The Public Trust Totem in Public Land Law: Ineffective - and Undesirable - Judicial Intervention

Steven M. Jawetz
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I

INTRODUCTION

A. The Problem

Through its ownership of almost one-third of the nation's land, the federal government has control over an immense wealth of natural resources. As the market demand for energy, hardrock minerals, and

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1. BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF INTERIOR, PUBLIC LAND STATISTICS 1, 9 (1980) [hereinafter cited as PUBLIC LAND STATISTICS].

2. Some of the natural resources on the public lands have great economic value, while others represent a non-commercial, yet priceless national heritage.

Public land areas “contain the bulk of the known domestic resources of a majority of the metallic minerals.” OFFICE OF TECHNOLOGY ASSESSMENT, MANAGEMENT OF FUEL AND NONFUEL MINERALS IN FEDERAL LAND 5 (1979). See also U.S. GENERAL ACCOUNTING OFFICE, MINING LAW REFORM AND BALANCED RESOURCE MANAGEMENT 2 (1979) (“[T]he public land areas of the West generally hold greater promise for future [hardrock] mineral discoveries than any other region”).

The public lands also contain 35% of the domestic coal supply. OFFICE OF TECHNOLOGY ASSESSMENT, supra, at 298. About 50% of Alaska's undiscovered oil and gas reserves are estimated to be on public land, while approximately 28% and 31% of the identified oil and gas resources, respectively, in the eleven western states are on public land. Id. at 314. The public lands also hold 80% of the shale oil deposits in the U.S. Moffett, Federal Oil Shale Policy: An Analysis of Development Alternatives, 13 HOUS. L. REV. 701, 703 (1976). In fiscal year 1980, production on the public lands contributed 144 million barrels of petroleum, 1 quadrillion cubic feet of natural gas, and 71 million short tons of coal. PUBLIC LAND STATISTICS, supra note 1, Table 67 at 98.

Moreover, while the national forests contain only about 18% of the nation's commercial timber lands, they account for over half of the softwood timber inventory due to dense, old-growth stands. G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 9 (1981).

In addition, many wild animals species depend on the prime habitats found within the public lands. See Swanson, Wildlife on the Public Lands, in WILDLIFE AND AMERICA 428 (H. Brokaw ed. 1978). The BLM estimates that 36,864 bears (black, brown, and grizzly), 44,684 bighorn sheep, 250,030 caribou, 68,923 elk, 88,451 moose, 5,182 mountain goats, and 1,223,518 deer use the public lands. PUBLIC LAND STATISTICS, supra note 1, Table 49, at 74.
timber continues to grow, interest groups seeking to exploit such resources are placing increasing pressure on federal administrative agencies to allow further commercial development of the public lands. Groups interested in the protection of noncommercial values in the public lands have historically been at a relative disadvantage in the administrative process, and are therefore likely to seek relief through any available forum, including the courts.

The courts have relatively few substantive standards by which to judge the legality of federal agency conduct concerning public lands and resources. In particular, the "multiple use" statutes governing the public lands are a vital source of water as well; 60% of the water yield in the eleven western states comes from the snowpack and other collected precipitation on the public lands. United States v. New Mexico, 438 U.S. 696, 699 n.3 (1978).

Congress has acted to preserve many wild areas and scenic wonders. The U.S. now has by far the largest governmentally designated system of wild areas in the world, see J. HENDEE, G. STANKEY & R. LUCAS, WILDERNESS MANAGEMENT 58 (1978), and national treasures such as the Grand Canyon, Yellowstone, Yosemite Valley and Bryce Canyon have been protected. However, many unique scenic resources continue to be lost or endangered by development, dams, etc. Escalante Canyon and Glen Canyon, both spectacular, were flooded by federal projects. Bryce Canyon remains threatened by strip mining and a proposed power project (the Allen-Warner Valley System). See Sierra Club v. Andrus, 487 F. Supp. 443, 445 (D.D.C. 1980).

3. See COGGINS & WILKINSON, supra note 2, at 1-17.
4. See infra notes 23-34 and accompanying text.
5. See infra text accompanying notes 200-07.


[the term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

In section 1702(h), FLPMA follows the Multiple-Use Sustained-Yield Act almost exactly in
two largest resource agencies, the Bureau of Land Management and the U.S. Forest Service, provide extremely broad authority to balance economic and non-economic values in public lands decisionmaking, and seem to environmental groups to be almost devoid of objective restrictions on agency discretion.\(^6\)

The public trust doctrine has been suggested as a source of substantive standards for judicial review of resource agency action.\(^7\) However, Congress has criticized the doctrine,\(^8\) and Congress’ wishes have been followed in at least one case.\(^9\) Despite congressional criticism, academics continue to advocate use of the doctrine,\(^10\) environmental groups will be tempted to retain it in their arsenal, and activist courts will also be tempted to utilize it. The purpose of this comment is to show that the public trust doctrine in the public land context has no more substantive content than the statutes it is supposed to supplement, and that a court’s use of the doctrine to regulate agency decisionmaking is therefore little more than a sham—a mask for the unauthorized substitution of judicial for administrative discretion. This comment seeks to lay the public trust doctrine to rest, and to encourage environmental groups or other concerned parties to seek more detailed statutory and regulatory standards and greater participation in agency decisionmaking.

B. Federal Management of the Public Lands

Four federal agencies manage the bulk of the approximately 738 million acres\(^11\) of land belonging to the United States. The U.S. Fish and Wildlife Service manages about 30 million acres, including all of the National Wildlife Refuges.\(^12\) The National Park Service, which

defining “sustained yield” as “the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.” While the more recent statutes have been more specific than the Multiple-Use Sustained-Yield Act of 1960 in terms of the uses and values to be weighed in the multiple-use calculation, Congress has not chosen to replace the multiple-use statutes with dominant-use statutes. Rather, Congress over the last 20 years has consistently reaffirmed its decision to have a multiple-use policy apply to the bulk of the public lands.

10. See sources cited supra note 7.
11. See supra note 1.
like the Fish and Wildlife Service is located in the Department of Interior, administers the 30 million-acre National Park System and various national monuments and recreation areas. These two agencies raise relatively few problems regarding their coordination of economic and non-economic uses of the public lands because they operate under statutes that clearly express dominant uses and purposes.

The most significant problems of federal land management spring from the activities of the Bureau of Land Management and the U.S. Forest Service. The Bureau of Land Management (BLM), also in the Department of Interior, administers about 397 million acres in the West, the South, and Alaska. The Bureau's chief function is to oversee grazing and mining activities on the lands under its jurisdiction. The Forest Service is in the Department of Agriculture. The oldest of the resource agencies, it manages about 187 million acres, and is primarily responsible for regulating timber harvesting in the National Forests. The BLM and the Forest Service each manage the units of the National Wilderness Preservation System that lie within their respective jurisdictions.


14. The National Park Service operates under a mandate to "conserve the scenery and the natural and historic objects and the wildlife [in the National Parks] and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." National Park Service Organic Act of 1916, 16 U.S.C. § 1 (1976 & Supp. IV 1980). The requirement that the parks be left "unimpaired for the enjoyment of future generations" makes preservation mandatory and has virtually excluded commercial interests from the parks. See Note, Managing Federal Lands: Replacing the Multiple Use System, 82 YALE L.J. 787, 796 n.45, 797 (1973).

Although it is true that the Secretary of the Interior can permit grazing in the National Parks under certain circumstances, potential conflict over grazing has been limited because the Park Service has not generally used this authority. National Park Service Organic Act, 16 U.S.C. § 3 (1976 & Supp. IV 1980); Note, Managing Federal Lands: Replacing the Multiple Use System, 82 YALE L.J. 787, 797 n.47 (1973).

The Fish and Wildlife Service manages the National Wildlife Refuge System under an act that similarly restricts commercial activity. The act declares that the National Wildlife Refuge System was established "for the conservation of fish and wildlife, including species that are threatened with extinction." National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd(a)(1) (1976 & Supp. IV 1980). In carrying out this mandate, the Fish and Wildlife Service has banned "[s]oliciting business or conducting a commercial enterprise on any national wildlife refuge . . . except as may be authorized by special permit." 50 C.F.R. § 27.97 (1981).

Thus, the Park Service and the Fish and Wildlife Service have had few problems coordinating economic and non-economic uses of public lands because they operate under statutes that severely restrict commercial activity. Note, Managing Federal Lands: Replacing the Multiple Use System, 82 YALE L.J. 787, 797 (1973).

15. See Wilkinson, supra note 7, at 272.

16. See PUBLIC LAND STATISTICS, supra note 1, Table 9, at 21.


18. PUBLIC LAND STATISTICS, supra note 1, Table 9, at 21. For a short history of the national forests, see COGGINS & WILKINSON, supra note 2, at 140-141.
The Bureau of Land Management and the Forest Service operate under "multiple-use sustained-yield" management statutes. These statutes are the source of the difficulties for conservationist and preservationist groups attempting to participate in or challenge BLM or Forest Service actions. Economic and non-economic resource values inevitably come into conflict on the public lands, as mining interferes with scenery, timber harvesting disrupts wilderness, etc. When conflicts occur, the Forest Service and BLM must use the authority granted to them by the multiple-use statutes to balance the various interests involved. The statutes themselves provide little guidance, however, for while they list factors that the agencies are to consider, they do not establish any particular preferences or weights to shape agency decisionmaking. In this respect, they vary considerably from the dominant-use statutes under which the Fish and Wildlife Service and National Park Service function. Where statutory guidance is minimal, the agencies must turn to other guides, such as constituent interests, to resolve resource conflicts.

C. Problems of Agency Discretion

The lack of statutory standards to guide the BLM and the Forest Service in their exercise of discretion may lead environmental groups to question the legitimacy as well as the quality of the decisions made, particularly where many circumstances may subtly influence the resource agencies to favor commercial, industrial, or other well-organized interests over more diffuse, relatively unorganized interests. For example, under current agency procedures, local BLM and Forest


20. See infra note 29 and accompanying text.

21. For example, damming of a major river can lead to increased water supplies for drinking, irrigation, recreational use, and electricity generation, but it may also lead to extensive destruction of wildlife habitat, disruption of downstream ecosystems, and the disappearance of the many amenities of a free-flowing river. Similarly, many of the old-growth timber lands contain unique scenic and aesthetic values that would be eliminated by substantial harvesting in the area. For other examples of the conflict between wilderness preservation and increased recreational use or resource exploitation see COGGINS & WILKINSON, supra note 2, at 4-17.

22. See supra note 5 for statutory definitions of multiple-use and sustained-yield. See infra text accompanying notes 193-210 for discussion of specific criteria in FLPMA and NFMA.

23. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1669, 1684-87 (1975). Congressional decisions derive their legitimacy from the nature of the underlying political framework: one-person, one-vote election. In the past, administrative decisions could be validated under the "traditional" model of administrative law by legislatively-established rules that controlled agency discretion. Id. at 1672. Hence, govern-
Service officials have considerable decisionmaking responsibility, particularly with regard to resource and land use planning.\textsuperscript{24} Agency procedures give local resource users substantial access to local officials through the mechanism of advisory boards.\textsuperscript{25} Even apart from such provisions, local users are best placed to exert informal pressure on local agency personnel, since they are often neighbors and friends and move in the same social circles.\textsuperscript{26} Moreover, local residents can conveniently use the agencies' adjudication processes to challenge particular land use decisions, perhaps forcing line officers to choose between time-consuming, bothersome appeals and conceding away portions of agency programs to satisfy local interests.\textsuperscript{27} Although non-local commercial interests may have the financial and organizational strength occasionally to compete with local users in the decisionmaking process, recreational and conservation interests, typically non-local and underfunded, will be virtually unrepresented.\textsuperscript{28}

Similar structural factors create the appearance of institutional biases on the national level. Even where the agencies provide opportunities for formal public involvement in resource planning,\textsuperscript{29} commercial and industrial interests may have an advantage over those persons desiring to promote less tangible values. Individuals and entities with the former sorts of interests are relatively few in number, and each one has no

\textsuperscript{24} District officers bear the main responsibility for developing resource management plans, see 43 C.F.R. § 1601.0-4 (1981) (BLM) and 36 C.F.R. § 219.4 (1981) (Forest Service).

\textsuperscript{25} Public participation requirements are supposed to be "appropriate to the area and people involved . . . and the level of planning." See, e.g., 36 C.F.R. §§ 219.7(d), (e) & (f). Local government officials are frequently to be consulted. The BLM continues the past practice of advisory boards with renewed vigor, 43 C.F.R. § 1784, including grazing advisory boards made up solely of holders of grazing permits and leases, 43 C.F.R. § 1784.6-5, and local district advisory councils, 43 C.F.R. § 1784.6-4.

\textsuperscript{26} Note, supra note 14, at 790-94. See H. KAUFMAN, THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR 76-77 (1960).

\textsuperscript{27} KAUFMAN, supra note 26, at 77-79.

\textsuperscript{28} See infra note 37 and accompanying text.

\textsuperscript{29} Both the BLM and Forest Service regulations now provide for extensive public participation in planning, though a bias toward local users continues. See supra note 24. Both FLPMA and NFMA provide for public participation in very broad terms, however, and it remains to be seen whether the agencies can effectively carry out the mandate. See Achterman & Fairfax, The Public Participation Requirements of the Federal Land Policy and Management Act, 21 ARIZ. L.J. 501, 517-21 (1979).
a substantial stake in the outcome of the federal resource allocation process. Hence, it is worthwhile for these interests to provide costly information and assistance to the agencies, and to fund national representatives and trade associations in Washington, D.C.

On the other hand, while individuals and members of groups interested in recreation or preservation tend to be numerous, no one individual or group has a significant personal stake in the substance of agency decisionmaking. It is therefore more difficult to organize a collective pressure group, and the concomitant benefit to individual group members is small.30 The incentive to organize is further lessened by the "free rider" problem: because the benefits of favorable federal resource allocation decisions accrue to non-members as well as members of the pressure group, there is little reason for non-members to pay the cost of joining.31

Commercial and industrial interests retain other relative advantages in agency decisionmaking processes. Because agency resources are limited, agencies tend to depend fairly heavily on outside sources for information, policy development, and political support.32 Commercial and industrial interests are well prepared to supply needed assistance.33 Moreover, such interests tend to have substantially more funds and personnel to commit to adversary proceedings than do the agencies, forcing the latter to compromise.34

Environmental groups feel that these various sources of systematic bias endanger the legitimacy and substantive quality of Forest Service and BLM decisions regarding the public lands.35 The scarcity of substantive statutory standards to constrain agency discretion aggravates the apparent threat. However, the exercise of agency discretion under a multiple-use statute is essentially a legislative process. The agency must balance the various factors and interests relevant to each decision, and arrive at some politically acceptable result. Because a multiple-use strategy has multiple objectives, every result will seem undesirable to some and perfect to none. In the words of Professor M. M. Kelso, "[m]ultiple use is simultaneously the chief supporting argument for public ownership and management and the chief source of conflict between users and the managing agency."36 Since the multiple-use stat-

31. Id. See Note, supra note 14, at 795.
32. Stewart, supra note 23, at 1686, 1714.
33. Id.
34. Id.
35. But for evidence that the systematic bias is more apparent than real, see infra notes 223-37 and accompanying text.
utes provide relatively few substantive standards for judicial review, judicial deference to administrative exercises of legislative authority regarding the public lands should be great.

D. Use of the Public Trust Doctrine

Despite judicial deference to administrative decisionmaking, groups interested in recreation, wildlife, wilderness, and other intangible public land values continue to seek judicial assistance when frustrated by agency actions (or failures to act) that seem to disregard their goals. The current administration in Washington, with its hostile attitude toward public participation and accommodation of environmental interests, is likely to increase rather than decrease environmental groups' dependence upon the judiciary in public land disputes. Since the main public land statutes offer few substantive restraints on administrative authority, plaintiffs are likely to seek alternative forms of legal armament with growing frequency in their attempts to influence agency behavior.

Commentators have suggested that the public trust doctrine may provide substantive standards for judicial review of resource agency conduct. The goal of this comment, however, is to show that the public trust doctrine in the public lands context has no more substantive content than the statutes it purportedly supplements. After examining the origins and development of the public trust doctrine, the comment compares judicial review under the doctrine to review under the Administrative Procedure Act and other statutory provisions. The analysis indicates that review under the public trust doctrine, if used to constrain agency action, may involve little more than an unguided exercise of judicial power. The author concludes that absent some infusion of substantive content, the doctrine should not be used to substitute judicial for administrative decisionmaking in this area of polycentric and inherently legislative decisionmaking. Congress has taken steps to deal with the problem of unconstrained agency discretion by amending the multiple-use statutes and current resource agency regulations to (1) refine and expand guidelines and priorities for resource allocation on the public lands, and (2) include more specific procedures


40. See supra note 19.

41. See, e.g., sources cited supra note 7.
and guidelines for public participation in particular agency decision-making processes. Groups frustrated by agency actions should seek further amendment of these guidelines and statutes rather than rely on the public trust doctrine.

II
THE PUBLIC TRUST DOCTRINE
A. Origins

Modern public trust law has its roots in Roman and English concepts of the res communes: property held in common for the benefit of the public. The res communes doctrine applied to property used for certain purposes, such as navigation and fishing, and distinguished such property from general public property which the sovereign could routinely grant to private parties. Hence, rivers, the sea, and the foreshore were preserved for the benefit of the public, and the rights of access, passage, and fishing were common to all persons.

In England, the struggle between Crown and Parliament and the growth of common law notions of private ownership modified the doctrine. Thus, the ownership of beds of navigable waters was said to lie in the King rather than in the public, although the King was held powerless to alienate those lands. The inability of the King to alienate or otherwise modify public rights in the rivers or shores was not a general restriction on government, however, as Parliament could freely legislate regarding fisheries, revenues, public safety, or other public purposes legitimately within the scope of what today is known as the police

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42. See infra notes 193-207 and accompanying text.
43. See infra notes 208-10 and accompanying text.
44. THE INSTITUTES OF JUSTINIAN (T. Cooper trans., 3d ed. 1852) refers to the rights of the public in waterways as follows:

> Things common to mankind by the law of nature, are the air, running water, the sea, and consequently the shores of the sea; no man therefore is prohibited from approaching any part of the seashore . . . .

*Id.* at 2.1.1.

> Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common.

*Id.* at 2.1.2.

> By the law of nations the use of the banks is as public as the rivers; therefore all persons are at equal liberty to land their vessels . . . as to navigate upon the river itself. . . .

*Id.* at 2.1.4.

For a concise discussion of the history and development of public trust law, see the seminal work by Sax, Judicial Intervention, supra note 7. See also Sax, Liberating the Public Trust Doctrine from its Historical Shackles, 14 U.C. DAVIS L. REV. 185 (1980) [hereinafter cited as Sax, Liberating the Public Trust].

American law inherited the somewhat paradoxical notion of "public rights" in certain property and government ownership of that property. Early statutes provided public access to and through certain waterways, and courts held that the states, as trustees for the public, may not absolutely alienate or destroy public rights in the beds of navigable waters. The question remains unsettled, however, whether the public trust doctrine provides individuals with judicially enforceable rights that constrain government activities more than the general restriction on exercises of the police power implicit in all judicial review of state action. For example, even large-scale dispositions of submerged lands are not generally prohibited, although courts may interpret such grants restrictively and hold that the grantee's title remains impressed with some elements of the public trust. The limit of the legal constraint may be that the state may not grant to a private party such an extensive holding of "trust property" that the state effectively abdicates its authority to govern. This principle, however, does not prevent a state from substantially diminishing public uses of "trust property."

46. Sax, Judicial Intervention, supra note 7, at 476.
47. For example, the Massachusetts "great pond" ordinance of 1641 granted citizens the right to fish and fowl in ponds larger than ten acres, together with the right of access across private property for those purposes. MASS. GEN. LAWS ANN. ch. 91 (West 1967), ch. 131 (West Supp. 1968), ch. 140, §§ 194-96 (West 1965); Sax, Judicial Intervention, supra note 7, at 199.

The Northwest Ordinance of 1787 required that "[t]he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free ... ." Act of July 13, 1787, art. IV, 1 Stat. 51 (1789). See Leighty, The Source and Scope of Public and Private Rights in Navigable State Waters (Part I), 5 LAND & WATER L. REV. 391, 408-21 (1970).


49. One general restriction is that the challenged conduct, to be valid, must be exercised for a public purpose, and may not be a gift of public property for a strictly private use. See Sax, Judicial Intervention, supra note 7, at 477.

50. Some states have recognized private title to tidelands and submerged lands below the high water mark. See, e.g., Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851); City of Milwaukee v. State, 193 Wis. 423, 214 N.W. 820 (1927) (state may grant submerged lands to a public corporation, if the grant is part of a larger public scheme). See also Sax, Judicial Intervention, supra note 7, at 486-89.


52. Sax, Judicial Intervention, supra note 7, at 488-89.
B. At the Farthest Reaches of the Doctrine—
The Federal Public Lands

1. No Specific or Individual Interests

In its classic form, then, the common law public trust doctrine prevented states from alienating lands under navigable waterways so as substantially to destroy the public rights of navigation and fishing inhering therein. State courts have extended the doctrine to prevent unreasonable infringement by the state or by private parties of other "public purposes" such as bathing, swimming, boating, hunting, general water recreation, and wildlife habitat preservation.53

The public trust doctrine originated and developed in the context of protection of public rights in water and water-related areas and uses. These public water rights are well-specified and encompass legal interests of individuals. Courts have been willing to balance the specific, often economic damages resulting from the infringement of individual legal rights with the conflicting interests.54

There are many reasons why courts may be less ready to invoke the public trust on behalf of some allegedly infringed public right in the inland public lands.55 For example, the sorts of public rights traditionally recognized by water law have historically never existed with respect to the public lands.56 Individuals have no separate interest in

53. See, e.g., Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380 (1971) ("a use encompassed within the tidelands trust . . . is preservation of these lands in their natural state . . . for scientific study, for open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area"); Moore v. Sanborne, 2 Mich. 519, 525 (1853) ("the servitude of the public interest depends . . . upon the purpose for which the public requires the use of its streams"); Lamprey v. State, 52 Minn. 181, 200, 53 N.W. 1139, 1143 (1893) ("sailing, rowing, fishing, fowling, bathing, skating, . . . and other public purposes"), See Stevens, supra note 44, at 221-23. See also Johnson, Public Trust Protection for Stream Flows and Lake Levels, 14 U.C. DAVIS L. REV. 233, 240-44 (1980).


55. The phrase "inland public lands" will be used interchangeably with "public lands" to refer to all federal public lands not under navigable waterways. As very little federal public land lies under navigable waterways, most public land is inland public land. See Wilkinson, supra note 15, at 273 n.17, 300 n.145.

Lands beneath navigable waterways passed to the states upon statehood; this put new states on an "equal footing" with the original thirteen, which retained their submerged lands when the Union was formed. Id. See Pollard v. Hagan, 44 U.S. (3 How.) 212, 228-30 (1845). Thus, the states were the proper bearers of the public trust obligation; the federal government held the lands "in trust" for disposal to the states. Id. at 221. During the period the lands were held prior to statehood, the classic public trust doctrine regarding submerged lands probably applied to the United States. Shively v. Bowlby, 152 U.S. 1 (1894); Wilkinson, supra note 15, at 301 n.146.

The federal government has since reacquired some submerged lands to which the doctrine probably applies, such as coastal areas in the Point Reyes National Seashore and the Golden Gate National Recreation Area. Id. at 273 n.17, 300 n.145.

56. Montgomery, supra note 54, at 152-53.
public lands or resources, and not even a right of access.57 The government administers the public lands for the general welfare of the undefined "public," and receives directly most of the benefits of use of the public lands. The "public interest" thus served is broad and non-specific. The courts have therefore consistently recognized only those legal interests expressly created by Congress, refusing to create rights that might interfere with the power of Congress to legislate with respect to the public lands.58

2. No Common Law Support

One major public trust case, *Illinois Central Railroad Co. v. Illinois*,59 actually declared in dictum that the common law public trust doctrine does not apply to the inland public lands.60 While holding that a state legislature may not engage in the wholesale disposition of lands under navigable waterways, the Supreme Court noted that ownership of such lands is "different from the title which the United States hold in the public lands which are open to pre-emption and sale."61 Thus, according to the Court, the inland public lands were not resources to be protected by the public trust doctrine. One probable basis for the Court's distinction was the inapplicability of the doctrine to inland Crown lands at common law. The Crown could own, manage, and alienate inland Crown lands without restriction.62

The inland public lands should be distinguished from Native American lands, which the United States holds in trust at common law. Although some commentators have argued that the Native American trust provides support for public trust doctrine obligations in the public lands,63 historical distinctions weaken the analogy between the two trusts. Since at least 1831, the federal government has been held to have special obligations to Native American tribes.64 Moreover, specific documents establish the tenor and scope of the trust relationship,


59. 146 U.S. 387 (1892).

60. *Id.* at 452.

61. *Id.*


63. *E.g.*, *Note, supra* note 7, at 591.

including bilateral treaties, other formalized negotiations, and unilateral executive orders. More importantly, Congress acts with respect to Native American lands to fulfill essentially private obligations running to specific Native American tribes and individuals, unlike its legislation for the general welfare regarding the public lands. Finally, Native American lands are not public lands, and were not subject to disposition under the general public land laws.

3. No Policy or Conceptual Bases

Numerous policy reasons indicate the inapplicability of the public trust doctrine to the public lands. First, the initial, unchallenged policy of the federal government was to dispose of rather than retain the public domain. The transfer of over 1.1 billion acres into state or private hands since 1781 belies any prohibition on the alienation of public lands or resources.

Second, Congress has directed over 400 pieces of legislation toward public land officials since 1792, including the recent Federal Land Policy and Management Act of 1976 and the National Forest Management Act of 1976. This plethora of legislation provides a comprehensive (though not always detailed) set of directions regarding public lands and resources management, leaving little, if any, room for a broad common law doctrine to operate.

Moreover, the four major resource agencies operate under substantially different organic acts, and must deal with a tremendously diverse range of lands and resources. The differences in statutory purpose among the agencies and the variations in geographic characteristics among the public lands militate strongly against using one unitary judicial doctrine to evaluate resource agency performance.

The public trust doctrine is also conceptually inappropriate for much of the nation's public lands. Professor Sax has outlined several reasons:

66. Id.
67. Id. at 275 n.25.
69. Public Land Statistics, supra note 1, Table 3 at 5.
71. See supra note 19.
72. See infra notes 124, 144-46, 193-209 and accompanying text.
73. See supra notes 14 and 19 and accompanying text.
74. Public lands are "high and low, wet and arid, hot and cold, coastal and inland, mineral and non-mineral, scenic and plain, timbered and barren, checkerboarded and contiguous." Wilkinson, supra note 15, at 276. See One Third of the Nation's Land—A Report to the President and to the Congress by the Public Land Law Review Commission 22-27 (1970) [hereinafter cited as PLLRC Report].
possible conceptual bases for the doctrine,\textsuperscript{75} including the following:

1. The general public could be viewed as the equitable owner of the trust property (Sax discards this notion, although others have upheld it);\textsuperscript{76}

2. Certain resource interests may be so intrinsically important that unrestrained access to them (\textit{i.e.}, the inability of any one private party to appropriate them) is a badge of a free society;\textsuperscript{77}

3. Special "gifts of Nature's bounty" should be reserved for general use and enjoyment;\textsuperscript{78}

4. Certain resources may have a peculiarly "public" nature, making their adaptation to private use inappropriate;\textsuperscript{79} or most globally,

5. "The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title," since "destabilizing forces . . . prevent effective adaptation" and therefore provoke biological, social and economic crises.\textsuperscript{80}

These notions do not apply in a useful fashion to the bulk of the public lands. There is no historical or legal support for declaring the

\textsuperscript{75.} Sax, \textit{Judicial Intervention}, supra note 7, at 478-85.

\textsuperscript{76.} Sax discarded the property concept for two reasons. First, the government rarely (if ever) "conveys" anything to the general public; the legislature at most specifies that certain resources will be set aside for certain uses, and it is not prevented from transferring the resources to other public purposes. \textit{Id.} at 478-79.

Second, a property concept contradicts the rationale underlying the Fifth Amendment takings clause. Economic benefits are protected against government "taking" to prevent a disproportionate amount of the cost of public enterprises from being unjustly placed on certain individuals or groups. If property is owned by the public as a whole, however, nothing is ever "taken" as no individuals are burdened by the transfer of resources from one use to another. \textit{Id.} at 479-80.

Sax's reasons for discarding the property concept have been criticized on the grounds that the first "begs the question of whether the state or commonalty initially owned the \textit{res}," and the second ignores the state's ability to alienate the \textit{res communes} and the courts' role in overseeing "the fairness of such transactions even when the public shares the costs equally." Coquillette, \textit{Masses from an Old Manse: Another Look at Some Historic Property Cases About the Environment}, 64 CORNELL L. REV. 761, 811-813 (1979). Professor Coquillette believed that a public trust doctrine would be more acceptable to the courts if it were tied to ancient property concepts, and he agreed with Professor Jaffe that Sax's concept of the public trust doctrine was so vague as to require what amounted to \textit{de novo} judicial review of administrative matters. \textit{Id.} at 813-14. \textit{See also} Jaffe, Book Review, 84 HARV. L. REV. 1562, 1566-68 (1971) (reviewing J. Sax, \textit{Defending the Environment: A Strategy for Citizen Action}).

\textsuperscript{77.} Note the U.S. Supreme Court's statement, "that the running water in a great navigable stream is capable of private ownership is inconceivable," in United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913), and the language of the Northwest Ordinance, supra note 47.

\textsuperscript{78.} This concept supports the creation of national parks and national monuments to preserve and display natural wonders, as it did the reservation of the "great ponds" in early New England. Sax, \textit{Judicial Intervention}, supra note 7, at 484-85.

\textsuperscript{79.} \textit{Id.} For example, the basic necessity of water and the interdependency of various water uses led the law to regard water rights as usufructuary. These are rights of use, not absolute ownership, and hence subject to the rights of other users and to regulation for the public benefit.

\textsuperscript{80.} Sax, \textit{Liberating the Public Trust}, supra note 44, at 187-89.
equitable or legal title to the public lands to be in the general public; the federal government has been accepted as proprietary owner of the public lands for many years, and as such has conveyed much of the original public domain to private parties. While there are still valuable resources on the public lands, there are few economic resources the private ownership of which would be "inconceivable," and many lands containing unique non-economic "gifts of Nature's bounty" have been reserved as national parks, national monuments, recreation areas, and wilderness areas. Most of the remaining public lands, in terms of acreage, are comprised of Alaskan tundra and the Great Basin high desert.

The remaining resources on the public lands (other than water) lack any peculiarly or historically "public" nature. While all resource uses are interdependent in the long run, water resources are essentially different from public land resources, and there is no compelling reason to regard legal interests in the latter as usufructuary.

4. The Proper Role of the Courts

Finally, while it may be important to avoid the "destabilizing disappointment of expectations," Sax himself admits that "[o]ur task is to identify the trustee's obligation with an eye toward insulating those expectations that support social, economic and ecological systems from avoidable destabilization and disruption." In the context of the public lands, this process must be recognized as a fundamentally delicate and complex balancing of social, economic, and biological factors, dependent on technical information and value judgments drawn from the body politic.

The judiciary is not properly suited to make such determinations, for two major reasons. First, judicial competency and resources are limited. Courts typically lack staffs practiced in scientific or technical disciplines, and are not equipped with investigative personnel or processes. Most judges are unlikely to be skilled in economic analysis. Courts rarely have technical expertise beyond that required to comprehend an administrative record and to determine whether an ex-

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81. See infra notes 133-42 and accompanying text.
82. Wilkinson, supra note 15, at 276 n.31.
83. Sax, Liberating the Public Trust, supra note 44, at 193.
85. Stewart, supra note 84, at 715.
Executive body has acted within the scope of its statutory authority.86

Agencies usually possess the resources and expertise that the courts lack. Unlike judges, administrators are also in a position to become closely familiar with the practical problems of statutory implementation; moreover, they can experiment with alternative policies and readily incorporate the knowledge thereby obtained.87 The courts have long recognized the utility and importance of deferring to agency expertise.88 For example, they have held that the informal "record" supporting a new agency rule may include agency expertise derived from sources outside of the particular rulemaking.89 Courts have also held that administrative decisions bear a "presumption of regularity." So long as the court finds that the decision is within the agency's statutory authority and exhibits some basis in fact, it will resolve factual ambiguities and omissions in favor of the agency.90

Beyond the limited ability of the judiciary to deal with large amounts of technically complex and uncertain information, there is a second powerful reason for courts not to engage in the balancing process of public lands decisionmaking. Policies and decisions concerning public lands have a very strong political component. The considerations for and against any given decision will often be in close balance, and any choice will involve some adverse environmental impacts. No objective standard exists by which a court could "correctly" trade off considerations of current costs, benefits, and fairness among different groups in society, or allocate resources between present and future generations.91 Congress has therefore explicitly chosen to assign the quasi-legislative balancing role to the resource agencies, and has created a variety of procedures to ensure public participation and consideration of all competing social values.92

A judge's confidence in a particular case that his or her instinct is better than an agency's judgment is irrelevant, given the express policy choice of Congress to allocate the balancing role to the agencies.93 To

88. See infra note 96.
91. Stewart, supra note 84, at 715-17.
92. See infra notes 193-210 and accompanying text.
93. Cf. Wallace, supra note 84, at 6 (arguing that even where a judge believes he could make a better choice than the legislature, he may not act upon such a belief).
draw any other conclusion would be to ignore the fundamental value that our society places on democracy, and to contradict the constitutional scheme of three separate and coequal branches of government. The area of public lands decisionmaking is not one in which the government is threatening to infringe individual liberties or the rights of a "discrete and insular minority," and hence does not require heightened judicial scrutiny. Rather, political forces of some magnitude are present on all sides of each issue, and there is thus no need for the courts to take advantage of their political isolation to overturn the majority will. If certain courts nonetheless were to substitute their judgment for that of the duly authorized administrators, their actions would threaten to create significant interbranch friction, thereby destabilizing the coequality among the three branches. Moreover, those courts would damage the independence of the judiciary by encouraging political reactions to "judicial" decisions. Fortunately, most courts have recognized the need for judicial restraint when reviewing highly discretionary agency decisions.

A court limited to questions of law, to determining whether there

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94. Id. at 6-8. See Jaffe, supra note 76, at 1567-68. See generally A. BICKEL, THE LEAST DANGEROUS BRANCH 16-40 (1962).
96. CHOPER, supra note 95, at 64-70.
97. Wallace, supra note 84, at 7-8.
98. Id.
99. For example, in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978), the Court stated that

[the fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision . . . , but it is Congress or the States within their appropriate agencies which must eventually make that judgment.

Administrative decisions should be set aside . . . only for substantial procedural or substantive reasons as mandated by statute [citation omitted], not simply because the court is unhappy with the result reached. (emphasis in original)

Similarly, in discussing the court's role when reviewing agency compliance with the National Environmental Policy Act (NEPA), the court noted that

[n]either [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions [citation omitted]. The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' Natural Resources Defense Council v. Morton [458 F.2d 827, 838 (D.C. Cir. 1972)].


Most importantly, the courts have long followed the above strictures in public lands disputes. See infra notes 102, 133-42, 201 and accompanying text.
has been an abuse of discretion, and to weighing the evidence, is not prevented from imposing significant restraints on administrative decisionmaking. In the case of the resources agencies, there is "law to apply." Courts can and must scrutinize agency decisionmaking to ensure compliance with legislative directions. The court will probe the entire record to identify the choices made by the agency, determine whether the agency has disregarded ascertainable legislative intent, assure itself that interested parties had an opportunity to present their positions, and decide whether the agency took a "hard look" at all relevant factors and reasonably assessed the interrelated policy and legal questions. This "searching and careful" review is adequate to pre-


101. Section 706(2) of the Administrative Procedure Act, 5 U.S.C. §§ 551-57, 701-06 (1976), sets forth the relevant scope and standard of review for all informal administrative action where no record is required by statute. The court may set aside agency actions, findings, or conclusions only where they are

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or]

(D) without observance of procedure required by law . . . .

5 U.S.C. § 706(2) (1976 & Supp. IV 1980). Courts have tended to merge (A) and (C) into a standard requiring the agency to have considered all relevant factors or to have articulated in detail the basis of the decision. See Oakes, The Judicial Role in Environmental Law, 52 N.Y.U. L. REV. 498, 509-12 (1977). The ultimate standard of review is quite narrow; the court's role is solely to ensure that the agency decision is both within the intent of the pertinent statute and not manifestly irrational. WNCN Listeners Guild & Citizens Communications Center v. FCC, 610 F.2d 838, 860 (D.C. Cir. 1979) (en banc) (Leventhal, J., concurring). See Verkuil, supra note 89, at 422-23. The court may not remand a decision to an agency simply because the court believes the record of the agency action is somehow inadequate, so long as the requirements specified in the enabling statute or the Administrative Procedure Act have been met. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 548-49 (1978); Camp v. Pitts, 411 U.S. 138, 143 (1973).

Nevertheless, the court is by no means powerless to restrain the unlawful exercise of administrative discretion. It will engage in a "searching and careful" review of the facts, immersing itself in whatever record exists to determine whether the agency has fulfilled its statutory obligations. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 35, 36 (D.C. Cir. 1975), cert. denied, 426 U.S. 941 (1976). The court must ascertain whether the agency has taken a "hard look" at all material facts and issues and exercised "a reasoned discretion" based solely on consideration of those factors made relevant by statute. Id. See Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); D.C. Federation of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1245-46 (D.C. Cir.), cert. denied, 403 U.S. 923 (1972). See also Stewart, supra note 84, at 738-39; Leventhal, supra note 86, at 511, 513-14, 540-41.

Moreover, even after Vermont Yankee, the court may determine that the available record is fatally inadequate on the grounds that it does not respond to a challenger's pertinent criticisms; does not provide adequate support for the agency's decision, Aqua Slide 'N' Dive Corp. v. Consumer Products Safety Commission, 569 F.2d 831 (5th Cir. 1978); or does not give the reviewing court sufficient information to understand the agency's decisionmaking
vent extra-legal influences from systematically biasing the exercise of agency discretion, particularly where the court seeks to ensure that the record adequately reflects the entire range of affected interests. As long as agency decisions are within the discretion afforded by law, however, the courts must sustain them.

To sum up, there is no substantial historical or conceptual basis for applying the public trust doctrine to the public lands. Unless the doctrine were radically modified to require merely rigorous but limited judicial review, applying the doctrine to public lands would improperly place legislative power in the hands of the courts. The Administrative Procedure Act and the cases interpreting it already supply passable standards of judicial review; little can be gained by distorting an ancient property and water law concept to imply additional standards.


102. Stewart, supra note 84, at 719.

In upholding under the National Environmental Policy Act, see infra note 143, the Forest Service's decision to open a tract in Texas to clearcutting pursuant to an overall management plan, the Fifth Circuit noted that

agency action under the multiple-use statutes and the Administrative Procedure Act.

III

PUBLIC TRUST LANGUAGE IN PUBLIC LAND LAW

A. Three Phases of Public Land Law

Simply by reflecting prevailing public attitudes and expectations, Congress has taken three distinctly different positions toward the public lands since the start of the 19th century. The courts have tended to follow Congress' lead, not surprisingly, and have interpreted the duties and powers of the federal government so as to carry out legislative directives. Courts have thus used trust concepts to support three different legislative stances, using similar trust language in each case.

1. Phase I—Disposition of Federal Lands

The original thirteen states ceded the first public lands to the United States to be held in common for sale to private parties. These sales were to raise revenue to pay off the public debt incurred during the Revolutionary War, and to provide land for new states. The Supreme Court described the Property Clause of the Constitution as intended solely to provide the federal government with authority to administer, protect, and sell these ceded lands for the benefit of the several states. The Clause was held not to apply to lands subsequently acquired by the United States from foreign nations.

104. I have borrowed the useful three-phase analysis that Professor Wilkinson developed in The Public Trust Doctrine in Public Land Law, 14 U.C. DAVIS L. REV. 269, 278-85, 294-98 (1980), to structure the following discussion. The history of public land management is actually somewhat more complex than portrayed here. For example, one author has broken down public land management from 1781 to the present into the following six overlapping phases: acquisition, disposal, reservation, custodial management, intensive management, and extensive preservation. See P. Culhane, Public Land Politics: Interest Group Influence on the Forest Service and the Bureau of Land Management 41 (1981).


107. U.S. Const. art. IV, § 3, cl. 2: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States..."


The U.S. held sovereign and hence plenary power over lands subsequently acquired from foreign nations; constitutional principles other than the Property Clause were held to govern federal power over these territories. 39 U.S. at 536-37; 60 U.S. at 447-50. See American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828). See also Nevada v. United States, 512 F. Supp. 166, 171-72 (D. Nev. 1981).
Court characterized the government’s obligation to carry out the purposes of the contracts of cession as a “trust,” holding that once the lands were sold and new states created, the United States will have “fully executed these trusts, [and] the municipal sovereignty of the new states will be complete . . . .”

Through generous direct and indirect land grants to states, settlers, miners, and railroads, as well as grants for reclamation, and grants of timber, the federal government disposed of much of the original public domain during the 19th century. Other than the land grants, Congress did little to implement the Property Clause, preferring to allow completely unrestrained access to the public lands; presumably, this policy was to encourage the growth of the western economy.

Federal grants to states often contained restrictions on the use of the land or its proceeds to ensure that states, their political subdivisions, and their grantees would carry out congressional policies. In settling disputes as to whether grantees had exceeded the statutory restrictions in particular cases, some federal courts used public trust language in discussing the grantees’ obligations.

For example, in interpreting the provisions of the Swamp Land Act of September 28, 1850, the Supreme Court noted in dicta that “in the hands of the county [the lands] were impressed with an important public trust,” and “the fact that all parties knew they were dealing with a trust fund devoted by the donor to a specific purpose demanded the utmost good faith on the part of the purchaser . . . .” However, the Court soon retreated from implying private trust law obligations in public land transactions under the Swamp Land Act, by holding that the Act’s restrictions were non-binding and that states had discretion to determine the extent to which they would follow the conditions of the Act. Moreover, the Court stated that “Congress alone has the power to enforce the conditions of the grant . . . .” even where the conditions had clearly been violated. This position was solidified in subsequent cases holding that no congressional intent to create a privately enforceable public trust had existed, and that the states had complete discretion with respect to the lands received under the Act.

111. See generally Coggins & Wilkinson, supra note 2, at 1, 43-119.
112. Montgomery, supra note 54, at 153-54.
113. Id. at 161-62.
114. Act of Sept. 28, 1850, ch. 84, 9 Stat. 519. The Act was a major tool to encourage reclamation of marginal swamp lands by states and counties.
116. Id. at 345.
117. See Montgomery, supra note 54, at 163.
118. Emigrant Co. v. County of Adams, 100 U.S. 61, 69 (1879).
119. Id. at 69.
120. Mills County v. Railroad Companies, 107 U.S. 557 (1882); Hagar v. Reclamation
In cases where Congress did place restrictions intended to be binding into the land grant, the Court has mentioned that the granted land was impressed with a public trust, but then has tended to use a contractual rather than a trust analysis to bind the grantee to the restrictions.121 Throughout the run of land grant cases, therefore, the trust concept was never developed into a principle that restricted the trustee's or grantee's actions concerning the public land.122 Instead, the trust could be likened to a vermiform appendix: usually present, never functioning.


Opening up the public lands to stimulate the growth of the western United States inevitably led to fraud, abuse, and overexploitation.123 During the late 1800's and early 1900's, Congress gradually and haltingly reacted to the abuses that had occurred by preserving and protecting certain recreation, timber, water, grazing, and mineral resources.124 The courts responded to the shift in federal policy. Between 1887 and 1970, numerous courts125 used trust language to justify virtually unlim-

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121. See, e.g., Stearns v. Minnesota, 179 U.S. 223 (1900). Where Congress had granted the State of Minnesota land to be used solely for railroad construction, the Court stated:

> [T]he lands . . . were granted in trust. The State . . . accepted the trust created by the act of Congress. Acceptance by a trustee of the obligations created by the donor of a trust completes a contract. Such contracts . . . have been frequent in the history of the nation, and their validity . . . has been directly affirmed.

Id. at 249-50.

See also United States v. City and County of San Francisco, 310 U.S. 16 (1940). The Raker Act granted to the City land in the Hetch Hetchy Valley to establish a reservoir and electric power source, but prohibited the City from selling the power to private utilities. The federal government successfully sued to enforce the restriction.

While mentioning that under the Property Clause Congress held the public lands in trust, the Court, in an oft-cited paragraph, stated that

> [t]he power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'

Id. at 29-30 (footnote omitted) (quoting Light v. United States, 220 U.S. 523, 537 (1910)). The Court used this notion of trust as support for plenary congressional power over the public lands, id. at 30, and proceeded to uphold the injunction in this case with a contractual analysis, id. at 30-31. Having accepted the benefits of the contract, the City was bound by its restrictions. The trust concept was entirely superfluous to the result; it had become archaic.

See Montgomery, supra note 54, at 167-68.

122. Montgomery, supra note 54, at 167-68.

123. See COGGS & WILKINSON, supra note 2, at 118-20, 124-25, 132-37.


125. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 294-95 (1958); United States v. California, 332 U.S. 19, 40 (1947); United States v. City and County of San Francisco, 310 U.S. 16, 28-29 (1940); Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917);
Ited federal power to manage, dispose of, and protect the public lands.\textsuperscript{126} In each case, the trust was a source of power, yet it was never held to impose any duty or obligation on the federal government.

The trust concept was used in two major ways during this period of increasing federal activity. First, the courts used the existence of a government trust with respect to the public lands as a source of administrative power in the absence of specific statutory authority. For example, the trust doctrine supported federal power to sue to enjoin trespasses,\textsuperscript{127} to contest land patents allegedly procured by fraud,\textsuperscript{128} and to uphold other administrative decisions made in the absence of expressly delegated authority.\textsuperscript{129} This usage also provided a basis for the corollary rule that laches and estoppel do not apply as against the federal government in cases involving public land transactions.\textsuperscript{130}


\textsuperscript{127} Wilkinson, \textit{supra} note 15, at 281-84.


\textsuperscript{129} The court in \textit{Beebe} refused to set aside fraudulently-obtained federal patents because of the equities involved: a city of innocent bona fide purchasers had grown up on the land in the 45 years since the alleged illegal acts occurred. However, the court discussed for the first time the potential role of the public trust doctrine in public land controversies:

\begin{quote}
The public domain is held by the government as part of its trust. The Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation, and under certain circumstances to invest the individual citizen with the sole . . . title which had until then been common to all the people as the beneficiaries of the trust.
\end{quote}

\textsuperscript{127} U.S. at 342. \textit{See} Montgomery, \textit{supra} note 54, at 154-55.

\textsuperscript{129} Knight v. United States Land Ass’n, 142 U.S. 161, 178, 181 (1891) (Secretary of Interior, as “guardian” of the public lands, has authority to set aside land survey); Forbes v. United States, 125 F.2d 404, 408 (9th Cir. 1942) (Secretary has authority to order plugging of abandoned oil well on public land); United States \textit{ex rel.} Roughton v. Ickes, 101 F.2d 248, 252-53 (D.C. Cir. 1938) (Secretary cannot be compelled to issue oil and gas prospecting lease). \textit{See also} United States v. Grimaud, 220 U.S. 506 (1911) (Congress may confer power on Secretary of Agriculture to make rules to protect forest reserves and to regulate their occupancy and use).


The rule is based on the theory that the inaction, negligence, or acquiescence of a fed-
Second, once Congress began to enact statutes regulating the use of the public lands, the courts found in the trust doctrine a source of police power, and thus used the trust to protect legislation and subsequent delegations of authority against constitutional challenge. Eventually the courts specifically reinterpreted and expanded the Property Clause to provide a constitutional basis for the trust and to vest regulatory power solely in Congress.

*Light v. United States* forcefully sums up the evolution of the public trust as a source of federal police power during this period. The government sought to enjoin unauthorized grazing on national forest land. The petitioner argued that the government had failed to comply with a state statute requiring fencing of range land as a condition precedent to initiating a trespass action, and that congressional withdrawal of public land for forest reserves violated the public trust doctrine since the withdrawn land was no longer used to benefit the several states. The Supreme Court granted the injunction, holding that the federal government did not have to comply with the state statute, that Congress has power under the Property Clause to withdraw lands for national forests, and that the public trust doctrine was by no means a limit on legislative discretion:

‘All of the public lands of the nation are held in trust for the people of the whole country.’ [citing *Trinidad Coal*, supra note 125]. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national

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131. *E.g.*, Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 294-95 (1958) (Congress may constitutionally limit acreage to which federal reclamation project water may be applied); United States v. City & County of San Francisco, 310 U.S. 16, 28-29 (1940) (Congress may require power generated on public lands to be sold directly to consumers); *Light v. United States*, 220 U.S. 523, 537 (1911) (Congress may establish forest reserves and empower Secretary of Agriculture to regulate grazing thereon); Camfield v. United States, 167 U.S. 518, 524 (1897) (Congress may prohibit erection of fences on private land that would effectively enclose public lands). *See Wilkinson, supra* note 15, at 282-84; Montgomery, supra note 54, at 156-60. *See supra* note 121 and accompanying text.

132. *See* the first three cases supra note 131 and Wilkinson, supra note 15, at 282. *Cf.* notes 107-09 supra and accompanying text.

The analysis in *Light* foreshadowed the plenary federal power to preempt state authority on the public lands confirmed in Kleppe v. New Mexico, 426 U.S. 529 (1976) and Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), aff’d, 100 S. Ct. 1593 (1980). For a full recitation of the power of Congress under the Property Clause, see Annot., 49 L. Ed. 2d 1239 (1977).

133. 220 U.S. 523 (1911).

134. *For* a thorough discussion of the implications of the case, *see* Montgomery, supra note 54, at 158-60.

135. 220 U.S. at 535-36.
and public purposes . . . [I]n the exercise of the same trust it may dis-establish a reserve, and devote the property to some other national and public purpose. These are the rights incident to proprietorship, to say nothing of the power of the United States as sovereign over the property belonging to it.\textsuperscript{136}

The Court in \textit{Light} said, in effect, that Congress is not only the best judge of how to execute the public trust, but the only judge. By equating the government's "sovereign" and "proprietary" rights, the Court ended all need to analyze the public's right to have the government administer the public lands for the general welfare; instead, the public trust after \textit{Light} could be used as a simple reference to invoke the absolute power vested in the government as owner of the public lands.\textsuperscript{137}

Proprietorship, and all of the common law remedies that ownership implied, soon proved to be a less subtle and simpler tool with which to protect the public lands against unauthorized use and overexploitation, and the courts ceased to develop the concept of a public trust.\textsuperscript{138} As a result, the public trust "standards" of protection against trespass and unlawful appropriation\textsuperscript{139} and prevention of waste,\textsuperscript{140} mentioned in a few early cases, never evolved into substantive principles. The growing number of federal statutes protecting and regulating the public lands also diverted the courts from refining vague and apparently unnecessary trust standards. Congress was viewed as the proper source of public land law, and administrative agencies were perceived as worthy recipients of broad delegations of authority.\textsuperscript{141} Agency action could be overturned only if it fell outside the scope of statutory authority,\textsuperscript{142} and strict scrutiny was the exception rather than

\textsuperscript{136} Id. at 537.

\textsuperscript{137} Montgomery, \textit{supra} note 54, at 158-60. See United States v. Midwest Oil Co., 236 U.S. 459 (1915) (United States has rights of proprietor and legislator with respect to the public lands).

\textsuperscript{138} Montgomery, \textit{supra} note 54, at 158-60. Note that \textit{Light} fuses the notions of sovereignty and proprietorship, belying the existence of any separate "public lands trust" that imposes private trust law duties and obligations. For a contrary view, see Note, \textit{supra} note 7.


\textsuperscript{140} Knight v. United States Land Ass'n, 142 U.S. 161, 181 (1891): '[T]he Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of . . . unexpected contingencies, to do justice.' (citations omitted)

The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.

\textsuperscript{141} See United States v. Grimaud, 220 U.S. 506 (1911), which was decided two days after \textit{Light} v. United States.

\textsuperscript{142} Utah Power & Light Co. v. United States, 243 U.S. 389, 410 (1917); Pan Am. Petro-
the rule.

For decades, then, the public trust "doctrine" remained solely a totem: mentioned in hushed, reverent tones as a symbol of federal power; cited always by the courts when they were upholding federal decisions and prerogatives; but never used to impose trust duties or obligations on any party.

3. Phase III—The Public Trust: A Source of Public Rights?

Beginning in 1969 with the National Environmental Policy Act, Congress enacted an unprecedented quantity of legislation designed to counter growing pressures on scarce natural resources. Vast areas of land were included in a wilderness preservation system, endangered species and public lands wildlife were given some protection, and coal development on the public lands was further regulated.

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(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

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


NEPA applies to all the public lands, and although it has been somewhat superseded by the more extensive planning requirements of NFMA and FLPMA, see notes 157-72 infra and accompanying text, it remains in force with respect to those planning processes, (e.g. mandating public comment on draft EISs) and has affected public lands management considerably. See COGGINS & WILKINSON, supra note 2, at 261-88. See also infra note 201.


The two major resource agencies also received substantial new legislative instructions. Congress directed the Forest Service, which had for decades operated under active multiple-use sustained yield management principles, to engage in even more long-range resource planning and citizen involvement. In response to the recommendations of a pathbreaking study of public land law, Congress in 1976 provided the Bureau of Land Management with a comprehensive organic act. This latter enactment declared that federal policy was now to retain rather than to dispose of the public lands.

Concurrent with this legislative activity, several federal cases since 1970 have used trust language. Some commentators have argued that these cases represent a marked shift in the courts' use of the public trust doctrine, paralleling the shift to greater environmental activism by Congress. In fact, most courts have either just mentioned trust language in passing, used the trust to uphold exercises of federal power and discretion, or refused to hold that the trust alone is sufficient to

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148. PLLRC REPORT, supra note 74.
150. 43 U.S.C. § 1701(a)(1) provides that "the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided in this Act, it is determined that disposal of a particular parcel will serve the national interest." See also id. (a)(2), which explains "national interest" as systematic inventorying and coordination with other Federal and state plans, and id. (a)(10), providing a procedure for disposing of public land.
151. See cases cited infra notes 153-57.
154. Kleppe v. New Mexico, 426 U.S. 529, 539-40 (1976) (broad federal preemptive power); Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1083 (9th Cir. 1979) ("the power over the public lands thus entrusted to Congress is without limitations.") (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)); United States v. Ruby Co., 588 F.2d 697, 701-05 (9th Cir. 1978) (no estoppel against federal administrative officials without compelling circumstances); Hannifin v. Morton, 444 F.2d 200, 202 (10th Cir. 1971) (Secretary of Interior has authority to impose rental fee as condition of sulphur prospecting permit); Sierra Club v. Hickel, 433 F.2d 24, 28, 34-35 (9th Cir. 1970), aff'd sub nom. Sierra Club v. Morton, 405 U.S. 727 (1972) (Secretaries of Interior and Agriculture have general authority to issue term and revocable use permits); In re Steuart Transp. Co., 495 F. Supp. 38, 39-40 (E.D. Va. 1980) (Virginia and U.S. may recover damages for migratory wildfowl lost in oil spill under doctrines of public trust and parens patria).

The court in Steuart stated the following: "Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the public." 495 F. Supp. at 40. The only case cited in support of this proposition is Toomer v. Witsell, 334 U.S. 385, 408 (1948) (Frankfurter, J., concurring), which noted that a State has the right to preserve or regulate exploitation of a
provide a private right of action against a federal agency. While several courts were willing to restrict administrative agency discretion and impose duties of environmental protection, they did so by interpreting the relevant grants of statutory authority.

The Redwood National Park litigation is virtually the only source of authority for the public trust as a limit on agency discretion. In that case, logging operations on private lands adjacent to and upstream of the Redwood National Park in northern California were allegedly causing erosion, creek siltation, and increased tree loss from blowdown. The Sierra Club had requested the Department of Interior, acting through the National Park Service, to use its power to protect the Park from further damage. The Department refused to act, and the Club eventually sought judicial relief.

The first Redwood National Park opinion indicates that, in addition to specific statutory duties under the National Park Service Organic Act of 1916 and the Redwood National Park Act, the Secretary of Interior has general fiduciary obligations regarding the public lands. The court in the second opinion held that the Secretary

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155. Friends of Yosemite v. Frizzell, 420 F. Supp. 390, 392-93 (N.D. Cal. 1976) (no "breach of trust" providing private right of action under National Park Service Act where no evidence that any government agency or official violated any statutory duty; no statutory duty to refrain from publicizing the Park to promote its use or constructing certain sanitation and housing facilities in the Park). But see West Va. Div. of Izaak Walton L. of Am., Inc. v. Butz, 522 F.2d 945, 954 (4th Cir. 1975), where a private party plaintiff successfully challenged, under the National Park Service Act of 1897, the Forest Service policy of clearcutting in national forests.


158. Much of the discussion of this case is drawn from Wilkinson, supra note 15, at 285-90.


160. Id.


had “unreasonably, arbitrarily, and in abuse of discretion” failed to act to protect the Park. The court then ordered the Secretary to exercise his statutory powers by taking steps to protect the Park from nearby logging, including negotiating contracts with private loggers and acquiring surrounding private lands. The court even ordered the Department to request further funds from Congress if necessary.

While the remedies in the Redwood National Park litigation were strong, the opinions provide little support for using the public trust concept to control agency behavior. Even in the initial opinion, where the court made its sole direct reference to general fiduciary duties, the court relied primarily on strong statutory provisions to compel the Secretary to act. In the second opinion, the court collapsed the general and statutory “trust” duties into a single reference and focused upon the statutory duties under the National Park Service Act and the Redwood National Park Act. By the third opinion, in which the court found that the Department had complied with its statutory duties, general


165. Id. at 294.

166. Id. However, the court subsequently noted that lobbying was not “mandated by existing law, but was ordered only to assure that Interior had gone as far as it legally or practically can go in an attempt to exercise its powers and perform its duties under existing law.” Sierra Club v. Department of Interior, 424 F. Supp. 172, 175 n.2 (N.D. Cal. 1976).


The National Park Service Organic Act, 16 U.S.C. §§ 1-18f (1976), states in section 1 that the National Park Service shall conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner . . . as will leave them unimpaired for the enjoyment of future generations.


[i]n order to afford as full protection as is reasonably possible to the timber, soil, and streams within the . . . park, the Secretary is authorized . . . to acquire interests in the land from, and to enter into contracts and cooperative agreements with, the owners of land on the periphery of the park and on watersheds tributary to streams within the park . . . to assure that the . . . forestry management, timbering, land use, and soil conservation practices conducted thereon, or the lack of such practices, will not adversely affect the timber, soil, and streams within the park . . . .

See also Friends of Yosemite v. Frizzell, 420 F. Supp. 390 (N.D. Cal. 1976) (apparently interpreting “breach of trust” as limited to statutorily-imposed duties).


[There is, in addition to [the] specific powers [enumerated in the Redwood National Park Act], a general trust duty imposed upon the National Park Service, Department of the Interior, by the National Park System Act to conserve scenery and natural and historic objects and wildlife in the National Parks, Monuments and reservations and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations (see: Knight v. United States Land Ass’n, 142 U.S. 161, 177-78 (1891)).

169. However, the court may have been referring to a non-statutory duty in its conclusion, where it stated that defendants had failed in the exercise of duties imposed “[by the two aforementioned Acts] and duties otherwise imposed upon them by law.” Id. at 293.
public trust language had altogether disappeared. \textsuperscript{170}

Moreover, the two older cases the court relied upon in invoking the public trust doctrine stand not for any restraints on agency action, but for extremely broad administrative discretion. \textsuperscript{171} The manner of the court’s indirect use of the doctrine was therefore unprecedented. The court weakened its position further by relying on a case involving Native American trust law, which is at best only analogously applicable. \textsuperscript{172}

One recent case, \textit{Sierra Club v. Andrus}, \textsuperscript{173} seems squarely to preclude the application of any non-statutory trust doctrine or “breach of trust” theory. The Sierra Club sought to compel the Department of Interior to assert alleged federal reserved water rights in Utah and Arizona to “protect” them from proposed water-intensive energy projects. \textsuperscript{174} None of the named projects were appropriating water at the time, and the Department was already actively participating in an interagency task force studying the issue of federal reserved water rights.

In addition to pointing out the Department’s duties under the National Park Service Organic Act and the Federal Land Policy and Management Act, the Sierra Club argued that the Department held National Park and Bureau of Land Management resources in trust for the public, and therefore must be charged with the duties and obligations of a trustee. \textsuperscript{175} The court disagreed, holding that the duties imposed by the statutes comprised all the responsibilities the Department need discharge. \textsuperscript{176}

The court reached this result by analyzing the 1978 amendments to the National Park Service Organic Act. \textsuperscript{177} The legislative history of the amendments specifically referred to the \textit{Redwood National Park} litiga-

\textsuperscript{170} Sierra Club v. Dep’t of Interior, 424 F. Supp. 172 (N.D. Cal. 1976):
On July 16, 1975, this court made its order finding that defendants . . . had failed to take steps to exercise and perform certain duties imposed upon Interior by the National Park System Act . . . and by the Redwood National Park Act . . . for the protection of that Park, 398 F. Supp. 284, 293.

\textsuperscript{171} Knight v. United States Land Ass’n, 142 U.S. 161, 177 (1891), gave discretion to the Secretary of Interior to reject a land survey, and Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917) held that Congress retains the power to control the occupancy and use of U.S. lands included within a state. Moreover, the general federal policy at the time these cases were decided was one of disposition.

\textsuperscript{172} See supra notes 48-51 and accompanying text. Also, the court in Davis v. Morton, 469 F.2d 593 (10th Cir. 1972), apparently confused the Indian lands with public lands. Wilkinson, supra note 15, at 275 n.25.


\textsuperscript{174} See projects described in 487 F. Supp. at 445-46.

\textsuperscript{175} Id. at 447-49.

\textsuperscript{176} Id.

\textsuperscript{177} Id. For a different view of the legislative history, see Wilkinson, supra note 15, at 291-93.
tion, indicating that those cases "may have blurred the responsibilities articulated by the 1916 Act." Congress noted that the amendments were intended to refocus and insure the basis for decisionmaking concerning the system continues to be the criteria provided by 16 U.S.C. § 1 ... This restatement of these highest principles of management is also intended to serve as the basis for any judicial resolution of competing private and public values and interest in ... areas of the National Park System.

The court found that "[b]y asserting an explicit statutory standard 'as the basis of any judicial resolution' of Park management issues, Congress eliminated 'trust' notions in National Park System management." Without further analysis, the court also concluded that the Bureau of Land Management had no trust duties outside of those imposed by FLPMA.

While the legislative history of the 1978 amendments to the National Park Service Organic Act may be brief and somewhat ambiguous, the above excerpts seem relatively clear. Congress desired to have the last word concerning the scope of the National Park Service's responsibilities, and did not want the courts to impose additional criteria, particularly as the statutory duties were already high.

Although there may be no direct support for concluding that Con-

179. Id. at 7-8.
181. Id. The court concluded that 43 U.S.C. §§ 1701 and 1782(c) "embody the entire duty and responsibility to manage and protect Bureau of Land Management lands generally with which the Secretary is charged." 487 F. Supp. at 449. See infra notes 203-05 and accompanying text. The court noted that the provisions contain limits on the Secretary's discretion, 487 F. Supp. at 448-49, and proceeded to review the agency conduct under those standards and those of the Administrative Procedure Act, 5 U.S.C. § 706 (1976 & Supp. IV 1980). 487 F. Supp. at 449-52.
183. In adding to the statement of policy in the National Park Service Organic Act of 1916, 16 U.S.C. § 1a-1 (1976), see supra note 133, Congress reaffirmed, declared, and directed that the promotion and regulation of the various areas of the National Park System ... shall be consistent with and founded in the purpose established by section 1 of this title, to the common benefit of all the people of the United States. The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress. Id. at § 1a-1 (Supp. IV 1980) (added by National Parks and Recreation Act of 1978, Pub. L. No. 95-250, 92 Stat. 163, 166). The amendment seems to impose the equivalent of a trust duty on the National Park Service, fortifying the interpretation that Congress intended to preclude courts from exercising their discretion and burdening the Service with further obligations.
gress felt the same standards should apply to judicial review of BLM conduct under FLPMA, the legislative policies underlying FLPMA militate in favor of such a result. FLPMA confers broad discretion on the Secretary to manage the lands in the public interest, and establishes certain general limits on that discretion. The limits in FLPMA are necessarily less strict than the duties imposed by dominant-purpose statutes such as the National Park Service Organic Act (as amended); the multiple-use goal of FLPMA requires allocating to the Secretary enough flexibility to adapt to changing circumstances while managing resource uses that are complex, overlapping, and intermixed. If courts are not to impose extra-statutory duties where the statute clearly expresses dominant uses and purposes, as held in Sierra Club v. Andrus, they should doubly refrain from doing so where the enactment sets out multiple and possibly conflicting objectives. In sum, the holding in Sierra Club v. Andrus accords with the congressional policies underlying the National Park Service Organic Act and the Federal Land Policy and Management Act, and the opinion should be read broadly to apply beyond its facts.

The foregoing review of the public trust cases decided since 1970 indicates that the recent upsurge in legislative activism produced no lasting change in judicial thinking. Moreover, the one attempt to broaden enforceable agency obligations beyond those imposed by statute—the Redwood National Park litigation—suffered subsequent legislative and judicial limitation. The public trust in federal public land law remains to this day an undeveloped, standard-free symbol of

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185. See infra note 203.
186. Loesch, Multiple Uses of Public Lands—Accommodation or Choosing Between Conflicting Uses, 16 ROCKY MTN. MIN. L. INST. 1, 19-23 (1971).
187. A court faced with a dominant-purpose statute can at least assume that if it imposes standards consonant with the overriding theme of the law, it will not be obstructing congressional policy. See infra notes 201-03 and accompanying text.
188. On appeal, the D.C. Circuit held that FLPMA withdrew no lands from the public domain, and without a withdrawal, there could be no reservation of water rights. Sierra Club v. Watt, 659 F.2d 203, 205 (D.C. Cir. 1981). Although the court affirmed the lower court's refusal to consider whether FLPMA implicitly conferred federal reserved water rights, the sole issue appealed, it also stated that the Sierra Club's contention that FLPMA conferred by implication federal reserved water rights in waters on BLM lands, was "totally without merit." Id. This blasting of the merits of the case may weaken somewhat the lower court's discussion of the statutory duties of the Secretary under FLPMA, 487 F. Supp. at 448.
190. Some state courts have apparently relied on public trust rationales in limiting the scope of state agency discretion, using the trust doctrine to justify a form of "strict scrutiny." For example, in Gould v. Greylock Reservation Commission, 350 Mass. 410, 215 N.E.2d 114 (1966), the court struck down a lease by a state park management agency for a large
THE PUBLIC TRUST TOTEM

legislative and administrative power. Even if a court were one day willing to adopt the public trust concept as a means of restricting the scope of agency discretion, the judge would be forced to exercise unguided judicial discretion to apply the “doctrine” to a particular set of facts. As the next section discusses, this would be an unnecessary and undesirable result, even in light of the imperfections of the administrative process.191

IV
PUBLIC LAND STATUTES AND STANDARDS FOR
JUDICIAL REVIEW

The public trust concept as used by federal courts establishes neither the specific factors that an agency must consider in its resource allocation decisions, nor the weights or priorities to be assigned to particular factors. Yet agencies and courts need precisely this sort of information in order to make decisions. This section, without being a major dissertation on judicial review in public land law, attempts to show that the key public land statutes provide adequate lists of relevant factors.

commercial skiing resort on the grounds that the agency had exceeded its statutory authority, even though the very purpose of the agency was to construct and operate such a facility, and the enabling act authorized the agency to lease “any portion” of the mountain. The court held as follows:

The Greylock reservation, as rural park land, is not to be diverted to another inconsistent public use without plain and explicit legislation to that end.'

We conclude that [the enabling act] authorized the Commission to lease only those portions of the reservation which may prove to be reasonably necessary to a project of permitted scope.

We hold that the 1960 lease covered an excessive area and thus was not authorized by the statutes.

350 Mass. at 419, 422, 423, 215 N.E.2d at 121, 123, 124 (citation omitted). No other state court has gone quite so far in using the public trust doctrine out of the water or wetlands context to impose its judgment on a state agency. Jaffe, supra note 76, at 1563-66.

Another state court cited the public trust doctrine to impose a planning requirement before a permit could issue for appropriation of water for development of major coal-related power production facilities. United Plainsmen Ass’n v. North Dakota State Water Conservation Comm’n, 247 N.W.2d 457, 462-63 (N.D. 1976). The requirement of “some short and long-term planning,” id., is not useful in the federal public lands context because the public lands statutes (FLPMA, NFMA, and NEPA) already mandate extensive planning.

Some states have written public trust notions directly into their constitutions. See, e.g., Pa. Const. art. 1, 27; Mass. Const. amend. art. 49, as amended by art. 97 (1972); R.I. Const. art. 37, 1; Tex. Const. art. 16, 59a; Utah Const. art. 20, 1. Others have enacted statutes creating enforceable trust obligations. See, e.g., Michigan Environmental Protection Act, Mich. Comp. Laws Ann. § 691.1202 (Supp. 1982). A similar federal law embodying an overall theory of environmental protection and resource conservation may be a highly worthy goal for the United States to pursue. But see text accompanying notes 73-74. Such a law would be a clearly-articulated, binding legislative principle, unlike the archaic, property-based public trust doctrine. See generally W. DOUGLAS, A WILDERNESS BILL OF RIGHTS (1965); Note, Toward a Constitutionally Protected Environment, 56 Va. L. Rev. 458 (1970), 191. See infra notes 233-37 and accompanying text.
and indicate procedures by which agencies can determine appropriate weights.

A. Some Standards Present

Agency action under a multiple-use statute is obviously more difficult for a court to review than action taken pursuant to a dominant-purpose statute, due to the lack of standards in the former with which the court can measure an agency's balancing of uses in a particular case. Congress has continued to reaffirm the importance of multiple-use management of the public lands, however, apparently on the grounds that current judicial review is adequate.

In the National Forest Management Act of 1976 (NFMA) and the Federal Lands Policy and Management Act of 1976 (FLPMA), Congress has commanded the Forest Service and the BLM to implement a wide range of procedures to improve the scope, quality, and acceptability of their multiple-use resource plans. The statutes list many of the policy factors that the agencies are to consider in planning, and are a marked improvement over previous vague exhortations to manage resources "in a combination that will best meet the needs of the American people." The statutes also provide that the agencies shall promulgate regulations that further elaborate the relevant criteria. More extensive public participation requirements were also imposed, although in some instances the statutes merely formalized the agencies' existing practices.

NFMA contains relatively specific standards and criteria to guide the Forest Service in its timber management practices, perhaps because it is output-oriented. In addition to providing for multiple use

195. See infra notes 200-06 and accompanying text. NEPA also provides a process by which the agencies are to consider all environmental factors relevant to their decisions. See supra note 143.
199. Id. See 36 C.F.R. §§ 216.1-216.6, 219.7 (1981); 43 C.F.R. § 1601.3 (1981). The Forest Service regulations providing for public participation in planning are considerably more comprehensive and detailed than the corresponding BLM regulations.
and sustained yield of the "products and services" obtained from each management unit, land management plans shall expressly include and coordinate the uses of "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." Moreover, in promulgating further planning guidelines, the Secretary of Agriculture shall

insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish . . . [and] provide for diversity of plant and animal communities . . . .

While still quite broad, these directives highlight potential problem areas for a court to examine, and Forest Service regulations implementing these sections should provide additional detail.

FLPMA also lists numerous general duties which the BLM must fulfill in planning for multiple use and sustained yield, though the duties will not become mandatory until implemented by additional legislation. The agency must manage the public lands

in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use . . . .

BLM must also promptly develop regulations and plans for designating and protecting "areas of critical environmental concern," identify and protect areas of wilderness character, and take steps to protect

201. Id. at § 1604(e)(1) (1976).
202. Id. at § 1604(g)(3).
206. Id. § 1782.

The National Environmental Policy Act also provides guidelines for the agency to follow when considering major federal actions significantly affecting the environment. See note 111 supra. The Forest Service must comply with NEPA as the agency develops its resource management plans under NFMA; the latter statute does not excuse the preparation and filing of an Environmental Impact Statement where otherwise appropriate. Texas Comm. on Natural Resources v. Bergland, 573 F.2d 201, 207-08, 212 (5th Cir.), reh. denied, 576 F.2d 931, cert. denied, 439 U.S. 966 (1978). However, in upholding the Service's decision to open a tract to clearcutting, the court carefully noted the limited nature of its review of Forest Service actions. After observing that the congressional decision to permit clearcutting to continue under narrow guidelines represented both a delicate balance between abolishing clearcutting and allowing it to continue unfettered, and an effort to place initial technical management responsibility with the Forest Service, the court stated "[t]he NFMA is a set of outer boundaries within which the Forest Service must work. Within its parameters, the management decision belongs to the agency and should not be second-guessed by a court." Id. at 210. See supra note 5.

206. Id. § 1782.
the California Desert area.\textsuperscript{207} The term "multiple use" is also explicitly defined in the Act to include important non-economic components.\textsuperscript{208}

Admittedly, these provisions are not specific, in that they do not give the agency any information as to the relative importance of each individual value; however, as with NFMA, they list the factors to which the agency and the courts should direct their attention, and they receive a more detailed treatment in the agency's regulations.\textsuperscript{209} Instead of specifying relative weights or priorities for the factors to be considered, Congress provided broad public participation and other procedural requirements.\textsuperscript{210} Unfortunately, the public participation provisions are in themselves lacking in detail, and the many ambiguities may cause significant problems for the agencies.\textsuperscript{211}

\subsection*{B. Judicial Review of Agency Action}

Although FLPMA comprehensively addresses planning, it contains virtually no mention of judicial review. Section 102(a)(6) states that it is congressional policy that "judicial review of public land adjudication decisions be provided by law."\textsuperscript{212} This provision apparently is intended to abrogate the Administrative Procedure Act (APA) exemption from judicial review of agency decisions that concern public property.\textsuperscript{213} FLPMA states elsewhere that the Secretaries of Interior and Agriculture should implement the Act through informal rulemaking; presumably the rules thus promulgated are reviewable under the APA as well.\textsuperscript{214}

The 1,779 page legislative history of FLPMA\textsuperscript{215} says little about judicial review, but its heavy reliance on the report of the Public Land

\begin{thebibliography}{99}
\bibitem{207} \textit{Id.} § 1781(b).
\bibitem{208} \textit{Id.} § 1702(c). \textit{See supra} note 19.
\bibitem{209} \textit{See} 43 C.F.R. §§ 1601.0-8, 1601.5-1 to 1601.5-8, 1725.3-1 to 1725.3-3 (1981).
\bibitem{210} \textit{See supra} notes 198-99.
\bibitem{211} \textit{See} Achterman & Fairfax, \textit{supra} note 29, at 508-13, 516-21, 528.
\bibitem{213} \textit{See} 5 U.S.C. §§ 553, 701, 706 (1976 & Supp. IV 1980); Frishberg, \textit{supra} note 38, at 578-80, 580 n.229; Achterman & Fairfax, \textit{supra} note 29, at 517, 519. The provision removes the defense of sovereign immunity. \textit{Id.}
\bibitem{214} Environmental impact statements prepared by the agency in connection with major federal actions may be reviewed for their adequacy, i.e. whether they discussed all relevant environmental factors, impacts, and alternatives, thus ensuring a reasonable basis for the agency decision. Lевenthal, \textit{supra} note 86, at 511-26.
\bibitem{215} 43 U.S.C. § 1740 (1976 & Supp. IV 1980). However, this section of FLPMA does not specifically provide for judicial review. It states that "[t]he promulgation of such rules and regulations shall be governed by the provisions of chapter 5 of title 5," (dealing with agencies' procedural requirements) but does not refer to chapter 7, which deals with the scope of judicial review.
\bibitem{216} \textsc{Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., Legislative History of the Federal Land Policy and Management Act of 1976 (Comm. Print 1978).}
Law Review Commission (PLLRC) may be instructive. The PLLRC stated that

in accordance with traditional concepts of separation of powers, it is not our intent that the courts would substitute their judgment for that of the agencies in matters committed by Congress to agency discretion. Indeed the courts traditionally have not attempted to, and as a practical matter cannot, substitute their views for those of the agencies in such matters. What judicial review does assure, however, is that (1) discretion is exercised evenhandedly; (2) its exercise is not arbitrary or discriminatory; and (3) guidelines in statutes or regulations are followed. In this context the availability of judicial review should pose no threat or burden to legitimate public land management.216

Now that public land adjudications are reviewable, the court will determine whether the findings of the BLM Administrative Law Judge are supported by substantial evidence on the record as a whole.217 The scope of review of informal agency decisions is less clear. The PLLRC recommendation would indicate that virtually all agency decisions may be reviewed; the court would presumably ascertain whether the agency decision was arbitrary, capricious (discriminatory), or in violation of applicable constitutional, statutory, or regulatory authority.218 This view comports with the general willingness of courts to review agency action under the APA.219 The court’s review would include matters of procedure as well as substance.220

The Ninth Circuit, in Ness Investment Corp. v. United States Department of Agriculture Forest Serv.,221 took a somewhat more restricted view than the PLLRC regarding the availability of judicial review:

Where consideration of the language, purpose and history of a statute indicate that action taken thereunder has been committed to agency discretion: (1) a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions; (2) but a federal court does not have jurisdiction to review agency action for abuse of discretion when the alleged abuse . . . consists only of the making of an informed judgment by the agency.222

Where the Forest Service or BLM may decide particular questions

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216. PLLRC REPORT, supra note 74, at 256.
218. Id. § 706(2)(A)-(C) (1976).
221. 512 F.2d 706 (9th Cir. 1975).
222. Id. at 715.
without reference to statutory standards, existing regulations, or case law, the court may be powerless to intervene under the *Ness* test. However, any informal action involving a procedural requirement would be reviewable to the extent of determining whether the agency complied with the requirement. The statutory standards for resource planning and management, though vague, would probably be adequate to ensure judicial review of all plans and rules.

There is no question that Congress could supply considerably more substantive and procedural detail in FLPMA and NFMA. For example, the statutes could specifically identify the representatives of national, regional, local, economic, and non-economic interests who have a right to participate in particular decisions and levels of decision-making. Such guidance would greatly assist the agencies as well as the courts in carrying out congressional policies. The PLLRC and numerous commentators have also suggested that Congress switch to a policy of designating dominant uses for much of the public lands, thus directly reducing the scope of agency discretion and alleviating the root problems of the resource agency decisionmaking processes: their systematic bias in favor of well-organized and well-funded commercial and industrial interests.

C. Returning to the Problem of Agency Discretion

Even without further action by Congress, the problem of agency bias may not be as severe as some commentators have in the past suggested. Several elements in the resource agencies’ operating environments strengthen their ability to adhere to established national policy and resist particular interest group pressures. For example, Forest Service and BLM administrators tend to exhibit a high degree of professionalism. They are resource managers, possessing a specialized body of knowledge based on the biological sciences; they usually hold degrees in forestry, range management, or natural resources management; they use a distinct mode of analysis when calculating resource benefits and yields and setting policy; and they often belong to professional associations that to some extent control education and employment opportunities in the relevant fields. The common backgrounds of the administrators tend to unify their views, predisposing them to use their skills to manipulate biological processes in search of the multiple use ideal. One recent study indicates that the old disparities

223. PLLRC REPORT, supra note 74, at 1-7; e.g. Note, supra note 14.
225. CULHANE, supra note 104, at 325-27.
226. Id. at 327. The Bureau of Land Management has begun to partake of the professional land management image developed by the Forest Service, including the latter’s con-
between the strong progressive conservation mandate and professionalism of the Forest Service and the stockmen-dominated, untrained administration of the BLM have disappeared: both agencies now have highly trained line officers operating under virtually identical statutory mandates requiring multiple use and extensive land use planning.\textsuperscript{227} Moreover, Forest Service and BLM line officers’ attitudes concerning the philosophy and practice of public land management are not only extremely similar, but are on the average more conservation-oriented than those of state fish and game officers.\textsuperscript{228}

The concept of multiple use itself guides resource agency decisionmaking. It instructs agency professionals to structure each use of the public lands to minimize interference with other uses in the same area and, if possible, to complement those other uses, thereby obtaining maximum net social benefits from the land.\textsuperscript{229} Sustained yield is simply the result of multiple use management over time; optimal use becomes that level of use sustainable in the long run that does not decrease the capacity of the land to provide other resources in perpetuity.\textsuperscript{230} Under the multiple use and sustained yield concepts, the crucial focus of land management decisions is not the absolute or relative levels of outputs, but the effects of particular uses on the land, and the conditions under which such uses should be allowed.\textsuperscript{231} Hence, the multiple use principle has a practical meaning for those trained in the applied sciences of forestry, range management, and natural resource management.\textsuperscript{232}

Multiple use is a guide to political as well as technical management operations, and this political facet of multiple use may best explain why the resource agencies have not been “captured” by one of their constituencies. Agency professionals can use their multiple use mandate as a shield to fend off constituency demands for various domi-

\begin{itemize}
  \item \textsuperscript{227} \textit{Id.} at 328-331.
  \item \textsuperscript{228} \textit{Id.} at 328.
  \item \textsuperscript{229} \textit{Id.} at 126.
  \item \textsuperscript{230} \textit{Id.} at 126, 327.
  \item \textsuperscript{231} \textit{Id.} at 127, 327.
  \item \textsuperscript{232} \textit{Id.} at 327.
\end{itemize}
nant uses, whether the demands are for increased grazing, greater timber harvesting, or complete preservation of undeveloped areas as wilderness. Resource agency constituents may also use this tactic against each other. 233

Interest group influence on the lower decisionmaking levels of the Forest Service and BLM is significant, but such influence is not tantamount to capture. Dominant clienteles of homogeneous consumptive users are rare in most local Forest Service and BLM jurisdictions; rather, numerous and heterogeneous competing constituencies tend to be present. 234 The degree of any one group's influence varies over time and by issue, and local agency officials continuously anticipate and respond to local public reactions to their decisions. 235 The agencies benefit from pursuing a "multiple clientele" strategy, as each constituency reinforces a different aspect of the multiple use policy. Furthermore, decisionmaking based on anticipated public reaction is consistent with national policy, which mandates extensive public participation and administrative responsiveness to local needs. 236 The abundance of interest group constituencies at the local level, many of which are affiliated or allied with active regional or national organizations, 237 prevents agency policy from deviating greatly from the purposes stated in the multiple use statutes and resource agency rules. 238

V

CONCLUSION

Where Congress intends that the interaction of multiple interest groups in the political and administrative arena should influence an agency's ultimate choice of policy, the courts have only a limited role to play in reviewing the agency's decision, particularly where agency procedures provide for the consideration of all relevant interests. The courts are not free to aid parties who feel slighted by the administrative decision, no matter how noble their cause. Judicial restraint protects the courts against a political backlash. Moreover, given the growing number of activist legal foundations funded by corporate interests

233. Id. at 331-32.
234. Id. at 28, 333-34.
235. Id. at 334.
236. Id. at 335. See supra notes 24-29, 143, 198-99 and accompanying text.
237. Culhane, supra note 104, at 332.
238. If the resource agencies are not "captured," why does the capture thesis persist? One answer may be that from one end of the ideological spectrum, the agencies always appear to be aligned with the other side. Furthermore, no group likes to lose on the merits; attributing an adverse decision to the influence of "special interests" (i.e. the other side) avoids the need to recognize the weaknesses in one's own position. Most important, the less centralized interest groups probably find the capture thesis useful to mobilize support and maintain group cohesion. See id. at 20-21, 338-39.
rather than by public contributions, judicial restraint benefits environmentalists as well.

The public trust doctrine cannot expand the limited scope of judicial review that the multiple use statutes currently require. At this point in its development, the public trust doctrine of itself imposes no duties or obligations on the agencies responsible for administering the public lands. If it were used by a court to review a resource agency decision, the doctrine would be merely a vehicle for the court to exercise raw judicial power.

The greatest problem arising from any attempt to apply the public trust doctrine to public lands is that it focuses attention on the wrong question. The important issue is not whether the courts can use the public trust doctrine to control resource agency decisionmaking under the multiple use statutes, but whether agency decisions under those statutes should be in court at all. The Ness test captures the essence of the proper role of the court in reviewing these fundamentally legislative judgments. First, the judge must examine the challenged agency action to determine whether it violates any constitutional, statutory, regulatory, or other legal constraint. If it does not, that is, if the action is not illegal or arbitrary, the judge has no further jurisdiction to evaluate the balance struck by the agency. From that point onward, the question is for Congress, and the body politic, to determine.