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University of Arkansas School of Law

NatAgLaw@uark.edu ☎ (479) 575-7646

An Agricultural Law Research Article

**Student Survey:
Public Lands**

by

Samuel J. Light

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PUBLIC LANDS*

I. BACKGROUND

In 1990 the Ninth Circuit considered a variety of public lands cases which demonstrated that the lands, as the Federal Land Policy and Management Act suggests, are of many uses.¹ The court's decisions show that the western public lands may be both a repository of the unwanted—nuclear waste²—and the ideal sepulcher of the very valuable—native American artifacts.³ The Ninth Circuit also considered jurisdictional issues and a variety of constitutional and administrative questions concerning the public lands. This Chapter reviews its major decisions in this area.

* This Chapter prepared by Samuel J. Light, Northwestern School of Law of Lewis and Clark College, J.D. expected 1992.

1. "The Congress declares that it is the policy of the United States that . . . management [of public lands] be on the basis of multiple use and sustained yield unless otherwise specified by law." 43 U.S.C. § 1701(a)(7) (1988).

2. *Nevada v. Watkins*, 914 F.2d 1545 (9th Cir. 1990) (upholding continued site characterization of Yucca Mountain, a tract of federal land in Nevada selected as a potential site for a national high-level radioactive waste repository), *cert. denied*, 111 S. Ct. 1105 (1991). See *infra* notes 4-31 and accompanying text.

3. In a criminal appeal, *United States v. Austin*, 902 F.2d 743 (9th Cir.), *cert. denied*, 111 S. Ct. 200 (1990), the court considered and rejected a constitutional challenge to the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470aa-mm (1988). Austin was convicted of violating the Act by excavating approximately 2,800 Native American arrowheads, pieces of pottery, fossilized bones, and other artifacts valued at more than \$100,000 from the Luna Lava Butte in the Deschutes National Forest. See *Artifact Digger Sentenced to Jail*, United Press Int'l., Nov. 15, 1988. On appeal, Austin argued that the Act was unconstitutionally overbroad and vague.

Austin's overbreadth argument, which the court considered creative if not meritorious, was based on his belief that his conduct was protected by academic freedom, which "long has been viewed as a special concern of the First Amendment." See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978). Austin, however, was not affiliated with any academic institution, and instead only claimed his conduct was academic because it was motivated by curiosity. The court flatly rejected this resort to academic freedom. It also rejected his claim that "weapons" and "tools," as used in the Act's list of materials which cannot be excavated, are unconstitutionally vague terms. As applied to Austin, the court found there was no doubt or lack of fair notice that the scrapers and arrow points he excavated were indeed weapons and tools. 902 F.2d at 743-45.

II. NEVADA V. WATKINS AND NEVADA V. BURFORD: NUCLEAR WASTE ON PUBLIC LANDS

It is not surprising that siting a repository for commercial and military high-level radioactive waste is a contentious and litigious undertaking. In 1990, the Ninth Circuit handed down two opinions that left Nevada the unwilling focus of Department of Energy (DOE) efforts to study, or "characterize,"⁴ Yucca Mountain as a potential nuclear waste repository. In *Nevada v. Watkins*,⁵ the state, as well as its governor and members of its congressional delegation, made a broad attack on the DOE's continued study at the site, and in a related case⁶ the state challenged the Bureau of Land Management's (BLM) grant to the DOE of a right-of-way at the site. While the end result of the Ninth Circuit's opinions is that the DOE may continue its characterization efforts at Yucca Mountain, in *Nevada v. Watkins*, the court analyzed several issues that will continue to dominate the nuclear waste siting process. Before discussing the conclusions, it is useful to review the legal and factual landscape surrounding Yucca Mountain.

The Nuclear Waste Policy Act of 1982 (NWPA)⁷ was enacted by a Congress deeply concerned over the growing accumulation of high-level radioactive waste and the lack of a safe and environmentally acceptable method of disposal. As originally enacted, NWPA's key objective was to identify and develop a deep, geologic repository for permanent disposal of spent nuclear fuel and high-level waste.⁸ Following a precise timetable, the DOE was to nominate and conduct environmental assessments of five loca-

4. The term 'site characterization' is defined as follows:

(A) siting research activities with respect to a test and evaluation facility at a candidate site; and (B) activities . . . undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository

42 U.S.C. § 10,101(21) (1988).

5. 914 F.2d 1545 (9th Cir. 1990).

6. *Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990).

7. Pub. L. No. 97-425, 96 Stat. 2201 (1983) (codified as amended at 42 U.S.C. §§ 10,101-10,270) (1988)).

8. 42 U.S.C. § 10,131 (a) (1988).

tions eligible for site characterization.⁹ After narrowing the field to three, the DOE was then to conduct site characterization activities and recommend to the President a single site for development.¹⁰ The President, in turn, was required to transmit his approval to Congress if he concurred in the choice.¹¹ NWSA allowed a host state to submit a notice of disapproval to Congress if it so desired. Congress then had ninety days during its first continuous session to pass a joint resolution overriding the State's notice of disapproval.¹²

In *Watkins*, the DOE, in line with the statutory scheme, nominated five sites for characterization in May 1986, including Yucca Mountain.¹³ However, Congress on December 22, 1987, amended NWSA and designated Yucca Mountain as the sole site to be characterized for possible development. Congress made characterization procedures applicable only to the Nevada site, but left intact the state's right to submit a notice of disapproval subject to congressional override.¹⁴ The DOE issued a final site characterization plan and applied for necessary state permits. The Nevada legislature then passed several pieces of legislation. One joint resolution expressed adamant opposition to a repository. Another resolution, premised on economic and environmental concerns—and thus an effort to avoid federal preemption¹⁵—required the federal government to obtain prior state consent or cession of jurisdiction over Yucca Mountain before developing the site. The resolution then summarily refused consent

9. 42 U.S.C. § 10,132(b)(1)(A).

10. *Id.* §§ 10,133(a), 10,134(a)(1).

11. *Id.* § 10,134(a)(2)(a).

12. *Id.* §§ 10,136 (b)(2), 10,135(c).

13. The other sites are located in Mississippi, Texas, Utah, and Washington. 51 Fed. Reg. 19,783, 19,783-84 (1986). Nevada, in an action consolidated with the instant case, challenged this decision. *Nevada v. Watkins*, 914 F.2d 1545, 1550 (9th Cir. 1990).

14. Nuclear Waste Policy Amendments Act of 1987, Pub. L. No. 100-203, § 5011, 101 Stat 1330, 1330-227 (codified at 42 U.S.C. §§ 10,133-10,136, 10,172 (1988)).

15. The Nevada legislature chose to use economic and environmental language based on its reading of *Pacific Gas & Elec. Co. v. State Energy Resource Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). The Court upheld a state law requiring adequate capacity for interim nuclear waste storage because it was motivated by economic concerns, an area not preempted by the federal Atomic Energy Act of 1954. Nevada's attempt failed. See *infra* notes 21-24 and accompanying text.

or cession. Finally, the state legislature passed a bill making it unlawful to store high-level radioactive waste in Nevada.¹⁶ In April 1989 both resolutions were transmitted to the President and Congress, and soon after the Nevada Attorney General concluded that the state had made a valid notice of disapproval under NWPA. After Governor Richard Bryan and DOE Secretary James Watkins exchanged differing opinions on whether characterization could proceed legally, the state filed suit in the Ninth Circuit, which has original jurisdiction.¹⁷

The court received an array of claims, but the crux of the state's complaint in *Nevada v. Watkins* was that Congress did not have the constitutional authority to amend NWPA in 1987 and, even if it did, its power was restricted by competing constitutional limitations. The court sought and found a sufficient grant of power for the amendments in the Property Clause, which states 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."¹⁸ The court stated this clause, which has been broadly construed by the Supreme Court,¹⁹ provided Congress with plenary power to regulate federally owned land. Yucca Mountain, which is on three adjacent parcels of federal land under the control of the DOE, BLM, and U.S. Air Force, is subject to that plenary power.

Nevada nonetheless contended Congress's authority was restricted by a number of constitutional provisions, with its most striking challenge resting in the tenth amendment.²⁰ Nevada ar-

16. See NEV. REV. STAT. § 459.910 (1989).

17. 42 U.S.C. § 10,139 (a)(1) (1988).

18. U.S. CONST. art. IV, § 3, cl. 2.

19. In *United States v. San Francisco*, the Court stated: "The power over the public land thus entrusted to Congress is without limitations." 310 U.S. 16, 29 (1940). This conclusion has been followed in later cases. See *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987); *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

20. U.S. CONST. amend. X states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Nevada also argued that Congress was restricted by the Federal Enclave Clause, U.S. CONST. art. I, § 8, cl. 17, the Equal Footing Doctrine, the Privileges and Immunities Clause, U.S. CONST. art. IV, § 2, cl. 1, and the Port Preference Clause, U.S. CONST. art. I, § 9, cl. 6.

The court rejected Nevada's claim under the Enclave Clause because state consent to or cession of jurisdiction over Yucca Mountain is not required where

gued that the political process by which Yucca Mountain was selected was skewed to a point that denied Nevada any opportunity to defend its sovereign interests. The court rejected this argument,²¹ but the claim raised the state's concern that, politically, the struggle to site a nuclear waste repository is as many parts Darwinism as democracy.²² Nevada considers itself unfit for this struggle because it has little congressional clout. The Ninth Circuit stated that this fact alone did not call for judicial action, but Congress undoubtedly will address this concern throughout the siting process.

The *Watkins* court also considered whether the state had submitted, under section 10,136 of NWPA, an effective notice of disapproval of the DOE's continued site characterization at Yucca Mountain. In asserting this claim, Nevada made two preliminary contentions. First, it claimed the timing provisions governing notices of disapproval²³ deprived its citizens of the "Republican Form of government" guaranteed by the Constitution²⁴ because the President could approve Yucca Mountain when the Nevada legislature, which meets biennially, is not in session, and thus deprive it of an opportunity to respond. Besides the court's observa-

Congress acts pursuant to plenary authority over public lands. *Nevada v. Watkins*, 914 F.2d 1545, 1554 (9th Cir. 1990) *cert. denied*, 111 S. Ct. 1105 (1991). For the court's discussions of the other three claims, see *id.* at 1554-58.

21. Under the strictures of *South Carolina v. Baker*, 485 U.S. 505 (1988), and *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), it is doubtful that Nevada or any "state qua state" could secure judicial protection of its sovereign interests. The *Garcia* court concluded that state sovereign interests "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. at 552. While the *Baker* court acknowledged that judicial action might be warranted where a state was deprived of its right to participate in the national political process or was singled out and left politically isolated and powerless, 485 U.S. at 513, neither court charted the defects that might prompt court action. The *Watkins* court, loathe to evaluate the national political process, held Nevada could not base a sufficient claim on the fact that it was simply outvoted and had no representation on the Conference Committee which considered the amendments. See *Watkins*, 914 F.2d at 1556-57.

22. Nevada, the court noted, is not without political recourse. Under the amendments it may still register its disapproval of a repository siting decision. *Watkins*, 914 F.2d at 1557.

23. NWPA § 116 (b)(2), 42 U.S.C. § 10,136 (b)(2) (1988), requires that a state submit its notice of disapproval not later than 60 days after the date of the Presidential recommendation made pursuant to § 114(a), 42 U.S.C. § 10,134(a).

24. U.S. CONST. art. IV, § 4.

tion that this argument was wholly speculative, it rested on odd assumption that the governor, a plaintiff in the suit, would not call a special session to prepare a notice of disapproval. Second, the state suggested the 1987 amendments by implication repealed the requirement that the President approve development of the final repository site *before* a state may send notice of disapproval.

Judge Alarcon, writing for the court, rejected this argument, stating that the statutory requirements of study, deliberation, and debate were not undermined simply because Yucca Mountain was the only site to be characterized. Practically, it is more plausible that the 1987 amendments were an implied approval of Yucca Mountain as the final repository, but because the state belatedly raised this point, and the DOE or the President might in fact disapprove of the site, this argument was reserved for another day.²⁵

With these preliminary objections dismissed, the court considered the effect of Nevada's joint resolutions and found that the acts preempted by the 1987 NWPA amendments.²⁶ The court declined to delineate the full reach of NWPA, noting that other courts have struggled to define the extent of the federal government's occupation of the nuclear safety field.²⁷ However, it did hold that the joint resolutions and bill, though based on professed motivations of economic and environmental effects, had the actual effect of frustrating the intent of the NWPA amendments. Valuing effect over purpose, the court concluded that a ban on nuclear disposal surely conflicted with NWPA's mandate that the DOE carry out site characterization of Yucca Mountain. Nevada, in turn, might return to the state house to more craftily draw a statute based on economic concerns, but success may be elusive in light of the Supreme Court's most recent discussion of preemption in the nuclear field.²⁸

25. *Nevada v. Watkins*, 914 F.2d 1545, 1558-60 (9th Cir. 1990), *cert. denied*, 110 S. Ct. 1105 (1991).

26. *Id.* at 1560-61.

27. The Supreme Court stated that the federal government, under the Atomic Energy Act, 42 U.S.C. §§ 2011-2284 (1988), "has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Elec. Co. v. State Energy Resources & Dev. Comm'n*, 461 U.S. 190, 212 (1983). The Court, however, upheld a California law conditioning nuclear plant approval because it had an avowed economic concern. 461 U.S. at 216.

28. The Court clarified *Pacific Gas & Electric* by stating that although part

Finally, the court dismissed Nevada's claim that the Secretary of the DOE had an enforceable duty to determine throughout the characterization process whether any conditions exist that would disqualify Yucca Mountain as a repository. The court concluded that NWSA, though it allows judicial review of a failure to take required action,²⁹ committed to the Secretary's discretion the timing of any disqualification decision.³⁰ While NWSA requires promulgation of site suitability guidelines,³¹ it states only that the DOE take steps to disqualify Yucca "if the Secretary at any time determines the . . . site to be unsuitable for development as a repository. . . ."³² NWSA requires no guidelines concerning the timing of this decision, which in turn means Nevada must challenge a later, final decision if it is opposed to further development.

Three months after *Watkins*, the Ninth Circuit in a short opinion, *Nevada v. Burford*, affirmed a district court determination that Nevada lacked standing to challenge a BLM grant to the DOE of a right-of-way at Yucca Mountain.³³ The thirteen-year right-of-way, which prohibits the disposal of any hazardous substances and does not convey any rights for construction or operation of a repository, provides the DOE access to 51,632 acres for site characterization studies.³⁴ Writing for the court, Judge Wallace stated that Nevada, which was prepared to bring various environmental and constitutional claims, had no more than a general grievance against the BLM since the state does not own the land and had alleged no injury fairly traceable to the defendant's conduct.³⁵ Also, the court rejected Nevada's allegation that it had

of the preemption question looks to the purpose of the state law in question, "another part of the field is defined by the state law's actual effect on nuclear safety." *English v. General Elec. Co.*, 110 S. Ct. 2270, 2278 (1990). Consequently, courts will not determine the preemption question solely by relying on the state's avowed purpose.

29. 42 U.S.C. § 10,139(a)(1)(B) (1988).

30. *Nevada v. Watkins*, 914 F.2d 1545, 1563 (9th Cir. 1990), cert. denied, 110 S. Ct. 1105 (1991).

31. 42 U.S.C. § 10,132(a). These guidelines are set forth at 10 C.F.R. §§ 960.3, .4 (1989).

32. 42 U.S.C. § 10,133(c)(3) (emphasis added).

33. 918 F.2d 854 (9th Cir. 1990).

34. *Id.* at 855-56.

35. *Id.* at 856-57.

standing in its *parens patriae*³⁶ capacity to advance the interests of its citizens. While this theory typically confers standing on states in appropriate actions, the Court followed the ruling in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*³⁷ that a state does not have *parens patriae* standing to bring an action against the federal government.³⁸

The circuit courts' original jurisdiction over much of the NWPAs process certainly means the Ninth Circuit will be the final resting place of many actions arising out of Yucca Mountain. The *Nevada v. Watkins* opinion adds to the NWPAs jurisprudence an affirmation of Congress's plenary power over federal lands and the conclusion that Nevada's political disadvantage is not a political defect of constitutional proportion. It also upholds NWPAs characterization and recommendation process in light of the 1987 amendments which limited these activities to the Nevada site. Whether Yucca, a six-mile ridge of BLM land one-hundred miles northwest of Las Vegas, will become the nation's first permanent nuclear waste repository, is a decision "many years and numerous procedural hurdles away."³⁹

36. Literally "parent of the country," the term refers traditionally to the standing concept that the state may bring an action on behalf of its citizens as guardian of quasi-sovereign interests such as health and welfare. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

37. 458 U.S. 592, 610 n.16 (1982).

38. *Nevada v. Burford*, 918 F.2d 854, 858 (9th Cir. 1990).

39. *Id.* at 857. For a critique of the lengthy process attending the apparently urgent disposal problem, see Krauskopf, *Disposal of High-Level Nuclear Waste: Is It Possible?* 249 Sci. 1231 (1990). For a discussion of NWPAs, see Raeber, *Federal Nuclear Waste Policy as Defined by the Nuclear Waste Policy Amendments Act of 1987*, 34 St. Louis U.L.J. 111 (1989).

III. BUREAU OF LAND MANAGEMENT: LAND WITHDRAWALS AND JURISDICTIONAL ISSUES

A. Shiny Rock Mineral Corp. v. United States: Federal Register Publication Starts Statute of Limitations for Public Land Withdrawal

The Ninth Circuit heard another appeal by the Shiny Rock Mining Corporation,⁴⁰ which in the late 1970s located the Mandalay claim on lands in the Willamette National Forest. Portions of the lands, however, had been withdrawn in 1964 from mining uses; the withdrawal was published twice in the Federal Register and noted in the BLM records. In 1987, the Ninth Circuit rejected Shiny Rock's constitutional challenges to land withdrawal administration through the so-called notation rule.⁴¹ However, it remanded the case for consideration of Shiny Rock's claim that the underlying land withdrawal, Public Land Order 3502, was improperly promulgated and implemented.⁴² The district court, in turn, found the action barred by the statute of limitations. Shiny Rock again appealed to the Ninth Circuit, which used the second appeal to clarify the effect of a published land withdrawal.⁴³

Both parties in the most recent *Shiny Rock* litigation agreed the claim concerning the 1964 Public Land Order was governed by the general civil action statute of limitations of six years.⁴⁴

40. *Shiny Rock Mineral Corp. v. United States*, 906 F.2d 1362 (9th Cir. 1990).

41. In the 1987 case, *Shiny Rock Mining Corp. v. United States*, 825 F.2d 216 (9th Cir. 1987), the court affirmed the district court's grant of summary judgment to the United States on the constitutional claims. Shiny Rock, arguing a taking and denial of due process, sought judicial review of the Interior Board of Land Appeals denial of its mineral patent application, made on the grounds that its claim to certain portions of the forest land was void *ab initio* due to the notation rule. That rule states that if Bureau of Land Management records reflect that the land is devoted to a particular use, no incompatible rights can attach until the record has been changed to reflect availability of the land for the desired use. The district court and Ninth Circuit agreed that the notation rule was a proper means to administer public lands, and that the withdrawal was noted and was still in effect when Shiny Rock attempted to locate its claim. 825 F.2d. at 218-19 (also citing line of cases upholding the notation rule).

42. *Id.* at 219-20.

43. *Shiny Rock Mineral Corp.*, 906 F.2d at 1364.

44. "Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a) (1988).

However, Shiny Rock challenged on three grounds the district court's conclusion that its right of action accrued when the Federal Register notices became effective. Shiny Rock first asserted that its right of action did not accrue until 1981, the time it received actual knowledge of the land withdrawal. The court, however, held that actual notice of the withdrawal was not required for the statutory limitation to commence.⁴⁵ Shiny Rock then contended it had no standing to challenge Public Land Order 3502 until its mineral patent application was denied in 1983. The Court rejected the suggestion that standing is a prerequisite to accrual of a right of action, stating Shiny Rock's position would "virtually nullify" the statute of limitations because it would allow parties to challenge regulations when administered, rather than when adopted. This would leave regulations vulnerable to frontal attack during each application—an impractical result. The court therefore refused to tie the commencement of the statute of limitations to the application rejection.⁴⁶ Lastly, Shiny Rock inverted its standing argument to claim it was not injured until the 1983 denial of its patent application. However, the court, relying on a 1986 case,⁴⁷ determined that *Federal Register* publication of a land withdrawal provides the requisite injury for the commencement of the limitations period. In fact, Shiny Rock and "all interested parties" were injured in 1964 when the withdrawal reduced the amount of land available for mining.⁴⁸ In short, Shiny Rock located its claim too late to capitalize on it.

The *Shiny Rock* case reaffirms that constructive knowledge

45. *Shiny Rock Mineral Corp. v. United States*, 906 F.2d 1362, 1364 (9th Cir. 1990). The court relied on *Friends of Sierra R.R., v. ICC*, 881 F.2d 663, 667-68 (9th Cir. 1989) ("[p]ublication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance"). See also 44 U.S.C. § 1507 (1988); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947). The *Shiny Rock* court also held the publication of Public Land Order 3502 was not defective because of a typographical error. The error, listing the centerline of the withdrawn area as "Forest Road 580" instead of S80, was cured by a 1965 *Federal Register* notice. *Shiny Rock Mineral Corp.*, 906 F.2d at 1365.

46. *Shiny Rock Mineral Corp.*, 906 F.2d at 1365.

47. *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760 (9th Cir. 1986) (entertaining challenge to land withdrawal though plaintiffs had filed no property claim).

48. *Shiny Rock Mineral Corp. v. United States*, 906 F.2d 1362, 1365-66 (9th Cir. 1990).

of government action is sufficient to commence the statutory period under 28 U.S.C. section 2401(a); actual knowledge is not required. Parties seeking review of a land withdrawal must have standing and file their action within six years of *Federal Register* publication of the withdrawal. While neither conclusion charts new law, the case does extend the reasoning of an earlier decision concerning the limitations on challenges to agency orders.⁴⁹

B. Norfolk Energy, Inc. v. Hodel: BLM's Power to Regulate Private Oil and Gas Holdings

Though "unitization"⁵⁰ of oil and gas production operations increases efficiency and reduces surface boundary disputes, it may also subject operators of facilities on otherwise private leases to federal regulations. In *Norfolk Energy, Inc. v. Hodel*,⁵¹ the Ninth Circuit sanctioned one such assertion of federal agency jurisdiction and held that the BLM, which has authority under the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA)⁵² to regulate federal and Indian lands within units, may also require schematic drawings from, and for other security purposes

49. In *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988), the court held that the plaintiff's procedural claims against the BLM did not relate back under FED. R. Civ. P. 15(a) to claims against BLM policy filed more than six years earlier. As in the instant case, the court reasoned a contrary holding would allow parties to challenge regulations well after the statute of limitations had lapsed.

50. Unitization, provided for by the Mineral Leasing Act, 30 U.S.C. §§ 181-194, 221-237 (1988), permits an entire oil and gas field, or a substantial portion of it, to be operated as an entity without regard to surface boundary issues. This allows for comprehensive management, reduces waste, and aids in greater recovery at less cost because wells can be located to maximize the use of the reservoir. See generally H. WILLIAMS & C. MEYERS, OIL & GAS LAW §§ 901, 913.5 (Supp. 1988). Lessees of federal and Indian lands are authorized to participate in unitization agreements. See 30 U.S.C. § 226(m). Their participation is also approved by the Secretary of the Interior. 43 C.F.R. §§ 3180-3186 (1988).

51. 898 F.2d 1435 (9th Cir. 1990).

52. 30 U.S.C. §§ 1701-1757 (1988). FOGRMA authorizes the Secretary of Interior to develop a comprehensive system of royalty management. To do so, the Department of the Interior promulgated regulations for an inspection, collection, and accounting system which will ensure adequate royalty payments. See 43 C.F.R. pt. 3160 (1990). These regulations govern operations associated with "leases issued or approved by the United States, restricted Indian land leases and those under the jurisdiction of the Secretary of the Interior by law or administrative arrangement." 43 C.F.R. § 3160.0-1.

regulate, nonfederal, non-Indian lands in the same unit.⁵³ Though the BLM's power to regulate private holdings for such purposes was clarified by regulatory amendments made during the pendency of the *Norfolk* case,⁵⁴ the Ninth Circuit's decision will continue to provide a helpful interpretation of FOGRMA's effect on private agreements to limit federal oversight. The controversy in *Norfolk* was rooted in the original Tiger Ridge and Bullhook unit agreements,⁵⁵ which were executed under Montana law in 1971 and approved by the federal government in 1972.⁵⁶ In them, the parties stated that various laws and regulations were "accepted and made a part of [the] Agreement as to Federal [and Indian] lands"⁵⁷ The agreements, however, were silent as to regulation of nonfederal and non-Indian land. It was not until 1985, when the BLM requested schematic drawings of Norfolk's private land facilities, that this silence proved troublesome.⁵⁸

At that time, and throughout its appeals to the district court and Ninth Circuit, Norfolk argued the agreement had by clear implication precluded regulation of nonfederal and non-Indian lands. Norfolk then argued that the BLM ignored the mandate of section 305 of FOGRMA, which states the Act applies to oil and gas leases issued before, on, or after the date of passage [1982], "except that in the case of a lease issue before such date, no provision of this Act, or any rule or regulation prescribed under this Act shall alter the express and specific provision of such a lease."⁵⁹ Laying the unit agreements against section 305, the Ninth Circuit found that the language Norfolk relied on was vague, and that silence as to regulation of private land surely was not an "express and specific" provision. It therefore held the unit agreement did not preclude federal regulation of private lands in

53. *Norfolk Energy, Inc. v. Hodel*, 898 F.2d 1435, 1439-42 (9th Cir. 1990).

54. See *infra* note 65 and accompanying text.

55. The Tiger Ridge Unit contains 6.87 percent federal land, and the Bullhook Unit contains 8.31 percent federal land and 6.03 percent Indian land. See *Norfolk Energy Inc.*, 898 F.2d at 1437 n.2. There was no dispute that the agreements for these units constitute "leases" for purposes of FOGRMA. *Id.* at 1440 n.5 (citing 30 U.S.C. § 1702(5) (1988), 43 C.F.R. § 3160.0-5(f) (1988)).

56. *Id.* at 1437.

57. *Id.* (emphasis added by Interior Bd. of Land Appeals).

58. *Id.*

59. Federal Oil and Gas Royalty Management Act of 1982, Pub. L. No. 97-451, § 305, 96 Stat. 2447, 2461-62 (1983) (codified at 30 U.S.C. § 1701 (1988)).

the Tiger Ridge and Bullhook units.⁶⁰

The decision⁶¹ must have troubled Norfolk, for though the court required "express and specific" language precluding FOGRMA regulation, it passed over language in a regulatory preamble which stated BLM's "limited authority" over private or state lands "is spelled out in the formal [unit] agreement."⁶² The preamble to the FOGRMA regulations in effect at that time further stated: "If the agreement fails to provide such limited authority to the Bureau [to obtain data and inspect sites], these regulations do not apply to operations on private or State lands."⁶³

However, the court, like the Interior Board of Land Appeals (IBLA), looked beyond the preamble and unit agreements and found that the "regulations as a whole" support the conclusion that the BLM has authority to require schematic drawings.⁶⁴ For example, the court noted BLM has an interest in private lands in units with federal or Indian lands simply because unitization contemplates mutually beneficial operations. Also, the regulations already gave the BLM authority to inspect private facilities, and the court agreed with the IBLA that it would be anomalous to conclude that the BLM could inspect private lands, but could not require schematic drawings of wells on those same lands.

In 1987, the BLM amended its regulations to clarify its authority in this area.⁶⁵ However, the new language, stating its regulations apply notwithstanding any provision of a unit agreement, appears to conflict with section 305 of FOGRMA. This would be true particularly if a unit agreement reached before 1983 precludes federal regulation of nonfederal, non-Indian lands by ex-

60. *Norfolk Energy Inc. v. Hodel*, 898 F.2d 1435, 1439-40 (9th Cir. 1990).

61. Norfolk appealed to the Ninth Circuit the district court's grant of summary judgment for Hodel. The district court received the case on appeal from the Interior Board of Land Appeals. *Id.* at 1437-38.

62. 49 Fed. Reg. 37,357 (1984).

63. *Id.*

64. *Norfolk Energy Inc.*, 898 F.2d at 1441.

65. The amended regulation states that FOGRMA regulations relating to site security, measurement, reporting of production and operations, and assessments of penalties for noncompliance with such requirements apply to "all wells and facilities on State or privately-owned mineral lands committed to a unit or communitization agreement which affects Federal or Indian interests, notwithstanding any provision of a unit or communitization agreement to the contrary." 43 C.F.R. § 3161.1 (1990).

press and specific terms. The *Norfolk* court was able to skirt a potential conflict with the constitutional prohibition against the impairment of contracts by concluding that the unit agreements were silent on the jurisdictional issue.⁶⁶ While a direct conflict between the security regulations and a unit agreement may arise in the future, the court's approval of the regulatory amendments and deference to the BLM's authority suggest that the unit agreement would fall.⁶⁷ Such a result would naturally follow from the court's reasoning that limited BLM authority over nonfederal, non-Indian lands in a unit is essential to effective administration of FOGRMA.

IV. DISPOSITION OF ABANDONED RAILROAD GRANTS

In a case of first impression, *Vieux v. East Bay Regional Park District*,⁶⁸ the Ninth Circuit was called upon to interpret a public lands law concerning the disposition of abandoned railroad rights-of-way.⁶⁹ Under the section, reversionary rights generally vest in the owner of the underlying land once the railroad discontinues use and occupancy of the land and abandonment is declared or decreed by a court, or established by an Act of Congress. However, section 912 excepts from reversion portions which are transferred to a state, county, or municipality and "embraced in a public highway legally established within one year" of the abandonment. The rule and its exception became the focus of *Vieux*, where rural landowners, Alameda County, and the area park district were all interested in rights-of-way owned by the Southern Pacific Railroad.

The plaintiffs claimed that Southern Pacific abandoned two rights-of-way adjoining or bisecting their properties in 1982, and that under section 912 reversionary rights should therefore vest in them.⁷⁰ They argued that the abandonment was established by an

66. *Norfolk Energy Inc. v. Hodel*, 898 F.2d 1435, 1441 n.6 (9th Cir. 1990).

67. *Id.* at 1441-42. The statutes and regulations which Norfolk challenged did not annul the unit agreements. *Id.*

68. 906 F.2d 1330 (9th Cir. 1990). The case came to the court on appeal from the district court's grant of summary judgment for the defendants. An earlier Ninth Circuit disposition of the case, 893 F.2d. 1558 (9th Cir. 1990), was withdrawn.

69. 42 U.S.C. § 912 (1988).

70. *Vieux*, 906 F.2d at 1332. Southern Pacific's predecessors acquired the rights of way in 1862 and 1864. These property interests have been referred to as a

"Act of Congress" because the Interstate Commerce Commission (ICC), which has "exclusive" authority to determine whether a carrier may abandon service,⁷¹ had at that time excused Southern Pacific from formal abandonment proceedings. On the other hand, the county contended that there had in fact been no abandonment triggering the landowners' reversionary rights. The county then claimed that the railroad had transferred the rights-of-way to it in 1985, and that the section 912 exception had been satisfied because it planned to use them for highway and transportation related facilities. The East Bay Regional Park District also expressed interest in obtaining the rights-of-way for trail purposes, but was dropped from the action because it held no actual or proposed interest in the rights-of-way.⁷² With the dispute sharply focused, and a dearth of case law, the Ninth Circuit undertook to review the lower court's construction of section 912 and the abandonment issue.

The court agreed with the district court that, in order for reversionary rights to vest under section 912, (1) the railroad must cease use and occupancy, and (2) abandonment must be declared or decreed by a court of competent jurisdiction or a congressional act.⁷³ It also agreed that the reversionary rights could be extinguished if a public highway is legally established within one year of a decree of abandonment or forfeiture or abandonment. But in this case, the court found the plaintiffs had failed to satisfy both prongs of its test. Regarding the second prong, the court held the 1982 ICC action was not an "Act of Congress." It noted the ICC had issued an exemption from formal abandonment rather than a formal certificate of abandonment, and also found evidence that Congress had not delegated its power to declare abandonments.⁷⁴

"limited fee, made on an implied condition of reverter," *Idaho v. Oregon Short Line R.R.*, 617 F. Supp. 207, 208, 210-12 (D. Idaho 1985), as opposed to grants after 1871, which have been considered exclusive use easements. *Vieux*, 906 F.2d at 1332-33.

71. The plaintiffs relied on *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321-23 (1981), for this proposition.

72. The Park District was not an entity to which a transfer could be made under § 912, and the trail it proposed was not a public highway or street. *Vieux*, 906 F.2d at 1334-35.

73. *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1337 (9th Cir. 1990) (citing *Idaho v. Oregon Short Line R.R.*, 617 F. Supp. 213 (D. Idaho 1985)).

74. *Id.* at 1339-40. The process for abandonment is set forth at 49 U.S.C. §§ 10,903-10,907 (1988).

Further, the court held that even if the ICC had made a formal finding of abandonment, that finding would be satisfactory only for ICC regulatory purposes,⁷⁵ not for the purpose of section 912.⁷⁶ Since there had therefore been no formal decree of abandonment or Act of Congress, the court concluded the plaintiffs had lost any vested reversionary rights to the land.

While it was possible that the plaintiffs could still secure nonvested rights by satisfying the first prong of the section 912 test, the court found that the county had legally established a highway within one year of the time the railroad had abandoned use and occupancy of the rights-of-way. In what was necessarily a factual inquiry, the Ninth Circuit affirmed the district court's finding that Southern Pacific had not abandoned the rights-of-way until April 1985, when it ceased to use the tracks for training purposes.⁷⁷ In the same month, however, the railroad granted the rights-of-way to the county, and the court held this extinguished the plaintiffs' non vested right.⁷⁸

The court's interpretation in *Vieux* demonstrates that section 912 sets a high hurdle for landowners seeking to secure reversionary rights over abandoned rights-of-way. The leap may be higher for abandonment contests involving insignificant rights-of-way, where the ICC may exempt the carrier from formal abandonment proceedings and plaintiffs may have less incentive to secure a judicial decree. *Vieux* not only declares that an ICC notice of exemption from formal abandonment procedures does not satisfy the requirements of section 912, but also confirms that the requisite Act of Congress declaring abandonment is just that, a bill passed by Congress.⁷⁹

75. The ICC issues a certificate of abandonment only if it finds that "the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. § 10903(a).

76. *Vieux*, 906 F.2d at 1339.

77. *Id.* at 1341.

78. *Id.* Under California law, the acceptance of the grant operates to establish the right-of-way as a county highway. No improvement is necessary. See *Watson v. Greely*, 69 Cal. App. 643, 232 P. 475 (1924).

79. Act of Nov. 18, 1988, Pub. L. No. 100-693, 102 Stat. 4559 (1988), which as its purpose declared the rights of way in *Vieux* to be abandoned, was said "to provide a Congressional pronouncement of abandonment of the type described in 1922 Act [which enacted 43 U.S.C. § 912]." H.R. REP. No. 941, 100th Cong., 2d Sess. (1988). Though the law could not affect the outcome of the litigation, the court held it "gives us some clue as to the intent of Congress in interpreting §

V. CONCLUSION

In 1990, the Ninth Circuit heard a variety of cases related to public lands. Two deal with high-level nuclear waste disposal. In *Nevada v. Watkins*, the court found that Nevada's lack of political clout did not call for judicial action to set aside a congressional amendment to the NWPA, which designates the Yucca Mountain as the sole high-level nuclear waste repository. In *Nevada v. Burford*, the court found that Nevada did not have standing to raise a number of constitutional challenges to a BLM grant of a right-of-way for the repository.

Regarding challenges to land withdrawals, the court held that constructive knowledge of a government action is sufficient to commence the statutory period under 28 U.S.C. section 2401(a). Those seeking judicial review of land withdrawals must file their action within six years of *Federal Register* publication.

Regarding oil and gas, the court found that the federal government has the authority to regulate private interests in units designated to enhance efficient resource management. Thus, the BLM can require schematic drawings or inspect private facilities, giving it authority over nonfederal, non-Indian lands when required for the effective administration of FOGPMA.

Finally, regarding the disposition of abandoned railroad rights-of-way, the court described the conditions for reversionary rights to be extinguished.