because he failed to base his decision on relevant factors and did not undertake additional factfinding. Noting that the Superintendent had consulted with Department of Interior experts and that Kenai Oil and Gas had presented its communitization proposal only two days prior to expiration, the court commented that Kenai Oil and Gas could not "expect greater consultation and deliberation."

Judge Barrett, concurring, also noted the short period in which the Superintendent was forced to make his decision and suggested a more favorable result to lessee if communitization proposals were presented in a timely fashion. When there is adequate time to hold hearings on the conservation-development characteristics of the proposed plan, a Superintendent's refusal to approve a communitization plan having the possibility of realizing a substantial bonus payment and increased royalty from another lessee would be contrary to the public interest. Lessees are entitled to rely on the pooling covenant in a lease when they have expended large sums in completing producing wells, and the development of additional wells is feasible. Judge Barrett concluded that Indian interests would be adequately protected by implied covenants requiring lessee-operators reasonably to develop the pooled leases and to exercise reasonable diligence in exploration and production on the pooled acreage.

V. ENVIRONMENTAL LAW

A. Uranium Tailings

In a lengthy, detailed opinion, the Tenth Circuit concluded in *Kerr-Mc*

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159. *Id.*
160. *Id.* at 387.
161. *Id.*
162. *Id.*
163. *Id.* at 388-89 (Barrett, J., concurring).
that the Nuclear Regulatory Commission (NRC) acted within its authority in promulgating uranium mill tailing regulations under the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) prior to the Environmental Protection Agency’s (EPA) issuance of general radiation standards. The court also concluded that the NRC had made a reasonable showing of significant risk sufficient to sustain the regulations.

At issue in Kerr-McGee Nuclear were the NRC’s regulations establishing standards for licensing active uranium mill tailings sites. The regulations required mill operators to provide wind protection for tailings; to reduce toxic material seepage into groundwater; to cover tailings with at least three meters of earth, reducing radon emanation to a minimal level; to reduce all airborne effluent releases to levels as low as reasonably achievable during milling operations; and to establish surety arrangements to ensure continued compliance with NRC requirements. Total costs imposed on existing mills by the regulations were estimated to range from $760,000,000 to $2,000,000,000.168

A health threat posed by tailings used in building materials in Grand Junction, Colorado, had awakened the public and government agencies to the dangers of radon produced from tailings.169 A generic environmental impact statement (GEIS) undertaken by the NRC in 1975 at the request of the Natural Resource Defense Council prompted new NRC regulations which were the predecessors to those under challenge in Kerr-McGee Nuclear. The early regulations essentially were license conditions imposed by the NRC, and represented a new approach to controlling uranium mill tailings under the Atomic Energy Act of 1954. Like the regulations under challenge, the early 1977 license conditions required mill operators to reduce wind dispersion of tailings and seepage into groundwater, and to cover tailings with at least three meters of earth, reducing radon emanation to a minimal level; to reduce all airborne effluent releases to levels as low as reasonably achievable during milling operations; and to establish surety arrangements to ensure continued compliance with NRC requirements.

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164. Nos. 80-2043, 80-229, 80-2269, 80-2271 (10th Cir. Mar. 23, 1982), reh’g granted, (Oct. 6, 1982).
166. 10 C.F.R. § 40 (1982). Among those challenging the regulations were Kerr-McGee Nuclear Corp., operator of a uranium mill in New Mexico’s Grants mineral belt; the American Mining Congress, a trade association representing nearly all domestic uranium producers; United Nuclear Corp., operator of a New Mexico mill, and partner in a Grants mineral belt mill; Western Nuclear, Inc., operator of mills in Wyoming and Washington; Energy Fuels Nuclear, Inc., and Phillips Uranium Corp.
167. Id.
168. Kerr-McGee Nuclear Corp., slip. op. at 43. NRC estimates indicated that the measures would cost from two percent to four percent of the total uranium mill product price, or from $760,000,000 to $1,521,000,000. Plaintiffs argued that the regulations would cost more than 7.5% of the product price because of a decline in the product price, or from $880,000,000 to $2,000,000,000.
169. Congress appropriated funds to the state of Colorado to limit radon exposure from tailings used in building materials. 86 Stat. 226 (1972).
170. 42 U.S.C. § 2011 (1976). Under the Act, the Atomic Energy Commission (AEC) was responsible for regulating and licensing the use, possession, and transfer of source material, by-product material, and special nuclear material. The NRC took over many of the AEC’s functions in 1974. Prior to 1978, the NRC’s authority over uranium mill tailings was limited to provisions for mill source material licensing. Because tailings did not fall within one of the three categories of radioactive material, the NRC’s control over tailings ceased upon removal from a licensed mill or termination of a mill license. Kerr-McGee Nuclear Corp., slip op. at 3-4.
ings with earth to reduce radon emissions.\textsuperscript{171}

NRC's regulatory scheme for uranium mill tailings was based on the GEIS estimate that radon, emanating from uncontrolled tailings, would account for six thousand additional cancer deaths over the next one thousand years.\textsuperscript{172} The National Academy of Sciences Committee on the Biological Effects of Ionizing Radiation (BEIR Committee) determined that although direct experimental evidence did not show that low-dose radiation, such as radon emissions, does or does not cause cancer, radon radiation had the potential for causing cancer and genetic mutations. Recognizing that high-dose radiation has been shown to cause cancer, the BEIR Committee hypothesized that radiation exposure is harmful regardless of its dosage level. The NRC consequently adopted the view that radiation from uranium mill tailings should be reduced to a level as low as reasonably achievable.\textsuperscript{173}

Plaintiffs challenged the NRC regulations on several grounds. Two salient assertions were that the NRC had usurped authority vested in the EPA, and that the NRC had failed to find that the regulations were necessary to address a significant risk.\textsuperscript{174}

1. NRC Authority

Under section 206 of the UMTRCA,\textsuperscript{175} the EPA is required to issue standards of general application to protect the public health and safety, and the environment from radiological and non-radiological hazards associated with uranium mill tailings at active sites.\textsuperscript{176} The NRC's authority also arises from the UMTRCA. Under section 206(d),\textsuperscript{177} the NRC is required to implement and enforce the EPA standards of general applicability during its licensing of byproduct materials.\textsuperscript{178} The NRC's licensing authority is set

\textsuperscript{171} Id. at 6.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 5. The BEIR Committee used a linear nonthreshold hypothesis for calculating deaths attributable to low-dose radiation. That hypothesis, adopted by the NRC, involved calculating extrapolations based upon the known deaths from specific levels of high-dose radiation and inferring downward to estimate the number of deaths attributable to specific levels of low-dose radiation. Id.
\textsuperscript{174} Other challenges included: 1) the NRC exceeded its authority in requiring disposal of tailings to eliminate the need for active maintenance once mills were decommissioned, 2) the NRC denied access to and comment on nineteen reports used by the NRC to support the regulations, 3) the NRC's technical criteria were arbitrary and capricious, 4) regulatory costs imposed on mill owners and operators failed to bear a reasonable relationship to the risks addressed, 5) the regulations were tailored to a hypothetical "model mill," and 6) the radiation standard, ground cover requirement, bar on groundwater degradation, and refusal to allow self-insurance were deficient for various reasons. Id. at 7-8. These challenges were addressed summarily by the court and will not be reviewed here.
\textsuperscript{175} 42 U.S.C. § 2022(b)(1) (Supp. IV 1980).
\textsuperscript{176} Congress enacted the UMTRCA in November 1978. The EPA regulations were to be issued within eighteen months after passage of the Act. Kerr-McGee Nuclear Corp., slip op. at 14.
\textsuperscript{177} 42 U.S.C. § 2022(d) (Supp. IV 1980).
\textsuperscript{178} Id. § 2014(e) defines "byproduct material" as: (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.
forth in sections 202 and 205 of the UMTRCA. Under section 202, byproduct material licenses issued or renewed by the NRC must contain site-specific terms to assure that prior to termination of the license, the licensee will have complied with NRC standards for uranium mill tailing sites regarding decontamination, decommissioning, and reclamation. Under section 205(a)(1), the NRC is charged with the general duty of ensuring that uranium tailings are managed in a manner appropriate to protect the public health and safety and the environment from radiological and non-radiological hazards associated with tailings. However, section 205(a)(2) suggests that the general duty imposed under section 205(a)(1) is limited by the EPA standards of general applicability since the NRC's management of byproduct material is to be carried out in a manner that "conforms with applicable general standards promulgated by the Administrator of the Environmental Protection Agency...".

When the EPA failed to issue standards of general applicability within the prescribed time, the NRC took the initiative to promulgate the regulations at issue in Kerr-McGee Nuclear. Plaintiffs argued that the statutory scheme established by section 206 of the Act required the EPA to act first. Plaintiffs argued that section 205(a)(2) supports the scheme in section 206 by requiring the NRC's management of uranium mill tailings sites to conform with the standards of general applicability issued by the EPA; therefore, Congress intended the EPA to issue its standards before the NRC tailored site-specific standards for individual licensees. The plaintiff argued the NRC exceeded its authority by promulgating its regulations prior to the EPA's issuance of general standards. Plaintiffs further supported their position by attempting to show that historically the NRC has undertaken the licensing role, while the EPA's role has been to promulgate generalized standards.

The NRC argued that its regulations were promulgated under section 202 of the Act, which grants the NRC authority to establish site-specific standards for licensees, and under the section 205(a)(1) grant of general authority to manage tailings to protect the public health and safety and the environment. The NRC also noted that language in section 108(a) of the Act, authorizing the Department of Energy to conduct remedial action at inactive sites but not before promulgation of the EPA standards, was omitted from those sections specifying the NRC's authority. The NRC also pointed to legislative history in which Congress stressed the urgency of regulating active uranium mill sites by November 1981. Congress indicated that the NRC was to perform a distinct regulatory task in establishing its mill site licensing standards, not a secondary role to the EPA's issuance of general standards. Finally, the NRC argued that by waiting for the EPA to issue its standards, the Commission would have failed to comply with the dictate of

179. Id. § 2113.
180. Id. § 2114(a)(1).
181. Id. § 2114(a)(2).
183. Id. at 19.
section 205(a)(1) of the Act, that it ensure proper management of tailings.\textsuperscript{186}

The Tenth Circuit, briefly reviewing the legislative history of the UMTRCA, concluded that Congress had been aware of the probability of the EPA's delay in issuing general standards. Nonetheless, Congress directed the EPA to promulgate standards for active sites within eighteen months after enactment. The legislative history indicated Congress' intention that the problem of active uranium mill tailing sites be addressed quickly. As a result, the court held that the NRC was compelled to undertake its managerial responsibilities under section 205(a)(1) and its licensing responsibilities under section 202 without waiting for the EPA to act, for to delay "would have been at odds with [the NRC's] affirmative duty."\textsuperscript{187}

In its holding, the court did not address those statutory provisions of the UMTRCA which would act to limit the NRC's ability to promulgate tailings standards until the EPA so acted. Furthermore, the court disregarded a recent congressional enactment\textsuperscript{188} which prohibits the NRC from implementing the challenged regulations with funds appropriated by the subsequent legislation.\textsuperscript{189} The court commented that the subsequent legislation, accompanied by numerous expressions of congressional sentiment that the NRC had acted too hastily in promulgating its regulations before the EPA issued its standards, provided little weight in interpreting the intent behind the earlier enacted UMTRCA. Thus, the court opined, "[w]here there is a clear expression of legislative intent upon enactment, subsequent statements by individual members of Congress or its committees are not entitled to be given overriding significance."\textsuperscript{190} The court found that the UMTRCA clearly expressed congressional intent that the NRC act before the EPA if necessary.

The Tenth Circuit's decision is suspect in two respects: the court failed to address the provisions of the UMTRCA that limit the NRC's authority to the legislative history and the EPA regulatory scheme, and the dissent convincingly asserted that subsequent legislation on the issue should be given more weight.\textsuperscript{191} Failure to consider all of the Act's provisions is demonstrated by the court's reliance on section 205(a)(1) as a general grant of authority to manage tailings sites in a manner appropriate to protect the public health and safety and the environment. This exclusive reliance ignores the language of section 205(a)(2), which, contrary to the decision, appears to

\begin{itemize}
\item \textsuperscript{186} Kerr-McGee Nuclear Corp., slip op. at 21.
\item \textsuperscript{187} Id. at 24.
\item \textsuperscript{188} Energy and Water Development Appropriation Act of 1982, 95 Stat. 1135.
\item \textsuperscript{189} Id. at 1147 (to be codified at 42 U.S.C. § 5801):
\begin{quote}
Provided further, That no funds appropriated to the Nuclear Regulatory Commission in this Act may be used to implement or enforce any portion of the Uranium Mill Licensing Requirements published as the final rules at 45 Federal Register 65521 to 65538 on October 3, 1980, or to require any State to adopt such requirements in order for the State to continue to exercise authority under State law for uranium mill and mill tailings licensing or to exercise any regulatory authority for uranium mill and mill tailings licensing in any State that has acted to exercise such authority under State law.
\end{quote}
\item The Act also provided, however, that appropriated funds could be used to regulate byproduct material in the manner and extent permitted prior to Oct. 3, 1980.
\item \textsuperscript{190} Kerr-McGee Nuclear Corp., slip op. at 26.
\item \textsuperscript{191} Id. (Barrett, J., dissenting).
\end{itemize}
modify the NRC's affirmative duty by requiring conformity with the EPA standards. This scheme is consistent with the limiting provisions of section 206(d). Although the court noted that the NRC had given its assurance that its regulations would conform to later adopted EPA standards, administrative agency agreements should be given little or no weight in determining the scope of legislative authority.

Judge Barrett's dissent emphasized that subsequent legislation "is a clear expression of legislative intent" directed to the UMTRCA, and that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." Unlike the majority's portrayal of the legislative history of the subsequent legislation as expressing the sentiments of individual congressmen, thus deserving little weight, passage of the legislation would seem to be a clear and unified expression by Congress as a decision-making body that the NRC had exceeded its authority.

2. Significant Risk

In the second prong of its challenge, Kerr-McGee Nuclear Corp. asserted that the NRC had failed to make a finding of significant risk to justify its regulations. Plaintiffs argued that under Industrial Union Department v. American Petroleum Institute, the NRC could impose its regulations only upon a finding of the necessity to address a significant risk; the Atomic Energy Act does not permit the NRC to address all conceivable risks.

Industrial Union Department involved regulations promulgated by the Occupational Safety and Health Administration (OSHA) that reduced the permissible exposure limit to benzene, a common industrial solvent having a causal connection to cancer, from the standard of ten parts per million to one part per million. The regulations were promulgated pursuant to OSHA's authority to protect workers from toxic materials. Like the regulations in Kerr-McGee Nuclear, the OSHA regulations were not based on specific findings that low doses of benzene were carcinogenic. OSHA had promulgated its low-level exposure standards on the assumption that absent definite proof of a safe level, "any level above zero presents some increased risk of cancer." The Supreme Court, however, interpreted the Occupational Safety and Health Act of 1970 as requiring a showing of significant risk before OSHA could act to establish standards for exposure to toxic materials.

192. Id.
193. Id.
194. Id. (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969)).
198. 448 U.S. at 635-36 (emphasis in original).
In so holding, the Court relied on the Act’s definition of standard as requiring practices “reasonably necessary” for health and safety. The Supreme Court then applied the significant-risk-of-harm test to determine if the regulations were reasonably necessary. A finding of significant harm must be supported by substantial evidence.

In Kerr-McGee Nuclear Corp. the Tenth Circuit concluded that the significant risk doctrine is confined to OSHA, or at least to those statutes containing language of the “reasonably necessary” nature found within the Act; the doctrine does not apply to the UMTRCA. The court also concluded that the UMTRCA’s legislative history regarding significant hazards to the public by uranium mill tailings appears “tantamount to a Congressional determination of ‘significant risk’ and thus may obviate the need for an equivalent determination by the NRC.” The court further held that the NRC findings as to the risks posed by uranium mill tailings probably would satisfy the significant risk requirement if it were applicable.

The determination of a significant risk of harm involves a two-step process. First, the agency establishes a specific level of risk of harm as being significant. The level need only be a reasonable one, or between one in one thousand and one in one billion. Second, the agency determines whether the risk posed by the conduct to be regulated exceeds that level. Those findings are subject to the “substantial evidence” or “arbitrary and capricious” standard of review. The court held that the NRC probably met the significant risk test upon its findings that radon released from uncontrolled uranium tailings piles would cause about one additional cancer death in fifty million, or 5.4 deaths, and one genetic defect in one hundred fifty million, or two genetic defects, in the United States each year between 1979 and the year 3000, based upon an estimated population of 293 million. Although the court characterized the risks as seemingly small, other characteristics of uranium mill tailings contributed to the reasonableness of the regulations promulgated.

B. Endangered Species

Glover River Organizations v. Department of Interior presented the Tenth
Circuit with a challenge to the Secretary of Interior's failure to prepare an environmental impact statement (EIS) pursuant to the National Environmental Policy Act (NEPA) before listing the leopard darter as a threatened species and designating its critical habitat under the Endangered Species Act. The challenge was brought by the Glover River Organization, a nonprofit Oklahoma corporation devoted to promoting flood control projects in the Little River Basin of southeastern Oklahoma. Plaintiffs argued that prior to the government's designations, an EIS should have been prepared to determine the impact of such action on federal funding for flood control projects and other federal industry and farm programs in southeastern Oklahoma. The organization alleged that the listing would eliminate appropriations for dams and soil conservation watershed projects for flood prevention along the Glover Creek and Little River. Many of the organization's members had been victims of severe flood damage.

The Tenth Circuit applied a two-step test to determine Glover River's standing. A plaintiff must allege that he has sustained "a distinct and palpable injury to himself," and that "the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." Applying this test, the court concluded that the first step of the test was satisfied by plaintiff's allegation of future flooding if dams were not built. The injury was concrete, not simply speculative or hypothetical. However, the court held that the second part of the test could be met only by a substantial showing that the relief requested would redress the injury claimed. The organization failed to demonstrate by a substantial showing that a causal link existed between the listing of the leopard darter and the loss of federal funding to build dams. The court summarized: "Even if the preparation of an EIS should lead to removal of the leopard darter from the threatened species list, this would not ensure the funding or construction of the projects Glover desires. Such relief must come from Congress and the President, not the Secretary of the Interior." The organization failed to establish standing.

The challenge in Glover River Organization is certain to provoke reappraisals of the scope of NEPA and the future role of the EIS. In essence, plaintiffs in Glover River Organization employed a "reverse" EIS strategy. Traditionally, the EIS is used to delay dam construction by demonstrating injury to endangered species and critical habitat. In this case an EIS was sought to prevent impediment to dam construction by showing injury to landowners. If future plaintiffs overcome the standing hurdle, the tactic employed in Glover River Organization may become a popular means of countering similar delaying strategies used by environmentalists.

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214. 675 F.2d at 253.
215. Id. at 254.
216. Id. at 253 (quoting Warth v. Seldin, 422 U.S. 490, 501, 505 (1975)).
217. 675 F.2d at 255.
VI. Water Law

A. Dredge-and-Fill Permits

Conditions imposed on a nationwide dredge-and-fill permit under section 404 of the Clean Water Act\textsuperscript{218} occasioned a challenge to the Army Corps of Engineers' authority to control water releases from a dam in \textit{Riverside Irrigation District v. Stipo}.\textsuperscript{219} Riverside Irrigation District and the Public Service Company of Colorado (PSC) were engaged in a joint project to construct a dam and reservoir on Wildcat Creek, a tributary of the South Platte River in Colorado. The reservoir water, acquired under state law, was to be used for irrigation and as a coolant for a coal-fired power plant. Construction was to proceed under a nationwide dredge-and-fill permit, which authorizes the discharge of dredged or fill material, causing minimal adverse effect on the environment, into certain waters of the United States.\textsuperscript{220} A nationwide permit is automatic for those who qualify; therefore, no individual application is necessary for qualified applicants.

After examining the potential impact of the project, the Fish and Wildlife Service determined that operation of Wildcat Reservoir would likely jeopardize the existence of the whooping crane, an endangered species, and adversely modify a fifty-three mile stretch of the crane's critical habitat 300 miles downstream, on the Platte River.\textsuperscript{221} The Corps of Engineers notified Riverside Irrigation District and PSC that the project would not qualify for a nationwide permit unless steps were taken to mitigate its impact on the whooping crane and its habitat. Mitigating measures included either replacing the amount of water consumed by Wildcat Reservoir or improving the whooping crane's habitat along the Platte River in Nebraska.\textsuperscript{222} Both measures required a modification of water releases from the reservoir. Failure to comply with the measures would require Riverside Irrigation District and

\begin{footnotes}
\footnote{219}{658 F.2d 762 (10th Cir. 1981).}
\footnote{221}{658 F.2d at 764.}
\footnote{222}{\textit{Id.} at 766. The alternatives were listed by the Fish and Wildlife Service Regional Director as follows:}
\end{footnotes}

\begin{quote}
The first alternative is for the Corps to condition the Section 404 permit to require replacement of the additional consumptive use due to the Wildcat Reservoir. Replacement must be done in a manner that closely approximates the flow that would occur if the reservoir were not constructed. It would be beneficial if the applicant were to obtain and release this water from a source closer to the critical habitat than the Wildcat Reservoir, thereby making the water less vulnerable to diversion upstream from this habitat; however, this would be left to the applicant's discretion. The volume to be released might be reduced and the timing altered after conclusion of Department of Interior studies of the Platte River system . . . .

The second alternative is for the Corps to require the applicant to improve or maintain whooping crane habitat along the Platte River. This alternative probably would include water releases (of a lesser volume than the reservoir would deplete) combined with land acquisition and habitat manipulation and management. Examples of habitat practices include clearing and leveling of islands, burning or spraying of vegetation, and flow regulation designed to increase scouring.

\textit{Id.} (quoting letter from Donald W. Minnich, Regional Director of the United States Fish and Wildlife Service, to Col. D.V. Stipo, District Engineer of the United States Army Corp of Engineers (Dec. 20, 1979)).
\end{quote}
PSC to seek an individual permit, with a full public interest review.\textsuperscript{223}

Riverside Irrigation District and PSC challenged the Corps of Engineers' exercise of authority in district court, asserting that they were entitled to a nationwide permit and were not required to comply with the mitigation measures or seek an individual permit. The Corps responded with a motion to dismiss for lack of jurisdiction and failure to exhaust administrative remedies.\textsuperscript{224} The Corps sought to require the irrigation district and PSC to begin administrative proceedings to seek an individual permit before testing the nationwide permit issue in court.\textsuperscript{225} The district court upheld jurisdiction to review the Corps' action.

On appeal, the Tenth Circuit considered whether the construction permit issue could be tested in a judicial rather than an administrative proceeding. The court concluded that jurisdiction was proper for two reasons. First, the court noted that the Corps had clearly decided that plaintiffs did not qualify for a nationwide permit.\textsuperscript{226} Thus, the official action represented a final determination on the matter, thereby subjecting the action to judicial review. Second, the court determined that for plaintiffs to proceed with construction and potentially incur severe criminal and civil penalties was an unrealistic course of action.\textsuperscript{227} Therefore, plaintiffs were entitled to judicial review in their search of a remedy.

The Tenth Circuit then narrowed the issue to whether the Corps of Engineers had exceeded its statutory authority in requiring compliance with mitigating measures that modified reservoir releases prior to issuing a nationwide dredge-and-fill permit. Although the court remanded the issue for determination, it noted that "[n]o one in these proceedings asserts that the construction work on the dam nor the placement of fill material will in any way affect the crane habitat."\textsuperscript{228} An assessment of the impact of the Wildcat project on whooping cranes and their habitat was made by the Corps of Engineers and the Fish and Wildlife Service. The court noted that the agencies' concerns focused on the operation of the Wildcat Reservoir after construction. Thus, the court concluded that the issue was whether the Corps of Engineers may, pursuant to its authority to issue dredge-and-fill permits, impose conditions on the operational phase of the dam.\textsuperscript{229}

The resolution of this question on remand will influence the degree of control that may be exercised pursuant to section 404 of the Clean Water Act over water rights acquired under state law. Storage rightholders, now subject to state in-stream flow maintenance restrictions could become subject to further flow restrictions imposed by the Corps of Engineers. Furthermore, the Corps' modifications of stream flow conditions could encompass purposes other than the state's maintenance of priority water rights.

\begin{itemize}
\item 223. 658 F.2d at 766. See 33 C.F.R. § 325 (1981).
\item 224. 658 F.2d at 764.
\item 225. Id. at 765.
\item 226. Id. at 767.
\item 227. Id.
\item 228. Id. (emphasis in original).
\item 229. Id. at 768.
\end{itemize}
B. Beneficial Use

In *Jicarilla Apache Tribe v. United States*, the Tenth Circuit considered the validity of an agreement between the Water and Resources Services (formerly the Bureau of Reclamation) and the city of Albuquerque. The agreement granted the city permission to store its share of the San Juan-Chama Project water in Elephant Butte Reservoir. The issue was whether the proposed uses for the stored water constituted a beneficial use under New Mexico's permit system of prior appropriation. The uses proposed by the city included present sales to beneficial users, exchanges with other beneficial users, power generation, municipal use, and recreation.

The city contracted for 48,200 acre feet of water per year beginning in 1982. As a result, the city was obligated to repay the federal government its portion of project construction costs attributable to the city's water supply, plus interest, and annual operation and maintenance charges. Payment was required whether or not the city used its allocated water supply. To offset its costs, Albuquerque sought to put its supply to immediate use even though the city will not need its full allocation until the year 2025. By that date the difference between its needs and its accumulated water allocation would total an estimated 1,121,900 acre feet. It is this "excess" water the city sought to store and place in use. If the excess water were stored for forty years until full use by the city, ninety-three percent of the water would be lost to evaporation.

The Tenth Circuit reviewed the city's plans to sell a portion of its water for present beneficial use and to exchange a portion for other water at a future time. The court regarded both uses as too speculative to qualify as a beneficial use because no showing of specific sale or exchange agreements had been made; a mere hope of sales in the future is not sufficient to establish a beneficial use. Albuquerque's plans to use the stored water to generate additional power were also speculative because the city lacked firm commitments from buyers. Thus, while the court recognized resale, exchange, and power generation as beneficial uses under state law, the application of the stored water to those uses was too remote or speculative to constitute a beneficial use.

The Tenth Circuit then turned its attention to whether recreational use qualifies as a beneficial use under state or federal law. The court, finding the issue had not been resolved under state law, concluded that federal law...
prohibits water storage for solely recreational purposes. Relying on the authorizing legislation and contemporaneous history of the San Juan-Chama Project, the court ruled that while recreation and wildlife were among those activities and resources to be benefited by the project, they constituted merely incidental uses. Congress intended that water storage serve the primary purposes of municipal, domestic, and industrial uses in order to qualify as a beneficial use.  

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239. 657 F.2d at 1145.