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SUSTAINABILITY STARTS LOCALLY: UNTYING THE HANDS OF LOCAL GOVERNMENTS TO CREATE SUSTAINABLE COMMUNITIES

*Jerrold A. Long**

All, then, are agreed on the pressing nature of this problem, all are bent on its solution, and though it would doubtless be quite Utopian to expect a similar agreement as to the value of any remedy that may be proposed, it is at least of immense importance that, on a subject thus universally regarded as of supreme importance, we have such a consensus of opinion at the outset.¹

After a recent contentious, and thus completely normal, faculty meeting, a colleague referred to the famous and widely-attributed criticism of academia that the intensity of our disputes is only matched by their inconsequence. So when I see the recent influx of scholarship discussing the role of local governments in promoting or ensuring environmental protection, battling climate change, or attaining sustainable development, I wonder if the intensity of these discussions is similarly matched by their inconsequence.² But when Wal-Mart³ and the

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¹ EBENEZER HOWARD, GARDEN CITIES OF TOMORROW 13 (2d ed. 1902). The “problem” at issue was the overcrowding allegedly caused by citizens abandoning the countryside to move into the cities.

² See, e.g., NEW GROUND: THE ADVENT OF LOCAL ENVIRONMENTAL LAW (John Nolan ed., Envtl. Law Inst. 2003); Philip R. Berke, *Integrating Bioconservation and Land Use Planning: A Grand Challenge of the Twenty-First Century*, 10 VT. J. ENVTL. L. 407 (2009); Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231 (2008); John Nolan, *Climate Change and Sustainable Development: The Quest for Green*

International Trade Union Confederation,⁴ the United Nations⁵ and the State of Idaho,⁶ and even the Republican⁷ and Democratic⁸ parties, can all agree on the ‘pressing nature’ of a specific problem, then maybe it is time to begin thinking more seriously about how we might finally resolve the problem on the ground.

In this article, I accept that local governments have a potentially significant role to play in defining and attaining social, economic and ecological sustainability.⁹ Sustainable communities must emerge from a *local* exercise in creating an imagined future and developing the means to achieve that future. In order to implement their visions of sustainable community effectively, individual communities—cities, towns and counties—must possess the land-use or other natural resource management authority to build the places they imagine. Without that authority, the act of imagining a sustainable place is largely meaningless, as the tools do not exist to get there.

Notwithstanding the substantial literature suggesting they can do something about creating sustainable places, many local governments lack the legal authority to implement place-based initiatives—including local land-use plans, and the land-use ordinances crafted to achieve the goals in those plans—that will get them to the sustainable future they desire. This article will identify one relatively simple, but potentially overlooked, legal impediment to the creation of sustainable communities. Other impediments exist, but by identifying this single impediment, and considering the negative consequences that it can engender, I hope to contribute to a discussion that might ultimately lead to the granting of authority to local governments that is sufficient to enable them to achieve their own visions of sustainability.

Communities, 61 PLANNING & ENVIRONMENTAL LAW 3–10, n.7 (2009); Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 FORDHAM URB. L.J. 537 (2009).

³ See Andrew C. Revkin, Wal-Mart’s New Sustainability Push, Dot Earth, <http://dotearth.blogs.nytimes.com/2008/10/23/wal-mart-china-ethics-environment/> (Oct. 23, 2008, 8:14 EST).

⁴ See Trade Union Sustainable Development Unit, <http://www.tradeunionsdunit.org/> (last visited Nov. 4, 2009).

⁵ See UN Department of Economic and Social Affairs: Division for Sustainable Development, <http://www.un.org/esa/dsd/index.shtml> (last visited Jan. 6, 2010).

⁶ See IDAHO DEP’T OF ENVTL. QUALITY, IDAHO ENVIRONMENTAL GUIDE: A RESOURCE FOR LOCAL COMMUNITIES 1 (2009), available at http://www.deq.idaho.gov/ieg/ieg_entire_0309.pdf.

⁷ See GOP Goes Green in Minneapolis—St. Paul, <http://www.gopconvention2008.com/features/greenfactsheet.pdf> (last visited July 3, 2008).

⁸ See The Democratic Party, Environment & Climate Change, http://www.democrats.org/a/national/american_leadership/clean_environment/ (last visited Jan. 6, 2010).

⁹ In other work, I argue although local governments can contribute to reducing the effects of global climate change, a number of significant obstacles must be overcome first. Jerrold A. Long, *From Warranted to Valuable Belief: Local Government, Climate Change, and Giving up the Pick-up to Save Bangladesh*, 49 NAT. RESOURCES J. (forthcoming 2010).

The seeds of this discussion germinated, as perhaps they should, when I witnessed the on-the-ground effects of separating land-use authority from the unique characteristics of different lands, and the people and communities that live on and best understand those unique lands. This past winter, on an unseasonably warm Saturday afternoon, I spent a few hours wandering around the hills east of Moscow, Idaho on my bicycle. A couple of weeks before, a substantial rainstorm and 50 degree temperatures had melted much of our early-winter snowpack. On a bicycle, the effects of water on the land are readily apparent, particularly where water and roads intersect and interact. Every ditch or depression showed signs of substantial water flow—flattened grass extended well above the apparently typical high-water marks, new undercuts adorned ditch and stream banks, new channels cut across pastures, and a few areas had even pulled the road graders out of their winter hibernation (leaving behind the temporarily forgotten, but now unnecessary, “water over road” signs).

Early in the ride, I was both astonished and impressed by the effect of rapidly melting snow on the landscape, but as I continued to ride, the different examples of flooding and erosion triggered a series of memories of rain storms and snow melt, and the consequences of both on the landscape. In my early years of law practice, my wife and I lived on a treeless hillside between Cheyenne and Laramie, Wyoming. Over the years, I waged a constant battle with the water that collected on and flowed across our driveway, forming an ever deepening gully that removed what little topsoil we had. As a law student in Colorado, I saw how the ground below popular climbing boulders or cliffs changed as the bare soil washed away with summer thunderstorms. But most significant, as a very young child, I spent one rainy Sunday morning watching my father and our neighbors try to control the rising waters of the open storm sewer that flowed across the back boundary of our yard. These memories are not particularly unique, as water flows across and changes land wherever both occur. In fact, it was precisely what I perceived as a lack of uniqueness in my own memories and experiences that initially struck me that afternoon on my bicycle.

But upon reflection, it was the precise, place-specific effect of water on land that continued to trouble me long after my ride ended. Without an inopportunistically placed cedar fence in my neighbor’s yard, the stormwater would have caused little trouble on that long-ago Sunday morning. The specific and attractive shapes and textures of those Colorado boulders determined the level of erosion at their feet. And but for my peculiarly contoured and routed driveway, combined with an astonishing lack of topsoil (and vegetation), I might have had no troubles with my eroding Wyoming hillside. But for the basic laws of physics governing the effect of running water on an erodible substrate, these examples of the interaction of water and land share little in common.

A few weeks after my winter bike ride, I sat in a small seminar room with eleven law students discussing potential new approaches for addressing non-

point source water pollution. A few students suggested, perhaps half-heartedly, a more aggressive state-wide (or maybe even federal) regulatory regime, in which agency personnel could walk a region's waterways looking for pollution sources to be regulated (and perhaps prosecuted). My own thoughts returned to my bike ride, and I suggested that rather than being a waterway issue—which could be approached by focusing on individual lakes, streams and rivers—this was a *landscape* issue, requiring a much broader and more holistic approach that climbs out of the streambeds and walks the upland farms, fields and roadways.

This insight is nothing new, of course, and Congress recognized early on that a national program might not address non-point source pollution in an effective fashion that would also be accepted, however begrudgingly, by landowners or the state and local governments accustomed to regulating land use. More to the point of this article, neither is this insight about a landscape approach necessarily about sustainability in any obvious sense, particularly given its typical presentation as primarily a jurisdictional question. But I believe, to the contrary, that it is specifically, and perhaps exclusively, about sustainability, precisely *because* it is a jurisdictional question. Achieving sustainability requires that we rethink our approach to regulating our western landscapes.

Given the complexities in bringing economic, ecological, and equitable concerns together in the management of a single resource—let alone an entire community, region, state or country—successful implementation of sustainability principles will require multiple experimentations, failures, re-envisionings and new experimentations. And this process will necessarily vary with the context of specific places, as different communities identify different economic, ecologic and social values that are worth sustaining. In other words, attaining sustainable communities (with an emphasis on the plural) will require allowing each community to identify its own pathway toward sustainability.

This article will make that argument, in the context of the communities of the western United States, in the following fashion: First, I will address very briefly the concept of sustainability generally, as the idea has developed worldwide. The article will then provide an example of how those principles have been implemented—not always successfully—on the ground in the American West, with the specific intent of demonstrating the difficulty of applying an apparently simple and straightforward, but very general and not context specific, definition of sustainability to a specific place with a specific problem. The article will then argue that over the coming century, creating and maintaining sustainable western communities will require a changed focus onto the West's *private* lands. I will describe a single example of the legal impediments that might exist to creating sustainable western communities, with suggestions for how to overcome those impediments.

In making these arguments, I make the following two assumptions: First, and most significant, we have yet to engage in a real discussion—or better said, series of discussions—about what a sustainable West might look like. Second, not yet knowing the end we hope to achieve, we are necessarily unable to create a pathway—including, specifically, the legal tools or approaches—that will take us there. I intend this article to contribute toward a discussion about how we might resolve both of those problems.

I. SUSTAINABLE DEVELOPMENT

In 1983, the United Nations convened the World Commission on Environment and Development, chaired by Gro Harlem Brundtland (and subsequently referred to as the “Brundtland Commission”).¹⁰ The Commission’s report to the U.N. General Assembly, titled *Our Common Future*, provides what has now become the widely accepted definition of “sustainable development”: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹¹ The Report characterizes sustainability as containing three components, each of which is equally important: ecology, economy and social equity. The first of these tends to receive the most attention, perhaps for the seemingly obvious reason that it is relatively easier to regulate the preservation of a specific ecological resource (e.g., a national park) than to simultaneously protect ecological resources while ensuring socially-equitable economic development. But the Brundtland Commission recognized that “our inability to promote the common interest in sustainable development is often a product of the relative neglect of economic and social justice within and amongst nations.”¹²

The Brundtland Commission’s definition is beguilingly simple and easily understood, at least in the abstract. But applying the definition on the ground requires posing and attempting to answer a wide range of additional questions, the most simply formulated, if not simply answered, of which is, ‘what does sustainability look like in *this* place?’ The difficulties inherent in this exercise are perhaps best demonstrated by the efforts to describe sustainable development as a concept in academic literature. A popular sustainable development reader—described by the Journal of the American Planning Association as “a comprehensive . . . compendium of the state of the art knowledge” of sustainability—combines forty-eight articles from a wide variety of disciplines to create a “foundation for understanding” approaches to sustainability.¹³ The articles include Leopold’s *The*

¹⁰ U.N. World Comm’n on Env’t & Dev., *Our Common Future: Report of the World Commission on Environment and Development*, U.N. DOC. A/42/427 (May 21, 1987) [hereinafter “the Report”].

¹¹ *Id.* at 43.

¹² *Id.* at 49.

¹³ THE SUSTAINABLE URBAN DEVELOPMENT READER (Stephen M. Wheeler & Timothy Beatley eds., 2d ed. 2009).

Land Ethic,¹⁴ *Waste as a Resource* by John Tillman Lyle,¹⁵ and *The LEED® Green Building Rating System* by the U.S. Green Building Council,¹⁶ among many other articles and topics. Each of the forty-eight articles is related to the Brundtland Commission's definition in some relatively obvious fashion, but the combination of the various articles in a single text makes equally obvious how difficult it is to capture sustainability in any single place, work, or perhaps most important, regulatory approach.

On that point, over the past two decades, a body of legal scholarship has arisen discussing potential legal approaches to attaining the sustainability goals identified by the Brundtland Commission. Notwithstanding that ongoing discussion in legal circles, we have reached little consensus on how to implement sustainability principles on the ground in real, workable legal regimes. J.B. Ruhl overstated (admittedly) this problem as follows:

[S]peaking as a practicing environmental attorney, I am sick to death of hearing about sustainable development. What is it? What do I do about it? How do I make it happen? What am I supposed to tell my client to do, or not to do? I need answers to those questions, and I am not finding them in law review articles, policy papers, and engineering journals. Don't talk to me about sustainable development until you have the answers.¹⁷

A. Dan Tarlock made a similar point in the title of his essay *Ideas Without Institutions: The Paradox of Sustainable Development*.¹⁸ Professor Tarlock suggested that implementation of sustainability principles requires the embodiment of sustainability "in a set of legal principles that constrain behavior, in order that it may be integrated into existing legal systems," as well as an institutional infrastructure to implement those legal principles.¹⁹ Unfortunately, both individual and institutional expectations and patterns of behavior prevent, or at least make more difficult, sustainability's implementation.²⁰ When the *Tulsa Law Review* dedicated its Fall 2008 issue to a symposium on environmental sustainability—notably leaving out economic and social sustainability—Professor Ruhl introduced the issue by noting:

¹⁴ *Id.* at 23.

¹⁵ *Id.* at 165.

¹⁶ *Id.* at 273.

¹⁷ J.B. Ruhl, *The Seven Degrees of Relevance: Why Should Real-World Environmental Attorneys Care Now About Sustainable Development Policy?*, 8 DUKE ENVTL. L. & POL'Y F. 273, 274 (1998).

¹⁸ See A. Dan Tarlock, *Ideas Without Institutions: The Paradox of Sustainable Development*, 9 IND. J. GLOBAL LEGAL STUD. 35 (2001).

¹⁹ *Id.* at 40.

²⁰ See *id.*

It would be nice if we could know that an action or policy actually would be sustainable in this euphoric sense in which the term has come to be used. But we cannot. In fact, it is quite simply and absolutely impossible for us to know that anything is this sustainable.²¹

Interestingly, in referring to “sustainable in this euphoric sense,” Professor Ruhl is referring to his own definition (or his own characterization of the definition) of sustainable development.²²

Rather than seek to overcome these problems, this article embraces this confusion regarding both the definition and implementation of sustainability. It is precisely those difficulties that most recommend identifying the specific communities of interest best able to envision a sustainable place, and then granting those communities the legal authority to implement that vision.

A. Sustainability in the Western United States

Arguably unlike other areas of the country,²³ conflict over land use has long been considered an integral part of the public’s understanding of the western United States, particularly the Intermountain West. The West gave rise to the “Sagebrush Rebellion,” the county-supremacy movement, the wise-use movement, and the modern property rights movement.²⁴ These conflicts are not merely recent developments, as the West’s history of land-use conflict extends over a century before the Sagebrush Rebellion.²⁵ But for much of its history as a place

²¹ J.B. Ruhl, *Law For Sustainable Development: Work Continues on the Rubik’s Cube*, 44 TULSA L. REV. 1, 1 (2008).

²² J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 STAN. ENVTL. L.J. 31, 39 (1999).

²³ Western literature is replete with references to the West’s regional exceptionalism. The most famous of these is Wallace Stegner’s reference to the West as the “native home of hope.” WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* 38 (1969). In focusing on the Intermountain West, this article necessarily accepts that there might be something to learn by looking at the region as a distinct place. That assumption is based, however, more on what I view to be the similarities between the modern West and the rest of the country, rather than any particular western exceptionalism. But in using “arguably” in this specific context, I do not intend to refute necessarily or call into doubt the statement that follows it. To the contrary, on this particular point at least, the West is perhaps (or at least was) a bit different.

²⁴ See, e.g., Harvey M. Jacobs, *The “Wisdom” but Uncertain Future of the Wise Use Movement*, in WHO OWNS AMERICA?: SOCIAL CONFLICT OVER PROPERTY RIGHTS 29 (Harvey M. Jacobs ed., 1998); Nancie G. Marzulla, *Property Rights Movement: How it Began and Where it is Headed*, in A WOLF IN THE GARDEN: THE LAND RIGHTS MOVEMENT AND THE NEW ENVIRONMENTAL DEBATE 39 (Phillip D. Brick & R. McGregor Cawley eds., 1996); Scott Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525 (1994).

²⁵ See, e.g., TERRY L. ANDERSON & PETER J. HILL, *THE NOT SO WILD, WILD WEST: PROPERTY RIGHTS ON THE FRONTIER* (2004); Char Miller, *Tapping the Rockies: Resource Exploration and*

where people live on and fight over land, the locus of those battles has been the public lands.²⁶ From the beginnings of the public lands West, with the creation of Yellowstone National Park and subsequent initial forest reserves on its boundaries, through the “movements” noted above, and current battles over roadless rules,²⁷ winter use plans and oil-and-gas development, the West’s personality has largely been defined by opposition to a federal landlord. This personality is largely one of entrenched disagreement over the appropriate use, and control, of the public’s land. In attempting to understand how any notion of “western sustainability” might emerge, it seems useful to begin a discussion of western sustainability with a few thoughts about how that concept has played out on those public lands. The West’s approach to sustainability on the federal lands might provide insight into how it might implement sustainability on its private lands.

Although the Intermountain West is the nation’s last settled and thus youngest region, sustainability is not a new concept. Particularly in the public lands context, we have created a variety of legal tools to approach sustainability with respect to specific resources. Perhaps most famous of these sustainability approaches is in the National Park Service Organic Act, which provides that the parks shall be managed in a fashion “as will leave them unimpaired for the enjoyment of future generations.”²⁸ Given that direct language, and the relatively simple purpose of the national parks, at least relative to other regulated public lands, it might seem like some version of sustainability—perhaps a version focusing primarily on ecological sustainability, if nothing else—would emerge readily in the national parks. But that is not necessarily the case.

The language quoted above from the Organic Act is not complete.²⁹ The complete relevant portions of the purpose provision of the Act provide:

The [National Park Service] *shall promote and regulate the use* of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to

Conservation in the Intermountain West, in REOPENING THE AMERICAN WEST 168 (Hal K. Rothman ed., 1998).

²⁶ I use the phrase “public lands” in this article to refer to all lands managed by the federal government, rather than simply those managed by the Bureau of Land Management. See 43 U.S.C. § 1702(e) (2006).

²⁷ See Ray Ring, *Roadless-less: The Campaign to Protect Unroaded Forests Gets Torn Apart by a Wyoming Judge in “Half-Assed Retirement,”* HIGH COUNTRY NEWS, Nov. 9, 2009.

²⁸ 16 U.S.C. § 1 (2006).

²⁹ *Id.*

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.³⁰

This mandate suggests something of an internal contradiction. The National Park Service (NPS) must “promote” the use of the national parks in a manner consistent with the purpose of those parks. The sentence describing that purpose contains two verb phrases: to conserve *and* to provide for the enjoyment of. It is only after this second verb phrase that the “sustainability” language identified above occurs; although the verb “conserve” might also be considered to include concepts of sustainability, even if it is not necessarily the sustainability we would recognize today.

This subtle contradiction in what otherwise seems to be relatively straightforward language regarding how the national parks should be managed has been interpreted to provide for two conflicting mandates—“the dual mandate of recreation (‘promote the use’ and ‘provide for the enjoyment’) versus conservation (‘regulate the use,’ ‘conserve,’ and ‘leave unimpaired’)”³¹ The point here is not to contribute to an ongoing debate regarding whether the NPS has been given a mandate with two conflicting purposes (other than to suggest perhaps that this ‘conflicting mandate’ is no more internally conflicting than the concept of sustainable development). Sustainability necessarily concerns these two components—use *now* and use in the future. In fact, use of the word “conserve” alone suggests the same interpretation.

In 1905, Gifford Pinchot suggested the following regarding the management of the nation’s new national forests: “Where conflicting interests must be reconciled, the question shall always be answered from the standpoint of the greatest good of the greatest number in the long run.”³² Pinchot used this notion from utilitarianism to define the term “conservation,” and thus, for Pinchot at least (who had some influence in public policy matters in the first decades of the twentieth century) the verb “to conserve” would have incorporated these allegedly conflicting notions of present enjoyment and leaving unimpaired. But Pinchot took his understanding of the role of *present* use in conservation a bit further. In *The Fight for Conservation*, Pinchot articulated the principles of conservation, in part, as follows:

³⁰ *Id.* (emphasis added).

³¹ Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 851, 862 (2009). See also Robin W. Winks, *The National Park Service Organic Act of 1916: “A Contradictory Mandate?”*, 74 DENV. U. L. REV. 575 (1997).

³² This statement is generally attributed to a February 1, 1905, letter of instructions to Gifford Pinchot from Secretary of Agriculture James Wilson that is considered to have been drafted by Pinchot. See, e.g., *Forest Transfer Act of 1905*, WHAT’S NEW? (U.S. Forest Serv.), June 15, 2009, available at http://www.fs.fed.us/global/wsnew/fs_history/issue15.pdf (part of a series on the history of the Forest Service).

The first great fact about conservation is that *it stands for development*. There has been a fundamental misconception that conservation means nothing but the husbanding of resources for future generations. There could be no more serious mistake. Conservation does mean provision for the future, but it means also and first of all the recognition of the right of the present generation to the fullest necessary use of all the resources with which this country is so abundantly blessed. Conservation demands the welfare of this generation first, and afterward the welfare of the generations to follow.³³

In the specific context of water resource development, Pinchot added: “Conservation stands emphatically for the development and use of water-power now, without delay.”³⁴

It is, of course, impossible to know with any certainty whether Congress had Pinchot’s definition of conservation specifically in mind when it inserted the verb “to conserve” in the NPS Organic Act of 1916. But it does seem that Congress was focused more on the use of the parks than their preservation:

[T]he legislative history of the Organic Act provides no evidence that either Congress or those who lobbied for the act sought a mandate for an exacting preservation of natural conditions. An examination of the motivations and perceptions of the Park Service’s founders reveals that their principal concerns were the preservation of scenery, the economic benefits of tourism, and efficient management of the parks. Such concerns were stimulated by the boosterism prevalent in early national park history, and they in turn greatly influenced the future orientation of national park management.³⁵

Given that apparent motivation, it is notable that the “unimpaired for future generations language” only qualifies the “provide for the enjoyment of” purpose of the parks. The “unimpaired” language does not, therefore, require a *preservation* approach to managing the national parks.

But whatever Congress’s intent in establishing the National Park Service, this story begins to suggest some of the difficulty that might arise in trying to implement just a single component of the Brundtland Commission’s

³³ GIFFORD PINCHOT, *THE FIGHT FOR CONSERVATION* 42 (1910) (emphasis added).

³⁴ *Id.* at 43–44.

³⁵ RICHARD WEST SELLARS, *PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY* 29 (1997), available at http://www.nps.gov/history/history/online_books/sellars/chap2.htm.

definition of sustainability.³⁶ While the concept of managing a national park to protect its resources for future generations seems straightforward, the NPS has struggled mightily in attempting to implement this limited notion of ecological sustainability, even in just a single park with respect to a single type of use. Since December 2000, the NPS has issued multiple temporary or final rules regarding the use of snowmobiles in Yellowstone National Park and has had those rules considered and overturned in eight separate decisions by two different (and we might say, competing) federal district courts.³⁷ It's been almost ten years since the Clinton Administration issued the first winter use plan that would have phased out snowmobile use in Yellowstone, but the NPS might now be further from reaching closure on this issue than when it started. What level of snowmobile use allows for current enjoyment of the park? What level ensures that snowmobiles not impair the park in such a way that it cannot be enjoyed by future generations?³⁸

Of course, the NPS Organic Act is not the only public lands statute to incorporate sustainability principles. The Multiple Use and Sustained Yield Act of 1960 included the concept in its title, and defines "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 national forests without impairment of the productivity of the land."³⁹ The National Forest Management Act also contains multiple references to renewable resource management and sustained yield of forest resources.⁴⁰ Even the Federal Land Policy and Management Act states it is the policy of the United States that "the public lands be managed 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."⁴¹ These are all impressive statements

³⁶ Although it might be more accurate to say that this story suggests some of the difficulty that might arise in trying to establish that ecological sustainability is even the goal to begin with.

³⁷ See also Hillary Prugh, *To Sled or Not to Sled: The Snowmobiling Saga in Yellowstone National Park*, 11 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 149 (2005). See generally NATIONAL PARK SERVICE, WINTER USE TECHNICAL DOCUMENTS, <http://www.nps.gov/yell/parkmgmt/winteruse/technicaldocuments.htm> (for a thorough analysis of the first 5 years of the controversy).

³⁸ The United States District Court for the District of Wyoming suggests we ask a third question: what level of snowmobile use protects the economies of gateway communities that surround the park? See *Int'l Snowmobiler Mfrs. Ass'n v. Norton*, 304 F. Supp. 2d 1278, 1288–89 (D. Wyo. 2004) (finding that the potential harm to businesses in communities surrounding the Park caused by eliminating snowmobiles outweighed the potential harm to the Park by allowing snowmobile use to continue).

³⁹ 16 U.S.C. § 531(b) (2006).

⁴⁰ See generally 16 U.S.C. §§ 1600–1687 (2006).

⁴¹ 43 U.S.C. § 1701(a)(8) (2006).

of federal policies directed toward achieving sustainability on the West's public lands, but as the previous abstract mentions of "conflict" over the public lands suggest, these policies are only implemented with some difficulty, if at all.⁴²

What the public lands controversies demonstrate, more than any other factor, is the difficulty that arises when the people who live in a place, and feel they know that place best, are not allowed to control the future of the place. The problems the United States District Court for the District of Wyoming found with the various snowmobile plans were less in the substance of the plans and more in the fact that those plans failed to take into account, in the judge's determination, the desires or input of the Wyoming communities surrounding the park.⁴³ This is perhaps best demonstrated in the most recent snowmobile related decision to be issued by the Wyoming court.⁴⁴ The United States District Court for the District of Columbia had already invalidated the Park Service's most recent winter use plan,⁴⁵ causing the Wyoming judge to note: "Initially, this Court finds it unfortunate that a United States District Court sitting over 2,000 miles away from the actual subject of this litigation feels compelled to hand down a rule affecting land that lies in this Court's backyard."⁴⁶ Notwithstanding this Wyoming judge's complaint, where the resource at issue is a national treasure like Yellowstone National Park, it may be entirely appropriate to "ignore" local feelings to implement a national good. But when the resource is a single community, with little national or state-wide importance, taking authority away from that community and placing it in the hands of individuals who do not know that place might lead to some justifiable anger and frustration.

The conflicts over the use of the West's public lands emerge from differing ideas about the purpose of those lands. While the problems born out of those differing ideas of purpose are largely resolved outside of the West, those conflicts provide insight into how the West might approach its own, apparently exclusively local, disputes. Because the same differing ideas about the purpose of land arise in the context of the private lands, we see similar themes emerge. What are the rights of the individual versus the broader public? To what extent can a community restrict an individual's ability to develop his or her own land? The same "development v. conservation v. preservation" arguments that arise regarding the national forests, public lands, or even national parks are now, increasingly, a part of the West's understanding of its private lands. And we are forced, in this

⁴² See generally CHARLES WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST (1993).

⁴³ *Int'l Snowmobiler Mfrs. Ass'n*, 304 F. Supp. 2d at 1288–89.

⁴⁴ *Wyoming v. U.S. Dep't of the Interior*, Civ. No. 07-CV-00319-CAB (D. Wyo. Nov. 7, 2008).

⁴⁵ *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183 (D.C. Cir. 2008).

⁴⁶ *Wyoming*, Civ. No. 07-CV-00319-CAB, slip op. at 7.

context, to take the complaint about non-local decision makers “messing with” Wyoming’s backyard a bit more seriously, given that in the private lands context, the use of the word “backyard” is often literal.

B. Moving Between the Public Lands: Emerging Beliefs about the Purpose of Private Lands

As the West emerges from its prolonged adolescence, its private lands, and the conflicts and conversations about how to use and manage those lands appropriately, contribute increasingly to the West’s twenty-first century personality. Over the past two decades, both the West’s population and the size of its urbanized or developed landscape have increased dramatically. Formerly unknown communities like Driggs, Pinedale, Livingston, or Moab are now arguably on a “first-name” basis with a broader portion of the country.⁴⁷ As new residents are attracted to these formerly unknown and perhaps unwanted places, the personalities of these communities change. These changes occur not because of changed management regimes on neighboring public lands, but rather because of changing ideas about the purpose of *private* lands. While the western United States are unlikely to continue the same dramatic growth indefinitely, some growth will necessarily continue. And with it will continue, or arise anew, conflicts over land.

Over the past few decades, the rate of population growth in the interior western states has far outpaced population growth in the rest of the country. Between 1970 and 2000, the counties that make up the central spine of the Continental Divide grew in population by 94.3%; the eight Rocky Mountain States⁴⁸ grew by 119.9% over the same period.⁴⁹ In contrast, the United States as a whole grew by only 38.5%.⁵⁰ Between 2000 and 2008, the United States grew in population by 8.0%.⁵¹ The eight states of the Intermountain West, including the slow-growing eastern plains of Montana and Colorado, grew by 20.1% during the same period. Although certain areas of the interior West demonstrate high birth rates, most of the West’s recent and current growth results from migration from other areas of the United States.⁵² And although the majority of the West’s inhabitants reside

⁴⁷ To suggest that a substantial percentage of the country knows where, or what, “Driggs” is would be a significant overstatement. Adding “Idaho” likely only increases the confusion, as on hearing “Idaho,” most American citizens think of corn and a rural state somewhere near Illinois. But the fact that *any* percentage of the country has heard of Driggs, outside of the Greater Yellowstone Region, represents a very significant change in status of the town.

⁴⁸ Idaho, Montana, Wyoming, Nevada, Utah, Colorado, Arizona and New Mexico.

⁴⁹ THE 2004 COLORADO COLLEGE STATE OF THE ROCKIES REPORT CARD (Walter E. Hecox & F. Patrick Holmes III eds., 2004).

⁵⁰ *Id.*

⁵¹ See generally United States Census Bureau, <http://www.census.gov/>.

⁵² Samuel M. Otterstrom & Matthew Shumway, *Deserts and Oases: The Continuing Concentration of Population in the American Mountain West*, 19 J. OF RURAL STUD. 445 (2003).

in urban areas,⁵³ the rapid growth of the last few decades did not limit itself to the interior West's large cities and urban areas. Although many rural areas of the country are experiencing population growth, the non-metropolitan West grew three times faster than other non-metropolitan areas of the country between 1990 and 1997, with two-thirds of this growth resulting from in-migration.⁵⁴

This rapid population growth has not been without consequences. Between 1980 and 2000, the U.S. population grew approximately 24%.⁵⁵ Over a shorter period of time—1982 to 1997—developed urban areas of the United States increased 34%.⁵⁶ The most recent Natural Resource Inventory data indicate that the developed area of the United States increased 48% between 1982 and 2003.⁵⁷ During that same period, the U.S. population increased approximately 25%.⁵⁸ Developed land area in the United States will continue to increase, with some estimates indicating it could increase by 79% for the period from 1997 to 2025.⁵⁹ Rural areas in the western states have experienced even greater disparities between population growth and developed area. Between 1970 and 1997, the population of the Greater Yellowstone Area in Montana, Wyoming and Idaho increased by 55%. Between 1975 and 1995, the developed urban area increased 348%, and the number of rural homes increased more than 400%.⁶⁰ Americans are not only growing individually larger, we are growing collectively larger, consuming far more space per person than ever before. Ranches and forests are now subdivisions, replacing wildlife habitat and open space with asphalt, “great” rooms with large picture windows, and swimming pools. The development has increased human-wildlife conflict (with the wildlife generally getting the short end of the deal), altered viewsheds, increased consumption of scarce water resources, and permanently altered local culture and social networks.⁶¹

⁵³ *See id.*

⁵⁴ John B. Cromartie & John M. Wardwell, *Migrants Settling Far and Wide in the Rural West*, 14 RURAL DEV. PERSP. 2, 3 (Aug. 1999).

⁵⁵ *See, e.g.*, Ralph J. Alig, Jeffery D. Kline & Mark Lichtenstein, *Urbanization on the U.S. Landscape: Looking Ahead in the 21st Century*, 69 LANDSCAPE & URB. PLAN. 219, 219 (2004). Census data are available at the United States Census website: <http://www.census.gov>.

⁵⁶ Alig et al., *supra* note 55, at 219–20.

⁵⁷ U.S. DEP'T OF AGRIC., NATURAL RESOURCES INVENTORY: 2003 ANNUAL NRI (2007), available at <http://www.nrcs.usda.gov/technical/NRI/2003/Landuse-mrb.pdf>; Eric M. White, Anita T. Morzillo & Ralph J. Alig, *Past and Projected Rural Land Conversion in the U.S. at State, Regional, and National Levels*, 89 LANDSCAPE & URB. PLAN. 37 (2009).

⁵⁸ Census data are available at the United States Census website: <http://www.census.gov>.

⁵⁹ Alig et al., *supra* note 55, at 227.

⁶⁰ *See* Andrew J. Hansen et al., *Ecological Causes and Consequences of Demographic Change in the New West*, 52 BIOSCIENCE 151, 156 (2002).

⁶¹ *See id.*

While these new residents are moving to the interior West, in part, because of the ecological amenities provided by the public lands,⁶² they are not directly reliant on those public lands for their livelihoods, in contrast to many members of the generations of westerners that preceded them. The new economies arising in these growing communities do not rely on the extraction of natural resources, but rather develop around the services required by the new westerners,⁶³ many of who do not themselves rely on local economies for their own livelihoods.⁶⁴ In these evolving communities, the decisions of local public lands managers regarding timber harvests, animal unit months and road closures on national forests might recede in the face of more important issues, such as the availability of a good latte, a decent fly-fishing guide, or a nice place to have a glass of wine.⁶⁵

For at least these reasons—the evolving personality of many western communities and the transition of *important*⁶⁶ development from the public to private lands—a sustainable West must be about more than simple federal lands sustainability. A truly sustainable West, if any such thing could ever exist, must accept and find meaning in the obvious fact that westerners primarily live and rely on the non-federal lands. Current notions of sustainability, as partly demonstrated above in the discussion of the public lands statutes, are unnecessarily limited and fail to address several potentially more important aspects of western life. For anyone with more than a very recent history in our region, the ongoing changes to the West's personality, cultures, and landscapes are increasingly obvious. Our neighborhoods, communities, and social networks “feel” the stress of our demographic transformations just as our forests, farms, ranchlands and water supplies do. All of these elements contribute to our vision of place and are worthy of sustaining. Thus, a complete western notion of sustainability requires consideration not only of timber supplies or rangelands, but also of the people and communities that live in and rely on those places. That consideration must begin in those communities.

⁶² Irene C. Frentz et al., *Public Lands and Population Growth*, 17 SOC'Y & NAT. RESOURCES 57, 65–66 (2004).

⁶³ Cromartie & Wardwell, *supra* note 54, at 5–6.

⁶⁴ See, e.g., William B. Beyers & David P. Lindahl, *Lone Eagles and High Fliers in the Rural Producer Services*, 11 RURAL DEV. PERSP. 2 (June 1996); Paul Lorah & Rob Southwick, *Environmental Protection, Population Change, and Economic Development in the Rural Western United States*, 24 POPULATION & ENV'T 255 (2003); Peter B. Nelson, *Quality of Life, Nontraditional Income, and Economic Growth: New Development Opportunities for the Rural West*, 14 RURAL DEV. PERSP. 32 (Aug. 1999).

⁶⁵ This is, of course, a caricature to some extent. But in many places it is much more accurate than exaggerated.

⁶⁶ That is to say, development that is *important* to the residents of western communities.

II. THE AUTHORITY TO CREATE SUSTAINABLE COMMUNITIES

The authority to regulate generally—including the authority to regulate to achieve economic, ecological, and social sustainability—originates in the inherent power of government, most commonly referred to as the “police power.” The police power includes the authority to regulate to protect the public health, safety, and welfare. When representatives of the original states⁶⁷ met in Philadelphia to fix inadequacies in the Articles of Confederation, they crafted an agreement among sovereigns (the states) creating a new national government and granting it specific powers. Any powers not specifically granted to the new national government were retained by the states—implicitly in the granting of enumerated powers, but also explicitly in the Tenth Amendment.⁶⁸ While the United States Supreme Court’s interpretations of the Interstate Commerce and Necessary and Proper clauses allow for an expansive federal government,⁶⁹ the states retained two powers specifically relevant to the goals of creating and maintaining sustainable communities.

In the United States, both private land-use regulation and the allocation of water have been traditionally considered the province of state governments. In interpreting the reach of the Commerce Clause, the United States Supreme Court has recognized the need to avoid “a significant impingement of the States’ traditional and primary power over land and water use.”⁷⁰ The Court earlier recognized that even if the federal government has some ability to regulate water use, that ability is limited: “except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters.”⁷¹ Congress similarly has recognized these limits on its authority.

⁶⁷ Excluding Rhode Island, which did not send delegates to the Constitutional Convention in Philadelphia.

⁶⁸ U.S. CONST. amend. X.

⁶⁹ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005). “First, Congress can regulate the channels of interstate commerce. Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.” *Id.* (internal citations omitted). In his concurring opinion, Justice Scalia suggested that Congress’s power extends beyond those articulated in this list:

the category of “activities that substantially affect interstate commerce,” is *incomplete* because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

Id. at 34–35 (Scalia, J., concurring).

⁷⁰ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001). In *Rapanos v. United States*, the United States Supreme Court restated this position: “Regulation of land use . . . is a quintessential state and local power.” 547 U.S. 715, 738 (2006).

⁷¹ *California v. United States*, 438 U.S. 645, 662 (1978).

The 1977 amendments to the Clean Air Act included the following provision: “Nothing in this chapter constitutes an infringement on the existing authority of counties and cities to plan or control land use, and nothing in this chapter provides or transfers authority over such land use.”⁷² The Clean Water Act also provides that the Act will “recognize, preserve, and protect” the rights of States to exercise the primary responsibility over “land and water resources.”⁷³

But while the regulation of water and land use are “quintessential” state powers, states generally treat the two areas differently. While all western states have established state-wide water allocation regimes, run by agencies or components of state government,⁷⁴ for the most part, the states do not directly implement their reserved *land-use* authority. Rather, the states delegate land-use authority to local units of governments—e.g., cities, towns and counties. In Idaho, for example, the state constitution grants the police power directly to local government: “Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.”⁷⁵ Wyoming grants the authority to regulate land to cities, towns and counties by statute,⁷⁶ as does Colorado.⁷⁷ The Standard State Zoning Enabling Act, published by the Department of Commerce in 1922 and still the primary influence of most state land-use enabling acts,⁷⁸ contains the following recommended language:

For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.⁷⁹

⁷² 42 U.S.C. § 7431 (2006).

⁷³ 33 U.S.C. § 1251(b) (2006).

⁷⁴ In Wyoming, for example, water administration is entrusted to the State Engineer’s Office, and Title 41 of the Wyoming Code provides for a comprehensive regulatory regime for the state’s waters.

⁷⁵ IDAHO CONST. art. XII, § 2.

⁷⁶ See, e.g., WYO. STAT. ANN. § 18-5-201 (2009) (granting general land-use authority to counties) and § 15-1-601 (2009) (granting general land-use authority to cities and towns).

⁷⁷ See, e.g., COLO. REV. STAT. § 29-20-104 (2009).

⁷⁸ At some point, all 50 states adopted the Standard Zoning Enabling Act, and it remains in effect in basic form in 47 states. 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW § 19.1 (3d ed. 2003).

⁷⁹ ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT: UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS § 1 (1926).

Inherent in the grant of land-use authority from the state to local units of government is a limitation on local authority, i.e., local governments can only exercise the authority specifically granted to them by the state government. This concept is often referred to as “Dillon’s Rule.” Judge John F. Dillon first articulated what would become his “rule” in a case from 1868, where he argued:

Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.⁸⁰

Judge Dillon later reiterated this argument in his influential *Commentaries on the Law of Municipal Corporations*, where he suggested that it is “a general and undisputed proposition of law” that municipalities may only exercise those powers expressly granted to them, necessarily or fairly implied in the express powers, or essential to the purposes of the municipality.⁸¹ Any doubts about the extent of the municipality’s powers “is [to be] resolved by the courts against the [municipality].”⁸²

In *Hunter v. City of Pittsburgh*, the United States Supreme Court relied on Judge Dillon’s work in holding that the state could require the union of two neighboring cities, notwithstanding the objection of one of the cities (in this case, Allegheny, which was annexed against its will by Pittsburgh).⁸³ The Court described the relationship between state and local governments as follows:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them. . . . The state, therefore, at its pleasure, may

⁸⁰ *City of Clinton v. Cedar Rapids & M.R.R. Co.*, 24 Iowa 455, 475 (1868) (emphasis omitted).

⁸¹ 1 JOHN FORREST DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* § 237, at 448 (5th ed. 1911).

⁸² *Id.* § 237, at 450.

⁸³ 207 U.S. 161 (1907).

modify or withdraw all [municipal] powers, may take without compensation [municipal] property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.⁸⁴

It should be unsurprising that local governments in the western United States similarly exist as creatures of pre-existing state governments.⁸⁵ In 1906, the Colorado Supreme Court made this point clear:

[Municipalities] are the creatures, mere political subdivisions, of the state for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government.⁸⁶

A Colorado appellate court made a similar, if not more emphatic, point in an earlier case: “The power of the legislature to narrow or broaden municipal jurisdiction, save as controlled by constitutional restrictions, is practically unlimited.”⁸⁷ Wyoming takes a similar approach, recognizing that: “[t]he legislature has controlled municipalities granting it [sic] whatever powers they have from the

⁸⁴ *Id.* at 178–79.

⁸⁵ In *Hunter v. City of Pittsburgh*, it might have been relevant that both Allegheny and Pittsburgh were incorporated as cities *after* Pennsylvania was recognized as its own unit of government. The United States Supreme Court did not mention this fact. While many eastern cities obviously predate the birth of the United States, and thus predate the existence of recognized states within that union, the greater age of those states means many municipalities arose after statehood. In the western United States, due to the later dates of statehood, many municipalities pre-date the creation of their state governments. In fact, many cities in Utah and the Southwest were founded before those regions became territories of the United States. For example, Santa Fe, New Mexico will be celebrating its 400th anniversary in 2010. See Santa Fe 400th Birthday, Inc., <http://www.santafe400th.com/> (last visited Nov. 26, 2009).

⁸⁶ *Keefe v. People*, 87 P. 791, 793 (Colo. 1906) (quoting *Atkins v. Kansas*, 191 U.S. 218, 220 (1903)). In this case, the Colorado Supreme Court addressed the powers of the city of Denver, which was established three years before the creation of Colorado Territory, and eighteen years before Colorado became a state. See Denver History, <http://www.denvergov.org/AboutDenver/history.asp> (last visited Nov. 19, 2009).

⁸⁷ *Warner v. Town of Gunnison*, 31 P. 238, 238 (Colo. 1892); see also *Pennobscot, Inc. v. Bd. of County Comm'rs of Pitkin County*, 642 P.2d 915, 918 (Colo. 1982) (“A county is a political subdivision of the state and, as such, possesses only those powers expressly granted by the constitution or delegated to it by statute.”).

very beginning of the existence of Wyoming.”⁸⁸ Even in Idaho, where the grant of police power authority to local governments exists in the state’s constitution, the limitation “as are not in conflict with . . . the general laws,” allows the state legislature to expand or limit the powers of local government as it wishes.⁸⁹

The most significant consequence of viewing local authority in this fashion is that state governments can exert control over what might otherwise be local issues without concern for the specific problems or issues faced by specific local governments. It is perhaps unnecessary to note that western communities are incredibly diverse. This region—like any other region of the country—consists of a wide range of communities and interests, histories and cultures, places and landscapes. There is no single “West” with a unique set of characteristics or qualities, just as there is no single Colorado, Wyoming, or Idaho. The region contains world-class cities with millions of inhabitants, small, isolated towns with just a few residents, and many different communities between those extremes. There are world-famous mountains and quiet, unknown valleys and plains. Fertile farmlands and desolate wastelands can exist just miles apart. Areas of deep snow and sufficient precipitation might sit just over a divide from large deserts. And despite containing the headwaters of several of North America’s largest river systems, the West is known more for its aridity than the thousands of streams, rivers and creeks that flow across the landscape.

A. Preventing Community Efforts to Create Unique Places

Notwithstanding the substantial diversity obvious in any place—not just the American West—many states enforce uniform state laws across all jurisdictions, whether it is Douglas County, Colorado with its rapid urbanization, or Kiowa County and its *decreasing* population and almost complete lack of urbanization.⁹⁰ Teton County, Wyoming faces land-use issues that are dramatically different from the issues facing neighboring Sublette County, to say nothing of Niobrara County on the opposite side of the state. But even given the geographic and cultural differences between these places, state law might require that each take the same land use or water resource approach, regardless of the specific, place-bound issues they must face.

As noted above, the United States Supreme Court considers the authority to regulate the use and development of private lands to be a “quintessential” local power. There is reason for this, of course, as it is the combination of many

⁸⁸ *Stewart v. City of Cheyenne*, 154 P.2d 355, 360 (Wyo. 1944).

⁸⁹ *See, e.g., EnviroSAFE Servs. of Idaho, Inc. v. Owyhee County*, 735 P.2d 998 (Idaho 1987).

⁹⁰ Between 2000 and 2008, the population of Douglas County increased by 60%, while the population of Kiowa County decreased 19%. The population density of Douglas County is approximately 333 persons per square mile. Kiowa County’s population density is 0.74 persons per square mile. United States Census Bureau, <http://www.census.gov/>.

diverse land-use decisions over time that create the personality of a place. A town of small lots and narrow streets laid out in rectilinear blocks is different than a similarly sized town with larger lots and wide, curving streets and cul-de-sacs. While uniform building plans for chain stores can change the personalities of our downtowns,⁹¹ local communities still use their land-use authority to create unique and special places. In the context of this discussion about sustainability, this basic land-use authority allows each community to make its own determinations about what it should look like, what types of land uses it will prefer, and how it should develop over time.

Of course, communities often do not choose to exercise their land-use authority to make unique or special places,⁹² but in some cases they do not have the choice, even if they might desire to do so. Oversimplifying to some extent, local authority over land use and development can be broadly placed into two classifications: zoning controls and subdivision controls.⁹³ These two regimes are generally authorized in separate statutes and, superficially at least, regulate distinct issues. Zoning generally regulates the use of land, including the types of uses allowed in an area, and the nature or form of those uses. Zoning uses tools like mandatory setbacks from streets or lot boundaries, floor area ratios, height restrictions, among other site, area or structural requirements. Subdivision regulations, in contrast, regulate the division of land into separate parcels for sale or development. Subdivision regulation arose initially to facilitate the conveyance and recording of lots, and later to ensure compliance with street planning.⁹⁴ Subdivision regulations have evolved to ensure that development pays for itself, by requiring dedication of land for roads, parks, streets, or other public uses. Planned unit developments, cluster developments, traditional neighborhood development, or transportation-oriented development are more sophisticated or creative subdivision ordinances that might create or protect specific natural or social amenities.

Zoning and subdivision regulation overlap in several ways, the most significant of which might be in the establishment of allowable lot sizes. In addition to authorizing the regulation of the *use* of land, the enabling language of the Standard Zoning Enabling Act also authorizes zoning legislation regulating “the density of population.”⁹⁵ Section 3 of the Standard Act, which describes the purposes of

⁹¹ Walgreens drug stores are perhaps the best example of this phenomenon, as the stores are identical—with very few exceptions—whatever town you are in. For a more detailed discussion of this issue, see JAMES HOWARD KUNTSLE, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA’S MAN-MADE LANDSCAPES* (1993).

⁹² See, e.g., ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000).

⁹³ See, e.g., DANIEL R. MANDELKER, *LAND USE LAW* (5th ed. 2003).

⁹⁴ See *id.* § 9.02.

⁹⁵ ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP’T OF COMMERCE, *supra* note 79.

zoning, indicates zoning should, among other things, “lessen congestion in the streets, . . . provide for adequate light and air, . . . prevent overcrowding of land, [and] avoid undue concentration of population.” These provisions, as well as the “density of population” provision of the enabling clause, suggest the intent that zoning regulate the *size* of allowable lots, as well as the uses allowed on those lots. Subdivision ordinances, as the name implies, regulate the creation of “lots,” and thus necessarily affect “population density” and the other noted areas regulated by zoning ordinances.

These general grants of zoning and subdivision authority provide local governments with a substantial amount of discretion in determining the nature of development they will allow. However, some limitations obviously do exist. Consistent with the preceding discussion, any local ordinances regulating land use or development must be consistent with state enabling legislation. For example, all subdivision-enabling statutes contain a definition of the terms “subdivision” or “subdivide.” If a specific division of property does not fit within the provided definition, it is not considered a “subdivision” subject to the requirements of the statute, and is, thus, not subject to the requirements of any local ordinances authorized by that statute.

Black’s Law Dictionary defines “subdivision” as “[t]he division of a lot, tract or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale or development.”⁹⁶ Idaho’s subdivision-authorizing legislation provides that subdivision is the division of a tract of land into “five (5) or more lots, parcels, or sites for the purpose of sale or building development.”⁹⁷ The higher threshold was apparently intended to allow farming and ranching families to divide lands among family members without complying with subdivision requirements, but the Idaho law also allows cities or counties to adopt their own, more restrictive, definitions, which many have done.⁹⁸ Idaho’s zoning enabling legislation largely mirrors the Standard Act, and thus allows for the regulation of land uses, as well as population density.⁹⁹ The Idaho enabling legislation provides a number of goals that also suggest some ability to regulate lot sizes or development density.¹⁰⁰ Other than a single exception for the “bona fide division” of land for agricultural

⁹⁶ BLACK’S LAW DICTIONARY 1424 (6th ed. 1990).

⁹⁷ IDAHO CODE ANN. § 50-1301 (2009).

⁹⁸ See, e.g., ADA COUNTY, IDAHO, CODE 8-1A-1 (2009) (defining a subdivision as the division of land into two or more lots). This statutory provision might allow local governments to substantially relax the definition of “subdivision.”

⁹⁹ IDAHO CODE ANN. § 67-6511 (2009).

¹⁰⁰ § 67-6502 (2009). These purposes include, for example, protecting important environmental features, protecting prime agricultural and forest lands, avoiding undue concentration of population and overcrowding of land, ensuring that development of land is commensurate with the physical characteristics of the land, among others.

purposes,¹⁰¹ the Idaho statutes contain no explicit limitations on regulation of lot sizes,¹⁰² providing each individual community the authority to determine what it will look like, at least in the context of its subdivision regulation.

In contrast to Idaho, both Colorado and Wyoming contain specific limitations on local authority to determine the nature of their local developed landscapes. Like most states, Colorado authorizes county governments to implement subdivision regulations that can address a wide variety of issues, including locally important natural resources, available water resources, transportation, land for schools, parks and other public uses, storm water drainage, among others.¹⁰³ However, the Colorado subdivision authorization differs from the standard enabling legislation in one crucial way. Colorado's statutory definition of "subdivision" specifically excludes certain divisions of land: "The terms 'subdivision' and 'subdivided land' . . . shall not apply to any division of land which creates parcels of land each of which comprises thirty-five or more acres of land and none of which is intended for use by multiple owners."¹⁰⁴ In other words, notwithstanding the substantial ecological, public service, cultural, and other effects caused by allowing for such dispersed, "ranchette" style development,¹⁰⁵ Colorado law specifically precludes application of subdivision authority to those developments.

Colorado counties are not wholly without authority to regulate large-lot subdivisions, however. Colorado's zoning enabling legislation provides that counties may adopt zoning ordinances regulating the use of land, the location, height, bulk and size of buildings, as well as the "density and distribution of population," and more importantly, "the size of lots."¹⁰⁶ In *Boone v. Board of County Commissioners*, landowners divided a 143-acre parcel into four separate lots, each larger than 35 acres.¹⁰⁷ Upon learning of the land division, the Elbert

¹⁰¹ § 50-1301 (2009).

¹⁰² All land-use regulations are implicitly limited by the "takings" clause of the Fifth Amendment to the U.S. Constitution, as applied to the states in the Fourteenth Amendment, and adopted by most states in their own constitutions.

¹⁰³ COLO. REV. STAT. § 30-28-133 (2009).

¹⁰⁴ § 30-28-101(10)(b) (2009); see also *Pennobscot, Inc.*, 642 P.2d 915.

¹⁰⁵ See, e.g., Adrian X. Esparza & John I. Carruthers, *Land Use Planning and Exurbanization in the Rural Mountain West: Evidence from Arizona*, 20 J. OF PLAN. EDUC. & RESEARCH 23 (2000); William R. Freudenburg, *The Impacts of Rapid Growth on the Social and Personal Well-Being of Local Community Residents*, in *COPING WITH RAPID GROWTH IN RURAL COMMUNITIES* 137 (Bruce A. Weber & Robert E. Howell eds., 1982); Andrew J. Hansen et al., *Effects of Exurban Development on Biodiversity: Patterns, Mechanisms, and Research Needs*, 15 ECOLOGICAL APPLICATIONS 1893 (2005); W.E. Riebsame, H. Gosnell & D.M. Theobald, *Land Use and Landscape Change in the Colorado Mountains I: Theory, Scale and Pattern*, 16 MOUNTAIN RESEARCH & DEV. 395 (1996); D.M. Theobald, H. Gosnell & W.E. Riebsame, *Land Use and Landscape Change in the Colorado Mountains II: A Case Study of the East River Valley*, 16 MOUNTAIN RESEARCH & DEV. 407 (1996).

¹⁰⁶ COLO. REV. STAT. § 30-28-111(1) (2009).

¹⁰⁷ 107 P.3d 1114, 1115 (Colo. App. 2004).

County, Colorado planning department wrote the landowners, informing them that they had created four “illegal lots” and that building permits would be withheld until the landowners had successfully obtained a rezoning of the four new parcels. The rezoning process overlapped with the subdivision process to some extent, requiring, among other things:

proof of ownership; comment about emergency access; covenant compliance; road permit; land survey plat; and a narrative. The narrative must address subjects such as: relationship to adjacent property land uses; compliance with the Elbert County Master Plan; sources of water; methods of wastewater treatment and disposal; confirmation of service from a water sanitation district; type of fire protection; impacts on county services; impacts on existing flora and fauna, air quality, wildlife, historical lands, drainage, or mineral extraction; and a weed control and grazing plan.¹⁰⁸

Rather than comply with the rezoning requirements, the landowners challenged the Elbert County rezoning ordinance, claiming it was inconsistent with the exemption in the subdivision statute for lots larger than thirty-five acres, and thus invalid. The Colorado Court of Appeals determined that, by its plain language, the thirty-five acre or greater exemption only applies to subdivision regulations, and that nothing in the statute or its legislative history suggest that the Colorado legislature intended to extend the exemption to the zoning regulations. Further, the court noted that the zoning and subdivision regimes are distinct, and developers must comply with them independently: “a subdivider must first satisfy applicable zoning regulations and then additionally comply with the subdivision regulations.”¹⁰⁹

On the surface, *Boone v. County Commissioners* suggests that Colorado counties do possess some authority to control the size of lots and the density of development, as specifically authorized in the zoning enabling statute. However, Elbert County’s response to the creation of the alleged “illegal lots” provides additional insight. Rather than try to invalidate the creation of the lots, Elbert County simply required the landowners to request a rezone to a new zone consistent with the size of the new “illegal” lots. The reason for this approach is simple: Elbert County possessed no authority to do anything else. As the court noted, somewhat in passing, although “county zoning authority expressly includes the power to regulate use based on lot size,”¹¹⁰ counties nevertheless possess no

¹⁰⁸ *Id.* at 1117.

¹⁰⁹ *Id.* at 1116.

¹¹⁰ *Id.* at 1117. This statement appears to be a misreading of the statutory provision. The statutory provision authorizes “the regulation by districts or zones of . . . the size of lots[.]” COLO. REV. STAT. § 30-28-111 (2009). Regulating the “size of lots” is quite different than regulating “use

authority to do anything about the creation of illegal parcels: “Initially, we note that a county’s statutory zoning enforcement powers do not include enjoining or invalidating conveyances.”¹¹¹

The only significant authority possessed by the county, with respect to its *zoning* ordinances, is the authority to withhold building permits.¹¹² Consequently, if a landowner creates 35-acre lots that are inconsistent with a county’s underlying zoning designation, the county’s only option is to rezone the area to be consistent with the new, landowner-created lots, and then enforce the ordinances applicable to that new zoning designation. The landowner, empowered by state law, can override the county’s plans for the nature of development it desires to allow in its rural, undeveloped, and ecologically, agriculturally, and perhaps culturally important areas.

Given that courts often look unkindly at local government efforts to create large minimum lot sizes,¹¹³ these limitations on a Colorado county’s ability to regulate lot sizes above thirty-five acres might seem unimportant. However, depending on the resources a specific place desires to protect, the ability to create 35-acre lots without any local government input or regulation might effectively invalidate local land-use plans or plans for the future of a community. Routt County, Colorado provides an example of this problem. Routt County is home to the Steamboat Ski Resort and the resort town of Steamboat Springs. Largely because of the ski resort and other natural amenities available there, Routt County has enjoyed, or suffered through, a relatively long period of the substantial population growth that often visits western resort communities.¹¹⁴ In the face of that growth, and fearing more growth in the future, Routt County established as its primary planning goals the protection and preservation of open space values and agricultural uses that have been part of the county’s culture and personality for over a century.¹¹⁵

based on lot size.” The statute as written suggests county authority to determine or limit appropriate lot sizes; the court’s language suggests that county’s can only regulate use based on pre-existing lots sizes (e.g., by authorizing uses consistent with those lot sizes), with the actual size of the lots presumably determined by the landowner (as regulated, or not, by subdivision regulations).

¹¹¹ *Boone*, 107 P.3d at 1117. The subdivision statute does provide this authority.

¹¹² COLO. REV. STAT. § 30-28-114 (2009).

¹¹³ See MANDELKER, *supra* note 93, §§ 5.30–5.32.

¹¹⁴ Routt County more than doubled in population during the 1970s. While its post-1990 population growth does not match other resort communities in the Intermountain West, its rate of growth still far outpaces the national average. United States Census Bureau, <http://www.census.gov/population/cencounts/co190090.txt> (last visited Nov. 19, 2009).

¹¹⁵ Routt County’s planning goals largely promote the protection of the county’s “rural character,” seek to avoid sprawl and focus development near the county’s urban areas. Where rural development occurs, the county prefers “clustered development with protected parcels of open land.” See Routt County, Colo., Routt County Master Plan, § 1.2 (Apr. 3, 2003), *available at* <http://www.co.routt.co.us/planning/plans/Master%20Plan.pdf>.

To achieve these ends, Routt County created a sophisticated “Land Preservation Subdivision” approach. This approach provides for density bonuses and substantially simplified administrative procedures in exchange for clustered development and the protection of significant areas of open space, while still protecting property rights and landowner expectations. In the face of the state’s prohibition on regulating larger lot sizes (passed, incidentally, in 1973),¹¹⁶ Routt County has been required to create a land-use regime that makes concessions that would be arguably unnecessary absent the state provision allowing, by right, the creation of 35-acre lot developments.¹¹⁷ For example, approval of a Land Preservation Subdivision (LPS) follows a dramatically simplified process.¹¹⁸ Where a traditional subdivision in Routt County must survive three approval stages—sketch subdivision, preliminary subdivision, and final subdivision—the LPS requires a single approval. The traditional subdivision has public meetings and public hearings in the first two stages, with the potential for a public hearing in the final stage. An LPS has a single public hearing. A traditional subdivision can be appealed at all three stages; the LPS can be appealed once. This simplified administrative process is notwithstanding significant design standards and other requirements for an LPS, which are intended to achieve the county’s planning goals, but which obviously do not receive the same administrative attention as a traditional subdivision.¹¹⁹ Local citizens who might oppose a specific development have both reduced access to information and limited ability to appeal, if that development is an LPS. While simplified administrative procedures in exchange for achieving local goals for protecting natural, social or cultural amenities might be a wise policy choice, it is a choice that should not be mandated by a state government with little to no detailed knowledge of or concern for the issues facing a specific community.

Colorado is not alone in using state law to override local decisions about the structure of their communities. In July 2009, Carbon County, Wyoming completed a final draft of its new land-use plan.¹²⁰ The county’s goals, as

¹¹⁶ See, e.g., *Pennobscot, Inc.*, 642 P.2d 915. This provision originated before the periods of rapid population growth during the 1970s and 1990s.

¹¹⁷ See Kurt Culbertson, Derri Turner & Judy Kolberg, *Toward a Definition of Sustainable Development in the Yampa Valley of Colorado*, 13 MOUNTAIN RESEARCH & DEV. 359 (1993) (recognizing this problem and recommending the creation of agricultural ‘commons’ where operators could pool their 35-acre parcels to create a single commons parcel large enough to function as a viable operation).

¹¹⁸ See, e.g., ROUTT COUNTY, COLO., SUBDIVISION REGULATIONS § 2 (2007), available at <http://www.co.routt.co.us/planning/plans/Subdivision%20Regulations.pdf>.

¹¹⁹ See, e.g., ROUTT COUNTY, COLO., SUBDIVISION REGULATIONS § 5 (2007).

¹²⁰ The draft is apparently awaiting final approval by the County Planning and Zoning Commission and the Board of County Commissioners. The Planning and Zoning Commission held a “Carbon County Land Use Plan Joint Workshop” during its November 2, 2009 meeting. See Carbon County Land Use Plan, <http://www.mmiplanning.com/cc06/cc06.htm> (last visited Nov. 29, 2009).

articulated throughout that plan, include the protection of rural areas and agricultural operations, including establishing minimum lot sizes that are large enough to ensure sustainable agricultural operations.¹²¹ Carbon County's existing zoning regulations include a "Ranching, Agriculture, Mining" (RAM) zone, with a minimum lot size of 640 acres (one square mile).¹²² The RAM zone exists to "preserve historic uses and open space areas of the County while at the same time permit ranching, agriculture, animal husbandry, forestry and mining in a manner that attains this purpose."¹²³ The RAM district applies to all lands in the county not otherwise zoned, and apparently covers a substantial portion of the county. Carbon County has two other large-lot zones—the Agriculture Exclusive and Agriculture General zones—with 160-acre minimum lots sizes.

However, Wyoming state law effectively overrides this local decision by allowing, with some recently adopted limitations,¹²⁴ the creation of 35-acre lots by right. Wyoming's subdivision-authorizing legislation defines subdivision as "the creation or division of a lot, tract, parcel or other unit of land for the immediate or future purpose of sale, building development or redevelopment, for residential, recreational, industrial, commercial or public uses."¹²⁵ The next section in the statute provides exemptions to the subdivision definition, including: "this article shall not apply to the sale or other disposition of land where the parcels involved are thirty-five (35) acres or larger . . ."¹²⁶ Until 2008, this provision only required that lots larger than thirty-five acres be guaranteed utility and access easements.¹²⁷ In 2008, the Wyoming legislature amended this exemption by making it subject to a new provision that authorizes counties to adopt subdivision regulations applicable "where the subdivision creates parcels that are thirty-five (35) acres or larger and up to one hundred forty (140) acres."¹²⁸ However, any legal parcel existing on or before July 1, 2008 is exempt from this provision (allowing the application of subdivision regulations) and can be subdivided by right, without county approval or involvement, into ten lots of at least thirty-five and no more than 140 acres.¹²⁹

¹²¹ See, e.g., Carbon County, Wyo., Carbon County Land Use Plan, Ch. 8 (Aug. 2009), available at http://www.mmipanning.com/cc06/planning_process/docs/Draft2/8-20-09%20CCLU%20PLAN%20FINAL.pdf.

¹²² CARBON COUNTY, WYO., CARBON COUNTY ZONING RESOLUTION OF 2003 ch. 4, § 4.2 (amended Jan. 6, 2004), available at http://www.carbonwy.com/images/CARBON_COUNTY_ZONING_RESOLUTION_BOOK_OF_2003_AMENDED-01-06-2004.PDF.

¹²³ *Id.*

¹²⁴ See WYO. STAT. ANN. § 18-5-316 (2009).

¹²⁵ WYO. STAT. ANN. § 18-5-302(a)(vii) (2009).

¹²⁶ WYO. STAT. ANN. § 18-5-303(b) (2009).

¹²⁷ See *id.*

¹²⁸ § 18-5-316.

¹²⁹ See *id.*

Unlike the grant of authority in Colorado's zoning legislation to regulate the "size of lots," Wyoming's zoning enabling statute is limited to regulating the *use* of land. The Wyoming enabling legislation for county governments provides:

To promote the public health, safety, morals and general welfare of the county, each board of county commissioners may regulate and restrict the location and use of buildings and structures and the use, condition of use or occupancy of lands for residence, recreation, agriculture, industry, commerce, public use and other purposes¹³⁰

In *Pedrol/Aspen, Ltd. v. Board of County Commissioners for Natrona County*, the Wyoming Supreme Court considered an attempt by Natrona County to regulate the creation of lots larger than thirty-five acres.¹³¹ The court considered the authority granted in the zoning legislation, quoted above, and determined that although "the authority granted by this provision is broad," it does not extend to regulating the size of the lots: "by express statutory language, this broad authority is limited to regulation of the *use* of land, not the division of it into parcels."¹³² Consequently, the only authority to regulate the size of parcels is contained in Wyoming's Real Estate Subdivisions Act, which specifically limited (at the time of this dispute) county authority to regulating the creation of parcels that are smaller than thirty-five acres in size.

Rather than representing isolated or distinct institutional approaches to defining subdivisions, Colorado and Wyoming are instead largely representative of their neighbors in exempting from subdivision requirements the creation of parcels larger than a certain size. Montana is not quite as permissive, defining a subdivision as "a division of land or land so divided that it creates one or more parcels containing less than 160 acres."¹³³ Arizona similarly limits application of its subdivision rules to the sale of lots smaller than 160 acres.¹³⁴ New Mexico law exempts from subdivision regulation the creation of new parcels of land that are larger than 140 acres, or the creation of parcels larger than thirty-five acres, where the land has been used continuously for agricultural purposes during the preceding three years.¹³⁵ Nevada exempts the creation of new parcels larger than 640 acres, and has simplified subdivision requirements for creating parcels larger than forty acres, or larger than ten acres if the local government so elects.¹³⁶ Only

¹³⁰ WYO. STAT. ANN. § 18-5-201 (2009).

¹³¹ 94 P.3d 412 (Wyo. 2004).

¹³² *Id.* at 419.

¹³³ MONT. CODE ANN. § 76-3-103(15) (2009).

¹³⁴ ARIZ. REV. STAT. ANN. § 32-2181.02(A)(2) (2009).

¹³⁵ N.M. STAT. § 47-6-2(M) (2009).

¹³⁶ NEV. REV. STAT. § 119.110 (2009).

Utah joins Idaho among states in the Intermountain West in statutorily allowing the application of subdivision requirements to land divisions irrespective of size.¹³⁷

While these exemptions from subdivision requirements—which *prohibit* local governments from regulating these activities—might not seem initially to impede achieving sustainability, just the opposite is in fact the case. “Exurban development”—characterized by widely-dispersed, large-lot development outside the boundaries of incorporated municipalities—is the fastest growing type of development in the United States,¹³⁸ and covers five times more land than urban and suburban development combined.¹³⁹ The creation of, for example, thirty-five-acre ranchettes—again, without any significant regulation on the local level¹⁴⁰—is one of the most significant contributors to dispersed exurban development, and consequent ecological and social harm occurring across much of the interior West.¹⁴¹ One of the ironies of exurban development is that these new country dwellers often move to formerly-rural areas, seeking out specific visions of ecological amenities, open-space and undisturbed “nature,”¹⁴² which those new residents then play a large role in diminishing.¹⁴³ While it may seem somewhat counterintuitive, operating ranchlands—including lands grazed regularly—can host higher levels of biodiversity than either exurban subdivisions or protected lands.¹⁴⁴

The state laws discussed above prevent local governments from considering—and more importantly, from regulating—the substantial effects of large-lot exurban development, even as those communities go about the process of envisioning what

¹³⁷ UTAH CODE ANN. § 17-27a-103(54) (2009).

¹³⁸ Jeff R. Crump, *Finding a Place in the Countryside: Exurban and Suburban Development in Sonoma County, California*, 35 ENV'T & BEHAV. 187 (2003).

¹³⁹ David M. Theobald, *Land-Use Dynamics Beyond the American Urban Fringe*, 91 GEOGRAPHICAL REV. 544 (2001).

¹⁴⁰ To clarify, local governments retain the authority under principles of zoning to regulate the *use* of the newly created thirty-five acre parcels. The local governments can establish setback requirements, or only allow certain uses. But the local governments have no control over the *creation* of the parcels. Once the parcels are created, the local government must allow for some development or face regulatory takings challenges.

¹⁴¹ See Riebsame et al., *supra* note 105, at 395; see also Hansen et al., *supra* note 105, at 1893.

¹⁴² See, e.g., Andrew J. Hansen et al., *Ecological Causes and Consequences of Demographic Change in the New West*, 52 BIOSCIENCE 151 (2002); see also Christy Dearien et al., *The Role of Wilderness and Public Land Amenities in Explaining Migration and Rural Development in the American Northwest*, in AMENITIES AND RURAL DEVELOPMENT 113 (Gary P. Green et al. eds., 2005).

¹⁴³ Esparza & Carruthers, *supra* note 105, at 23.

¹⁴⁴ See, e.g., Jeremy D. Maestas et al., *Biodiversity Across a Rural Land-Use Gradient*, 17 CONSERVATION BIOLOGY 1425 (2003) (finding that ranchlands in northern Colorado had higher native plant species richness than either exurban developments or state-protected nature reserves); see also Jaymee T. Marty, *Effects of Cattle Grazing on Diversity in Ephemeral Wetlands*, 19 CONSERVATION BIOLOGY 1626 (2005) (finding that ephemeral wetlands that were grazed regularly supported more native species and fewer exotic species than wetlands where no grazing occurred).

might be a future and then establishing the institutional regimes that will enable them to achieve that imagined future. As noted above, western states are large and diverse. In Wyoming, Carbon County's vision of a sustainable place likely differs substantially from Teton County's vision, even if both are subject to the same state laws. What might work in Carbon County might seem unwise, or impossible, in Teton County. In Carbon County, a 640-acre minimum lot size might in fact be too *small*;¹⁴⁵ Teton County, in contrast, has only a single remaining private lot larger than 640 acres.¹⁴⁶

I do not present this specific limitation on the exercise of traditional local land-use authority as the only example of how state governments might limit the ability of local communities to envision and attain sustainable place. Nor is it necessarily the best example. But it is a relatively obvious and easily understood example and that fact alone warrants its discussion in this fashion. The purpose of this article, and the examples contained within, is to identify and describe the simple idea that state law can and does prevent the application of community-based decisions and visions on the community's future. Understanding the basic potential for generic state-law to conflict with local visions for a place might sensitize law and policy makers to the necessity of allowing state-wide management regimes to evolve, as the places and people they regulate evolve. A final example demonstrates both the current lack of that necessary sensitivity, as well as the thorough institutionalization of these impediments in state governments.

B. Changing Communities: From State-wide to Local Concern

In contrast to their powers to regulate land, the western states *have not* delegated their authority to regulate the use of water to local units of government. States justify this distinction, if at all, by identifying the allocation and use of water as being a matter of state-wide, rather than local, concern.¹⁴⁷ But as noted

¹⁴⁵ In his *Report on the Lands of the Arid Region of the United States, with a more detailed account of the lands of Utah*, John Wesley Powell recommended that the homestead laws allocate 2,560 acres for non-irrigated farms or ranches in the arid West, which would include Carbon County, Wyoming. See WALLACE STEGNER, *BEYOND THE HUNDRETH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST* 225 & n.19 (1954).

¹⁴⁶ I base this assessment on a review private lots in Teton County's Geographic Information System database, available at Teton County Map Server, <http://www2.tetonwyo.org/mapserver/> (last visited Nov. 19, 2009).

¹⁴⁷ See, e.g., IDAHO CODE ANN. § 42-101 (2009) ("Water being essential to the industrial prosperity of the state, and all agricultural development throughout the greater portion of the state depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall be in the state, which, in providing for its use, shall equally guard all the various interests involved."). See also WYO. CONST. art. 8, § 1 ("The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.").

in the introduction to this article, water and land are inherently intertwined. In many areas, one of the most significant landscape features of the changing rural West is the ongoing transformation of agricultural lands to subdivisions, and the consequent loss of farms, farmers, and the culture and traditions that have been part of western communities for over a century.¹⁴⁸ Agriculture remains the single largest consumer of the West's water resources.¹⁴⁹ As agricultural lands are converted to uses that do not require such substantial water quantities, the possibilities exist for local communities—as they regulate that change in land use—to restore the rivers, streams, wetlands and riparian habitats that might have suffered from long years of water withdrawals and the complete dewatering of western streams. But state law often prohibits any local efforts to address the restoration of locally important water resources.

As one example, as farm fields are converted to exurban subdivisions, the water formerly used for irrigation is often re-tasked to provide fishing ponds and ornamental water features for private use.¹⁵⁰ The nature of local subdivisions, the use of locally important natural resources, and the physical and social structure of a community are all issues of local concern. Consequently, we accept a variety of land-use controls—including design standards, water body setbacks, view-protecting height restrictions or skyline ordinances, restrictions on development in wildlife habitats, parkland exactions—that address natural resource concerns and build that specific community's understandings and visions about the purpose of place into the physical landscape of that place. But as soon as those ordinances address the *use* of water—e.g., by attempting to require restoration of stream flows in exchange for subdivision authorization—those efforts run into state pre-emption problems, whatever the public interest served, or not, by requiring that pre-emption.¹⁵¹ The question of whether a specific subdivision, in a specific place,

¹⁴⁸ See generally Riebsame et al., *supra* note 105, at 395.

¹⁴⁹ See, e.g., JAMES J. ROBB, *ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION* 83 (William E. Riebsame ed., 1997).

¹⁵⁰ While this fact is readily apparent to anyone who has spent any time studying the development of the rural West, there is very little discussion of this issue in the academic literature. Hopefully this will change, given that the practice raises a number of interesting questions, including whether the policy considerations that justified the dewatering of western streams in support of agriculture also justify dewatering streams for completely private use as ornamental or fishing ponds. Given the changing economies of many rural communities, the public interest might be best served now by restoring natural stream flows.

¹⁵¹ See, e.g., *Eagle Creek Partners, L.L.C. v. Blaine County*, Case No. CR 2007-670 (5th Jud. Dist. of Idaho, May 6, 2008) (overturning a county ordinance regulating the construction of "irrigation ponds" in a small subdivision as preempted by state law); see also *Naylor Farms, L.L.C. v. Latah County*, Case No. CV 2005-670 (2d Jud. Dist. of Idaho, May 9, 2006) (overturning a county ordinance prohibiting certain activities on a "groundwater management overlay zone" as preempted by state law). The Idaho Supreme Court considered an appeal of *Naylor Farms* on the limited issue of whether attorney fees were appropriate. In considering whether the county had acted without a "reasonable basis in fact or law," the court indicated that although the question of the validity of the

should be allowed to use the state's water resources to construct a private fishing pond, or whether that specific place should be able to regulate its subdivisions in a manner that protects or restores locally important natural resources, is not a matter of state-wide concern in the same way that the original decisions to promote agriculture, at a time when agriculture was a primary component of the state's economy, served the state-wide public interest.

The idea that the control of water resources is vital to a state's overall well being is so engrained in western institutions that any local incursions into restoring local water resources are often summarily invalidated, whatever the balance of state and local interests. Private "rights" in water might be protected irrespective of the social costs, notwithstanding the fact that water is generally owned by the state and held in trust for the benefit of its citizens. Although the Idaho Constitution provides, for example, that the use of water is a "public use . . . subject to the regulations and control of the state"¹⁵² and specifically allows the state to place limits on its use whenever necessary to satisfy competing demands,¹⁵³ contemporary courts might still find that "[t]he right to divert and appropriate water in Idaho to its beneficial use appears almost sacred, and all else secondary."¹⁵⁴ It is precisely this institutional ossification that must be overcome if we are to create sustainable communities.

III. CREATING A SUSTAINABLE WEST

Communities and neighborhoods change, and perceptions of place and purpose evolve with those changes. The sustainable region westerners seek today is not necessarily the region of 1950, 1970 or even 2000. And perhaps more significant, there is no *single* sustainable West. Mackay, Idaho has a different vision of its purpose and future than does Summit County, Colorado, just as Taos imagines something different for itself than Las Vegas. What is sustainable in these places should not be decided in Boise, Denver, Santa Fe or Carson City anymore than it should be decided in Washington, D.C. A community's *purpose*, and the vision of how that community might be sustainable into the future, is discovered as that community works through the process of creating itself, neighborhood by neighborhood. Purpose emerges as each community imagines its future, and it is not until the community creates its own visions of what is possible that it can determine what it wants, and thus what it can and should sustain.

original ordinance was not before it, "it appears that the major thrust of this Ordinance is to regulate land use, a power clearly reserved to the local governing boards." *Ralph Naylor Farms, L.L.C. v. Latah County*, 172 P.3d 1081, 1086 (Idaho 2007).

¹⁵² IDAHO CONST. art. XV, § 1.

¹⁵³ IDAHO CONST. art. XV, § 5.

¹⁵⁴ *Eagle Creek Partners, L.L.C.*, Case No. CR 2007-670 at 13.

Returning to the story that introduced this article: How does this relate to my January bike ride? And more important, how does it relate to the legal community working out western land-use conflicts on the ground? After discussing my bike ride, and the general issue of non-point source pollution with my class, I returned to my office and spent a few moments reviewing the structure of the Water Quality Division of the Idaho Department of Environmental Quality. There are 13 regional water quality managers in Idaho responsible for Idaho's approximately 107,000 miles of streams and rivers and approximately 522,000 acres of lakes. That's an approximate average of 8,300 river miles, 40,000 acres of lakes, and 6,365 square miles for each of those water quality managers, who despite being assisted by committed and capable assistants, understandably might feel overwhelmed by the landscapes before them. In contrast, Latah County, Idaho, where I live, is 1,077 square miles. If Latah County wanted to create a water quality manager with a similar level of responsibility, on a land-area basis, it would need just one sixth of one person to provide the same level of attention allowed at the state level. Latah County, like every western community, has potentially hundreds of individuals interested in, and committed to, finding creative solutions to the problems in *their* place. A community-based, or even a watershed-based, water quality program could incorporate those ideas of purpose and place that are unique to each community.

But water quality is merely one component of a sustainable West. Westerners, new and old alike, desire healthy ecosystems, vibrant neighborhoods, stable and growing local economies, and real *places* to belong and return to. And those individuals and communities are in the best position to discover how to achieve those goals and create those places. The crucial task is to provide western communities the freedom to imagine their own purpose and discover what sustainability means in their own neighborhoods and communities, and then more importantly, to grant them the *legal authority* to implement that vision. As each city, town, county, or even watershed or organic region creates its own purpose, and then goes about the process of implementing that purpose, *all* residents will share in the successes and failures of these many different laboratories, increasing the chance that each separate community will achieve its own vision of sustainable place. But the creation of hundreds of sustainability laboratories across the West faces a single, significant obstacle: local communities often lack the legal authority to regulate in the areas most closely related to sustainability.

State law can, and does, inhibit the creation of sustainable communities. In case the point has been too subtle so far, achieving a sustainable West may—and in fact, likely will—require western state governments to change their approaches to resource management and land-use regulation in order to allow specific communities to achieve their own visions of sustainable place. In the small snapshot of land-use laws and cases discussed here, state legislatures have limited—perhaps unnecessarily—the ability of local communities to experiment with new approaches to protect their own valued resources and create and achieve

a community vision of sustainability. These limitations—whether dealing with water quality or quantity, the use of land, ecosystem preservation, or more generally the creation of place—present unfortunate and unnecessary roadblocks on the pathway toward a sustainable West.

There is nothing radical about suggesting that Challis, Idaho might be better situated to understand itself than Boise is; or that Saratoga, Wyoming might approach its landscape differently than Cheyenne. In fact, maybe Boise or Cheyenne have something to learn from Challis or Saratoga about protecting their communities, neighborhoods and natural resources. Until we allow each *community* the freedom and legal authority to develop its own vision, we cannot know if any single vision is the best vision for that place—particularly a single vision imposed by a somewhat distant and potentially disconnected decision maker. A western democracy of communities—in this case a democracy allowing each community an equal voice and equal authority in our collective quest to achieve sustainability—is the necessary precondition to the full application of our individual and collective intelligence and creativity to the task of creating a sustainable West.

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NEW LIFE FOR IMPAIRED WATERS: REALIZING THE GOAL TO “RESTORE” THE NATION’S WATERS UNDER THE CLEAN WATER ACT

*Roger Flynn**

The Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), is the primary statute regulating the quality of our nation’s waters.¹ Among the many provisions of the CWA, one of the least understood, and least implemented, is the requirement to protect waters that do not meet water quality standards from further pollution—the impaired waters provision.² That is changing.

The United States Court of Appeals for the Ninth Circuit recently reviewed this part of the CWA and issued a far-reaching decision interpreting the duties of federal and state agencies to prevent further pollution of impaired waters.³ In *Friends of Pinto Creek v. United States E.P.A.*, the court overturned a water quality discharge permit issued by the federal Environmental Protection Agency (EPA) to a large copper mining project in Arizona.⁴ The critical issue in the case was whether a discharge permit could be issued that would add a pollutant to Pinto Creek, a water body that did not meet the applicable water quality standard for

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¹ The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006) (originally enacted as Act of June 30, 1948, ch. 758, 62 Stat. 1155). The Act has been frequently revised. EPA v. California *ex rel.* State Water Res. Control Bd. (*State Water Res. Control Bd.*), 426 U.S. 200, 202 n.2 (1976).

² 33 U.S.C. § 1313(d); *see also* 40 C.F.R. § 122.4(i) (2008).

³ *Friends of Pinto Creek v. U.S. E.P.A.* (*Pinto Creek*), 504 F.3d 1007 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 896 (2009).

⁴ *Id.* at 1009.

that pollutant—in that case, dissolved copper. The court vacated and remanded the EPA-issued permit on the ground that such a discharge violated the impaired waters provision of the CWA.⁵

The *Pinto Creek* decision generated significant controversy among regulated industries and resulted in a petition for certiorari to the United States Supreme Court by the discharge permit applicant, the Carlota Copper Company.⁶ Carlota's petition for certiorari was supported by six separate amicus briefs to the Supreme Court.⁷ The EPA filed a brief in opposition to Carlota's certiorari petition.⁸ In January of 2009, the United States Supreme Court denied, without discussion, Carlota's certiorari petition.⁹

Pinto Creek was the first federal appellate court decision to comprehensively review the CWA's impaired waters provision, and due to the United States Supreme Court's decision not to review the Ninth Circuit's result, *Pinto Creek* has national implications. Impaired waters are a significant concern across the country. According to the EPA, there are 44,023 waters in the United States that do not comply with minimum water quality standards—i.e., that are impaired.¹⁰ According to the latest EPA National Water Quality Inventory, of the representative streams and rivers assessed,

44% were reported as impaired or not clean enough to support their designated uses, such as fishing and swimming. . . . Pathogens, habitat alterations, and organic enrichment/oxygen

⁵ *Id.* at 1011–15.

⁶ Petition for Writ of Certiorari, *Carlota Copper Co. v. Friends of Pinto Creek (Carlota)*, 129 S. Ct. 896 (2008) (No. 07-1524), 2008 WL 2355791 (June 4, 2008).

⁷ Brief of Amicus Curiae for the Federal Water Quality Coalition in Support of Petition for Writ of Certiorari, *Carlota*, 129 S. Ct. 896 (No. 07-1524), 2008 WL 2697355 (July 7, 2008); Amicus Curiae Brief of Mountain States Legal Foundation in Support of Petitioner, *Carlota*, 129 S. Ct. 896 (No. 07-1524), 2008 WL 2697354 (July 7, 2008); Brief of the Arizona Mining Association et al. as Amici Curiae in Support of Petitioner, *Carlota*, 129 S. Ct. 896 (No. 07-1524), 2008 WL 2682525 (July 3, 2008); Brief of the National Association of Clean Water Agencies et al. as Amici Curiae in Support of Petitioner Carlota Copper Company, *Carlota*, 129 S. Ct. 896 (No. 07-1524), 2008 WL 2682526 (July 3, 2008); Brief of Pacific Legal Foundation et al. as Amici Curiae in Support of Petitioner, *Carlota*, 129 S. Ct. 896 (No. 07-1524), 2008 WL 2676565 (July 2, 2008); Brief of the National Association of Home Builders et al. as Amici Curiae in Support of Petitioner Carlota Copper Company, *Carlota*, 129 S. Ct. 896 (No. 07-1524), 2008 WL 2676566 (July 2, 2008).

⁸ Brief for the Federal Respondent in Opposition, *Carlota*, 129 S. Ct. 896 (2008) (No. 07-1524), 2008 WL 4155605 (Sept. 5, 2008).

⁹ *Carlota*, 129 S. Ct. at 896.

¹⁰ U.S. E.P.A., NATIONAL SUMMARY OF IMPAIRED WATERS AND TMDL INFORMATION, http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T (last visited Nov. 5, 2009) (including waters located in all fifty states, American Samoa, District of Columbia, Guam, Northern Mariana Islands, and Puerto Rico).

depletion were cited as the leading causes of impairment in rivers and streams, and top sources of impairment included agricultural activities, hydrologic modifications (such as water diversions and channelization), and unknown/unspecified sources.¹¹

For the assessed lakes and reservoirs, “64% were reported as impaired and 36% were fully supporting all assessed uses. Mercury, polychlorinated biphenyls (PCBs), and nutrients were cited as the leading causes of impairment in lakes.”¹²

Thus, the implications of *Pinto Creek* are significant, as the decision places substantial restrictions on the ability of states and the EPA to approve new water quality discharge permits for discharges into any of these 44,023 waters. This article will review the impaired waters provision of the CWA and the case law that has developed over the years interpreting that provision, with a focus on the Ninth Circuit’s *Pinto Creek* decision.

I. THE CLEAN WATER ACT AND IMPAIRED WATERS

A. *Brief Summary of the Clean Water Act*

Recognizing that previous attempts to regulate and control water pollution had been ineffective, Congress enacted the CWA in 1972.¹³ Prior to the CWA, previous federal water pollution laws relied on

water quality standards specifying the acceptable levels of pollution in a State’s interstate navigable waters as the primary mechanism . . . for the control of water pollution This program based on water quality standards, which were to serve both to guide performance by polluters and to trigger legal action to abate pollution, proved ineffective.¹⁴

One significant problem with this approach was that these pre-1972 laws did not contain any specific direction as to how these state water quality standards would be met.¹⁵

¹¹ U.S. E.P.A., NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2004 REPORTING CYCLE, EPA 841-R-08-001 at 1 (Jan. 2009), available at http://www.epa.gov/owow/305b/2004report/2004_305Breport.pdf.

¹² *Id.* at 2.

¹³ See *State Water Res. Control Bd.*, 426 U.S. at 202.

¹⁴ *Id.*

¹⁵ *Id.* at 203.

Prior to 1972, Congress attempted to control water pollution by focusing regulatory efforts on achieving “water quality standards,” standards set by the states specifying the tolerable degree of pollution for particular waters. This scheme had two important flaws. First, the mechanism of enforcement was cumbersome. Regulators had to work backward from an overpolluted body of water and determine which entities were responsible; proving cause and effect was not always easy. Second, the scheme failed to provide adequate incentives to individual entities to pollute less; an entity’s dumping pollutants into a stream was ignored if the stream met the standards. The scheme focused on “the tolerable effects rather than the preventable causes” of pollution.¹⁶

In 1971, the Senate Committee on Public Works concluded that “the federal water pollution control program . . . has been inadequate in every vital aspect.”¹⁷ As a result, Congress enacted the CWA Amendments, declaring “the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.”¹⁸ Another lofty goal established by Congress in 1972 was that “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.”¹⁹

Although these lofty goals were never achieved, the passage of the CWA was a “bold and sweeping legislative initiative” protecting water quality across the country.²⁰ As the United States Supreme Court stated: “It is fair to characterize the Clean Water Act as watershed legislation. The statute endorsed fundamental changes in both the purpose and the scope of federal regulation of the Nation’s waters.”²¹

¹⁶ *Natural Res. Def. Council v. U.S. E.P.A. (NRDC)*, 915 F.2d 1314, 1316 (9th Cir.1990) (citing *State Water Res. Control Bd.*, 426 U.S. at 200, 202–03).

¹⁷ S. REP. NO. 92-414, at 7 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674.

¹⁸ 33 U.S.C. § 1251(a)(1) (2006); *see also* *Monongahela Power Co. v. Alexander*, 809 F.2d 41, 45–46 (D.C. Cir. 1987) (marking the 1972 legislation as “the ascendancy of water-quality control to the status of a major national priority”); *Sierra Club v. U.S. Army Corps of Eng’rs*, 772 F.2d 1043, 1055 (2d Cir. 1985) (stating that Congress’s far-reaching statutory goals are based on “its belief that man and nature are so intimately connected that to significantly degrade the waters of [the United States] threatens not only the fish, but ultimately man as well”); *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1371 (D.C. Cir. 1977) (stating that the Act was a “dramatic response to accelerating environmental degradation of rivers, lakes and streams in this country”).

¹⁹ 33 U.S.C. § 1251(a)(2).

²⁰ *Dubois v. U.S. Dep’t of Agric.*, 102 F.3d 1273, 1294 (1st Cir. 1996) (citing *U.S. v. Commonwealth of Puerto Rico*, 721 F.2d 832, 834 (1st Cir. 1983)).

²¹ *Solid Waste Auth. of N. Cook County v. U.S. Army Corps of Eng’rs.*, 531 U.S. 159, 175 (2001) (Stevens, J., dissenting).

With the passage of the CWA in 1972, Congress shifted the focus from the health of the receiving waters to the imposition of controls on the pollution being released into the nation's waters.²²

In 1972, Congress passed the Clean Water Act, which made important amendments to the water pollution laws. The amendments placed certain limits on what an individual firm could discharge, regardless of whether the stream into which it was dumping was overpolluted at the time The Act thus banned only discharges from point sources. The discharge of pollutants from nonpoint sources—for example, the runoff of pesticides from farmlands—was not directly prohibited. The Act focused on point source polluters presumably because they could be identified and regulated more easily than nonpoint source polluters.²³

As the United States Court of Appeals for the Ninth Circuit has stated: “The Clean Water Act thus overhauled the regulation of water quality. Direct federal regulation now focuses on reducing the level of effluent that flows from point sources.”²⁴ As the United States Supreme Court recognized, the shift to direct restrictions on discharges facilitated enforcement “by making it unnecessary to work backward from an over-polluted body of water to determine which point sources are responsible and which must be abated.”²⁵

The CWA is designed “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”²⁶ The CWA attempts to achieve these goals through a comprehensive regulatory scheme using permits, technology controls, and water quality-based pollution controls. The Supreme Court has outlined the main goals and provisions of the CWA:

The Federal Water Pollution Control Act, commonly known as the Clean Water Act . . . is a comprehensive water quality statute

²² *Or. Natural Desert Assoc. v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998).

²³ *NRDC*, 915 F.2d at 1316.

²⁴ *Dombeck*, 172 F.3d at 1096.

²⁵ *State Water Res. Control Bd.*, 426 U.S. at 204.

²⁶ 33 U.S.C. § 1251(a). As one appellate court stated:

This objective incorporated a broad, systematic view of the goal of maintaining and improving water quality: as the House report on the legislation put it, “the word ‘integrity’ . . . refers to a condition in which the natural structure and function of ecosystems [are] maintained.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132, 106 S. Ct. 455, 462 (1985) (quoting H.R. REP. NO. 92-911, at 76 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3744).

Dubois, 102 F.3d at 1294.

designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” The Act also seeks to attain “water quality which provides for the protection and propagation of fish, shellfish, and wildlife.”

To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments. Under the Act, the Administrator of the Environmental Protection Agency (EPA) is required, among other things, to establish and enforce technology-based limitations on individual discharges into the country’s navigable waters from point sources. Section 303 of the Act also requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. These state water quality standards provide “a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.”²⁷

The CWA expressly prohibits all discharges of pollutants from point sources into navigable waters, unless such discharges are authorized pursuant to a CWA permit.²⁸ “Pollutants” are defined as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”²⁹ The term “discharge of any pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.”³⁰ A point source is defined under the CWA as any “discernable, confined, and discrete conveyance.”³¹ The CWA regulates point source discharges through the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program, which applies to discharges of pollutants, and through the Section 404 permit program for discharges of dredged and fill materials.³²

²⁷ PUD No. 1 of Jefferson County v. Wash. Dep’t of Ecology, 511 U.S. 700, 704 (1994) (citations omitted).

²⁸ 33 U.S.C. § 1311(a)(1) (2006).

²⁹ 33 U.S.C. § 1362(6) (2006). The term “pollutant” has been defined broadly. *See* N. Plains Res. Council v. Fidelity Exploration & Dev. Co., 325 F.3d 1155, 1160–63 (9th Cir. 2003).

³⁰ 33 U.S.C. § 1362(12)(A); *see also* Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1142–46 (10th Cir. 2005) (discussing what constitutes an “addition of a pollutant”).

³¹ 33 U.S.C. § 1362(14). The term point source is also defined broadly. *United States v. Earth Sci., Inc.*, 599 F.2d 368, 370 (10th Cir. 1979); *see also* Trustees for Alaska v. E.P.A., 749 F.2d 549, 557–58 (9th Cir. 1984) (adopting *Earth Science’s* broad interpretation of point source).

³² 33 U.S.C. §§ 1342–1344 (2006). The CWA does not directly regulate the discharge of pollutants from so-called “nonpoint sources.” *Dombeck*, 172 F.3d at 1097. The Act “provides no

Although the EPA is the primary agency responsible for administering the CWA, the CWA allows states to assume the authority for issuing NPDES permits, upon approval of the state's permitting program by EPA.³³ The EPA also "retains authority to review operation of a State's permit program. . . . [and] in addition to this review authority, after notice and opportunity to take action, the EPA may withdraw approval of a state permit program which is not being administered in compliance with [Section] 402."³⁴

B. The Role of Water Quality Standards and TMDLs in "Restoring and Maintaining" the Integrity of the Nations' Waters

Despite Congress's change in focus from the health of the receiving water body to the control of effluent from point source discharges into those waters, the CWA contained significant provisions aimed at protecting the nation's waters, based on the quality and uses of those waters.

Congress decidedly did *not* in 1972 give up on the broader goal of attaining acceptable water quality. Rather, the new statute recognized that even with the application of the mandated technological controls on point source discharges, water bodies still might not meet state-set water quality standards. The 1972 statute therefore put in place mechanisms other than direct federal regulation of point sources, designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."³⁵

The primary CWA provision focused on the water bodies themselves is Section 303, entitled "Water Quality Standards and Implementation Plans."³⁶ This section establishes water quality standards in cooperation with the states: "The states are required to set water quality standards for *all* waters within their boundaries regardless of the sources of pollution entering the waters."³⁷ Water quality standards establish, and then protect, the desired conditions of each

direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task." *Id.* (citations omitted).

³³ 33 U.S.C. § 1342(b) (2006); *see also* Nat'l Assoc. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 649–55 (2007) (involving the EPA's delegation of the Section 402 permitting program to Arizona).

³⁴ *State Water Res. Control Bd.*, 426 U.S. at 208 (citing 33 U.S.C. § 1342(c)).

³⁵ *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002) (citations omitted) (emphasis in original). For a detailed discussion of *Pronsolino*, see Erin Tobin, *Pronsolino v. Nastri: Are TMDLs For NonPoint Sources the Key to Controlling the 'Unregulated' Half of Water Pollution?*, 33 ENVTL. L. 807 (2003).

³⁶ 33 U.S.C. § 1313 (2006).

³⁷ *Pronsolino*, 291 F.3d at 1127 (emphasis in original).

waterway within the state's regulatory jurisdiction.³⁸ "Water quality standards are retained as a supplementary basis for effluent limitations, however, so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels."³⁹

Section 303 mandates three specific components of a state's water quality program. First, a state establishes the "designated uses" of its waters.⁴⁰ Second, a state promulgates "water quality criteria," both numeric and narrative, specifying the water quality conditions, such as maximum pollutant levels, that are necessary to protect the designated uses.⁴¹ Third, a state adopts and implements an "antidegradation" policy to prevent any further degradation of water quality.⁴² These three components of a state water quality program are independent and separately enforceable requirements of federal law.⁴³

States are responsible for the development of water quality standards applicable to water bodies within their borders.⁴⁴ A state-developed water quality standard, however, does not become effective until the EPA approves the standard or policy.⁴⁵ If a state does not set water quality standards, or if the EPA determines that the state standards do not meet the requirements of the CWA and EPA regulations, then the EPA promulgates standards for the state.⁴⁶

Water quality standards establish the water quality goals for a waterbody as a whole.⁴⁷ They are the benchmarks by which the quality of a waterbody is measured: waterbodies that do not meet these benchmarks are deemed "water

³⁸ According to the statute:

[A] water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based on such uses. Such standards shall be such as to protect the public health and welfare, enhance the quality of the water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

33 U.S.C. § 1313(c)(2)(A).

³⁹ *State Water Res. Control Bd.*, 426 U.S. at 205 n.12. See also *PUD No. 1*, 511 U.S. at 704.

⁴⁰ 33 U.S.C. § 1313(c)(2)(A).

⁴¹ *Id.*

⁴² 33 U.S.C. § 1313(d)(4)(B); see also 40 C.F.R. § 131.12 (2008).

⁴³ *PUD No. 1*, 511 U.S. at 705.

⁴⁴ 33 U.S.C. § 1313(c)(1), (3).

⁴⁵ 33 U.S.C. § 1313(c)(3); see also 40 C.F.R. § 131.21(c) (2008).

⁴⁶ *Pronsolino*, 291 F.3d at 1127 (citing 33 U.S.C. § 1313 (b), (c)(3)–(4)).

⁴⁷ 40 C.F.R. § 131.2 (2008).

quality-limited” or “impaired” and placed on the list for such waters in each state prepared pursuant to CWA Section 303(d), known as the “303(d) list.”⁴⁸ Section 303(d) requires that:

Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b) (1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.⁴⁹

For impaired waters identified on each state’s 303(d) list, the states must develop total maximum daily loads (TMDLs) in order to bring these waterbodies back into compliance with applicable water quality standards.⁵⁰ According to the CWA:

Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the [EPA] Administrator identifies under section 1314(a) (2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.⁵¹

⁴⁸ 33 U.S.C. § 1313(d) (2006).

⁴⁹ 33 U.S.C. § 1313(d)(1)(A).

⁵⁰ 33 U.S.C. § 1313(d)(1)(C). If a state fails to establish a TMDL for an impaired water, the EPA may do so. *Pinto Creek*, 504 F.3d at 1010 (noting that the EPA developed the TMDL after the conservation groups filed their initial administrative appeal of the EPA-issued NPDES permit).

⁵¹ 33 U.S.C. § 1313(d)(1)(C). For a series of detailed analysis of the TMDL provisions of the CWA, see Oliver A. Houck, *TMDLs III: A New Framework for the Clean Water Act’s Ambient Standards Program*, 28 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,415 (1998) (analyzing the TMDL provision of the CWA); Oliver A. Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, 27 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,327 (1997) (analyzing the TMDL provision of the CWA); Oliver A. Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water Quality—Based Regulation under the CWA*, 27 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,391 (1997) (analyzing the TMDL provision of the CWA).

“A TMDL defines the specified maximum amount of a pollutant which can be discharged or ‘loaded’ into the waters at issue from all combined sources.”⁵² The CWA, however, never defined the term “total maximum daily load.”⁵³

Each state must submit its 303(d) list to EPA for approval.⁵⁴ If EPA approves the state’s list, the state then incorporates the list and any TMDLs done for these waters into the state’s “continuing planning process” established pursuant to CWA Section 303(e).⁵⁵ A state’s continuing planning process is aimed at achieving compliance with water quality standards if the point source effluent limitations are not sufficient.⁵⁶ The continuing planning process incorporates a variety of water quality protection tools, such as individual point source permit effluent limitations, TMDLs, and area wide waste management plans for nonpoint sources.⁵⁷

The TMDL process includes identification of existing sources of pollution that have caused or contributed to the degraded water quality, then establishment of “wasteload allocations” (for point sources of pollution) and “load allocations” (for nonpoint sources of pollution) for those sources which have caused or contributed to the degraded water.⁵⁸ The final TMDL represents a ratcheting

⁵² *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1520 (9th Cir. 1995); *Pronsolino*, 291 F.3d at 1127–28.

⁵³ *Friends of the Earth, Inc. v. E.P.A.*, 446 F.3d 140, 144–48 (D.C. Cir. 2006). The United States Court of Appeals for the District of Columbia held that, in developing TMDLs, EPA and the states must set daily limits on pollutant levels—rejecting EPA’s argument that the agencies could base TMDLs on monthly or seasonal levels. *Id.* at 140. For an analysis of this issue, see Matthew Chalker, *Friends of the Earth, Inc. v. Environmental Protection Agency: The U.S. Court of Appeals for the D.C. Circuit Holds That ‘Daily’ Within the Context of the Clean Water Act, Unambiguously Requires Daily Loads*, 14 U. BALT. J. ENVTL. L. 201 (2007) (discussing daily limits on pollutant levels).

⁵⁴ 33 U.S.C. § 1313(d)(2).

⁵⁵ 33 U.S.C. § 1313(d)(2), (e).

⁵⁶ 33 U.S.C. § 1313(e).

⁵⁷ 33 U.S.C. § 1313(e)(3). In 2000, EPA issued regulations to require “implementation plans” as part of TMDLs. Revisions to the Water Quality Planning and Management Regulation and Revisions to the NPDES Program, 65 Fed. Reg. 43,586 (July 13, 2000). However, Congress refused to fund the proposed regulations, keeping them ineffective until October 1, 2001. Military Construction Appropriations Act of 2001, Pub. L. No. 106-246, § 8, 114 Stat. 511, 567 (2000). Before the October 1, 2001 date could be reached, EPA suspended the regulations. Delay of Effective Revisions to the Water Quality Planning and Management Regulation and Revisions to the NPDES Program, 66 Fed. Reg. 41,817 (Aug. 9, 2001). On March 19, 2003, EPA formally withdrew the rule. Withdrawal of Revision to Water Quality Planning and Management Regulation, 68 Fed. Reg. 13,607 (Mar. 19, 2003). For a detailed discussion of the TMDL regulations, see Linda Malone, *Myths and Truths That Ended the 2000 TMDL Program*, 20 PACE ENVTL. L. REV. 63 (2002); see also Sarah Klahn, *TMDLs: Another New Regulation*, 34 A.B.A. SEC. OF ENV’T, ENERGY, & RES. TRENDS, Dec. 2003, 12 (discussing TMDL regulations).

⁵⁸ 40 C.F.R. § 130.2(g), (h). See also *Pronsolino*, 291 F.3d at 1128 (discussing the structure of TMDLs).

down of the pollution sources via their respective pollutant loading allocations. If TMDLs are properly adhered to, then the result would be restoration of the stream to water quality standards. The TMDL reflects an impaired waterbody's capacity to tolerate point source, nonpoint source, and natural background pollution, with a margin of error, while still meeting state water quality standards.⁵⁹

Thus, the load and wasteload allocations and loading reductions detailed in a TMDL serve a purpose—getting the impaired waterbody back to health. The basic purpose for which TMDLs are established is the eventual attainment of water quality standards.⁶⁰ The TMDL specifies the maximum amount of a particular pollutant that can pass through a waterbody each day without water quality standards being violated.⁶¹ Two of the leading TMDL decisions have been issued by the United States Courts of Appeal for the Ninth and Eleventh Circuits: *Pronsolino v. Nastri*, and *Sierra Club v. Meiburg*.⁶² These cases discussed how TMDLs are established, with the goal of reducing both point and non-point source loadings to the level at which stream standards can be achieved.⁶³

Regarding individual discharges into an impaired water body, the *Meiburg* court explained the following CWA requirements:

that individual-discharge permits will be adjusted and other measures taken [such as reducing non-point source loadings] so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL. As should be apparent, TMDLs are central to the Clean Water Act's water-quality scheme because . . . "they tie together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water."

. . . .

. . . Point-source discharges are regulated through the federal permit regime, with TMDLs incorporated into the effluent and technological-based limitations.⁶⁴

In addition to the federal appellate court opinions in *Pronsolino* and *Meiburg*, federal district courts have also recognized the connection between the loading

⁵⁹ *Pronsolino*, 291 F.3d at 1128.

⁶⁰ *Id.* at 1137.

⁶¹ *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002).

⁶² *Pronsolino*, 291 F.3d at 1127–29 (holding that TMDLs apply to nonpoint sources); *Meiburg*, 296 F.3d at 1025–26 (holding that TMDLs are to be established even on streams that have only nonpoint source loadings).

⁶³ *Pronsolino*, 291 F.3d at 1127–29; *Meiburg*, 296 F.3d at 1025–26.

⁶⁴ *Meiburg*, 296 F.3d at 1025 (citations omitted).

restrictions established in the TMDL and restrictions on new or renewed NPDES permits. In *Friends of the Wild Swan, Inc. v. United States E.P.A.*, the court prohibited EPA and the State of Montana from issuing any new NPDES permits “until all necessary TMDLs are established for a particular WQLS [water quality limited stream].”⁶⁵ In *Sierra Club v. Hankinson*, the court ordered that:

To ensure that the TMDLs are used to improve water quality, EPA shall implement . . . TMDLs through the NPDES permitting program. This includes the following:

- (a) Once the TMDL is established, EPA shall . . . cause the modification, revocation and reissuance, or termination of permits where appropriate as necessary to implement the TMDLs . . . ;
- (b) EPA shall . . . comply with 40 CFR § 122.4(i) regarding the prohibition on new sources or new dischargers that will cause or contribute to a violation of water quality standards, requiring new permittees or new dischargers to demonstrate that there are sufficient load allocations to allow for the discharge and requiring that the existing dischargers into that segment are subject to compliance schedules designed to bring the WQLS into compliance with applicable water quality standards.⁶⁶

Although these decisions focused on TMDLs, the primary means of protecting water quality and achieving water quality standards is through the establishment of effluent limitations for point sources, implemented through NPDES permits.⁶⁷

In the 1980s and 1990s, there was a flurry of litigation aimed at requiring EPA and the states to promulgate TMDLs for water quality limited (impaired) waters.⁶⁸ Conservation groups were largely successful in getting the federal courts to force EPA and the states to act.⁶⁹ According to the EPA’s latest analysis, there

⁶⁵ *Friends of the Wild Swan, Inc. v. U.S. E.P.A.*, 130 F. Supp. 2d 1199, 1203 (D. Mont. 1999), *aff’d in relevant part*, 74 Fed. Appx. 718, 2003 WL 21751849 (9th Cir. 2003).

⁶⁶ *Sierra Club v. Hankinson*, 939 F. Supp. 872, 873–74 (N.D. Ga. 1996).

⁶⁷ See *supra* notes 22–32 and accompanying text.

⁶⁸ For a detailed discussion of the TMDL litigation up to 1997, see Diane K. Conway, *TMDL Litigation: So Now What?*, 17 VA. ENVTL. L. J. 83, 93–103 (1997). For a more recent analysis, see Kelly Seaburg, *Murky Waters: Courts Should Hold That the ‘Any-Progress-Is Sufficient Progress’ Approach to TMDL Development Under Section 303(d) of the Clean Water Act Is Arbitrary and Capricious*, 82 WASH. L. REV. 767 (2007).

⁶⁹ See, e.g., *Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 979 (1985); *Friends of the Wild Swan*, 130 F. Supp. 2d 1199; *Kingman Park Civic Ass’n v. U.S. E.P.A.*, 84 F. Supp. 2d 1 (D.D.C. 1999); *American Canoe Ass’n v. U.S. E.P.A.*, 54 F. Supp. 2d

are 40,275 TMDLs that have been prepared on water bodies across the country.⁷⁰ However, the conservationists' subsequent attempts to use Section 303 and the promulgation of TMDLs to actually force reductions in pollutant discharges into impaired waters were not successful.⁷¹

This was because it was held that the promulgation of a TMDL does not, by itself, require EPA or the states to reduce pollutant loadings into an impaired water.⁷² In other words, neither EPA nor the states are independently required to implement the loading restrictions contained in the TMDL.⁷³ Rather, TMDLs are to be used as part of a state's continuing planning process to control nonpoint source pollution, and as part of individual NPDES permits, to bring impaired waters back to the point where they are no longer impaired—i.e., until the waters meet water quality standards.⁷⁴ However, according to one commentator, there has been an “abject failure of the CPP [continuing planning process established in CWA Section 303(e)] to lead to the clean up of non-point source impaired waters.”⁷⁵

This failure of the Section 303(e) continuing planning process to restore impaired waters, coupled with the lack of any mechanism to enforce or implement the loading restrictions of the TMDL, implies that TMDLs are the proverbial toothless tigers when it comes to actually “restoring” impaired waters.⁷⁶ When viewed in isolation, that may be the case, as TMDLs are not self-implementing. However, when viewed in conjunction with the NPDES permitting program and its implementing regulations—particularly the requirement that all new permits ensure that discharges do not “cause or contribute” to a violation of water quality standards in the receiving waters—the load reductions contained in the TMDL can become the driving force in restricting or preventing new discharges into impaired waters.⁷⁷ It is to this issue we now turn.

621 (E.D. Va. 1999); *American Canoe Ass'n v. U.S. E.P.A.*, 30 F. Supp. 2d 908 (E.D. Va. 1998); *Hankinson*, 939 F. Supp. 872; *Idaho Sportsmen's Coal. v. Browner*, 951 F. Supp. 962 (W.D. Wash. 1996); *Sierra Club v. Browner*, 843 F. Supp. 1304 (D. Minn. 1993); *Alaska Ctr. for the Env't v. Reilly*, 796 F. Supp. 1374 (W.D. Wash. 1992) *aff'd*, *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981 (9th Cir. 1994); *Alaska Ctr. for the Env't v. Reilly*, 762 F. Supp. 1422 (W.D. Wash. 1991).

⁷⁰ U.S. E.P.A., NATIONAL SUMMARY OF IMPAIRED WATERS AND TMDL INFORMATION, http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T#APRTMDLS (last visited Nov. 5, 2009).

⁷¹ See *supra* note 68 and accompanying text.

⁷² *Meiburg*, 296 F.3d at 1034.

⁷³ *Id.*

⁷⁴ *Id.* (discussing CWA Section 303(e) codified at 33 U.S.C. § 1313(e)).

⁷⁵ Eric Huber, *TMDLs: White Knight or Bureaucratic Nightmare*, 4 VT. J. ENVTL. L. 1, 14 (2003).

⁷⁶ For a further discussion of the problems with the lack of “self-implementation” of TMDLs, see *id.*

⁷⁷ 40 C.F.R. § 122.4(i) (2008).

C. The EPA NPDES Permitting Regime for New Sources in Impaired Waters

When EPA (or a state that has been delegated the Section 402 permitting program) issues an NPDES permit, the agency must comply “with the applicable water quality requirements of all affected states.”⁷⁸ Moreover, the EPA or state permitting agency is prohibited from issuing an NPDES permit “when the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA,” or “when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states.”⁷⁹

EPA’s long-standing regulations prohibit the issuance of an NPDES permit for a new discharge where the discharge may “cause or contribute to the violation of water quality standards”:

§ 122.4 Prohibitions. No permit may be issued:

- (i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.⁸⁰

This is a flat-out prohibition against any new discharge that would cause or contribute to a violation of a water quality standard.

This EPA regulation allows for one limited exception—contained in 40 C.F.R. § 122.4(i)(1) and (2)—to this prohibition of discharges into impaired waters that already are violating the standard. In order for a discharge of the pollutant in question to be allowed, the EPA regulations require strict assurances that (1) the stream can handle the new discharge and still meet the standard and (2) that specific plans are in place to ensure that the stream will be brought back to health—i.e., achieve the applicable water quality standard for that waterbody.⁸¹ Specifically, the EPA regulations require that:

The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B)

⁷⁸ 40 C.F.R. § 122.4(d).

⁷⁹ 40 C.F.R. § 122.4(a), (d).

⁸⁰ 40 C.F.R. § 122.4(i).

⁸¹ *Id.*

of CWA and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the [NPDES permit] public comment period, that:

- (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
- (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.⁸²

Thus, the permit applicant has the dual burden of demonstrating that “there are sufficient pollutant load allocations to allow for the discharge” and that “existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.”⁸³

Prior to the Ninth Circuit’s decision in *Pinto Creek*, very few courts dealt with 40 C.F.R. § 122.4(i). In *Friends of the Wild Swan*, the Ninth Circuit upheld a Montana federal district court’s stay of the issuance of NPDES permits for new sources or discharges to impaired waters pending completion of TMDLs.⁸⁴ The district court’s action was taken pursuant to 40 C.F.R. § 122.4(i) and was set forth as a remedy to compel the state of Montana to complete TMDLs for a number of impaired waters.⁸⁵

In *Ohio Valley Environmental Coalition v. Horinko*, *San Francisco Baykeeper v. Browner*, and *Sierra Club v. Hankinson*, the regulation was raised, but was not the primary issue in the litigation.⁸⁶ In these cases, each court noted the language of 40 C.F.R. § 122.4(i) and appeared to read it similar to the interpretation argued by the conservation groups in *Pinto Creek*, but did not address the language in detail.⁸⁷ In *Horinko*, the court noted that EPA agreed with the plaintiff’s statement that 40 C.F.R. § 122.4(i) prohibited further discharges into an impaired water,

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Friends of Wild Swan v. U.S. E.P.A.*, 74 Fed. App’x 718, 723–24, 2003 WL 21751849, at *3–5 (9th Cir. 2003).

⁸⁵ *Id.*; see also *Friends of the Wild Swan*, 130 F. Supp. 2d at 1203, 1207.

⁸⁶ *Ohio Valley Envtl. Coal. v. Horinko*, 279 F. Supp. 2d 732, 774–75 (S.D. W. Va. 2003); *San Francisco Baykeeper v. Browner*, 147 F. Supp. 2d 991, 995 (N.D. Cal. 2001); *Hankinson*, 939 F. Supp. at 874.

⁸⁷ *Horinko*, 279 F. Supp. 2d at 774–75; *San Francisco Baykeeper*, 147 F. Supp. 2d at 995; *Hankinson*, 939 F. Supp. at 874.

unless strict controls under 40 C.F.R. § 122.4(i) were in place.⁸⁸ In *San Francisco Baykeeper*, the court cited 40 C.F.R. § 122.4(i) and held that “there cannot be a new source or a new discharger if the waterbody is a WQLS [water quality limited segment] impaired waterway *unless* the state completes a TMDL for that WQLS beforehand.”⁸⁹ Finally, in *Hankinson*, the court required TMDL development and ordered:

EPA shall (or ensure that the State shall) comply with 40 C.F.R. § 122.4(i) regarding the prohibition on new sources or new dischargers that will cause or contribute to a violation of water quality standards, requiring new permittees or new dischargers to demonstrate that there are sufficient load allocations to allow for the discharge and requiring that the existing dischargers into that segment are subject to compliance schedules⁹⁰

In one state case, *Crutchfield v. State Water Control Board*, the Virginia Court of Appeals interpreted a state regulation essentially identical to 40 C.F.R. § 122.4(i) and approved the state’s issuance of an NPDES permit into an impaired water.⁹¹ *Crutchfield* held that since the level of pollutant of concern in the discharge, dissolved oxygen, would be less than the level of that pollutant in the receiving water, the new discharge would not cause or contribute to a violation of the dissolved oxygen standard.⁹² Notably, however, *Crutchfield* addressed only the first sentence of 40 C.F.R. § 122.4(i), holding that the second sentence of the regulation was inapplicable to the facts, because there was no TMDL at issue—unlike the situation in *Pinto Creek*.⁹³

Thus, faced with little consistent guidance or precedent regarding the application of 40 C.F.R. § 122.4(i) and the protection of impaired waters, the court in *Pinto Creek* was faced with the task of deciding these issues on essentially first impression.⁹⁴

⁸⁸ *Horinko*, 279 F. Supp. 2d at 774–75.

⁸⁹ *San Francisco Baykeeper*, 147 F. Supp. 2d at 995.

⁹⁰ *Hankinson*, 939 F. Supp. at 874.

⁹¹ *Crutchfield v. State Water Control Bd.*, 612 S.E.2d 249, 251 (Va. Ct. App. 2005). The Virginia regulation, 9 VA. ADMIN. CODE § 25-31-50(C)(9) (2009), contains identical language to that found in the EPA regulation, 40 C.F.R. § 122.4(i); *see also Crutchfield*, 612 S.E.2d at 255.

⁹² *Crutchfield*, 612 S.E.2d at 255.

⁹³ *Id.* at 258.

⁹⁴ *See* Jeffrey M. Gaba, *New Sources, New Growth and the Clean Water Act*, 55 ALA. L. REV. 651, 664–71 (2004) (discussing the confusion surrounding TMDLs and § 122.4(i) prior to *Pinto Creek*).

II. *PINTO CREEK* AND THE DUTY TO PROTECT IMPAIRED WATERS

The United States Court of Appeals for the Ninth Circuit's decision in *Pinto Creek* was the first federal court decision that squarely addressed the interconnection between CWA Section 303(d), TMDLs, the NPDES permitting program, and EPA's 40 C.F.R. § 122.4(i) impaired waters regulation. The decision was the result of over ten years of agency review, administrative appeals, and federal court litigation—all triggered by the NPDES permit application submitted by the Carlota Copper Company to EPA.⁹⁵

A. *The Road to Pinto Creek*

Pinto Creek involved EPA's issuance of an NPDES permit which authorized discharges from the Carlota Copper Mine. The Mine would cover an area of over 3,000 acres and mine an estimated 100 million tons of ore from four open pits.⁹⁶ The Mine would be located on a mixture of public and private lands near the small town of Miami, Arizona, situated in the mountains approximately 100 miles east of Phoenix.⁹⁷ The challenged permit authorized Carlota to discharge a number of pollutants, including dissolved copper, into Pinto Creek from its mine facilities. As described by the EPA's Environmental Appeals Board (EAB) in its decision rejecting the conservation groups' administrative appeal of the NPDES permit:

Carlota plans to use five separate areas for waste rock disposal. . . . Carlota will build seven storm water and sediment retention basins, or retention ponds, to capture storm water runoff and sediment from the slopes of the waste rock dumps. The basins will contain outlet structures to release storm water if a storm event exceeds the design criteria. These outlets, where discharges could occur during large precipitation events, are outfalls that require an NPDES permit.⁹⁸

⁹⁵ Carlota Copper Company submitted its NPDES permit application to EPA, as the permitting agency for NPDES permits in Arizona at the time (1998). Since that time, EPA has approved the delegation of the NPDES permitting program to the State of Arizona. This delegation was approved by the United States Supreme Court, which rejected a challenge to the delegation by conservation groups. See *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). The delegation of permitting authority to Arizona during the pendency of *Pinto Creek* did not alter the Ninth Circuit's decision, since the NPDES permit had been issued by EPA.

⁹⁶ *Friends of Pinto Creek v. U.S. E.P.A. (Pinto Creek)*, 504 F.3d 1007, 1009 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 896 (2009).

⁹⁷ *In re Carlota Copper Co.*, 11 E.A.D. 692, 702 (Sept. 30, 2004), *available at* <http://www.epa.gov/eab/disk11/carlota.pdf> (citations omitted).

⁹⁸ *Id.* at 703–04.

Carlota also would divert approximately 5,300 feet (over one mile) of Pinto Creek around the largest of the open pits, redirecting the stream into a concrete channel.⁹⁹ The mine's operation would also require a sulfuric acid leach pad, with a capacity of 100 million tons, to be located directly in what is now Powers Gulch.¹⁰⁰ Approximately 7,300 feet of Powers Gulch would also be diverted around the leach pad and redirected through a concrete channel.¹⁰¹ The operation plan also includes buried cut-off walls to direct groundwater into the surface diversion channels and away from the mine.¹⁰² These diversion channels would also discharge copper and other pollutants into Pinto Creek.¹⁰³

The State of Arizona had classified both Pinto Creek and Powers Gulch for the designated uses of a warm water fishery, recreation, and fish consumption and agricultural uses.¹⁰⁴ The Pinto Creek watershed contains a number of active, inactive, and abandoned copper mines that release copper into the stream.¹⁰⁵ As a result of this copper contamination, Pinto Creek is included on Arizona's Section 303(d) list of impaired waters due to non-attainment of water quality standards for dissolved copper.¹⁰⁶

EPA originally issued a Draft NPDES Permit for the Carlota Copper Mine in 1998.¹⁰⁷ After receiving public comment on the draft permit, on July 24, 2000, EPA issued a Final Permit (Permit) for the discharges from the Carlota Mine.¹⁰⁸ On August 24, 2000, a coalition of conservation groups appealed that Permit with the EAB, the EPA's internal administrative review body.¹⁰⁹ In that appeal,

⁹⁹ *Id.* at 703.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Pinto Creek*, 504 F.3d at 1009.

¹⁰³ *Id.* at 1015–16.

¹⁰⁴ U.S. E.P.A., 2004 WATERBODY REPORT FOR PINTO CREEK, http://iaspub.epa.gov/tmdl_waters10/attains_waterbody.control?p_list_id=&p_au_id=AZ15060103-018B_00&p_cycle=2004&p_state=AZ (last visited Oct. 29, 2009). Arizona water quality standards are established pursuant to ARIZ. ADMIN. CODE § R18-11-101 to -205 (2009).

¹⁰⁵ *Pinto Creek*, 504 F.3d at 1009; *see also Carlota*, 11 E.A.D. at 702; U.S. E.P.A., ARIZONA WATER QUALITY ASSESSMENT TRACKING REPORT, UPPER SALT WATERSHED (2004), http://iaspub.epa.gov/waters10/attains_watershed.control?p_state=AZ&p_huc=15060103.

¹⁰⁶ *Pinto Creek*, 504 F.3d at 1009.

¹⁰⁷ *Id.* at 1010.

¹⁰⁸ *Id.*

¹⁰⁹ EPA's decisionmaking procedures are governed by its regulations at 40 C.F.R. Part 124 (2008). Appeals of EPA-issued NPDES permits are filed pursuant to 40 C.F.R. § 124.19 (2008). Upon the filing of an appeal, the permit is stayed until the EAB's resolution of the appeal. *See* 40 C.F.R. § 124.16 (2008).

Petitioners argued that EPA had violated the substantive provisions of the Clean Water Act and failed to adequately provide for public notice and comment on the Permit.¹¹⁰

Instead of responding to that original appeal, EPA withdrew the challenged NPDES permit.¹¹¹ In April of 2001, in response to the appeal, EPA issued its TMDL for Pinto Creek, entitled “Total Maximum Daily Load for Copper in Pinto Creek, Arizona” which established allowable pollutant loadings for Pinto Creek designed to restore Pinto Creek to a condition in which it would comply with designated water quality standards (2001 TMDL).¹¹² In May of 2001, EPA issued its Supplemental Environmental Assessment, prepared pursuant to the National Environmental Policy Act (NEPA) for the NPDES permit.¹¹³

On February 27, 2002, EPA reissued the Final NPDES permit, along with the Amended Record of Decision and Finding of No Significant Impact.¹¹⁴ The conservation groups again filed an appeal of the new Final Permit with the EAB on March 29, 2002.¹¹⁵ After briefing and argument, the EAB issued its Order Denying Review on September 30, 2004.¹¹⁶ The conservation groups then appealed the EAB’s decision to the United States Court of Appeals for the Ninth Circuit in San Francisco in February 2005.

The EPA’s position at the center of the dispute in *Pinto Creek*—involving the interpretation of 40 C.F.R. § 122.4(i)—was summarized by the EAB’s decision:

¹¹⁰ See generally *Pinto Creek*, 504 F.3d 1007. The conservation group petitioners before the EAB were: Friends of Pinto Creek, the National Wildlife Federation, the Arizona Wildlife Federation, Grand Canyon Chapter of the Sierra Club, Mineral Policy Center, Maricopa Audubon Society, and Citizens for the Preservation of Powers Gulch and Pinto Creek.

¹¹¹ See *In re Carlota*, 11 E.A.D. at 702 (discussing the procedural aspects of the case before the EAB); see also *Pinto Creek*, 504 F.3d at 1010.

¹¹² U.S. E.P.A., TOTAL MAXIMUM DAILY LOAD FOR COPPER IN PINTO CREEK, ARIZONA (2001), available at http://www.epa.gov/waters/tmdldocs/11700_11700.pdf.

¹¹³ “NEPA [42 U.S.C. §§ 4321 *et seq.*] requires [federal] agencies to examine potential environmental effects of any proposed action, and to inform the public of its studies and resulting concerns.” *Pinto Creek*, 504 F.3d at 1016–17. In *Pinto Creek*, the conservation groups argued that EPA failed to conduct the proper NEPA review in its issuance of the NPDES permit, particularly EPA’s failure to consider the environmental impacts from the pollutants, including copper, discharged into Pinto Creek from the diversion channels. *Id.* at 1017. The Ninth Circuit held that the EAB decision had improperly ruled that the groups had not sufficiently raised their NEPA concerns during the administrative process. *Id.* Regarding other NEPA issues raised by the groups, the Ninth Circuit declined to rule on these because of its finding that the permit violated the CWA. *Id.* This article does not discuss these NEPA issues.

¹¹⁴ *Pinto Creek*, 504 F.3d at 1010.

¹¹⁵ *Id.*

¹¹⁶ *In re Carlota*, 11 E.A.D. at 692.

Petitioners further contend that the Region cannot allow new copper discharges into any segment of Pinto Creek prior to the implementation of the Pinto Creek TMDL and restoration of the water body. There is nothing in the statute, the cases Petitioners cite, or 40 C.F.R. section 122.4(i) providing that an impaired water segment needs to be restored prior to allowing new source discharges into the water body. The Board declines to endorse Petitioners' interpretation because to do so would perpetrate the very outcome the Supreme Court in *Arkansas v. Oklahoma* sought to avoid (adoption of a rigid approach that might frustrate the construction of new facilities that would improve existing conditions). The Board finds no clear error in the Region's determination that Carlota's discharges will not "cause or contribute" to a violation of water quality standards, but rather, Carlota will improve existing conditions because the reductions that will result from its activities are greater than the projected discharges. In addition, the Region did not clearly err in determining that "there are sufficient remaining pollutant load allocations to allow for Carlota's discharges." The Pinto Creek TMDL specifically provides pollutant load allocations for Carlota, and the Board has no reason to disregard the TMDL findings, especially because the TMDL has not been challenged in the proper forum. Moreover, contrary to Petitioners' assertions, the requirements in section 122.4(i)(2) can only apply to point sources. Under the CWA the Agency only has authority to promulgate regulations for point sources, and by section 122.4(i)(2)'s use of the term "compliance schedules," the Agency has signaled its intention that the requirements apply to existing "permit holders," as opposed to all dischargers (permitted and unpermitted) as Petitioners propose.¹¹⁷

According to the EAB, the fact that EPA required Carlota to "offset" its proposed new copper discharges by "improv[ing] existing conditions because the reductions that will result from its activities are greater than the projected discharges" was the critical factor in the EAB's decision—and set the stage for the Ninth Circuit's ruling in *Pinto Creek*.

B. The Heart of the Dispute: EPA's "Offset" Theory

As a result of the first appeal of the 2000 Permit to the EAB, EPA completed its TMDL for Pinto Creek.¹¹⁸ In that TMDL, EPA established reduced allowable pollutant loadings for all of the copper discharges into Pinto Creek designed

¹¹⁷ *Id.* at 695 (citations omitted).

¹¹⁸ See *Pinto Creek*, 504 F.3d at 1010 (describing the permitting and appeal process).

to bring Pinto Creek back to a condition in which it would meet the copper standard.¹¹⁹ The sources of copper loading to be reduced included an active copper mine and numerous inactive mines.¹²⁰

The challenged NPDES permit authorized Carlota to discharge additional copper into the stretch of Pinto Creek that was listed on Arizona's 303(d) list as impaired for copper.¹²¹ EPA's proposed solution to the copper loading at the Carlota Mine site was to "offset" this new copper loading by requiring Carlota to reduce copper loadings in upper Pinto Creek by partially cleaning up a small inactive copper mine over five miles upstream—the Gibson Mine.¹²² The Gibson Mine is just one of the numerous sources of copper loading covered by the TMDL.¹²³

Although the reduction of copper loadings from the Gibson Mine partial cleanup would reduce overall copper loadings to Pinto Creek, without additional reductions Pinto Creek would still not achieve the required copper standard.¹²⁴ Thus, once the Carlota Mine commenced its discharge of additional copper into Pinto Creek, the stream would still exceed the copper standard and still be classified as an impaired water.¹²⁵

EPA and Carlota argued that under this "offset," the total amount of copper in the *entire* reach of Pinto Creek would be reduced, even with the additional copper discharges from the new mine.¹²⁶ Thus, according to EPA and Carlota, due to this "offset," the new copper discharges from the Mine would not "cause or contribute" to a violation of the copper standard. The conservation groups argued, in contrast, that the upstream "offset" was but one part of the larger need to reduce all of the copper loadings into Pinto Creek so that Carlota's new discharge would not "cause or contribute" to the violation of the copper standard at the point of discharge.¹²⁷

¹¹⁹ U.S. E.P.A., TOTAL MAXIMUM DAILY LOAD FOR COPPER IN PINTO CREEK, ARIZONA (2001), http://www.epa.gov/waters/tmdl/docs/11700_11700.pdf.

¹²⁰ *Id.*

¹²¹ *Pinto Creek*, 504 F.3d at 1009.

¹²² *Id.* at 1012.

¹²³ U.S. E.P.A., TOTAL MAXIMUM DAILY LOAD FOR COPPER IN PINTO CREEK, ARIZONA (2001), http://www.epa.gov/waters/tmdl/docs/11700_11700.pdf.

¹²⁴ *Id.* at 16.

¹²⁵ *Id.*

¹²⁶ *Pinto Creek*, 504 F.3d at 1012.

¹²⁷ *Id.* at 1011–12.

The *Pinto Creek* case was the first federal court decision to review the legality of EPA's "offset" policy, which EPA had been developing for a number of years.¹²⁸ In 1999, as part of a rulemaking which dealt with TMDLs, EPA proposed the use of offsets as a means to meet overall water quality standards in a watershed.¹²⁹ After four years of congressional and administrative disputes over the rules, EPA formally revoked the proposal.¹³⁰ However, also, in 2003, EPA published its Water Quality Trading Policy, which approved the use of "offsets" for discharges into impaired waters.¹³¹ As EPA stated in the promulgation of its Trading Policy:

Water quality trading is a voluntary, incentive-based approach that can offer greater efficiency in restoring or protecting water bodies. Trading allows a source to meet its regulatory obligations by using pollutant reductions created by another party with lower pollution control costs. EPA's final Water Quality Trading Policy offers guidance to states and tribes on developing and implementing water quality trading programs.¹³²

According to EPA's Trading Policy, new dischargers could "[offset] new or increased discharges resulting from growth in order to maintain levels of water

¹²⁸ For an analysis in favor of trading and offsets under the CWA, see Kurt Stephenson et al., *Toward an Effective Watershed-based Effluent Allowance Trading System: Identifying the Statutory and Regulatory Barriers to Implementation*, 5 ENVTL. L. 775 (1999). See also Esther Bartfield, *Point-Nonpoint Source Trading: Looking Beyond Potential Cost Savings*, 23 ENVTL. L. 43, 51–52, 58, 72–74, 105 (1993); Lawrence J. MacDonnell, *Thinking About Environmentally Sustainable Development in the American West*, 18 J. LAND RESOURCES & ENVTL. L. 123, 133–34 (1998) (suggesting that TMDLs can create opportunities for pollutant trading among point and nonpoint sources); William Taylor & Mark Gerath, *The Watershed Protection Approach: Is The Promise About to Be Realized?*, 11 NAT. RES. & ENV'T 16, 20 (1996) (discussing pollutant trading using TMDLs).

¹²⁹ Revisions to the NPDES Program and Federal Antidegradation Policy in Support of Revisions to the Water Quality Planning and Management Regulation, 64 Fed. Reg. 46,058 (proposed Aug. 23, 1999). In 2000, EPA issued the final regulations. Revisions to the Water Quality Planning and Management Regulation and Revisions to the NPDES Program, 65 Fed. Reg. 43,586 (July 13, 2000). However, Congress refused to fund the proposed regulations, keeping them ineffective until October 1, 2001. Military Construction Appropriations Act of 2001, Pub. L. No. 106-246, 114 Stat. 511, 567, Title II, § 8 (2000). Before the October 1, 2001 date could be reached, EPA suspended the regulations. Delay of Effective Date of Revisions to the Water Quality Planning and Management Regulation and Revisions to the NPDES Program, 66 Fed. Reg. 41,817 (Aug. 9, 2001).

¹³⁰ On March 19, 2003, EPA issued a rule formally withdrawing the proposed TMDL regulations. Withdrawal of Revision to Water Quality Planning and Management Regulation, 68 Fed. Reg. 13,607 (Mar. 19, 2003). For a detailed discussion of the TMDL regulations, see Linda Malone, *Myths and Truths That Ended the 2000 TMDL Program*, 20 PACE ENVTL. L. REV. 63 (2002).

¹³¹ 68 Fed. Reg. 1608 (Jan. 13, 2003). For an argument in favor of water pollution trading, see James S. Shortle & Richard D. Horan, *Water Quality Trading*, 14 PENN ST. ENVTL. L. REV. 231 (2006).

¹³² Water Quality Trading Policy, 68 Fed. Reg. at 1608.

quality that support all designated uses.”¹³³ Under the Trading Policy, “EPA interprets 40 CFR [§] 122.4(i) to allow for a new source or a new discharger to compensate for its entire increased load through trading.”¹³⁴

In its briefing to the Ninth Circuit in *Pinto Creek*, EPA argued that its offset and trading policy, as implemented in Carlota’s NPDES permit, satisfied the CWA and, more specifically, the requirement in 40 C.F.R. § 122.4(i) that a new discharge not “cause or contribute” to a violation of any water quality standard:

As the EAB held, the record establishes that “the copper loadings into Pinto Creek attributable to the Gibson Mine exceed Carlota’s projected loadings and that the . . . Gibson Mine [remediation] will offset any discharges [by] Carlota[. . .].” Thus, “rather than ‘causing or contributing’ a degradation, Carlota will be improving Pinto Creek’s water quality, or at the very least maintaining water quality.”¹³⁵

The conservation groups did not challenge the fact that, on paper, the projected reductions in copper loading from the remediation of the upstream Gibson Mine exceeded the amount of copper loading from the new permitted outfalls at the downstream Carlota copper mine. Rather, the groups argued that, at the point of discharge at the new mine site, the copper standard would still be exceeded by the new discharges, regardless of the upstream copper reductions. According to the conservation groups, the Gibson “offset” was just one of the many pollutant load reductions described in EPA’s TMDL and without a plan to implement all of the watershed-wide reductions detailed in the TMDL, the copper standard would never be achieved. The conservation groups summarized this argument in the following passage from their brief to the Ninth Circuit:

EPA and Carlota defend the EPA’s permitting decisions based on an “offset” theory and ignore the fundamental requirement of the Clean Water Act . . . —that new pollution discharges cannot violate established water quality standards In EPA/Carlota’s view, the company’s proposal to reduce some of the copper loadings to Pinto Creek from another source (the Gibson Mine) allows EPA to overlook the undisputed fact that Carlota’s new discharges will exceed the allowable amount of copper in the stream at the point of discharge.

¹³³ *Id.* at 1610.

¹³⁴ EPA Water Quality Trading Toolkit for Permit Writers, EPA 833-R-07-004, at 24 (June 2009), available at <http://www.epa.gov/npdes/pubs/wqtradingtoolkit.pdf>.

¹³⁵ Brief for Respondents, *Pinto Creek*, 504 F.3d 1007 (9th Cir. 2007) (No. 05-70785), 2005 WL 6269928, at *23 (citations omitted).

Such a scheme violates the CWA and its implementing regulations. In fact, the EPA's TMDL, . . . completed for Pinto Creek shows that even with the Gibson partial remediation, the additional pollution from Carlota will cause the load allocations and WQS [water quality standards] in Pinto Creek to be exceeded.

Overall, the key focus is at the point of the new discharge—will the discharge cause or contribute to a violation of WQS? Here, the undisputed answer is Yes. The fact that upstream copper levels may decrease somewhat—a very laudable goal—does not mean that the new discharge complies with the CWA.¹³⁶

Faced with these conflicting interpretations of the CWA, 40 C.F.R. § 122.4(i), and the ability to “offset” or “trade” pollutant loading within a watershed, the stage was set for the Ninth Circuit to issue its ruling.¹³⁷

Complicating this dispute were a pair of decisions by the Minnesota courts that were issued during the *Pinto Creek* litigation. In the first case, *In re the Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance for Discharge of Treated Wastewater*, the Minnesota State Court of Appeals overturned the state agency's issuance of an NPDES permit based on a similar “offset” defense.¹³⁸ In *Annandale*, the Minnesota Pollution Control Agency issued an NPDES permit for a proposed wastewater treatment plant that would discharge phosphorus into a waterbody listed as impaired for phosphorus.¹³⁹ The appeals court rejected the

¹³⁶ Reply Brief for Petitioners, *Pinto Creek*, 504 F.3d 1007 (No. 05-70785), 2005 WL 4220331, at *1.

¹³⁷ In previous analysis of this issue, some commentators had presented essentially the same argument as that asserted by the conservation groups in *Pinto Creek*:

The regulations [§ 122.4(i)] prohibit the issuance of an NPDES permit to a new source if the source's pollution “will cause or contribute to the violation of water quality standards.” A new pollutant source cannot help but “contribute” to a violation of the applicable standards for that pollutant on a waterbody that was listed because of violations of those same standards, even if pollutant loading from the new source will be offset by an equivalent load reduction from an existing source.

Michael M. Wenig, *How ‘Total’ Are ‘Total Maximum Daily Loads’?—Legal Issues Regarding the Scope of Watershed-Based Pollution Control Under the Clean Water Act*, 12 TUL. ENVTL. L.J. 87, 120–21 (1998) (citations omitted); see also Diane K. Conway, *TMDL Litigation: So Now What?*, 17 VA. ENVTL. L.J. 83, 118 (1997) (“While this regulation has been on the books for close to twenty years, the EPA has never enforced it.”); Houck, *TMDLs III*, *supra* note 51, at 10,420.

¹³⁸ *In re Cities of Annandale and Maple Lake (In re Annandale I)*, 702 N.W.2d 768, 774 (Minn. Ct. App. 2005).

¹³⁹ *Id.* at 769–70.

“offset” defense: “This reduced discharge from other sources, . . . does not rectify the violation of water-quality standards.”¹⁴⁰

The Minnesota Supreme Court, in a split decision, overturned the lower court decision and reinstated the NPDES permit.¹⁴¹ The Minnesota Supreme Court held that, due to the proposed “offset” from reduced pollutant loadings from other sources, the pollutant loading from the new discharge would therefore not “cause or contribute” to a violation of water quality standards.¹⁴²

Notably, despite the seeming conflict between the Minnesota Supreme Court’s decision in *Annandale* and the Ninth Circuit’s eventual decision in *Pinto Creek*, the Ninth Circuit did not discuss *Annandale*. EPA had argued to the Ninth Circuit that the Minnesota Supreme Court’s decision supported EPA’s “offset” theory and its issuance of the NPDES permit to Carlota.¹⁴³

Annandale, however involved a different factual scenario and focused on a different part of the applicable regulation. In *Annandale*, unlike the situation in *Pinto Creek*, the water body did not have a TMDL—a critical distinction between the cases.¹⁴⁴ Thus, there was no need for the *Annandale* court to apply the second sentence of 40 C.F.R. § 122.4(i)—the sentence that was a key part of the Ninth Circuit’s decision in *Pinto Creek*.¹⁴⁵ Instead, *Annandale* focused extensively on interpretation of the phrase “cause or contribute to the violation of water quality standards” in the first sentence of the regulation, and never reached the interpretation of the second sentence (due in large part to the lack of any TMDL in that case).¹⁴⁶

C. *The Ninth Circuit Rejects the “Offset” Theory and Prohibits New Discharges Until Compliance Plans Are in Place to Bring the Impaired Water Back to Health*

In *Pinto Creek*, the Ninth Circuit framed the fundamental issue in the case as: “Whether the issuance of the permit to discharge a pollutant, dissolved copper, into Pinto Creek, which already exceeded the amount of dissolved copper allowed

¹⁴⁰ *Id.* at 774.

¹⁴¹ *In re* Cities of Annandale and Maple Lake (*In re Annandale II*), 731 N.W.2d 502, 525–26 (Minn. 2007).

¹⁴² *Id.* at 516–22. *In re Annandale II* is discussed in detail in Mehmet K. Konar-Steenberg, *In Re Annandale and the Disconnections Between Minnesota and Federal Agency Deference Doctrine*, 34 WM. MITCHELL L. REV. 1375 (2008).

¹⁴³ Letter from D. Judith Keith, Trial Attorney, U.S. Department of Justice, to Cathy Catterson, Clerk, U.S. Court of Appeals for the Ninth Circuit (May 29, 2007) (on file with author).

¹⁴⁴ See generally *In re Annandale II*, 731 N.W.2d at 502.

¹⁴⁵ See *infra* notes 206–09 and accompanying text.

¹⁴⁶ *In re Annandale II*, 731 N.W.2d at 517 n.11.

under the Section 303(d) Water Quality Standard, is in violation of the Clean Water Act and applicable regulations.”¹⁴⁷ The Ninth Circuit’s decision squarely rejected the “offset” defense raised by EPA and Carlota.¹⁴⁸

The court started with its interpretation of the first sentence of 40 C.F.R. § 122.4(i). That sentence reads: “Prohibitions. No permit may be issued: . . . (i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.”¹⁴⁹ Relying on the stated objective of the CWA “to restore and maintain the chemical, physical, and biological integrity of the nation’s waters,” the court held that “[t]he plain language of the first sentence of the regulation is very clear that no permit may be issued to a new discharger if the discharge will contribute to the violation of water quality standards.”¹⁵⁰

Regarding EPA and Carlota’s “offset” defense, the court held that: “[T]here is nothing in the Clean Water Act or the regulation that provides an exception for an offset when the waters remain impaired and the new source is discharging pollution into that impaired water.”¹⁵¹ The court noted that 40 C.F.R. § 122.4(i) allows for an exception to this strict rule when a TMDL has been completed.¹⁵² However, this exception does not apply unless the new source can demonstrate that, under the TMDL, a plan is designed to bring the water into compliance with applicable water quality standards.¹⁵³

The court noted that, in addition to the requirement that a TMDL be performed, the discharger must demonstrate that two conditions are met. These two conditions are contained in the two numbered clauses in 40 C.F.R. § 122.4(i):

- (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and

¹⁴⁷ *Pinto Creek*, 504 F.3d at 1009.

¹⁴⁸ *Id.* at 1012.

¹⁴⁹ 40 C.F.R. § 122.4(i).

¹⁵⁰ *Pinto Creek*, 504 F.3d at 1012.

¹⁵¹ *Id.* In contrast, the federal Clean Air Act specifically allows new air pollutant dischargers to obtain a permit by offsetting their emissions. 42 U.S.C. § 7503(a)(1)(A) (2006). That Act allows the permitting of new air emission sources if “sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources.” *Id.*

¹⁵² *Pinto Creek*, 504 F.3d at 1012.

¹⁵³ *Id.*

(2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.¹⁵⁴

In *Pinto Creek*, EPA had argued that the first clause is satisfied because the “TMDL provides a method by which the [pollutant load] allocations could be established to allow for the discharge.”¹⁵⁵ EPA relied upon its previous NPDES and proposed TMDL regulations, which provided that the establishment of the load reductions contained in the TMDL, by themselves, established the necessary “remaining pollutant load allocations to allow for the discharge.”¹⁵⁶

A new source or new discharger may, however, obtain a permit for discharge into a water segment which does not meet applicable water quality standards by submitting information demonstrating that there is sufficient loading capacity remaining in waste load allocations (WLAs) for the stream segment to accommodate the new discharge and that existing dischargers to that segment are subject to compliance schedules designed to bring the segment into compliance with the applicable water quality standards.¹⁵⁷

The Ninth Circuit disagreed, noting that the TMDL only set targets for the eventual load reductions along Pinto Creek that would need to be met before the stream met the copper standard. The court explained that the “TMDL merely provides for the manner in which Pinto Creek *could* meet the water quality standards if all of the load allocations in the TMDL were met, not that there are sufficient remaining pollutant load allocations under existing circumstances.”¹⁵⁸

Of critical importance to the court’s decision in *Pinto Creek* was the fact that the EPA’s TMDL found that a number of existing sources of copper loading into Pinto Creek needed to reduce their copper discharges before the stream

¹⁵⁴ 40 C.F.R. § 122.4(i). The Ninth Circuit specifically held that, in order for the “exception” to the prohibition of new discharges into impaired waters to apply, both clauses needed to met by the permit applicant. *Pinto Creek*, 504 F.3d at 1013.

¹⁵⁵ *Pinto Creek*, 504 F.3d at 1012.

¹⁵⁶ Amendments to Streamline the NPDES Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,888 (May 15, 2000); *see also* Revisions to the Water Quality Planning and Management Regulation and Revisions to the NPDES Program in Support of Revisions to the Water Quality Planning and Management Regulation, 65 Fed. Reg. 43,586, 43,588 (July 13, 2000) (discussing implementation of TMDL findings and load reductions). These regulations were never made effective. *See supra* note 57.

¹⁵⁷ Amendments to Streamline the NPDES Program Regulations: Round Two, 65 Fed. Reg. at 30,888.

¹⁵⁸ *Pinto Creek*, 504 F.3d at 1012 (emphasis in original).

would achieve the copper standard.¹⁵⁹ The upstream Gibson Mine that was to be remediated was only one of these existing sources. These additional sources include a mixture of point and nonpoint sources such as another active copper mine, inactive mines, abandoned mines, as well as the Gibson Mine and the proposed discharges from the new Carlota Mine.¹⁶⁰ In other words, even with the Gibson “cleanup”—due to the lack of any plan or schedule to deal with the other sources—there still would not be enough assimilative capacity in Pinto Creek to handle Carlota’s new copper discharges.

Before the Ninth Circuit in *Pinto Creek*, EPA took the position that as long as the TMDL “pollutant load allocations” are produced on paper (i.e., in the TMDL document), this document satisfies 40 C.F.R. §122.4(i)(1)’s requirement that “there are sufficient remaining pollutant load allocations to allow for the discharge.”¹⁶¹ The critical issue in complying with 40 C.F.R. § 122.4(i) is whether there will be sufficient capacity in the receiving stream to handle the new discharge of the pollutant initially responsible for the stream being impaired. The key is to reduce these loadings “so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL.”¹⁶²

In other words, a critical focus of review is the stream reach receiving the new discharge. Any “offset” occurring prior to the new discharge is relevant only if the “offset” is of such magnitude that the stream will still achieve standards, even after the new loadings.¹⁶³ Even if the new permittee is allowed to discharge prior to the achievement of the applicable standard, 40 C.F.R. §122.4(i) requires that plans and schedules are in place so that the standard will be achieved according to the TMDL stream restoration plan—even with the addition of the new copper loadings from the new source.¹⁶⁴

In *Pinto Creek*, the TMDL’s load allocation for the new Carlota copper discharge was based on the assumption that all the other sources were also meeting their allocations.¹⁶⁵ The TMDL concluded that Pinto Creek could accommodate Carlota’s new discharges only if all of the other sources were meeting their reduced allocations, not just the Gibson Mine. Thus, only upon implementation of all of

¹⁵⁹ *Id.*; see also U.S. E.P.A., TOTAL MAXIMUM DAILY LOAD FOR COPPER IN PINTO CREEK, ARIZONA (2001), available at http://www.epa.gov/waters/tmdl/docs/11700_11700.pdf.

¹⁶⁰ U.S. E.P.A., TOTAL MAXIMUM DAILY LOAD FOR COPPER IN PINTO CREEK, ARIZONA (2001), available at http://www.epa.gov/waters/tmdl/docs/1170_11700.pdf.

¹⁶¹ Brief for Respondents, *supra* note 135, at *21–22.

¹⁶² *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002).

¹⁶³ *Pinto Creek*, 504 F.3d at 1012.

¹⁶⁴ *Id.* at 1013.

¹⁶⁵ U.S. E.P.A., TOTAL MAXIMUM DAILY LOAD FOR COPPER IN PINTO CREEK, ARIZONA, at 16 (2001), available at http://www.epa.gov/waters/tmdl/docs/11700_11700.pdf.

the wasteload and load allocations prescribed in the TMDL would Pinto Creek meet water quality standards.¹⁶⁶ There was, however, no plan in place for the remediation of any sources other than the Gibson Mine. The Ninth Circuit correctly noted that “[t]he only step the EPA or Carlota has taken to meet the requirements of [40 C.F.R.] § 122.4(i) is the partial remediation of the Gibson Mine discharge.”¹⁶⁷ The lack of any plan to reduce the copper sources identified in the TMDL was critical to the Ninth Circuit’s findings regarding 40 C.F.R. § 122.4(i)(2), which required that the NPDES permit applicant demonstrate that: “the existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.”¹⁶⁸

The court required that these plans must not only show *what* pollutant load reductions are needed to bring a water body back to health, but also actually *how* these reductions will be achieved.

The error of both the EPA and Carlota is that the objective of . . . [40 C.F.R. § 122.4(i)(2)] is not simply to show a lessening of pollution, but to show how the water quality standards will be met if Carlota is allowed to discharge pollutants into the impaired waters.¹⁶⁹

The *Pinto Creek* court further found that “compliance schedules” must be established for all “existing dischargers” into Pinto Creek, so that the stream could accommodate the new and increased copper discharges from the Carlota Mine.¹⁷⁰ The court held that all point sources must be subject to these compliance schedules (i.e., plans designed to reduce the pollutant loading from each source so the stream segment would be brought into compliance with water quality standards).¹⁷¹ The court specifically rejected EPA’s argument that only currently permitted point source discharges were subject to the “compliance schedule” requirement.¹⁷² The *Pinto Creek* court established the basic procedure that must be followed before a new NPDES permit is issued for a discharge into an impaired water:

If point sources, other than the permitted point source, are necessary to be scheduled in order to achieve the water quality standard, then EPA must locate any such point sources and

¹⁶⁶ *Id.*

¹⁶⁷ *Pinto Creek*, 504 F.3d at 1014 n.2.

¹⁶⁸ 40 C.F.R. § 122.4(i).

¹⁶⁹ *Pinto Creek*, 504 F.3d at 1014.

¹⁷⁰ *Id.* at 1012–13.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1013.

establish compliance schedules to meet the water quality standard before issuing a permit. If there are not adequate point sources to do so, then a permit cannot be issued unless the state or [the discharge permit applicant] agrees to establish a schedule to limit pollution from a nonpoint source or sources sufficient to achieve water quality standards.¹⁷³

On this point, EPA had correctly argued that nothing in the CWA compelled it to act against other dischargers. However, the *Pinto Creek* court noted that its ruling did not force EPA to take any action requiring existing discharges to reduce their pollutant loadings. Rather, “[t]he EPA remains free to establish its priorities; it just cannot issue a permit to a new discharger until it has complied with [40 C.F.R.] § 122.4(i).”¹⁷⁴

Lastly, the *Pinto Creek* court noted that its ruling does not require that the remediation of all the existing discharges into the impaired stream segment (in order to achieve the water quality standards) be *actually completed* prior to the issuance of a new NPDES permit pursuant to 40 C.F.R. § 122.4(i).¹⁷⁵ Rather, *Pinto Creek* required that the compliance schedules mandated by 40 C.F.R. § 122.4(i)(2) and the court’s own ruling be established for all the discharges prior to issuance of the new permit.¹⁷⁶ The problem with the NPDES permit in *Pinto Creek* was that—except for the partial remediation of the old Gibson mine—none of the other copper sources discharging into Pinto Creek had any schedules established to reduce the overall copper loadings into the stream to the point where the stream would achieve the copper standard.¹⁷⁷

Therefore, although EPA and the states are not required to “implement” the TMDL and its loading reductions for a particular pollutant, neither EPA nor a state permitting agency can issue a new NPDES permit for discharges into that impaired waterbody without the necessary compliance plans in place. *Pinto Creek* thus closes the loophole that had developed in the CWA § 303 and TMDL program, as a result of the cases that held that TMDLs were not “self-implementing.”¹⁷⁸ While TMDLs may continue to be “paper tigers” standing alone, after *Pinto Creek* the loading reductions contained in the TMDL are now the critical factors in restoring the health of impaired waters. In other words, the loading reductions in the TMDL are now essentially implemented via *Pinto*

¹⁷³ *Id.* at 1014.

¹⁷⁴ *Id.* at 1015.

¹⁷⁵ *Id.* at 1013.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* notes 68–77 and accompanying text.

Creek's prohibition against new discharges that fail to contain compliance plans and loading reductions found in the TMDL.

D. The Lack of a Conflict Between Pinto Creek and the Supreme Court's Decision in Arkansas v. Oklahoma

EPA and Carlota argued that the conservation groups' interpretation of the CWA and 40 C.F.R. § 122.4(i) in *Pinto Creek* conflicted with the United States Supreme Court's decision in *Arkansas v. Oklahoma*.¹⁷⁹ In *Arkansas*, the state of Oklahoma challenged EPA's issuance of an NPDES permit to a sewage treatment plant in Arkansas which discharged into a river flowing into Oklahoma.¹⁸⁰ Oklahoma argued that EPA could not issue such a permit because the discharge into an impaired river would violate the strict water quality standards of the river as it entered Oklahoma.¹⁸¹

The United States Court of Appeals for the Tenth Circuit overturned the EPA permit on the grounds that such discharges into impaired waters were categorically prohibited.¹⁸² The United States Supreme Court reversed the Tenth Circuit, stating: "The Court of Appeals construed the Clean Water Act to prohibit any discharge of effluent that would reach waters already in violation of existing water quality standards. We find nothing in the Act to support this reading."¹⁸³ The Court then discussed the relationship between discharges and the attainment of water quality standards in that water body.

Although the Act contains several provisions directing compliance with state water quality standards, the parties have pointed to nothing that mandates a complete ban on discharges into a waterway that is in violation of those standards. The statute does, however, contain provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources. Thus, rather than establishing the categorical ban announced by the Court of Appeals—which might frustrate the construction of new plants that would improve existing conditions—the Clean Water Act vests in the EPA and the States broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution.¹⁸⁴

¹⁷⁹ *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

¹⁸⁰ *Id.* at 95.

¹⁸¹ *Id.*

¹⁸² *Oklahoma v. E.P.A.*, 908 F.2d 595 (10th Cir. 1990).

¹⁸³ *Arkansas*, 503 U.S. at 107.

¹⁸⁴ *Id.* at 108 (citations omitted).

In briefing to the Ninth Circuit in *Pinto Creek*, EPA and Carlota portrayed the conservation groups' argument as tantamount to the "categorical ban" rejected by the Supreme Court in *Arkansas*. In the conservation groups' administrative appeal to the EAB, the EAB held that the groups' interpretation of 40 C.F.R. § 122.4(i) "would perpetrate the very outcome [that] the Supreme Court in [*Arkansas*] sought to avoid (adoption of a rigid approach that might frustrate the construction of new facilities that would *improve existing conditions*)."¹⁸⁵ The EAB reasoned that "to agree with Petitioners would set in motion a 'Catch-22' whereby [*Pinto Creek*] cannot get cleaner because it cannot become pristine enough for Carlota to begin the [*Gibson remediation*]."¹⁸⁶

The Ninth Circuit disagreed and reversed the EAB decision, finding no conflict with *Arkansas*.¹⁸⁷ *Arkansas* is distinguishable from *Pinto Creek* in several ways.¹⁸⁸ First and foremost, *Arkansas* did not involve new discharges and never mentioned 40 C.F.R. §122.4(i).¹⁸⁹ Further, restricting the issuance of new discharge permits into impaired waters pending completion of a plan to remediate excess pollution, as discussed in *Pinto Creek*, is not the type of "categorical ban" discussed in *Arkansas*.¹⁹⁰

¹⁸⁵ *In re Carlota*, 11 E.A.D. 692, 766 (Sept. 30, 2004), available at <http://www.epa.gov/eab/disk11/carlota.pdf> (emphasis added).

¹⁸⁶ *Id.*

¹⁸⁷ *Pinto Creek*, 504 F.3d at 1013–15.

¹⁸⁸ At least one commentator had recognized the potential connections between §122.4(i) and its prohibitions against dischargers into impaired waters and the Supreme Court's decision in *Arkansas*.

The EPA's regulation [§ 122.4(i)] . . . provide[s] a reasonably strong argument that a water's 303(d) listing precludes new or revised NPDES permits that allow additional pollution, although it is unclear what facts need to be demonstrated to support the argument in any given case. However, the Supreme Court's 1991 decision in *Arkansas v. Oklahoma* may suggest that this preclusionary rule is inapplicable in any circumstance. In that decision, the Court rejected a circuit court conclusion that the Act "prohibit[ed] any discharge of effluent that would reach waters already in violation of existing water quality standards." The Court concluded that the Act lacked any such prohibition. However, the Court did not discuss or acknowledge the prohibition contained in 40 C.F.R. [§]122.4(i), or the implied statutory prohibition underlying that regulation.

Michael M. Wenig, *How 'Total' Are 'Total Maximum Daily Loads'?—Legal Issues Regarding the Scope of Watershed-Based Pollution Control Under the Clean Water Act*, 12 TUL. ENVTL. L.J. 87, 122 (1998) (citations omitted).

¹⁸⁹ As another commentator noted: "Among other things, the case dealt with 'antidegradation' requirements; the Supreme Court never mentioned, let alone discussed, the role of TMDLs and section 122.4(i)." Jeffrey M. Gaba, *New Sources, New Growth and the Clean Water Act*, 55 ALA. L. REV. 651, 668 n.101 (2004).

¹⁹⁰ See *Friends of the Wild Swan, Inc. v. U.S. E.P.A.*, 130 F. Supp. 2d 1199, 1203 (D. Mont. 1999) (prohibiting EPA and the State of Montana from issuing new discharge permits into impaired waters), *aff'd in relevant part*, 74 Fed. Appx. 718, 724; 2003 WL 21751849, at *4 (9th Cir. 2003) (discussing how the district court's prohibition did not conflict with *Arkansas*).

Arkansas also involved very different facts than *Pinto Creek*. In *Arkansas*, the new pollution was so minimal that it could not even be measured—the discharge “would not lead to a detectable change in water quality.”¹⁹¹ Because the discharge in *Arkansas* would not affect water quality, the Court was reluctant to overturn the EPA permit which allowed that discharge. Thus, the Court was correct in ruling against “establishing a categorical ban” on such *de minimis* discharges.¹⁹² The Court’s statement against “frustrat[ing] the construction of new plants that would improve existing conditions,” thus makes sense when viewed against the facts of that case.¹⁹³

In *Pinto Creek*, the situation at Carlota was markedly different. There, Carlota proposed to discharge measurable and significant amounts of copper into Pinto Creek. Indeed, the TMDL was established to account for Carlota’s new copper discharges.¹⁹⁴ This is different from the undetectable and unmeasurable discharges in *Arkansas*. In *Pinto Creek*, the Ninth Circuit held that requiring a new discharger to meet the procedural requirements of 40 C.F.R. §122.4(i) is not a “ban.”¹⁹⁵ “This is not a complete ban but a requirement of schedules to meet the objective of the Clean Water Act.”¹⁹⁶

The Ninth Circuit held that without a plan to achieve water quality standards, EPA cannot allow new discharges that will exacerbate the violations.¹⁹⁷ However, if such a plan is developed, the discharge may occur. The Ninth Circuit’s decision requires EPA to review proposed discharges on a case-by-case basis, focusing on the existing quality of the stream, the pollution levels in the proposed discharge, and whether a plan exists to achieve the water quality standards based on other pollution sources in the stream.¹⁹⁸

E. Carlota’s Post-Merits Efforts to Overturn Pinto Creek and the EPA’s Attempt to Avoid the Ramifications of the Ninth Circuit’s Decision

After the Ninth Circuit’s decision on the merits, Carlota filed a petition for en banc review. The EPA did not join in that petition, and the Ninth Circuit, without discussion, denied the petition. Carlota then filed a petition for certiorari with

¹⁹¹ *Arkansas*, 503 U.S. at 112; see also *id.* at 95–96 (noting that the proposed discharge would not affect downstream water quality standards).

¹⁹² *Id.* at 108.

¹⁹³ *Id.*

¹⁹⁴ See generally U.S. E.P.A., TOTAL MAXIMUM DAILY LOAD FOR COPPER IN PINTO CREEK, ARIZONA, at 16 (2001), available at http://www.epa.gov/waters/tmdl/docs/11700_11700.pdf.

¹⁹⁵ *Pinto Creek*, 504 F.3d at 1015.

¹⁹⁶ *Id.* at 1013.

¹⁹⁷ *Id.* at 1012.

¹⁹⁸ *Id.* at 1012–13.

the United States Supreme Court.¹⁹⁹ This time, EPA actively opposed Carlota's certiorari petition.²⁰⁰ Six separate amicus briefs were submitted in support of Carlota's petition.²⁰¹

In its certiorari petition, Carlota argued that the Ninth Circuit's decision conflicted with the United States Supreme Court's decision in *Arkansas*, as well as the Minnesota Supreme Court's decision in *Annandale*.²⁰² Carlota argued that the Ninth Circuit's decision amounted to the "categorical ban" on discharges into impaired waters rejected by the United States Supreme Court in *Arkansas*.²⁰³ Carlota also focused on the language in *Arkansas* that noted the EPA's and States' "broad authority to develop long-range, area-wide programs to alleviate and eliminate existing pollution."²⁰⁴

By focusing on the "long-range, area-wide programs," Carlota was essentially arguing that *Arkansas* validated the type of "offset" approach that had been at issue in *Pinto Creek*. However, there was no mention of any "offset" in *Arkansas*, and the issue of pollutant trading within a watershed never arose in that case.

The EPA's opposition to Carlota's certiorari petition refutes the notion that *Pinto Creek* conflicts with *Arkansas*. In its response brief to the United States Supreme Court, EPA concluded that "the decision [in *Pinto Creek*] does not virtually or categorically prohibit the permitting of new sources or new dischargers to impaired water bodies under the CWA, and there is no conflict with *Arkansas*."²⁰⁵

Instead, EPA focused on the Ninth Circuit's reliance on the need for plans to remediate existing pollution in impaired waters. According to EPA, *Pinto Creek* "affirmatively noted that EPA can use its broad discretion to establish priorities among point sources and it can issue permits for new discharges, so long as there are compliance schedules."²⁰⁶

EPA's response to Carlota's claim that *Pinto Creek* conflicted with *Annandale*, however, is more ambiguous and appears to signal EPA's attempt to minimize the Ninth Circuit's rejection of the agency's "offset" defense in *Pinto Creek*. In its

¹⁹⁹ Petition for Writ of Certiorari, *supra* note 6.

²⁰⁰ Brief for Federal Respondent, *supra* note 8, at *21.

²⁰¹ See *supra* note 7.

²⁰² Petition for Writ of Certiorari, *supra* note 6, at *13–14.

²⁰³ *Id.*

²⁰⁴ *Id.* at *13 (quoting *Arkansas*, 503 U.S. at 108).

²⁰⁵ Brief for Federal Respondent, *supra* note 8, at *18.

²⁰⁶ *Id.* at *17.

response to Carlota's certiorari petition, EPA argued that the reason there was no conflict with *Annandale* was because the Ninth Circuit's decision "expressly turned on the second sentence of the regulation [40 C.F.R. § 122.4(i)], which became relevant because a TMDL had already been established for Pinto Creek."²⁰⁷

Here, EPA attempted to downplay the Ninth Circuit's holding that "[T]here is nothing in the Clean Water Act or the regulation that provides an exception for an offset when the waters remain impaired and the new source is discharging pollution into that impaired water."²⁰⁸ EPA argued that this holding was just a "passing statement" regarding the Ninth Circuit's interpretation of the first sentence of 40 C.F.R. § 122.4(i), and that the Ninth Circuit's holding was "itself ambiguous."²⁰⁹ The first sentence of 40 C.F.R. § 122.4(i) states that "No permit may be issued . . . To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards."²¹⁰

In an effort to defend its interpretation of its "offset" defense, EPA argued that the Ninth Circuit did not rule on whether a new discharger could avoid the prohibition against "causing or contributing" to a violation of a water quality standard by creating an "offset" somewhere in the same watershed.²¹¹ EPA stated:

The Ninth Circuit's passing observation that the CWA and regulations do not contain an "exception for an offset" is itself ambiguous. The court may simply have meant that there is no express provision in the CWA or regulations that in terms provides an "exception" in situations involving an "offset." If so, the court's conclusion was correct but ultimately irrelevant. Whether the phrase that *does* appear in the first sentence of Section 122.4(i) (*i.e.*, "will cause or contribute to the violation of water quality standards") is properly construed to be met where there will be an offset is a different question, which the Ninth Circuit did not address. Indeed, elsewhere in its decision the court appeared to contemplate that any offset created by remediation of the Gibson Mine *could* be taken into account.²¹²

²⁰⁷ *Id.* at *14 n.4. EPA noted that a TMDL had not been established for the receiving waters in *Annandale*.

²⁰⁸ *Pinto Creek*, 504 F.3d at 1012.

²⁰⁹ Brief for Federal Respondent, *supra* note 8, at *15 n.4.

²¹⁰ 40 C.F.R. § 122.4(i).

²¹¹ Brief for Federal Respondent, *supra* note 8, at *15 n.4.

²¹² *Id.* (citing *Pinto Creek*, 504 F.3d at 1016).

Notably, in its reply brief to the United States Supreme Court in support of its certiorari petition, Carlota strongly disagreed with EPA, stating that: “Contrary to the [EPA]’s argument, the Ninth Circuit held that the first sentence of the regulation prohibits discharges subject to offset conditions, and its analysis, although terse, was a holding and not dictum.”²¹³

Despite the clear language from the Ninth Circuit, EPA’s argument to the United States Supreme Court indicated the agency’s attempt to keep alive its “offset” and trading policy that it has been trying to implement for over a decade.²¹⁴ However, such an open-ended policy cannot survive *Pinto Creek*. Indeed, in its reply brief in support of its petition for certiorari, Carlota acknowledged that the EPA’s “offset” policy does not comport with the court’s decision. “[T]he court plainly rejected the EPA’s ‘contention’ that Carlota’s discharge does not ‘contribute to’ violations because of the ‘offset’ condition, stating that the first sentence [of 40 C.F.R. § 122.4(i)] contains no ‘exception’ for an offset.”²¹⁵

Although it is understandable that EPA would want to continue to defend its “offset” and trading policies, such a defense does not comport with the rule established in *Pinto Creek*. As noted above, EPA argued that, based on the “offset” from the partial remediation of the upstream Gibson mine, the new permit’s copper discharges (which were, on paper, less than the amount of copper to be removed from the watershed by the Gibson mine cleanup) did not “cause or contribute” to a violation of the copper standard at the new Carlota site.²¹⁶ Both EPA and Carlota had argued, and the EPA’s Environmental Appeals Board had held, that the first sentence of 40 C.F.R. § 122.4(i)’s prohibition against “causing or contributing” could be satisfied by an “offset.” The EAB paraphrased EPA’s argument:

In [EPA]’s view Carlota will not cause or contribute to the violation of water quality standards but rather will improve existing conditions because the reductions that will result from its activities are greater than the projected discharges [from the new Carlota mine]. According to [EPA], Carlota’s permit would result in a net condition in the total load of copper delivered to Pinto Creek and that suffices to meet the first sentence of section 122.4(i).²¹⁷

²¹³ Petitioner’s Reply Brief, *Carlota Copper Co. v. Friends of Pinto Creek*, 129 S. Ct. 896 (2008) (No. 07-1524), 2008 WL 4263548, at *2 (Sept. 15, 2008).

²¹⁴ See *supra* notes 128–34 and accompanying text (regarding EPA’s trading and offset policies).

²¹⁵ Petitioner’s Reply Brief, *supra* note 213, at *3.

²¹⁶ See *supra* note 135 and accompanying text.

²¹⁷ *In re Carlota*, 11 E.A.D. at 767.

The EAB ratified this argument, agreeing with the EPA permit writers that the requirement of an “offset” in the NPDES permit satisfies the first sentence of 40 C.F.R. § 122.4(i).²¹⁸

However, as detailed above, the Ninth Circuit flatly rejected this assertion.²¹⁹ *Pinto Creek* holds that the presence of an “offset” of the pollutant loading from the new source, absent a plan (i.e., compliance schedules) to bring the other sources of pollutant-loading down to the level at which the stream will achieve water quality standards, does not satisfy the strict requirements of 40 C.F.R. § 122.4(i).²²⁰

This means that in addition to requiring a plan for the “offset” or “trade” of the pollutant loading to be discharged by the new source, the new discharger must show there is a plan in place to reduce the pollutant loading from *all* the water pollution discharges into that impaired water body. Depending on the size of the watershed and the number and scope of the discharges contributing to the impairment of the water body, meeting this requirement may prove very difficult.

CONCLUSION

The United States Court of Appeals for the Ninth Circuit’s decision in *Pinto Creek* has broad ramifications for the regulation of pollution discharges into the nation’s waters. The Clean Water Act’s recognition of the need to protect impaired waters, and indeed “restore” their health, had long been a neglected and overlooked requirement. This is no longer the case, as the directive from *Pinto Creek* is clear. New pollutant discharges into impaired waters are no longer allowed, absent a specific plan to lower the pollutant loading from all the existing sources, so that the stream may achieve its water quality standards.

Until *Pinto Creek*, the establishment of TMDLs for impaired waters—while sometimes a useful tool for analyzing potential means to reduce pollutant loadings—was essentially a non-enforceable exercise in water quality planning. *Pinto Creek* has changed the calculus of TMDLs. No longer are TMDLs “paper tigers.” After the court’s decision in *Pinto Creek*, EPA and the states must now ensure that the loading reductions contained in TMDLs become part and parcel of any new discharge permits into that watershed. While the loading reductions contained in TMDLs are still not “self-implementing,” EPA and the states cannot issue new discharge permits for impaired waters without a plan in place to bring that impaired water back to health.

²¹⁸ *Id.* at 767–68.

²¹⁹ *Pinto Creek*, 504 F.3d at 1012.

²²⁰ *Id.*

Although the implementation of the rule established in *Pinto Creek* may be initially resisted by EPA and the states (as evidenced by EPA's briefing to the Supreme Court in the case) in the long run, *Pinto Creek* represents an important step towards fulfilling Congress' goal in enacting the modern Clean Water Act in 1972—to “restore and maintain . . . the integrity of the nation's waters.”²²¹

²²¹ 33 U.S.C. § 1251(a) (2006).

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Hicks v. Dowd, CONSERVATION EASEMENTS, AND THE CHARITABLE TRUST DOCTRINE: SETTING THE RECORD STRAIGHT

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This is the fourth in an exchange of articles published by the *Wyoming Law Review* discussing the application of charitable trust principles to conservation easements conveyed as charitable gifts. In 2002, Johnson County, Wyoming, attempted to terminate a conservation easement that had been conveyed to the County as a tax-deductible charitable gift.¹ The County's actions were challenged,

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¹ See Quitclaim Deed between the Board of County Commissioners of Johnson County, Wyoming, Grantor, and Fred L. Dowd and Linda S. Dowd, Grantee (Aug. 6, 2002), in which the County attempted to transfer the conservation easement to the Dowds for the purpose of terminating the easement. The Dowds had earlier purchased the land subject to the easement from the easement donor. See Warranty Deed between the Lowham Limited Partnership, Grantor, and Fred L. Dowd and Linda S. Dowd, Grantees (Feb. 1, 1999).

first in a suit brought by a resident of the County, *Hicks v. Dowd*, and then in a suit brought by the Wyoming Attorney General, *Salzburg v. Dowd*.² The over six years of litigation associated with the easement's attempted termination has been the catalyst and background for the exchange of articles.

C. Timothy Lindstrom published the first article, entitled *Hicks v. Dowd: The End of Perpetuity (The End of Perpetuity)*.³ The authors of the present article published the second, entitled *In Defense of Conservation Easements: A Response to "The End of Perpetuity" (In Defense of Conservation Easements)*.⁴ Mr. Lindstrom then responded with a "surrebuttal" entitled *Conservation Easements, Common Sense and the Charitable Trust Doctrine (the Surrebuttal)*.⁵

In his *Surrebuttal*, Mr. Lindstrom reiterates his assertion that land trusts are free to modify and terminate the conservation easements they acquire as charitable gifts, subject only to whatever constraints may be imposed by federal tax law and any internal policies and procedures the land trusts might voluntarily adopt from time to time.⁶ In other words, he would eliminate the right of state attorneys

² In *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007), a resident of Johnson County (Hicks) filed suit alleging, *inter alia*, that the conservation easement was held in trust for the benefit of the public and the County could not terminate the easement without receiving court approval in a *cy pres* proceeding. On May 9, 2007, the Wyoming Supreme Court dismissed the case on the ground that Hicks did not have standing to sue to enforce a charitable trust, but the Court invited the Wyoming Attorney General, as supervisor of charitable trusts in the state of Wyoming, "to reassess his position" with regard to the case. *Hicks*, 157 P.3d at 921. In July of 2008, the Wyoming Attorney General filed a complaint in District Court similarly arguing that the County had breached its fiduciary duties in attempting to terminate the easement and requesting that the deed transferring the easement to the Dowds be declared null and void. See Complaint for Declaratory Judgment Charitable Trust, Mandamus Relief, Breach of Fiduciary Duties, Violation of Constitutional Provisions at 13, *Salzburg v. Dowd*, Civ. No. CV-2008-0079 (July 8, 2008). *Salzburg v. Dowd* was still pending at the time of the publication of this article.

³ C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008) [hereinafter *The End of Perpetuity*]. The first article discussing the case was published two years earlier in the Wyoming bar journal. See Nancy A. McLaughlin, *Could Coalbed Methane be the Death of Conservation Easements?*, 29 WYO. LAW. 18 (2006).

⁴ Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1 (2009) [hereinafter *In Defense of Conservation Easements*].

⁵ C. Timothy Lindstrom, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*, 9 WYO. L. REV. 397 (2009) [hereinafter *Surrebuttal*].

⁶ The *Surrebuttal* complains of the "dismissive manner" in which *In Defense of Conservation Easements* purportedly deals with the "constraints on land trusts imposed by existing law," which, according to *The End of Perpetuity*, are limited to the common law of real property and federal tax law. See *Surrebuttal*, *supra* note 5, at 399; *The End of Perpetuity*, *supra* note 3, at 67. However, as explained in *In Defense of Conservation Easements*, under the common law of real property, the owner of an easement can unilaterally release the easement, in whole or in part, or agree with the owner of the burdened land to modify or terminate the easement. Accordingly, such law does not appear to place any meaningful constraint on a holder's decision to modify or terminate a conservation easement. See *In Defense of Conservation Easements*, *supra* note 4, at 4 n.4. *In Defense of Conservation*

general and state courts to call land trusts (and, by extension, government entities) to account for breaches of their fiduciary duties to conservation easement donors and the public.

In advocating that the states should be deprived of their ability to call easement holders to account for breaches of their fiduciary duties, the *Surrebuttal* reiterates many of the same arguments originally made in *The End of Perpetuity*. Although those arguments were refuted in *In Defense of Conservation Easements*, the authors have nonetheless taken the time to respond to the *Surrebuttal* because of the danger that it may mislead landowners, land trusts, public officials, and others regarding the laws that govern the actions of government entities and land trusts that solicit and accept conservation easement and other charitable donations.⁷

Recognizing that readers may, by now, be a bit weary of this debate, the authors address below only the most problematic of the *Surrebuttal's* assertions. They also have done so in an abbreviated fashion, referring readers, where appropriate, to other sources for a more detailed exposition of the given points.

Technical "Trust" Characterization Not Required

The *Surrebuttal* argues that charitable trust principles should not apply to conservation easements because "Wyoming law permits inference of intent to create a trust, but the ' . . . inference is not to come easily . . . ' and ' . . . clear, explicit, definite, unequivocal and unambiguous language or conduct establishing the intent to create a trust is required'"⁸ That same argument was made by the Dowds (the landowners arguing in favor of the termination of the perpetual conservation easement) in *Salzburg v. Dowd*.⁹ That argument

Easements also explains in great detail why federal tax law does not ensure that government entities and charitable organizations comply with their fiduciary obligations to administer conservation easements in accordance with their stated terms and purposes, and that state attorneys general and state courts, rather than the Internal Revenue Service (IRS), are the proper enforcers of such state law fiduciary obligations. See *id.* at 74–82. See also *infra* notes 95, 96 and accompanying text.

⁷ Although the *Surrebuttal* and *The End of Perpetuity* draw no distinction between conservation easements donated as charitable gifts and those acquired by purchase, exaction, or in other nondonative contexts, the analysis in this article (as in *In Defense of Conservation Easements*) focuses on conservation easements conveyed to land trusts or state or local government entities in whole or in part as charitable gifts—as was the case with the conservation easement at issue in *Salzburg v. Dowd* and *Hicks v. Dowd*. See *In Defense of Conservation Easements*, *supra* note 4, at 4 n.5 (explaining that the fact that some conservation easements are not conveyed as charitable gifts is not a justification for permitting government or land trust holders to avoid their fiduciary obligations with regard to those that are).

⁸ *Surrebuttal*, *supra* note 5, at 402 (citation omitted).

⁹ See Defendant Dowd's Response to Motion for Summary Judgment at 7, *Salzburg v. Dowd*, Civ. No. CV-2008-0079 (Sept. 4, 2009) [hereinafter Dowd's Response].

should be unavailing. The cases cited in the *Surrebuttal* and by the Dowds in support of that argument do not involve charitable gifts. More importantly, it should matter not whether the donation of a conservation easement creates a technical “trust” under state law. As the Wyoming Attorney General explained in his Memorandum in Support of his Motion for Summary Judgment in *Salzburg v. Dowd*, in many jurisdictions charitable gifts made to government entities and charitable organizations to be used for specific purposes are characterized as “charitable trusts” even in the absence of the use of the words “trust” or “trustee” in the instrument of conveyance.¹⁰ However, even in jurisdictions where such gifts are not technically characterized as trusts, the substantive rules governing the administration of charitable trusts nonetheless apply.¹¹ All charitable gifts made for specific purposes, regardless of whether they are technically characterized as charitable trusts, are enforceable by the state attorney general (or other appropriate public official).¹² “The theory underlying the power of the attorney general to enforce gifts for a stated purpose is that a donor who attaches conditions to his gift has a right to have his intention enforced.”¹³ Wyoming law is in accord with these authorities.¹⁴

Obsessive focus on whether the conveyance of a conservation easement technically creates a charitable “trust” under state law obscures the fundamental point. Conservation easements are donated as charitable gifts to government entities or charitable organizations to be used for a specific charitable purpose—the protection of the particular land encumbered by the easement for the conservation purposes specified in the deed of conveyance.¹⁵ Accordingly, donated conservation easements constitute restricted charitable gifts, and whether technically characterized as charitable trusts under state law or not, the

¹⁰ See Plaintiff’s Memorandum in Support of Motion for Summary Judgment at 19–26, *Salzburg*, Civ. No. CV-2008-0079 (Aug. 12, 2009) [hereinafter AG’s Motion for SJ]. See also 15 AM. JUR. 2D *Charities* § 8 (2009) (“A condition attached to a gift may be considered as tantamount to imposing a trust, and if the condition involves application for charitable purposes, a charitable trust will result.”).

¹¹ See AG’s Motion for SJ, *supra* note 10, at 19–26. See also *In Defense of Conservation Easements*, *supra* note 4, at 6–7.

¹² See AG’s Motion for SJ, *supra* note 10, at 23–24.

¹³ *Id.* at 25–26 (citing *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 998 (Conn. 1997)).

¹⁴ *Id.* at 24–26.

¹⁵ The conservation easement at issue in *Salzburg v. Dowd* is a case in point, having been donated to Johnson County, Wyoming, for the express purpose of “preserv[ing] and protect[ing] in perpetuity the natural, agricultural, ecological, wildlife habitat, open space and aesthetic features and values of [Meadowood] Ranch” for the benefit of the public. See Deed of Conservation Easement and Quitclaim Deed between the Lowham Limited Partnership, Grantor, and the Board of County Commissioners of Johnson County, Wyoming, Grantee 1, 2 (Dec. 29, 1993) [hereinafter *Lowham Conservation Easement*].

substantive rules governing the administration of charitable trusts should apply. This conclusion is supported by a variety of authoritative sources, including the Uniform Conservation Easement Act, the Uniform Trust Code, the Restatement (Third) of Property: Servitudes, and federal tax law.¹⁶ There is no authoritative source of support for the contrary view.

Because the Wyoming Attorney General's cogent exposition of the relevant legal principles should be read by anyone interested in these issues, the portion of his Memorandum in Support of his Motion for Summary Judgment discussing the status of conservation easements as restricted charitable gifts or charitable trusts is included as APPENDIX A to this Article.

Amendments

The *Surrebuttal* asserts that the application of charitable trust principles to conservation easements means that

(1) no amendments should be agreed upon between landowner and a holder of an easement without court approval under any circumstances and (2) even with court approval, no amendments should be approved unless compliance with easement terms would “defeat or substantially impair” the purpose of the easement, or unless the charitable purpose of the easement becomes “impossible or impracticable.”¹⁷

Repetition of these alarming claims in the *Surrebuttal* does not make them any more accurate or less misleading than when they were first made in *The End of Perpetuity*.¹⁸ The *Surrebuttal* does not respond to the detailed explanation of the application of charitable trust principles to conservation easement amendments in *In Defense of Conservation Easements*.¹⁹ Accordingly, we are compelled to point out, again, that the law is much more reasonable and flexible than *The End*

¹⁶ See UNIF. CONSERVATION EASEMENT ACT § 3 cmt. (2007), available at http://www.law.upenn.edu/bll/ulc/ucea/2007_final.htm (last visited Nov. 28, 2009) [hereinafter UCEA]; UNIF. TRUST CODE § 414 cmt. (2005), available at <http://www.law.upenn.edu/bll/ulc/uta/2005final.htm> (last visited Nov. 28, 2009) [hereinafter UTC]; RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (2000); I.R.C. § 170(h) (2006); Treas. Reg. § 1.170A-14 (2009). See generally *In Defense of Conservation Easements*, *supra* note 4, for an extended discussion of these sources. For a more abbreviated discussion of these sources, see Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L.Q.* 673 (2007) [hereinafter *Perpetuity and Beyond*]. Wyoming adopted the UTC in 2003. See WYO. STAT. ANN. §§ 4-10-101 to -1103 (2009) [hereinafter WYUTC]. Wyoming adopted the UCEA in 2005. See WYO. STAT. ANN. §§ 34-1-201 to -207 (2009) [hereinafter WYUCEA].

¹⁷ *Surrebuttal*, *supra* note 5, at 407.

¹⁸ See *The End of Perpetuity*, *supra* note 3, at 62, 68–69, 78–79, 81.

¹⁹ See *In Defense of Conservation Easements*, *supra* note 4, at 41–56.

of *Perpetuity* or the *Surrebuttal* would have the reader believe. Rather than set forth a detailed exposition of the law in this article, the reader is encouraged to return to Part II. D. of *In Defense of Conservation Easements*, where the subject of amendments is discussed in detail. For purposes of this article, only the following short summary of how charitable trust principles should apply to conservation easement amendments is warranted.

1. If a land trust has negotiated for the inclusion of a standard amendment provision in a conservation easement (as is recommended by the Land Trust Alliance), the land trust has the express power to simply agree with the owner of the encumbered land to any and all amendments that are consistent with the conservation purpose of the easement.²⁰ Moreover, the land trust's exercise of this discretionary power will not be second-guessed by a court unless there has been a clear abuse.²¹
2. In the absence of an amendment provision, the land trust may have the implied power to agree to amendments that are consistent with the purpose of the easement, or the land trust could seek court approval of such "consistent" amendments in an administrative deviation proceeding, the legal standard for which is more generous than the *Surrebuttal* asserts.²²

²⁰ See *id.* at 42–47. Such "consistent" amendments are the only type of amendments sanctioned by the Land Trust Alliance and the Land Trust Accreditation Commission. For information on the Land Trust Alliance, see <http://www.landtrustalliance.org>. For information on the Land Trust Accreditation Commission, see <http://www.landtrustaccreditation.org>.

²¹ See *In Defense of Conservation Easements*, *supra* note 4 at 42–43.

²² See *id.* at 47–52. The *Surrebuttal* cites to an article published by Professor McLaughlin in the *Harvard Environmental Law Review* in 2005, which states the common law standard for the doctrine of administrative deviation (i.e., a court can authorize a deviation from the term of a trust if compliance with the term would defeat or substantially impair the accomplishment of the charitable purpose of the trust). Despite the seeming strictness of the common law standard, the modern tendency has been to permit a trustee to deviate from an administrative term if continued compliance with the term is deemed merely "undesirable," "inappropriate," or "inexpedient." See, e.g., *In Defense of Conservation Easements*, *supra* note 4, at 50. See also GEORGE GLEASON BOGERT ET AL., *THE LAW OF TRUSTS AND TRUSTEES* § 994 (3d ed. 2009) ("Where administrative provisions handicap the trustee, or the trustee lacks an essential power, the court frequently releases the trustee from the objectionable provision, or grants the needed authority, or otherwise changes the trust as to methods of operation, so as to enable the trustee to achieve the primary purposes of the settlor."). The UTC, which was approved by NCCUSL in 2000 and has since been adopted in 22 states, including Wyoming, relaxes the common law administrative deviation standard, basically codifying the fact that courts tend to liberally apply the doctrine to allow deviations from the terms of a trust where those deviations are consistent with or further the purpose of the trust. See UTC, *supra* note 16, § 412(b) ("The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration."); WYO. STAT. ANN. § 4-10-413(b) (2009) (same).

3. It is only when a land trust is seeking to terminate a conservation easement, or “amend” it in a manner inconsistent with its conservation purpose (such as to permit the subdivision and development of the land, as was proposed in the Myrtle Grove controversy), that court approval in a *cy pres* proceeding would be necessary.²³ In such a proceeding, it would have to be shown that the charitable conservation purpose of the easement had become “impossible or impractical,” and, if such a showing were made, the holder would be entitled to a share of the proceeds from a subsequent sale or development of the land, and the holder would be required to use such proceeds to accomplish similar charitable conservation purposes in some other manner or location.

These requirements under charitable trust law are consistent with the requirements under federal tax law for tax-deductible conservation easements. Federal tax law requires, among other things, that (1) the conservation purpose of a conservation easement must be “protected in perpetuity” (i.e., the easement must not be transferable or amendable in a manner inconsistent with its conservation purpose), and (2) the easement must be extinguishable (other than through condemnation) only in a judicial proceeding, upon a finding that the continued use of the land for conservation purposes has become “impossible or impractical,” and with the payment of a share of the proceeds from the subsequent sale or development of the land to the holder to be used for similar conservation purposes (i.e., in a *cy pres* or similar equitable proceeding).²⁴

Moreover, although no data exists on the prevalence of amendment provisions in conservation easement deeds, their use is likely not “infrequent” as asserted in

²³ See *In Defense of Conservation Easements*, *supra* note 4, at 52–53. The Myrtle Grove controversy involved the attempted “amendment” of a conservation easement encumbering a 160-acre historic tobacco plantation on the Maryland Eastern Shore to permit a seven-lot upscale subdivision on the property, complete with a single-family residence and ancillary structures, such as a pool, pool house, and tennis courts, on each of the lots. The Maryland Attorney General filed suit, objecting to the amendment on charitable trust grounds. The case eventually settled, with the easement remaining intact and the parties agreeing, *inter alia*, that (i) subdivision of the property is prohibited; (ii) any action contrary to the express terms and stated purposes of the easement is prohibited; and (iii) amending, releasing (in whole or in part), or extinguishing the easement without the express written consent of the Maryland Attorney General is prohibited, except that prior written approval of the attorney general is not required for approvals carried out pursuant to the ordinary administration of the easement in accordance with its terms. See *id.* at 37–39.

²⁴ See *In Defense of Conservation Easements*, *supra* note 4, at 78–79 (describing the requirements under federal tax law for tax-deductible conservation easements). Federal tax law also requires, among other things, that (1) the interest in the land retained by the conservation easement donor must be subject to legally enforceable restrictions that will prevent any use of the land inconsistent with the easement’s purpose, and (2) at the time of the donation, the possibility that the easement will be defeated (by, for example, amendment, release, or termination) must be so remote as to be negligible. See *id.*

the *Surrebuttal*, at least not now.²⁵ As explained in *In Defense of Conservation Easements*, (1) the Conservation Easement Handbook has discussed the wisdom of including an amendment provision in conservation easement deeds since its first publication in 1988, (2) the 2005 edition of the Handbook provides that “[m]any easement drafters . . . consider it prudent to set the rules governing amendments, both to provide the power to amend and to impose appropriate limitations on that power to prevent abuses,” and “[a]mendment provisions are becoming more common to assure and limit the Holder’s power to modify,” and (3) in its recently published report on amendments, the Land Trust Alliance strongly recommends that land trusts negotiate with easement grantors for the desired level of amendment discretion and include an amendment provision in easement deeds expressly granting them such discretion.²⁶

Finally, the fact that some, typically older, conservation easements do not contain amendment provisions is not a cause for specially exempting an entire class of charities (land trusts) and an entire class of charitable gifts (conservation easements) from oversight by state attorneys general and state courts.²⁷ Rather, to the extent they are not already doing so, land trusts should implement best practices as recommended by the Land Trust Alliance and negotiate for the amendment discretion they desire up front and in good faith at the time of the acquisition of easements, and memorialize that grant of discretion in the easement deeds. With regard to older conservation easements that do not contain amendment provisions, it may be desirable to seek judicial or legislative clarification of the extent of a holder’s implied power to agree to amendments that are clearly consistent with or further the purpose of such easements.²⁸ And where the scope of a land trust’s implied power to amend is unclear or an amendment would exceed its implied power, the land trust can seek judicial approval of the amendment in a typically non-adversarial and flexible administrative deviation proceeding.

Land trusts can also work with state attorneys general to develop guidelines regarding the proper procedures to be followed when amending conservation easements. Land trusts in New Hampshire are doing just that. The office of the New Hampshire Attorney General, in conjunction with land trusts in New Hampshire, is developing a comprehensive guide to amending conservation

²⁵ See *Surrebuttal*, *supra* note 5, at 408 (asserting, without support, that amendment provisions are “infrequently included”).

²⁶ See *In Defense of Conservation Easements*, *supra* note 4, at 44–45.

²⁷ If the *Surrebuttal*’s position were adopted, the hundreds of government entities holding thousands of conservation easements across the nation would also be exempted from state oversight.

²⁸ See *In Defense of Conservation Easements*, *supra* note 4, at 48 n.178 (discussing the Uniform Management of Institutional Funds Act and the Uniform Prudent Management of Institutional Funds Act). *But see also id.* at 87–94 (discussing the constitutional and other limits on the power of state legislatures to alter the terms of existing or future charitable gifts).

easements within the framework of the charitable trust doctrine.²⁹ The Nature Conservancy, which operates in all fifty states, has similarly been working with state attorneys general to develop policies regarding conservation easement amendments.³⁰ Accordingly, contrary to the assertion in the *Surrebuttal*, state attorney general and court oversight of the activities of land trusts is not advocated by “just academicians.”³¹ Rather, it is recognized by state attorneys general and many in the land trust community as part of the common or statutory law of the states.³²

The Uniform Conservation Easement Act (UCEA)

The *Surrebuttal*'s argument of choice, the foundation upon which it stands, is that conservation easements may be modified or terminated by simple agreement of the parties thereto because the Wyoming Uniform Conservation Easement Act (WYUCEA) states that conservation easements may be modified or terminated “in the same manner as other easements.”³³ This is surely an argument no lawyer would fail to make if defending a client who improperly amended or terminated a conservation easement.³⁴ It might even appear to be reasonable to an audience not experienced in reading the law. But those who have tried to understand and apply statutory law know that it is far too easy to get it wrong if a line is taken from a statute and read separately from the lines around it, insulated from the common law that preceded and exists beside it, and bereft of the interpretive guidance provided by the people who wrote it.

²⁹ E-mail from Terry Knowles, past President of the National Association of State Charity Officials and Assistant Director of the Charitable Trusts Unit of the New Hampshire Attorney General's Office, to Nancy A. McLaughlin (Dec. 21, 2009, 7:07am MST) (on file with authors).

³⁰ The Nature Conservancy also filed a Motion to Intervene in *Salzburg v. Dowd* in support of the Wyoming Attorney General's defense of the conservation easement at issue on charitable trust grounds. See Motion of The Nature Conservancy to Intervene or Alternatively, Motion to Appear as Amicus Curiae at 7, *Salzburg*, Civ. No. CV-2008-0079 (Aug. 7, 2009).

³¹ See *Surrebuttal*, *supra* note 5, at 412.

³² See *In Defense of Conservation Easements*, *supra* note 4, at 36–41 (explaining that the land trust community has contemplated the application of charitable trust principles to conservation easements for decades, and *The End of Perpetuity*'s (and, by extension, the *Surrebuttal*'s) characterization of the application of such principles to conservation easements as a new or unanticipated control or burden is not supportable).

³³ See *Surrebuttal*, *supra* note 5, at 401, 404–05. The actual provision of the WYUCEA reads as follows: “[e]xcept as otherwise provided in [the act], a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected in the same manner as other easements.” WYO. STAT. ANN. § 34-1-202(a) (2009).

³⁴ In fact, the Dowds, who argue that Johnson County's termination of the conservation easement at issue in *Hicks v. Dowd* and *Salzburg v. Dowd* was proper, make this very argument in their pleadings and cite to the *Surrebuttal* for support. See Dowd's Response, *supra* note 9, at 6–7. Indeed, all those who seek to modify or terminate perpetual conservation easements for development purposes and personal gain will no doubt cite to *The End of Perpetuity* and the *Surrebuttal* in support of their position that conservation easements can be modified or terminated “in the same manner as other easements.”

To properly understand the UCEA, the reader should not hearken to the *Surrebuttal*'s invitation to ignore the UCEA drafter's commentary or the state legislatures' intention in enacting the statute to achieve uniformity among the states. The reader also should not accept the *Surrebuttal*'s advice to ignore centuries of common law intended to encourage charitable donations by defending the intentions of charitable donors. And the reader should not disregard the clear implication of the UCEA itself, which expressly provides that "[the act] shall not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity."³⁵

The *Surrebuttal* attempts to dismiss the statutory language just noted, arguing that such language "cannot be assumed to incorporate into Wyoming conservation easements an entire body of law that directly contradicts the WYUCEA's explicit provision that conservation easements can be modified or terminated in the same manner as other easements."³⁶ But the *Surrebuttal*'s reasoning is fundamentally flawed. As the drafters of the UCEA explained in their original comments, the UCEA "leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements *and* the enforcement of charitable trusts" and "independently of the Act, the Attorney General could have standing [to enforce a conservation easement] in his capacity as supervisor of charitable trusts."³⁷ In other words, the UCEA does not, and was never intended to abrogate the well-settled principles that apply when property, such as a conservation easement, is conveyed as a charitable gift to be used for a specific charitable purpose.³⁸

To address any possible lingering confusion on this point, in 2007 the National Conference of Commissioners on Uniform State Laws approved amendments to

³⁵ UCEA, *supra* note 16, § 3(b); WYO. STAT. ANN. § 34-1-203(b).

³⁶ *Surrebuttal*, *supra* note 5, at 404 (emphasis omitted).

³⁷ UCEA, *supra* note 16, § 3 cmt. (emphasis added).

³⁸ In fact, if the drafters of the UCEA had intended to deny to landowners donating conservation easements the protections afforded under state law to charitable donors of all other forms of property, they surely would have done so explicitly. A basic principle of statutory construction is that repeals by implication are strongly disfavored. *See, e.g., Lewis v. Marriot Int'l*, 527 F. Supp. 2d 422, 429 (E.D. Pa. 2007) ("As a matter of statutory construction, 'statutes are not presumed to make changes in the rules and principles of common law or prior existing law beyond what is expressly declared in their provisions. . . . '[A]n implication alone cannot be interpreted as abrogating existing law. The legislature must affirmatively repeal existing law or specifically preempt accepted common law for prior law to be disregarded.'"); *Brown v. Mem'l Nat'l Home Found.*, 329 P.2d 118, 132-33 (Cal. Ct. App. 1958) ("[I]t is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication."); *Boyd v. Commonwealth*, 374 S.E.2d 301, 302 (Va. 1988) ("The common law will not be considered as altered or changed by statute unless the legislative intent is plainly manifested. . . . When an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule."); *In re Claim of Presad*, 11 P.3d 344, 348

the comments to the UCEA to confirm its intention that conservation easements be enforced as charitable trusts in appropriate circumstances, explaining that

while Section 2(a) [of the Act] provides that a conservation easement may be modified or terminated “in the same manner as other easements,” the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a *cy pres* proceeding.³⁹

The decision of the UCEA drafters to “leave intact” the existing case and statutory law as it applies to charitable trusts, and to decline to address such law in the statute itself, was entirely sensible. As the drafters explained in their commentary: (1) the UCEA has the relatively narrow purpose of sweeping away certain impediments under the common law of real property that might otherwise undermine the validity of conservation easements held in gross, and, thus, the UCEA intentionally does not address a number of issues that were considered extraneous to that objective, (2) researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was beyond the scope of the drafting committee’s charge, and (3) the UCEA was intended to be placed in the real property law of adopting states, and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes.⁴⁰

Moreover, the UCEA validates conservation easements created in a variety of contexts and containing a variety of terms. Thus, the UCEA validates

n.1 (Wyo. 2000) (“Knowledge of the settled principles of statutory interpretation must be imputed to the legislature.’ . . . This Court presumes that the legislature enacts statutes ‘with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection and in harmony with the existing law, and as part of a general and uniform system of jurisprudence’” (citations omitted)); *McKinney v. McKinney*, 135 P.2d 940, 942 (Wyo. 1943) (“[I]t is well settled that in construing statutes the rules of the common law are not to be changed by doubtful implication nor overturned except by clear and unambiguous language.”).

³⁹ UCEA, *supra* note 16, § 3 cmt.

⁴⁰ See UCEA, *supra* note 16, § 3 cmt. The *Surrebuttal* argues that this last statement, which is included in the revised comments to the UCEA “itself acknowledges that the charitable trust doctrine does not apply to easements currently.” *Surrebuttal*, *supra* note 5, at 401. That is a misreading of the comments. It could not be more clear from the comments that the drafters of the UCEA intended charitable trust principles, which were expressly left “intact,” to apply to conservation easements in appropriate circumstances. Other issues the UCEA drafters expressly left to be addressed by an adopting state’s “other applicable laws” are: (1) the formalities and effects of recordation, (2) the potential impact of a state’s marketable title laws upon the duration of conservation easements, (3) the effect of a conservation easement on the value of the burdened land for local property tax purposes, and (4) the scope and the power of eminent domain and the entitlement of the holder of the easement and the owner of the encumbered land to compensation upon condemnation. See UCEA, *supra* note 16, Commissioners’ Prefatory Note.

conservation easements that are donated in whole or in part as charitable gifts, purchased with funds received or solicited for such purchase, purchased with general funds, exacted as part of development approval processes, or acquired in mitigation or other regulatory contexts.⁴¹ The UCEA also validates perpetual conservation easements, term easements, and easements that expressly provide that they are terminable in the discretion of the holder or upon the happening of some event other than a judicial proceeding.⁴² Accordingly the laws governing the administration of charities and charitable gifts or trusts will apply with different force to different types of conservation easements, and attempting to address such permutations in the UCEA was considered by the drafters to be neither necessary nor wise.⁴³ But the fact that the UCEA was never intended to abrogate such laws could not be more clear.⁴⁴

Finally, as with the comments to any Uniform Act, the comments to the UCEA and the Uniform Trust Code (also adopted in Wyoming) should be relied upon as a guide in interpreting those acts so as to achieve uniformity among the states that have enacted them.⁴⁵ As explained by the Connecticut Supreme Court:

⁴¹ The UCEA validates conservation easements that are (1) created for certain conservation purposes and (2) conveyed to qualified “holders,” regardless of the context in which they are created. See UCEA, *supra* note 16, § 1(1), (2) cmt.

⁴² The UCEA enables parties to create conservation easements of perpetual or lesser duration, subject to the power of a court to modify or terminate the easements in accordance with the principles of law and equity. See *id.* § 2(c), cmt.

⁴³ E-mail from K. King Burnett, member and past president of NCCUSL and member of the drafting committee for the UCEA, to Nancy A. McLaughlin (Nov. 13, 2009, 7:00pm MST) (on file with authors).

⁴⁴ As the discussion in this section makes clear, the *Surrebuttal*'s argument that application of charitable trust principles to conservation easements would require a “re-write” of existing law is incorrect. See *Surrebuttal*, *supra* note 5, at 402. Rather, existing law would have to be rewritten to specially exempt conservation easements conveyed as charitable gifts from the common and statutory laws that govern the administration of charitable gifts made for specific purposes, which laws the UCEA expressly left “intact.”

⁴⁵ The comments to § 414 of the UTC provide:

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the “trustee” could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section, and subsection (d) so provides. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value.

UTC, *supra* note 16, § 414 cmt. (2005).

Only if the intent of the drafters of a uniform act becomes the intent of the legislature in adopting it can uniformity be achieved. Otherwise, there would be as many variations of a uniform act as there are legislatures that adopt it. Such a situation would completely thwart the purpose of uniform laws.⁴⁶

In sum, contrary to the assertion made in the *Surrebuttal* and *The End of Perpetuity*, conservation easements are not mere creatures of property law, like right-of-way easements between neighbors. As Professor McLaughlin has explained:

Those who argue that donated perpetual conservation easements can be modified or terminated in the same manner as other easements—i.e., by agreement of the holder of the easement and the owner of the encumbered land . . . —are viewing such easements solely through a real property law prism, and ignoring the fact that such easements are also charitable gifts made for a specific charitable purpose. Whenever any interest in real property, whether it be fee title to land or a conservation easement, is donated to a municipality or charity for a specific charitable purpose, both state real property law and state charitable trust law should apply. State real property law prescribes the procedural mechanisms by which real property interests can be transferred and, in the case of easements, modified or terminated. State charitable trust law governs a donee's use and disposition of property conveyed to it for a specific charitable purpose. In other words, although state real property law may provide that a conservation easement can be modified or terminated by agreement of the holder of the easement and the owner of the encumbered land . . . , the holder of a perpetual conservation easement, in its capacity as trustee, may not agree to modify or terminate the easement in contravention of its stated purpose without first obtaining court approval in a *cy pres* proceeding.⁴⁷

⁴⁶ *Yale Univ. v. Blumenthal*, 621 A.2d 1304, 1307 (Conn. 1993) (citations omitted); *see also* WYO. STAT. ANN. § 4-10-1101 (2009) (“In applying and construing [the WYUTC], consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.”); WYO. STAT. ANN. § 34-1-206 (2009) (“[The WYUCEA] shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the Act among states enacting it.”); WYO. STAT. ANN. § 8-1-103(a)(vii) (2009) (“Any uniform act shall be interpreted and construed to effectuate its general purpose to make uniform the law of those states which enact it.”).

⁴⁷ *Perpetuity and Beyond*, *supra* note 16, at 683.

Bjork v. Draper

An Appellate Court of Illinois has already rejected the *Surrebuttal's* argument that a perpetual conservation easement can be modified or terminated in accordance with only the provisions of the applicable state conservation easement enabling statute.⁴⁸ In *Bjork v. Draper*, the court invalidated amendments to a perpetual conservation easement that a land trust had approved at the request of new owners of the encumbered land. The land trust argued that the Illinois conservation easement enabling statute, which provides that a holder may release a conservation easement, gave the land trust the lesser right to agree to amendments, despite (1) the status of the easement as a tax-deductible perpetual charitable gift, (2) the easement's charitable purpose, which is to retain "forever" the scenic and open space condition of the grounds of a historic home, (3) provisions in the easement expressly prohibiting some of the activities authorized by the amendments, and (4) the provision in the easement requiring that the easement be extinguished, in whole or in part, only by judicial proceedings.⁴⁹ The court first determined that, because the easement expressly contemplated amendments, the easement could be amended.⁵⁰ The court then held, however, that while protecting the conservation purpose of an easement in perpetuity does not necessarily mean that the language of the easement can never be changed (the court explained that an easement could be amended to add land, which would most likely enhance the easement's purpose), "no amendment is permissible if it conflicts with other parts of the easement."⁵¹

⁴⁸ *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2008), *appeal denied*, 897 N.E.2d 249 (Ill. 2008). Conservation easement enabling statutes are the state real property statutes, many of which are based on the UCEA, that sweep away the impediments under the common law of real property that might otherwise undermine the validity of conservation easements held in gross. For a somewhat dated survey of such statutes, see Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 26 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

⁴⁹ The Illinois easement enabling statute provides that conservation easements "may be released by the holder of such rights to the holder of the fee even though the holder of the fee may not be an agency of the State, a unit of local government or a not-for-profit corporation or trust." 765 ILL. COMP. STAT. 120/1(b) (2009).

⁵⁰ *Bjork*, 886 N.E.2d at 572.

⁵¹ *Id.* at 574. The easement at issue in *Bjork* does not contain a standard amendment provision. It states only that: "No alteration or variation of this instrument shall be valid or binding unless contained in a written amendment first executed by Grantors and Grantee, or their successors, and recorded in the official records of Lake County, Illinois." *Id.* at 572. That provision does not expressly authorize the holder to agree to amendments or state the circumstances under which the holder can agree to amendments. Rather, it states only that, to be valid and binding, an amendment has to be written and recorded. In contrast, a standard amendment provision generally provides as follows:

Amendment. If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantors and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed

The court in *Bjork* was not presented with and, thus, did not address the argument that the conservation easement constitutes a restricted charitable gift or charitable trust. If the court had been presented with that argument, it could possibly have ratified some of the amendments as permissible deviations from the administrative terms of the easement, assuming any of the amendments were consistent with the easement's charitable conservation purpose.⁵² The court properly held, however, that a perpetual conservation easement may not be substantially amended or released by its holder at will, regardless of the seemingly permissive language in the state easement enabling statute.

The land trust that agreed to the amendments in *Bjork* was aware of the argument that conservation easements conveyed as charitable gifts constitute restricted charitable gifts or charitable trusts.⁵³ However, rather than requesting

that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including [state statute] or Section 170(h) of the Internal Revenue Code, and any amendment shall be consistent with the purpose of this Easement and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of _____ County, [state].

THOMAS S. BARRETT & STEFAN NAGEL, MODEL CONSERVATION EASEMENT AND HISTORIC PRESERVATION EASEMENT, 1996: REVISED EASEMENTS AND COMMENTARY FROM "THE CONSERVATION EASEMENT HANDBOOK" 22 (1996). Had the conservation easement at issue in *Bjork* contained a standard amendment provision, the court presumably would have determined that the land trust had the express power to agree to amendments that are consistent with the purpose of the easement and otherwise comply with the terms of the amendment provision.

⁵² Whether any of the amendments were consistent with the purpose of the easement is questionable. One of the amendments approved landscaping changes that obscured the public's view of the property and, thus, was inconsistent with the purpose of the easement. *Bjork*, 886 N.E.2d at 571. Another of the amendments removed 809 square feet from the easement to allow the new landowners to construct a driveway turnaround in exchange for the addition to the easement of 809 square feet from an adjacent lot. *Id.* at 568, 574. The removal of land from the easement constituted a partial extinguishment rather than an amendment, and would have permitted a garage, carport, or other structure to be constructed on the protected grounds in contravention of the purpose of the easement. The amendment could have been drafted to permit the driveway turnaround in exchange for the protection of an additional 809 square feet of land without releasing the original 809 square feet from the easement. Had this been done, the amendment would not have resulted in the extinguishment of a portion of the easement or permitted construction of a structure on the originally protected grounds in contravention of the purpose of the easement. In such a case, the court may have been willing to ratify the amendment after the fact as a permissible administrative deviation. See BOGERT ET AL., *supra* note 22, § 561 ("Occasionally a trustee acts beyond his powers without court approval and later the validity of his act is presented for court determination on an accounting or otherwise. It seems probable that the court will approve or ratify the conduct of the trustee in exceeding his powers, after the ultra vires act has been done, in those cases where it would have approved the proposed change if the matter had been submitted to it in advance.").

⁵³ In its petition for rehearing filed with the Appellate Court of Illinois, the land trust noted:

Professor Nancy McLaughlin wrote an exhaustive article dealing with amendments to conservation easements. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421 (2005). Professor McLaughlin points out that as the number of acres subject to conservation easement [sic]

that the court ratify the amendments as permissible administrative deviations, the land trust argued (like the author of the *Surrebuttal*) that land trusts have the right to simply agree with subsequent owners of the burdened land to amend or release conservation easements, in whole or in part, regardless of the manner in which the easements were acquired or their express terms. That strategy backfired, and the land trust obtained a holding that constrains the ability to amend conservation easements in Illinois far more than would charitable trust principles.⁵⁴

Donor Assumptions

The *Surrebuttal* asserts that conservation easement donors “reasonably assume that the easements they convey may be modified or terminated in the same manner as other easements, i.e., if both parties to the easement agree.”⁵⁵ Such an assumption would be astonishing given the express terms of conservation easement deeds, as well as the representations made by land trusts to conservation easement donors and the public regarding the perpetual nature of conservation easements.

Most conservation easement deeds (like the easement deed at issue in *Salzburg v. Dowd*) contain detailed terms regarding the prohibited and permitted uses of the property, and further expressly provide that: (1) the purpose of the easement is to protect certain conservation attributes of the particular land encumbered by the easement in perpetuity, (2) the easement is transferable only to another government entity or charitable organization that agrees to continue to enforce the easement, and (3) the easement is extinguishable (other than through condemnation) only in a judicial proceeding. In addition, consistent with best practices as recommended

continues to increase, the need to make modifications and adjustment to account for changed conditions and societal needs may also increase. She does not suggest that the easement holder and property owner should have an unlimited right to amend, but urges that all amendments be in the framework of the charitable trust rules . . . because “such rules were developed and refined over the centuries to deal precisely with the issue presented by conservation easements . . .” McLaughlin, p. 429. *While the charitable trust doctrine has not been raised in this case, it may serve to provide guidelines for conservation easement amendments in the future.*

See Defendant/Appellee’s Rule 367 Petition for Rehearing and Rule 316 Application for a Certificate of Importance at 9–10, *Bjork v. Draper*, 886 N.E.2d 563 (Ill. App. Ct. 2008) (No. 2-06-1145) (emphasis added). The land trust’s petition for rehearing was denied, as was its petition for leave to appeal filed with the Supreme Court of Illinois.

⁵⁴ In support of its claim that conservation easements are modifiable and terminable by simple agreement of the parties thereto, the *Surrebuttal* asserts that “it is a fundamental principal [sic] of all agreements that they are amendable if the parties thereto agree to amend them, even if the agreements in question expressly prohibit amendment (because even a prohibition against amendment can be amended away by the parties to the agreement).” *Surrebuttal*, *supra* note 5, at 408. It is clear, however, that the Illinois Appellate Court would not agree with this claim as applied to conservation easements, nor would the American Law Institute, NCCUSL, Congress, or the Internal Revenue Service.

⁵⁵ *Surrebuttal*, *supra* note 5, at 404 (emphasis omitted).

by the Land Trust Alliance, many land trusts and government entities negotiate for the discretion to agree to amend conservation easements in certain limited circumstances and memorialize that grant of discretion in easement deeds in the form of an amendment provision.⁵⁶ It would be remarkable if a landowner signing a conservation easement deed containing such provisions assumed the holder was not bound by them and, instead, could simply agree with a subsequent owner of the land to modify, transfer, or terminate the easement “in the same manner as other easements.”

Land trusts also routinely represent to landowners and the public that a conservation easement permanently protects the particular parcel of land it encumbers, and the specific restrictions on development and use of the land in the easement deed will run with land and bind all future owners. The Jackson Hole Land Trust—with which the author of the *Surrebuttal* is affiliated—is a case in point.⁵⁷ Under *Easement Basics* on its website, the Jackson Hole Land Trust explains:

A conservation easement is a voluntary contract between a landowner and a land trust, government agency or another qualified organization in which the owner places *permanent restrictions* on the future uses of some or all of their property to protect scenic, wildlife, or agricultural resources (conservation values).

. . . The easement is donated by the landowner to *the land trust*, which then *has the authority and obligation to enforce the terms of the easement in perpetuity*. The landowner still owns the property and can use it, sell it, or leave it to heirs, *but the restrictions of the easement stay with the land forever*.⁵⁸

Similar representations can be found in the promotional materials of the Land Trust Alliance and virtually every land trust.⁵⁹ In light of these representations, it would again be remarkable if the donor of a conservation easement assumed that the holder could simply agree with a subsequent owner of the land to modify,

⁵⁶ See *supra* note 26 and accompanying text. For a sample standard amendment provision, see *supra* note 51. While the standard amendment provision grants the holder the right to agree with the owner of the land to amendments that are consistent with the purpose of the conservation easement, some donors do not wish to grant holders such broad amendment discretion and will customize the amendment provision to, for example, preclude the holder from agreeing to amendments that would increase the level of residential development permitted on the property. See *In Defense of Conservation Easements*, *supra* note 4, at 45–46.

⁵⁷ The Jackson Hole Land Trust has employed the author of the *Surrebuttal* as its Director of Protection and Staff Attorney since 2000. See Jackson Hole Land Trust, Our Board & Staff, <http://jhlandtrust.org/about/ctimothyindstrom.htm> (last visited Nov. 29, 2009).

⁵⁸ Jackson Hole Land Trust, *Easement Basics*, <http://jhlandtrust.org/protection/easement.htm> (last visited Nov. 20, 2009) (emphasis added).

⁵⁹ See *In Defense of Conservation Easements*, *supra* note 4, at 9–15.

transfer, or terminate the easement “in the same manner as other easements.” When the donor of a conservation easement is told by a land trust that the carefully negotiated restrictions in the easement deed will “stay with the land forever” and that the land trust “has the obligation to enforce the terms of the easement in perpetuity,” the donor is far more likely to assume that the holder means what it says, and that the holder will be legally bound to enforce the terms of the easement as written.

There also is an assumption implicit in the *Surrebuttal* that must be spotlighted: that conservation easement grantors neither care nor should be heard to express concern over time about the precise terms of their conservation easement deeds or the long-term protection of the particular property encumbered by their easements. That assumption is unfounded. Surveys of easement donors indicate that many landowners feel more like the author of the *Surrebuttal* says he feels about his family farms: they are willing to donate conservation easements in large part because of a personal attachment to the particular land encumbered by the easement and a desire to see *that* land permanently preserved.⁶⁰ Indeed, the land trust movement was built on promises made to individual landowners about the perpetual protection of *their* land according to the terms *they specify* in their conservation easement deeds.⁶¹

This does not mean that conservation easements are immutable, unchangeable documents. Rather, it means that land trusts should negotiate for the discretion to amend conservation easements in manners consistent with their stated purposes up front and in good faith with easement donors at the time of acquisition, and memorialize that grant of discretion in the easement deeds in the form of an amendment provision. Land trusts should not acquire expressly perpetual conservation easements with carefully negotiated terms, promise that the restrictions in the easements will “stay with the land forever,” and then take the position that they are free to simply agree with subsequent owners of the land to substantially modify or terminate the easements. In addition to violating its fiduciary duties to the donor and the public, a land trust that takes such a position may find itself guilty of fraudulent solicitation.⁶²

⁶⁰ *Surrebuttal*, *supra* note 5, at 412 (“As an easement donor myself, the last thing I want to see is reversal of the conservation of two family farms to which I made an economic and emotional commitment, particularly as the ownership of these farms is no longer mine.”); *see also In Defense of Conservation Easements*, *supra* note 4, at 15 (discussing surveys of easement donors).

⁶¹ *See In Defense of Conservation Easements*, *supra* note 4, at 9–15 (detailing the representations land trusts make to conservation easement donors regarding perpetual protection of the donors’ land, and explaining that donors do care about the specific restrictions in their conservation easement deeds).

⁶² *Id.* at 15–16 (discussing fraudulent solicitation).

Chilling Conservation Easement Donations

The *Surrebuttal* asserts that “[t]he effect of imposing the kind of uncertainty and potential bureaucratic burden on the daily administration of conservation easements that could arise from a broad application of the charitable trust doctrine is sure to discourage many landowners from the use of conservation easements.”⁶³ That logic is backwards.

The standard amendment provision in a conservation easement deed grants the holder the right to simply agree with the owner of the land to amendments that are consistent with the easement’s stated charitable conservation purpose.⁶⁴ Moreover, it is black letter law that when a trustee is granted such a discretionary power, the trustee’s exercise of that power is subject to oversight by the state attorney general and the courts only to prevent abuse.⁶⁵ In other words, neither the courts nor the attorney general would be permitted to second-guess a land trust’s exercise of such a discretionary power unless there had been a clear abuse.⁶⁶

Accordingly, a landowner who donates a conservation easement containing a standard amendment provision can expect attorney general or court involvement in the administration of the easement only if the holder attempts to terminate the easement, or amend it in a manner clearly inconsistent with its stated conservation purpose—as is contemplated by federal tax law in any event.⁶⁷ Charitable trust principles thus impose no additional “bureaucratic burden” on properly advised donors and holders, and, therefore, cannot be expected to discourage future donations. Indeed, if such principles are properly explained, prospective easement donors should welcome their application because they will operate to safeguard the purposes of their gifts, as in the Myrtle Grove controversy and, hopefully, *Salzburg v. Dowd*.

On the other hand, what “is sure to discourage many landowners from the use of conservation easements” is the prospect that land trust and government

⁶³ *Surrebuttal*, *supra* note 5, at 412.

⁶⁴ See *In Defense of Conservation Easements*, *supra* note 4, at 42–43.

⁶⁵ *Id.*

⁶⁶ See *id.* at 43 (quoting RESTATEMENT (THIRD) OF TRUSTS § 87 cmt. b (2003) (“A court will not interfere with a trustee’s exercise of a discretionary power . . . when that conduct is reasonable, not based on an improper interpretation of the terms of the trust, and not otherwise inconsistent with the trustee’s fiduciary duties . . . Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion.”). On the other hand, in cases where there has been a clear abuse, as in the Myrtle Grove controversy or *Salzburg v. Dowd*, the attorney general is a proper party to bring an action to enforce the conservation easement on behalf of the donor and the public. See *supra* notes 2, 23, and accompanying text (discussing *Salzburg v. Dowd* and the Myrtle Grove controversy, respectively).

⁶⁷ See *In Defense of Conservation Easements*, *supra* note 4, at 75–79 (describing the requirements under federal tax law for tax-deductible conservation easements).

holders will take the position that, regardless of the express terms of easement deeds, holders are free to modify or terminate easements as they may see fit to, for example, accommodate the wishes of new owners of the land or raise cash to fund other ostensibly “better” projects or programs. In other words, what will surely chill future conservation easement donations is the prospect that land trusts and government holders will take the position espoused in *The End of Perpetuity* and the *Surrebuttal*: that perpetual conservation easements, regardless of their terms, are, at base, fungible or liquid assets, like “other easements.”

The “Partnership” Red Herring

The *Surrebuttal* argues that the “partnership” created upon the donation of a conservation easement between the owner of the land and the holder of the easement distinguishes the gift of a conservation easement from other forms of charitable gifts.⁶⁸ The creation of this partnership, so the argument goes, supports exempting gifts of conservation easements from the laws that apply to all other charitable gifts made for specific purposes. There is, however, no basis in the law or policy for creating such an exemption.

As discussed above, the UCEA and other conservation easement enabling statutes were not intended to abrogate the well-settled principles that apply when property, such as a conservation easement, is conveyed as a charitable gift to be used for a specific charitable purpose. Rather, the laws governing charities and the charitable gifts they solicit and accept were left “intact.”

In addition, donors do not expect that their gifts of conservation easements will receive less protection under state law than all other forms of charitable gifts; indeed, it is likely they expect such gifts will receive *more* protection given the importance and visibility of land and land conservation.⁶⁹ Donors also do not expect that the carefully wrought restrictions in their easement deeds may be terminated or amended away by the holder at the request of future owners of the land.⁷⁰ And purchasers of conservation easement-encumbered land (such as the Dowds) cannot be heard to complain because they have at least constructive notice of the easement’s perpetual restrictions and they generally pay a much-reduced price for the land as a result of those restrictions.

Moreover, as discussed in *In Defense of Conservation Easements*, any charitable organization could make the same complaints about the application of charitable

⁶⁸ See *Surrebuttal*, *supra* note 5, at 406.

⁶⁹ See, e.g., Affidavit of Paul Lowham at 4–5, *Hicks v. Dowd*, 157 P.3d 914 (Wyo 2007) (Civ. No. CV-2003-00057) (“It was the intention of the Lowham Family, that the conservation easement be held and operated by the Scenic Preserve Trust and they hired legal counsel to see that this was done. The conservation easement was a gift of immeasurable value to the people of Johnson County and the State of Wyoming from the Lowham Limited Partnership.”).

⁷⁰ See *supra* notes 56–61 and accompanying text (discussing donor assumptions).

trust principles as are made on behalf of land trusts in *The End of Perpetuity* and the *Surrebuttal*—that complying with such principles can, at times, be inconvenient, costly, and time consuming.⁷¹ Indeed, other charities have faced similar challenges, but none have made the novel argument that they be specially exempted from the state laws governing charities and the charitable gifts they solicit and accept.⁷²

Most importantly, though, the “procrustean bed” in which the *Surrebuttal* argues that land trusts are forced to lie is self-made and can easily be avoided.⁷³ To repeat: a land trust that negotiates for the inclusion of a standard amendment provision in the conservation easement deeds it acquires has the right to simply agree with the owner of the land to amend the easement in any manner consistent with its stated charitable conservation purpose without attorney general or court approval. In such cases, court and attorney general involvement will be necessary only if the land trust seeks to terminate the easement, or “amend” it in a manner clearly contrary to its purpose—as is contemplated by federal tax law in any event. Accordingly, charitable trust principles impose no additional burdens on properly advised land trusts. Rather, they simply require that land trusts, like all other charities, administer the charitable gifts they solicit and accept in accordance with the donors’ stated charitable purposes.⁷⁴

It is, of course, true that some landowners are not willing to grant an easement holder broad discretion to amend a conservation easement in any manner consistent with its stated purpose.⁷⁵ Some landowners wish to customize the amendment provision to, for example, preclude the holder from agreeing to amendments that

⁷¹ See *In Defense of Conservation Easements*, *supra* note 4, at 29, 81.

⁷² For example, the Robertsons’ gift of funds to Princeton University that ended in a celebrated dispute involved an ongoing partnership between Princeton and the donors’ heirs regarding the management and use of the gifted funds. See generally Iris J. Goodwin, *Ask Not What Your Charity Can Do For You: Robertson v. Princeton Provides Liberal-Democratic Insights Into The Dilemma of Cy Pres Reform*, 51 ARIZ. L. REV. 75 (2009) (discussing the gift and the dispute). Although Princeton and the donors’ heirs disagreed regarding the interpretation of the donors’ charitable purpose in making the gift, both understood that state law governing the use of restricted charitable gifts applied to the dispute. *Id.* at 99 (“No party to *Robertson v. Princeton* denied that the Robertsons’ 1961 gift to the Robertson Foundation for the benefit of the Woodrow Wilson School is governed by the restrictive language found in [the] Robertson Foundation Certificate of Incorporation, and that the effect of this language was to restrict the purposes for which the funds contributed by Charles and Marie Robertson might be applied.”). See also *In Defense of Conservation Easements*, *supra* note 4, at 49 n.178 (discussing the approach of museums and of charities holding institutional funds to the challenges posed by restricted charitable gifts; neither group has argued that they should be specially exempted from the state laws governing charities and the charitable gifts they solicit and accept).

⁷³ See *Surrebuttal*, *supra* note 5, at 410.

⁷⁴ See also *supra* notes 17–32 and accompanying text (explaining the manner in which charitable trust principles should apply to easement amendments in the absence of an amendment provision, and that the *Surrebuttal*’s claims with respect thereto are incorrect).

⁷⁵ See *supra* note 56 and accompanying text.

would increase the level of residential development permitted on the property. In that event, the land trust can simply refuse to accept the easement, or it can accept the easement knowing that its ability to amend absent attorney general and court involvement will be more circumscribed. In such cases—where a donor refuses to grant the holder broad amendment discretion—it would be even more absurd to argue that the holder nonetheless has that discretion.

In sum, while conservation easements do inevitably involve an ongoing partnership between the owner of the burdened land and the holder of the easement, that partnership is not a reason to ignore donor intent or exempt the government entities and land trusts holding such easements from oversight at the state level. Rather, it is a reason for government entities and land trusts acquiring conservation easements to consider *ex ante* the flexibility they may need to amend the easements consistent with their stated purposes, and negotiate for that discretion up front and in good faith when acquiring easements.

State Constitutions Do Not Provide Sufficient Safeguards

The *Surrebuttal* recommends that the termination of the conservation easement involved in *Salzburg v. Dowd* be voided, not because Johnson County violated its fiduciary duties to the donor and the public by agreeing to terminate the easement outside of a *cy pres* proceeding, but because the County's transfer of the easement to the Dowds was in violation of the Wyoming Constitution's prohibition on the transfer of public assets to private individuals without adequate consideration.⁷⁶ The *Surrebuttal* then implies that improper terminations of conservation easements by government entities can be similarly remedied in most states, thus obviating the need for the application of charitable trust principles to such easements.⁷⁷

It is true that most state constitutions prohibit government entities from transferring their assets to private persons without adequate consideration.⁷⁸ Like the private benefit and private inurement prohibitions applicable to land trusts, however, these state constitutional prohibitions do not ensure that government entities will administer the conservation easements they hold in accordance with the easements' stated terms and purposes.⁷⁹ If all government holders were required to do is avoid running afoul of the state constitutional prohibitions, and if conservation easements were modifiable and terminable "in the same manner

⁷⁶ See *Surrebuttal*, *supra* note 5, at 411.

⁷⁷ See *id.*

⁷⁸ See *In Defense of Conservation Easements*, *supra* note 4, at 76 n.294.

⁷⁹ See *infra* notes 95, 96 and accompanying text. For a detailed discussion of the private benefit and private inurement provisions and how they cannot be relied upon to ensure that land trusts administer conservation easements in accordance with the easements' stated terms and purposes, see *In Defense of Conservation Easements*, *supra* note 4, at 74–82.

as other easements” as the *Surrebuttal* argues, then government entities would be free to sell, trade, release, extinguish, or otherwise dispose of the perpetual conservation easements they hold, provided only that they receive appropriate compensation and use that compensation consistent with their broad public missions. In other words, government entities would be free to sell conservation easements to the highest bidder and use the proceeds to, for example, build roads or fund public schools. As with land trusts, the continued administration of conservation easements in accordance with their stated terms and purposes depends on a government holder’s fiduciary obligations to the easement donor and the public under state charitable trust law or similar equitable principles.

The “Private” Misnomer

The *Surrebuttal* asserts that land trusts are “private” and conservation easements are “privately held” and “privately administered.”⁸⁰ This is an odd claim, given that most land trusts qualified to hold conservation easements are publicly-supported charitable organizations, they receive substantial tax and other benefits because of the public purposes they serve, and, like all other charitable organizations, they are subject to oversight on behalf of the public by both state and federal regulators.⁸¹

Moreover, conservation easements themselves and their administration over the long term are also not “private.” A private servitude is a private contract between private parties created for private benefit, such as a traditional right-of-way easement agreed to between neighbors. In contrast, conservation easements are validated under state law only if they are (1) created for certain conservation or historic preservation purposes intended to benefit the public and (2) conveyed to a government entity or charitable organization to be held and enforced for the benefit of the public.⁸² The public heavily subsidizes the acquisition of conservation easements through appropriations to easement-purchase programs and the provision of tax benefits to landowners who donate conservation easements as charitable gifts.⁸³ And the importance of conservation easements to the public will only continue to increase as population growth exerts ever-greater pressures

⁸⁰ See *Surrebuttal*, *supra* note 5, at 401, 409.

⁸¹ See generally MARION FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS (2004) (describing state and federal regulation of charities in the United States).

⁸² See, e.g., UCEA, *supra* note 16, § 1(1), (2). See also *supra* note 48 (referencing a survey of state conservation easement enabling statutes).

⁸³ See ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 9 (2d ed. 2005) (describing easement purchase programs); Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement Donations—A Responsible Approach*, 31 ECOLOGY L.Q. 1 (2004) (describing the federal tax incentives); DEBRA PENTZ, THE CONSERVATION RESOURCE CENTER, STATE CONSERVATION TAX CREDITS: IMPACT AND ANALYSIS (2007) (describing the state tax incentives), available at http://conserveland.org/lpr/library?parent_id=18216 (last visited Nov. 29, 2009).

on undeveloped land, ecosystems, and wildlife.⁸⁴ Accordingly, the public, which heavily invests in and is the beneficiary of the conservation and historic benefits provided by conservation easements, has a significant stake in ensuring the proper enforcement of such easements over time.

This was recognized by the drafters of the Restatement (Third) of Property: Servitudes. Rather than providing that conservation easements are modifiable and terminable “in the same manner as other easements,” as the *Surrebuttal* advocates, the Restatement provides just the opposite. Pursuant to the Restatement, the modification and termination of conservation easements held by government entities and charitable organizations are governed by a special set of rules based on charitable trust principles, and those rules apply regardless of how the easements were acquired. The drafters explained that “Because of the public interests involved, these servitudes are afforded more stringent protection than privately held conservation servitudes.”⁸⁵

State Attorneys General

The *Surrebuttal* repeats the assertion made in *The End of Perpetuity* that state attorneys general may use the charitable trust doctrine as a “a sword” to “pierce” conservation easements.⁸⁶ This time, the author cites to a conversation with a former Wyoming Attorney General and a Wyoming state legislator in support of the assertion.⁸⁷ The assertion is, however, no more compelling or correct the second time around.

As explained in detail in *In Defense of Conservation Easements*, state attorneys general are charged with protecting the public interest in charitable assets.⁸⁸ They also take seriously their obligation to ensure the intent of charitable donors is honored because they recognize that disregarding donor intent would chill future charitable donations.⁸⁹ Moreover, even if a rogue attorney general were to file suit in an attempt to terminate a conservation easement in favor of development interests, the authority to apply the doctrine of *cy pres* is vested in the courts, not the attorney general.⁹⁰ And for the reasons noted in *In Defense of Conservation Easements*, it would be a profound departure from settled precedent for a court to authorize the termination of a conservation easement if the easement continued to provide significant benefits to the public.⁹¹

⁸⁴ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 cmt. a (2000).

⁸⁵ *Id.*

⁸⁶ See *Surrebuttal*, *supra* note 5, at 409–10.

⁸⁷ See *id.*

⁸⁸ See *In Defense of Conservation Easements*, *supra* note 4, at 73.

⁸⁹ See *id.*

⁹⁰ See *id.* at 74.

⁹¹ See *id.* at 70–74.

The *Surrebuttal*'s assertion that state attorneys general will attempt to use their position as supervisor of charitable gifts and trusts to terminate conservation easements in favor of development interests is even more remarkable in light of the evidence in the author's own state. The Wyoming Attorney General has spent considerable time and resources defending the intent of the donor and the interests of the public with regard to the conservation easement at issue in *Salzburg v. Dowd*, despite competing priorities and limited resources.⁹² The Maryland Attorney General did the same in the context of the Myrtle Grove controversy.⁹³ *Salzburg v. Dowd* and the Myrtle Grove controversy provide concrete evidence that, contrary to the unsupported assertions made in the *Surrebuttal* and *The End of Perpetuity*, state attorneys general take seriously their obligation to protect the interests of donors and the public in charitable gifts, and they can be powerful allies to the land conservation community in cases involving the wrongful "amendment" or termination of conservation easements.⁹⁴

Emasculating the States

The *Surrebuttal* recommends that Wyoming (and all other states) be deprived of their longstanding right to supervise the activities of the municipalities and charities that operate within their borders, and to call those entities to account for breaches of their fiduciary duties in one context: conservation easements. In a world structured according to the *Surrebuttal*, a state would have no power to require that conservation easement holders honor the terms of the easements protecting land within the state's borders. Rather, the only recourse available to a state and the citizens therein in the event a municipality or land trust improperly amended or terminated a conservation easement (as in *Salzburg v. Dowd* or the Myrtle Grove controversy) would be to look to the Internal Revenue Service (IRS), the enforcement powers of which are indirect, at best.⁹⁵ Even assuming the IRS had the resources and interest to involve itself in the enforcement of the thousands of conservation easements encumbering millions of acres across the fifty states, the IRS does not have the power to declare an improper conservation easement amendment or termination null and void, or remove and replace the

⁹² See, e.g., AG's Motion for SJ, *supra* note 10.

⁹³ See generally Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006) (detailing the Maryland Attorney General's defense of the conservation easement at issue in the Myrtle Grove controversy).

⁹⁴ See also FREMONT-SMITH, *supra* note 81, at 447–48 (explaining that, while state attorneys general regulate charities, they also function as supporters of and advocates for charities).

⁹⁵ The IRS could, for example, impose financial sanctions on an insider who receives an economic benefit from a land trust as a result of an easement amendment or termination, or revoke the tax-exempt status of a land trust that confers private benefit on a landowner in such circumstances. See *In Defense of Conservation Easements*, *supra* note 4, at 74–82. However, neither sanction would restore a conservation easement that had been improperly amended or terminated, or prevent amendments or terminations agreed to in exchange for an appropriate amount of cash or other compensation. Moreover, government entities are not subject to even these indirect sanctions.

holder of an easement, or enjoin the holder from future wrongdoing; those key remedies are the province of state courts.⁹⁶

The *Surrebuttal* attempts to reassure the reader that depriving the states of the ability to call easement holders to account for breaches of their fiduciary duties should be of no concern because conservation easements are “privately administered” and, with intensified training from the Land Trust Alliance and the Alliance’s recent accreditation program, land trusts can be relied upon to always do the right thing.⁹⁷ But that is cold comfort given the long history of abuses in the charitable context and the inevitable financial, political, and other pressures that will be brought to bear on holders to substantially modify, release, or terminate conservation easements.⁹⁸ As explained in *In Defense of Conservation Easements*, negligence, malfeasance, and the use of assets for purposes other than those specified by the donor are not unknown in the charitable context, and there is no reason to believe that land trusts holding conservation easements will be the first class of entities in history to be immune to such abuses.⁹⁹ Moreover, many other segments of the charitable sector, such as universities, museums, and religious organizations, have much more mature self-regulatory accreditation programs, and they are not thereby exempted from the state laws governing charities and the charitable gifts they solicit and accept.¹⁰⁰ The *Surrebuttal* also fails to explain how its plan to emasculate the states would affect the thousands of conservation

⁹⁶ See *In Defense of Conservation Easements*, *supra* note 4, at 81 (“[I]t is state courts, rather than the Tax Court or the IRS, that possess the broad range of equitable powers necessary to protect assets dedicated to charitable purposes.”).

⁹⁷ See *Surrebuttal*, *supra* note 5, at 412.

⁹⁸ These pressures may be brought to bear on the executive director and board members of a land trust 25, 50, or 75 years hence—when the current executive director and current board members and all their best intentions and loyalties to existing donors are long gone. Moreover, such pressures are likely to be particularly intense in the conservation easement context because development pressures can be expected to rise as undeveloped land becomes increasingly scarce, and there is enormous economic value inherent in the development and use rights restricted by conservation easements. See *In Defense of Conservation Easements*, *supra* note 4, at 61–62.

⁹⁹ See *id.* at 61.

¹⁰⁰ See, e.g., PANEL ON THE NONPROFIT SECTOR, PRINCIPLES FOR GOOD GOVERNANCE AND ETHICAL PRACTICE: A GUIDE FOR CHARITIES AND FOUNDATIONS 78–81 (reference ed. Oct. 2007) available at <http://www.nonprofitpanel.org/Report/index.html> (last visited Nov. 29, 2009) (listing numerous self-regulatory accreditation programs for nonprofit organizations). This report also discusses the legal obligations of nonprofit organizations, explaining, for example:

If a donor provides a clear, written directive about how funds are to be used at the time a charitable gift is made, the board of the recipient organization has a fiduciary obligation to comply with the donor’s directive and state attorneys general may enforce compliance. . . . An organization’s communications while it is soliciting contributions may also create a legally binding restriction that can be enforced under state and federal fraudulent solicitation prohibitions.

Id. at 43.

easements held by the hundreds of government entities across the nation, which entities are subject to even less oversight by the IRS than are land trusts.¹⁰¹

Salzburg v. Dowd, *Bjork v. Draper*, and the Myrtle Grove controversy, as well as a controversy involving a Wal-Mart,¹⁰² starkly illustrate why there must be a means by which holders of conservation easements can be held accountable for breaches of their fiduciary duties to both easement donors and the public.¹⁰³ Emasculating the states when it comes to calling easement holders to account for such breaches would not only be contrary to existing law, it would be bad policy. This was recognized by the National Conference of Commissioners on Uniform State Laws in its adoption of the UCEA and the Uniform Trust Code, as well as by the American Law Institute in its promulgation of the Restatement (Third) of Property: Servitudes.¹⁰⁴ This was also recognized by Congress and the Treasury Department in enacting and issuing, respectively, § 170(h) of the Internal Revenue Code and the accompanying Treasury Regulations, which effectively require that the donation of a tax-deductible conservation easement be in the form of a restricted charitable gift or charitable trust.¹⁰⁵

Pyrrhic Victory

To some land trusts, the position espoused in the *Surrebuttal*—that conservation easements should be modifiable, transferrable, and terminable

¹⁰¹ See *In Defense of Conservation Easements*, *supra* note 4, at 77. *The End of Perpetuity* proposes two unrealistic and unsatisfactory “solutions” to the problem of lack of oversight of government holders in the event states are denied enforcement powers. See *In Defense of Conservation Easements*, *supra* note 4, at 77 n.297.

¹⁰² The Wal-Mart controversy involved a four-lane road providing access to a Wal-Mart Supercenter that was constructed across land protected by a perpetual conservation easement. Two nonprofit organizations and a private citizen sued the owner of the encumbered land (the development corporation that had sold the adjacent land to Wal-Mart) and the holder of the easement (the city of Chattanooga) objecting to the road. The case settled, and the development corporation agreed to convey a replacement parcel of land and \$500,000 to the plaintiffs to be used for similar conservation purposes and to pay the plaintiffs’ not insubstantial legal fees. In approving the settlement, the court concluded that the charitable purpose of the easement had become, in part, “impossible or impractical,” and the property and cash transferred to the plaintiffs constituted a reasonable and adequate substitute for any portion of the property that may have been affected or taken as a result of the road construction. See *Perpetuity and Beyond*, *supra* note 16, at 678, 695–700.

¹⁰³ Contrary to the assertion made in the *Surrebuttal*, the “problems” in the Myrtle Grove and Wal-Mart controversies were not “voluntarily corrected.” See *Surrebuttal*, *supra* note 5, at 412. Rather, they were corrected through settlement only after suit was brought in state court. See *Perpetuity and Beyond*, *supra* note 16, at 690–93, 695–700. Moreover, the IRS did not involve itself, directly or indirectly, in either the Wal-Mart or Myrtle Grove controversies, or in *Hicks v. Dowd*, *Salzburg v. Dowd*, or *Bjork v. Draper*.

¹⁰⁴ See *supra* note 16 and accompanying text.

¹⁰⁵ See *In Defense of Conservation Easements*, *supra* note 4, at 78–91 (explaining that the real check that federal tax law places on the conservation easement amendment and termination activities of land trusts and government entities depends on state charitable trust law).

by mere agreement of the owner of the land and the holder of the easement, and that states should have no oversight authority with regard to conservation easements—may have superficial appeal. If courts in a state were to accept that position, however, the consequences to the land trust community could be grave.

A landowner donating a conservation easement is eligible for a federal charitable income tax deduction pursuant to § 170(h) of the Internal Revenue Code only if the conservation easement is “granted in perpetuity” and its conservation purpose is “protected in perpetuity.” In explaining these perpetuity requirements, the Treasury Regulations provide that, among other things, a conservation easement must be (1) expressly transferable only to another government entity or charitable organization that agrees to continue to enforce the easement, and (2) extinguishable by its holder only in a judicial proceeding, upon a finding that the continued use of the encumbered land for conservation purposes has become impossible or impractical, and with the payment of a share of the proceeds from the subsequent sale or development of the land to the holder to be used for similar conservation purposes.¹⁰⁶

The donor of the conservation easement at issue in *Salzburg v. Dowd* attempted to comply with these requirements. The donor expressly provided in the conservation easement deed that the purpose of the easement is to preserve and protect certain conservation attributes of the land burdened by the easement in perpetuity.¹⁰⁷ The donor also expressly provided that the easement can be transferred or extinguished only in the circumstances set forth in the Treasury Regulations.¹⁰⁸ If Wyoming courts were to adopt the *Surrebuttal*'s position—that a conservation easement may be modified, transferred, or terminated by mere agreement of the owner of the land and the holder of the easement, regardless of the status of the easement as a restricted charitable gift or its express terms—the IRS could readily conclude that there simply is no way conservation easements donated in Wyoming could meet the federal tax law requirements for deductibility. Congress might also deem it imprudent to continue subsidizing the acquisition of conservation easements nationwide and repeal the federal tax incentives for easement donations altogether. Accordingly, even if courts in a state could be convinced to deny themselves their historic and inherent jurisdiction with respect to matters relating to charitable gifts in the conservation easement context (i.e., if they could be convinced to accept the position espoused in the *Surrebuttal*), it would likely prove to be a Pyrrhic victory for *Surrebuttal* enthusiasts.¹⁰⁹

¹⁰⁶ See Treas. Reg. § 1.170A-14(c)(2), -14(g)(6) (2009).

¹⁰⁷ See Lowham Conservation Easement, *supra* note 15, at 2.

¹⁰⁸ See *id.* at 8–9.

¹⁰⁹ A “Pyrrhic victory” is a victory offset by staggering losses. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1476 (3d ed. 1992). The phrase is named after Macedonian King Pyrrhus of Epirus, whose army, although defeating the Roman army in a 280 B.C. battle at Heraclea, suffered such severe and irreplaceable casualties that the phrase “Pyrrhic victory” became the proverbial expression for an over-expensive gain. See PETER CONNOLLY, GREECE AND ROME AT WAR 90 (Prentice-Hall 1981).

Logical Incoherence

Finally, the *Surrebuttal* opines that, if it were possible to contain the application of the charitable trust doctrine to cases such as *Salzburg v. Dowd*—those involving an “outright, unmitigated easement termination”—then “the implications of the doctrine for conservation easement administration might be of less concern.”¹¹⁰ The *Surrebuttal* further notes that “[i]t is in the application of the doctrine to modifications that negative implications for efficient and reasonable easement administration arise.”¹¹¹ The *Surrebuttal* then acknowledges, however, that “[o]f course, the problem is that one can effectively terminate an easement by amendment nearly as effectively as by outright termination.”¹¹²

The *Surrebuttal* offers no answer to this conundrum: that applying charitable trust principles to the termination, but not modification, of conservation easements leaves the door open to the effective termination of easements through cleverly designed “modifications.” One can only assume that, if asked to respond to this conundrum (and in the absence of the enactment of the unspecified new “remedy” he calls for),¹¹³ the author of the *Surrebuttal* would return to the position that underlies all of his arguments: land trusts and, by extension, government entities should simply be trusted to do the right thing. For all the reasons previously discussed, that response simply cannot satisfy the needs of easement donors and the public. Far better for land trusts and government holders to negotiate for the discretion they need “for efficient and reasonable administration” up front and in good faith at the time of their easement acquisitions. And far better for the states to retain their longstanding right to oversee the activities of the government entities and nonprofits soliciting and accepting all manner of charitable gifts within their borders, including conservation easements.

In conclusion, conservation easement donors, like all other charitable donors, should have assurance that the charitable purposes to which they dedicate their property will be honored. The law should not leave them to find that, instead of having sacrificed a more comfortable life and a legacy for their heirs so as to conserve a beloved farm or ranch, they have, instead, merely made a fungible gift of resources to an entity unwilling to make a durable commitment to the protection of that land. If a government entity or land trust wishes to be able to modify or terminate the conservation easements it acquires as it may see fit in accomplishing its public or charitable mission over time, it should negotiate for that discretion up front and in good faith at the time of acquisition. Donors would then have the choice to give under those conditions, or not.

¹¹⁰ See *Surrebuttal*, *supra* note 5, at 411.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See *id.* at 412 (calling for the creation of some new “remedy for improper easement administration”). As discussed at length in *In Defense of Conservation Easements*, there are potentially significant constitutional and other problems with attempting to apply new state law “remedies” to existing or future conservation easements, and the creation of such new remedies is unnecessary. See *In Defense of Conservation Easements*, *supra* note 4, at 87–94.

APPENDIX A

EXCERPT FROM WYOMING ATTORNEY GENERAL'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT IN SALZBURG V. DOWD^{***}

C. Lowham's Charitable Donation of the Conservation Easement either created a Charitable Trust or constituted a Restricted Charitable Gift, and the Board Breached its Fiduciary Duties by Failing to Obtain Judicial Approval for the Transfer and Termination of the Easement in a Cy Pres Proceeding

1. Lowham's Charitable Donation of the Conservation Easement either created a Charitable Trust or constituted a Restricted Charitable Gift

Lowham's charitable donation of the conservation easement to the Board [of County Commissioners of Johnson County, Wyoming] for the express purpose of preserving and protecting in perpetuity the natural, agricultural, ecological, wildlife habitat, open space, scenic, and aesthetic features and values of the Ranch for the benefit of the people of and visitors to Wyoming either created a charitable trust, or constituted a restricted charitable gift, the administration of which is also governed by charitable trust principles.

a. Legal Principles

Charitable gifts made to government entities and charitable organizations can be either restricted or unrestricted. *See* Nancy A. McLaughlin, *In Defense of Conservation Easements: A Response to the End of Perpetuity*, 9 Wyo. L. Rev. 1, 2 (2009). An unrestricted charitable gift is a contribution of money or property that the donor makes without attaching any conditions on its use by the recipient entity or organization. *Id.* An entity or organization in receipt of an unrestricted charitable gift is free to use that gift as it sees fit in accomplishing its general public or charitable mission. *Id.* A restricted charitable gift, on the other hand, is a contribution of money or property that the donor makes to a government entity or charitable organization to be used for a specific charitable purpose and often according to carefully negotiated terms. *Id.* at 2–3.

In many cases, restricted charitable gifts are characterized as “charitable trusts” even in the absence of the use of the word “trust” or “trustee” in the instrument of conveyance. *See, e.g., In re Estate of Heil v. Nevada*, 210 Cal. App. 3d 1503, 1511

^{***} Plaintiff's Memorandum in Support of Motion for Summary Judgment at 19–41, *Salzburg v. Dowd*, Civ. No. CV-2008-0079 (Aug. 12, 2009) (on file with the *Wyoming Law Review*).

*Editor's Note: Plaintiff's Memorandum appears here with its original footnotes. All nonconforming citations and any omissions, corrections, and substitutions in this excerpt using standard punctuation appeared in the original with the exception of the first bracketed substitution identifying the Board of County Commissioners of Johnson County, Wyoming. Omissions by the author are indicated by * * * *. Emphasis appearing in the original and superscripts have been changed to comply with our journal's style requirements.*

(Cal. Ct. App. 1989) (bequest to State of Nevada for the purpose of preservation of wild horses in Nevada created a charitable trust); *Chattowah Open Land Trust, Inc. v. Jones*, 636 S.E.2d 523, 524–26 (Ga. 2006) (devise of decedent’s home and surrounding acreage to a charitable organization for the purpose of maintaining the property in perpetuity exclusively for conservation purposes within the meaning of Internal Revenue Code § 170(h) “unambiguously created a charitable trust,” and decedent’s failure to use the terms “trust” and “trustee” did not alter the outcome because the strict use of those terms is not required to establish a trust); *In re Village of Mount Prospect*, 522 N.E.2d 122, 125–26 (Ill. App. 1988) (land dedicated to Village “for public purposes” was held to create an express charitable trust and could not be sold without court approval in a cy pres proceeding); *City of Salem v. Attorney Gen.*, 183 N.E.2d 859, 862 (Mass. 1962) (devise of land to city to be used “forever as public grounds” established a trust); *State v. Rand*, 366 A.2d 183, 186, 196 (Me. 1976) (gift of land to city to be “forever held and maintained . . . as a public park” created a charitable trust); *Bankers Trust Co. v. New York Women’s League for Animals*, 23 N.J. Super. 170, 182 (1952) (bequest to charitable organization to be used to purchase a rural farm for the care of animals created a trust); *Abel v. Girard Trust Co.*, 73 A.2d 682, 684 (Pa. 1950) (“A charitable trust is created by deed where there appears in the deed an intention that the transferee shall hold the land subject to the equitable duty to use the land for a charitable purpose.”).

It is well-settled that no magical incantation, such as use of the word ‘trust’ or ‘trustee,’ is required to create a trust. Indeed, the settlor need not even understand precisely what a trust is. All that is required to create a trust is an intention to create a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another.

McLaughlin, 9 Wyo. L. Rev. 1, 20–21.

The Restatement (Third) of Trusts (2003) treats restricted charitable gifts as charitable trusts, providing in cmt. a of § 28:

An outright devisee [sic] or donation to a . . . charitable institution, expressly or impliedly to be used for its general purposes, is charitable but does not create a trust . . . A disposition to such an institution for a specific purpose, however, such as to support medical research, perhaps on a particular disease, or to establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is the trustee. . . .

Moreover, even in those cases in which a restricted charitable gift is not characterized as a technical “trust,” the substantive rules governing the

administration of charitable trusts, including the doctrine of *cy pres*, nonetheless apply. See, e.g., *Estate of Vallery v. St. Luke's Cmty. Found. Inc.*, 883 P.2d 24, 28 (Colo. Ct. App. 1994) (bequest for a specified charitable purpose constituted a "restricted gift" as opposed to a trust, but doctrine of *cy pres* applied); *Blumenthal v. White*, 683 A.2d 410, 412–13 (Conn. App. Ct. 1996) (gift of land to a city with instructions that land be used as a public park and not transferred did not create a trust "in strict sense," but "it may be so regarded," and city held land as a "quasi-trustee"); *Lancaster v. City of Columbus*, 333 F. Supp. 1012, 1024 (N.D. Miss. 1971) ("It is settled state law that lands taken and held by a municipality as a gift for a specific purpose are subject to the law of trusts, and any use inconsistent with that intended by the dedicator constitutes a breach of trust."); *School Dist. No. 70, Red Willow County v. Wood*, 13 N.W.2d 153, 156 (Neb. 1944) ("a gift to a charitable corporation [for a particular purpose] is equivalent to a bequest upon a charitable trust and will ordinarily be governed by the same rules"); *St. Joseph's Hosp. v. Bennett*, 22 N.E.2d 305, 308 (N.Y. 1939) (while no trust arises "in a technical sense," a charitable corporation "may not . . . receive a gift made for one purpose and use it for another, unless the court applying the *cy pres* doctrine so commands").

The Restatement (Second) of Trusts § 348, cmt f. (1959) explains:

Property may be devoted to charitable purposes not only by transferring it to individual trustees to hold it for such purposes, but also by transferring it to a charitable corporation. . . .

Where property is given to a charitable corporation, particularly where restrictions are imposed by the donor, it is sometimes said by the courts that a charitable trust is created and that the corporation is a trustee. It is sometimes said, however, that a charitable trust is not created. This is a mere matter of terminology. . . .

Ordinarily the principles and rules applicable to charitable trusts are applicable to charitable corporations. . . .

The doctrine of *cy pres* (see § 399) is applicable to gifts to charitable corporations as well as to gifts to individual trustees for charitable purposes.

Regardless of whether they are characterized as charitable trusts, restricted charitable gifts are enforceable by the state attorney general. See, e.g., *Lefkowitz v. Lebensfeld*, 417 N.Y.S.2d 715 (N.Y. App. Div. 1979) (noting "the never disturbed equitable doctrine that although gifts to a charitable organization do not create a trust in the technical sense, where a purpose is stated a trust will be implied, and the disposition enforced by the attorney general, pursuant to his duty to effectuate

the donor's wishes"); Restatement (Second) of Trusts § 348, Reporter's Note. cmt f. ("Where restricted gifts are made to charitable corporations, the restrictions are enforceable at the suit of the Attorney General"); McLaughlin, 9 Wyo. L. Rev. 1, 6–7, n. 12 (*quoting* Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 348.1 (4th Ed. 1989) ("Certainly many of the principles applicable to charitable trusts are applicable to charitable corporations. In both cases the Attorney General can maintain a suit to prevent a diversion of the property to purposes other than those for which it was given; and in both cases the doctrine of cy pres is applicable.")).

Wyoming law is in accord with these authorities. In *Buffalo Bill Memorial Ass'n*, the Supreme Court of Wyoming held that fee title to land that had been donated to a charitable association to be used for a specific charitable purpose – to perpetuate the memory of Buffalo Bill – could not be transferred by the association without authorization of a court of equity. *Buffalo Bill Memorial Ass'n*, 196 P.2d 369, 382 (Wyo. 1948). The court explained:

Grants made to a charitable corporation may, of course, be of various kinds. They may be absolute or, on the other hand, proper terms, conditions and directions may be annexed thereto. In the latter case, the terms, conditions and directions annexed must be carried out. . . .

. . . .

[W]ithout particularly characterizing the grants involved in this case at this place, *we are here dealing with a charitable trust, or the ordinary rules relating thereto should be applied. . . .*

. . . .

[C]ounsel completely failed to recognize that the rules of a charitable trust are applicable herein.

Buffalo Bill Memorial Ass'n, 196 P.2d at 377, 383 (emphasis added).

Charitable trust principles also apply to charitable gifts to municipal corporations. See *Rayor v. City of Cheyenne*, 178 P.2d 115, 117 (Wyo. 1947) ("If a dedication of property for public use is by a private party, not even the legislature can authorize property thus dedicated to be used for any other purpose, since that would violate the contract between the dedicator and the public"); McQuillin, *The Law of Municipal Corporations* § 47:17 ("A gift to a municipal corporation for a charitable purpose cannot, after the municipality accepts it, be renounced or conveyed away so as to defeat the charity"); *Id.* § 28:25 ("when the trust is accepted, the municipal corporation assumes the same burdens and is subject

to the same regulations that pertain to other trustees. The duty to administer the donation or charitable fund agreeably to the expressed wish of the donor or testator will be enforced in equity, and, where circumstances warrant such action, the municipal corporation may be removed or replaced as trustee.”).

“The theory underlying the power of the attorney general to enforce gifts for a stated purpose is that a donor who attaches conditions to his gift has a right to have his intention enforced.” *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 998 (Conn. 1997). *See also St. Joseph’s Hosp.* 22 N.E.2d at 307 (“Nothing in authority, statute or public policy has been brought to our attention which prevents a testator from leaving his money to a charitable corporation and having his clearly expressed intention enforced.”); *Holt v. Coll. of Osteopathic Physicians and Surgeons*, 394 P.2d 932, 935 (Cal. 1964) (“In addition to the general public interest...there is the interest of donors who have directed that their contributions be used for certain charitable purposes. Although the public in general may benefit from any number of charitable purposes, charitable contributions must be used only for the purposes for which they were received in trust.”).

The Wyoming Supreme Court has similarly recognized the rights of charitable donors. *See First Nat’l Bank & Trust Co. of Wyo. v. Brimmer*, 504 P.2d 1367, 1371 (Wyo. 1973) (“The clearly expressed intention of the settlor should be zealously guarded by the courts, particularly when the [charitable] trust instrument reveals a careful and painstaking expression of the use and purposes to which the settlor’s financial accumulations shall be devoted.”); *Bentley v. Whitney Benefits*, 281 P. 188, 190 (Wyo. 1929) (“The provisions of instruments creating charitable trusts are favorably regarded by the courts, and are generally construed with the utmost liberality in order to carry out the laudable purpose of the donor.”).

b. Application of Above Legal Principles to Lowham’s Charitable Donation of the Conservation Easement to the Board

* * * *

Lowham clearly did not donate the conservation easement to the Board to be used for the Board’s general purposes. Rather, Lowham donated the conservation easement as a charitable gift to the Board to be used for a very specific charitable purpose—the preservation and protection in perpetuity of the natural, agricultural, ecological, wildlife habitat, open space, scenic and aesthetic features and values of the Ranch for the benefit of the people of and visitors to Wyoming. Accordingly the conservation easement constitutes a restricted charitable gift and, pursuant to *Buffalo Bill Memorial Ass’n* and the other authorities referenced above “*we are here dealing with a charitable trust, or the ordinary rules relating thereto should be applied. . . .*” (emphasis added). *Buffalo Bill Memorial Ass’n*, 196 P.2d at 377.

The conservation easement deed reveals a particularly careful and painstaking expression of the use and purposes to which Lowham intended the gift would be devoted, and “[t]he clearly expressed intention of the [donor] should be zealously guarded by the courts. . . .” *First Nat’l Bank & Trust Co. v. Brimmer*, 504 P.2d at 1371. As explained in one of the leading cases in this area:

[E]quity will afford protection to a donor to a charitable corporation in that the Attorney-General may maintain a suit to compel the property to be held for the charitable purpose for which it was given. . . .

. . . .

No authority has been brought to our attention that a gift to a charitable corporation with the express direction that it be applied to a specific corporate purpose in a specific manner may be accepted by the corporation, and then used for a different corporate purpose in a different manner. . . . [A] *charitable corporation . . . may not . . . receive a gift made for one purpose and use it for another, unless the court applying the cy pres doctrine so commands.*

St. Joseph’s Hosp. 22 N.E.2d at 306–07, 308 (emphasis added). In addition, as explained above, these same charitable trust rules also apply to charitable gifts made to municipal corporations. *See Rayor*, 178 P.2d at 117; McQuillin, *The Law of Municipal Corporations* §§ 28:25; 47:17.

c. The Uniform Trust Code, the Uniform Conservation Easement Act, the Restatement (Third) of Property, and Federal Tax Law Further Support the Application of Charitable Trust Rules to the Conservation Easement

Wyoming adopted the Uniform Trust Code (UTC) effective July 1, 2003. *See WYO. STAT. ANN.* §§ 4-10-101 through 4-10-1103. The drafters of the UTC specifically addressed conservation easements in their comments to § 414, which provides a special set of rules for the modification and termination of “uneconomic trusts,” but also provides that the section does not apply to conservation easements:

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. *Because of the fiduciary obligation imposed, the termination or substantial modification of*

the easement by the “trustee” could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from [§ 414], and subsection (d) so provides. *Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value.*

Uniform Trust Code § 414 cmt. (2005) (emphasis added); WYO. STAT. ANN. § 4-10-415(c). The comments by the drafters of a uniform law adopted by Wyoming are particularly persuasive authority in light of the Legislature’s explicitly declared goal of promoting uniformity with other jurisdictions that have also adopted the uniform law. *See* WYO. STAT. ANN. §§ 4-10-1101 (“In applying and construing this act [the UTC], consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.”); 8-1-103(a)(vii) (“Any uniform act shall be interpreted and construed to effectuate its general purpose to make uniform the law of those states which enact it[.]”).

Wyoming has also adopted the Uniform Conservation Easement Act (UCEA), effective July 1, 2005². *See* WYO. STAT. ANN. §§ 34-1-201 through 34-1-207. That Act states that:

Except as otherwise provided in this article, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected in the same manner as other easements.

WYO. STAT. ANN. § 34-1-202(a). It also provides, however, that the Wyoming UCEA “shall not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.” WYO. STAT. ANN. § 34-1-203(b). In the original comments to the UCEA, the drafters explained that “the Act leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements *and* the enforcement of charitable trusts,” and “independently of the Act, the Attorney General could have standing [to enforce a conservation easement] in his capacity as supervisor of charitable trusts.” Uniform Conservation Easement Act § 3 cmt. (1982) (Emphasis added).

² Like the UTC, the Wyoming UCEA promotes uniformity of application and construction: “This article [the UCEA] shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of the article among the states enacting it.” WYO. STAT. ANN. § 34-1-206.

In 2007, the drafters amended the comments to the UCEA to include further discussion of conservation easements as enforceable under charitable trust principles:

The [UCEA] does not directly address the application of charitable trust principles to conservation easements because: (i) the [UCEA] has the relatively narrow purpose of sweeping away certain common law impediments that might otherwise undermine a conservation easement's validity, and researching the law relating to charitable trusts and how such law would apply to conservation easements in each state was beyond the scope of the drafting committee's charge, and (ii) the [UCEA] is intended to be placed in the real property law of adopting states and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes. However, *because conservation easements are conveyed to governmental bodies and charitable organizations to be held and enforced for a specific public or charitable purpose – i.e., the protection of the land encumbered by the easement for one or more conservation or preservation purposes – the existing case and statute law of adopting states as it relates to the enforcement of charitable trusts should apply to conservation easements.* This was recognized by the drafters of the Uniform Trust Code, approved by the National Conference of Commissioners on Uniform State Laws in 2000.

....

The [UCEA] leaves intact the existing case and statute law of adopting states as it relates to the modification and termination of easements and the enforcement of charitable trusts. Thus, while Section 2(a) provides that a conservation easement may be modified or terminated “in the same manner as other easements,” *the governmental body or charitable organization holding a conservation easement, in its capacity as trustee, may be prohibited from agreeing to terminate the easement (or modify it in contravention of its purpose) without first obtaining court approval in a cy pres proceeding.*

Uniform Conservation Easement Act § 3 cmt. (amended 2007) (emphasis added).

In 2000, the American Law Institute published the Restatement (Third) Property: Servitudes, which recommends that, in lieu of the traditional real property law doctrine of changed conditions, the modification and termination of conservation easements held by governmental bodies or charitable organizations

should be governed by a special set of rules based on the charitable trust doctrine of *cy pres*. In their commentary, the drafters of the Restatement explained:

Because of the public interests involved, these servitudes [conservation easements] are afforded more stringent protection than privately held conservation servitudes. . . .

There is a strong public interest in conservation and preservation servitudes. . . .

The rules stated in this section are designed to safeguard the public interest and investment in conservation servitudes to the extent possible, while assuring that the land may be released from the burden of the servitude if it becomes impossible for it to serve a conservation or preservation purpose. . . .

. . . .

If the particular purpose for which the servitude was created can no longer be accomplished, but the servitude is adaptable for other conservation or preservation purposes, the servitude should be continued for those other purposes unless the document that created the servitude provides otherwise.

RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.11 cmts. a and b (2000).

Finally, federal tax law also contemplates that charitable trust principles will apply to tax-deductible conservation easements. 26 U.S.C. § 170(h) sets forth the criteria governing tax benefits for those who donate conservation easements. *See also* C.F.R. § 1.170A-14 (interpreting IRC § 170(h)). To be eligible for a federal charitable income tax deduction, a landowner donating a conservation easement must satisfy the following requirements (among others):

(i) The conservation easement must be conveyed as a charitable gift to a government entity or charitable organization to be used for a specific charitable purpose—the protection of the particular land encumbered by the easement for one or more of the conservation purposes enumerated in the Internal Revenue Code “in perpetuity.” *See generally* 26 U.S.C. § 170(h); Treas. Reg. § 1.170A-14.

(ii) The conservation easement must be expressly transferable only to another government entity or charitable organization that agrees to continue to enforce the easement. *See* Treas. Reg. § 1.170A-14(c)(2).

(iii) The conservation easement must be extinguishable by its holder only in a judicial proceeding, upon a finding that the continued use of the encumbered land for conservation purposes has become “impossible or impractical,” and with the payment of a share of the proceeds from the subsequent sale or development of the land to the holder to be used for similar conservation purposes. *See* Treas. Reg. § 1.170A-14(g)(6).

These requirements ensure that every tax-deductible conservation easement will be conveyed in the form of a restricted charitable gift, thereby triggering the application of charitable trust principles under state law, including the requirement that the easement be terminated only in the context of a judicial proceeding.

The conservation easement Lowham donated as a charitable gift to the Board was drafted to comply with federal tax law requirements. It was donated as a charitable gift to a government entity for the specific purpose of protecting certain conservation features and values of the Ranch in perpetuity for the benefit of the people of and visitors to Wyoming (i.e, it was donated as a restricted charitable gift). [Appendix A, Deed, p. 1, ¶ 2; p. 2, ¶ 1] It required that any transfer of the easement had to be to a “qualified organization” that agreed to enforce the easement. [Appendix A, Deed, p. 8, ¶ 9(a)]. It also specifically required that the easement could be terminated only in a judicial proceeding, upon a finding that continuation of the easement had become impossible, and with a payment of a share of the proceeds to the holder as mandated by the Treasury Regulations. [Appendix A, Deed, p. 8, ¶ 9(b)].

In sum, pursuant to well-settled state law governing charitable gifts made to government entities and charitable organizations for specified charitable purposes, and consistent with the recommendation of the American Law Institute in the Restatement (Third) of Property: Servitudes, the intent of the drafters of the Uniform Trust Code and the Uniform Conservation Easement Act (both adopted in Wyoming), and federal tax law requirements, Lowham’s donation of the conservation easement to the Board either created a charitable trust, or constituted a restricted charitable gift, the administration of which is also governed by charitable trust principles.

2. The Board Breached its Fiduciary Duties by Failing to Obtain Judicial Approval in a Cy Pres Proceeding for the Transfer and Termination of the Conservation Easement

As explained above, Lowham’s charitable gift of the conservation easement to the Board either created a charitable trust, or constituted a restricted charitable gift, the administration of which is also governed by charitable trust principles. By accepting the charitable gift of the conservation easement, the Board assumed the

fiduciary obligations of a trustee. See *Buffalo Bill Memorial Ass'n* 196 P.2d at 377 (“we are here dealing with a charitable trust, or the ordinary rules relating thereto should be applied. . . .”); McQuillin, *The Law of Municipal Corporations* § 28:25 (“when the trust is accepted, the municipal corporation assumes the same burdens and is subject to the same regulations that pertain to other trustees. The duty to administer the donation or charitable fund agreeably to the expressed wish of the donor or testator will be enforced in equity. . . .”).

Pursuant to the common law, termination of a restricted charitable gift or charitable trust or modification of its purpose requires judicial approval pursuant to the doctrine of *cy pres*. See *Jackson v. Phillips*, 96 Mass. 539 (1867) (Applying *cy pres* to a charitable trust created to promote abolition of slavery; in light of Thirteenth Amendment, court amended trust to provide aid to former slaves); *St. Joseph's Hosp.* 22 N.E.2d at 306–07, 308 (“[a] charitable corporation . . . may not . . . receive a gift made for one purpose and use it for another, unless the court applying the *cy pres* doctrine so commands”); Restatement (Second) of Trusts § 348, cmt f. (1959) (“The doctrine of *cy pres* . . . is applicable to gifts to charitable corporations as well as to gifts to individual trustees for charitable purposes”). The Wyoming Supreme Court has described this rule thusly:

In 2 Bogert, *Trusts and Trustees*, § 435, the author states:

‘In the absence of special provisions in the trust instrument, the trustees have no power of their own motion to decide that it has become impossible or inexpedient to carry out the trust as originally planned and then to substitute another scheme. If the trustees feel that an emergency of this type has arisen, they should bring the situation to the attention of the court and ask for instructions.’

That is said in connection with the doctrine of *cy pres*. . . . That terms means ‘as nearly as possible.’ ‘Roughly speaking,’ says Bogert, *supra*, § 431, ‘it is the principle that equity will make specific a general charitable intent of a settlor, and will, when an original specific intent becomes impossible or impracticable of fulfillment, substitute another plan of administration which is believed to approach the original scheme as closely as possible. It is the theory that equity has the power to mould the charitable trust to meet emergencies.’ . . . It is sometimes referred to as the doctrine of Approximation.

Buffalo Bill Memorial Ass'n, 196 P.2d at 378 (citations omitted); see also McLaughlin, *In Defense of Conservation Easements*, 9 Wyo. L. Rev. at 52–53.

The conservation easement deed incorporates the doctrine of *cy pres* as the procedure required to terminate the easement:

The Grantor wishes to express again its intent that this Easement be maintained in perpetuity for the purposes expressed herein. However, if due to unforeseeable circumstances a final binding non-appealable judicial determination is made that continuation of this Easement is impossible, or if such determination renders the continuation of the Easement impossible (e.g. pursuant to a condemnation proceeding), and if a judicial determination is made that the Easement cannot be so reformed as to accomplish substantial compliance with the purposes of this Easement, then Grantor and Grantee, with the approval of the Court, may agree to transfer their respective interests in the Ranch, provided the Grantee shall be entitled to such proceeds from the transfer as provided for in Treasury regulation section 1.170A-14(g)(6)(ii)³ [Emphasis added].

[Appendix A, Deed, p. 9, ¶ 9(b)]

* * * *

The conservation easement deed also permits the Board to voluntarily transfer the easement only to another “qualified organization” that agrees to continue to enforce the easement.

Grantee shall have the right to transfer or assign any and all rights and responsibilities accruing unto it by this Easement, provided that the assignee is an entity acceptable to Grantor, and that, at the time of such transfer of [sic] assignment the transferee is a “qualified organization,” within the meaning of § 170(h) of the Code, and provided that such transfer or assignment shall be conditioned on the transferee or assignee complying with or enforcing the conservation purposes which this Easement intends to accomplish.

[Appendix A, Deed, p. 8, ¶ 9(a)]

By accepting the charitable gift of the conservation easement, the Board became bound by the easement’s terms. *See Am. Nat. Bank of Cheyenne, Wyo. v. Miller*, 899 P.2d 1337, 1339 (Wyo. 1995) (“A fundamental duty of a trustee is to carry out the terms of the trust”); *Buffalo Bill Memorial Ass’n*, 196 P.2d at 377 (the

³ The Treasury Regulations require that the holder receive a certain percentage of the proceeds upon extinguishment and use such proceeds “in a manner consistent with the conservation purposes of the original contribution.” See Treas. Reg. § 1.170A-14(g)(6).

terms, conditions and directions annexed to a charitable gift must be carried out); Wyo. Stat. Ann. § 4-10-801 (“Upon acceptance of a trusteeship, the trustee shall administer the trust . . . in accordance with its terms and purposes . . .”).

The Board thus had “no power of their own motion to decide that it has become impossible or inexpedient to carry out the trust as originally planned and then to substitute another scheme.” *Buffalo Bill Memorial Ass’n*, 196 P.2d at 378 (quoting 2 Bogert, *Trusts and Trustees* § 435). Rather, in order to transfer the conservation easement to private parties – the Dowds – and thereby terminate the easement, the Board was obligated to seek judicial approval in a *cy pres* proceeding pursuant to both state law governing the administration of charitable gifts made for specific purposes *and* the express terms of the conservation easement deed. The Board completely ignored the legal duties and obligations it assumed upon accepting the charitable gift of the conservation easement and its conveyance of the one-acre parcel and the conservation easement to the Dowds was therefore void. See *Buffalo Bill Memorial Ass’n*, 196 P.2d at 378–82 (Transfer of trust property in contravention of trust terms and purpose and without authorization of a court of equity is void.).

* * * *

COMMENT

**The Need for Codification of Wyoming's Coal Bed Methane
Produced Groundwater Laws**

*Neal Joseph Valorz**

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I. INTRODUCTION

A high probability exists that below ground, at some depth, there is water.¹ There is an estimated 5.6 million cubic miles of groundwater; 2.5 million cubic miles of the groundwater is freshwater.² These statistics illustrate that freshwater is limited in quantity and indicate how important the capture and development of groundwater resources is to everyday life. Yet, in the Rocky Mountain West,

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¹ United States Geological Survey, *Water Science for Schools*, <http://ga.water.usgs.gov/edu/earthwherewater.html> (last visited Nov. 23, 2009).

² *Id.* The numbers used here are rounded.

the development of coal bed methane results in the production of large quantities of groundwater that remain unused.³ As a result, issues surrounding the quantity and disposal of coal bed methane produced water are becoming more prevalent in the arid western United States.⁴

This comment provides a summary of recent legal developments in Colorado, Montana, and Wyoming related to the legal status of coal bed methane produced water.⁵ Despite the recognition of the valuable character of water in the Rocky Mountain West, none of these states require further use of coal bed methane produced water.⁶ Nevertheless, the Wyoming Supreme Court stated there are perhaps no questions of greater importance than those dealing with water.⁷ This comment pays particular attention to Wyoming's approach for regulating coal bed methane produced water and recommends a statutory change drawn from a review of developments in Colorado and Montana.⁸

Wyoming's current regulatory scheme does not address many of the problems associated with coal bed methane development.⁹ The water law and well permitting system originally adopted and developed in Wyoming did not

³ See *infra* notes 24–27 and accompanying text (discussing the quantities of water coal bed methane production captures).

⁴ Gary Bryner, *Coal Bed Methane Development: The Costs and Benefits of an Emerging Energy Resource*, 43 NAT. RESOURCES J. 519, 520 (2003) [hereinafter Bryner, *Coal Bed Methane Development: The Costs and Benefits*] (“Parties are forced to deal with issues of produced water, conflicts between landowners and those who lease mineral rights, impacts of development on communities, demands for governmental and regulatory services, and other issues in a very compact time frame.”); GARY BRYNER, COALBED METHANE DEVELOPMENT IN THE INTERMOUNTAIN WEST 1 (2002), http://www.colorado.edu/Law/centers/nrlc/CBM_Primer.pdf [hereinafter BRYNER, COALBED METHANE DEVELOPMENT IN THE INTERMOUNTAIN WEST] (“[Coal bed methane] production has expanded tremendously over the past decade, and the rapidity with which development has expanded has resulted in stresses and tension in affected communities.”); Andrew R. Kear, *The Changing and Contested Discourse of Coalbed Methane Policy in the Western U.S.* 4 (Mar. 20, 2008) (unpublished manuscript, on file with All Academic Research, available at http://www.allacademic.com/meta/p237850_index.html) (“[Coal bed methane] conflicts encompass gas ownership and severed rights, water disposal and use rights, overlapping regulatory jurisdictions, environmental law implementation, environmental problems, public land multiple-use mandates and tribal land [coal bed methane] development.”); see also THE RUCKELSHAUS INSTITUTE OF ENVIRONMENT AND NATURAL RESOURCES, WATER PRODUCTION FROM COALBED METHANE DEVELOPMENT IN WYOMING: A SUMMARY OF QUANTITY, QUALITY AND MANAGEMENT OPTIONS, UNIVERSITY OF WYOMING v-vi (Dec. 2005), available at <http://www.powderriverbasin.org/assets/Uploads/files/cbm-studies/CBMWaterFinalReportDec2005.pdf> (providing a comprehensive study of Wyoming's coal bed methane resources and industry) [hereinafter THE RUCKELSHAUS REPORT].

⁵ See *infra* notes 57–125 and accompanying text.

⁶ See *infra* notes 134–52 and accompanying text.

⁷ *Farm Inv. Co. v. Carpenter*, 61 P. 258, 259 (Wyo. 1900).

⁸ See *infra* notes 153–77 and accompanying text.

⁹ THE RUCKELSHAUS REPORT, *supra* note 4, at 2.

treat coal bed methane aquifers as potential sources of future water supply.¹⁰ The regulatory system also does not require reinjection or use after the extraction of water.¹¹ Consequently, Wyoming policy allows the wasting of water by coal bed methane developers in exchange for the development of energy.¹² Wyoming is not alone; in fact, neighboring states have also struggled with this important issue.¹³ Wyoming must look to these states and amend its legal and regulatory structure by enacting statutory provisions to ensure produced water is not wasted.¹⁴

II. BACKGROUND

In the background section, this comment first addresses how coal bed methane is developed.¹⁵ It then provides a brief description of the prior appropriation water law doctrine and the concept of beneficial use.¹⁶ All western states, including Wyoming, Colorado, and Montana, have adopted the doctrine of prior appropriation for the distribution of water found within each state's borders.¹⁷ Lastly, the background section articulates how Colorado, Montana, and Wyoming vary in their determination of whether water produced in association with coal bed methane requires the issuance of an appropriation right and in the required usages of the extracted water.¹⁸

¹⁰ Bryner, *Coal Bed Methane Development: The Costs and Benefits*, *supra* note 4, at 550 ("Water law and the water well permit process simply did not anticipate [coal bed methane] development and the produced water problem. As a result, some of the produced water that could be put to beneficial use is wasted.").

¹¹ WYOMING STATE ENGINEER, GUIDANCE: CBM/GROUND WATER PERMITS 1 (Mar. 2004), http://seo.state.wy.us/PDF/GW_CBM%20Guidance.pdf; Dennis Stickley & Lawrence J. MacDonnell, *Wyoming's Legal Framework for Management of Water Produced in Conjunction with Coal Bed Methane*, 32 WYO. LAW. 24, 25 (Oct. 2009).

¹² *See* Kear, *supra* note 4, at 10 (describing how Wyoming's method of regulating coal bed methane produced water is economically driven causing a "drill away" status quo in Wyoming).

¹³ *See infra* notes 57–77 and accompanying text (describing how Colorado regulates coal bed methane produced groundwater); *see also infra* notes 103–125 and accompanying text (describing how Montana regulates coal bed methane produced groundwater).

¹⁴ *See infra* notes 126–77 and accompanying text.

¹⁵ *See infra* notes 19–29 and accompanying text.

¹⁶ *See infra* notes 30–46 and accompanying text.

¹⁷ GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCE LAWS 488 (6th ed. 2007) ("[G]enerally speaking, the prior appropriation doctrine now holds sway in all states west of the 100th meridian.").

¹⁸ *Compare infra* notes 57–77 and accompanying text (describing Colorado's approach), *with infra* notes 103–125 and accompanying text (describing Montana's approach), *and infra* notes 78–102 and accompanying text (describing Wyoming's approach).

A. *The Coal Bed Methane Capturing Process*

In the western United States, many of the coal bed seams that contain methane gas also hold groundwater aquifers.¹⁹ To drop the pressure in the seam and capture the gas, the water from the aquifer first must be pumped out of the aquifer.²⁰ Thus, the production of water is an essential requirement of the coal bed methane development cycle.²¹ Water extraction is not the goal of the coal bed methane development; rather, the methane gas is the desired resource.²² Once the gas is released, developers deal with the captured coal bed methane water in a number of ways: discharging it onto the surface, reinjecting it back into the aquifer, or placing it into impoundments.²³

The process of coal bed methane production captures an overwhelming amount of groundwater.²⁴ For example, in Wyoming, one coal bed methane well produces an average of 15,000 gallons of water.²⁵ Furthermore, from 1987 to 2004, the Powder River Basin produced an estimated 380,000 acre-feet of groundwater.²⁶ Indeed, over the expected timeframe of coal bed methane production in the Powder River Basin, the total water produced could exceed 5.7 million acre-feet.²⁷

Because coal bed methane produces vast amounts of groundwater in the western United States, to the casual observer it appears these sources of water are infinite; however, all water sources, including coal bed methane aquifers, are

¹⁹ Anne MacKinnon & Kate Fox, *Demanding Beneficial Use: Opportunities and Obligations for Wyoming Regulators in Coalbed Methane*, 6 WYO. L. REV. 369, 370 (2006) (stating that in the western United States many of the “coal seams which hold the gas are also aquifers”).

²⁰ *Id.* (“[W]ater is pumped from the aquifers in order to release and recover the target methane gas.”); Thomas F. Darrin, *Waste or Wasted?—Rethinking the Regulation of Coalbed Methane Byproduct Water in the Rocky Mountains: A Comparative Analysis of Approaches to Coalbed Methane Produced Water Quantity Legal Issues in Utah, New Mexico, Colorado, Montana and Wyoming*, 17 J. ENVTL. L. & LITIG. 281 (2002).

²¹ WYOMING STATE ENGINEER, *supra* note 11, at 1.

²² *Id.*

²³ OFFICE OF FOSSIL ENERGY & NAT’L ENERGY TECH. LAB. STRATEGIC CTR. FOR NATURAL GAS, U.S. DEP’T OF ENERGY, POWDER RIVER BASIN COALBED METHANE DEVELOPMENT AND PRODUCED WATER MANAGEMENT STUDY 1–13, *available at* <http://www.netl.doe.gov/publications/EPreports/PowderRiverBasin.pdf> [hereinafter NAT’L ENERGY TECH. LAB. STRATEGIC CTR. FOR NATURAL GAS].

²⁴ *See infra* notes 25–27 and accompanying text.

²⁵ Robert J. Duffy, *Political Mobilization, Venue Change, and the Coal Bed Methane Conflict in Wyoming and Montana*, 45 NAT. RESOURCES J. 409, 416 (2005).

²⁶ MacKinnon & Fox, *supra* note 19, at 371–72.

²⁷ THE RUCKELSHAUS REPORT, *supra* note 4 at 10, tbl. 2.

finite.²⁸ The doctrine of prior appropriation is designed to protect and govern finite water resources.²⁹

B. Prior Appropriation: The Doctrine of Western Water Law

Western states use the system of prior appropriation for distributing water, and states in the Rocky Mountain Region use only this system.³⁰ An appropriation right is the right to use a specified amount of water for a specified purpose.³¹ The prior appropriation system allows one to legally apply a specific quantity of water to a particular beneficial use.³² The state entity that grants the appropriation must consider whether granting the new water right will adversely impair existing water rights.³³ Thus, prior appropriation provides protection of existing water rights from adverse interference by newer appropriators.³⁴

Under the prior appropriation doctrine, the amount of water an appropriator can divert is typically limited to the amount of water needed for a specified beneficial use.³⁵ The appropriation is limited to a pre-determined amount; for example, in Wyoming, irrigators are allowed to divert up to one cubic foot per second for every 70 acres needed for irrigation.³⁶ Thus, the doctrine of prior

²⁸ Alex C. Sienkiewicz, *Instream Values Find Harbor in Bean Lake III, Drown in Prior Appropriation*, 25 PUB. LAND & RESOURCES L. REV. 131, 132 (2004) (“The volume in any particular body of water is finite.”).

²⁹ See *infra* notes 30–37 and accompanying text.

³⁰ *E.g.*, COGGINS, *supra* note 17, at 488 (“[G]enerally speaking, the prior appropriation doctrine now holds sway in all states west of the 100th meridian.”); DUFFY, *supra* note 25, at 423 (“All of the mountain states have adopted the prior appropriation approach to water rights.”).

³¹ *E.g.*, 78 AM. JUR. 2D *Waters* § 350 (2009).

³² Sienkiewicz, *supra* note 28, at 131.

³³ *E.g.*, Kevin J. Smith, *Permitting a Natural Flow in a Prior Appropriation System*: Decay v. United States Fish and Wildlife Service, 1 GREAT PLAINS NAT. RESOURCES J. 97, 104 (1996) (“To receive a water permit two initial questions must be addressed: (1) would this appropriation impair existing rights, and (2) is there water available for appropriation.”); A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 5:30 (2009).

³⁴ *E.g.*, 78 AM. JUR. 2D *Waters* § 351 (2009) (“It is the very essence of the doctrine of prior appropriation that as between persons claiming water by appropriation, he or she has the best right who is first in time, and that the prior appropriator is entitled to the water to the extent appropriated to the exclusion of any subsequent appropriator.”); see also *Empire Lodge Homeowners’ Ass’n v. Moyer*, 39 P.3d 1139, 1149 (Colo. 2001) (stating senior appropriators’ rights are superior to the rights of junior appropriators).

³⁵ *E.g.*, 78 AM. JUR. 2D *Waters* § 350; *United States v. Alpine Land & Reservoir Co.*, 27 F. Supp. 2d 1230, 1243 (D. Nev. 1998).

³⁶ Wyoming State Engineer, *About the SEO*, <http://seo.state.wy.us/about.aspx> (last visited Nov. 23, 2009); see also MacKinnon & Fox, *supra* note 19, at 376.

appropriation intertwines with the concept of beneficial use, and one cannot discuss appropriation without discussing beneficial use as well.³⁷

C. Beneficial Use

States located in the dry western part of the United States use the doctrine of beneficial use to prevent wasting scarce water resources within their borders; consequently, beneficial use is the single most important public policy underlying western water law.³⁸ The requirement of a beneficial use for the acquisition and use of the state's surface water is statutory in prior appropriation states.³⁹ Similarly, Wyoming also requires, by statute, a permit for the beneficial use of groundwater.⁴⁰

³⁷ See MacKinnon & Fox, *supra* note 19, at 375–78; C. Stephen Herlihy, Comment, *Trading Water For Gas: Application of the Public Interest Review to Coalbed Methane Produced Water Discharge in Wyoming*, 9 WYO. L. REV. 455, 463–65 (2009).

³⁸ E.g., *Alpine Land & Reservoir Co.*, 27 F. Supp. 2d at 1243; Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 53 n.7 (Colo. 1999); Mark Squillace, *A Critical Look at Wyoming Water Law*, 24 LAND & WATER L. REV. 308, 323–24 (1989); Herlihy, *supra* note 37, at 463.

³⁹ Compare WYO. STAT. ANN. § 41-3-101 (2009):

Beneficial use shall be the basis, the measure and limit of the right to use water at all times, not exceeding the statutory limit except as provided by W.S. 41-4-317. In addition to any beneficial use specified by law or rule and regulation promulgated pursuant thereto, the use of water for the purpose of extracting heat therefrom is considered a beneficial use subject to prior rights. Water being always the property of the state, rights to its use shall attach to the land for irrigation, or to such other purposes or object for which acquired in accordance with the beneficial use made for which the right receives public recognition, under the law and the administration provided thereby.

with COLO. REV. STAT. ANN. § 37-92-103(4) (West 2009):

Beneficial use is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife. For the benefit and enjoyment of present and future generations, "beneficial use" shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree.

⁴⁰ WYO. STAT. ANN. § 41-3-930(a) (2009).

Any person who intends to acquire the right to beneficial use of any underground water in the state of Wyoming, shall, before commencing construction of any well or other means of obtaining underground water or performing any work in connection with construction or proposed appropriation of underground water or any manner utilizing the water for beneficial purposes, file with the state engineer an application for a permit to make the appropriation

In Wyoming, the fact a beneficial use is a necessity for the acquisition of any water right is vital to the state's ownership of the water.⁴¹

The Wyoming State Engineer's Office declared a beneficial use of water results in facilitating the development of coal bed methane.⁴² It also recognizes the possibility of subsequent beneficial uses after extraction of the water, although it does not currently require a further use.⁴³ Clearly, Wyoming recognizes the water extracted during coal bed methane production can be used for a further recognized beneficial use and, when so used, the State Engineer requires another water right.⁴⁴

As mentioned, when one requests a right to appropriate water, the state entity issuing such rights must take into consideration the harm to other water right holders and whether there is water to appropriate from the water source.⁴⁵ One such potential harm resulting from coal bed methane production involves the interference with existing water rights resulting from removal of the produced water from groundwater aquifers.⁴⁶

and shall not proceed with any construction or work until a permit is granted by the state engineer The application shall contain the name and post-office address of applicant or applicants, a detailed description of the proposed use, the location by legal subdivision of the proposed well or other means of obtaining underground water, the estimated depth of the proposed well, the quantity of water proposed to be withdrawn and beneficially utilized in gallons per minute and acre-feet per calendar year, the location by legal subdivision of the area or point of use shall be provided, and such other information as the state engineer may require.

Id.

⁴¹ MacKinnon & Fox, *supra* note 19, at 375; Herlihy, *supra* note 37, at 464–65.

⁴² WYOMING STATE ENGINEER, *supra* note 11, at 1 (“The intentional production, or appropriation, of ground water for the [coal bed methane] production led to the designation of [coal bed methane] as a *beneficial use* of water and subsequently, to a requirement for a permit to appropriate the ground water.”).

⁴³ *Id.* “Coal seams in many areas of Wyoming have been and continue to be important sources of ground water to appropriators for uses including, but not limited to, stock and domestic.” *Id.* However, “[n]o additional permitting is required if there is no additional beneficial use other than [coal bed methane] production.” *Id.*

⁴⁴ *Id.* (“[W]ater that is discharged to the surface or discharged to a new or existing reservoir may have additional permitting requirements through the [State Engineer's Office].”).

⁴⁵ *E.g.*, Smith, *supra* note 33, at 104 (“To receive a water permit two initial questions must be addressed: (1) would this appropriation impair existing rights, and (2) is there water available for appropriation.”); *see also* TARLOCK, *supra* note 33 (“Water is distributed by state or local water officials who are generally limited to the enforcement of previously established rights.”).

⁴⁶ *See* Duffy, *supra* note 25, at 416 (explaining how coal bed methane development hinders aquifer recharge).

D. Lowering of Groundwater Aquifers

The coal seams where methane is found are technically considered aquifers.⁴⁷ Coal bed methane reserves lead to problems involving the lowering of aquifer water levels and the ability to recharge such aquifers.⁴⁸ The removal of water in connection with coal bed methane production directly affects the recharge of aquifers and the lowering of water tables.⁴⁹ According to one commentator, “In addition to lowering water tables and drying up household and livestock wells, such massive pumping would hinder the ability of aquifers to recharge, a critical issue in any circumstance, but certainly in the middle of a . . . drought.”⁵⁰ The point of recharge for coal bed methane aquifers may be miles away from the diversion and well sites.⁵¹ Consequently, recharge typically takes between a few years to twenty years.⁵² The ability of aquifers to recharge is of particular concern in states whose water resources are all, or almost all, appropriated because when groundwater sources are not recharged, individual appropriation rights are adversely affected.⁵³ Water found in the coal bed methane development process is in every way groundwater, and the implications and issues surrounding the recharging of aquifers trickle down to coal bed methane production.⁵⁴

⁴⁷ Montana State University, The Department of Land Resources and Environmental Sciences, Water Quality and Irrigation Management, Coal Bed Methane Frequently Asked Questions, http://waterquality.montana.edu/docs/methane/cbmfaq.shtml#are_coal_seams_aquifers (last visited Nov. 23, 2009).

⁴⁸ Duffy, *supra* note 25, at 416.

⁴⁹ JAMES R. KUIPERS ET AL., COAL BED METHANE-PRODUCED WATER: MANAGEMENT OPTIONS FOR SUSTAINABLE DEVELOPMENT 26–30 (draft, Aug. 2004), http://www.northernplains.org/files/Coal_Bed_Methane_Water_Study_8_25_04.pdf (stating that as a result of rapid coal bed methane development in the Powder River Basin, and in other basins throughout the west, thousands of water wells will experience drops in water levels and springs flow rates will decrease or totally dry up).

⁵⁰ Duffy, *supra* note 25, at 416.

⁵¹ Montana State University, *supra* note 47 (defining aquifer recharge as the process by which surface water and precipitation is absorbed into the ground and penetrates the aquifer system).

⁵² *Id.*

⁵³ Sienkiewicz, *supra* note 28, at 132 (“It is thus possible that the entire volume of water in a river, stream or lake [or underground aquifer] may be allocated to appropriators at any given period in time”); see also *Fundingsland v. Colo. Ground Water Comm’n*, 468 P.2d 835, 839 (Colo. 1970) (stating when more water is withdrawn from an aquifer than is recharged, mining conditions occur).

⁵⁴ See KUIPERS *supra* note 49, at 30. (“Dropping water levels and decreased hydrostatic pressure in confined aquifers decreases the discharge to springs, streams, ponds, and wetlands connected to the aquifers. Springs, streams, ponds, and wetlands that are hydraulically connected to aquifers that are being pumped heavily may experience reduced recharge or may even dry up if they rely mainly on groundwater as their water source.”).

This comment next provides a summary of recent legal developments related to the legal status of coal bed methane produced water in Colorado, Montana, and Wyoming.⁵⁵ First, a relatively new development in Colorado is addressed.⁵⁶

E. Colorado's Approach: The Case of Vance v. Wolfe

In April of 2009, the Colorado Supreme Court issued its opinion in the case of *Vance v. Wolfe*.⁵⁷ The court considered whether the water produced in association with coal bed methane extraction was a beneficial use and whether water captured as part of the coal bed methane process should be brought under the supervision of Colorado's prior appropriation system.⁵⁸

In *Vance*, the plaintiff ranchers used the water obtained via their water rights for the recognized beneficial uses of irrigation, stock watering, domestic uses, farming, and maintaining fisheries.⁵⁹ The ranchers' water rights were close to an area of substantial coal bed methane production, and, at the time, no water right was required prior to extracting groundwater for coal bed methane development.⁶⁰ The ranchers argued the water produced from the coal bed methane development constituted an out of priority appropriation causing harm to their senior water rights, and the water produced in coal bed methane development was a beneficial use requiring permitting.⁶¹ In contrast, the coal bed methane producers argued water production was merely a byproduct, or nuisance, of obtaining the methane and, therefore, not a beneficial use subject to state permitting.⁶²

First, the Colorado Supreme Court rejected the coal bed methane producers' nuisance argument.⁶³ Second, the court declared the production of water in coal bed methane extraction is a beneficial use because the capture of water is a vital

⁵⁵ See *infra* notes 57–125 and accompanying text.

⁵⁶ See *infra* notes 57–77 and accompanying text.

⁵⁷ 205 P.3d 1165 (Colo. 2009).

⁵⁸ *Id.* at 1168.

⁵⁹ *Id.*

⁶⁰ See *id.* (discussing the ranchers' claims that their water rights were being harmed by the coal bed methane producers capturing the groundwater out of priority).

⁶¹ *Id.* (arguing water diverted in association with coal bed methane production constituted a beneficial use requiring a water right for the capture of the water).

⁶² *Id.* at 1169.

⁶³ *Id.* at 1169–70. The Colorado Supreme Court held precedent from a line of gravel cases demonstrated that the fact water may become a nuisance after it has been captured (that is, after it has been beneficially used) does not prevent the finding that the process of groundwater retrieval is a beneficial use. See *id.* at 1169–70. Citing the gravel case of *Three Bells*, and making an inference from the gravel case of *Zigan*, the Colorado Supreme Court recognized the gravel pits were not dug for the purposes of capturing groundwater, and the diverted water affected the different aspects of the mining operation. *Id.* at 1170 (citing *Three Bells Ranch Assocs. v. Cache La Poudre Water Users*

and necessary part of the methane retrieval process.⁶⁴ Furthermore, the presence and subsequent control of the diverted water made the capture of methane gas possible.⁶⁵ The *Vance* Court held the dewatering of coal bed methane aquifers by coal bed methane companies without an appropriation right to remove water harmed senior water right holders.⁶⁶

Since Colorado had never viewed this use of water as an appropriation, the finding of a beneficial use placed coal bed methane produced water into the priority system.⁶⁷ Under the prior appropriation doctrine, junior users cannot interfere with the rights of a senior water right holder; if the senior water right holder is not getting his entire allotment, the junior water right holder must stop using the water.⁶⁸ Thus, based on the court's decision, Colorado law no longer allows for the removal of produced groundwater out of priority; when a developer wants to remove the water, the developer must first get an appropriation right from the Colorado State Engineer.⁶⁹

The Colorado Supreme Court's holding provides some protection for water appropriators affected by coal bed methane production.⁷⁰ As a result of this holding, Colorado does not allow the removal of this groundwater out of priority by coal bed methane producers; thus, when one wants to remove such water, one must obtain an appropriation and use the water accordingly.⁷¹ However, the

Ass'n, 758 P.2d 164 (Colo. 1988); *Zigan Sand & Gravel, Inc. v. Cache La Poudre Water Users Ass'n*, 758 P.2d 175 (Colo. 1988)). The Colorado Supreme Court drew from these gravel cases because the court found the capturing of groundwater resulted in "the inevitable result of the excavating pits to a depth below the water table." *Id.* In *Vance*, the coal bed methane producers set forth a temporal argument for distinguishing the gravel cases: in the gravel cases, the beneficial use occurred *after* the capture of the water (after the water was captured in the gravel cases, the water was used for wildlife and recreation) whereas the water use in coal bed methane development occurs *simultaneously* to the capture. *Id.* The court held the gravel cases did not impose a requirement that beneficial use occur subsequent to or collateral to the withdrawal of water. *Id.* The *Vance* Court found a beneficial use in the production of water in coal bed methane extraction because the use of water in the coal bed methane process, which is coincidental to the extraction, is a vital and necessary part of the methane retrieval process. *Id.* Furthermore, it is the presence and subsequent control of the diverted water that makes the capture of methane gas possible. *Id.*

⁶⁴ *Id.* at 1170.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1171–72.

⁶⁷ *See id.* at 1170 (explaining the result of finding the producers must acquire a water right, is that the producers would take their water right subsequent (junior) to the ranchers' rights).

⁶⁸ *E.g.*, *Sienkiewicz*, *supra* note 28, at 132.

⁶⁹ *Vance*, 205 P.3d at 1167.

⁷⁰ *See supra* notes 67–69 and accompanying text.

⁷¹ *Vance*, 205 P.3d at 1167.

Colorado Supreme Court failed to provide additional protection by addressing what should happen to the water after its extraction from the methane seam.⁷²

The dissent in *Vance* agreed with the majority that coal bed methane produced groundwater is a beneficial use and requires an appropriation right; however, the dissent did not believe such a conclusion should end the court's analysis.⁷³ The dissent argued the majority should have taken the next step by requiring a further beneficial use of the captured water; indeed, never before in Colorado could extraction alone satisfy the beneficial use requirement.⁷⁴

The Colorado Supreme Court's decision leaves the future unclear.⁷⁵ The Colorado State Engineer's Office has proposed legislation to remedy some of the problems addressed by the *Vance* dissent.⁷⁶ The wisdom of Colorado's experience is important because Wyoming's regulation of coal bed methane produced groundwater faces a problem similar to the problem in Colorado.⁷⁷

⁷² See *id.* at 1165.

⁷³ See *id.* at 1174 (Coats, J., concurring in part and dissenting in part).

⁷⁴ *Id.*

⁷⁵ Ken Wonstolen, *Vance Decision Throws Oil and Gas Into Uncharted Waters*, ENERGY NEWS ALERT, at 1–3, <http://www.bwenergylaw.com/News/documents/VanceDecisionThrowsOilandGasIntoUnchartedWaters.pdf> (last visited Nov. 23, 2009) (“[T]he decision of the [*Vance*] water court did not turn on proof of tributary status, or evidence of injury to the plaintiffs’ water rights. Instead, it began with the assumption, as did the [Colorado] Supreme Court, that the case involved tributary water.”); see also *Vance*, 205 P.3d at 1174 (stating a further use of water is not required).

⁷⁶ Wonstolen, *supra* note 75, at 2 (claiming the Colorado General Assembly enacted House Bill 1303 to address some of the issues raised by the *Vance* decision). The Colorado State Engineer is permitted to engage in rulemaking proceedings concerning the “dewatering of geologic formations by withdrawing nontributary ground water to facilitate or permit mining of minerals.” COLO. REV. STAT. ANN. § 37-90-137(7)(c) (West 2009). Rulemaking proceedings are now occurring by means of House Bill 1303, which has three major components:

- First and foremost, the bill establishes a “timeout” from the application of water well permitting and water rights administration to oil and gas wells until March 31, 2010.
- During this timeout period, the [State Engineer’s Office] is authorized to conduct a rulemaking to establish criteria for determining the (non)tributary status of oil and gas produced water.
- Those [coal bed methane] wells determined to be tributary must be permitted as water wells as of April 1, 2010, but will be allowed to operate pursuant to temporary “substitute water supply plans” until 2013, when such plans must be converted to water court-approved augmentation plans.

Wonstolen, *supra* note 75, at 2–3; see also HOUSE BILL 1303 SUMMARY, COLORADO STATE LEGISLATURE 2 (March 30, 2009), [http://www.leg.state.co.us/CLICS/CLICS2009A/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/25ef23eae1d23b288725758b007ce0a5/\\$FILE/090401AttachS.pdf](http://www.leg.state.co.us/CLICS/CLICS2009A/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/25ef23eae1d23b288725758b007ce0a5/$FILE/090401AttachS.pdf) (last visited Nov. 23, 2009) [hereinafter COLORADO STATE LEGISLATURE].

⁷⁷ See *infra* notes 147–52 and accompanying text (describing the similarities between Colorado and Wyoming).

F. Wyoming's Water Permitting System and Coal Bed Methane

In Wyoming, the doctrine of prior appropriation applies, and the application of water to a beneficial use is an element of a water right.⁷⁸ Wyoming delegates the responsibility of considering and approving water use applications to the State Engineer's Office.⁷⁹ The State Engineer's Office is not to prefer one beneficial use over another and must give equal consideration to all beneficial uses.⁸⁰

According to the Wyoming State Engineer's Office, extracting coal bed methane groundwater is a beneficial use because the water is intentionally produced in the development process.⁸¹ The intentional production of this water is also the reason why coal bed methane producers must get a permit before appropriating groundwater.⁸² Producers must also obtain a permit when disposing of produced water by storing it because the State Engineer recognizes storage as another beneficial use requiring its own permit.⁸³

The State Engineer's Office requires the submission and approval of an application for appropriation of groundwater for each coal bed methane well before the drilling of the coal bed methane well begins.⁸⁴ The State Engineer

⁷⁸ WYOMING STATE ENGINEER, *supra* note 11, at 1 ("Wyoming water law requires that water rights be administered on the basis of prior appropriation, giving rise to the necessity of permitting all beneficial uses from the water source in question.").

⁷⁹ WYO. STAT. ANN. § 41-4-503 (2009).

[I]t shall be the duty of the state engineer to approve all applications made in proper form, which contemplate the application of the water to a beneficial use and where the proposed use does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare. But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, it shall be the duty of the state engineer to reject such application and refuse to issue the permit asked for.

Id.; Wyoming State Engineer, *supra* note 36.

⁸⁰ THE RUCKELSHAUS REPORT, *supra* note 4, at 33.

⁸¹ WYOMING STATE ENGINEER, *supra* note 11, at 1. This type of use is considered a non-consumptive beneficial use "similar to water used for hydropower and instream flow in that the full amount of the water remains available for appropriation after the initial use has been completed." THE RUCKELSHAUS REPORT, *supra* note 4, at 35.

⁸² WYOMING STATE ENGINEER, *supra* note 11, at 1 ("The intentional production, or appropriation, of ground water for the [coal bed methane] production led to the designation of [coal bed methane] as a beneficial use of water and subsequently, to a requirement for a permit to appropriate the ground water."); *see also* THE RUCKELSHAUS REPORT, *supra* note 4, at 35.

⁸³ *See* MacKinnon & Fox, *supra* note 19, at 385 (stating the storage of water may be a beneficial use); WYOMING STATE ENGINEER, GUIDANCE FLOW CHART FOR PERMITTING OF CBM PRODUCED WATER BY THE WYOMING STATE ENGINEER'S OFFICE (SEO) (Apr. 27, 2004), http://seo.state.wy.us/PDF/CBM_FlowChart.pdf.

⁸⁴ WYOMING STATE ENGINEER, *supra* note 11, at 2.

considers all information provided in the application when considering whether to approve the application and issue a permit, and the State Engineer also considers what conditions to attach to the water right.⁸⁵ Wyoming's permitting system is supposed to consider whether a coal bed methane producer's well interferes with the wells of other water appropriators in the area.⁸⁶ However, the permitting process allows for the disposal of captured water and does not require a further beneficial use.⁸⁷

The Wyoming State Engineer is the only state entity regulating the quantity of coal bed methane produced water.⁸⁸ The Wyoming state legislature has been reluctant to address issues surrounding this produced water; between 1997 and 2007, 39 bills were proposed, 12 were passed, none of which focused on beneficial use or re-use of produced water.⁸⁹ Similarly, the Wyoming Supreme Court recently had an opportunity to articulate additional guidelines for the regulation of coal bed methane water but never reached the merits of the claim.⁹⁰

G. *The Case of William F. West Ranch, L.L.C. v. Tyrrell*

In December 2008, the Wyoming Supreme Court heard the coal bed methane groundwater case of *William F. West Ranch, L.L.C. v. Tyrrell*.⁹¹ The plaintiffs sought a judgment declaring the Wyoming State Engineer's management of coal bed methane was in violation of the state constitution.⁹² The plaintiffs owned property in the Powder River Basin in northeastern Wyoming.⁹³ They claimed their property and water rights were adversely affected by coal bed methane water production because their wells dried up and they suffered other injuries.⁹⁴ The

⁸⁵ *Id.*

⁸⁶ MacKinnon & Fox, *supra* note 19, at 373 ("Wyoming's water rights permitting process keeps an eye out to be sure CBM wells don't produce water by interfering with neighbors' wells . . .").

⁸⁷ MacKinnon & Fox, *supra* note 19, at 373 ("Wyoming's water right permitting process . . . accepts a producer's choice simply to dispose of the water once it reaches the surface."); see Kear, *supra* note 4, at 9 ("Wyoming does not require [coal bed methane] discharge water to be reinjected, treated, or measured for impacts to fisheries and wildlife.").

⁸⁸ See WYOMING STATE ENGINEER, *supra* note 11, at 1 (requiring a permit to extract coal bed methane produced water because it is a beneficial use of water).

⁸⁹ Kear, *supra* note 4, at 9 (examining the different proposed bills in Wyoming for regulating coal bed methane produced water; only a few bills concerning taxation of coal bed methane were enacted).

⁹⁰ See *William F. West Ranch, L.L.C. v. Tyrrell*, 206 P.3d 722 (Wyo. 2009).

⁹¹ *Id.*

⁹² *Id.* at 725.

⁹³ *Id.*

⁹⁴ *Id.*

plaintiffs claimed the State Engineer failed to administer the coal bed methane produced water as Wyoming water law required.⁹⁵ The state filed a motion to dismiss claiming the plaintiffs lacked standing.⁹⁶ The district court concluded there was no justiciable controversy present because the four-part test for a justiciable controversy was not satisfied in light of current legislative efforts in the area.⁹⁷ The Wyoming Supreme Court agreed with the decision and reasoning of the district court and reiterated the plaintiffs' claims for relief were too vague to be justiciable.⁹⁸

The Wyoming Supreme Court did not resolve whether water taken from coal bed methane production is a beneficial use or whether the process of capturing water in order to mine coal bed methane affected the groundwater rights of the plaintiffs.⁹⁹ Nevertheless, the Wyoming Supreme Court recognized it may need to address this issue in the future:

By ruling that the Court does not have jurisdiction over this case, we do not want to leave the impression that we approve of the State's administration of [coal bed methane] water. West and Turner [the plaintiffs] raise serious allegations of damages to their property from [coal bed methane] water and failures on the part of the State to properly regulate [coal bed methane] water statewide. The plaintiffs' failure to connect any particular state action to their harm prevents them from establishing justiciability here. Nevertheless, in the event we are presented with a true justiciable controversy in another case, we will not hesitate to determine whether the State's processes meet the constitutional and statutory directives.¹⁰⁰

⁹⁵ *Id.* at 725. ("State is not regulating [coal bed methane] water production in compliance with Wyoming's constitution or statutes and that their property has been damaged by [coal bed methane] water.").

⁹⁶ *Id.* at 725–26 ("[Plaintiffs] 'intend this to be a public interest lawsuit' and they had not alleged individual harms that would be remedied by their requested relief.").

⁹⁷ *Id.* at 726–27 (citing *Brimmer v. Thomson*, 521 P.2d 574, 578 (Wyo. 1974)) ("[The Wyoming Supreme Court] adopted a four-part test for determining whether a party presents a justiciable controversy to maintain a declaratory judgment action in Wyoming."). The four-part test was not satisfied because the Wyoming state legislature and the executive branch were exploring different avenues concerning regulation of coal bed methane groundwater. *Id.*

⁹⁸ *Id.* at 730 ("[The plaintiffs'] claims and requests for relief are simply too amorphous to be justiciable.").

⁹⁹ *Id.* at 725.

¹⁰⁰ *Id.* at 737.

Without providing answers to these questions, however, the status of coal bed methane produced water in Wyoming is still in limbo.¹⁰¹ In the meantime, the Wyoming state legislature must take steps to address this problem.¹⁰²

H. Montana's Statutory Approach to Coal Bed Methane Groundwater

Montana's state legislature acted on the coal bed methane groundwater issue by statutorily providing methods for regulating the water captured in coal bed methane production and protecting water right holders.¹⁰³ In Montana, water is defined as a byproduct of coal bed methane production and developers are not required to secure an appropriation water right before operating the coal bed methane well and extracting the water.¹⁰⁴ Montana, however, requires developers to use the produced water in a limited number of ways.¹⁰⁵ According to the applicable statute, the water must be: (1) used in other beneficial uses, such as irrigation; (2) reinjected into the coal bed methane aquifer; (3) discharged to the surface subject to permitting regulations; or (4) managed in another way allowable by state law.¹⁰⁶

Montana also requires the developer, prior to the drilling the well, to notify and offer a mitigation agreement to each water right holder affected by the removal of coal bed methane groundwater.¹⁰⁷ This provision of the statute ensures qualified water right holders some protection against developers capturing huge quantities of water.¹⁰⁸ The mitigation agreement must address the loss of the water

¹⁰¹ For the Wyoming Supreme Court to make a determination on this issue, petitioners must have adequate standing by showing a justiciable controversy. *See id.* at 730. The petitioners must also exhaust all administrative remedies before bringing the case to the district court. *Id.* at 735–36. Furthermore, a petitioner must not make any of the same procedural errors the plaintiffs in *William West Ranch* made when bringing their declaratory judgment action. *Id.* at 730–33. *See generally* Amy M. Staehr, Case Note, *The Wyoming Supreme Court Constricts the Public Interest Exception of the Declaratory Judgments Act*, 10 WYO. L. REV. 141 (2010).

¹⁰² *See infra* notes 160–77 and accompanying text (recommending statutory change to address the issues surrounding coal bed methane produced groundwater).

¹⁰³ *See* MONT. CODE ANN. §§ 82-11-175, 76-15-902 to -905 (2008).

¹⁰⁴ Duffy, *supra* note 25, at 423.

¹⁰⁵ MONT. CODE ANN. § 82-11-175(2)(a)–(d).

¹⁰⁶ *Id.*

¹⁰⁷ § 82-11-175(3).

¹⁰⁸ *See* § 82-11-175(3)(a)(i)–(ii) (“Prior to the development of a coal bed methane well that involves the production of ground water from an aquifer that is a source of supply for appropriation rights or permits to appropriate . . . the developer of the coal bed methane well shall notify and offer a reasonable mitigation agreement to each appropriator of water who holds an appropriation right or a permit to appropriate . . . that is for ground water and for which the point of diversion is within: (i) 1 mile of the coal bed methane well; or (ii) one-half mile of a well that is adversely affected by the coal bed methane well.”).

and provide for replacement water of the appropriation right adversely affected by the coal bed methane well.¹⁰⁹ A mitigation agreement is required only for the loss of groundwater production, typically in the form of reduced groundwater well productivity, directly caused by the coal bed methane production.¹¹⁰ If the loss of production from the water source is not caused by the coal bed methane development, the mitigation agreement need not address nor supplement the lost water or well productivity.¹¹¹ Consequently, when drilling for coal bed methane there is always the requirement of a mitigation agreement; however, the producer need not supplement lost water productivity of a well when the decreased activity of the well is not the result of the coal bed methane production.¹¹²

Montana also established by statute the Coal Bed Methane Protection Program—a program to compensate affected water rights for particular injuries.¹¹³ The legislature delegated administration of this program to conservation districts.¹¹⁴ These districts must either have coal bed methane within their boundaries or water in their boundaries that is, or will be, adversely affected by coal bed methane production.¹¹⁵ The Montana legislature stated the purpose of the Coal Bed Methane Protection Program is to compensate “private landowners or water right holders for damage caused by coal bed methane development.”¹¹⁶ The conservation districts impose grievance procedures for those whose water rights are adversely affected by coal bed methane production.¹¹⁷ Even when a coal

¹⁰⁹ § 82-11-175(3)(b) (“The mitigation agreement must address the reduction or loss of water resources and must provide for prompt supplementation or replacement of water from any natural spring or water well adversely affected by the coal bed methane well.”).

¹¹⁰ *Id.* (“The mitigation agreement is not required to address a loss of water well productivity that does not result from a reduction in the amount of available water because of production of ground water from the coal bed methane well.”).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ § 76-15-905.

¹¹⁴ § 76-15-905(1).

¹¹⁵ *Id.*

¹¹⁶ *Id.*; see also Montana Department of Natural Resources & Conservation, Montana Coal Bed Methane, <http://www.dnrc.mt.gov/cardd/CBM/default.asp> (last visited Nov. 15, 2009) (“The Program was established by the 2001 Legislature for the purpose of ‘compensating private landowners and water right holders for damage to land and to water quality and availability that is attributable to the development of coal bed methane wells.’”).

¹¹⁷ MONT. CODE ANN. § 76-15-905(2)(a)–(d). Grievance procedures must include:

- (a) a method for submitting an application for compensation for damages caused by coal bed methane development;
- (b) a process for determining the cost of the damage to land, surface water, or groundwater, if any, caused by coal bed methane development;
- (c) the development of eligibility requirements for receiving compensation that include an applicant’s access to existing sources of state funding, including state-mandated payments, that compensate for damages;
- and (d) criteria for ranking applications related to available resources.

bed methane producer complies with the Coal Bed Methane Protection Program, the statute does not relieve the producers of their liability or of their responsibility to comply with any other applicable provision of law found in Montana's legal code.¹¹⁸

Eligibility for compensation under Montana's Coal Bed Methane Protection Program requires a demonstration of damage caused by coal bed methane production.¹¹⁹ Compensation for damages is awarded only when the harm resulted from "the contamination, diminution, or interruption of surface water or groundwater."¹²⁰ Under this program, an eligible landowner may be compensated for damages under three scenarios: loss of value in the land, loss of value in improvements the affected party made to the land, or the loss of agricultural production and income caused by coal bed methane development.¹²¹ However, the receipt of compensation and damages under this statute requires the affected party to show the particular producer that caused the harm, in all likelihood, will not adequately compensate the adversely affected party.¹²² Further, Montana limits the damages allowable under this statute by providing that damages rewarded may not exceed 75% of the cost of the harm caused and may not be greater than \$50,000.¹²³

¹¹⁸ § 76-15-902(5)–(6).

(5) The legislature . . . declares that the provisions of this part do not relieve coal bed methane developers or operators that own, develop, or operate coal bed methane wells and collection systems of their legal obligation to compensate landowners and water right holders for damages caused by the development of coal bed methane. (6) The legislature further declares that the provisions of this part do not relieve coal bed methane developers or operators from: (a) any liability associated with the exploration or development of coal bed methane; or (b) the responsibility to comply with any applicable provision of Titles 75, 82, and 85 and any other provision of law applicable to the protection of natural resources or the environment.

Id.

¹¹⁹ § 76-15-905(3)(a)–(c) ("An eligible recipient for compensation includes private landowners and water right holders who can demonstrate as the result of damage caused by coal bed methane development: (a) a loss of agricultural production or a loss in the value of land; (b) a reduction in the quantity or quality of water available from a surface water or ground water source that affects the beneficial use of water; or (c) the contamination of surface water or ground water that prevents its beneficial use."). It is unclear upon whom the burden of demonstrating this will fall. *See id.*

¹²⁰ § 76-15-905(4)(b).

¹²¹ § 76-15-905(4)(a) ("A payment made under section 4(a) may only cover land directly affected by coal bed methane development.").

¹²² § 76-15-905(5).

¹²³ § 76-15-905(6).

In addition to the mentioned statutory scheme, Montana requires another water right when groundwater taken from coal bed methane production is used for further beneficial uses such as for stock ponds, wildlife ponds, or irrigation.¹²⁴ In that sense, Montana is building on its prior appropriation water law by requiring an appropriation for the further use of coal bed methane produced water.¹²⁵

III. ANALYSIS

The current Wyoming regulatory scheme for coal bed methane produced water does not adequately address many of the problematic issues regarding quantity and quality of water.¹²⁶ Wyoming's only stride regarding the management and use of this extracted water is recognizing the production of this water as a beneficial use.¹²⁷ The Wyoming Legislature, Wyoming Supreme Court, and Wyoming State Engineer's Office have all failed to provide satisfactory methods for the management and use of this water after extraction and for the protection of other water appropriators. As a result, coal bed methane producers are allowed to let the produced water sit in storage pits, evaporate, or be discharged.¹²⁸ Because of Wyoming's arid nature, Wyoming is a prior appropriation state and the waste of water is heavily disfavored.¹²⁹ Nevertheless, water produced incident to coal bed methane development is being wasted.¹³⁰

To sufficiently address the issues surrounding the quantity of coal bed methane produced water, Wyoming must continue to find the coal bed methane production process falls within the constraints of its water law system.¹³¹ However, Wyoming's beneficial use analysis cannot end at this juncture because such an analysis only leads to problems regarding the use of this water and uncertainty concerning the protection of this resource and of other appropriators.¹³² This

¹²⁴ Montana Department of Environmental Quality, Coal Bed Methane, http://www.deq.state.mt.us/coalbedmethane/Laws_regulations_permits.asp (last visited Nov. 15, 2009).

¹²⁵ See *id.* (stating another water right is required when putting produced water to further beneficial uses).

¹²⁶ THE RUCKELSHAUS REPORT, *supra* note 4, at 2.

¹²⁷ See WYOMING STATE ENGINEER, *supra* note 11, at 1 (discussing the Wyoming State Engineer's Office's determination that the production of coal bed methane is a beneficial use of water).

¹²⁸ See *id.* (listing some methods of disposing of produced water); WYOMING STATE ENGINEER, *supra* note 83.

¹²⁹ See 78 AM. JUR. 2D *Waters* § 350 (2009) (“[In a prior appropriation system] an appropriation will not be sustained in the wasteful use of the water.”).

¹³⁰ Darrin, *supra* note 20, at 323–34 (“[Prior appropriation] does not fit [coal bed methane] production primarily because . . . only a small percentage of [coal bed methane] byproduct water in Wyoming can be beneficially used itself. As a result, the rest is wasted.”).

¹³¹ See WYOMING STATE ENGINEER, *supra* note 11, at 2–3 (discussing the Wyoming State Engineer's Office current method of dealing with coal bed methane).

¹³² See *Vance v. Wolfe*, 205 P.3d 1165, 1174 (Colo. 2009) (Coats, J., concurring in part and dissenting in part) (explaining the requirement of using the water disappears).

comment first addresses the issues associated with solely treating produced water as a beneficial use; thereafter, this comment recommends Wyoming statutorily change its produced water laws to protect other water right holders and promote fuller uses of produced water.¹³³

A. The Inadequacy of Wyoming's Coal Bed Methane Laws: More Than Just a Finding That a Beneficial Use Exists in the Coal Bed Methane Production is Needed

When produced water is withdrawn from groundwater aquifers, the water stored in these systems is completely lost.¹³⁴ There is very little recharge of water; as a result, future opportunities to develop and use groundwater in these areas vanish.¹³⁵ Viewing the mere extraction of water alone as a beneficial use removes any obligation to make further beneficial use of the water, as explained by the dissent in the Colorado case of *Vance*.¹³⁶

As the *Vance* dissent points out, never before could extraction alone satisfy the beneficial use requirement.¹³⁷ Yet the Colorado Supreme Court interpreted beneficial use to include any purpose, so long as a successful and efficient diversion of water occurred.¹³⁸ Justice Coats's dissent raises the important question of whether the efficient diversion of water in coal bed methane production should end the beneficial use analysis.¹³⁹

In both Wyoming and Colorado, the mere extraction of water incident to coal bed methane development is a beneficial use; however, neither state requires a further beneficial use.¹⁴⁰ The *Vance* dissent correctly would force an additional

¹³³ See *infra* notes 134–77 and accompanying text.

¹³⁴ See KUIPERS, *supra* note 49, at 30 (articulating that surface water is interconnected with groundwater and the heavy pumping of aquifers will affect recharge and may cause the aquifer to dry up).

¹³⁵ See Montana State University, *supra* note 47 (stating recharge of coal bed methane aquifers can take up to twenty years).

¹³⁶ *Vance*, 205 P.3d at 1174 (Coats, J., concurring in part and dissenting in part) (articulating the problems of the majority holding in the Colorado case of *Vance v. Wolfe*).

¹³⁷ *Id.*

¹³⁸ *Id.* (“It appears . . . that the Majority interprets ‘beneficial use’ so broadly as to encompass virtually any diversion of the waters of the state that is not an inefficient way of accomplishing its purpose, whatever that purpose may be.”).

¹³⁹ See *id.* (“By so loosening the requirement of beneficial use for valid appropriations, and by tying its expanded definition of ‘beneficial use’ to constitutional protections against curtailing the right to appropriate unappropriated waters, I fear the Majority not only authorizes appropriation under the existing statutory scheme for virtually any reason but also inadvertently implies a constitutional limitation on the power of the legislature to limit this protection in the future.”).

¹⁴⁰ Compare *id.* at 1174 (claiming that a further beneficial use is not required), with WYOMING STATE ENGINEER, *supra* note 11, at 1–3 (articulating that a further beneficial use of this produced water is not required).

beneficial use of the produced groundwater whenever possible.¹⁴¹ The Colorado Supreme Court's failure to require a more traditional beneficial use—such as stock watering, irrigation, recreation, instream flows—for the water taken in coal bed methane production may create problems in the future.¹⁴² It is imperative Wyoming heed the *Vance* dissent's reflection on the possible lack of use of water and take steps to ensure water is put to a further beneficial use or reinjected into aquifers.¹⁴³

Wyoming's coal bed methane laws favor, and are designed to encourage, coal bed methane development because methane brings high revenues to the state.¹⁴⁴ The effect, however, is the loss of substantial quantities of water in a state with a limited water supply.¹⁴⁵ Requiring additional use of produced water may add to the cost of production, but it would also encourage more efficient water uses and would promote fuller use of the water resource.¹⁴⁶

Post-extraction management of produced water from coal bed methane development is similar in Colorado and Wyoming.¹⁴⁷ In Colorado, when water is disposed of by injecting it into a well or pit, those disposal methods fall under the jurisdiction of the Colorado Oil and Gas Conservation Commission.¹⁴⁸ Water discharged into the environment falls under the jurisdiction of the Colorado Department of Public Health and Environment: Water Quality Control

¹⁴¹ *Vance*, 205 P.3d at 1174 (Coats, J., concurring in part and dissenting in part).

¹⁴² *Id.* (stating never before was an efficient diversion the sole requirement for a beneficial use determination, thus implying new uses of water having an efficient diversion will be viewed as a beneficial use, and thereby making it imminent that the sole requirement of efficient diversion will be challenged in court or in the legislature).

¹⁴³ *Id.* (claiming a sole requirement of efficient diversion will be challenged in court or in the legislature); see also THE RUCKELSHAUS REPORT, *supra* note 4, at 52–54 (claiming beneficial use can be achieved by requiring additional beneficial uses of water).

¹⁴⁴ Duffy, *supra* note 25, at 431 (“The state’s laws, institutions, and regulatory procedures grant privileged access to oil and gas interests and facilitate [coal bed methane] exploration and development.”); see *id.* at 438 (“[T]he political environment in [Wyoming] has been very supportive of energy exploration.”); Kear, *supra* note 4, at 9 (“[Wyoming] State revenues from [coal bed methane] development totaled \$26 million in 2001 and the royalties projected from [coal bed methane] development could reach an estimated \$7.5 billion over the next 35 years.”) (citations omitted).

¹⁴⁵ See KUIPERS, *supra* note 49, at 30 (“Not only is the drawdown and removal of groundwater (aquifer depletion) . . . of concern, but the consequences related to . . . dewatering are vast.”); see also Sienkiewicz, *supra* note 28 (discussing the finite nature of the water resource).

¹⁴⁶ NAT’L ENERGY TECH. LAB. STRATEGIC CTR. FOR NATURAL GAS, *supra* note 23, at 5-4 to 5-9 (explaining the potential costs and current economic feasibility of the different coal bed methane disposal methods).

¹⁴⁷ See *infra* notes 148–52 and accompanying text.

¹⁴⁸ COLORADO STATE ENGINEER, COALBED METHANE STREAM DEPLETION ASSESSMENT STUDIES (2006), http://water.state.co.us/pubs/presentations/dwolfe_022806.pdf.

Division.¹⁴⁹ In Wyoming, the State Engineer's Office, the Wyoming Department of Environmental Quality, and the Wyoming Oil and Gas Conservation Commission currently share supervision of the water captured from coal bed methane production.¹⁵⁰ The Department of Environmental Quality is involved with water quality regulation, and the State Engineer's Office is involved with water right permitting.¹⁵¹ If further beneficial uses of coal bed methane water occur, further permitting under other administrative agencies is required.¹⁵²

B. Ensuring Protection of Existing Water Rights

In both Wyoming and Colorado, the lack of legislative and regulatory solutions to coal bed methane problems has led to litigation in search of remedies.¹⁵³ The Wyoming state legislature must actively take steps to address the issues surrounding the management of coal bed methane produced water and the potential harm to other water right holders and property owners.¹⁵⁴

The primary purpose of declaring a beneficial use in the production of coal bed methane is to ensure protection of other water rights.¹⁵⁵ Yet, the Wyoming State Engineer's Office is violating its statutory mandate in regulating coal bed methane produced water because its permitting process promotes groundwater development without clearly accounting for the possibility such development can

¹⁴⁹ *Id.*

¹⁵⁰ MacKinnon & Fox, *supra* note 19, at 373; Herlihy, *supra* note 37, at 461; THE RUCKELSHAUS REPORT, *supra* note 4, at 2.

¹⁵¹ MacKinnon & Fox, *supra* note 19, at 373; THE RUCKELSHAUS REPORT, *supra* note 4, at 2.

¹⁵² See WYOMING STATE ENGINEER, *supra* note 11, at 2–3.

¹⁵³ Compare *Vance*, 205 P.3d 1165 (addressing whether water captured in association with coal bed methane production constituted a beneficial use), with *William F. West Ranch, L.L.C. v. Tyrrell*, 206 P.3d 725 (Wyo. 2009) (failing to reach the merits on whether the State Engineer was adequately managing Wyoming's water law in regards to coal bed methane production). See generally THE RUCKELSHAUS REPORT, *supra* note 4, at 2 (claiming Wyoming's current regulatory scheme for coal bed methane produced water "has led to difficulties with respect to management of [coal bed methane] water, including gaps and overlays in regulatory coverage," lack of agency harmonization, and a "lack of regulatory certainty").

¹⁵⁴ See THE RUCKELSHAUS REPORT, *supra* note 4, at 52 (stating statutory revisions could remedy coal bed methane issues); see also Duffy, *supra* note 25, at 436 ("[C]ritics [of coal bed methane development] have been pushing the state to mandate surface owner agreements that would give ranchers and other landowners more input into the location of pipelines, roads, and other aspects of [coal bed methane] activity on their land.").

¹⁵⁵ See WYO. STAT. ANN. § 41-4-503 (2009) ("[W]here the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, it shall be the duty of the state engineer to reject such application and refuse to issue the permit asked for."); see also WYOMING STATE ENGINEER, *supra* note 11, at 1 ("Wyoming water law requires that water rights be administered on the basis of *prior appropriation*, giving rise to the necessity of permitting all beneficial uses from the water source in question.").

impair existing surface and groundwater uses.¹⁵⁶ Presumably, those with water rights near the proposed site of groundwater extraction for methane production could file a protest.¹⁵⁷ After that, it does not appear there is consideration of potential harm in the permitting process.¹⁵⁸ The State Engineer needs legislative direction to address such potential problems, especially considering that studies on Wyoming's coal bed methane produced water have specifically determined the current regulatory structure for coal bed methane produced water is insufficient.¹⁵⁹

C. Recommendation to Wyoming for Codification of Its Coal Bed Methane Laws Related to Water

Montana is the only state with a statutory regime for dealing with coal bed methane groundwater.¹⁶⁰ Montana avoids many of the issues involved with the extraction of coal bed methane groundwater by providing statutory guidance on

¹⁵⁶ *Contra* WYO. STAT. ANN. § 41-4-503 (“[W]here the proposed use conflicts with existing rights . . . it shall be the duty of the state engineer to reject such application and refuse to issue the permit asked for.”).

¹⁵⁷ *William West Ranch*, 205 P.3d at 735. The court stated:

[I]f the appropriate circumstances were presented, the Plaintiffs could petition the Board of Control for a determination of the quantity of water another water right holder is entitled to use. The Plaintiffs could also petition the district court . . . for review of a particular administrative action, such as the granting of a well permit or an adjudication order, so long as they could show that they were “aggrieved or adversely affected” by the agency action or inaction. Under such circumstances, the Plaintiffs could challenge the processes used by the State in making its decision and/or the legal and factual basis for the decision.

Id.

¹⁵⁸ *See generally id.* (discussing the Wyoming Supreme Court's reluctance to hear cases that have not presented a justiciable controversy). *See also* Duffy, *supra* note 25, at 438 (“The policymaking venues provide few opportunities for citizen input and few chances to litigate successfully in state court.”).

¹⁵⁹ Wyoming CBM Water Management Task Force, Final Recommendations, Power Point, <http://governor.wy.gov/Media.aspx?MediaId=214> (last visited Nov. 15, 2009) [hereinafter Wyoming CBM Water Management Task Force, Final Recommendations] (recommending the legislature develop a new statute for the management of water produced from coal bed natural gas operations requiring the limitation of discharged water to match the natural capacity of the channel); *see* THE RUCKELSHAUS REPORT, *supra* note 4; *see also* *William West Ranch*, 206 P.3d at 725. The Wyoming Supreme Court recognized:

[T]he Interim Report from the Wyoming Coal Bed Natural Gas Water Management Task Force (2006) . . . concluded: a. The State Engineer has determined that water production for CBM extraction is a beneficial use[;] b. The current regulatory structure is inadequate to protect downstream landowners; and c. The State Engineer lacks specific authority to regulate quantity of water discharge.

William West Ranch, 206 P.3d at 725 n.1.

¹⁶⁰ MONT. CODE ANN. §§ 82-11-175, 76-15-902 to -905 (2008); BRYNER, COALBED METHANE DEVELOPMENT IN THE INTERMOUNTAIN WEST, *supra* note 4, at 32.

the management options for the water captured.¹⁶¹ Montana protects its water right appropriators by providing for mitigation agreements and compensation to affected water right appropriators, despite not subjecting the produced water to the water permitting system.¹⁶² Wyoming should follow this approach to protect its own water appropriators.¹⁶³ Moreover, Wyoming should take a stricter stance than Colorado's legislative response to *Vance*.¹⁶⁴

Many in the legal and environmental communities advocate in favor of statutory control of coal bed methane produced water.¹⁶⁵ Statutorily mandating a further beneficial use or reinjection of produced water would provide for more efficient and long-term beneficial use of Wyoming's water.¹⁶⁶

D. The Benefits of Statutory Change

Several legal and environmental commentators argue Wyoming's method of regulating produced water is problematic because only a small fraction of the produced water is actually used.¹⁶⁷ Issues will continuously arise concerning the

¹⁶¹ MONT. CODE ANN. § 76-15-905 (requiring the offering of a mitigation agreement by coal bed methane producers to those presumed affected by the operation, determining how grievance procedures are to be set up and administered, and determining the extent of damages that may be awarded to adversely affected parties).

¹⁶² *Id.*

¹⁶³ See THE RUCKELSHAUS REPORT, *supra* note 4, at 52 (describing why statutory change would be valuable in Wyoming).

¹⁶⁴ The Colorado State Engineer is currently in the rulemaking stages with House Bill 1303 to address some of the problems of the *Vance* holding. Holland & Hart LLP, Publications, Produced Water Rulemaking Announced by State Water Officials, <http://www.westernwaterlaw.com/articles/ProducedWaterRulemaking.html> (last visited Nov. 15, 2009). However, the Colorado State Engineer will not address the issue of requiring a further beneficial use nor always require water permitting in coal bed methane production because current Colorado water law does not require a permit for those oil and gas wells that produce nontributary water, as nontributary water is not part of the appropriation system. COLORADO STATE LEGISLATURE, *supra* note 76, at 4. "Therefore, if produced groundwater can be shown to be nontributary, the need for water well permitting can be avoided for wells producing that ground water." *Id.* Coal bed methane producers want the water they produce classified as nontributary water because they will not have to get a water permit. Wonstolen, *supra* note 75, at 3.

¹⁶⁵ *E.g.*, BRYNER, COALBED METHANE DEVELOPMENT IN THE INTERMOUNTAIN WEST, *supra* note 4, at 33 ("Given the value of the water which many believe is at least as valuable as the gas, if not more so, state legislatures may decide to fashion provisions expressly aimed at defining who owns [coal bed methane] produced water and what should happen to it."); see also THE RUCKELSHAUS REPORT, *supra* note 4, at 52 ("It seems that the [coal bed methane] industry needs to be regulated as a unique kind of development. This would require statutory revisions or an entirely new statute that addresses [coal bed methane] specifically.").

¹⁶⁶ See THE RUCKELSHAUS REPORT, *supra* note 4, at 52 (creating a "set of statutory revisions that specifically addressed regulation of [coal bed methane] . . . could help remedy the kinds of challenges . . . related to [coal bed methane] water, . . . [and] all issues unique to [coal bed methane]").

¹⁶⁷ Darrin, *supra* note 20, at 293; Kear, *supra* note 4, at 15 ("Wyoming has actively promoted the pro-development status quo by: creating institutions that foster [coal bed methane] develop-

limited use, or the nonuse of coal bed methane produced water, and the lack of mitigating harm to senior water right holders and property owners.¹⁶⁸

Many of the current methods for disposal of produced water treat this water as a waste product; for example, it is common to leave produced water in storage pits, or similar reservoirs, to evaporate.¹⁶⁹ The storage of water for the purpose of letting it evaporate, or recharge on its own accord back into the environment, eliminates the water and does not constitute a beneficial use in and of itself.¹⁷⁰ Wyoming should take steps to ensure produced water is further beneficially used or reinjected and should make certain other water appropriators are protected from harms resulting from the production of coal bed methane.¹⁷¹

The Wyoming state legislature must take steps to address the aforementioned problems.¹⁷² It should formalize the State Engineer's initial requirement of a water right for drilling coal bed methane wells and set up procedures for protecting other water right appropriators. It should then take the next step by requiring produced water to be put to an additional beneficial use or reinjected into underground formations for future potential use.¹⁷³

ment; providing little environmental protections; maintaining tight control over [coal bed methane] revenues; and enacting the weakest surface owner protection act.”); THE RUCKELSHAUS REPORT, *supra* note 4, at 35.

¹⁶⁸ See Kear, *supra* note 4, at 15 (stating Wyoming regulations for the protection of other water right holders and surface owner are less than those in Montana, Colorado, and New Mexico).

¹⁶⁹ See MacKinnon & Fox, *supra* note 19, at 385 (claiming the coal bed methane reservoirs and pits used by the developers are created for the storage and disposal of this water through infiltration, evaporation, or release); COLORADO STATE ENGINEER, *supra* note 148, at 17 (mentioning the methods of disposal include discharge and injection into storage tanks or reservoirs/pits, commercial disposal, and waste management facilities); National Energy Technology Laboratory Strategic Center for Natural Gas, *supra* note 23, at 5-6 to 5-8 (stating that in the Powder River Basin of Wyoming, water disposal methods include infiltration impoundment, shallow re-injection, and active treatment using reverse osmosis).

¹⁷⁰ MacKinnon & Fox, *supra* note 19, at 385 (“Storage for its own sake is not a beneficial use.”).

¹⁷¹ See Wyoming CBM Water Management Task Force, Final Recommendations, *supra* note 159 (recommending the adoption of a statute on the management of water produced from coal bed methane wells limiting the discharge of water to the channel's natural capacity and “recommend[ing] that the state engineer add a condition to [State Engineer's Office] ground water permits establishing a threshold water-to-gas ratio necessary for establishing or continuing beneficial use after a period of time”).

¹⁷² THE RUCKELSHAUS REPORT, *supra* note 4, at 42 (“Beneficial use . . . can be achieved by minimizing water production in the first place . . . or by finding additional beneficial uses for water once it is produced.”).

¹⁷³ *Id.*

There are some in the legal and environmental communities who claim fixing the coal bed methane produced groundwater issue requires regulatory change and not statutory change.¹⁷⁴ Nonetheless, statutory change would bring desperately needed closure to the issues of managing the water captured from the production of coal bed methane.¹⁷⁵ As evidenced in *William West Ranch*, the Wyoming Supreme Court is reluctant to step in and provide a concrete determination on this issue.¹⁷⁶ Thus, it is time for the Wyoming Legislature to clarify state law and policy related to coal bed methane produced water.¹⁷⁷

IV. CONCLUSION

The issue surrounding the status of coal bed methane produced groundwater is of great importance, especially in the arid west.¹⁷⁸ As a prior appropriation state, Wyoming should continue to find groundwater diverted in association with the coal bed methane production process is an appropriation of water for a beneficial use.¹⁷⁹ However, Wyoming's beneficial use analysis cannot end with a simple finding that a beneficial use exists in coal bed methane production because production incident to coal bed methane development is not enough—application of the water to some other use or reinjection of the water is necessary.¹⁸⁰ Wyoming's current regulatory system inadequately addresses potential aspects of groundwater extraction during the coal bed methane production and management process, and, therefore, Wyoming should codify laws requiring a further beneficial

¹⁷⁴ MacKinnon & Fox, *supra* note 19, at 398 (“In order to effectively address this reality, both agencies [State Engineer’s Office and Department of Environmental Quality] need to abandon their rigid adherence to the regulatory division between water quantity and water quality, which has resulted in leaving the intersection of quantity and quality unregulated.”); Herlihy, *supra* note 49, at 482 (articulating that a public interest review needs to occur with coal bed methane permitting by the State Engineer).

¹⁷⁵ See THE RUCKELSHAUS REPORT, *supra* note 4, at 52–54 (explaining the benefits of a Coal Bed Methane Management Act and how such an act could be structured for Wyoming); see also MONT. CODE ANN. §§ 82-11-175, 82-11-905 (providing for the protection of adversely affected water rights holders and property owners).

¹⁷⁶ See *William West Ranch*, 206 P.3d at 737 (“The plaintiffs’ failure to connect any particular state action to their harm prevents them from establishing justiciability here. Nevertheless, in the event we are presented with a true justiciable controversy in another case, we will not hesitate to determine whether the State’s processes meet the constitutional and statutory directives.”).

¹⁷⁷ See THE RUCKELSHAUS REPORT, *supra* note 4, at 52 (referring to the benefits of and the need for statutory change in Wyoming’s regulation of coal bed methane produced water).

¹⁷⁸ E.g., BRYNER, COALBED METHANE DEVELOPMENT IN THE INTERMOUNTAIN WEST, *supra* note 4, at 1; Kear, *supra* note 4, at 1–2.

¹⁷⁹ WYOMING STATE ENGINEER, *supra* note 11, at 1 (discussing Wyoming’s finding of a beneficial use of water in producing coal bed methane).

¹⁸⁰ See *Vance v. Wolfe*, 205 P.3d 1165, 1174 (Colo. 2009) (Coats, J., concurring in part and dissenting in part) (explaining how, in Colorado, only an efficient diversion is needed to constitute a beneficial use and the requirement the water actually be used is nonexistent).

use or reinjection of the water and requiring protection of other water right appropriators.¹⁸¹

Since the Wyoming Supreme Court is reluctant to rule on the issue, as demonstrated by *William West Ranch*, it is time the Wyoming Legislature address coal bed methane produced groundwater.¹⁸² The Wyoming Legislature must build on the finding of the State Engineer's Office that a water right is required to mine for coal bed methane.¹⁸³ The legislature must codify the State Engineer's Office's beneficial use determination, require management of this produced water in the form of further beneficial uses or reinjection, and impose protections for affected water appropriators.¹⁸⁴

¹⁸¹ *E.g.*, Wyoming CBM Water Management Task Force, Final Recommendations, *supra* note 159; *see also* THE RUCKELSHAUS REPORT, *supra* note 4, at 52.

¹⁸² *See generally* *William F. West Ranch, L.L.C. v. Tyrrell*, 206 P.3d 722 (Wyo. 2009) (failing to reach a determination on the issue of harm to the plaintiffs and on how coal bed methane produced water should be managed).

¹⁸³ *See* WYOMING STATE ENGINEER, *supra* note 11, at 1 (stating the Wyoming State Engineer has already made the determination coal bed methane production is a beneficial use of water).

¹⁸⁴ *See supra* notes 126–77 and accompanying text (setting forth arguments to codify the beneficial use determination and recommending statutory change in how Wyoming administers coal bed methane produced water).

CASE NOTE

CIVIL PROCEDURE—The Wyoming Supreme Court Constricts the Public Interest Exception of the Declaratory Judgments Act; *William F. West Ranch, L.L.C. v. Tyrrell*, 206 P.3d 722 (Wyo. 2009)

Amy M. Staehr*

INTRODUCTION

The William West Ranch and the Turner Family (the Wests and the Turners) own tracts of land in Wyoming's Powder River Basin.¹ The Wests alleged that by 2007 they were no longer able to normally irrigate their land because saline and sodic water from nearby coalbed methane (CBM) wells had infiltrated their local water supply, resulting in plant and soil damage.² Additionally, leaking CBM water stored in reservoirs had further harmed the soil and vegetation on the West Ranch.³ The Turners claimed several of the wells they use for domestic and agricultural purposes had either dried up or threatened to as a result of the CBM ground water pumping in their area.⁴

Based on these alleged injuries, the Wests and the Turners filed a complaint with the district court seeking a declaratory judgment stating Wyoming State Engineer Patrick Tyrrell and the Wyoming Board of Control had acted unlawfully and in violation of the Wyoming Constitution in permitting CBM wells and reservoirs.⁵ The district court dismissed the case, and the Wests and the Turners

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¹ *William F. West Ranch, L.L.C. v. Tyrrell*, 206 P.3d 722, 725 (Wyo. 2009).

² Brief of Appellants at ix, *William West Ranch*, 206 P.3d 722 (No. S-08-0161), 2008 WL 5041670.

³ *Id.*

⁴ Brief of Pennaco Energy Inc. & Devon Energy Production Co. as Appellees at 2, *William West Ranch*, 206 P.3d 722 (No. S-08-0161), 2008 WL 6559519 [hereinafter Brief of Pennaco].

⁵ *William West Ranch*, 206 P.3d at 725. In Wyoming, the State Engineer issues permits for wells to extract CBM water as well as permits for reservoirs in which to store CBM water. WYO. STAT. ANN. §§ 41-3-930 to -931 (2009); STATE ENGINEER'S OFFICE, GUIDANCE: CBM/GROUND WATER PERMITS 1-2 (2004), available at http://seo.state.wy.us/PDF/GW_CBM_Guidance.pdf; STATE ENGINEER'S OFFICE, PERMITTING REQUIREMENTS ASSOCIATED WITH OFF-CHANNEL CONTAINMENT PITTS 1 (2002), available at <http://seo.state.wy.us/PDF/OffChannelContainReq.pdf>. For additional information on the CBM water regulatory process, see *infra* notes 27-35 and accompanying text.

appealed to the Wyoming Supreme Court.⁶ Finding the landowners did not present a justiciable controversy, the court affirmed the district court's dismissal.⁷

The landowners premised their justiciable controversy argument on the public interest exception, which recognizes a relaxed version of standing in cases where the public interest is affected.⁸ Because the regulation of water in an arid Western state is almost surely a matter of great public interest, the landowners argued they need not explicitly satisfy all four prongs of the *Brimmer* test—a tool to assess justiciability in Wyoming first articulated in *Brimmer v. Thomson*.⁹ The court, however, disagreed with the plaintiff landowners and found not only that the landowners failed to meet the second *Brimmer* element, but that all four elements of the *Brimmer* test must be met even in cases concerning the public interest.¹⁰ As a result, the Wyoming Supreme Court held the landowners failed to establish a justiciable controversy because (1) they did not allege an injury that would be practically redressed by the court's ruling, and (2) they failed to exhaust administrative remedies.¹¹

This case note analyzes the Wyoming Supreme Court's application of the *Brimmer* test to establish a justiciable controversy in *William West Ranch*.¹² The background section looks briefly at the coalbed methane industry in Wyoming's Powder River Basin, as well as the regulations governing CBM wastewater disposal.¹³ Next, this note explores the requirements for establishing justiciability

⁶ *William West Ranch*, 206 P.3d at 726. The district court held the plaintiffs did not present a justiciable controversy because other sectors of the government were currently considering the issue and because the issue concerned a political question. *Id.* at 725.

⁷ *Id.*

⁸ *Id.* at 736; Brief of Appellants, *supra* note 2, at 7–8.

⁹ *William West Ranch*, 206 P.3d at 727, 736; *Brimmer v. Thomson*, 521 P.2d 574, 578 (Wyo. 1974) (quoting *Sorenson v. City of Bellingham*, 496 P.2d 512, 517 (Wash. 1972)). The test reads as follows:

First, a justiciable controversy requires parties having existing and genuine, as distinguished from theoretical, rights or interests. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument evoking a purely political, administrative, philosophical or academic conclusion. Third, it must be a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships . . . or, wanting these qualities be of such great and overriding public moment as to constitute the legal equivalent of all of them. Finally, the proceedings must be genuinely adversary in character and not a mere disputation

Brimmer, 521 P.2d at 578.

¹⁰ *William West Ranch*, 206 P.3d at 737.

¹¹ *Id.* at 738.

¹² See *infra* notes 174–218 and accompanying text.

¹³ See *infra* notes 21–35 and accompanying text.

in a declaratory judgment action.¹⁴ Particular attention is given to the requirement that, under certain circumstances, plaintiffs must exhaust alternative remedies before bringing a declaratory judgment action.¹⁵ Finally, this note explores the public interest exception and its purported relaxation of justiciability requirements, including an investigation into the Wyoming Supreme Court's relevant precedential cases.¹⁶ This note argues that the specificity the landowners' pleadings lacked in *William West Ranch* was also lacking in earlier cases in which the court found a justiciable controversy.¹⁷ In stating that plaintiffs had a *duty* to allege facts specifically demonstrating how the court's decision would remedy their specific harm, the court imposed a more rigid burden on pleadings than called for in the past.¹⁸ Additionally, by acknowledging the landowners in *William West Ranch* brought a claim implicating an issue of great public interest and yet failing to extend the court's jurisdiction, the court departed from precedential case law invoking the exception.¹⁹ In holding that under the public interest exception all four *Brimmer* elements must be met, the Wyoming Supreme Court constricted the exception's intended jurisdiction-granting role.²⁰

BACKGROUND

Wyoming's Powder River Basin has seen an explosion of coalbed methane (CBM) production since the late 1980s; this increasingly-prevalent method of gas extraction involves drilling into and dewatering unmineable coal seams, thereby releasing methane gas.²¹ The main by-product of the process is a large quantity of often saline water.²² The Powder River Basin CBM wells produce relatively high quality water that is often potable, although it can be unsuitable for irrigation

¹⁴ See *infra* notes 36–124 and accompanying text.

¹⁵ See *infra* notes 40–43, 82–89, 154–73 and accompanying text.

¹⁶ See *infra* notes 90–118 and accompanying text.

¹⁷ See *infra* notes 174–92 and accompanying text.

¹⁸ See *infra* notes 174–92 and accompanying text.

¹⁹ See *infra* notes 193–218 and accompanying text.

²⁰ See *infra* notes 193–218 and accompanying text.

²¹ Anne MacKinnon & Kate Fox, *Demanding Beneficial Use: Opportunities and Obligations for Wyoming Regulators in Coalbed Methane*, 6 WYO. L. REV. 369, 370 (2006).

²² Sharon Buccino & Steve Jones, *Controlling Water Pollution From Coalbed Methane Drilling: An Analysis of Discharge Permit Requirements*, 4 WYO. L. REV. 559, 562–63 (2004). In 2005 alone, the Powder River Basin wells produced 72,000 acre-feet of water—an amount equal to a five-year supply of water for the city of Cheyenne; this amount is expected to double by 2014. Kate Fox, *The Problem of Water as Waste*, 2008 No. 1 ROCKY MTN. MIN. L. INST. Paper 16, 1 (2008). Use of saline water in large quantities on crop or grazing land can adversely affect clay-based soils such as those in the Powder River Basin by altering the soil's water absorption rate and ability to drain, thereby compromising crop growth and yield. JAN M.H. HENDRICKX & BRUCE A. BUCHANAN, EXPERT SCIENTIFIC OPINION ON THE TIER-2 METHODOLOGY: REPORT TO THE WYOMING DEPARTMENT OF ENVIRONMENTAL QUALITY 3–11 (2009), available at http://deq.state.wy.us/out/downloads/Final_Report_WY_DEQ_sep_21_2009.pdf.

because it is harmful to plants and certain soils in large amounts.²³ A number of options exist for handling CBM water including discharge into drainage systems, use as a municipal water supply, release directly onto the land, reinjection of the water back into deep geological formations, storage in a series of pools that rely on evaporation rather than seepage as a disposal method, or treatment to remove sodium.²⁴ Most producers in the Powder River Basin discharge CBM water into drainage systems, onto the soil as irrigation, or into unlined storage reservoirs.²⁵ Currently, CBM water is almost universally managed as a waste product of gas production; however, as a scarce resource in an arid state, it is widely argued that CBM water should be regulated and made use of as a valuable resource in and of itself.²⁶

²³ U.S. Geological Survey, U.S. Dept of the Interior, Fact Sheet 2006-3137, *Coalbed Methane Extraction and Soil Suitability Concerns in the Powder River Basin, Montana and Wyoming*, ¶ 3 (2006), available at http://pubs.usgs.gov/fs/2006/3137/pdf/fs06-3137_508.pdf. The quality of CBM water is generally discussed in terms of total dissolved solids, sodium absorption ratio, and electrical conductivity, all of which are dependant upon the inorganic salt content of the water. THE RUCKELSHAUS INST. OF ENV'T & NATURAL RES., WATER PRODUCTION FROM COALBED METHANE DEVELOPMENT IN WYOMING: A SUMMARY OF QUANTITY, QUALITY AND MANAGEMENT OPTIONS 17 (Univ. of Wyo. 2005) [hereinafter RUCKELSHAUS REPORT]. The quality of water extracted in CBM production generally deteriorates the deeper the wells are drilled. Samuel S. Bacon, Comment, *Why Waste Water? A Bifurcated Proposal for Managing, Utilizing, and Profiting From Coalbed Methane Discharged Water*, 80 U. COLO. L. REV. 571, 577 (2009). The Powder River Basin's coal seams tend to be shallow, thus the extracted water is of relatively high quality. *Id.* at 579. While this water can be used for domestic uses and stock watering, it nevertheless poses significant risks to plants and crops in large quantities, making it unsuitable for irrigation unless it is properly managed. *Id.* at 577–78; HENDRICKX & BUCHANAN, *supra* note 22, at 20.

²⁴ Bacon, *supra* note 23, at 576–77.

²⁵ Buccino & Jones, *supra* note 22, at 570–71; RUCKELSHAUS REPORT, *supra* note 23, at vii. Storage reservoirs are designed to be permeable, allowing CBM water to migrate back to the water table; however, the water seeping out of such reservoirs generally ends up in a higher water table with better quality water than that from which it was originally pulled, impacting the quality of the higher water table. See Buccino & Jones, *supra* note 22, at 571. Additionally, these reservoirs often double as stock watering ponds (in fact, their potential as stock watering ponds has led to the current lack of an adjudication step in the permitting process for such reservoirs). *Id.*; see also *infra* note 35 and accompanying text.

²⁶ Colby Barrett, *Fitting a Square Peg in a Round (Drill) Hole: The Evolving Legal Treatment of Coalbed Methane-Produced Water in the Intermountain West*, 38 *Envtl. L. Rep.: News & Analysis* (Envtl. Law Inst.) 10,661, 10,662 (2008); Thomas F. Darin, *Waste or Wasted?—Rethinking the Regulation of Coalbed Methane Byproduct Water in the Rocky Mountains; A Comparative Analysis of Approaches to Coalbed Methane Produced Water Quantity Legal Issues in Utah, New Mexico, Colorado, Montana and Wyoming*, 17 *J. ENVTL. L. & LITIG.* 281, 288–89, 341 (2002); Bacon, *supra* note 23, at 571–73; RUCKELSHAUS REPORT, *supra* note 23, at 42–54. See generally Neal Joseph Valorz, Comment, *The Need for Codification of Wyoming's Coal Bed Methane Produced Groundwater Laws*, 10 *WYO. L. REV.* 115 (2010).

Current Regulatory Structures for CBM Water

In Wyoming, CBM production is regulated by three state agencies: the Wyoming Oil and Gas Conservation Commission (WOGCC), the Department of Environmental Quality (DEQ), and the State Engineer's Office (State Engineer).²⁷ Responsibility lies with the WOGCC to permit "oil and gas well construction, well spacing and density, and bonding and reclamation."²⁸ DEQ regulates the quality of extracted CBM water according to the Clean Water Act (CWA) which establishes minimum federal water quality standards and allows individual states to further regulate, control, and enforce more stringent requirements.²⁹ DEQ issues permits for CBM water as a point-source pollutant subject to the Wyoming Pollutant Discharge Elimination System (WYPDES).³⁰

The State Engineer is responsible for managing the quantity of produced CBM water.³¹ The State Engineer categorizes CBM water as a type of groundwater.³² As such, it falls under the State's prior appropriation system, which allows the appropriation of groundwater if it is being stored or diverted for a beneficial use in the public interest.³³ The State Engineer has determined the production of CBM

²⁷ RUCKELSHAUS REPORT, *supra* note 23, at 33–35 (including additional information on the regulatory and permitting process in Wyoming). Local environmental groups, as well as the federal Environmental Protection Agency, consider Wyoming's current regulatory scheme insufficient. Robert J. Duffy, *Political Mobilization, Venue Change, and the Coal Bed Methane Conflict in Montana and Wyoming*, 45 NAT. RESOURCES J. 409, 434–35 (2005). This has not gone unnoticed: the Wyoming legislature formed the Wyoming Coal Bed Natural Gas Water Management Task Force. Wyoming CBM Water Management Task Force, Final Recommendations, Power Point, <http://governor.wy.gov/Media.aspx?MediaId=214> (last visited Nov. 24, 2009). The Governor's office asked the University of Wyoming to address a series of CBM-related questions. RUCKELSHAUS REPORT, *supra* note 23, at 4. And the Environmental Quality Council (EQC), the rulemaking body of DEQ, has worked towards adopting a rule embodying standards regarding water quality and discharge quantity. Letter from John V. Cora, Director of DEQ, to Dennis Boal, Chairman of EQC (Sept. 23, 2009), available at <http://deq.state.wy.us/out/downloads/cbmletter9.23.09.pdf>. However, on September 23, 2009, DEQ withdrew the proposed rule from consideration in response to a report by two independent consultants that called into question the science behind the rule. *Id.*; see also HENDRICKX & BUCHANAN, *supra* note 22, at ii.

²⁸ WYO. STAT. ANN. § 30-5-104(d) (2009); RUCKELSHAUS REPORT, *supra* note 23, at 34.

²⁹ RUCKELSHAUS REPORT, *supra* note 23, at 34; Bacon, *supra* note 23, at 588. The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Clean Water Act, 33 U.S.C. §§ 1251–1387 (2006).

³⁰ 33 U.S.C. §§ 1251(a), 1311(a), 1342; see also Bacon, *supra* note 23, at 582. In order to delegate the WYPDES program to a state, the state must establish a scheme of citizen enforcement. 33 U.S.C. § 1251(e); see also WYO. STAT. ANN. § 35-11-1001 (2009).

³¹ C. Stephen Herlihy, Comment, *Trading Water for Gas: Application of the Public Interest Review to Coalbed Methane Produced Water Discharge in Wyoming*, 9 WYO. L. REV. 456, 462 (2009).

³² GUIDANCE: CBM/GROUND WATER PERMITS, *supra* note 5, at 1.

³³ WYO. CONST. art. 8, § 3; WYO. STAT. ANN. § 41-3-101 (2009); see also GUIDANCE: CBM/GROUND WATER PERMITS, *supra* note 5, at 1.

water is a beneficial use; it therefore requires permitting.³⁴ The State Engineer is also responsible for issuing permits for CBM water put to an additional beneficial use or stored in on-channel reservoirs.³⁵

The Uniform Declaratory Judgments Act

The Uniform Declaratory Judgments Act is a legal vehicle used to determine rights, status, or other legal relationships between parties; its application is left to the discretion of the courts; its purpose is remedial; and courts should construe it liberally.³⁶ For a court to have jurisdiction over a declaratory judgment action, a justiciable controversy must exist.³⁷ While courts have tremendous discretion in exercising their jurisdictional parameters, it is the court's responsibility, as well as the underlying logic behind stare decisis, that it make such decisions with an eye towards precedent, as well as towards the future implications of its current rulings.³⁸ A court's finding of whether a justiciable controversy exists is a threshold

³⁴ WYO. STAT. ANN. § 41-3-931 (2009).

³⁵ GUIDANCE: CBM/GROUND WATER PERMITS, *supra* note 5, at 2; PERMITTING REQUIREMENTS ASSOCIATED WITH OFF-CHANNEL CONTAINMENT PITS, *supra* note 5, at 2. Unlike with traditional water rights, there is no adjudication process required for CBM water production or its storage in reservoirs. WYO. STAT. ANN. § 41-3-935(b) (2009).

³⁶ Uniform Declaratory Judgments Act, WYO. STAT. ANN. §§ 1-37-101, -103, -114 (2009); *Barber v. City of Douglas*, 931 P.2d 948, 951 (Wyo. 1997) (“To accomplish its purpose, the Uniform Declaratory Judgments Act is to be ‘liberally construed and administered.’” (quoting *Brimmer v. Thomson*, 521 P.2d 574, 577 (Wyo. 1974)); *Reiman Corp. v. City of Cheyenne*, 838 P.2d 1182, 1185 (Wyo. 1992) (“As a measure of preventive justice, the declaratory judgment . . . is designed to enable parties to ascertain and establish their legal relations”); *Brimmer*, 521 P.2d at 577 (“Begrudging availability of the declaratory vehicle is inconsistent with the Act’s expressed remedial tenor directed to the elimination of uncertainty and insecurity and the settlement of controversy.”).

³⁷ *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 316 (Wyo. 1980); *Cranston v. Thomson*, 530 P.2d 726, 728–29 (Wyo. 1975).

³⁸ 22A AM. JUR. 2D *Declaratory Judgments* § 15 (2009) [hereinafter *Declaratory Judgments*]. According to *American Jurisprudence, Second Edition*:

The grant or denial of relief in a declaratory judgment action is a matter within the discretion of the trial court. This discretion entrusted to the courts must be exercised judicially and cautiously, with due regard to all the circumstances of the case. Discretion must not be arbitrary, but based on good reason and calculated to serve the purposes for which the legislation was enacted—namely, to afford relief from uncertainty and insecurity.

. . . However, the discretion of the court with regard to declaratory relief is not unlimited, and where a complaint sets forth facts and circumstances showing that a declaratory judgment is entirely appropriate, the court may not properly refuse to assume jurisdiction.

Id.; see also *Mem’l Hosp. of Laramie County v. Dep’t of Revenue & Taxation*, 770 P.2d 223, 226 (Wyo. 1989) (“Declaratory relief should be liberally administered if the elements of a justiciable controversy exist to give the trial court jurisdiction.”). Commenter Ann M. Rochelle notes, “What constitutes a justiciable controversy will not always be clear. In the past, the Wyoming Supreme Court has involved itself in the splitting of hairs when it comes to distinguishing a *justiciable*

determination that includes a multiplicity of doctrines.³⁹ Of these, the doctrines of ripeness and standing deserve some attention.

Courts use the doctrine of ripeness to avoid premature adjudication.⁴⁰ For a controversy to be considered ripe, it is generally necessary for the litigant to exhaust administrative remedies before bringing the case to court.⁴¹ Although the existence of an alternative remedy does not always bar a plaintiff from seeking a declaratory judgment, some courts will refrain from entertaining an action if alternate remedies have not been exhausted.⁴² In Wyoming, courts base their decision about whether alternate remedies must be exhausted on the type of claim at issue.⁴³

To establish standing in Wyoming, a party must demonstrate it is sufficiently affected by the issue at hand, thereby ensuring the controversy presented to the court is justiciable and the court has jurisdiction over the matter.⁴⁴ The standing doctrine requires the parties to have a tangible interest at stake that directly affects them rather than one which is abstract or hypothetical.⁴⁵ Wyoming case law

controversy from a *nonjusticiable* one.” Comment, *Wyoming’s Uniform Declaratory Judgments Act: Statutory and Case Law Analysis*, 16 LAND & WATER L. REV. 243, 267 (1981). According to *Black’s Law Dictionary*, *stare decisis* is “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” 1537 (9th ed. 2009).

³⁹ *Reiman*, 838 P.2d at 1186 (“The doctrines include the political question doctrine, the administrative questions doctrine, the advisory opinions doctrine, the feigned and collusive cases doctrine, the doctrine of standing, the doctrine of ripeness, and the doctrine of mootness.”); *W. Texas Utils. Co. v. Exxon Coal USA, Inc.*, 807 P.2d 932, 938 (Wyo. 1991); *Anderson v. Wyo. Dev. Co.*, 154 P.2d 318, 337–38 (Wyo. 1944).

⁴⁰ *BHP Petroleum Co. v. State*, 766 P.2d 1162, 1164 (Wyo. 1989).

⁴¹ 2 AM. JUR. 2D *Administrative Law* § 474 (2003); *see also* *Rissler & McMurry Co. v. State*, 917 P.2d 1157, 1162–63 (Wyo. 1996); *Seckman v. Wyo-Ben, Inc.*, 783 P.2d 161, 170 (Wyo. 1989); *BHP Petroleum*, 766 P.2d at 1164.

⁴² *Declaratory Judgments*, *supra* note 38, at § 50.

⁴³ WYO. R. CIV. P. 57 (“The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.”); *see also, e.g.*, *Bonnie M. Quinn Revocable Trust v. SRW, Inc.*, 91 P.3d 146, 151–52 (Wyo. 2004) (holding that because the landowners had not exhausted administrative remedies in challenging the CBM producer’s right to drill exploratory wells on land zoned for agricultural purposes, judicial relief was not available); *Rocky Mtn. Oil & Gas Ass’n v. State*, 645 P.2d 1163, 1167–68 (Wyo. 1982) (stating in Wyoming the availability of an alternate remedy will not alone preclude declaratory judgment relief); *infra* notes 82–89 and accompanying text.

⁴⁴ *Jolley v. State Loan & Inv. Bd.*, 38 P.3d 1073, 1076 (Wyo. 2002); *see also* *Mem’l Hosp.*, 770 P.2d at 226; *Washakie County*, 606 P.2d at 316–17.

⁴⁵ *Washakie County*, 606 P.2d at 317. According to the Wyoming Supreme Court:

Standing is a concept used to determine whether a party is sufficiently affected to insure that a justiciable controversy is presented to the court. It is a necessary and useful tool to be used by courts in ferreting out those cases which ask the

urges courts to liberally interpret the requirements for standing in a declaratory judgment action; nevertheless, parties must present a justiciable controversy.⁴⁶ The Wyoming Supreme Court, however, has recognized an exception which states that if a great public interest is implicated in a case in which elements of a justiciable controversy are lacking, the existence of a great public interest can stand in as the legal equivalent of a justiciable controversy.⁴⁷ Regarding a court's jurisdictional discretion, Professor Robert B. Keiter has characterized the standing doctrine as "a highly abstract jurisdictional concept that the court periodically invokes to avoid reaching the merits of cases otherwise properly before it."⁴⁸

In order to better understand Wyoming's standing doctrine, a brief discussion of its relationship to federal standing requirements is warranted. Article III standing under the U.S. Constitution is predicated upon the "case or controversy" requirement.⁴⁹ Lacking a similar restriction, the Wyoming Constitution instead gives the Wyoming Supreme Court jurisdiction over all "civil and criminal causes," thereby allowing a wider jurisdiction than that accorded in federal courts.⁵⁰ Furthermore, most notably in cases where the Wyoming Supreme Court invoked the public interest exception, the court has found a justiciable controversy in cases that would not have met the federal standards.⁵¹ Indeed, the Wyoming legislature mandates that the Uniform Declaratory Judgments Act "is to be liberally construed

courts to render advisory opinions or decide an artificial or academic controversy without there being a palpable injury to be remedied. However, it is not a rigid or dogmatic rule but one that must be applied with some view to realities as well as practicalities. Standing should not be construed narrowly or restrictively.

Id. (citations omitted); *see also* *Cox v. City of Cheyenne*, 79 P.3d 500, 505 (Wyo. 2003); *Jolley*, 38 P.3d at 1076; *Barber*, 931 P.2d at 951; *Declaratory Judgments*, *supra* note 38, § 21.

⁴⁶ *Barber*, 931 P.2d at 951; *Rocky Mtn.*, 645 P.2d at 1167–68; *Washakie County*, 606 P.2d at 317.

⁴⁷ *Brimmer*, 521 P.2d at 578.

⁴⁸ Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 527, 528 (1986).

⁴⁹ U.S. CONST. art. III, § 2, cl. 1; Keiter, *supra* note 48, at 529. The United States Supreme Court elaborated upon the "case or controversy" requirement in *Lujan v. Defenders of Wildlife*: "Article III requires, as an irreducible minimum, that a plaintiff allege (1) an injury that is (2) 'fairly traceable to the defendant's allegedly unlawful conduct' and that is (3) 'likely to be redressed by the requested relief.'" 504 U.S. 555, 590 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

⁵⁰ WYO. CONST. art. 5, § 2; Keiter, *supra* note 48, at 529, 533–34. Keiter argues there is enough of a difference between the state and federal judicial systems to justify the State's rejection of the narrow constraints of the federal standing doctrine. Keiter, *supra* note 48, at 533–34.

⁵¹ Keiter, *supra* note 48, at 534. Compare *Eastwood v. Wyo. Highway Dep't.*, 301 P.2d 818, 819 (Wyo. 1956) (finding the plaintiff had standing under the public interest exception even though the issue was moot), *with* *Defunis v. Odegaard*, 416 U.S. 312, 316 (1974) (finding because the issue was moot the plaintiff did not have standing).

and administered.”⁵² Thus, the legislature’s provisions and the court’s recognition of the public interest exception justify a liberal invocation of jurisdiction.⁵³

The Brimmer Test

In assessing whether a Wyoming court has jurisdiction over an issue, courts use a four-prong test first articulated in *Brimmer v. Thomson*.⁵⁴ According to *Brimmer*, (1) the parties must have genuine rights at issue; (2) their controversy must be redressable by the court; (3) the judgment must have the effect of a final judgment on the rights or, in the absence of these qualities, encompass a great public interest and thereby stand in for the legal equivalent of all of them; and (4) the issue must engender adversity.⁵⁵ The *Brimmer* test encompasses the doctrines of standing, ripeness, and mootness.⁵⁶ It is relevant to note Wyoming case law regarding justiciability reveals that, absent a matter of great public interest implicating the third *Brimmer* element, litigants widely contest the first two elements, while the fourth has received relatively little attention.⁵⁷

The First Brimmer Element

The first *Brimmer* element requires the parties to “have existing and genuine, as distinguished from theoretical, rights or interests” at stake.⁵⁸ In *Office of State Lands & Investments v. Merbanco, Inc.*, the plaintiffs filed a declaratory judgment action claiming the Board of Land Commissioners’ consideration of

⁵² WYO. STAT. ANN. § 1-37-114; see also Rochelle, *supra* note 38, at 243.

⁵³ Keiter, *supra* note 48, at 537; see, e.g., *Washakie County*, 606 P.2d at 318; *Brimmer*, 521 P.2d at 574.

⁵⁴ 521 P.2d at 578; see *Cox*, 79 P.3d at 505 (quoting *Reiman*, 838 P.2d at 1186). This test is originally from a Washington State case *Sorenson v. City of Bellingham*, 496 P.2d 512, 517 (Wash. 1972).

⁵⁵ 521 P.2d at 578.

⁵⁶ *Barber*, 931 P.2d at 951 (“The jurisprudential principles underlying the standing, ripeness, and mootness doctrines are embodied in the definition of a justiciable controversy adopted in *Brimmer*.”). The *Brimmer* elements and the doctrines they encompass tend to overlap, making it difficult to discuss the requirements and boundaries of one element without implicating another. Rochelle, *supra* note 38, at 252.

⁵⁷ See, e.g., *Wilson v. Bd. of County Comm’rs*, 153 P.3d 917, 926 (Wyo. 2007) (finding while the plaintiffs had a “tangible interest” in the controversy when they received approval of their subdivision, they lost it by not asserting their complaint regarding required open space when their plan was initially approved, thereby failing to meet *Brimmer* elements one and two); *Office of State Lands & Invs. v. Merbanco, Inc.*, 70 P.3d 241, 248–49 (Wyo. 2003) (finding while a non-profit, a county resident, and his children had standing to challenge the State’s obligation to sell public school land at auction, a corporation did not because it did not have a legally recognizable right to bid on the property, therefore failing to satisfy *Brimmer* element one); *Dept of Revenue & Taxation v. Pacificorp*, 872 P.2d 1163, 1168–69 (Wyo. 1994) (ruling no tangible and legally protected interest existed because the taxpayers only claimed they *might* apply for the contested exemption for uncapitalized property, thereby failing to meet *Brimmer* element one).

⁵⁸ *Brimmer*, 521 P.2d at 578; *Cox*, 79 P.3d at 505 (quoting *Reiman*, 838 P.2d at 1186).

an exchange of public school land for private land without a public auction was unconstitutional.⁵⁹ When the plaintiffs filed the action, the Board had yet to decide whether to forgo a public auction.⁶⁰ Nevertheless, the Wyoming Supreme Court found some of the plaintiffs had genuine rights at issue.⁶¹

Conversely, in *White v. Board of Land Commissioners*, the Board requested a declaratory judgment on their own ruling that a lessee did not have a preferential right to meet the highest bid in a public land auction.⁶² The Wyoming Supreme Court found no justiciable controversy existed because the Whites' rights were only theoretical.⁶³ The auction had not yet taken place, and the Board's letter indicated an *intent* to deny the Whites' right at the auction—a future, rather than existing, denial of a right.⁶⁴ Most importantly, the Whites had not yet tried to exercise their right nor was it ensured they would.⁶⁵

Notably, in *Merbanco*, as opposed to *White*, while the damage had not yet occurred, the court found the first *Brimmer* element satisfied because the litigants' rights—the county resident and his school-age children were stakeholders and beneficiaries of funds generated by state school lands—were genuinely at issue whether the auction occurred or not.⁶⁶ Even if the Board denied the Whites the

⁵⁹ 70 P.3d at 244–45.

⁶⁰ *Id.* at 246.

⁶¹ *See id.*

⁶² 595 P.2d 76, 77 (Wyo. 1979).

⁶³ *Id.* at 79–80; *see also, e.g., Pacificorp*, 872 P.2d at 1168–69 (holding no tangible and legally protected interest existed because the taxpayers only claimed they *might* apply for the contested exemption for uncapitalized property); *Mtn. W. Farm Bureau Mut. Ins. Co. v. Hallmark Ins. Co.*, 561 P.2d 706, 711–12 (Wyo. 1977) (finding because the plaintiff did not make the insurance policy at issue a part of the record, their rights were only theoretical and therefore the controversy was not justiciable); *Budd v. Bishop*, 543 P.2d 368, 372–73 (Wyo. 1975) (finding a water rights owner did not have standing to challenge the State's administration of the surplus water statute on behalf of other water rights holders when he himself could not show an injury).

⁶⁴ *White*, 595 P.2d at 79–80.

⁶⁵ *Id.* at 80 (“It is altogether possible that the bid might be in excess of what the appellants believe to be the value of the land, it might be beyond their resources, or they might simply lose interest in buying this land.”).

⁶⁶ *Merbanco*, 70 P.3d at 248. Regarding the use of a declaratory judgment action in situations where the harm has not yet occurred but is almost certain to occur:

The Uniform Declaratory Judgments Act dispelled the myth that the judicial arm of government could be extended only to redress prior wrongdoings (corrective justice). The Act is founded upon the premise that society is disturbed not only when legal rights are violated, but also when they are placed in serious doubt or uncertainty. Consequently, the Act establishes a procedural vehicle whereby litigants may approach the court for a declaration of their “rights, status, and other legal relations whether or not further relief is or could be claimed” (preventative or corrective justice).

Reiman, 838 P.2d at 1185 (citations omitted).

opportunity to meet the highest bid, it was not certain their rights would have been genuinely at issue because they might not have availed themselves of the opportunity to meet the highest bid.⁶⁷ Thus, the Whites' theoretical rights did not satisfy the first *Brimmer* element while the *Merbanco* plaintiffs' did.⁶⁸

The Second Brimmer Element

The *Brimmer* test states, "The controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument evoking a purely political, administrative, philosophical or academic conclusion."⁶⁹ In *Reiman Corp. v. City of Cheyenne*, the Wyoming Supreme Court clarified "effectively operate."⁷⁰ Reiman sought to rescind a mistaken bid for a city project; after the city accepted Reiman's mistaken bid as the low bid, Reiman filed a declaratory judgment action seeking to either withdraw or reformulate the bid.⁷¹ Subsequent to the filing, the city and Reiman agreed that if Reiman prevailed, the city would pay the higher bid price, and if the city prevailed, it would pay the lower amount.⁷² The district court held the issue was moot based on the parties' agreement; the Wyoming Supreme Court reversed, stating, "[E]ffectively operate' means only that a court's decision must have *some practical effect* upon the litigants, i.e., a court may not issue a purely advisory opinion."⁷³ In *Reiman*, the practical effect was that the ruling would determine which price the city paid.⁷⁴

The second *Brimmer* element was also implicated in both *White* and *Merbanco*. In *White*, the Board effectively asked for an advisory opinion regarding the Board's own ruling; however, because the Whites' rights might never become an issue, the court's opinion would have been academic.⁷⁵ In *Merbanco*, the court held the county resident and his children had standing as stakeholders in the educational system.⁷⁶ However, the court noted while revenues from school lands are devoted to the support of education, they provide a relatively small portion of overall public school funding.⁷⁷ Furthermore, the plaintiffs did not show how

⁶⁷ *White*, 595 P.2d at 79–80.

⁶⁸ *Id.*; *Merbanco*, 70 P.3d at 248.

⁶⁹ *Brimmer*, 521 P.2d at 578; *Cox*, 79 P.3d at 505 (quoting *Reiman*, 838 P.2d at 1186).

⁷⁰ 838 P.2d at 1187.

⁷¹ *Id.* at 1184–85.

⁷² *Id.*

⁷³ *Id.* at 1187 (emphasis added); see also *Beatty v. C.B. & Q.R. Co.*, 52 P.2d 404, 409 (Wyo. 1935); *Holly Sugar Corp. v. Fritzler*, 296 P. 206, 210 (Wyo. 1931).

⁷⁴ 838 P.2d at 1187.

⁷⁵ 595 P.2d at 79–80; see *supra* notes 62–68 and accompanying text.

⁷⁶ 70 P.3d at 248; see also *Washakie County*, 606 P.2d at 316 (finding the plaintiffs had standing even though they did not specifically cite the statutes causing their harm but referred to a "system" of financing public education); *supra* notes 58–61, 66–68 and accompanying text.

⁷⁷ *Merbanco*, 70 P.3d at 248.

a lack of increase in interest from the permanent school fund—where proceeds from a public action would be deposited—would negatively impact the public schools.⁷⁸ Additionally, an exchange of school lands must be undertaken on a value-for-value basis, and the court stated, “[I]t seems unlikely that an exchange of lands would negatively impact the funds available for the support of education in any significant amount.”⁷⁹ Nevertheless, the court found the county resident and his children met the second *Brimmer* element.⁸⁰ While the underlying goal of the second *Brimmer* element is that the court expend its resources only on issues adjudication can actually resolve, the distinction can be a narrow one.⁸¹

The second *Brimmer* element also encompasses the administrative remedies consideration. The Wyoming Supreme Court first articulated this consideration in *Anderson v. Wyoming Development Co.*⁸² Individual water users sued a private development company, arguing they had proportionate rights to stored water that the permit-holding company refused to recognize.⁸³ In this opinion the court stated, “[A] declaratory judgment will not be entertained where another equally serviceable remedy has been provided for the character of case in hand.”⁸⁴ Almost twenty-five years later, the court heard *Rocky Mountain Oil & Gas Association v. State*, in which the plaintiffs sought a declaratory judgment action invalidating the rules promulgated by the Environmental Quality Council (EQC) to regulate water produced by oil and gas companies.⁸⁵ The court reiterated its *Anderson* finding but then went on to reject it:

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* In coming to its conclusion, the court relied on reasoning in *Branson School Dist. RE-82 v. Romer*, 958 F. Supp. 1501, 1509–11 (D. Colo. 1997) (finding the plaintiff school district and public school students had standing even though the state legislature would likely make up any shortfall from a decline in revenue caused by the challenged amendment, thereby negating the plaintiffs’ injury), *aff’d*, 161 F.3d 619, 631 (10th Cir. 1998) (declining to address whether plaintiffs had standing based on a potential lack of revenue change but finding injury-in-fact in that the trustees managed the lands not solely in the interest of supporting the public schools but taking environmental and aesthetic considerations into their management strategy). *Merbanco*, 70 P.3d at 248; *see infra* notes 90–118 and accompanying text (discussing the public interest exception).

⁸¹ *See Hirschfield v. Bd. of County Comm’rs*, 944 P.2d 1139, 1143 (Wyo. 1997); *Brimmer*, 521 P.2d at 578. In *Rocky Mtn.*, while the majority opinion of the Wyoming Supreme Court held the plaintiffs presented a justiciable controversy, the opinion itself does not reflect a discussion of the *Brimmer* elements. *See* 645 P.2d at 1168. In his dissent, however, Justice Rose pointed out he failed to find where the plaintiffs had identified an application or probable future application of a rule that would lead to an impingement of the plaintiffs’ rights resulting in a controversy the court’s decision would redress. *Id.* at 1174 (Rose, J., dissenting).

⁸² 154 P.2d at 348.

⁸³ *Id.* at 347–48.

⁸⁴ *Id.* at 348; *see also* *Humane Soc’y v. Port*, 404 P.2d 834, 835–36 (Wyo. 1965).

⁸⁵ 645 P.2d at 1164.

In Wyoming, the existence of another adequate remedy will not, of itself, preclude declaratory judgment relief. We cannot relegate such relief to the position of an extraordinary, as opposed to an optional, remedy.

Of course, there must be a justiciable controversy, and the procedure cannot be used to secure an advisory opinion in a matter in which there is no justiciable controversy.⁸⁶

Furthermore, the *Rocky Mountain* court opined if the requested relief concerned the validity of an agency regulation or the constitutionality of a statute granting agency action, the court should hear the issue without requiring the exhaustion of alternate remedies.⁸⁷ As a result, the *Rocky Mountain* court found it within the scope of the Declaratory Judgments Act to clarify whether the EQC had the power to create rules and regulations controlling industrial waste, including water produced by oil and gas companies.⁸⁸ The court has subsequently applied the *Rocky Mountain* parameters.⁸⁹

The Third Brimmer Element & The Public Interest Exception

The *Brimmer* court stated the controversy must be one in which the court's decision will have the effect of a final judgment regarding the law or a legal relationship, or "wanting these qualities to be of such great and overriding

⁸⁶ *Id.* at 1167–68 (commenting on WYO. R. CIV. P. 57 which states, "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.").

⁸⁷ *Id.* at 1168; *see also Hirschfeld*, 944 P.2d at 1142.

⁸⁸ 645 P.2d at 1169. In his dissent, however, Justice Thomas (joined by Justice Rose) stated that a declaratory judgment should not have been available in this case because they did not exhaust their administrative remedies, namely rulemaking proceedings according to Wyoming Statute § 9-4-106. *Id.* at 1175 (Rose & Thomas, JJ., dissenting). Both Justice Rose and Justice Thomas questioned the court's finding of a justiciable controversy, arguing the plaintiffs' rights were not sure to be affected, nor was any action by the court sure to have any impact on the plaintiffs. *Id.* at 1174; *see also infra* notes 183–89 and accompanying text (discussing the dissenting opinions). *But see* Goedert *ex rel. Wolfe v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 991 P.2d 1225, 1228 (Wyo. 1999) (explaining the plaintiffs had the option of requesting rulemaking *or* instituting a declaratory judgment action).

⁸⁹ *See, e.g., Dep't of Revenue v. Exxon Mobil Corp.*, 150 P.3d 1216, 1221–23 (Wyo. 2007) (holding Exxon was not required to exhaust administrative remedies because it challenged the authority of the Board, not the results of the Board's valuation method); *Bonnie M. Quinn*, 91 P.3d at 149 (holding the Trusts did not have standing to challenge a CBM operator's lack of a conditional use permit because they had not sought relief with the board administering the zoning resolution and their complaint did not challenge the board's authority to act); *Mem'l Hosp.*, 770 P.2d at 225–26 (holding administrative remedies need not be exhausted because the hospital's complaint questioned the constitutionality of statutory interpretation).

public moment as to constitute the legal equivalent of all of them.”⁹⁰ Further articulating the public interest exception, the *Brimmer* court stated, “[T]here is a well recognized exception that the rule requiring the existence of justiciable controversies is not followed or is relaxed in matters of great public interest or importance.”⁹¹ The third *Brimmer* element clearly states that if a matter of great public interest is implicated in a case, it can stand in for the legal equivalent of a justiciable controversy.⁹² Nevertheless, the exception must be employed with caution.⁹³

A year after *Brimmer*, the court stated in *Cranston v. Thomson* that in the absence of the other *Brimmer* elements, an overriding public interest alone was not enough to assert justiciability.⁹⁴ However, the *Brimmer* version of the public interest exception prevailed in several subsequent cases.⁹⁵ Fifteen years after *Brimmer*, in *Memorial Hospital v. Department of Revenue & Taxation*, the court extended the exception from “a relaxation of the requirement for a justiciable controversy to a *justification* for standing,” stating:

Declaratory relief should be liberally administered if the elements of a justiciable controversy exist to give the trial court jurisdiction. For that controversy to exist, a genuine right or interest must be at issue between adversarial parties, and the trial court must be able to make an effective judgment which will finally determine the rights of the parties. Even these prerequisites, however, may properly be avoided or relaxed when matters of great public interest or importance are presented to the trial court.⁹⁶

⁹⁰ 521 P.2d at 578.

⁹¹ *Id.* Wyoming is not the only jurisdiction to recognize the public interest exception. *See, e.g.,* Godfrey v. State, 752 N.W.2d 413, 425 (Iowa 2008) (“We believe our doctrine of standing in Iowa is not so rigid that an exception to the injury requirement could not be recognized for citizens who seek to resolve certain questions of great public importance and interest in our system of government.”); Berberian v. Travisono, 332 A.2d 121, 124 (R.I. 1975) (“[E]xcept for a relatively few instances when compelling public interest makes for an exception to the rule, and actual justiciable controversy . . . is basic to the court’s jurisdiction.”); State *ex rel.* Distilled Spirits Inst., Inc. v. Kinnear, 492 P.2d 1012, 1014 (Wash. 1972) (“Where the question is one of great public interest and has been brought to the court’s attention . . . the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation.”).

⁹² *Brimmer*, 521 P.2d at 578.

⁹³ *Id.*

⁹⁴ 530 P.2d at 729.

⁹⁵ *See, e.g.,* *Mem’l Hosp.*, 770 P.2d at 226 (holding that, notwithstanding that the hospital had filed an administrative petition for review, a declaratory judgment action alleging the hospital’s tax-exempt status precluded tax assessed on property purchased for its own use was available because the hospital’s complaint questioned the constitutionality of statutory interpretation); *Washakie County*, 606 P.2d at 318.

⁹⁶ 770 P.2d at 226 (citations omitted) (emphasis added); *cf. Jolley*, 38 P.3d at 1077 (holding a plaintiff challenging a change in the schedule of public meetings did not meet the justiciability

Nine years later, in *Management Council of the Wyoming Legislature v. Geringer*, the court considered whether the Management Council had standing to challenge the Governor's exercise of partial veto power under Article 4, § 9 of the Wyoming Constitution.⁹⁷ The court entirely dispensed with applying the *Brimmer* test, stating the issue was one of great public importance, and therefore the court recognized the standing of the Council to bring a declaratory judgment action.⁹⁸

Following *Brimmer*, the Wyoming Supreme Court relaxed or dispensed with analyzing requirements for a justiciable controversy in situations of educational funding, the apportionment of state revenues, the constitutionality of the Wyoming Professional Review Panel Act, gubernatorial powers under the Wyoming Constitution, and the constitutionality of a preferential right to renew public land leases.⁹⁹ Generally, these matters involved the constitutionality of a statute or act.¹⁰⁰ The court clarified this distinction in *Jolley v. State Loan & Investment Board* by declining to expand the exception to "encompass alleged violations of an agency's rules and regulations that do not directly implicate the constitutionality of legislation or an agency's actions or inactions."¹⁰¹

Oftentimes, after determining the issue was of great public interest, the court dispensed with applying the *Brimmer* test, finding the existence of a great public interest gave the court jurisdiction over the matter.¹⁰² In other cases invoking the public interest exception, the court discussed the *Brimmer* test and stated the

requirements, and those requirements would not be relaxed because the issue was *not* one of great public importance).

⁹⁷ 953 P.2d 839, 840–42 (Wyo. 1998).

⁹⁸ *Id.* at 842.

⁹⁹ See *id.* (Governor's partial veto power); *Bd. of County Comm'rs v. Laramie County Sch. Dist. No. One*, 884 P.2d 946, 950 (Wyo. 1994) (accumulated interest from school district funds); *Wyo. Ass'n of Consulting Eng'rs & Land Surveyors v. Sullivan*, 798 P.2d 826, 828–29 (Wyo. 1990) (Wyoming Professional Review Panel Act); *Mem'l Hosp.*, 770 P.2d at 227 (hospital's tax exempt status); *Washakie County*, 606 P.2d at 318 (educational funding).

¹⁰⁰ *E.g.*, *Washakie County*, 606 P.2d at 318; *cf.* *Jolley*, 38 P.3d at 1078–79.

¹⁰¹ 38 P.3d at 1078–79.

¹⁰² *E.g.*, *Geringer*, 953 P.2d at 842 (following no discussion of the *Brimmer* test, the court recognized jurisdiction over the plaintiffs because the issue was of great public importance); *Laramie County Sch. Dist. No. One*, 884 P.2d at 950 (following no mention of the *Brimmer* test, the court stated the School District asserted a justiciable controversy because the issue was of great public importance); *Sullivan*, 798 P.2d at 829 ("Without deciding whether Petitioners have standing . . . , we hold that the issue of whether the Wyoming Professional Review Panel Act is constitutional is of great public importance and, therefore, merits a decision from this Court."); *Sullivan*, 798 P.2d at 831 (Golden, J., specially concurring) ("I would also prefer that this court identify, explore, and try to resolve certain concerns about 'affected party' principles and standing doctrine in Wyoming jurisprudence. This appeal presents a unique opportunity for such an analysis, but we do not seize it.") (citations omitted).

plaintiffs met all four elements.¹⁰³ A number of these cases are worth a close look because the court's application of the *Brimmer* elements allowed wide latitude regarding the manner in which the plaintiffs met the elements.¹⁰⁴ For example, the first *Brimmer* element was noticeably relaxed in *Washakie County School District No. One v. Herschler*, a case in which the appellants challenged Wyoming's system of financing public education.¹⁰⁵ In their briefs, the appellants asserted the unconstitutionality of "the system of financing public education" rather than identifying a particular statute.¹⁰⁶ The court found further specificity unnecessary because in their pleadings the appellants had shown a complete understanding of the statutes and how the statutes affected them.¹⁰⁷ Consequently, the court was willing to accept that the school district's rights to an equitable system of public education financing were existing and genuine even given the lack of specificity in pleading.¹⁰⁸

The second element of the *Brimmer* test addresses whether the judgment of the court will effectively operate on the situation at hand.¹⁰⁹ The *Washakie County* plaintiffs did not show how a new system of financing would increase the school district's funds enough to impact the quality of education.¹¹⁰ As a result, the plaintiffs' argument that their damage was redressable by the court contained several gaps the court was willing to overlook in order to assert the existence of a justiciable controversy and find the system of school financing unconstitutional.¹¹¹

Similarly, in *Office of State Lands & Investments v. Merbanco*, the court acknowledged the issue was of great public interest but only *after* concluding all elements of a justiciable controversy existed.¹¹² As discussed earlier in this note, the *Merbanco* opinion clearly stretched the envelope of connectivity between rights, injury, and resolution.¹¹³ Akin to *Merbanco*, the Wyoming Supreme Court's 2003 finding of a justiciable controversy based on the public interest exception in

¹⁰³ *E.g.*, *Merbanco*, 70 P.3d at 249; *Riedel v. Anderson*, 70 P.3d 223, 229–31 (Wyo. 2003); *Washakie County*, 606 P.2d at 318.

¹⁰⁴ The *William West Ranch* court acknowledged this leniency. 206 P.3d at 737.

¹⁰⁵ 606 P.2d at 316.

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Brimmer*, 521 P.2d at 578; *Cox*, 79 P.3d at 505 (quoting *Reiman*, 838 P.2d at 1186).

¹¹⁰ *See* 606 P.2d at 316.

¹¹¹ *See id.*; *see also* Keiter, *supra* note 48, at 535–36.

¹¹² 70 P.3d at 249; *see also supra* notes 58–61, 66–68, 75–81 and accompanying text.

¹¹³ 70 P.3d at 249 (holding plaintiffs presented a justiciable controversy despite a lack of evidence showing how funds from a public auction, as opposed to a proposed exchange of public lands, would affect the quality of education in the district); *see also supra* notes 58–61, 66–68, 75–81 and accompanying text.

Riedel v. Anderson was liberal in its application of the *Brimmer* test.¹¹⁴ The plaintiff landowner challenged the constitutionality of the statute creating a preferential right to renew public land leases, arguing that absent a competitive bid system, the fiduciary violated its obligation to maximize revenue for the public school system.¹¹⁵ The plaintiff claimed this violation resulted in diminished school funds, which in turn translated into an injury to the public school system.¹¹⁶ The plaintiff was not a beneficiary of the public school system nor did he articulate an alternate injury; nonetheless, the court found injury “implicit in the relief he seeks, namely, that the Board be enjoined from enforcing the preferential renewal statute and that they be ordered to award the lease to him.”¹¹⁷ The court acknowledged this stretch of the justiciability requirements by invoking the “great public interest exception.”¹¹⁸

The Fourth Brimmer Element

Finally, the fourth element of the *Brimmer* test stipulates, “The proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues.”¹¹⁹ In order to have genuine adversity, the parties must have a tangible interest at stake that provokes more than mere disagreement.¹²⁰ The situation in *Pedro/Aspen, Ltd. v. Board of County Commissioners* illustrates what constitutes genuine adversity for the Wyoming Supreme Court.¹²¹ *Pedro/Aspen*, a land development corporation, brought a declaratory judgment action challenging a Natrona County zoning ordinance.¹²² The county argued that because the developer submitted an application under the ordinance “in the spirit of cooperation” before challenging its validity, it did not hold a truly adverse position.¹²³ The court, however, found adversity, citing that because the developer had withdrawn the application, the two parties’ positions were “diametrically opposed” and held the plaintiff’s attempt to meet the terms of the regulation did not preclude it from later asserting its invalidity.¹²⁴

¹¹⁴ See 70 P.3d at 230–31.

¹¹⁵ *Id.* at 230.

¹¹⁶ See *id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 231.

¹¹⁹ *Brimmer*, 521 P.2d at 578; *Cox*, 79 P.3d at 505 (quoting *Reiman*, 838 P.2d at 1186).

¹²⁰ See *Pedro/Aspen, Ltd. v. Bd. of County Comm’rs*, 94 P.3d 412, 417 (Wyo. 2004).

¹²¹ *Id.* at 413.

¹²² *Id.* at 419.

¹²³ *Id.*

¹²⁴ *Id.*

PRINCIPAL CASE

The Wests and the Turners, Powder River Basin landowners, claimed damage to their properties due to the influx of CBM water into the local water supply, leaking CBM reservoirs, and excessive CBM ground water pumping in their area.¹²⁵ In a declaratory judgment action at the district court level, the landowners challenged the constitutionality of the Wyoming State Engineer's and the Wyoming Board of Control's overall scheme in permitting CBM wells and reservoirs.¹²⁶ The district court dismissed their complaint, stating it did not present a justiciable controversy.¹²⁷ The landowners appealed this dismissal to the Wyoming Supreme Court.¹²⁸ In their argument, the Wests and the Turners called upon the public interest exception to justiciability in declaratory judgment actions, claiming the issue of groundwater drilling and disposal in an arid Western state was of great public importance.¹²⁹ The State countered by arguing the court lacked jurisdiction because the landowners failed to establish any of the four *Brimmer* elements and failed to exhaust administrative remedies.¹³⁰

¹²⁵ Brief of Appellants, *supra* note 2, at ix; Brief of Pennaco, *supra* note 4, at 2.

¹²⁶ *William F. West Ranch, L.L.C. v. Tyrrell*, 206 P.3d 722, 725 (Wyo. 2009). The landowners asked the district court for several additional declarations on their behalf:

1. The current permitting of CBM ground water and reservoirs violates Wyoming's statutes because it fails to quantify the amount of water put to beneficial use for CBM production.
2. The [State Engineer's] practice of permitting CBM ground water without notice and an opportunity for a hearing violates the constitutional right to due process of law under the United States and Wyoming constitutions.
3. The State cannot issue permits for CBM ground water wells and reservoirs without adopting rules pursuant to WAPA specifically addressing CBM water and defining the "public interest."
4. Placement of CBM water in reservoirs and pits for the purpose of achieving disposal of that water through evaporation, infiltration and/or flushing is not a beneficial use of water.
5. The State must evaluate and weigh the public and various interests as part of its duty to supervise Wyoming's water.
6. The State must inspect and adjudicate all CBM groundwater wells and reservoirs used to store CBM water.

Id. at 732.

¹²⁷ *Id.* at 725.

¹²⁸ *Id.*

¹²⁹ Brief of Appellants, *supra* note 2, at 6–22. The landowners alternatively argued they met all four prongs of the *Brimmer* test. *Id.* at 9.

¹³⁰ Brief of Appellees at 10–31, *William West Ranch*, 206 P.3d 722 (No. S-08-0161), 2008 WL 6559518.

The Court's Opinion

Justice Kite wrote the opinion for *William West Ranch*.¹³¹ The court focused its jurisdictional discussion on whether the plaintiff landowners established a justiciable controversy.¹³² Because Wyoming case law is well-settled regarding declaratory judgment actions, the court limited its discussion to the court's own previous holdings.¹³³ After generally defining the scope of declaratory judgment actions, the court invoked the *Brimmer* test and proceeded into a discussion of case law providing guidance in applying the four elements.¹³⁴ After noting the plaintiffs' allegations were "extensive" and "somewhat vague," the court consolidated them into four claims and applied the *Brimmer* test.¹³⁵

The court found the first *Brimmer* element, that of a tangible interest, satisfied by the plaintiffs' claim that they owned property damaged by CBM water.¹³⁶ The

¹³¹ 206 P.3d at 724. The court's decision was unanimous. *Id.*

¹³² *Id.* at 725. The district court found the landowners failed to allege a justiciable controversy but premised their holding on the fact that issues concerning the permitting and regulating of CBM water were currently being deliberated by other branches of state government. *Id.*

¹³³ *Id.* at 727 n.2. The State's briefs relied on the federal case and controversy doctrine of standing. *Id.* The court, however, rejected the federal argument and focused on Wyoming case law regarding establishing a justiciable controversy in declaratory judgment actions, stating, however, that Wyoming law is mostly consistent with federal law. *Id.* Keiter disagrees. *Supra* note 48, at 535–41.

¹³⁴ *William West Ranch*, 206 P.3d at 726–29.

¹³⁵ *Id.* at 729–36. The court summarized the plaintiffs' allegations as follows:

1. The State has violated the Wyoming Constitution by failing to consider the "public interest" and "all the various interests involved" when administering CBM water. In addition, the plaintiffs allege generally that the State has violated their right to due process. . . .

2. The State has violated Wyoming statutes in administering CBM water by failing to protect the public interest in issuing CBM permits and to determine the amount of water which may be withdrawn from groundwater wells and placed in reservoirs in accordance with the concept of beneficial use and prevention and waste. West and Turner also claim that the State has abdicated its statutory duty to adjudicate and inspect wells and reservoirs.

3. The State's actions violate the plaintiffs' due process rights. . . .

4. The State has violated the Wyoming Administrative Procedure Act (WAPA) governing agency rulemaking. Specifically, the plaintiffs claim the State has failed to promulgate rules pertaining particularly to CBM well and reservoir permitting and is, instead, unlawfully regulating by "policy" and "guidance" as evidenced by the exhibits to the complaint.

Id. at 729–30 (citations and footnotes omitted). After holding the claims were "too amorphous to be justiciable," the court laid out what the plaintiffs needed to allege to establish a justiciable controversy. *Id.* at 730–31.

¹³⁶ *Id.* at 731.

second element, however, the court found lacking, stating the plaintiffs failed to specifically show how the relief they requested—that the court find the State’s regulatory actions regarding CBM water wells and reservoirs unconstitutional and in violation of Wyoming statutes—would tangibly mitigate or prevent the property damage they suffered.¹³⁷

The court then addressed the exhaustion of administrative remedies doctrine.¹³⁸ Citing *Rocky Mountain* and *Bonnie M. Quinn*, the court stated when the substance of the issue has been delegated to a specific agency and a plaintiff challenges an agency action under its delegated authority, all available administrative remedies must be exhausted; when a plaintiff challenges an agency’s constitutional or statutory authority to act, however, administrative remedies need not be exhausted before bringing a claim.¹³⁹ Without specifically characterizing each of the *William West Ranch* landowners’ claims, by holding the landowners ought to have pursued administrative remedies before bringing their suit, the court implied they challenged the State Engineer’s and Board of Control’s actions under their delegated authority.¹⁴⁰

In addressing the Wests’ and the Turners’ invocation of the public interest exception, the court agreed the issue was one of great public interest.¹⁴¹ Summarizing precedential usage of the exception, the court characterized it as confined to instances presenting a constitutional question or issue regarding the apportionment of State funds.¹⁴² Then the court reiterated an early holding, that of *Cranston v. Thomson* in 1975, in which it stated even in cases concerning the

¹³⁷ *Id.* at 731–32. See also *supra* note 126 and accompanying text for the specific declarations the plaintiffs asked the court to make. In summing up its position, the court took its previous declaratory judgment rulings a step further by stating the plaintiffs had a “duty to allege sufficient specific facts showing that a judgment in their favor will have an immediate and real effect on them.” *William West Ranch*, 206 P.3d at 733 (emphasis added). The court noted that by “failing to challenge a particular permit, the plaintiffs have not provided a context in which a court could determine” the nature of the agency’s action. *Id.* Additionally, the court cited *Budd v. Bishop*, 543 P.2d 368, 372 (Wyo. 1975) (finding a water rights owner did not have standing to challenge the State’s administration of the surplus water statute on behalf of other water rights holders when he himself could not show any injury), stating that parties cannot ask for a declaratory judgment on behalf of other injured parties. *William West Ranch*, 206 P.3d at 733.

¹³⁸ *William West Ranch*, 206 P.3d at 735.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 735–36. The court mentioned several potentially available administrative remedies including: (1) petitioning the State Engineer to conduct rulemaking pursuant to Wyoming Statute § 16-3-106; (2) filing a well interference action pursuant to Wyoming Statute § 41-3-911; (3) petitioning the Board of Control for a determination of the amount of water a CBM producer is entitled to withdraw; and (4) petitioning the district court to review a specific agency action pursuant to Wyoming Statute § 16-3-114. *William West Ranch*, 206 P.3d at 735–36.

¹⁴¹ *William West Ranch*, 206 P.3d at 736–37.

¹⁴² *Id.* at 737.

public interest, a justiciable controversy must be at the heart of the issue for it to be heard.¹⁴³ In holding it did not have jurisdiction over the action brought by the Wests and the Turners, the court stated that while it has recognized a “more lenient definition of justiciability” in cases of great public importance, all four *Brimmer* elements must nonetheless be met to establish justiciability.¹⁴⁴

ANALYSIS

In *William F West Ranch, L.L.C. v. Tyrrell*, the Wyoming Supreme Court asserted that to establish a justiciable controversy and invoke the court’s jurisdiction, the plaintiffs had a *duty* to specifically show how the court’s action would remedy their particular harm.¹⁴⁵ This decision narrows the footing upon which a declaratory judgment can be brought to only those plaintiffs who can unequivocally show how the declaration of a right—even one in the public interest—would directly and tangibly benefit them.¹⁴⁶ Additionally, the court’s holding that all four *Brimmer* elements must be met even in situations of great public interest negates the public interest exception’s role as a legal stand-in for a justiciable controversy.¹⁴⁷ This section tracks the court’s exploration of the second *Brimmer* element as it applied to the plaintiff landowners’ claims, beginning with the court’s holding that the plaintiffs ought to have exhausted administrative

¹⁴³ *Id.*; see also *Cranston v. Thomson*, 530 P.2d 726, 728–29 (Wyo. 1975).

¹⁴⁴ *William West Ranch*, 206 P.3d at 732–33, 736–37. As examples, the court cited *Washakie County, Memorial Hospital, and Merbanco*, stating that in none of these intervening public interest cases had they detoured from *Cranston*. *Id.* at 737. Along the way to this holding, the court articulated how future litigants in CBM water cases might avoid the pitfalls it identified in the Wests’ and the Turners’ pleadings. *Id.* at 722–28. As alternatives to declaratory judgment actions, the court noted the plaintiff landowners might have been able to bring a civil action to find relief from continuing property damage. *Id.* at 735 n.12. Negligence, nuisance, and trespass actions have been brought against individual CBM producers for damage to property based on the producer’s disposal of CBM wastewater. *Id.* However, while these alternatives might solve one issue of property damage on one piece of property, they would not do what the Wests and the Turners set out to do—effect a changed State system of regulation and permitting procedures that more equally balances the many interests at stake in accord with the agency’s constitutional and statutory duties. See Brief of Appellants, *supra* note 2, at 2–3. Furthermore, it is possible that civil claims against the CBM producers were unavailable to the Wests and the Turners. Brief of Pennaco, *supra* note 4, at 6. Appellees Pennaco Energy Inc. and Devon Energy Production Company, L.P., stated:

On February 14, 2002, . . . the Wests entered into a Surface Damage and Access Agreement . . . with Devon whereby they agreed to accept payment of a substantial annual fee for Devons’ [sic] discharge and management of CBNG water on their ranch. Pursuant to the terms of the Agreement, the Wests further agreed that the payments they received from Devon were full and complete satisfaction for any damages caused by the discharge and management of CBNG water.

Id. (citations omitted).

¹⁴⁵ 206 P.3d 722, 733 (Wyo. 2009).

¹⁴⁶ See *infra* notes 174–92 and accompanying text.

¹⁴⁷ *William West Ranch*, 206 P.3d at 737; see also *infra* notes 193–218 and accompanying text.

remedies.¹⁴⁸ Next, this analysis takes a close look at how the court characterized the plaintiffs' claims in relation to the requirements of the second *Brimmer* element.¹⁴⁹ The leniency with which Wyoming Supreme Court precedent applied the *Brimmer* test suggested a wider latitude for establishing a justiciable controversy than the court adopted in *William West Ranch*.¹⁵⁰ Consequently, the *William West Ranch* decision raised the bar for plaintiffs attempting to establish justiciability.¹⁵¹ Finally, this note examines the court's discussion of the public interest exception in precedential case law and its application in *William West Ranch*.¹⁵² The court's invalidation of the exception nullified the doctrine's jurisdiction-granting function.¹⁵³

Exhaustion of Administrative Remedies

In *William West Ranch*, the court acknowledged its holdings in *Rocky Mountain* and *Bonnie M. Quinn*, both of which distinguished between cases challenging a particular action of an agency and those challenging the agency's statutory or constitutional authority to act.¹⁵⁴ When a particular agency action is challenged,

¹⁴⁸ See *infra* notes 154–73 and accompanying text.

¹⁴⁹ See *infra* notes 174–92 and accompanying text.

¹⁵⁰ See *infra* notes 174–92 and accompanying text.

¹⁵¹ See *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 317 (Wyo. 1980) (“[I]t is not a rigid or dogmatic rule but one that must be applied with some view to realities as well as practicalities. Standing should not be construed narrowly or restrictively.”); see also *infra* notes 174–92 and accompanying text.

¹⁵² See *infra* notes 193–218 and accompanying text; Keiter, *supra* note 48, at 536–37. Keiter writes:

The Wyoming Supreme Court has . . . broadly construed the Uniform Declaratory Judgments Act and sanctioned actions under it that raised questions of great public importance.

. . . .

. . . [T]he court has held that parties seeking relief under the Act must present a justiciable controversy in an adversarial posture; however, the court also has read an “issue of great public importance” exception into these justiciability requirements.

Keiter, *supra* note 48, at 536–37; see also *Washakie County*, 606 P.2d at 317; *Brimmer v. Thomson*, 521 P.2d 574, 578 (Wyo. 1974).

¹⁵³ See Keiter, *supra* note 48, at 540 (“[T]he ‘affected party’ principle cannot be understood as an absolute standing barrier because the court has recognized the ‘matter of great public importance’ exception.”). Keiter’s “affected party” terminology is drawn from Wyoming case law; he explains that it reflects the court’s concern with avoiding premature judicial resolution of constitutional issues but should not be restricted by the federal three-part injury-in-fact test for standing. *Id.* at 539; see also *Office of State Lands & Invs. v. Merbanco, Inc.*, 70 P.3d 241, 249 (Wyo. 2003); *Brimmer*, 521 P.2d at 578.

¹⁵⁴ *William West Ranch*, 206 P.3d at 735; see, e.g., *Bonnie M. Quinn Revocable Trust v. SRW, Inc.*, 91 P.3d 146, 151 (Wyo. 2004); *Rocky Mtn. Oil & Gas Ass’n v. State*, 645 P.2d 1163, 1168–69 (Wyo. 1982). See *supra* notes 87–89 and accompanying text for a discussion of the difference between the types of challenges.

plaintiffs must first exhaust alternative remedies; when the agency's constitutional or statutory authority to act is challenged, alternative administrative remedies need not be exhausted.¹⁵⁵

The court identified several of the landowners' claims as challenging the State's constitutional and statutory authority to act.¹⁵⁶ For example, the landowners asked for a declaration that the State's regulatory scheme for CBM water violated its statutory authority by disregarding the public welfare.¹⁵⁷ Specifically, the landowners argued that since the State's regulatory scheme does not control the *amount* of water which may be withdrawn by CBM producers "in accordance with the concepts of beneficial use and prevention of waste," the State has violated its affirmative duty to guard the public welfare.¹⁵⁸ In support of their claim, the landowners cited several Wyoming statutes including § 41-3-909(a), which outlines the policy of the State regarding the conservation of underground water resources and charges the State Engineer and Board of Control with requiring that wells be constructed and maintained to prevent waste of underground water.¹⁵⁹

¹⁵⁵ *Bonnie M. Quinn*, 91 P.3d at 151 (holding the plaintiffs must exhaust administrative remedies because their request for a declaratory judgment regarding whether the production of CBM requires a conditional use permit according to a zoning resolution was not a constitutional challenge); *Rocky Mtn.*, 645 P.2d at 1168–69 (holding the plaintiffs need not exhaust administrative remedies because their request for a declaratory judgment challenged the EQC's regulatory scheme as in violation of its statutory authority).

¹⁵⁶ See *William West Ranch*, 206 P.3d at 731–34; Reply Brief of Appellants at 7, *William West Ranch*, 206 P.3d 722 (No. S-08-0161), 2008 WL 5041673. See *supra* note 135 and accompanying text listing the court's restatement of the plaintiffs' claims. The landowners' complaints were admittedly general, as the court and the State concluded; nevertheless, they were couched as challenges to the agencies' statutory and constitutional authority to act. Brief of Appellants, *supra* note 2, at vi, 15–16; Reply Brief of Appellants, *supra*, at 6–7 ("The relief sought by Appellants . . . concerns the constitutionality of agency practices . . . and thus falls squarely into the *Merbanco* category of cases, in which the Wyoming Supreme Court has found that judicial review is necessary regardless of the availability of administrative remedies."). Additionally, the district court classified the landowners' complaints as challenging the "constitutionality of the current CBM water permitting scheme." Brief of Appellants, *supra* note 2, at 11 n.2. *But see* Brief of Appellees, *supra* note 130, at 8–9 ("They did not ask the district court to declare illegal any particular actions or inactions by the State Engineer or Board of Control either in their respective drainages or which relate to their particular properties.").

¹⁵⁷ *William West Ranch*, 206 P.3d at 732; see WYO. CONST. art. 8, § 3; WYO. STAT. ANN. §§ 41-3-931, 41-4-503 (2009); see also *Merbanco*, 70 P.3d at 244; *Rocky Mtn.*, 645 P.2d at 1168–69.

¹⁵⁸ *William West Ranch*, 206 P.3d at 729–30; see Brief of Appellants, *supra* note 2, at 16–17. These allegations are analogous to prior challenges of constitutional or statutory authority. See, e.g., *Merbanco*, 70 P.3d at 244 (challenging the decision of the Office of State Lands & Investments and the Board of Land Commissioners to exchange school lands without public auction as in violation of the state constitution); *Rocky Mtn.*, 645 P.2d at 1165, 1168–69 (challenging the EQC's regulatory scheme as in violation of its statutory authority).

¹⁵⁹ *William West Ranch*, 206 P.3d at 729–30; see Brief of Appellants, *supra* note 2, at 14–17. Additionally, the landowners state:

Just as in *Merbanco* and *Brimmer*, the Wests and Turners seek a judicial determination of the constitutional propriety of the State Engineer's practice

The landowners focused their argument on the overall CBM water regulatory scheme and its unconstitutional nature; however, the court repeatedly noted the plaintiffs should have made allegations regarding specific permits, specific wells, and specific State actions.¹⁶⁰ The court recognized the State's duty to consider the public interest under the cited statutes but asserted that a declaration regarding that duty would not have a practical effect on the plaintiff landowners.¹⁶¹ Effectively, the court disregarded the landowners' challenges to the statutory authority of the agency's regulatory stance based on the standing doctrine without addressing whether they were barred by the alternative remedies doctrine.¹⁶² This treatment suggests the alternative remedies doctrine does not apply to a number of the landowners' claims.¹⁶³

Without identifying which claims it referenced, the court went on to imply some of the plaintiffs' claims challenged the State's action in granting permits, which, according to *Rocky Mountain*, requires the exhaustion of alternate remedies.¹⁶⁴ The court's contradictory characterizations of the landowners' various

of issuing permits without consideration of the public interest, as required by Wyoming Constitution art. 8, § 3; without equally guarding the various interests involved, as required by Wyoming Constitution art. 1, § 31

Brief of Appellants, *supra* note 2, at 14; see WYO. CONST. art. 1, § 31 ("Water being essential to industrial prosperity, of limited amount, and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved."); WYO. CONST. art. 8, § 3 ("Priority of appropriation for beneficial use shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests.").

¹⁶⁰ *William West Ranch*, 206 P.3d at 730–34. It is difficult to reconcile the court's and the State's insistence that the landowners challenge a *particular* action of the State when the State's current regulatory stance is general inaction regarding the quantity of produced CBM water, the adjudication of reservoirs that double as stock ponds, and the depletion of groundwater resources. GUIDANCE: CBM/GROUND WATER PERMITS, *supra* note 5, *passim* (explaining the State Engineer is required to grant applications for permits to drill wells for the production of CBM "as a matter of course" because it is for a "beneficial use."). See generally Herlihy, *supra* note 31 (arguing limits should be placed on the quantity of water produced by the CBM industry to ensure compliance with the public interest statutory requirement and the wise use of both resources).

¹⁶¹ *William West Ranch*, 206 P.3d at 732–33; see *supra* notes 69–81 and accompanying text (discussing the second *Brimmer* element and the court's ability to address injured rights).

¹⁶² See *William West Ranch*, 206 P.3d at 733–35. "Declaratory relief decrees under Wyoming's Uniform Declaratory Judgments Act are intended to terminate uncertainty and provide relief from insecurity with respect to one's rights; prevent wrongs before their commission; stabilize uncertain or disputed legal relations; and generally declare rights, status, or other legal relations." Rochelle, *supra* note 38, at 243.

¹⁶³ See *William West Ranch*, 206 P.3d at 733–35; *Merbanco*, 70 P.3d at 247; *Rocky Mtn.*, 645 P.2d at 1168–69.

¹⁶⁴ *William West Ranch*, 206 P.3d at 735; see also *Bonnie M. Quinn*, 91 P.3d at 151; *Humane Soc'y v. Port*, 404 P.2d 834, 835 (Wyo. 1965). The court stated, "[W]hen the matter at issue is one that has been delegated to an administrative agency, such as whether to grant a permit, the challenger must utilize available administrative processes." *William West Ranch*, 206 P.3d at 735.

declaratory requests muddied the court's argument, making it difficult to parse which declarations the court felt challenged the State's constitutional and statutory authority to act and which did not.¹⁶⁵ The only claim the court conclusively addressed was the plaintiffs' request for a declaratory judgment *ordering* the State to adopt new regulations.¹⁶⁶ The court stated the landowners should have first requested rulemaking under Wyoming Statute § 16-3-106.¹⁶⁷ Regarding the court's handling of this request, however, there is contrary precedent suggesting that a declaratory judgment action was still within the purview of the plaintiffs.¹⁶⁸

In *William West Ranch*, the distinction between the two types of claims comes down to scope and semantics.¹⁶⁹ The plaintiffs based their allegations on the unconstitutional nature of the general scheme of regulation currently in place.¹⁷⁰ While the court's stance was slightly unclear, it repeatedly focused on *specific* actions of the State, consistently dismissing the landowners' broader arguments.¹⁷¹ However, had the court clearly found no constitutional or statutory challenge, it could have stopped its analysis there, forgoing any discussion of the standing doctrine.¹⁷² The court's holding regarding the exhaustion of alternate remedies was not in error; it was simply not specific as to which claims it applied.¹⁷³

Perhaps the court referred to separate declaratory judgment requests than those discussed previously in its analysis; perhaps it meant to recharacterize the previously discussed claims. *See id.*

¹⁶⁵ *William West Ranch*, 206 P.3d at 730–35.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 736. Any interested person may petition the State Engineer to conduct rulemaking. WYO. STAT. ANN. § 16-3-106 (2009).

¹⁶⁸ *William West Ranch*, 206 P.3d at 730–35. In its discussion, the court specifically referenced *Goedert ex rel. Wolfe v. State ex rel. Wyoming Workers' Safety & Compensation Division*, 991 P.2d 1225, 1228 (Wyo. 1999), as illustrative of the importance of rulemaking. *Id.* at 736. While the *Goedert* court held the plaintiff should have requested rulemaking, it acknowledged that, alternatively, the plaintiff "could have challenged the rules by instituting an independent action for a declaratory judgment." 991 P.2d at 1228. The *Goedert* court stated seeking rulemaking and initiating a declaratory judgment action were equally viable, independent options. *See id.* The Wests and the Turners opted for a declaratory judgment. *See William West Ranch*, 206 P.3d at 735; Brief of Appellants, *supra* note 2, at 4–8.

¹⁶⁹ Compare *William West Ranch*, 206 P.3d at 733–35 (insisting landowners allege harm from specific wells and permits), with Reply Brief of Appellants, *supra* note 156, at 6–7 (alleging the State's overall scheme of CBM water regulation did not comply with statutory and constitutional mandates).

¹⁷⁰ Reply Brief of Appellants, *supra* note 156, at 6–7.

¹⁷¹ *William West Ranch*, 206 P.3d at 733–35.

¹⁷² *See Bonnie M. Quinn*, 91 P.3d at 151; *Humane Soc'y*, 404 P.2d at 835; *see also supra* notes 82–89 and accompanying text.

¹⁷³ *See William West Ranch*, 206 P.3d at 733–35.

Specificity of Evidence Needed to Establish the Brimmer Elements

In criticizing how the plaintiff landowners argued their issue, the court stated to meet the second *Brimmer* element, the plaintiffs should have alleged (1) the State had a constitutional duty to execute a particular function in regulating CBM water; (2) the State failed to do so with respect to particular CBM producers; (3) this failure caused actual damage to their properties; and (4) the State must take some regulatory action that will effectively redress their grievances.¹⁷⁴ Furthermore, the parties should have challenged a particular permit or the lack of adjudication of particular wells and reservoirs affecting their land and identified specific reservoirs that leaked, leading to the damage they claimed.¹⁷⁵ Overall, the court asked for a very specific line of evidence from the actions of the State to the landowners' impinged-upon rights and, from there, to an established assuredness the court's ruling would have an effect on the plaintiffs.¹⁷⁶ This approach appears closer to the federal three-prong test for injury-in-fact than to the requirements of the *Brimmer* test.¹⁷⁷ Furthermore, the Wests and the Turners were not challenging a particular State action but the entire regulatory CBM water scheme as an unconstitutional interpretation of the agency's authority.¹⁷⁸ This wide, and arguably vague, focus in the landowners' pleadings led to exactly the lack of specificity the court criticized.¹⁷⁹ However, in precedential cases the court found the plaintiffs met the *Brimmer* test even when the pleadings exhibited similar gaps and lacked specificity.¹⁸⁰

In *Rocky Mountain*, a case that did not implicate a great public interest, the court held the plaintiffs asserted a justiciable controversy in bringing a declaratory judgment action challenging the constitutionality of the rules and regulations of the Environmental Quality Council (EQC).¹⁸¹ Because the EQC's regulations

¹⁷⁴ *Id.* at 730–31.

¹⁷⁵ *Id.* at 734.

¹⁷⁶ *Id.*; see also *Brimmer*, 521 P.2d at 578–79. For further discussion of *Brimmer* elements one and two, see *supra* notes 58–81.

¹⁷⁷ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992); *supra* notes 49–53 and accompanying text (discussing the federal three-prong test); Keiter, *supra* note 48, at 533–34, 539 (commenting there is enough of a difference between the state and federal judicial systems to justify the State's rejection of the narrow constraints of the federal standing doctrine).

¹⁷⁸ See *supra* note 156 and accompanying text (discussing the nature of the landowners' allegations).

¹⁷⁹ *William West Ranch*, 206 P.3d at 729–31; Brief of Appellants, *supra* note 2, at 18–23.

¹⁸⁰ See, e.g., *Merbanco*, 70 P.3d at 249 (failing to show how the plaintiffs would be affected by a lack of increase in interest from the school fund or how the court's action would have any tangible effect on them); *Washakie County*, 606 P.2d at 316 (failing to specifically cite the statutes with which the plaintiffs took issue or how the court's action would have any tangible effect on the plaintiffs); see also Keiter, *supra* note 48, at 537; *supra* notes 58–81 (discussing cases in which the court overlooked gaps and vague pleadings to find standing).

¹⁸¹ 645 P.2d at 1168.

required the plaintiffs' immediate action to secure permits which could require considerable time and expense, as well as penalties if they did not succeed, the court found the *Brimmer* test met.¹⁸² In dissenting, however, Justices Rose and Thomas argued the majority was too liberal in finding a justiciable controversy.¹⁸³ Justice Rose explained the plaintiffs ought to have pointed to an "actual threatened application of a rule together with a probable adverse effect."¹⁸⁴ He went on to posit, "For all we know, DEQ might never invoke the rule against the appellants, or, if it did, the appellants might find it impossible to show they were harmed in such a degree as a court would find sufficient to call for declaratory relief."¹⁸⁵ Justice Thomas stated the plaintiffs premised their claim on their own interpretation of the agency rules, which could arguably be interpreted and applied in an alternate way.¹⁸⁶ In sum, both Justices argued the presence of *Brimmer* elements one and two was ambiguous.¹⁸⁷ Nevertheless, the majority found a threatened right sufficiently connected to the agency's regulation which was redressable by the court.¹⁸⁸

The dissenting opinions in *Rocky Mountain* articulated several arguments used by the *William West Ranch* court in finding the landowners had not presented a justiciable controversy.¹⁸⁹ However, it is the majority opinion in *Rocky Mountain* that stands as precedent, and it is indeed the majority's finding of a justiciable controversy in *Rocky Mountain* that the *William West Ranch* court cited.¹⁹⁰ The dissent's characterization of the nebulous quality of the *Rocky Mountain* plaintiffs' affected right and the lack of certainty regarding the court's ability to mitigate the issue highlights a precedential degree of leniency regarding *Brimmer* elements one and two, even when the public interest exception was not implicated.¹⁹¹ In

¹⁸² *Id.*

¹⁸³ *Id.* at 1174–75 (Rose, J., dissenting); *id.* at 1175 (Thomas & Rose, JJ., dissenting).

¹⁸⁴ *Id.* at 1174 (Rose, J., dissenting).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1175 (Thomas & Rose, JJ., dissenting).

¹⁸⁷ *See id.* at 1174–75 (Rose, J., dissenting); *id.* at 1175 (Thomas & Rose, JJ., dissenting). *Brimmer* element one requires an impinged-upon present or future right. *See supra* notes 58–68. The possibility that the agency might never invoke the rule against the plaintiff, that the plaintiff might not be able to show actual harm by having to comply with the rule, or that the rule might be interpreted so as to not implicate the plaintiff at all pulled the first *Brimmer* element into question. *Rocky Mtn.*, 645 P.2d at 1174–75 (Rose, J., dissenting). The second *Brimmer* element requires the court's decision to effectively remedy the harm. *See supra* notes 69–81. If the harm was not certain to occur, it was possible the court's action would have no tangible effect on the plaintiffs. *Rocky Mtn.*, 645 P.2d at 1174–75 (Rose, J., dissenting).

¹⁸⁸ *Rocky Mtn.*, 645 P.2d at 1168.

¹⁸⁹ *See William West Ranch*, 206 P.3d at 730–35; *Rocky Mtn.*, 645 P.2d at 1174–75 (Rose, J., dissenting); *id.* at 1175 (Thomas & Rose, JJ., dissenting); *supra* notes 131–44 and accompanying text (discussing the principal case).

¹⁹⁰ *William West Ranch*, 206 P.3d at 728.

¹⁹¹ *See Rocky Mtn.*, 645 P.2d at 1174–75 (Rose, J., dissenting); *see also* Keiter, *supra* note 48, at 535–36.

William West Ranch, however, under the purported relaxed standards of the public interest exception, the court was not willing to find a justiciable controversy in light of similar doubts as to the court's ability to redress the harm.¹⁹²

The Court's Negation of the Public Interest Exception

The court was unwilling to find that the *William West Ranch* plaintiffs met the requirements of the second *Brimmer* element.¹⁹³ It was, however, willing to accept the landowners' assertion that the case presented a matter of great public importance.¹⁹⁴ In its discussion, the court stated that throughout precedential case law applying the public interest exception, all four elements of the *Brimmer* test were met.¹⁹⁵ Such is not the case.

In *Merbanco*, a case implicating a great public interest, the court found all four prongs of the *Brimmer* test met in a situation presenting as many gaps as that in *Rocky Mountain*.¹⁹⁶ A county resident and his children claimed the school system would be detrimentally affected if the Board of Land Commissioners traded school lands in a value-for-value exchange instead of putting them up for auction.¹⁹⁷ The court conceded the plaintiffs failed to show how additional interest deposited in the school fund from a public auction would have any effect on the educational system.¹⁹⁸ Nor did the plaintiffs show how their rights as stakeholders in that system would be negatively impacted.¹⁹⁹ The court instead focused on the impact funds from an auction would have on the balance of the permanent school fund itself, found the impact significant, and therefore concluded the plaintiffs had standing.²⁰⁰

¹⁹² See Rochelle, *supra* note 38, at 267 ("What constitutes a justiciable controversy will not always be clear. In the past, the Wyoming Supreme Court has involved itself in the splitting of hairs when it comes to distinguishing a justiciable controversy from a nonjusticiable one."). See *supra* notes 126, 135, 144, and 156 for a discussion of the vague nature of the landowners' allegations in relation to the second element of the *Brimmer* test. See, e.g., *Humane Soc'y*, 404 P.2d at 835 (refusing to grant declaratory relief because the plaintiff did not plead concrete facts). But see Rochelle, *supra* note 38, at 256–57 (arguing the court's finding in *Humane Society* was erroneous because declaratory relief is to be liberally administered).

¹⁹³ *William West Ranch*, 206 P.3d at 731–32.

¹⁹⁴ *Id.* at 736. Additionally, the State Engineer and Board of Control conceded the issue presented a matter of great public importance. Brief of Appellees, *supra* note 130, at 28.

¹⁹⁵ *William West Ranch*, 206 P.3d at 737.

¹⁹⁶ *Merbanco*, 70 P.3d at 246–49 (stating the plaintiffs met the four *Brimmer* elements even though the court invoked the public interest exception).

¹⁹⁷ *Id.* at 248.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 248–49.

²⁰⁰ *Id.*

The Wests and the Turners were in an analogous situation as stakeholders in a scheme of interests including landowners, sub-surface mineral rights holders, CBM producers, water rights holders, etc., affected by the State's regulation of CBM water.²⁰¹ Unlike the plaintiffs in *Merbanco*, they showed not just that they were stakeholders, but that their rights had been tangibly invaded.²⁰² The Wests and the Turners asked for a ruling that the State's regulation and permitting of CBM water wells and reservoirs was unconstitutional, just as the *Merbanco* plaintiffs asked for a ruling that not offering school lands at a public auction was unconstitutional.²⁰³ In neither case was it certain such a ruling would redress the problem.²⁰⁴ In *Merbanco*, no actual problem was identified; nevertheless, as stakeholders, the court considered the plaintiffs' rights at issue; furthermore, the chance the requested ruling would have any effect at all on the plaintiffs was miniscule.²⁰⁵ In *William West Ranch*, there was similarly no guarantee, though certainly a chance, that a new regulatory/permitting scheme would mitigate the landowners' property damage.²⁰⁶ In both cases, however, finding the contested

²⁰¹ See Brief of Appellants, *supra* note 2, at 16–17; RUCKELSHAUS REPORT, *supra* note 23, at v–ix.

²⁰² *William West Ranch*, 206 P.3d at 731; Brief of Appellants, *supra* note 2, at ix; see *infra* notes 66–68 and accompanying text (discussing how, in a declaratory judgment action, the damage need not have already occurred as long as it is substantially certain to occur).

In *Merbanco*, the court recognized the plaintiffs' interest in the value of the permanent school fund as their affected right even though no tangible benefit or detriment would accrue to the plaintiffs. 70 P.3d at 248. The value of the school lands added to the value of the permanent school fund in a value-for-value exchange was equal to the value of the school fund if the land was auctioned. *Id.* This suggests the issue was moot. See *Eastwood v. Wyo. Highway Dept.*, 301 P.2d 818, 819 (Wyo. 1956) (holding even though the period of revocation had expired and the issue was therefore moot, the plaintiff could challenge the revocation of his driver's license because the court considered the issue to be of great public interest). Nevertheless, the *Merbanco* court found a justiciable controversy. 70 P.3d at 248–49.

²⁰³ *William West Ranch*, 206 P.3d at 729–30. The *Merbanco* plaintiffs challenged a much more specific action of the State than did the landowners in *William West Ranch*. Compare *William West Ranch*, 206 P.3d at 729–30, with *Merbanco*, 70 P.3d at 248–49. However, the landowners in *William West Ranch* listed the statutes and acts they challenged. 206 P.3d at 729–30. For an example of a case in which the court waived the need for specificity in challenging a particular statute, see *Washakie County*, 606 P.2d at 316 (finding the plaintiffs asserted a justiciable controversy even though they did not specifically cite the statutes allegedly causing their harm, instead referring to a “system” of financing public education).

²⁰⁴ *William West Ranch*, 206 P.3d at 732; *Merbanco*, 70 P.3d at 248–51. See *supra* notes 162–73 for a discussion of the court's rationale in *Rocky Mountain* regarding the existence of arguably unaffected rights that would not be redressable by the court's action.

²⁰⁵ 70 P.3d at 248–49.

²⁰⁶ 206 P.3d at 731; Brief of Appellants, *supra* note 2, at 21–22. The landowners did not claim a judicial finding that the actions or lack thereof on the part of the State would specifically redress their damage, rather they argued the *Reiman* court's articulation of “effectively operate” applied. Brief of Appellants, *supra* note 2, at 21–22. According to the *Reiman* court, “effectively operate” means the court's opinion must have some practical effect on the litigants. 838 P.2d 1182, 1187 (Wyo. 1992); see also *supra* notes 69–74 and accompanying text (discussing the second *Brimmer*

actions unconstitutional would affect the stakeholders—groups to which the plaintiffs, in each case, belonged.

The court's granting of standing to the *Merbanco* plaintiffs can only be understood in light of the leniency afforded by the public interest exception; it follows that the same leniency should have been applied in *William West Ranch*.²⁰⁷ The *Merbanco* court showed particular leniency in finding the plaintiffs satisfied the *Brimmer* test.²⁰⁸ The Wyoming Supreme Court acted with similar leniency in regard to the *Brimmer* elements in cases discussed throughout this note, both those that did and did not implicate a great public interest.²⁰⁹ In *Washakie County*, for example, the plaintiffs established a justiciable controversy even though they did not specifically cite the statutes causing their harm but referred to a "system" of financing public education.²¹⁰ Similarly, the *Riedel* court found the plaintiff asserted a justiciable controversy by claiming the fiduciary for public school lands failed to maximize revenue for the public schools, even though the plaintiff was not a beneficiary of the school system and did not articulate an alternate injury.²¹¹

element). Practically, having the permanent school fund increase by \$36.48 million would have had no effect on the *Merbanco* plaintiffs. See 70 P.3d at 248. As stakeholders in the system, the court explained, the balance of the permanent school fund was relevant to the plaintiffs. See *id.* Similarly, while a ruling that the State acted unconstitutionally in permitting CBM wells would result in new regulations that might affect the Wests and the Turners, it is likely that they, like the *Merbanco* plaintiffs, would be unaffected in a practical way. Brief of Appellees, *supra* note 130, at 21, 30. However, as Powder River Basin landowners, a new set of regulations purportedly taking the public interest into account would be as relevant to the Wests and the Turners as a \$36.48 million increase in the permanent school fund was to the *Merbanco* plaintiffs. See Brief of Appellants, *supra* note 2, at 22.

²⁰⁷ See Keiter, *supra* note 48, at 537–38. Regarding the public interest exception:

[T]he Act represents a legislative determination that the doors of the State's courts should be opened widely to hear such actions Thus, the court is justified in liberally accord standing under the Act as it has in cases such as *Brimmer v. Thompson* [sic] and *Washakie County School District No. 1 v. Herschler*. . . .

. . . The cases [*Brimmer* and *Washakie County*] point towards a liberal construction of the state constitutional standing provisions.

Id.

²⁰⁸ See *id.*; *supra* notes 58–81 and accompanying text (discussing how *Merbanco* stretched the boundaries of the *Brimmer* elements).

²⁰⁹ See Keiter, *supra* note 48, at 537–38; Rochelle, *supra* note 38, at 251–52; see, e.g., *Rocky Mtn.*, 645 P.2d at 1174–75 (Rose & Thomas, JJ., dissenting); *Washakie County*, 606 P.2d at 316; *Brimmer*, 521 P.2d 574.

²¹⁰ 606 P.2d at 316.

²¹¹ 70 P.3d at 230.

In acknowledging the relaxed justiciability requirements previously afforded by the public interest exception, the *William West Ranch* court asserted that, leniency aside, all four elements of the *Brimmer* test had been met in precedential cases.²¹² This argument is akin to saying the chicken came first, not the egg—the court found the *Brimmer* elements met, but the elements were only met because of the leniency with which the court established standing in cases involving a great public interest.²¹³ Absent a great public interest, the court arguably might have found these same elements lacking.²¹⁴

While it lies within the court's discretion to read flexibility into the four *Brimmer* elements in any given case, its holdings set the tone for future litigation.²¹⁵ In this case, while it was within the court's discretion to find that the parties did not present a justiciable controversy, the court did so based on reasoning that directly contradicted its own past decisions.²¹⁶ Consequently, as *William West Ranch* now stands as precedent, the court has restricted cases which can be brought under a declaratory judgment action by requiring a more specific link between the plaintiffs' damages and the court's ability to provide a tangible remedy.²¹⁷ Additionally, the court has withdrawn the public interest exception from the justiciability doctrine, likewise limiting the cases which can be brought implicating a great public interest but standing on shaky justiciability legs.²¹⁸

CONCLUSION

The Wyoming Supreme Court's decision in *William West Ranch* narrowed the basis upon which a declaratory judgment action can be brought to only those plaintiffs who can show how their specific remedy will be directly and tangibly

²¹² *William West Ranch*, 206 P.3d at 737.

²¹³ See, e.g., *Mgmt. Council of the Wyo. Legislature v. Geringer*, 953 P.2d 839, 843 (Wyo. 1998); *Bd. of County Comm'rs v. Laramie County Sch. Dist. No. One*, 884 P.2d 946, 950 (Wyo. 1994); *Wyo. Ass'n of Consulting Eng'rs & Land Surveyors v. Sullivan*, 798 P.2d 826, 828–29 (Wyo. 1990); *Mem'l Hosp. of Laramie County v. Dep't of Revenue & Taxation*, 770 P.2d 223, 227 (Wyo. 1989); *Washakie County*, 606 P.2d at 318.

²¹⁴ See, e.g., *Geringer*, 953 P.2d at 843; *Laramie County Sch. Dist. No. One*, 884 P.2d at 949–50; *Sullivan*, 798 P.2d at 828–29; *Mem'l Hosp.*, 770 P.2d at 227; *Washakie County*, 606 P.2d at 318; *supra* notes 82–111 and accompanying text.

²¹⁵ See *Mem'l Hosp.*, 770 P.2d at 226; Keiter, *supra* note 48, at 527–28; Rochelle, *supra* note 38, at 267.

²¹⁶ See *supra* notes 174–214 and accompanying text.

²¹⁷ See *supra* notes 174–92 and accompanying text.

²¹⁸ See *supra* notes 193–214 and accompanying text.

redressed by the court's actions.²¹⁹ Additionally, the court restricted the relaxed nature of justiciability in cases implicating a great public interest by holding all four elements of the *Brimmer* test must be met even when plaintiffs invoke the exception.²²⁰ This decision is inconsistent with past cases—both those that did and did not involve a great public interest—in which the court found a justiciable controversy even when pleadings lacked specificity and exhibited gaps similar to those in *William West Ranch*.²²¹ With the requirements to establish a justiciable controversy as well as the public interest exception thus narrowed, plaintiffs that have traditionally been able to seek relief in Wyoming's courts will be without a remedy.²²²

²¹⁹ See *supra* notes 174–92 and accompanying text.

²²⁰ See *supra* notes 193–214 and accompanying text.

²²¹ See *supra* notes 193–214 and accompanying text.

²²² See *supra* notes 215–18 and accompanying text.

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NON-COMMERCIAL AIRCRAFT SALES— PLANNING STRATEGIES TO ENSURE FAA COMPLIANCE AND MINIMIZE TAXES

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Individuals and entities purchasing, owning and operating personal aircraft for non-commercial use face a myriad of regulatory compliance issues, including meeting Federal Aviation Administration (FAA) and state and federal tax requirements. A natural impulse for many clients when purchasing an aircraft is to form an entity to take title to the aircraft. The use of an entity seems logical for (i) liability protection, (ii) administration and accounting, and (iii) tax minimization. Generally, clients gravitate towards forming such an entity in states without sales or use tax to take delivery of the aircraft. This article discusses the potential pitfalls of forming an entity to take title to non-commercial aircraft.¹ It presents the proper steps necessary to comply with FAA regulations, and reviews the various taxing schemes of certain western states.²

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¹ See *infra* notes 3–70, 78–81 and accompanying text.

² See *infra* notes 3–77, 84–103 and accompanying text.

I. PART 91, PART 135 AND THE FLIGHT DEPARTMENT COMPANY PROBLEM

Part 91 of the FAA regulations governs the operation of small, non-commercial aircraft in the United States.³ Most clients who purchase aircraft for personal or business use fall within the parameters of coverage offered by Part 91. In order for an aircraft operator to use an aircraft for hire (i.e., a commercial operator), he or she must obtain a commercial license, at which point the operation of such aircraft is governed by Part 135 of the FAA Regulations.⁴ Part 135 provides a set of rules with more stringent standards for commercial operations than Part 91 offers for commuter operations.

An aircraft commercial operator is a person hired for the sole purpose of transporting persons or property.⁵ Such definition raises a key issue in personal aircraft ownership: If a client establishes an entity to hold title to an aircraft for the purpose of personal use and the transportation of owners and guests, is that entity engaging in a “major enterprise for profit” as defined under Part 91?⁶ According to numerous FAA Legal Interpretations and Chief Counsel’s Opinions, the answer is: Yes.⁷ Simply put, aircraft operations cannot be “incidental” to any other operation if the sole purpose of the entity is to own and operate the aircraft.⁸ Although it is not defined in any regulation, the FAA refers to such

³ 14 C.F.R. §§ 91.1–91.1507 (2008).

⁴ §§ 135.1–135.507.

⁵ § 1.1. A commercial operator is defined as:

[A] person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property Where it is doubtful that an operation is for ‘compensation or hire’, the test applied is whether the carriage by air is merely incidental to the person’s other business or is, in itself, a major enterprise for profit.

Id.

⁶ *See id.*

⁷ *See infra* note 9 and accompanying text; Letter from Chief Counsel, FAA, to Joseph A. Kirwan, Ogden, Newell & Welch, PLLC (May 27, 2005), available at http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc200/interpretations/data/interps/2005/Kirwan.rtf (last visited Nov. 21, 2009); David T. Norton, *Don’t Put Your Client’s Shiny New Corporate Jet Into a Sole-Asset LLC*, 65 TEX. BAR J. 314, 314 (2002); Jeff Wieand, *Your Client vs. the FAA: The Flight Department Company Trap*, 12 ABA BUS. L. TODAY 38, 39 (Mar./Apr. 2003); *see also* Letter from Kenneth P. Quinn, Chief Counsel, FAA, to the Honorable Wendell L. Wilkie, II, General Council, Department of Commerce (June 16, 1992), available at http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc200/interpretations/data/interps/1992/W.Willkie.rtf (last visited Nov. 21, 2009).

⁸ 14 C.F.R. § 91.501(b)(5):

Operations that may be conducted under the rules in this subpart instead of those in parts 121, 129, 135, and 137 of this chapter when common carriage is not involved, include— . . . (5) Carriage of officials, employees, guests, and property of a company on an airplane operated by that company, or the parent or a subsidiary of the company or a subsidiary of the parent, when the carriage is within the scope

a single purpose entity as a “flight department company.”⁹ The determination that an entity is a “flight department company” will remove an operation from Part 91 to the more stringent operating rules of Part 135. For example, in the FAA Assistant Chief Counsel Opinion (Opinion) issued on March 9, 2007, a private party wished to form a limited liability company (Company) for the purpose of owning and operating an aircraft.¹⁰ The owner of the Company made contributions to the Company which were used to pay the costs of owning and operating the aircraft.¹¹ The aircraft was used solely for the transportation of the client, client’s family members, and guests.¹² The FAA declared the Company a “flight department company” and disallowed the aircraft’s operation under Part 91.¹³ The conclusion made by the FAA was that contributions made by the client to the Company used to fund the operating expenses of the aircraft were regarded as “compensation.”¹⁴ Based upon this reasoning, clients are barred from forming a special purpose “flight department company” to take title to an aircraft because contributions to the entity to pay expenses would be deemed compensation, and thus remove the client from regulation under Part 91 and into Part 135.¹⁵

The flight department company rule prohibits operation, not the mere ownership of aircraft for personal use by individuals or the joint ownership by several entities leasing aircraft to third parties.¹⁶ Therefore, a properly structured joint ownership arrangement of an aircraft is a practical solution to meeting the flight department company rule.¹⁷ Under the advice and oversight of an attorney familiar with FAA regulations, a group of individual clients can jointly own and operate an aircraft for personal purposes without running afoul of the flight

of, and incidental to, the business of the company (other than transportation by air) and no charge, assessment or fee is made for the carriage in excess of the cost of owning, operating, and maintaining the airplane, except that no charge of any kind may be made for the carriage of a guest of a company, when the carriage is not within the scope of, and incidental to, the business of that company

⁹ Letter from Rebecca B. MacPherson, Assistant Chief Counsel, FAA, to James W. Dymond, Esq., Moore & Van Allen, PLLC (Mar. 9, 2007), *available at* http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc200/interpretations/data/interps/2007/James%20Dymond.pdf (last visited Nov. 21, 2009) (responding to a request for guidance as to whether the entity at issue would be a “flight department company,” Ms. MacPherson replies “Yes, as that phrase has been used in FAA interpretations.”).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* The term “compensation” is not defined in Part 91. However, the finding that the operator was receiving compensation brought the operator within the definition of a “commercial operator” and out of the Part 91 operating rules. *See* 14 C.F.R. § 1.1 (defining commercial operator).

¹⁵ *See supra* note 4 and accompanying text.

¹⁶ 14 C.F.R. § 91.501(a) (“This subpart prescribes *operating* rules,”) (emphasis added).

¹⁷ *See* 14 C.F.R. § 91.501(b)(6).

department company problem. Such individual clients could each form an entity to own a portion of the aircraft, but the newly formed entities would be barred from “operating” the entity under the flight department company rule. Instead, the more practical solution for a group of individual clients wishing to jointly own and operate an aircraft is simply to enter into a dry lease with a separate operating entity.¹⁸

II. FEDERAL EXCISE TAX

A major tax concern of owning and operating a personal aircraft is the application of the federal excise tax (FET).¹⁹ Private business aircraft operators are required to pay FET on either fuel or the transportation of persons or property.²⁰ The FET applied to the transportation of persons or property is a percentage tax on the amount paid for commercial transportation, while the FET on fuel is a cents-per-gallon tax.²¹ Effective October 1, 1999, the Internal Revenue Code imposes a 7.5% excise tax upon taxpayers providing air transportation services to persons.²²

For the most part, private operators falling under the parameters of Part 91 are subject to the fuel tax on non-commercial aviation, while commercial operators operating within the parameters of Part 135 are subject to the tax on the transportation of persons or property. However, the status of commercial or noncommercial operators differs from the industry status for tax purposes.²³ Revenue Ruling 78-75 dictates that the status of an aircraft operator as a “commercial operator” under FAA regulations does not determine the commercial

¹⁸ See, e.g., 14 C.F.R. § 91.1001(b)(2) (“A dry-lease aircraft exchange means an arrangement, documented by the written program agreements, under which the program aircraft are available, on an as needed basis without crew, to each fractional owner.”).

¹⁹ See generally I.R.C. § 4261 (2006).

²⁰ See IRS PUBLICATION 510, EXCISE TAXES (INCLUDING FUEL TAX CREDITS AND REFUNDS) (Revised Apr., 2009), available at <http://www.irs.gov/pub/irs-pdf/p510.pdf> (last visited Nov. 21, 2009).

²¹ For a helpful website pertaining to the FET as applied to aircraft, see National Business Aviation Association, <http://www.nbaa.org>.

²² I.R.C. § 4261(a).

²³ As noted in note 5, the FAA defines the term “commercial operator” as:

[A] person who, for compensation or hire, engages in the carriage by aircraft in air commerce of persons or property Where it is doubtful that an operation is for ‘compensation or hire’, the test applied is whether the carriage by air is merely incidental to the person’s other business or is, in itself, a major enterprise for profit.

14 C.F.R. § 1.1 (2008). However, the Internal Revenue Service defined the term “commercial operator” as: “Anyone in the business of transporting persons or property for compensation or hire by air.” I.R.C. § 4041(c) (2006).

or noncommercial status of the operator in the application of the aviation fuel and air transportation taxes.²⁴

Generally speaking, when an individual owns his or her own aircraft and uses it to fly persons for personal enjoyment, such operation of the aircraft is not deemed a taxable event for purposes of FET.²⁵ However, any commercial operation of an aircraft, including flying persons or property for hire, for payment, or for some type of service rendered in exchange for the flight is subject to FET.²⁶

In reality, there is a fine line in determining whether a personal aircraft is operating as a commercial or non-commercial aircraft and such determination is extremely important to aircraft ownership. If an aircraft is not flying in compliance with FAA regulations due to its lack of appropriate certification, the aircraft's owner runs the risk of hefty FAA fines and aircraft insurance coverage could be denied. The FAA issues fines for every flight taken under a Part 91 certificate when a Part 135 certificate is actually required.²⁷ The dollar amounts of these fines can be extraordinary.²⁸ Adding insult to injury, the denial of insurance coverage generally arises from a standard clause in aircraft insurance policies requiring that the aircraft operate in compliance with FAA regulations in order to maintain insurance coverage. Therefore, it is not only vitally important to determine whether a client is acting as a commercial or non-commercial aircraft operator, it is also essential to determine whether the FET will apply to such transportation of persons or property for tax purposes.

III. SALES AND USE TAX IMPLICATIONS

In any outright purchase or leasing structure involving non-commercial aircraft, various state taxes play a significant role in logistical planning.²⁹ Specifically, the area of multistate sales and use tax must be considered in the purchase or lease of a personal aircraft. Generally, sales tax is a tax applied at the

²⁴ Rev. Rul. 78-75, 1978-1 C.B. 340.

²⁵ Rev. Rul. 84-12, 1984-1 C.B. 211 (stating that where there is no amount paid for air transportation, the amount is not subject to the percentage tax).

²⁶ See I.R.C. § 4261(a) (stating in general, any amounts paid for the air transportation of person are subject to tax). See generally INTERNAL REVENUE SERVICE, INTERNAL REVENUE SERVICE EXCISE TAX—AIR TRANSPORTATION AUDIT TECHNIQUES GUIDE (ATG) (Revised Apr. 2008), available at http://www.irs.gov/pub/irs-mssp/air_transportation.pdf (last visited Nov. 21, 2009).

²⁷ See 14 C.F.R. § 13.305(d) (2009).

²⁸ *Id.* (establishing fines up to \$11,000 for each violation of an aircraft operating under a Part 91 certificate when it should be operating under a Part 135 certificate).

²⁹ Although not discussed in great detail in this article, taxes must be considered and addressed at the state level, as well as the local level, when advising clients on the purchase or lease of an aircraft.

point of sale on tangible personal property and certain enumerated services.³⁰ Use tax is generally an excise tax applied in lieu of sales tax on the use, storage or consumption of goods within a state, regardless of when the actual sale took place.³¹ Use tax is generally imposed at the same rate as the state's statutory sales tax rate.³² Because state statutes and regulations regarding sales and use tax are not universal, understanding the various state sales and use tax implications is imperative when devising planning strategies for high net-worth sales.

In 2000, a nationwide effort to align the states' sales and use tax rules was established via the Streamlined Sales Tax Project (SSTP).³³ The SSTP's main objective is to simplify and modernize sales and use tax collection and administration in the United States by creating a set of universal rules called the Streamlined Sales and Use Tax Agreement (Agreement).³⁴ As not every state has adopted the measures drafted in the Agreement, an understanding of the sales and use tax statutes in all applicable jurisdictions associated with a sale or lease of personal aircraft is essential.

Because an aircraft is tangible personal property, states tend to impose sales and use tax on personal aircraft sales.³⁵ Depending upon the state's statutory requirement, sales tax is generally due based on the location of the sale.³⁶ Additionally, sales tax is imposed on the retailer, which then remits the tax directly

³⁰ See, e.g., WYO. STAT. ANN. § 39-15-103(a)(i)(A), (J) (2009); COLO. REV. STAT. § 39-26-106(1)(a), (c) (2009); UTAH CODE ANN. § 59-12-103(1)(a), (b) (2009). Each statute discusses the imposition of sales tax within the state.

³¹ See WYO. STAT. ANN. § 39-15-103(a)(i), (c)(i).

³² See, e.g., WYO. STAT. ANN. § 39-16-104(a) (2009) (imposing the use tax at the same rate as state sales tax).

³³ For more information pertaining to the Streamlined Sales Tax Project, see Streamlined Sales Tax Governing Board, Inc., <http://www.streamlinedsalestax.org>.

³⁴ The goal of SSTP is to unify state sales tax systems. In two United States Supreme Court cases, *Bellas Hess v. Illinois*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), it was determined that a state may not require a seller without nexus in the state to collect sales tax on the sale. The United States Supreme Court found the existing sales tax system too complicated to impose upon a business which lacks nexus. The Court further determined Congress has the authority to allow states to require remote sellers to collect tax. The result of these two key cases is the Streamlined Sales and Use Tax Agreement (Agreement). The purpose of the Agreement is to simplify the administration of sales and use tax among the states.

³⁵ See, e.g., WYO. STAT. ANN. § 39-15-101(a)(ix) (2009) (defining "tangible personal property" as all personal property that can be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses. Aircraft falls within such definitions); UTAH CODE ANN. § 59-12-102(108)(a)(i) (2009) (defining "tangible personal property" as all personal property that can be seen, weighed, measured, felt or touched, or that is in any other manner perceptible to the senses, a definition that aircraft fall within).

³⁶ See, e.g., WYO. STAT. ANN. § 39-15-103(a)(i)(A) (levying sales tax on every retail sale of tangible personal property within the state).

to the state.³⁷ However, certain key states can be considered tax friendly havens for personal aircraft sales, and strategic planning utilizing these states could mean large tax savings to an aircraft purchaser. Five states—Alaska, Delaware, Montana, New Hampshire and Oregon—do not impose sales or use tax on the sale of tangible personal property or certain enumerated services.³⁸ Neither Massachusetts nor Rhode Island impose sales or use tax on aircraft sales.³⁹ Depending upon the aircraft's weight, Connecticut exempts certain aircraft from sales and use tax and Delaware exempts certain aircraft from the state's gross receipts tax.⁴⁰ Further, a number of states, including Arizona, Kansas and Nebraska, have certain fly away exemptions, which generally allow that title of an aircraft can transfer within the state with no sales tax imposition, so long as the aircraft is removed from the state within a certain specified period of time.⁴¹

Wyoming requires sales tax be levied on the purchase price of every retail sale of tangible personal property in the state.⁴² Wyoming's sourcing statute details a myriad of sourcing rules for various sales of tangible personal property within in the state.⁴³ Wyoming also requires persons storing, using or consuming tangible personal property in the state be liable for use tax.⁴⁴ Use tax is a tax on the use of goods or certain services within a state when sales tax has not been paid.⁴⁵ This tax is generally based on the fair market value of the property at the time of sale.⁴⁶ The sourcing rule for use tax in Wyoming is quite similar to the sourcing rule for sales tax in the state, as it covers various and specific transactions upon which use tax would be imposed.⁴⁷

³⁷ See, e.g., WYO. STAT. ANN. § 39-15-103(c)(i) (requiring every vendor to collect sales tax).

³⁸ See ALASKA STAT. § 29.45.650–710 (2009); DEL. CODE ANN. tit. 30, § 2909(l) (2009); MONT. CODE ANN. § 15-6-219 (2007); N.H. CODE ADMIN. R. ANN. §§ 72:1–78, 73:4 (2009); OR. REV. STAT. § 307.190 (2009).

³⁹ MASS. GEN. LAWS ch. 64H, § 6(vv) (2009); R.I. GEN. LAWS § 44-18-30(56) (2009).

⁴⁰ CONN. GEN. STAT. ANN. § 12-412(99) (West 2009) (exempting from sales tax the sale of aircraft weighing 6,000 pounds or more); DEL. CODE ANN. tit. 30 § 2909(l) (exempting from gross receipts tax the sale of aircraft weighing 12,500 pounds or more).

⁴¹ See ARIZ. REV. STAT ANN. § 42-5159(B)(7)(b) (2009); FLA. STAT. ANN. § 212.05(1)(a)(2) (West 2009); KAN. STAT. ANN. § 79-3606(k) (2009) (exempting from sales tax any aircraft sold in the state (i.e., title transferring in Kansas) if the purchaser is a resident of another state and the aircraft is removed from Kansas within ten days of the sale).

⁴² WYO. STAT. ANN. § 39-15-103(a)(i)(A).

⁴³ WYO. STAT. ANN. § 39-15-104 (2009). Sourcing is the process of tracing a sale by the type and location of the sale in order to determine what jurisdiction the tax collected from a transaction is subsequently owed.

⁴⁴ WYO. STAT. ANN. § 39-16-103(a)(i) (2009).

⁴⁵ See, e.g., WYO. STAT. ANN. § 39-16-103(c)(i)–(ii) (extinguishing the use tax if the taxpayer proves that sales tax on the tangible personal property was paid in another jurisdiction).

⁴⁶ See, e.g., WYO. STAT. ANN. § 39-16-103(b) (establishing the basis of use tax in Wyoming).

⁴⁷ WYO. STAT. ANN. § 39-16-104 (2009).

Many jurisdictions treat the lease of tangible personal property as a sale for tax purposes.⁴⁸ In Wyoming, sales tax applies to the gross rental paid for the lease of tangible personal property, if the transfer of possession would be taxable upon sale.⁴⁹ For sales tax purposes, Wyoming statutes further specify that leases of aircraft requiring recurring periodic payments are sourced to the primary property location.⁵⁰ For leases not requiring recurring periodic payments, the payment is sourced like a retail sale—at the business location of the seller.⁵¹ In Wyoming, the use tax statutes also specify that leases of aircraft requiring recurring periodic payments are sourced to the primary property location.⁵² For leases not requiring recurring periodic payments, the payment is sourced to the business location of the seller.⁵³

To understand Wyoming's sales and use tax statutes in a practical scenario, consider a basic sale of personal aircraft from an aircraft broker to a Wyoming resident. For the aircraft sale to be taxable in Wyoming, title of the aircraft must transfer in Wyoming.⁵⁴ To properly avoid sales tax on the transaction, a Wyoming resident purchaser may structure the sale so that title of the aircraft transfers in a sales tax friendly haven, such as Montana, which does not impose sales or use tax.⁵⁵ However, once the aircraft is brought back into Wyoming for use, the purchaser is subject to use tax at the same rate upon which sales tax would have applied, had the sale taken place in Wyoming.⁵⁶ Use tax in Wyoming is calculated based upon when the tangible personal property is first stored, used, or consumed within the state.⁵⁷ Wyoming use tax does not apply to tangible personal property which is purchased and used in another state prior to its use in Wyoming.⁵⁸

⁴⁸ See WYO. STAT. ANN. § 39-15-103(a)(i)(B); IDAHO CODE § 63-6612(2)(h) (2009); ARIZ. REV. STAT. § 42-5001(13) (2009).

⁴⁹ WYO. STAT. ANN. § 39-15-103(a)(i)(B).

⁵⁰ WYO. STAT. ANN. § 39-15-104(f)(ii)(A) (2009). Note that while Wyoming statutes do not define the term “recurring periodic payments,” it is arguable that monthly or yearly installment payments for a particular term would qualify as recurring periodic payments (i.e., \$10,000 payment each year for a lease term of ten years).

⁵¹ WYO. STAT. ANN. § 39-15-104(f)(ii)(B). Note that while Wyoming statutes do not define the term “recurring periodic payment,” it is arguable that a lump sum payment made for a particular term would be denoted as a non-recurring periodic payment (i.e., \$50,000 payment made for a ten year lease term).

⁵² WYO. STAT. ANN. § 39-16-104(e)(iii)(A).

⁵³ WYO. STAT. ANN. § 39-16-104(e)(iii)(B).

⁵⁴ See WYO. STAT. ANN. § 39-15-103(a)(i)(A).

⁵⁵ See MONT. CODE ANN. § 15-6-219.

⁵⁶ See WYO. STAT. ANN. § 39-16-104(a).

⁵⁷ 011-000-002 WYO. CODE R. § 4(i)(ii) (Weil 2009).

⁵⁸ § 4(i)(v).

In *In re Ken Koster*, a Wyoming resident who purchased an aircraft out of state for use out of state was not subject to sales or use tax in Wyoming.⁵⁹ In *Koster*, the Wyoming resident purchased an aircraft with title transferring in Missouri, and the aircraft was never delivered, used or stored in Wyoming.⁶⁰ The Wyoming Board of Equalization found that sales tax did not apply to the sale of the aircraft, as title transferred outside the state of Wyoming.⁶¹ Further, use tax was not imposed because the aircraft was never stored or used within the state.⁶² In instances similar to *Koster*, it is arguable that if an aircraft is purchased and used outside of Wyoming, neither sales nor use tax should apply to a Wyoming purchaser. However, special care must be taken in situations where the sale of an aircraft occurs outside of Wyoming but *use* of such aircraft might occur inside the state.

A. *Advantages of Lease Transactions*

In scenarios where the sale of an aircraft occurs outside of Wyoming but use of the aircraft occurs within the state, it is advantageous to structure a leasing agreement using tax-friendly states in order to effectively minimize a Wyoming resident's sales and use tax obligations.

To understand the implications of Wyoming's sales and use tax statutes in this particular factual scenario, consider a leasing agreement entered into between a non-Wyoming resident business entity and a Wyoming resident. In this example, a business entity situated in a state with no sales tax (for example, Montana) could purchase an aircraft from a third-party broker and subsequently lease the aircraft to Wyoming residents, resulting in favorable sales and use tax results.⁶³ In such a transaction, title of the aircraft would successfully transfer outside of Wyoming, while use of the aircraft by the lessee would occur in Wyoming.⁶⁴ As noted earlier, for purposes of both sales and use tax the Wyoming sourcing requirements with respect to leases provide that recurring periodic payments are sourced to the primary property location, while payments which are not recurring are sourced

⁵⁹ *In re Ken Koster*, No. 2004-132 (Wyo. Bd. of Equalization Aug. 2005), available at http://taxappeals.state.wy.us/images/docket_no_2004132.htm (last visited Nov. 21, 2009).

⁶⁰ *Id.* at ¶¶ 9–11.

⁶¹ *Id.* at ¶¶ 30–40 (order).

⁶² *Id.*

⁶³ For favorable income tax results, the non-resident business entity should be organized as a pass through entity and the Wyoming resident lessees should be the members/partners of such entity. For example, the Montana entity could be set up as a Montana LLC and the members of the LLC would be the Wyoming residents who will ultimately lease the aircraft from the LLC.

⁶⁴ Title of the aircraft would transfer in Montana upon the sale by the broker to the business entity. Upon the leasing arrangement between the Montana business entity lessor and the Wyoming resident lessees, use of such aircraft would occur in Wyoming.

to the business location of the seller.⁶⁵ Hence, structuring a leasing agreement between a non-resident lessor and Wyoming resident lessees requiring a lump sum, non-periodic payment covering a term of years would result in the leasing payment sourced outside of Wyoming for both sales and use tax purposes.⁶⁶ Further, structuring a transaction utilizing a leasing agreement between a business entity lessor and a third party lessee, rather than structuring a transaction utilizing an outright purchase of an aircraft by an entity for use, is essential in order to avoid the flight department company rule imposed by the FAA.⁶⁷ The flight department company rule bars a single individual from forming an entity for the sole purpose of owning and operating an aircraft, and also disallows a group of individuals from pooling their funds together to form a specific purpose entity.⁶⁸

IV. ADDITIONAL CONSIDERATIONS

Other planning considerations associated with the sale or lease of personal aircraft include income and property taxes, as well as title and lien priorities. APPENDIX A below provides a brief outline of the applicable sales, use, income and personal property tax rates in certain states located around or near Wyoming.⁶⁹

Income tax considerations must be accounted for with respect to the sale or lease of personal aircraft. Income tax is a tax levied on the gross income of an individual or business entity.⁷⁰ In the outright purchase of a personal aircraft, the seller will be subject to federal and, in many cases, state income tax on the gross income received from the sale of an aircraft.⁷¹ In a thoughtful leasing structure, state income tax obligations can be reduced or eliminated if the lessor's business entity is set up in a state which imposes no income tax.⁷²

⁶⁵ See WYO. STAT. ANN. §§ 39-15-104(f)(ii)(A)–(B), 39-16-104(e)(iii)(A)–(B); see *supra* note 38 and accompanying text.

⁶⁶ Note, this scenario does not consider the income tax obligations a taxpayer may be subject to in any given state where the lessor and lessees are located. A thorough understanding of a particular state's income tax requirements where such parties are located is imperative to fully understand the tax consequences facing the lessor and lessees in any given scenario. While outside the scope of this article, proper planning can also reduce or eliminate income tax obligations with respect to such parties.

⁶⁷ See MacPherson, *supra* note 9 and accompanying text.

⁶⁸ *Id.*

⁶⁹ See *infra* APPENDIX A, WESTERN STATE TAX MATRIX.

⁷⁰ I.R.C. § 61(a) (2006) (defining gross income as all income from whatever source derived).

⁷¹ *Id.* (defining gross income without differentiating between an individual or business entity).

⁷² Seven states—Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming—impose no state income tax. Therefore, a tax planner advising a client about the various tax implications associated with the sale or lease of an aircraft must be aware that certain states are more favorable than others with respect to setting up a business entity. Note, however, that while

Property tax is another consideration to keep in mind when selling or leasing personal aircraft. Property tax, also referred to as an ad valorem tax, is a tax on the assessed value of real and certain tangible personal property.⁷³ Property tax is defined as a “tax imposed by municipalities upon owners of property within their jurisdiction based on the value of such property.”⁷⁴ Generally, property tax is imposed at the state level, but can also be imposed at the city or county level.⁷⁵ Registration of the aircraft with the FAA at its permanent hanger location will likely dictate which state’s property tax is applicable.

Title and lien priority must also be considered in the sale or lease of an aircraft. Federal law effectively preempts a state’s normal methods of perfection under the Uniform Commercial Code.⁷⁶ To perfect an outright interest, security interest, or lease, etc., such instrument must be filed with the FAA, which acts as a central repository for all domestic aircraft commercial transactions.⁷⁷ In addition, any aircraft able to transport more than eight people is subject to the Cape Town Treaty adopted by the United States in the Cape Town Treaty Implementation Act of 2004.⁷⁸ This treaty recognizes the International Registry of Mobile Assets (International Registry) in Dublin, Ireland, as the central registry establishing title and lien priority on an international level.⁷⁹ Any owner of an aircraft covered by the Treaty should register at the International Registry in addition to registration with FAA.

CONCLUSION

Transactions involving personal aircraft sales and leases are tremendously complex and should only be implemented after careful consideration of all the applicable taxes, FAA regulations, and priority of title and liens. While the basic

these seven states do not impose income tax, some of them impose other applicable taxes, including franchise taxes on business entities, excise taxes of aircraft, or Business and Occupation (B&O) tax on taxpayers engaging in business activities in the state which must be considered in the planning process.

⁷³ See WYO. STAT. ANN. §§ 39-13-101(a)(ii), 39-13-103 (2009).

⁷⁴ BARRON’S LAW DICTIONARY 471 (2d ed. 1984).

⁷⁵ I.R.C. § 164 (2006) (permitting a personal deduction from federal income taxes for state and local income taxes and taxes on real and personal property).

⁷⁶ See, e.g., WYO. STAT. ANN. § 34.1-9-311(a)(i) (2009) (indicating that the filing of a financing statement at the Wyoming Secretary of State does not perfect a security interest subject to federal law).

⁷⁷ See 49 U.S.C. §§ 40102, 44101–44112; see also 14 C.F.R. Parts 45, 47 and 49 (2008).

⁷⁸ Cape Town Implementation Act of 2004, Pub. L. No. 108-297, 118 Stat. 1095 (2004) (codified at 49 U.S.C. §§ 40101 note, 44107, 44108, 44113 (2006)).

⁷⁹ *Id.* The international registry is supervised by the International Civil Aviation Organization (ICAO) and is being operated out of Dublin, Ireland by Aviareto, a joint venture between SITA, an air transport IT service provider, and the Irish government. See Aviareto, <http://www.aviareto.aero/> (last visited Nov. 21, 2009).

sale of a personal aircraft from a broker to a purchaser in a state with no sales tax may initially seem appealing, tremendous pitfalls can occur with respect to use and income tax implications. Such a sale may also render hefty FAA penalties and fees.⁸⁰

A better alternative to personal aircraft ownership comes in the form of a dry lease from a business entity lessor to business or individual lessees, which utilizes strategic states with aircraft tax-friendly implications.⁸¹ Because the structuring of such a transaction requires meticulous understanding of various state income tax, sales and use taxes, and property tax implications, as well as a thorough understanding of FAA regulations in order to obtain the best possible outcome for the taxpayer, particular care should be taken to understand all such issues prior to implementation.

⁸⁰ See *supra* notes 27–28 and accompanying text.

⁸¹ See *supra* notes 29–70 and accompanying text.

APPENDIX I
WESTERN STATE TAX MATRIX

ARIZONA

<i>Sales/Use Tax Rate:</i> ⁸²	5.6% ⁸³
<i>Corporate Income Tax Rate:</i>	6.968% ⁸⁴
<i>Aircraft License and Registration Fees:</i>	\$5 registration fee + licensing fee equal to ½ % of FMV in lieu of personal property taxes ⁸⁵

COLORADO

<i>Sales/Use Tax Rate:</i>	3.0% ⁸⁶
<i>Corporate Income Tax Rate:</i>	4.63% ⁸⁷
<i>Aircraft License and Registration Fees:</i>	None ⁸⁸

IDAHO

<i>Sales/Use Tax Rate:</i>	6% ⁸⁹
<i>Corporate Income Tax Rate:</i>	7.6% ⁹⁰
<i>Aircraft License and Registration Fees:</i>	\$0.01 per pound not to exceed \$200 licensing fee ⁹¹

MONTANA

<i>Sales/Use Tax Rate:</i>	0% ⁹²
<i>Corporate Income Tax Rate:</i>	6.75% ⁹³
<i>Aircraft License and Registration Fees:</i>	Registration fee based on type and weight of aircraft in lieu of personal property taxes ⁹⁴

UTAH

<i>Sales/Use Tax Rate:</i>	4.70% ⁹⁵
<i>Corporate Income Tax Rate:</i>	5% ⁹⁶
<i>Aircraft License and Registration Fees:</i>	\$25 registration fee + .4% (.004) of average wholesale market rate licensing fee ⁹⁷

WASHINGTON

<i>Sales/Use Tax Rate:</i>	6.5% ⁹⁸
<i>Corporate Income Tax Rate:</i>	0%. B&O tax applies at various rates ⁹⁹
<i>Aircraft License and Registration Fees:</i>	\$15.00 registration fee + excise tax based on type of aircraft ¹⁰⁰

WYOMING

<i>Sales/Use Tax Rate:</i>	4% ¹⁰¹
<i>Corporate Income Tax Rate:</i>	0% ¹⁰²
<i>Aircraft License and Registration Fees:</i>	None ¹⁰³

⁸² State sales and use tax rates included in this matrix do not include applicable local city and county rates.

⁸³ ARIZ. REV. STAT. ANN. § 42-5010(A), (G) (2009).

⁸⁴ ARIZ. REV. STAT. ANN. § 43-1111 (2009).

⁸⁵ See ARIZ. REV. STAT. ANN. §§ 28-8324, -8325, -8335, -8336, -8342 (2009).

⁸⁶ COLO. REV. STAT. ANN. § 39-26-106(1)(a)(I) (West 2009).

⁸⁷ COLO. REV. STAT. ANN. § 39-22-301(I) (West 2009).

⁸⁸ See COLO. REV. STAT. ANN. §§ 41-1-101 to -108 (West 2009).

⁸⁹ IDAHO CODE ANN. § 63-3619 (2009).

⁹⁰ IDAHO CODE ANN. § 63-3025(1) (2009).

⁹¹ IDAHO CODE ANN. § 21-114(b)(1) (2009).

⁹² See MONT. CODE ANN. §§ 15-68-101 to -110 (2007).

⁹³ MONT. CODE ANN. §§ 15-31-121, -403 (2007).

⁹⁴ See MONT. CODE ANN. §§ 67-3-201; 67-3-206 (2007).

⁹⁵ UTAH CODE ANN. § 59-12-103(2) (2009).

⁹⁶ UTAH CODE ANN. § 59-7-104(2) (2009).

⁹⁷ UTAH CODE ANN. §§ 59-2-404(1)(b); 72-10-110(2)(a) (2009).

⁹⁸ WASH. REV. CODE ANN. § 82.08.020(1) (West 2009).

⁹⁹ See WASH. REV. CODE ANN. § 82.04.220 (West 2009).

¹⁰⁰ See WASH. REV. CODE ANN. §§ 47.68.250, 82.48.020(1), .030(1) (West 2009).

¹⁰¹ WYO. STAT. ANN. § 39-15-104(a)-(b) (2009).

¹⁰² WYO. STAT. ANN. § 39-12-101 (2009).

¹⁰³ See WYO. STAT. ANN. §§ 10-1-101 to 10-6-104 (2009).

REPORT OF THE WYOMING SUPREME COURT TO THE WYOMING STATE BAR

*Barton R. Voigt, Chief Justice**

September 18, 2009

Given my brief remaining tenure as Chief Justice, this will be by last annual report to the Wyoming State Bar. Our state courts have made considerable progress this past year in dealing with all sorts of issues, and I am proud to tell you about them. First and foremost, of course, is our return to the Supreme Court building after two years in temporary quarters. We believe the remodeling project was a huge success, and that the building is now ready for another hundred years of use. As always, I have to credit the foresight of the legislature in doing the right thing at the right time.

Next, I should mention that the Supreme Court's electronic case management and electronic filing system is running full tilt. We are still operating under a court order, rather than formerly adopted rules, because we want to make sure we have all the bugs worked out before things are finalized. The good news is that the system is not cast in concrete and we are always looking for ways to improve it; we can make it better as we learn from experience. For instance, we are still considering the request we have had from several attorneys to expand our filing deadline from 5:00 p.m. to 12:00 a.m. We have not made that change, for two reasons: first, we figure the attorneys will just have to stay up late to panic at 11:59, instead of panicking at 4:59; and second, if you have a problem before 5:00, someone is in the clerk's office to help you. They won't be there at midnight.

This will not come as news to the officers, commissioners, employees, or director of the Bar, but the Court and the Bar are cooperating with the Court's I.T. vendor to improve the passage of information between the Court and the Bar. Once again, the legislature recognized this as a legitimate need, and funded the program. It is my understanding, although I have stayed out of the nitty gritty aspects of this project, that, after some initial discussions, the project has been toned down a bit and that there will not be as much change as was originally expected. The goal, simply put, is to make sure that both systems have the same information about attorneys at the same time.

* Barton R. Voigt was raised in Thermopolis, Wyoming. He obtained a B.A. and M.A. in American History, as well as a J.D., at the University of Wyoming. He practiced law in his home town for ten years, serving as Hot Springs County and Prosecuting Attorney for two terms. After two years as a county judge in Gillette, he was a district judge in Douglas for eight years. He was appointed to the Supreme Court on March 29, 2001, and became Chief Justice on July 1, 2006.

Our other major technology project, and it is a massive project, is the installation of a common electronic case management system, which will eventually incorporate electronic filing, in all of the State's district courts. There are now four separate systems in operation, with little ability to communicate with one another or the Supreme Court. We took this on as a state-funded project because it was clear that individual counties could not do it. Dockets and case files, and I assume the court calendar, will become available to counsel and litigants, just as briefs now are available at the Supreme Court. This is going to be a multi-year project, so do not expect grand changes in your county too quickly.

Our project to implement an electronic citation program for the circuit courts and law enforcement fell by the wayside after the economic slowdown. It had been approved, and we expect that we will get it back in some fashion, at some time. The idea is that the officer can create an electronic citation that is sent to the court, and to his or her agency, and that the information contained therein will then populate all the various required reports, thereby eliminating duplication of effort. The officer will not actually be able to open a court file, but the citation will end up in a queue for review by the prosecutor and the court before it is actually filed. Although the project was derailed at the end of the last legislative session, it is our understanding that the Wyoming Highway Patrol is getting it back on track.

Another project in which we are in mid-stream is an attempt to draft polices both for public access to court records, and the denial thereof, plus polices to govern redaction of confidential information from all court filings. You can imagine that it is much easier to *keep* confidential information out of documents before they are filed, than it is to *take* confidential information out of documents after they are filed. This is especially true when we get into the arena of electronic filing. There are just lots of things that you do not want out there on the internet. The Board of Judicial Policy and Administration (BJPA) is considering these rules this very week.

Because of a bit of a crisis in our State's ability to provide access to justice, the BJPA also created a Commission on Access to Justice. It will be an on-going commission whose purpose will be to study what we have had, to determine what our needs are, and to see how close we can get to fulfilling those needs. Justice Burke and Justice Kite, at my request, have taken the lead in this endeavor, and as they usually do, they have taken it far beyond where I would have been able to get in this much time. The Commission is holding public hearings, and I am sure the members would be happy to speak to your local bar associations.

One of the biggest areas of controversy within the judiciary this past year has been the transition from so-called "drug courts" to "court-supervised treatment programs." We are trying to separate out the judicial functions from the prosecutorial and counseling functions, and we are now drafting rules that

guide what judges may, and may not, do in this non-traditional arena. Our central problem, and I will admit it up front, is that we are far from uniform amongst ourselves in what we believe to be the correct answer. But we are getting close.

I do not really have much to report about caseloads and statistics. They tend to be fairly static at this point, by which I mean that where we are okay, we are okay, but where we have needed additional judges, we still need additional judges. Sweetwater County and the Third Judicial District are primary problem areas right now, but until some facilities decisions are made, we are unable to do much. We are also looking at the Fourth Judicial District, where District Judge Fenn is overloaded in Sheridan, even before he attempts also to cover Buffalo.

Lastly, I will tell you about the budget cutting in the judiciary that resulted from the Governor's call that we cooperate as the economy fell apart. Each of the courts has tried to aim at a 10% cut—5% for each year of the biennium—with the scary thought in mind that those cuts will be reflected in the next biennium budget. That, of course, means that we go through at least three years underfunded. You are all probably aware that almost all of the judiciary's budget goes to personnel. For the most part, we own no buildings, we have no special programs—so it has been tough to find places to cut. Travel, supplies, equipment, and a few positions have been our focus. Actually, this mention of travel costs reminds me of something I wanted to bring to your attention. The Bar's beloved peremptory challenge rule actually costs the judiciary a lot of money in travel costs, because a judge has to be brought in from somewhere else. Our fiscal staff is looking into this matter to see how much money is actually involved, and if the amount is sufficient, to determine whether we should do something about it, such as charging those travel fees to litigants who utilize peremptory challenges, rather than challenges for cause.

Well, that about covers it. The judicial branch of government in Wyoming continues to function pretty much as it always has. Change is slow, but progress is made. That is as it should be.

WYOMING LAW SCHOOL BUILDING DEDICATION: WILLIAM N. BRIMMER LEGAL EDUCATION CENTER

Robert H. Henry
Chief Judge of the United States Court of Appeals for the Tenth Circuit

September 24, 2009

“The Barefoot and the Building”¹

Governor Dave Freudenthal and First Lady Nancy Freudenthal; President Tom Buchanan; the Honorable Barton Voigt, Chief Justice of the Wyoming Supreme Court; Judge Wade Brorby; Judge Terrence O’Brien and other distinguished judges; Dean Stephen Easton; Dean Jerry Parkinson (as a recovering dean myself, I always say once a dean always a dean); Marian Rochelle and April Brimmer Kunz; other distinguished donors and *sine qua nons*; political leaders; business leaders; lawyers; would-be lawyers; friends of lawyers; and lovers of lawyers—it is an honor to be here today to participate in the dedication of this marvelous edifice.

Governor, I want to thank you again for recently speaking to the judges of the Tenth Circuit at one of our somewhat rare circuit dinners. My colleagues and I admired your insightful remarks about the future of the energy industry, and we very much enjoyed our conversations with your distinguished and lawyerly First Lady.

It is appropriate that I be here as Chief Judge of the Tenth Circuit, the highest federal appellate court in the land (Denver being at 5,280 feet) because four of my colleagues hail from this state and from this law school: Judges Jim Barrett, Wade Brorby, Michael Murphy, and Terry O’Brien. Wyoming judges are taking over the Tenth Circuit; their number is matched only by a little place back East, called Harvard. (Incidentally, today I understand the Supreme Court of Wyoming sat here today in Laramie, making this the highest court in the land at 7,200 feet.)

This is a great state, with great traditions, and a great bar. And today, we celebrate a new tradition. This remarkable William N. Brimmer Legal Education center is more than an expensive, technologically up-to-date, beautifully landscaped (thank you—Marian Rochelle) learning facility, it is also a commitment to the

¹ This is a slightly edited text of remarks made by Chief Judge Robert Henry at the dedication of the William N. Brimmer Legal Education Center in Laramie, Wyoming, on September 24, 2009.

courts and to the law, and to continuing the tradition of educating the leaders of this state, and the leaders of its laws. “We shape our buildings; thereafter they shape us,” Churchill famously said. I have no doubt that this new education center will shape the generations of lawyers who pass through its doors, who in turn will help shape future legal traditions.

The legal profession is a profession dating back thousands of years. When I spoke with you last spring, at a very nice graduation of an outstanding class from this law school, I used the Torah for my text. It is, after all, appropriate to use old books of the law when one comes to a law school, or even when one comes to the law itself. I notice that Justice Scalia, a person sometimes known for his hostility to citations of foreign law, recently cited the Talmud in an opinion,² and the Talmud assuredly is foreign law. And I shall return to that scriptural mode today, with a beginning reference to the Noahide laws, also contained in the Talmud. Unlike the Decalogue or the other 613 mitzvahs or laws of the Jews, the seven Noahide laws were those that applied across the board to the children of Noah. These laws, the Rabbis taught, were given by God to Noah as a binding set of laws for all mankind.

Now many of you know the story of the flood—conveyed in both the Torah and in perhaps the world’s oldest book, the Epic of Gilgamesh. The point of the Noahide laws, given after the destruction of the world by flood, is that we are all—Jews, Gentiles, everyone—children of Noah, and thus we have certain equalities, and also certain responsibilities. There are certain laws that all civilized peoples must adhere to and follow. Indeed, in the biblical story, lawlessness was the very reason the flood occurred. As Genesis 6:11 tells it, “The earth had become corrupt before God; the earth was filled with lawlessness.”

Now a discussion of all seven laws is beyond the scope of this dedication, but one of those laws is the reason we are having this celebration. It is usually formulated as the seventh and last Noahide law, and it is often stated this way: “You shall have just laws: You shall set up an effective judiciary to enforce these laws.”

² *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2274–75 (2009) (Scalia, J., dissenting) (“A Talmudic maxim instructs with respect to the Scripture: ‘Turn it over, and turn it over, for all is therein.’ The Babylonian Talmud, Tractate Aboth, Ch. V, Mishnah 22 (I. Epstein ed. 1935). Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not. The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed—which is why some wrongs and imperfections have been called nonjusticiable.”).

These sages long ago realized that society must have a body of just laws to prosper, and even to survive. And they recognized that a judicial system is necessary to enforce and interpret these laws. And this is, of course, why we have law schools: To train and educate lawyers and judges (and also legislators, businessmen, and other readers of legal texts) how to access and utilize the law in a society governed and regulated by laws. And maybe through their advocacy they can leave a legacy or make an impact that will make changes for the better on this system. So we are here today in obedience to that universal Noahide law. And to recognize the important role law schools like this can play in the ongoing development of new legal minds.

And speaking of universal laws, the brilliant scientist and mystic Isaac Newton famously said, “If I have seen further it is only by standing on the shoulders of giants.”³ And today as we think about the task at hand, to educate about the law, we clearly share Newton’s vantage point. We stand on the shoulders of several giants who occupy the historic stage of this law school. They have built this institution and made this possible. Perhaps the first giant that should be mentioned is William N. Brimmer.

William Brimmer was a man of great integrity, vision, and civility. He loved his family, his country, and the University of Wyoming. He attended the University for seven years. His undergraduate degree was in political science. In a time-honored tradition (and one that I share by the way) he took his political science degree to law school, specifically, to the University of Wyoming College of Law, where he earned his J.D.—much to the chagrin of his father who had wanted him to attend the University of Michigan Law School. But, paternal chagrin aside, he certainly turned out well: Upon his graduation in 1941, Brimmer started his practice in Rawlins. Later he moved to Cheyenne where he earned a reputation as a premier attorney, specializing in businesses and oil and gas law. Other accolades included the Bronze Star for his service in World War II and the City of Rawlins Distinguished Service Award. He also found time to teach political science here. This legal education center is a fitting tribute to him.

How fortunate we are to have his legacy and how fortunate we are that his wife Marian continues his largesse: this center, its landscaping and—perhaps my favorite of all of her contributions—the beautiful statue of Socrates the “Barefoot of Athens”⁴ that you see here before you. How appropriate to have a larger-than-heroic-sized Socrates at the very entrance to a law school! (More on him in a moment.) And Brimmer’s legacy includes April, his remarkable daughter who, recovering from an early misstep in attending University of Southern California,

³ Letter from Sir Isaac Newton to Robert Hooke (Feb. 5, 1676).

⁴ Jerry Palen, the noted artist who sculpted our Socrates, sent me a note that appears at the end of this article.

graduated from this law school, and had a brilliant career in business and politics, including being the first woman elected President of the Wyoming State Senate.

Bill Brimmer's life itself teaches. He valued integrity and lived his life accordingly, even when it cost him in other endeavors. During his tenure as the Carbon County Attorney he closed the houses of ill repute and shut down gambling in the city of Rawlins. But Rawlins was a pretty tough place then—I suppose it still is—and he lost the next election and the vices flourished again. But he was true to himself, and things seemed to work out. He established a brilliant and successful career, and ennobled the already brilliant star of the Brimmer clan in Wyoming.

Other giants deserve mention, albeit briefly as my time is short. Chief Justice Michael Golden nominated his own Magnificent Seven in a law review article on the history of this institution.⁵ He mentioned the brothers Arnold—Thurman and Carl; also Robert R. Hamilton, Dean Frank J. Trelease, E. George Rudolph, Peter C. Maxfield, and Arthur Gaudio. These and many others have allowed us to stand upon their shoulders and hopefully see a bit farther.

But what is it that this College of Law will do with this building as it tries to comply with its task? What does a legal education do? How does a law school shape lawyers who will shape future changes in the law? Well, in a typical judicial mode, I decided to look at two competing views in postulating my own answer.

The first postulate was provided to me by my wonderful colleague, Judge O'Brien, and it came from Dean Trelease. Judge O'Brien said,

When I was in law school (in the years when student activism was at its zenith) Dean Trelease gave a speech to students . . . that was not well received because it was an affront to their sophomoric yearnings. His message was that the duty of law students is to learn the law, not to inflict their nascent understanding of it on others through passionate but unrefined activism. Learning the law also means learning restraint. The law is a profession because it requires an understanding of its evolution, respect for its purposes and reflection upon its principles, as well as obedience to its commands—some would say its commands cannot be understood or obeyed without such understanding, reflection and respect. Informed and tempered judgment makes for an attorney and counselor at law. The law is not a bludgeon to be used upon others to force them to yield to a client's (or

⁵ Justice Michael Golden, *History of the University of Wyoming College of Law: The First Seventy-Five Years*, 31 LAND & WATER L. REV. 1 (1996).

lawyer's) purposes and it is not a foil to excuse intemperate acts. So treated it would be a tool of oppression. It is a lawyer's duty to zealously advocate for a client, but within the limits of the law. That requires lawyers to obey and counsel others to obey the law. But a lawyer should also seek to aid in the evolution of law through reasoned discourse. It does not serve the higher calling of our profession when advocacy fails to advance the ultimate goal, an ability to live together in harmony.

The Dean's view, as I understand it, was that the law should be understood before it is changed. And as a judge, I can appreciate that, as I have never seen an advocate succeed who had not first mastered the law. Socrates advanced the position even further and argued that the law should not only be understood, but always be followed—or else it should be changed. Sometimes this is called “obey or persuade.” But this somewhat positivist view is not the only view. Some natural law followers might even urge civil disobedience—Martin Luther King for example—in the case of an unjust law. But I think that the Dean's first point remains: it might be good to understand the law before concluding it is wrong or seeking to change it.

One of my law clerks provided me with another view, perhaps a bit more cynical. It comes from Professor Duncan Kennedy of Harvard, a critical legal studies scholar. Professor Kennedy complained about the law school experience, calling it:

The trade-school mentality, the endless attention to trees at the expense of forests, the alternating grimness and chumminess of focus on the limited task at hand—all these are only a part of what is going on. The other part is the ideological training for willing service in the hierarchies of the corporate welfare state.⁶

Prof. Kennedy continues:

Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world. . . . Students act affirmatively within the channels cut for them, cutting them deeper, giving the whole a patina of consent, and weaving complicity into everyone's life story.⁷

⁶ Duncan Kennedy, *Legal Education as a Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 54, 54 (David Kairys ed., 3d ed. 1998).

⁷ *Id.*

It gets worse. Prof. Kennedy prophesies what judges may add to the formula:

In the classroom and out of it, students learn a particular style of deference. They learn to suffer with positive cheerfulness interruption in mid-sentence, mockery, ad hominem assault, inconsequent asides, questions that are so vague as to be unanswerable but can somehow be answered wrong all the same, abrupt dismissal, and stinginess of praise (even if these things are not always and everywhere the norm). They learn, if they have talent, that submission is most effective flavored with a pinch of rebellion, to bridle a little before they bend. They learn to savor crumbs, while picking from the air the indications of the master's mood that can mean the difference between a good day and misery. They learn to take it all in good sort, that there is often shyness, good intentions, some real commitment to your learning something behind the authoritarian façade. So it will be with many a robed curmudgeon in years to come.⁸

Now even though I am, I suppose, a robed curmudgeon, I don't mean to set Professor Kennedy up as a straw man.⁹ But I don't think law schools are or need to be the stifling environments that Professor Kennedy describes. Certainly this one is not.

I think legal education can be stultifying, and can be conforming, but it can also be different. And I might say that state law schools, and perhaps especially state law schools in smaller states, often have a different take. When Thurman Arnold sought support for this law school in 1921, he urged that a school be created that would be especially relevant to Wyoming. He told the Bar,

The new generation of lawyers . . . will either have to be born in this state, or they will have to come here from beyond our borders, where they will not be versed in the traditions and in the peculiar conditions which surround the practice of law

⁸ *Id.* at 68.

⁹ Nor do I mean to criticize him for his Leftist philosophical leanings. Like my late-friend Professor Bernard Schwartz, I would note that Marxism is alive and well in only one place—the elite law schools of the United States. But also, like Prof. Schwartz, I think all sincere schools of legal thought have something to say—sometimes not for use in the real world, but still for consideration, discussion, and thought. Parenthetically, I might pause to remind you of what the President of the University of Chicago said to a woman who was irate that the Great Books curriculum of the University included Marx. She said, “So, Dr. Hutchens, are you still teaching communism at the University of Chicago?” “Yes,” he replied, “and cancer at the Medical School.”)

in this state. That is a condition which is of great interest to this bar, and that is a condition which fortunately has now been changed by the introduction of our new law school.¹⁰

Prof. Kennedy might say, “I told you so. He wanted to create a conforming tradition.” But not so. He wanted to create the opportunity to develop a community of lawyers within Wyoming, and he wanted citizens of Wyoming to have the opportunity to enter that powerful profession of lawyer. Some would no doubt turn that education into successful corporate practices. Certainly Thurman Arnold did himself. Yet along the way he and his firm struck some blows for liberty, including their work on the great case of *Gideon v. Wainwright*, which established the fundamental right to the assistance of counsel in criminal proceedings.¹¹ He also willingly took on Senator Joseph McCarthy during the peak of McCarthyism.¹² His career as mayor of Laramie, representative in the Wyoming Legislature, law professor, Federal Court of Appeals judge, assistant attorney general, and law firm partner, showed the diverse range of possibilities open to such a lawyer.¹³

¹⁰ Golden, *supra* note 5, at 2 (quoting T.W. Arnold, *The Law School of the University of Wyoming*, in WYOMING STATE BAR ASSOCIATION—PROCEEDINGS OF THE EIGHTH ANNUAL MEETING 49, 49 (1921)).

¹¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹² As Mr. Arnold’s firm still proudly describes on its website:

[Arnold & Porter] was the only major law firm in the United States willing to represent the victims of McCarthyism. In 1950, Senator McCarthy made a false charge that an Asian affairs expert named Owen Lattimore was the “top Communist espionage agent” in the country, instantaneously making Lattimore the most reviled man in America. Within hours, future Supreme Court Justice Abe Fortas (soon joined by Thurman Arnold) signed on for a bitterly protracted legal battle, including the longest ever grilling of a single person by a congressional committee, as well as an indictment for perjury because Lattimore denied being a Communist “sympathizer.”

The firm ultimately defeated all of these charges, and its courage in taking Lattimore’s case brought numerous other victims of McCarthyism to our door.

Arnold & Porter, *Our Pro Bono Program, Then and Now*, http://www.arnoldporter.com/about_the_firm_pro_bono_our_program.cfm (last visited Nov. 15, 2009).

¹³ One legendary story about Mr. Arnold concerns a letter to a Yale University chemistry professor which Arnold wrote answering the professor’s complaints about Arnold & Porter representing the tobacco industry. After making the point that in America all are entitled to be represented, and further pointing out that his firm had, pro bono, represented some unpopular people (including Yale law professors in tenure battles), he then recounted his firm’s defense of those attacked by Senator McCarthy for being communists. He told the story of a person approaching his colleague, Paul Porter, and asking, “Is it true that Arnold & Porter primarily represents communists and deviants?” “Yes,” Mr. Porter replied, “what can we do for you?”

Likewise lawyers educated here have advanced many causes and built many great legacies and traditions. Certainly corporations and industry, especially that of oil and gas, have benefitted greatly from what goes on here. (And making and distributing wealth is not necessarily a bad thing!) But also graduates here have fought racism and sexism, defended those unjustly accused, and worked internationally for human rights.

In the end, although I am closer to Dean Trelease's view than those of the Professor, I do conclude that both have something to say. Perhaps we should rethink some of the old ways of legal education, and open the doors to new ideas. But the law is a tradition, and must be studied. I am always amazed by its ancient realizations that are sometimes controversial today: that it is better for ten guilty people to go free than one innocent person to be punished (Blackstone's famous ratio), that people charged with crimes have rights to be heard, defended, and confront their adversaries, and that even the government must follow the law.

And as this law school continues its vital mission to train lawyers for Wyoming and beyond, the faculty and students can remember Professor Kennedy's challenges: to not be complicit where complicity is unjust, to not miss the forests for the trees, to be willing to challenge ideas.

And for some reason, I don't think we have to worry about students challenging ideas. For one thing, a College of Law that enshrines Socrates in bronze (thank you again, Ms. Rochelle, for that gift) is creating a great "statutory" example. Socrates not only popularized the Socratic (or maieutic) method. He taught the youth of his day to challenge thinking that needed to be challenged. Someone said that the best you could say about the Athens that convicted him was that at least it thought that the education of its youth was worth killing for. But of course the Barefoot of Athens again trumps: he demonstrated that the education of youth was worth dying for. This remarkable statue of Socrates, contemplatively leaning back as he propounds yet another question, will inspire and challenge all who enter here.

Graduates of this school have been Ambassadors, Governors, United States Senators, law professors, and judges. They have also been school board members, city council members, and pro bono defenders of people with no money and difficult cases. We shape our buildings; thereafter they shape us. Students, faculty, and citizens will hear lectures in this marvelous hall that will challenge them. They can then go on to challenge and shape the law.

Litigants will have their actual cases handled, so that students can learn from them. And arguments will be honed in this moot court room that will someday shape the justice in this state and nation. It is indeed an honor to stand on the shoulders of the giants who have made this possible, and to envision a more just and law abiding world, shaped by this building we dedicate here today.

APPENDIX A

September 24, 2009

Dear Judge Henry,

Thanks to Mrs. Rochelle, the University of Wyoming Law School will be able to enjoy the father of the “Socratic Method” right in its midst. Socrates, the ancient Greek thinker, laid the early foundations for western philosophical thought. His method involved asking probing questions in a give-and-take manner, which eventually led to the truth. This method of learning the truth is used daily in the law school as a way of discussing complex topics to discover the underlying issues of the subject and speaker.

Socrates (469–399 BC), as I learned after reading and evaluating different sculptures of him, was a short, homely man whose trademark was his bare feet and his unkempt appearance. Although he professed no extraordinary wisdom, established no school and founded no sects, his influence on the course of philosophy through his most famous pupil, Plato, is incalculable.

I was very honored to be asked to create this work. It gave me the opportunity to work in my style and be sensitive to two artists I admire, Rodin and Degas. As I’ve always said, art is there to show us where we’ve been.

Sincerely,

/s/ Jerry Palen

CASE NOTE

ADMINISTRATIVE LAW—Deliberating in the Open? Applying Wyoming's Public Meetings Act to Contested Case Hearings; *Decker v. State ex rel. Wyo. Med. Comm'n (Decker II)*, 191 P.3d 105 (Wyo. 2008)

*Justin Newell Hesser**

INTRODUCTION

In 2001, the Wyoming Workers' Compensation Division denied Daniel Decker's claim for benefits.¹ The division referred Decker's claim to the Medical Commission (Commission), which established a hearing panel (Panel) to hold a contested case hearing under the Wyoming Administrative Procedure Act (WAPA).² The Panel upheld the denial and Decker appealed.³

The Wyoming Supreme Court remanded the case back to the Panel.⁴ Citing the Wyoming Public Meetings Act (PMA), Decker filed a motion on remand with the Commission seeking to observe the Panel deliberations.⁵ The Commission

* Candidate for J.D., University of Wyoming, 2011. I would like to thank Professor Michael Duff and Robert M. Brenner for their comments and advice. Also, thanks to my wife and mother for their continued support and endless feedback.

Editor's Note: As this issue was going to press, on January 8, 2010, the Wyoming Supreme Court handed down its decision in *Cheyenne Newspapers, Inc. v. Building Code Board of Appeals*, 2010 WY 2 (2010), discussed *infra* notes 29, 63, 177. *The court held that quasi-judicial deliberations following a contested case hearing under the Wyoming Administrative Procedure Act are subject to the Wyoming Public Meetings Act. However, the court held that the agency's action was not null and void because the agency's ultimate action took place at a public meeting. The special concurrence and the dissenting opinion illustrate the continuing significance of the issues discussed by this note.*

¹ *Decker v. State ex rel. Wyo. Med. Comm'n (Decker I)*, 191 P.3d 105, 107 (Wyo. 2008). Decker claimed his employment with Mountain Aire Heating and Air materially aggravated his preexisting condition of thoracic outlet syndrome. *Id.* at 107–08.

² *Id.* at 107. The Wyoming Administrative Procedure Act is located at Wyoming Statutes §§ 16-3-101 to -115. This case note will refer to the Medical Commission and the hearing panel as separate bodies. The Medical Commission is made up of at least eleven health care providers who are appointed by the governor and serve as members. WYO. STAT. ANN. § 27-14-616(a)–(b) (2009). One of the Commission's duties is to provide three members to serve as a hearing panel for contested cases referred to the Commission. § 27-14-616(b)(iv).

³ *Decker v. State ex rel. Wyo. Med. Comm'n (Decker I)*, 124 P.3d 686, 688 (Wyo. 2005). Appeals from an administrative agency are first taken to the district court. WYO. STAT. ANN. § 16-3-114. A district court's final judgment can then be reviewed by the Wyoming Supreme Court. WYO. STAT. ANN. § 16-3-115. However, the Wyoming Supreme Court gives the district court's decision no deference and instead reviews the case as if it came directly from the agency. *McIntosh v. State ex rel. Wyo. Med. Comm'n*, 162 P.3d 483, 487 (Wyo. 2007). The district court affirmed the denial of Decker's benefits. *Decker I*, 124 P.3d at 688.

⁴ *Decker I*, 124 P.3d at 697.

⁵ Transcript of Record vol. II at 500–01, *Decker II*, 191 P.3d 105 (S-07-0051) [hereinafter *Decker Motion*]. While Decker was seeking to attend the hearing panel's deliberations, his motion

denied Decker's motion, and the hearing panel entered a supplemental order upholding the denial of benefits.⁶ Decker again appealed.⁷

The Wyoming Supreme Court held the hearing panel was not subject to the provisions of the PMA, and therefore was not required to allow parties or the public to attend deliberations following a contested case hearing.⁸ While the court found the Panel followed proper procedures, it ultimately held substantial evidence did not support the order and reversed on that basis.⁹

This case note examines the Wyoming PMA and how it applies to quasi-judicial bodies, particularly when they deliberate following contested case hearings.¹⁰ First, this note will examine the policies and purposes behind open meeting acts in general and the Wyoming PMA specifically.¹¹ This discussion will also examine the nature of quasi-judicial bodies and how open meeting laws apply to them.¹² Next, this case note will explain how the majority relied on alternative rationales to reach its holding in *Decker II*, and discuss the dissent's argument.¹³ Furthermore, this note will argue that while the majority was correct in its conclusion, it erred by finding the hearing panel was not a body subject to the PMA—instead the court should have determined that, while the Panel is subject to the act, its deliberations are not.¹⁴ Finally, this note will conclude the court should continue to hold the PMA does not cover quasi-judicial deliberations following contested case hearings, given the purpose and policies of the act.¹⁵

was filed with the Office of the Medical Commission. *Id.* The Wyoming Public Meetings Act is located at Wyoming Statutes §§ 16-4-401 to -408. Decker's motion argued the PMA would allow his attendance because the Panel was an agency and its deliberations were a meeting and action under Wyoming Statute § 16-4-402(a). Decker Motion, *supra*. Even though Decker cited the PMA as authority, his argument to the Wyoming Supreme Court stated he did not believe the deliberations should be open to the entire public. Brief of Appellant at 25, *Decker II*, 191 P.3d 105 (S-07-0051) [hereinafter *Decker II* Appellant's Brief].

⁶ *Decker II*, 191 P.3d at 112; Transcript of Record vol. II at 526–36, *Decker II*, 191 P.3d 105 (S-07-0051) [hereinafter Commission's Decision].

⁷ *Decker II*, 191 P.3d at 108. The district court affirmed the Panel's decision and Decker continued his appeal to the Wyoming Supreme Court. *Id.* at 113.

⁸ *Id.* at 118.

⁹ *Id.* at 122. This case note focuses on the issue Decker raised regarding the right to attend the Panel's deliberations; therefore the court's discussion of the substantial evidence standard is outside the scope of this note.

¹⁰ See *infra* notes 113–94 and accompanying text.

¹¹ See *infra* notes 16–43 and accompanying text.

¹² See *infra* notes 44–78 and accompanying text.

¹³ See *infra* notes 79–107 and accompanying text.

¹⁴ See *infra* notes 120–74 and accompanying text.

¹⁵ See *infra* notes 175–94 and accompanying text.

BACKGROUND

The press began to lobby legislatures to pass open meeting statutes in the 1950s, because many press organizations thought state and local governments conducted too much business behind closed doors.¹⁶ The public has no common law right to attend meetings of governmental bodies, and the U.S. Constitution does not guarantee the right to attend public meetings; therefore open meeting laws are necessary to ensure an open government.¹⁷ There are many purposes and benefits of open meeting laws: they are essential to the democratic process by providing information to the citizens, creating a public forum to discuss issues, serving as a check on those elected, guarding against corruption, and allowing taxpayers to see how their money is spent.¹⁸ On the other hand, critics of open meeting laws often argue there are times when decision-makers should be free from public pressure.¹⁹ Critics also argue open meeting laws prematurely disclose some information, produce unintended consequences, and discourage debate among politicians who may elect to stay silent because they fear appearing ignorant.²⁰ Despite the objections some have, open meeting laws exist in all fifty states.²¹

Open meeting laws typically contain the following types of provisions: (1) definitions that determine what bodies the act applies to and its scope, (2) general procedural requirements, (3) exemptions, and (4) provisions prescribing

¹⁶ Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1199 (1962) [hereinafter *The Press Fights*]. These types of statutes have many names, including open meeting, right to know, public meeting, and sunshine laws. ANN TAYLOR SCHWING, *OPEN MEETING LAWS* 3 (2d ed. 2000). For the purpose of this note they will be referred to as open meeting laws.

¹⁷ Charles N. Davis, Milagros Rivera-Sanchez & Bill F. Chamberlin, *Sunshine Laws and Judicial Discretion: A Proposal for Reform of State Sunshine Law Enforcement Provisions*, 28 URB. LAW. 41, 41 (1996).

¹⁸ *The Press Fights*, *supra* note 16, at 1200–01; Sandra F. Chance & Christina Locke, *The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position as a Leader in Open Government*, 35 FLA. ST. U. L. REV. 245, 245–46 (2008); Davis, Rivera-Sanchez & Chamberlin, *supra* note 17, at 43; Teresa Dale Pupillo, *The Changing Weather Forecast: Government in the Sunshine in the 1990's—An Analysis of State Sunshine Laws*, 71 WASH. U. L. Q. 1165, 1166 (1993).

¹⁹ *The Press Fights*, *supra* note 16, at 1202. The often-cited example is the Constitutional Convention in which the delegates met in secret. *Id.* However, it is noted the Federalist Papers were necessary to gain the public's acceptance of the Constitution because the Convention was closed to the public. *Id.* at 1202 n.18; Pupillo, *supra* note 18, at 1167 n.13. Also, despite the closure of the Convention, the Founding Fathers did argue for open meetings. Pupillo, *supra* note 18, at 1167 n.12.

²⁰ *The Press Fights*, *supra* note 16, at 1202; Chance & Locke, *supra* note 18, at 246; Davis, Rivera-Sanchez & Chamberlin, *supra* note 17, at 43.

²¹ Pupillo, *supra* note 18, at 1165. The last state to adopt such a statute was New York in 1976. *Id.* at 1165 n.1.

remedies and penalties.²² While the purpose of open meeting laws is often clearly stated, application of the laws can be difficult because they are vague.²³

The Wyoming legislature passed the PMA in 1973.²⁴ The legislature adopted a statement of purpose declaring, “[A]gencies of Wyoming exist to conduct public business. Certain deliberations and actions shall be taken openly as provided in this act.”²⁵ The PMA does not specify bodies or activities it applies to, but instead provides definitions of action, agency, and meeting.²⁶ The general requirement under the PMA is “[a]ll meetings of the governing body of an agency are public meetings, open to the public at all times, except as otherwise provided.”²⁷ While the legislature and judiciary are exempt from coverage, the only other exemptions

²² *Id.* at 1168.

²³ *Id.* at 1175.

²⁴ 1973 Wyo. Sess. Laws 192–94. The PMA was partially based on the California and Florida open meeting statutes passed in previous years. 1973 Op. Wyo. Att’y Gen. No. 17, 51 (Aug. 3, 1973). However, those states more actively amended the statutes since enactment, and a comparison is no longer beneficial. *Compare* WYO. STAT. ANN. §§ 16-4-401 to -408 (2009), *with* CAL. GOV’T CODE §§ 11120–32 (West 2009) (covering public meetings of state bodies), CAL. GOV’T CODE §§ 54950–63 (West 2009) (covering public meetings of local bodies), *and* FLA. STAT. § 286.011 (2009).

²⁵ WYO. STAT. ANN. § 16-4-401. The original statement of purpose adopted in 1973 stated, “[v]arious agencies of Wyoming exist to conduct public business.” 1973 Wyo. Sess. Laws 192 (emphasis added). But the legislature eliminated the word “various” in 1982. 1982 Wyo. Sess. Laws 376. That has been the only change made to this section. *See id.*

²⁶ WYO. STAT. ANN. § 16-4-402. This statute states:

(a) As used in this act:

- (i) “Action” means the transaction of official business of an agency including a collective decision of a governing body, a collective commitment or promise by a governing body to make a positive or negative decision, or an actual vote by a governing body upon a motion, proposal, resolution, regulation, rule, order or ordinance;
- (ii) “Agency” means any authority, bureau, board, commission, committee, or subagency of the state, a county, a municipality or other political subdivision which is created by or pursuant to the Wyoming constitution, statute or ordinance, other than the state legislature and the judiciary;
- (iii) “Meeting” means an assembly of at least a quorum of the governing body of an agency which has been called by proper authority of the agency for the purpose of discussion, deliberation, presentation of information or taking action regarding public business.

Id.

²⁷ WYO. STAT. ANN. § 16-4-403. This statute continues to provide, “No action of a governing body of an agency shall be taken except during a public meeting following notice of the meeting in accordance with this act. Action taken at a meeting not in conformity with this act is null and void and not merely voidable.” *Id.*

relate to executive sessions.²⁸ The PMA also provides that its provisions control if there is any conflict with other statutes.²⁹ The Wyoming legislature amended the PMA three times since its adoption.³⁰ The most substantive amendment occurred in 1995 when the definition of “meeting” was changed to include deliberations.³¹ In 2005 the legislature added a penalty provision.³²

In 1977, the Wyoming Supreme Court first mentioned the PMA and declared “state agencies must act in a fishbowl” unless their actions fall within an exemption.³³ In a later case addressing public records, the court summarized its position toward openness, declaring “courts, [the] legislature, administrative agencies, and the state, county and municipal governments should be ever mindful that theirs is public business and the public has a right to know how its servants are conducting its business.”³⁴ Despite pronouncements about the public’s right to know, the Wyoming Supreme Court has never held a public body’s action void for violating the PMA.³⁵

²⁸ WYO. STAT. ANN. §§ 16-4-402(a)(ii), 16-4-405. While a public body can meet in executive session, the body must still have a motion to do so, and minutes must be kept. WYO. STAT. ANN. § 16-4-405(b)–(c).

²⁹ WYO. STAT. ANN. § 16-4-407. This statute has been used to argue the PMA provisions control over other provisions. See Brief of Appellant at 28, *Cheyenne Newspapers, Inc. v. Building Code Bd. of Appeals (Cheyenne Newspapers PMA Case)* (S-09-0103) [hereinafter *Cheyenne Newspapers PMA Case* Appellant’s Brief]; see Editor’s Note *supra* p. 203. However, at least one party has argued provisions of the open meeting laws are repealed by implication if a specific provision is adopted after the open meeting laws. See *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990). Wyoming Statute § 16-4-407 was last amended in 1982. 1982 Wyo. Sess. Laws 378. Statutes relating to contested case proceedings in workers’ compensation cases were first adopted in 1986. 1986 Wyo. Sess. Laws 35–41 (Special Session). Implication by repeal is not favored, and a party must demonstrate “beyond question that the legislature intended that its later legislative action evinced an unequivocal purpose of affecting a repeal.” *Mathewson v. City of Cheyenne*, 61 P.3d 1229, 1233 (Wyo. 2003) (quoting *Shumway v. Worthey*, 37 P.3d 361, 367 (Wyo. 2001)). A party must also show that the later statute “is so repugnant to the earlier one that the two cannot logically stand together.” *Id.*

³⁰ 2005 Wyo. Sess. Laws 494–95; 1995 Wyo. Sess. Laws 207–08; 1982 Wyo. Sess. Laws 376–78.

³¹ 1995 Wyo. Sess. Laws 208. The previous definition of meeting stated: “‘Meeting’ means an assembly of the governing body of an agency at which action is taken.” *Id.*

³² 2005 Wyo. Sess. Laws 494. This amendment created Wyoming Statute § 16-4-408, which provides that any member of an agency who “knowingly and willfully” violates the act is guilty of a misdemeanor. *Id.*

³³ *Laramie River Conservation Council v. Dinger*, 567 P.2d 731, 734 (Wyo. 1977). The issue in that case involved whether a transcript of a public meeting was subject to disclosure under the Public Records Act. *Id.* at 732. The court did not have to decide if the meeting was subject to the PMA, but did address generally the state’s “disclosure acts.” *Id.* at 734.

³⁴ *Sheridan Newspapers, Inc. v. City of Sheridan*, 660 P.2d 785, 791 (Wyo. 1983).

³⁵ See *Hicks v. Dowd*, 157 P.3d 914, 923 (Wyo. 2007) (holding members of a Board of County Commissioners did not violate the PMA when they met in their capacity as trustees of the Scenic Preservation Trust); *Mayland v. Flitner*, 28 P.3d 838, 849 (Wyo. 2001) (holding no action was taken by County Commissioners when they instructed a county attorney to prepare findings of

The Wyoming Supreme Court has addressed whether deliberative meetings prior to decisions are in violation of the PMA.³⁶ The most recent of these cases is *Mayland v. Flitner*, which occurred after substantive amendments to the PMA were made in 1995.³⁷ The plaintiffs in *Mayland* alleged a board of county commissioners violated the PMA by meeting in private to discuss a private road application.³⁸ The court accepted previous holdings that allowed agencies to gather for informal meetings prior to making a decision and held the commissioners did not perform any action that could be void.³⁹

The only time the court has addressed deliberations with reference to quasi-judicial bodies was in a case prior to adoption of the PMA—when the court considered a claim that a district boundary board met behind closed doors.⁴⁰ The plaintiffs in that case complained the board met in private to make a decision and then later announced that decision to the public.⁴¹ The court stated due to the nature of quasi-judicial boards and agencies, they were required to hold hearings in the open, even though no statute then required it.⁴² However, the court noted the right to attend and present evidence at the meeting did not prohibit such boards from planning and deliberating in private sessions.⁴³

fact and conclusions of law prior to the Commissioners' decision); *Deering v. Bd. of Dirs. of County Library*, 954 P.2d 1359, 1364–65 (Wyo. 1998) (holding no violation of the PMA occurred because the alleged improper meeting was a rescheduled regular meeting and not a special meeting); *Ward v. Bd. of Trs. of Goshen County Sch. Dist. No. 1*, 865 P.2d 618, 622 (Wyo. 1993) (holding there was not sufficient evidence to find a school board made a “collective decision” in a closed meeting); *Emery v. City of Rawlins*, 596 P.2d 675, 680 (Wyo. 1979) (holding no action resulted from a “preliminary gathering” of city council members and therefore no violation of PMA occurred); see also *Fontaine v. Bd. of County Comm'rs*, 4 P.3d 890, 891 (Wyo. 2000) (holding no violation of PMA occurred, but a County Clerk is required to attend executive sessions and take minutes).

³⁶ *Mayland*, 28 P.3d at 849; *Ward*, 865 P.2d at 621–22; *Emery*, 596 P.2d at 680; see also *Sch. Dist. No. 9 v. Dist. Boundary Bd.*, 351 P.2d 106, 110 (Wyo. 1960).

³⁷ 28 P.3d at 841; see *supra* note 31 and accompanying text (discussing the 1995 amendments).

³⁸ *Mayland*, 28 P.3d at 848.

³⁹ *Id.* at 849 (citing *Ward*, 865 P.2d at 621; *Emery*, 596 P.2d at 679).

⁴⁰ *Sch. Dist. No. 9*, 351 P.2d at 110. A district boundary board establishes and has the power to alter school district boundaries. *Id.* at 108 n.1.

⁴¹ *Id.* at 108.

⁴² *Id.* at 110.

⁴³ *Id.*

Character of Quasi-Judicial Agencies

The two main functions of administrative agencies are adjudication and rulemaking.⁴⁴ A single agency often performs both of these functions.⁴⁵ When an agency performs an adjudication it acts in a quasi-judicial capacity, determining an individual's rights or duties.⁴⁶ In contrast, when an agency performs rulemaking it acts in a quasi-legislative capacity, adopting regulations which reflect general policy.⁴⁷ A quasi-judicial activity must possess certain characteristics.⁴⁸ These characteristics include investigating a claim, weighing evidence, applying preexisting standards to the controversy, and making binding decisions.⁴⁹ While quasi-judicial agencies do not technically hold judicial proceedings, the courts performed many of the agencies' functions prior to their existence.⁵⁰

In Wyoming, an administrative agency acts in a quasi-judicial capacity when it performs a contested case proceeding.⁵¹ A contested case requires a right to a hearing, and such a right may exist by statute, by agency rule, or because it is necessary to satisfy due process requirements.⁵² The Workers' Compensation Division is among the Wyoming agencies that provide for contested case hearings.⁵³ Originally, workers' compensation hearings were handled exclusively

⁴⁴ E.g., CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 2.11 (2d ed. Supp. 2009); 73 C.J.S. *Public Administrative Law and Procedure* § 1 (2009) [hereinafter C.J.S. *Administrative Law*]. Each of these functions can be conducted in either a formal or informal manner. KOCH, *supra*, § 2.10.

⁴⁵ C.J.S. *Administrative Law*, *supra* note 44, § 1; 2 AM. JUR. 2D *Administrative Law* § 48 (2009) [hereinafter AM. JUR. *Administrative Law*].

⁴⁶ KOCH, *supra* note 44, § 2.11; C.J.S. *Administrative Law*, *supra* note 44, § 16.

⁴⁷ KOCH, *supra* note 44, § 2.11; C.J.S. *Administrative Law*, *supra* note 44, § 17.

⁴⁸ KOCH, *supra* note 44, § 2.11; AM. JUR. *Administrative Law*, *supra* note 45, § 28; C.J.S. *Administrative Law*, *supra* note 44, § 16.

⁴⁹ KOCH, *supra* note 44, § 2.11; AM. JUR. *Administrative Law*, *supra* note 45, § 28; C.J.S. *Administrative Law*, *supra* note 44, § 16.

⁵⁰ C.J.S. *Administrative Law*, *supra* note 44, § 16.

⁵¹ Nancy D. Freudenthal & Roger C. Fransen, *Administrative Law: Rulemaking and Contested Case Practice in Wyoming*, 31 LAND & WATER L. REV. 685, 698 (1996). A contested case is defined as a proceeding "in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." WYO. STAT. ANN. § 16-3-101(b)(ii) (2009).

⁵² Freudenthal & Fransen, *supra* note 51, at 698–99. The WAPA does not create the right to have a contested case, and instead provides the procedure to be followed in a contested case. *Id.* at 699.

⁵³ WYO. STAT. ANN. § 27-14-601(k)(iv) (2009). A worker is entitled to request a hearing regarding his or her claim after the Workers' Compensation Division has made a final determination. *Id.*

by the district courts.⁵⁴ Beginning in 1986, workers' compensation cases were heard exclusively by hearing examiners.⁵⁵ In 1993, the legislature created the Medical Commission, which provides an additional venue to hear workers' compensation cases which are "medically contested."⁵⁶

A medically contested case has been defined as "one in which the primary issue requires the application of a medical judgment to complex medical facts or conflicting diagnoses."⁵⁷ Medically contested cases must be referred to the Commission.⁵⁸ Once a worker requests a hearing, the Workers' Compensation Division refers contested cases to either the Office of Administrative Hearings or the Commission based on issues in the case.⁵⁹ Upon referral, the Commission establishes a hearing panel to decide each medically contested case.⁶⁰

⁵⁴ George Santini, *The Breaking of a Compromise: An Analysis of Wyoming Worker's Compensation Legislation, 1986-1997*, 33 LAND & WATER L. REV. 489, 500 (1998). Under this system, deliberations of district court judges would have been conducted in private, because the PMA has always exempted the judiciary. See WYO. STAT. ANN. § 16-4-402 (1973).

⁵⁵ *Decker v. State ex rel. Wyo. Med. Comm'n (Decker II)*, 191 P.3d 105, 115 (Wyo. 2008); 1986 Wyo. Sess. Laws 36 (Special Session). This process was formalized in 1992 when the legislature created the Office of Administrative Hearings. Santini, *supra* note 54, at 505.

⁵⁶ *Decker v. State ex rel. Wyo. Med. Comm'n (Decker I)*, 124 P.3d 686, 694 (Wyo. 2005); Santini, *supra* note 54, at 507. The Medical Commission is created pursuant to Wyoming Statute § 27-14-616. See *supra* note 2 for a discussion of the commission and hearing panel.

⁵⁷ *McIntosh v. State ex rel. Wyo. Med. Comm'n*, 162 P.3d 483, 492 (Wyo. 2007) (quoting *French v. Amax Coal W.*, 960 P.2d 1023, 1030 (Wyo. 1998)); accord 025-220-006 WYO. CODE R. § 1 (Weil 2008).

⁵⁸ WYO. STAT. ANN. § 27-14-616(b)(iv) (2009); *McIntosh*, 162 P.3d at 491; 025-220-006 WYO. CODE R. § 1.

⁵⁹ WYO. STAT. ANN. § 27-14-616(b)(iv); 025-220-006 WYO. CODE R. § 1. The Division's decision regarding where to refer a contested case is not subject to administrative review. WYO. STAT. ANN. § 27-14-616(b)(iv). A hearing panel can also receive a case from the Office of Administrative Hearings if there is a medically contested issue and all parties agree to the transfer. § 27-14-616(e); 025-240-003 WYO. CODE R. § 2 (Weil 2008). A hearing panel can also provide advice to the OAH hearing examiner on specified medical issues. 025-240-003 WYO. CODE R. § 2.

⁶⁰ 025-240-006 WYO. CODE R. § 1 (Weil 2008) (providing the selection process for establishing hearing panels). The Commission can establish different Panels to hear cases, or the same panel can hear multiple cases. *Id.* When possible, commission members are assigned to cases based on their expertise relevant to medical issues in the case. *Id.* A presiding officer is designated and has "all powers necessary to conduct a fair and impartial hearing." 025-240-006 WYO. CODE R. § 2 (Weil 2008). The Panel has "exclusive jurisdiction to make the final administrative determination of the validity and amount of compensation payable under" the Workers' Compensation Act. WYO. STAT. ANN. § 27-14-616(b)(iv). The Panel's hearing procedure includes the opportunity for opening and closing statements, presentation of evidence, and written arguments when appropriate. 025-240-009 WYO. CODE R. § 2 (Weil 2008). The Panel must enter a written final decision which contains findings of fact and conclusions of law. 025-240-010 WYO. CODE R. § 3 (Weil 2008).

Quasi-Judicial Agencies as Being Covered by Open Meeting Laws

The majority of states have addressed the issue of whether quasi-judicial bodies are covered by open meeting laws, but they reach varying conclusions depending on multiple factors.⁶¹ The states can be classified into three main groups: (1) states that address the issue by statute, (2) states that address the issue in case law interpreting statutes, and (3) states that have not addressed the issue.⁶² The Wyoming PMA does not address the issue, and prior to *Decker II*, Wyoming was among the group of states that had not addressed the issue.⁶³

Among states that address the issue by statute, a majority exempt quasi-judicial agencies in at least some form.⁶⁴ Some of these state statutes broadly exempt all quasi-judicial agencies with no qualifications.⁶⁵ Other statutes exempt only state quasi-judicial bodies, and still require local quasi-judicial bodies to hold deliberations in the open.⁶⁶ Another group of states have statutes that allow quasi-judicial bodies to deliberate in closed session, but still require the body to follow

⁶¹ SCHWING, *supra* note 16, at 122–28 (discussing how states do not treat quasi-judicial bodies uniformly and stating the result depends on a variety of factors).

⁶² *See id.*

⁶³ *See* WYO. STAT. ANN. §§ 16-4-401 to -408 (2006). The premise of this note is that *Decker II* did not clearly decide the issue because it relied on alternative rationales. *See infra* note 177 and accompanying text. However, it can be argued *Decker II* stands for the proposition that quasi-judicial deliberations are not subject to the PMA. *See* Brief of Appellee at 5, 11, *Cheyenne Newspapers PMA Case*, (S-09-0103) [hereinafter *Cheyenne Newspapers PMA Case Appellee's Brief*] (relying on *Decker II* for proposition that quasi-judicial deliberations do not need to be conducted in public). *But see* *Cheyenne Newspapers PMA Case Appellant's Brief*, *supra* note 29, at 21–22 (arguing the court's analysis in *Decker II* applies only to the Panel). *See infra* note 177 and accompanying text for a discussion of *Cheyenne Newspapers PMA Case*. *See also* Editor's Note *supra* p. 203.

⁶⁴ *See infra* notes 65–70 and accompanying text.

⁶⁵ *See* ALA. CODE § 36-25A-7(a)(9) (2009) (stating a quasi-judicial body is allowed to “deliberate and discuss evidence or testimony presented during a public or contested case hearing” as long as the body either votes on the decision in a public meeting or issues a written decision which may be appealed); ALASKA STAT. § 44.62.310(d)(1) (2009); KAN. STAT. ANN. § 75-4318(g)(1) (2009); KY. REV. STAT. ANN. § 61.810(1)(j) (West 2009); N.C. GEN. STAT. ANN. § 143-318.18(7) (West 2009) (exempting public bodies subject to the State Budget Act that perform “quasi-judicial functions, during a meeting or session held solely for the purpose of making a decision in an adjudicatory action or proceeding”); VT. STAT. ANN. tit. 1, § 312(e)–(f) (2009); WASH. REV. CODE ANN. § 42.30.140(2) (West 2009) (“[T]his chapter shall not apply to . . . [t]hat portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group”); W. VA. CODE § 6-9A-2(4)(A) (2009) (“[M]eeting does not include . . . [a]ny meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding”); WIS. STAT. ANN. § 19.85 (West 2009) (stating a closed session may be held to deliberate a case subject to a quasi-judicial trial or hearing).

⁶⁶ *See* MASS. GEN. LAWS ANN. ch. 30A, § 11A (West 2009) (exempting quasi-judicial bodies from the state open meeting law); MASS. GEN. LAWS ANN. ch. 34, § 9F (West 2009) (providing no exemptions for quasi-judicial bodies from the county open meeting law); MASS. GEN. LAWS ANN. ch. 39, § 23A (West 2009) (providing no exemptions for quasi-judicial bodies from the municipal open meeting law); OR. REV. STAT. ANN. § 192.690 (West 2009).

certain procedures and make a final decision in the open.⁶⁷ A smaller group of states list specific quasi-judicial bodies that are exempt.⁶⁸ A few statutes generally exempt all quasi-judicial bodies, but then list certain quasi-judicial bodies the act applies to.⁶⁹ Finally, a minority of state open meeting statutes explicitly cover quasi-judicial agencies.⁷⁰

When state courts interpret open meeting laws to determine if quasi-judicial bodies are subject to the laws, they reach different results.⁷¹ First, some courts hold quasi-judicial bodies and their deliberations are subject to open meeting statutes.⁷² Second, some courts hold deliberations by quasi-judicial bodies are not subject to open meeting statutes; and these courts give varying rationales.⁷³ One approach is for courts to rely on policy and “practical application” of the laws to hold that quasi-judicial deliberations are not subject to open meeting

⁶⁷ See CAL. GOV'T CODE § 11126(c)(3) (West 2009); 5 ILL. COMP. STAT. ANN. 120/2(c)(4), 120/2a (West 2009); IOWA CODE ANN. § 21.5(1)(f) (West 2009); N.M. STAT. ANN. § 10-15-1(H) (3), (I) (West 2009) (exempting “deliberations by a public body in connection with an administrative adjudicatory proceeding”); 65 PA. CONS. STAT. ANN. § 708(a)(5) (West 2009).

⁶⁸ See IDAHO CODE ANN. § 67-2342 (2009) (allowing closed deliberations by the board of tax appeals, public utilities commission and industrial commission following an adjudicatory proceeding); MICH. COMP. LAWS ANN. § 15.263(7) (West 2009); MINN. STAT. ANN. § 13D.01 (West 2009) (providing the open meeting law does not apply “to a state agency, board, or commission when it is exercising quasi-judicial functions involving disciplinary proceedings”); MISS. CODE ANN. § 25-41-3(a)(vi), (x) (West 2009) (exempting the Workers' Compensation Commission and State Tax Commission when it holds hearings).

⁶⁹ See HAW. REV. STAT. § 92-6(a)(2), (b) (2009) (exempting “adjudicatory functions,” but requiring the land use commission to deliberate in the open); MD. CODE ANN., STATE GOV'T § 10-503 (West 2009) (exempting a public body which performs a quasi-judicial function, but requiring public bodies which grant licenses or permits, or consider zoning matters to comply with the open meeting law); N.Y. PUB. OFF. LAW § 108(1) (McKinney 2009) (“Nothing contained in this article shall be construed as extending the provisions hereof to . . . judicial or quasi-judicial proceedings, except proceedings of the public service commission and zoning boards of appeals . . .”).

⁷⁰ See ARIZ. REV. STAT. ANN. § 38-431 (2009) (stating a “[p]ublic body includes all quasi-judicial bodies,” and defining quasi-judicial body as “a public body, other than a court of law, possessing the power to hold hearings on disputed matters between a private person and a public agency and to make decisions in the general manner of a court regarding such disputed claims”); MO. ANN. STAT. § 610.010(4)(d) (West 2009) (stating that “[p]ublic governmental body” includes any “administrative governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power”); TEX. GOV'T CODE ANN. § 551.001(3)(D) (Vernon 2009) (stating “[g]overnmental body” includes “a deliberative body that has rulemaking or quasi-judicial power”).

⁷¹ See *infra* notes 72–76 and accompanying text.

⁷² See *Lanes v. State Auditor's Office*, 797 P.2d 764, 766 (Colo. App. 1990) (holding a board which acts in a quasi-judicial manner does not “negate its obligation” under the open meeting law); *Canney v. Bd. of Pub. Instruction*, 278 So. 2d 260, 263 (Fla. 1973); *Bryan County Bd. of Equalization v. Bryan County Bd. of Tax Assessors*, 560 S.E.2d 719, 720 (Ga. Ct. App. 2002); *Citizens Action Coal. of Ind. Inc. v. Pub. Serv. Comm'n*, 425 N.E.2d 178, 183–84 (Ind. Ct. App. 1981); *Remington v. City of Boonville*, 701 S.W.2d 804, 807 (Mo. Ct. App. 1985).

⁷³ See SCHWING, *supra* note 16, at 122–28; see also *infra* notes 74–76 and accompanying text.

laws.⁷⁴ Another approach is for courts to find that quasi-judicial bodies are part of the judiciary and therefore exempt.⁷⁵ An Oklahoma court expressed a final approach when it relied on the Oklahoma Administrative Procedure Act to hold a final decision by a quasi-judicial body does not need to be reached in an open meeting.⁷⁶

Finally, the remaining states have open meeting laws that do not address whether quasi-judicial bodies are covered, and the issue has not been raised to the appellate courts.⁷⁷ In some of these states, attorney general opinions provide guidance.⁷⁸

PRINCIPAL CASE

After the Workers' Compensation Division denied Decker's claim for benefits, his case was referred to the Medical Commission, which established a hearing panel to decide whether his claimed injury was compensable.⁷⁹ The Panel denied Decker's claim for benefits.⁸⁰ In Decker's first appeal, the Wyoming Supreme Court concluded the hearing panel's findings of fact failed to provide the court with a rational basis for judicial review and remanded.⁸¹

⁷⁴ *Common Cause of Utah v. Utah Pub. Serv. Comm'n*, 598 P.2d 1312, 1315–16 (Utah 1979); *accord Angerman v. State Med. Bd. of Ohio*, 591 N.E.2d 3, 7 (Ohio Ct. App. 1990).

⁷⁵ *See McQuinn v. Douglas County Sch. Dist. No. 66*, 612 N.W.2d 198, 206–07 (Neb. 2000) (construing an exemption of judicial proceedings to apply when a body “decides a dispute of adjudicative fact”); *Stockmeier v. Nev. Dept. of Corr. Psychological Review Panel*, 135 P.3d 220, 223 (Nev. 2006); *Roberts II v. City of Cranston Zoning Bd. of Review*, 448 A.2d 779, 781 (R.I. 1982).

⁷⁶ *Stillwater Savings & Loan Assoc. v. Okla. Savings & Loan Bd.*, 534 P.2d 9, 11 (Okla. 1975).

⁷⁷ *See SCHWING, supra* note 16, at 122–28 (citing statutes and cases from states which have addressed the issue); ARK. CODE ANN. §§ 25-19-101 to -110 (West 2009); CONN. GEN. STAT. ANN. §§ 1-200 to -205a, 225 to -243 (West 2009); DEL. CODE ANN. tit. 29, §§ 10001–10006 (2009); LA. REV. STAT. ANN. §§ 42:4.1 to 4.13 (2009); ME. REV. STAT. ANN. tit. 1, §§ 401–412 (2009); MONT. CODE ANN. § 2-3-201 to -221 (2009); N.H. REV. STAT. ANN. § 91-A:1–9 (2009); N.J. STAT. ANN. § 10:4-6 to -4-21 (West 2009); N.D. CENT. CODE § 44-04-17.1 to -22 (2009); S.C. CODE ANN. § 30-4-10 to -110 (2009); S.D. CODIFIED LAWS § 1-25-1 to -9 (2009); TENN. CODE ANN. § 8-44-101 to -106 (West 2009); VA. CODE ANN. § 2.2-3701 to -3714 (West 2009).

⁷⁸ *E.g.*, 42 MONT. OP. ATT'Y GEN. 239 (1988) (determining county tax appeal board could not close its deliberations based on the fact it was a quasi-judicial body); ARK. OP. ATT'Y GEN. No. 97-080 (1997) (stating that “generally” deliberations of quasi-judicial bodies must be open).

⁷⁹ *Decker v. State ex rel. Wyo. Med. Comm'n (Decker I)*, 124 P.3d 686, 698 (Wyo. 2005).

⁸⁰ *Id.* at 688.

⁸¹ *Id.* at 697. The Wyoming Supreme Court concluded the Panel did not explain how it weighed conflicting medical opinions and appeared to be independently diagnosing Decker. *Id.* at 694. The court stated an independent diagnosis would be contrary to the WAPA and without a weighing of the evidence there was no basis to determine the reasonableness of the Panel's decision. *Id.* at 697.

On remand, Decker filed a motion with the Commission seeking to present additional arguments and to observe the Panel deliberations.⁸² Decker cited the PMA as authority for allowing him to observe the deliberations.⁸³ The Commission denied both aspects of Decker's appeal.⁸⁴ The Commission first concluded the hearing panel functions as a quasi-judicial body, which is allowed private deliberations.⁸⁵ The Commission then determined no provisions of the WAPA required deliberations to be open, and the PMA did not apply to the Panel because it was not an "agency," "quorum of the governing body," nor holding a "meeting."⁸⁶

After the Commission denied Decker's motion, the hearing panel entered a supplemental order denying Decker's claim for benefits.⁸⁷ Decker again appealed and presented two issues for review: first, whether substantial evidence supported the hearing panel's supplemental order or if it was arbitrary and capricious; and second, whether the Commission's decision denied Decker's due process rights because he could not attend the deliberation or present additional argument.⁸⁸ The district court and Wyoming Supreme Court summarily dismissed any due process violation.⁸⁹ The district court and the Wyoming Supreme Court instead treated Decker's second issue as a claimed violation of the PMA.⁹⁰

With little discussion, the district court affirmed, stating the PMA was not violated because the Panel's deliberations were not a "meeting" under the PMA.⁹¹ The Wyoming Supreme Court noted a PMA violation would void the Panel's decision, thereby making the issue dispositive.⁹² While the court was split

⁸² Decker Motion, *supra* note 5, at 500–01.

⁸³ *Id.*

⁸⁴ Commission's Decision, *supra* note 6, at 526–36.

⁸⁵ *Id.* at 529. The Commission made this general conclusion prior to discussing the PMA specifically. *Id.* The Commission seemed to rely on the WAPA in making this conclusion. *See id.*

⁸⁶ *Id.* at 530–32. The Commission also stated in the alternative, if the Panel's deliberations were subject to the PMA, an executive session would be allowed. *Id.* at 533.

⁸⁷ *Decker v. State ex rel. Wyo. Med. Comm'n (Decker II)*, 191 P.3d 105, 108 (Wyo. 2008).

⁸⁸ *Id.*

⁸⁹ *Decker II*, 191 P.3d at 119; *Decker II* Appellant's Brief, *supra* note 5, app. E at 12. The Wyoming Supreme Court stated the Commission's denial of Decker's motion raised no due process concerns because he already had a full opportunity to present and argue his case and was trying to get a second chance that was not required by law. *Decker II*, 191 P.3d at 119.

⁹⁰ *Decker II*, 191 P.3d at 113; *Decker II* Appellant's Brief, *supra* note 5, app. E at 12.

⁹¹ *Decker II* Appellant's Brief, *supra* note 5, app. E at 12.

⁹² *Decker II*, 191 P.3d at 113; *see* WYO. STAT. ANN. § 16-4-403 (2009). The issue would have been dispositive because a void decision would mean the court had nothing to review. *Decker II*, 191 P.3d at 113.

regarding the PMA violation, it ultimately reversed the denial of Decker's benefits because substantial evidence did not support the Panel's decision.⁹³

Majority Opinion

After reviewing the PMA and statutes relating to the Commission, the majority stated many reasons supported a conclusion that open deliberations by the Panel were not required.⁹⁴ The court's main rationale was the Panel is not an "agency" as defined by the PMA.⁹⁵ The court reasoned the Panel is not a permanent body created by the legislature, but instead a "transitory body," existing solely under the control of the Commission.⁹⁶ The court also provided alternative reasons for why the PMA did not apply to the Panel: (1) it is not a "governing body," (2) its quasi-judicial hearing is not a "meeting," and (3) decisions by the Panel are not "action."⁹⁷ Finally, the court looked to workers' compensation statutes and stated it would make "no sense" to require the Panel to deliberate in a short open meeting because the Panel is allowed forty-five days to deliberate.⁹⁸

Dissenting Opinion

The dissent argued the Panel violated the PMA by deliberating behind closed doors.⁹⁹ The dissent first addressed whether the Panel is an "agency," concluding it fits within the definition because the legislature granted it authority to decide all issues in the case.¹⁰⁰ The dissent further argued that if the Panel is not an agency under the PMA, then it would not be an agency under the WAPA; and this would eliminate the court's basis for judicial review.¹⁰¹ The dissent said this made the

⁹³ *Id.* at 108. Justice Golden authored the majority opinion, which Justice Hill and District Judge Norman E. Young joined. *Id.* Judge Young was sitting for Justice Burke who recused himself. Justice Kite authored the dissent, which Chief Justice Voigt joined. *Id.* at 122 (Kite, J., dissenting). The dissent would not have reached the substantial evidence issue, and it was never discussed whether the dissent agreed with that portion or not. *See id.* at 122–25.

⁹⁴ *Id.* at 118 (majority opinion). Justice Golden authored the majority opinion, which was joined by Justice Hill and District Judge Young. *Id.* at 106.

⁹⁵ *Id.* at 118.

⁹⁶ *Id.* at 118–19 (“[T]he legislature has provided for [the Panel’s] potential existence, but their actual existence is governed solely by the Medical Commission.”). The PMA requires the agency to be “created by or pursuant to the Wyoming Constitution, statute or ordinance.” WYO. STAT. ANN. § 16-4-402(a)(ii) (2009).

⁹⁷ *Decker II*, 191 P.3d at 119. The court provided no reasoning for these conclusions. *See id.*

⁹⁸ *Id.* (referring to WYO. STAT. ANN. § 27-14-602(b)(ii) (2007), which provides that the panel shall issue a decision within 45 days after the case’s record is closed).

⁹⁹ *Id.* at 122 (Kite, J., dissenting). Justice Kite was joined by Chief Justice Voigt. *Id.* at 122.

¹⁰⁰ *See id.* at 123.

¹⁰¹ *Id.* at 123–24. The dissent cited Wyoming Statute § 16-3-114(a) which is the provision allowing for judicial review of agency action. *Id.*; *see also* WYO. STAT. ANN. § 16-3-114 (2009).

majority's opinion "internally inconsistent" because the court reviewed the Panel's decision even though it found it was not an agency.¹⁰²

Next, the dissent had to determine if the Panel constituted a "quorum of the governing body," which required interpretation of "quorum."¹⁰³ The dissent accepted that the Medical Commission was the governing body and concluded a quorum exists when there are a sufficient number of members present to transact the body's business.¹⁰⁴ Since three members of the Medical Commission are authorized to make final decisions, the dissent concluded the three-member panels constituted a "quorum."¹⁰⁵ Finally, the dissent dismissed the Commission's argument that Panel deliberations could be closed under the executive session exception because confidential information is discussed.¹⁰⁶ The dissent stated no exception would apply since information disclosed in a hearing is not confidential because the plaintiff waives his or her privilege when a claim is brought.¹⁰⁷

ANALYSIS

In *Decker v. State ex rel. Wyo. Med. Comm'n (Decker II)*, the Wyoming Supreme Court relied on alternative rationales for finding there was no violation of the PMA: (1) the Panel was not a public body subject to the PMA, and, in the alternative, (2) the Panel's deliberations were not covered by the PMA.¹⁰⁸ This section begins by setting forth the basic framework for determining if a public body has violated the PMA.¹⁰⁹ Next, this analysis discusses why the court's first rationale is incorrect, and concludes the Panel is a body subject to the act.¹¹⁰ Furthermore, this analysis discusses why the court's second rationale supports its decision, and concludes quasi-judicial deliberations are not covered by the PMA.¹¹¹ Finally, this analysis will examine the subject matter of quasi-judicial deliberations and argue that policy favors the court's second rationale.¹¹²

¹⁰² *Decker II*, 191 P.3d at 123 (Kite, J., dissenting).

¹⁰³ *Id.* at 124.

¹⁰⁴ *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1868 (1993)).

¹⁰⁵ *Id.* The court used the following syllogism: (1) issuing final decisions is the business of the Commission, (2) a hearing panel is authorized to issue final decisions, so (3) therefore the hearing panel is a quorum of the governing body. *Id.*

¹⁰⁶ *Id.* at 124–25.

¹⁰⁷ *Id.* at 125. The dissent also stated even if an executive session was allowed, the proper procedures were not followed. *Id.*; WYO. STAT. ANN. § 16-4-405(b)–(c) (2009).

¹⁰⁸ *Decker v. State ex rel. Wyo. Med. Comm'n (Decker II)*, 191 P.3d 105, 118–19 (Wyo. 2008).

¹⁰⁹ See *infra* notes 113–19 and accompanying text.

¹¹⁰ See *infra* notes 120–46 and accompanying text.

¹¹¹ See *infra* notes 147–74 and accompanying text.

¹¹² See *infra* notes 175–94 and accompanying text.

Framework of Analysis in PMA Cases

The PMA does not list with specificity all the bodies subject to its provisions; instead, its scope is determined by whether the body in question fits within the definitions provided.¹¹³ Therefore, the question of whether a particular body is subject to the PMA is one of statutory interpretation.¹¹⁴ In order for a party to successfully allege a body violated the PMA, the alleged body must: (1) be an “agency,” (2) have held a “meeting,” requiring a quorum of the governing body to be present, and (3) have undertaken “action” in a closed meeting not authorized under executive session privileges.¹¹⁵ Courts often analyze open meeting violations in two stages.¹¹⁶ First, courts determine whether the alleged body is subject to the act—in Wyoming this would require the body be an “agency” and a “quorum of the governing body.”¹¹⁷ Second, courts determine whether the act covers the subject matter of the meeting.¹¹⁸ While the court in *Decker II* found the Panel did not satisfy any of the requirements, it primarily relied on the first stage of analysis.¹¹⁹

Determining if the Hearing Panel is a Body Subject to the PMA

The Wyoming Supreme Court’s main theory was that the Panel was not subject to the PMA because it was not an “agency” to which the act applied.¹²⁰ The court also held the Panel was not a “governing body” and therefore could not hold meetings.¹²¹ Disagreement with these arguments formed the basis for the dissent.¹²² The dissent correctly decided this first stage of the analysis, because the Panel is an “agency” and a “quorum of the governing body.”¹²³

¹¹³ WYO. STAT. ANN. § 16-4-402 (2009). A majority of open meeting laws define “agency” in broad terms. Andrea G. Nadel, Annotation, *What Constitutes an Agency Subject to Application of State Freedom of Information Act*, 27 A.L.R. 4TH 742 (2009).

¹¹⁴ See *Decker II*, 191 P.3d at 118.

¹¹⁵ WYO. STAT. ANN. §§ 16-4-402, 403, 405 (2009).

¹¹⁶ Pupillo, *supra* note 18, at 1168–70 (describing how open meeting laws must first apply to particular bodies and then how the laws govern certain actions); Margaret S. DeWind, Note, *The Wisconsin Supreme Court Lets the Sun Shine in: State v. Showers and the Wisconsin Open Meeting Law*, 1988 WIS. L. REV. 827, 837–38 (describing qualitative and quantitative prongs in determining whether there is a meeting under the Wisconsin open meeting law).

¹¹⁷ Pupillo, *supra* note 18, at 1168–70; DeWind, *supra* note 116, at 837–38.

¹¹⁸ Pupillo, *supra* note 18, at 1168–70; DeWind, *supra* note 116, at 837–38.

¹¹⁹ *Decker II*, 191 P.3d at 118–19. The following two sections will discuss why the court should have relied more on the second stage. See *infra* notes 120–94 and accompanying text.

¹²⁰ *Decker II*, 191 P.3d at 118.

¹²¹ *Id.* at 119.

¹²² *Id.* at 122–25 (Kite, J., dissenting).

¹²³ See *infra* notes 124–46 and accompanying text.

Agency Definition

Since the PMA and WAPA define “agency” similarly, the court has limited ability to determine the hearing panel is not an agency.¹²⁴ A finding that the hearing panel is not an agency under the WAPA eliminates the court’s basis for judicial review.¹²⁵ The WAPA’s definition of “agency” is narrower than the PMA’s because it does not include “committee” or “subagency.”¹²⁶ Therefore when a body is an agency under the WAPA—like the Panel—it must also be an agency under the PMA.¹²⁷ The Commission suggested the PMA did not apply to the hearing panel because it was quasi-judicial and therefore fell under the judiciary exemption.¹²⁸ However, the WAPA’s definition of “agency” also exempts the judiciary, and therefore the dissent’s argument that there would be no basis for judicial review would also apply to the Commission’s reasoning.¹²⁹

Even if the WAPA did not pose a problem, the court’s interpretation of the statute was incorrect because the hearing panel is an “agency” as the PMA defines the term.¹³⁰ The court focused on whether a hearing panel is “created by or pursuant to” a state statute.¹³¹ The court determined the Panel is not created by the legislature, distinguishing between providing for the existence of the hearing panel and actually creating the hearing panel.¹³² There are two

¹²⁴ *Decker II*, 191 P.3d at 123–24 (Kite, J., dissenting) (describing the majority’s opinion as “internally inconsistent” because it reviews the Panel’s action even though it finds it is not an agency). Agency is defined under the PMA at WYO. STAT. ANN. § 16-4-402(a)(ii). Agency is defined under the WAPA at WYO. STAT. ANN. § 16-3-101(b)(i) (2009).

¹²⁵ *Decker II*, 191 P.3d at 124 (Kite, J., dissenting); see WYO. STAT. ANN. § 16-3-114(a) (2009) (“[A]ny person aggrieved or adversely affected in fact by a final decision of an agency in a contested case . . . is entitled to judicial review . . .”).

¹²⁶ Compare WYO. STAT. ANN. § 16-4-402(a)(ii), with WYO. STAT. ANN. § 16-3-101(b)(i). According to the PMA, “agency” means “any authority, bureau, board, commission, committee, or subagency of the state . . . which is created by or pursuant to . . . statute.” WYO. STAT. ANN. § 16-4-402(a)(ii). The WAPA does not include “committee” or “subagency” in its definition and adds “department, division, officer or employee of the state.” WYO. STAT. ANN. § 16-3-101(b)(i).

¹²⁷ *Decker II*, 191 P.3d at 124 (Kite, J., dissenting). The dissent did not determine specifically what type of body the hearing panel was, but stated “there is simply no question that it is an authority, bureau, board, commission, committee, or subagency of the state.” *Id.* at 123.

¹²⁸ Commission’s Decision, *supra* note 6, at 533. See generally WYO. STAT. ANN. § 16-4-402(a)(ii) (stating that the definition of agency does not include the judiciary). The Commission’s rationale is similar to the approach some state courts have taken when considering if quasi-judicial deliberations are subject to open meeting laws. See, e.g., *Roberts II v. City of Cranston Zoning Bd. of Review*, 448 A.2d 779, 780–81 (R.I. 1982); see also *supra* note 75 and accompanying text (citing and discussing states that find quasi-judicial bodies are similar to the judiciary for the purposes of open meeting laws).

¹²⁹ See WYO. STAT. ANN. § 16-3-101(b)(i); *Decker II*, 191 P.3d at 124 (Kite, J., dissenting).

¹³⁰ See *Decker II*, 191 P.3d at 124.

¹³¹ *Id.* at 118 (majority opinion); see WYO. STAT. ANN. § 16-4-402(a)(ii).

¹³² *Decker II*, 191 P.3d at 118.

problems with the court's rationale.¹³³ First, this interpretation ignores the plain meaning of the statute because it does not consider the meaning of "pursuant to" as used in the statute.¹³⁴ While each individual hearing panel is not created by statute, the Commission creates the Panels pursuant to statute.¹³⁵ Second, a public body cannot avoid open meeting laws by delegating power to a committee or subagency.¹³⁶ Under the majority's interpretation, the PMA is circumvented anytime the Wyoming Legislature passes a statute that gives bodies the power to create additional bodies; because these additional bodies are only "potential."¹³⁷

Quorum of the Governing Body Definition

In order for there to be a "meeting" under the PMA, a quorum of the governing body is required.¹³⁸ Both the Wyoming Supreme Court and Medical Commission determined the hearing panel was not a "quorum of the governing body."¹³⁹ The court and commission reached this conclusion by reasoning the governing body was the Medical Commission, and not the hearing panel.¹⁴⁰

While the term "governing body" is not defined in the PMA, the court could have turned to *Black's Law Dictionary*, which defines it as "a group of officers or persons having ultimate control."¹⁴¹ This definition is consistent with how other

¹³³ See *infra* notes 134–37 and accompanying text.

¹³⁴ *Hede v. Gilstrap*, 107 P.3d 158, 163 (Wyo. 2005) (stating the principles of statutory construction).

¹³⁵ WYO. STAT. ANN. § 27-14-616 (2009). One of the duties of the Commission is furnish three of its members to serve as a hearing panel. § 27-14-616(b)(iv). The Commission has no control over who the members of the Panel are, because all members are appointed by the governor. § 27-14-616(a). Further, the legislature has recognized in another statute the hearing panel is created "pursuant to statute." WYO. STAT. ANN. § 27-14-602(b)(ii) (2009) ("If the contested case is heard by the hearing panel created pursuant to [§] 27-14-616(b)(iv), the panel shall render a decision within forty-five (45) days after the close of the record . . .").

¹³⁶ *Jersawitz v. Fortson*, 446 S.E.2d 206, 208 (Ga. Ct. App. 1994) (holding a committee that "acted as a vehicle" of the Atlanta Housing Authority had to comply with the open meeting law and the housing authority could not "hide behind the committee"); see SCHWING, *supra* note 16, at 51. Further, many open meeting laws, including Wyoming's, explicitly cover subagencies. *E.g.*, IDAHO CODE ANN. § 67-2341(4)(d) (2009); WASH. REV. CODE ANN. § 42.30.020(1)(c) (West 2009); WYO. STAT. ANN. § 16-4-402(a)(ii).

¹³⁷ See *Wheeling Corp. v. Columbus & Ohio River R.R. Co.*, 771 N.E.2d 263, 272 (Ohio Ct. App. 2001) (stating the fact a committee is established informally is immaterial, otherwise public bodies could always informally establish committees to avoid the open meeting law).

¹³⁸ WYO. STAT. ANN. § 16-4-402. Prior to 1995 this was not a requirement. 1995 Wyo. Sess. Laws 208.

¹³⁹ *Decker II*, 191 P.3d at 119; Commission's Decision, *supra* note 6, at 532–33.

¹⁴⁰ *Decker II*, 191 P.3d at 119; Commission's Decision, *supra* note 6, at 532–33. Since the Commission contains at least eleven members, a three-member hearing panel would not be a quorum. See BLACK'S LAW DICTIONARY 1370 (9th ed. 2009) (defining "quorum" as "[t]he minimum number of members (usu[ally] a majority of all the members) who must be present for a deliberative assembly to legally transact business").

¹⁴¹ BLACK'S LAW DICTIONARY 764 (9th ed. 2009).

open meeting statutes define governing body because it focuses on the control and authority of the body.¹⁴² The hearing panel is authorized to make final decisions for the Medical Commission regarding the resolution of contested case hearings involving medically contested cases, and therefore is a governing body.¹⁴³ The majority's reasoning should only apply if the body has no authority to make final decisions and exists solely as an advisory board.¹⁴⁴ In determining if open meeting laws apply to subordinate bodies, there is a distinction between those bodies that exercise actual decision-making power and those that are purely advisory.¹⁴⁵ The dissent was therefore correct to focus on the authority granted to the hearing panel when determining it was a "quorum of the governing body."¹⁴⁶

Determining if the Panel's Deliberations are Covered by the PMA

Once a court determines a body is subject to the PMA, it must then examine the subject matter of the meeting to determine if it fits within the definition of "meeting."¹⁴⁷ Neither the majority nor the dissent discussed this aspect of the analysis in any depth.¹⁴⁸ However, the Commission relied heavily on this topic when denying Decker's motion.¹⁴⁹ This part of the analysis provides the strongest support for the court's decision.¹⁵⁰

Terms Defined

The PMA's definition of "meeting" requires that it be called "for the purpose of discussion, deliberation, presentation of information or taking action regarding public business."¹⁵¹ Prior to 1995, the PMA did not cover deliberations or

¹⁴² *E.g.*, ALASKA STAT. § 44.62.310 (2009) ("[G]overnmental body' means an assembly, council, board, commission, committee, or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity . . ."); IDAHO CODE ANN. § 67-2341(5) (2009) ("Governing body' means the members of any public agency which consists of two (2) or more members, with the authority to make decisions for or recommendations to a public agency regarding any matter.").

¹⁴³ *See* WYO. STAT. ANN. § 27-14-616(b)(iv) (stating that when hearing a contested case, the hearing panel "shall have exclusive jurisdiction to make the final administrative determination of the validity and amount of compensation payable").

¹⁴⁴ *See* SCHWING, *supra* note 16, at 94–96 (discussing open meeting laws which apply only to "governing" bodies compared to those that cover advisory committees); Pupillo, *supra* note 18, at 1169 (stating that open meeting statutes typically exempt those boards and committees which perform an advisory role).

¹⁴⁵ SCHWING, *supra* note 16, at 97–98.

¹⁴⁶ *See Decker II*, 191 P.3d at 124 (Kite, J., dissenting).

¹⁴⁷ *See* WYO. STAT. ANN. § 16-4-402.

¹⁴⁸ *See Decker II*, 191 P.3d at 118–19; *id.* at 122–25 (Kite, J., dissenting).

¹⁴⁹ Commission's Decision, *supra* note 6, at 526–36.

¹⁵⁰ *See infra* notes 151–94 and accompanying text.

¹⁵¹ WYO. STAT. ANN. § 16-4-402(a)(iii).

discussions of a public body and instead only required open meetings when a body took “action.”¹⁵² Like Wyoming, other states amended open meeting laws to include deliberations because they believed citizens required knowledge about more than the final decision.¹⁵³ Deliberation is not defined in the PMA, though other states do define the term.¹⁵⁴ Public business is not defined in the PMA, but the Wyoming Supreme Court has stated the term is broad and would encompass how a public agency operates and functions.¹⁵⁵ The court has also said any business of a state agency is public business.¹⁵⁶

Types of Deliberations Covered

Determining which deliberations are exempt from coverage of the PMA involves a balancing of interests.¹⁵⁷ On one side is the interest of the public in being informed.¹⁵⁸ On the other side is the interest of the body in maintaining privacy and confidentiality.¹⁵⁹ In the context of quasi-judicial deliberations, some courts and commentators argue an agency’s interest in confidentiality outweighs the public’s interest and therefore conclude quasi-judicial deliberations should not be subject to open meeting laws.¹⁶⁰

¹⁵² 1995 Wyo. Sess. Laws 208. The previous definition of meeting stated: “Meeting’ means an assembly of the governing body of an agency at which action is taken.” *Id.* While some state open meeting statutes covered deliberations from the beginning, others only covered action. SCHWING, *supra* note 16, at 284. Wyoming was the last state to cover deliberations. *Id.* While the definition of “meeting” changed to add deliberation, the PMA still only states “action” taken in a closed meeting is void. WYO. STAT. ANN. § 16-4-403.

¹⁵³ SCHWING, *supra* note 16, at 275 (“Simple knowledge of the final action or the vote is often only the unsatisfactory end of the story—the butler did it—without the deliberations and analysis leading up to the denouement.”).

¹⁵⁴ *See, e.g.*, ALA. CODE § 36-25A-2 (2009) (defining deliberation as “[a]n exchange of information or ideas among a quorum of members of a governmental body intended to arrive at or influence a decision as to how the members of the governmental body should vote on a specific matter”); MASS. GEN. LAWS ANN. ch. 30A, § 11A (West 2009) (defining deliberation as “a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction”).

¹⁵⁵ *Shaefer v. State ex rel. Univ. of Wyo.*, 139 P.3d 468, 472 (Wyo. 2006) (citing *Fincher v. State*, 497 S.E.2d 632, 636 (Ga. App. 1998)).

¹⁵⁶ *Sheridan Newspapers, Inc. v. City of Sheridan*, 660 P.2d 785, 791 (Wyo. 1983).

¹⁵⁷ *See The Press Fights*, *supra* note 16, at 1206 (stating the “most important exemptions” to open meeting laws exist because the interests served by maintaining secrecy are more important than informing the public).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See, e.g.*, *Kennedy v. Upper Milford Twp. Zoning Hearing Bd.*, 834 A.2d 1104, 1115–16 (Pa. 2003); *Common Cause of Utah v. Utah Pub. Serv. Comm’n*, 598 P.2d 1312, 1315 (Utah 1979); William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 189–90 (2009) (recognizing the interest an agency has in confidentiality and stating it is necessary to collegial decision making).

The purpose of the PMA supports not requiring all types of deliberations to be within the scope of the PMA.¹⁶¹ The legislature expressed its intent by declaring, “[A]gencies of Wyoming exist to conduct public business. *Certain* deliberations and actions shall be taken openly as provided in this act.”¹⁶² Neither the majority nor the dissent discussed the PMA’s statement of purpose adopted by the legislature.¹⁶³ Since every word in a statute must have meaning, when the legislature used “certain” it must have meant the PMA would not apply to all types of deliberations.¹⁶⁴

The Wyoming Supreme Court’s application of the PMA also suggests there are types of deliberations not covered by the act.¹⁶⁵ In a case after the legislature added deliberations to the definition of meeting, the court continued to follow cases which allow bodies to hold “informal meetings” prior to making a decision.¹⁶⁶ The reasoning accepted in those cases is similar to a case considered prior to the adoption of the PMA, where the Wyoming Supreme Court recognized public bodies—including quasi-judicial agencies—should be allowed to conduct some deliberations in private.¹⁶⁷ While the legislature has adopted and amended the PMA since then, the underlying policy has not changed because the rationale is similar to recent cases decided by the court.¹⁶⁸

Business of Quasi-Judicial Deliberations

The district court found the hearing panel’s deliberations were “not a matter of public business,” and therefore no “meeting” was held.¹⁶⁹ The business before the Panel, and other quasi-judicial bodies, primarily involves an individual or

¹⁶¹ See *infra* notes 162–68 and accompanying text. As the court noted in *Decker II*, the primary focus when interpreting statutes is the legislature’s intent. 191 P.3d. at 118.

¹⁶² WYO. STAT. ANN. § 16-4-401 (2009) (emphasis added).

¹⁶³ See *Decker II*, 191 P.3d at 118–19; *id.* at 122–25 (Kite, J., dissenting).

¹⁶⁴ See *id.* at 118 (majority opinion); *Hede v. Gilstrap*, 107 P.3d 158, 163 (Wyo. 2005) (“Each word of a statute is to be afforded meaning, with none rendered superfluous”); *Coal. for Quality Health Care v. N.J. Dept. of Banking*, 791 A.2d 1085, 1103 (N.J. Super. Ct. App. Div. 2002) (interpreting “certain” in a statute to mean “not all”); Brief of Appellee at 36, *Decker II*, 191 P.3d 105 (S-07-0051) (emphasizing the legislature’s use of “certain”).

¹⁶⁵ See *Mayland v. Flitner*, 28 P.3d 838, 849 (2001); *Ward v. Bd. of Trs. of Goshen County Sch. Dist. No. 1*, 865 P.2d 618, 622 (Wyo. 1993); *Emery v. City of Rawlins*, 596 P.2d 675, 680 (Wyo. 1979).

¹⁶⁶ *Mayland*, 28 P.3d at 849.

¹⁶⁷ See *Sch. Dist. No. 9 v. Dist. Boundary Bd.*, 351 P.2d 106, 110 (Wyo. 1960); see also *supra* notes 40–43 and accompanying text (explaining facts and holding of *Sch. Dist. No. 9*).

¹⁶⁸ See Commission’s Decision, *supra* note 6, at 533.

¹⁶⁹ *Decker II* Appellant’s Brief, *supra* note 5, app. E at 12. The Wyoming Supreme Court and commission also summarily determined there was no “meeting,” though neither provided a rationale similar to the district court’s. See *Decker II*, 191 P.3d at 118–19; Commission’s Decision, *supra* note 6, at 526–36.

small group of individuals.¹⁷⁰ It is true quasi-judicial bodies sometimes conduct business that relates to the general public when they issue decisions.¹⁷¹ However, this type of public business is distinguishable from what the PMA covers because opening quasi-judicial deliberations to the public does not satisfy the policy and purpose of the act.¹⁷² One of the main purposes of open meeting laws is to hold government bodies and officials accountable.¹⁷³ However, this purpose conflicts with the purposes of a quasi-judicial body deciding a contested case because it must act independently and be fair—to do this requires the decision-makers to be free from criticism.¹⁷⁴

Implications of the Wyoming Supreme Court's Decision

A holding that quasi-judicial deliberations are not within the scope of the PMA's definition of "meeting" would be similar to the approach taken by Utah and Ohio courts.¹⁷⁵ The approach would also be consistent with a Wyoming district court's interpretation of the Wyoming Public Records Act—construing the act to include a deliberative-process privilege.¹⁷⁶ Since the court in *Decker II* relied on alternative rationales, it is not entirely clear whether Wyoming will continue to follow this approach with regard to all quasi-judicial bodies.¹⁷⁷ However, the court

¹⁷⁰ See *AFSCME v. Dept. of Cent. Mgmt. Servs.*, 681 N.E.2d 998, 1005 (Ill. App. Ct. 1997); *KOCH*, *supra* note 44, § 2.11 ("In general, adjudication is the decision making process for applying preexisting standards to individual circumstances.").

¹⁷¹ See *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947); *KOCH*, *supra* note 44, § 2.11 ("[P]olicy articulation is often a necessary part of adjudication.").

¹⁷² See *Common Cause of Utah*, 598 P.2d at 1315; Christopher B. McNeil, *The Public's Right of Access to "Some Kind of Hearing": Creating Policies that Protect the Right to Observe Agency Hearings*, 68 LA. L. REV. 1121, 1128 (2008).

¹⁷³ See *The Press Fights*, *supra* note 16, at 1201; Pupillo, *supra* note 18, at 1166.

¹⁷⁴ See Carolyn M. Van Noy, Comment, *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 WASH. L. REV. 533, 556 (1986) (explaining that public officials face a conflict in values when they act as decision makers). This would be especially true at local government levels, for example the county commissioners. See *id.*

¹⁷⁵ See *Common Cause of Utah*, 598 P.2d at 1315–16; *Angerman v. State Med. Bd. of Ohio*, 591 N.E.2d 3, 7 (Ohio Ct. App. 1990).

¹⁷⁶ Decision Letter at 1–7, *Cheyenne Newspapers, Inc. v. Freudenthal (Cheyenne Newspapers PRA Case)*, Docket No. 173-978 (Laramie County Dist. Ct. Aug. 4, 2009).

¹⁷⁷ See *Cheyenne Newspapers PMA Case* Appellant's Brief, *supra* note 29, at 14–28 (arguing quasi-judicial bodies must deliberate in the open following contested case hearings). The plaintiffs in *Cheyenne Newspapers PMA Case* claimed the Cheyenne Board of Appeals violated the PMA by deliberating in private. *Id.* at 5. The Board of Appeals held a contested case hearing to review the denial of demolition permits by Cheyenne's Historic Preservation Board. *Cheyenne Newspapers PMA Case* Appellee's Brief, *supra* note 63, at 2. After the hearing the board deliberated the case in private and later adopted a written decision in an open meeting. *Id.* The district court held the PMA did not apply to quasi-judicial deliberations following contested case hearings. *Id.* at 11. *But see* Editor's note *supra* p. 203.

should continue to hold quasi-judicial deliberations are not subject to the PMA because of strong policy considerations.¹⁷⁸

When discussing these policy concerns, most courts recognize privacy is necessary to ensure an effective decision-making process in quasi-judicial deliberations.¹⁷⁹ Many courts, including the United States Supreme Court, recognize the importance of keeping a court's decision-making process closed.¹⁸⁰ There is no right of the public, or parties, to witness jury deliberations.¹⁸¹ This should apply equally to administrative adjudications.¹⁸²

As one court recognized, it is “unnatural” to think members of an agency will not deliberate about the case in private.¹⁸³ An agency member will frequently use his mind and think about the case, whether in the privacy of his home or at the office.¹⁸⁴ In the context of the hearing panel, it would effectively mean that even two members of the panel could not talk to each other about any matter of the case outside of a public meeting.¹⁸⁵ Since the agency can deliberate for several days, the agency would either have to condense deliberations into one open meeting, or hold multiple open meetings anytime the PMA applied.¹⁸⁶ The body's written decision, which contains findings of fact and conclusions of law, is sufficient to show the deliberative process of the quasi-judicial body.¹⁸⁷

¹⁷⁸ See *infra* notes 179–94 and accompanying text.

¹⁷⁹ See *Canney v. Bd. of Pub. Instruction*, 278 So.2d 260, 265 (Fla. 1973) (Dekle, J., dissenting) (stating that if an administrative body is deprived of “free deliberation” it will prohibit open discussion which is necessary to reach a “fair and just result”); *Kennedy*, 834 A.2d 1104, 1115 (Pa. 2003) (describing how public deliberations are incompatible with the decision-making process).

¹⁸⁰ *E.g.*, *United States v. Morgan*, 313 U.S. 409, 422 (1941) (stating because the mental processes of judges cannot be scrutinized, it follows that the Secretary of Agriculture's decision-making process should not be scrutinized); *Kennedy*, 834 A.2d at 1115–17; *Commonwealth v. Vartan*, 733 A.2d 1258, 1263–64 (Pa. 1999); *Common Cause of Utah*, 598 P.2d at 1315.

¹⁸¹ See *The Press Fights*, *supra* note 16, at 1206.

¹⁸² See *McNeil*, *supra* note 172, at 1128 (discussing how the “mental processes” of judges, including administrative adjudicators, should be kept private).

¹⁸³ *Common Cause of Utah*, 598 P.2d at 1315.

¹⁸⁴ *Id.*

¹⁸⁵ Two members would be a quorum, therefore requiring an open meeting. See WYO. STAT. ANN. § 16-4-402; *supra* note 140 and accompanying text.

¹⁸⁶ See *Decker II*, 191 P.3d at 119.

¹⁸⁷ See *Canney*, 278 So. 2d at 265 (Dekle, J., dissenting) (“The basic concept of the ‘right of the public to know’ is fulfilled upon reaching such a fair and just result which is then publicly conveyed.”); *Stockmeier v. Nev. Dept. of Corrs. Psychological Review Panel*, 135 P.3d 220, 224 (Nev. 2006) (stating the ability to appeal the decision holds the public body accountable); *Kennedy*, 834 A.2d at 1115; SCHWING, *supra* note 16, at 348–49; Funk, *supra* note 160, at 191.

Furthermore, requiring agencies to hold deliberations of contested case hearings in the open would have many negative implications.¹⁸⁸ The Commission noted in its decision that the “practical effect” of requiring deliberations to be open would cause “chaos” among the agencies in Wyoming that conduct contested case proceedings.¹⁸⁹ One reason for chaos would be that decisions reached by any quasi-judicial agency that has not conducted its deliberations in the open would be void if challenged by a party.¹⁹⁰ Another form of chaos will result from the delicate types of discussions adjudicators must have when deciding cases.¹⁹¹ For example, a Pennsylvania court noted that case decisions frequently rely on the credibility of witnesses and the weight an agency puts on a witness’s testimony, and therefore such discussions evaluating witness testimony should be held privately.¹⁹² Another problem would be created because members of the hearing panel cannot engage in *ex parte* communication, which would result if only one party showed up to the deliberations.¹⁹³ Finally, chaos may also result because quasi-judicial bodies subject to the PMA could try to avoid its requirements by appointing a single hearing officer to decide the case.¹⁹⁴

CONCLUSION

The Wyoming Supreme Court’s decision in *Decker II* relied on alternative rationales.¹⁹⁵ First, the court concluded the hearing panel formed by the Medical

¹⁸⁸ See Commission’s Decision, *supra* note 6, at 535.

¹⁸⁹ *Id.*

¹⁹⁰ See WYO. STAT. ANN. § 16-4-403(a) (“Action taken at a meeting not in conformity with this act is null and void and not merely voidable.”); Commission’s Decision, *supra* note 6, at 535 (“Such would also have the effect of undermining all past decisions in all contested case proceedings before virtually all agencies.”). The PMA does not provide a statute of limitations. See WYO. STAT. ANN. § 16-4-401 to -408 (2009). After an action is voided by the court, the body is usually required to start its procedure from the beginning, this time complying with the law. See SCHWING, *supra* note 16, at 516–17 (discussing how various states address the effect of a void action). Wyoming has not considered how a void act can be cured, because it has never found a violation of the act. See *supra* note 35 and accompanying text.

¹⁹¹ *Kennedy*, 834 A.2d at 1115–17. In the context of medically contested cases, the hearing panel would be discussing whether doctors are credible. See *Decker v. State ex rel. Wyo. Med. Comm’n (Decker I)*, 124 P.3d 686, 697 (Wyo. 2005) (“As with any hearing examiner, the Commission is charged with weighing the evidence and determining the credibility of witnesses.”).

¹⁹² *Kennedy*, 834 A.2d at 1115–17.

¹⁹³ See WYO. STAT. ANN. § 16-3-111 (2009); Commission’s Decision, *supra* note 6, at 528; see also WYO. EXEC. ORDER NO. 1981-12 (1981) (requiring agencies “to guard against *ex parte* contacts and biased decision making”). When the quasi-judicial body begins deliberations the case would be closed, so a party may not show up because it could not advocate its position any longer. See 025-240-009 WYO. CODE R. § 2 (Weil 2008).

¹⁹⁴ See SCHWING, *supra* note 16, at 99–100 (concluding that most states find one individual does not constitute a public body).

¹⁹⁵ See *supra* notes 94–98 and accompanying text.

Commission was not a body subject to the PMA.¹⁹⁶ However, this rationale was incorrect because the panel is an “agency” as defined by the PMA.¹⁹⁷ Second, the court concluded the deliberations of the hearing panel were not subject to the PMA.¹⁹⁸ This rationale provides the strongest support for the court’s decision.¹⁹⁹ Reliance on both rationales creates uncertainty about whether quasi-judicial deliberations are subject to the PMA—making it unclear if other agencies in the state which preside over contested case hearings must hold their deliberations in the open.²⁰⁰ The PMA does not directly answer the question, and, like many other states, it is left to the court’s interpretation, absent legislation.²⁰¹ The court should continue to hold that quasi-judicial deliberations are not subject to the PMA because the conclusion is supported by the purpose of the act and policy arguments.²⁰² Without such a holding, chaos could be created among the many state agencies that preside over contested cases.²⁰³

¹⁹⁶ See *supra* notes 94–96 and accompanying text.

¹⁹⁷ See *supra* notes 120–46 and accompanying text.

¹⁹⁸ See *supra* note 97 and accompanying text.

¹⁹⁹ See *supra* notes 147–74 and accompanying text.

²⁰⁰ See *supra* note 177 and accompanying text.

²⁰¹ See *supra* note 63 and accompanying text.

²⁰² See *supra* notes 175–87 and accompanying text.

²⁰³ See *supra* notes 188–94 and accompanying text.

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THE VIABILITY OF DIRECT NEGLIGENCE CLAIMS AGAINST MOTOR CARRIERS IN THE FACE OF AN ADMISSION OF RESPONDEAT SUPERIOR

*Richard A. Mincer**

The reputation of a driver and his conduct at other times and places are not reliable or safe criterions by which to determine what his conduct was at a particular time and place. . . . A very poor or careless driver may have been wholly free from fault in the particular instance involved and, likewise, the most skilful driver, accustomed to exercising the utmost care, may be grossly negligent on one particular occasion.¹

It is becoming increasingly difficult to find a case arising out of a commercial motor vehicle accident where the driver's employer is not also named as a party. Typically, the motor carrier admits that the driver was acting in the scope of employment, thereby subjecting itself to vicarious liability for the employee's negligence pursuant to the doctrine of respondeat superior.² Nevertheless, plaintiffs

* Partner, Hirst Applegate, LLP; Cheyenne, WY. I want to express my thanks to Amanda Good, an associate at Hirst Applegate, who provided valuable assistance in getting this project off the ground and performed much of the initial research on this topic in the course of our work on transportation cases, and special thanks to Jennifer Cook, a 2L law student at the University of Wyoming, who surveyed the various states to provide an up-to-date "nose count" of majority and minority jurisdictions.

¹ *Holberg v. McDonald*, 289 N.W. 542, 543 (Neb. 1939) (quoted by *Washita Valley Grain Co. v. McElroy*, 262 P.2d 133, 138 (Okla. 1953)).

² Direct negligence claims also arise in a variety of factual situations including workplace accidents, medical and other professional negligence cases, and any other situation where one party may have had some duty to control the actions of the alleged wrongdoer. The majority of the case law on the subject involves negligent entrustment of vehicles, although others will be discussed. Therefore, while this article focuses on motor vehicle accidents, it is equally applicable to other situations.

often assert direct negligence claims against the motor carrier for negligent hiring, training, supervision, retention, or entrustment. The motivation behind such an attempt is to gain the plaintiff a tactical advantage in the litigation, to encourage the court to admit otherwise inadmissible evidence, and to provide a basis for oppressive discovery. The majority of courts hold that such direct negligence claims are improper in the face of an admission of vicarious liability. They are right.

I. THE STORY

If we view this situation in the context of an ordinary motor vehicle accident (one that does not involve a tractor-trailer), we can see the wisdom in dismissing direct negligence claims. As the story goes, Little Johnny was a problem child. He went outside barefoot, tore the tags off mattresses and even ran with scissors occasionally—despite his mother’s repeated warning that he would “put someone’s eye out with that thing.” When he turned sixteen, his mom, Mrs. Jones, was concerned about him starting to drive. But, as a single mother of three, she needed help taking the younger kids to school, practice and other activities. She also hoped Johnny would get a job to help out the family finances.

A. *The First Lawsuit*

As you might expect, Johnny got his fair share of tickets as a young driver. He even had one accident where he rear-ended another vehicle.³ The day before his seventeenth birthday, Johnny was involved in another accident in the school parking lot with a vehicle driven by fellow student, Joe Blow. The other student filed suit seeking to recover property damages as a result of the accident. At trial, Joe’s father, Dr. Blow, wanted to testify that the accident must have been Johnny’s fault. After all, Joe was an honor student,⁴ had never been in an accident and never even received a ticket for a traffic violation. Johnny, everyone knew, could not make the same claims; the accident must be his fault.

Much to the good doctor’s chagrin, Judge Learned excluded the evidence of Johnny’s prior bad acts pursuant to Rules 403 and 404(b).⁵ So, the jury never heard about Little Johnny’s frailties, his less than perfect driving record, or his prior accident. The judge informed the parties that Johnny could only be held liable if he acted negligently at the time of the accident and such negligence was a proximate cause of the damages sought. The jury found in favor of Johnny.

³ Thankfully, no one was hurt.

⁴ If you have any doubts, just look at the bumper sticker on the back of the Blows’ minivan.

⁵ See FED. R. EVID. 403 and 404(b) for examples of rules that exclude unfairly prejudicial evidence, character evidence, and evidence of other acts.

B. The Second Lawsuit

Incredibly, Johnny was in another accident the next week on his way to a job interview with Pizza Darn Quik (PDQ).⁶ Luckily, during the interview, the manager did not ask Johnny why he was late for the interview and never checked his driving record. Johnny got the job, as his mother had hoped, and went to work as a delivery driver for PDQ. Dr. Blow was appalled. Never one to let a grudge go, the good doctor filed suit against PDQ for negligent hiring, training and retention. He learned from the first suit that a person has a duty to act reasonably under the circumstances. Certainly, PDQ acted unreasonably when it hired a person such as Johnny—never even bothering to check his driving record before turning him loose on an unsuspecting public!

Judge Learned, of course, summarily dismissed the Blow claim. After all, while PDQ may have acted unreasonably in hiring Johnny, this act had not translated into any harm. Johnny had not driven negligently, had not caused any accidents, and had not caused any damage to the Blows. Negligence, the judge explained, has four elements—duty, breach, causation and damages—and the good doctor simply could not prove all four. Case dismissed.

C. The Current Lawsuit

Now for the reason we're all here. Johnny was involved in yet another accident. Johnny was driving down a residential street in his PDQ Geo to make a delivery. He was driving the speed limit and paying attention, for a change. Unexpectedly, a man darted out into the street. Johnny slammed on his brakes and, just as his car was coming to a stop a good 20 feet from the man, Joe Blow plowed into Johnny from behind in his brand new Range Rover. The impact propelled Johnny forward and into the man, who was severely injured.

Suit followed against Joe Blow,⁷ PDQ and Little Johnny. The injured plaintiff alleged that the two young drivers acted negligently and caused the accident. The plaintiff also alleged that PDQ was liable for their direct negligence. Specifically, he alleged PDQ negligently hired, trained, supervised and entrusted the vehicle to Johnny. Joe denied that he was negligent and blamed Johnny. Johnny denied that he was negligent and alleged that the accident was caused by the plaintiff's negligence in darting into the street and Blow's negligence in rear ending Johnny at a high rate of speed, causing him to be pushed into the pedestrian. PDQ admitted that Johnny was acting in the course and scope of his employment, admitted it was vicariously liable for Johnny's negligence, if any, but denied that it was directly negligent or that such direct negligence was the proximate cause of

⁶ This one was Johnny's fault and his insurer paid \$12,500 to settle the claim.

⁷ Joe was now 18 and the vehicle was titled in his name.

the accident. PDQ filed a motion to dismiss the direct negligence claims, arguing that the claims were superfluous in light of the admission of respondeat superior.

D. The Direct Negligence Claims Should be Dismissed

Should the Court dismiss the direct negligence claims against PDQ, given the admission that it is vicariously liable for Johnny's negligence under the doctrine of respondeat superior? The obvious and logical answer is *yes* and for a lot of reasons.

II. WHY THE DIRECT NEGLIGENCE CLAIMS SHOULD BE DISMISSED

A. What Is a Direct Negligence Claim?

Generally, a master is liable for the negligent acts of its employee when such acts are performed in the course and scope of employment. This is the familiar doctrine of respondeat superior. Yet, there are other theories that provide a basis to hold a master liable for the negligence of its servant. For purposes of this article, the term "direct negligence claims" means claims such as negligent hiring, negligent training or supervision, negligent retention, and negligent entrustment.⁸ Also known as independent negligence claims, these claims for relief were originally intended to provide a potential means of recovery in situations where vicarious liability is otherwise unavailable.⁹ In other words, liability can exist under these theories when the proximate cause of the injury is an employee's negligence who is acting *outside* the course and scope of his employment.¹⁰ Simply put, these

⁸ Unlike negligent hiring, training, supervision and retention, negligent entrustment does not necessarily arise out of the employment relationship, but is often asserted against a driver's employer. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 308 (1965).

§ 308 Permitting Improper Persons to Use Things or Engage in Activities

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Id.

⁹ *Plains Res. v. Gable*, 682 P.2d 653, 662 (Kan. 1984). "The application of the theory of independent negligence in hiring or retaining an employee becomes important in cases where the act of the employee either was not, or may not have been, within the scope of his employment." *Id.* (quoting 53 AM. JUR. 2D *Master & Servant* § 422). RESTATEMENT (SECOND) OF TORTS § 317 speaks to situations where the master has a duty to control his servant "while acting outside the scope of his employment." Similarly, RESTATEMENT (SECOND) OF TORTS § 318 discusses a duty on the part of a possessor of land or chattels with respect to someone using the same other than as a servant.

¹⁰ *Plains Res.*, 682 P.2d at 662. *See also* RESTATEMENT (SECOND) OF TORTS §§ 317–19. Generally, a person does not owe a duty to prevent a person from causing harm unless a special relationship exists between the actor and the person causing the harm or between the actor and the injured person which gives the injured person a right to protection. RESTATEMENT (SECOND) OF TORTS § 315.

theories are intended to provide an alternate means of recovery against the master for harm caused by his servant when respondeat superior or agency theories might not suffice. It seems apparent, then, that these theories are superfluous when the master has already admitted responsibility for any judgment entered against the servant.

B. Are Direct Negligence Claims Really Superfluous?

It is difficult to imagine a case where an employer's negligence in the hiring, training, or supervising of his employee is truly the proximate cause of harm to a third party in the absence of a wrongful act committed by the servant. In this case, the action against PDQ rises and falls on whether Johnny was negligent and whether his negligence was a proximate cause of the accident. If Johnny acted reasonably under the circumstances, how can anyone find fault with PDQ's conduct as his employer?¹¹ More specifically, if Johnny acted reasonably, how can any unreasonable conduct at a remote time and place possibly be the proximate cause of the plaintiff's accident and injuries?

Put another way, if Johnny's negligence was a proximate cause of the accident, it really does not matter whether the direct negligence claims have merit or not. If Johnny is negligent, whether or not the master is also negligent can neither increase nor decrease the percentage of fault attributable to Johnny. Similarly, whether or not the master is negligent can neither increase nor decrease the amount of recoverable damages. Finally, whether or not the master is also negligent does not change the legal fact that the master is liable for all of the negligence of its servant. Since the direct negligence of the master is derivative of the negligence of the servant, the direct negligence claims serve no real purpose, unless the purpose is to inject prejudice into the proceedings and invite error.¹²

¹¹ Similarly, a manufacturer cannot negligently manufacture a non-defective product, at least for purposes of tort liability.

A manufacturer logically cannot be held liable for failing to exercise ordinary care when producing a product that is not defective because: (1) if a product is not unreasonably dangerous because of the way it was manufactured, it was not negligent to manufacture it that way and (2) even if the manufacturer was somehow negligent in the design or production of the product, that negligence cannot have caused the plaintiff's injury because the negligence did not render the product unreasonably dangerous.

Bradley v. Gen. Motors Corp., No. 96-8073, 1997 U.S. App. LEXIS 15389, at *9-10 (10th Cir. June 26, 1997) (quoting Garrett v. Hamilton Standard Controls, Inc., 850 F.2d 253, 257 (5th Cir. 1988)).

¹² See, e.g., Beavis v. Campbell County Mem'l Hosp., 20 P.3d 508 (Wyo. 2001).

C. *What Harm Can Arise From Allowing the Direct Negligence Claims to Survive?*

If the claims are truly superfluous, why do plaintiffs file such claims and what harm, aside from the obvious waste of time, can result from allowing these claims to go to the jury? The answer should be obvious. Direct negligence claims against the employer provide a plaintiff with a backdoor means to introduce evidence, such as driving records and prior bad acts, which are otherwise inadmissible. Moreover, such claims promote confusion of the issues, and provide an avenue to encourage the jury to act based on passion and prejudice, rather than material facts.

For example, Johnny's driving record was inadmissible in the First Lawsuit.¹³ His driving record would be admissible, however, in the Current Lawsuit to show that PDQ acted unreasonably in hiring Johnny to deliver pizzas. Johnny's character, obviously inadmissible in the First Lawsuit, becomes potentially admissible in the Current Lawsuit. Similarly, PDQ's business practices take center stage in the Current Lawsuit, even though the critical inquiry is whether someone operated a vehicle in a negligent manner thereby causing an accident. These issues also provide a basis for unnecessary and costly discovery practices.

III. OVERVIEW OF THE LAW

There are several alternative methods whereby a master can be held liable for the negligence of its servant. The most obvious is respondeat superior. Under this agency doctrine, "a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent."¹⁴ The doctrine applies when the servant is acting within the course and scope of his employment at the time the injury occurs.¹⁵

Otherwise, "vicarious liability or imputed negligence has been recognized under varying theories, including agency, negligent entrustment of a chattel to an incompetent, conspiracy, the family purpose doctrine, joint enterprise, and ownership liability statutes."¹⁶ Regardless, all are different means to a common

¹³ See *supra* notes 3–5 and accompanying text.

¹⁴ BLACK'S LAW DICTIONARY 1311–12 (6th ed. 1990).

¹⁵ *Id.*

¹⁶ *State ex rel. McHaffie v. Bunch (McHaffie)*, 891 S.W.2d 822, 826 (Mo. 1995). Note, negligent entrustment does not necessarily impose vicarious liability on an entrustor who is not the trustee's employer, parent, or principal. See, e.g., *Ali v. Fisher*, 145 S.W.3d 557 (Tenn. 2004). Ali was injured in an accident with Fisher who was driving a car owned by his friend Scheve. The jury found Fisher 80% at fault and Scheve 20% on a negligent entrustment theory. The trial court then found Scheve vicariously liable on the negligent entrustment theory and ordered him to pay all of the damages. The Tennessee Court of Appeals reversed and was affirmed by the state supreme

end—to hold one party liable for the negligence of another; and, in the context of the employer-employee relationship. All theories share a common element—the underlying negligence of the employee.¹⁷

In either case, the employee is responsible to the same degree as the employee would be if there were no means to establish vicarious liability. Therefore, the “liability of the employer is fixed by the amount of liability of the employee.”¹⁸ “The employer is [liable] for *all* the fault attributed to the negligent employee, but *only* the fault attributed to the negligent employee as compared to other parties to the accident.”¹⁹ In other words, whether or not the employer is directly negligent neither increases nor decreases the employer’s ultimate liability—nor should it.

A. Majority View

Not surprisingly, the majority of jurisdictions embrace the logically consistent view described above.²⁰ When an employer admits vicarious liability for an employee’s negligence, a majority of courts hold it is improper to allow a plaintiff

court. *Id.* Specifically, the court held that negligent entrustment did not mandate a finding of vicarious liability and that the relative fault of the two defendants must be allocated pursuant to the comparative fault system. Notably, Scheve did not admit he was vicariously liable for Fisher’s actions under any theory and this case did not involve an employer-employee or similar agency relationship.

¹⁷ *Gant v. L.U. Transport, Inc.*, 770 N.E.2d 1155, 1160 (Ill. App. Ct. 2002) (“The doctrine of respondeat superior and the doctrine of negligent entrustment are simply alternative theories by which to impute an employee’s negligence to an employer. Under either theory, the liability of the principal is dependent upon the negligence of the agent.”); *see also* *Beavis v. Campbell County Mem’l Hosp.*, 20 P.3d 508, 515 (Wyo. 2001) (holding that an element of a negligent hiring claim is “some form of misconduct by the employee that caused damages to the plaintiff”) (quoting *McHaffie*, 891 S.W.2d at 826)). Thus, even if the defendant hospital was negligent in hiring the nurse, “it is clear such negligence could not be the proximate cause of [plaintiff’s] injuries unless the predicate negligence of [the nurse] was first found.” *Beavis*, 20 P.3d at 515. *But see* *James v. Kelly Trucking Co.*, 661 S.E.2d 329 (S.C. 2008); *Ali v. Fisher*, 145 S.W.3d 557 (Tenn. 2004).

¹⁸ *Campa v. Gordon*, No. 01C50441, 2002 U.S. Dist. LEXIS 15032, at *1 (N.D. Ill. 2002) (quoting *Gant*, 770 N.E.2d at 1160).

¹⁹ *Gant*, 770 N.E.2d at 1159.

²⁰ Many state supreme courts have not specifically decided the issue of whether direct negligence claims should be dismissed in the face of an admission of vicarious liability. Jurisdictions in which the highest court followed the majority view include California, Connecticut, Idaho, Maryland, Mississippi, and Missouri. *See* *Armenta v. Churchill*, 267 P.2d 303 (Cal. 1954); *Prosser v. Richman*, 50 A.2d 85 (Conn. 1946); *Wise v. Fiberglass Systems, Inc.*, 718 P.2d 1178, 1181 (Idaho 1986); *Houlihan v. McCall*, 78 A.2d 661, 665 (Md. 1951); *Nehi Bottling Co. v. Jefferson*, 84 So. 2d 684 (Miss. 1956); *McHaffie*, 891 S.W.2d at 826 (Mo. 1995). *See also* *Debra E. Wax*, Annotation, *Propriety of Allowing Persons Injured in Motor Vehicle Accident to Proceed Against Vehicle Owner Under Theory of Negligent Entrustment Where Owner Admits Liability Under Another Theory of Recovery*, 30 A.L.R. 4th 838 (1984).

Other jurisdictions that appear to be firmly in the majority include Florida, Georgia, Illinois, New Mexico, Texas, and Wyoming. *See* *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977); *Bartja v. Nat’l Union Fire Ins. Co.*, 463 S.E.2d 358, 361 (Ga. Ct. App. 1995); *Gant*, 770 N.E.2d at 1160; *Ortiz v. N.M. State Police*, 814 P.2d 17 (N.M. Ct. App. 1991); *Rodgers v. McFarland*, 402 S.W.2d 208, 210 (Tex. App. 1966); *Beavis*, 20 P.3d 508.

to also proceed against the employer on additional theories of imputed liability, such as direct negligence claims.

1. *Direct Negligence Claims Are Superfluous When Vicarious Liability Is Admitted*

The doctrine of respondeat superior and direct negligence theories “are simply alternative theories by which to impute an employee’s negligence to an employer. Under either theory, the liability of the principal is dependent on the negligence of the agent.”²¹ Thus, in cases where claims for respondeat superior and direct negligence against the employer are alleged, a defendant employer’s admission of liability under respondeat superior establishes “the liability link” from the negligence of the driver to the employer.²² Evidence of direct negligence claims is rendered “unnecessary and irrelevant,” because vicarious liability under the theory of respondeat superior makes the employer strictly liable for all fault attributed to the negligent employee.²³ The courts expressing the majority view recognized that the dangers of allowing both respondeat superior and direct negligence claims to proceed are many and risk reversible error.

Federal courts in Colorado, Washington D.C., Kentucky, New York, and Tennessee also suggest these states will follow the majority rule. *See Hill v. Western Door*, Civil Case No. 04-cv-0332-REB-CBC, 2006 U.S. Dist. LEXIS 36641 (D. Colo. June 6, 2006); *Hackett v. Wash. Metro. Area Transit Auth.*, 736 F. Supp. 8, 10 (D.D.C. 1990); *Oaks v. Wiley Sanders Truck Lines, Inc.*, 2008 U.S. Dist. LEXIS 109111 (E.D. Ky. Nov. 10, 2008); *Lee ex rel. Estate of Lee v. J.B. Hunt Transport, Inc.*, 308 F. Supp. 2d 310, 315 (S.D.N.Y. 2004); *Scroggins v. Yellow Freight Sys., Inc.*, 98 F. Supp. 2d 928, 931 (E.D. Tenn. 2000).

States that purport to follow the minority rule include: Alabama, Kansas, Michigan, Ohio, South Carolina, and Virginia. *See Poplin v. Bestway Express*, 286 F. Supp. 2d 1316 (M.D. Ala. 2003); *Marquis v. State Farm Fire & Cas. Co.*, 961 P.2d 1213, 1225 (Kan. 1998); *Perin v. Peuler (Perin II)*, 130 N.W.2d 4, 8 (Mich. 1964); *Clark v. Stewart*, 185 N.E. 71, 73 (Ohio 1933); *James v. Kelly Trucking Co.*, 661 S.E.2d 329, 332 (S.C. 2008). Lower courts in Delaware, North Carolina and Virginia also appear in the minority. *Smith v. Williams, C.A. No. 05C-10-307 PLA*, 2007 Del. Super. LEXIS 266, at *16–17 (Del. Super. Ct. Sept. 11, 2007); *Plummer v. Henry*, 171 S.E.2d 330, 334 (N.C. Ct. App. 1969); *Fairshter v. Am. Nat’l Red Cross*, 322 F. Supp. 2d 646, 654 (E.D. Va. 2004).

²¹ *Gant*, 770 N.E.2d at 1160; *accord Beavis*, 20 P.3d at 514–17 (negligent hiring claim rests upon the predicate of the employee’s alleged negligence); *McHaffie*, 891 S.W.2d 822 (finding that, since the purpose of such direct negligence claims is to impose vicarious liability where none otherwise exists, there is no need to submit such claims to the jury where vicarious liability is admitted).

²² *Bartja*, 463 S.E.2d at 361.

²³ *Id.* at 361 (“In cases alleging both respondeat superior and negligent entrustment against an employer for the acts of its driver where no punitive damages are sought, we have stated that a defendant employer’s admission of liability under respondeat superior establishes ‘the liability link from the negligence of the driver . . . rendering proof of negligent entrustment unnecessary and irrelevant.’” (quoting Thomason v. Harper, 289 S.E.2d 773 (1982)). “Thus, the evidence of [the driver’s] prior driving record is ‘unnecessary and irrelevant’” *Bartja*, 463 S.E.2d at 817; *see also McHaffie*, 891 S.W.2d at 826–27 (same); *Gant*, 770 N.E.2d at 1160 (holding that if vicarious liability is not disputed, “there is no need to prove that the employer is liable”; the direct negligence cause of action is “duplicative and unnecessary”).

2. *Direct Negligence Claims Confuse the Issues*

The primary issues for a court to consider in a motor vehicle accident case are whether a driver was negligent in the operation of his or her vehicle and whether that negligence was a proximate cause of the plaintiff's injuries. The evidence necessary to support direct negligence claims, such as a driver's driving record, or the employer's hiring practices, is routinely excluded as evidence in a motor vehicle accident case.²⁴ This evidence is either irrelevant to a determination of what happened in the accident or is unfairly prejudicial.²⁵

"A very poor or careless driver may have been free from fault in the particular instance involved and, likewise, the most skillful driver, accustomed to exercising the utmost care may be grossly negligent on one particular occasion."²⁶ This basic tenet of both tort and criminal law forms the basis for rules of evidence such as Federal Rules of Evidence 401, 403 and 404(b). "[C]ollateral misconduct such as other automobile accidents or arrests for violation of motor vehicle laws would obscure the basic issue, namely, the negligence of the driver, and would inject into the trial indirectly, that which would otherwise be irrelevant."²⁷ "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."²⁸ Simply put,

to hold that the rights and liabilities of the parties should be determined, not solely by what they did, but by their conduct on other occasions and in different situations would put us on a tortious trail—tedious, difficult and expensive to follow and leading in the end only to an intolerable result.²⁹

Evidence of direct negligence risks the danger of the jury drawing inferences from "prior bad acts."³⁰ Therefore, courts bar such superfluous claims because "permitting proof of previous misconduct would only serve to inflame the jury

²⁴ Even minority jurisdictions acknowledge that such evidence should be inadmissible. *See, e.g.*, *Deatherage v. Dyer*, 530 P.2d 150, 152 (Okla. Civ. App. 1974).

²⁵ Order Granting Defendant's Motion for Partial Summary Judgment at 4, *Werneke v. Powder River Coal, L.L.C.*, Civ. No. 00132-D (D. Wyo. Feb. 20, 2009) (*Werneke Order*) ("The reasons for limiting plaintiffs' causes of action are many, including the risk that the proof of previous misconduct necessary to show [direct negligence claims] might 'inflame the jury.');" *see also* *McHaffie*, 891 S.W.2d at 826 (citing *Wise*, 718 P.2d at 1181–82; *Willis*, 159 S.E.2d at 158).

²⁶ *Deatherage*, 530 P.2d at 152.

²⁷ *Gant*, 770 N.E.2d at 1158 (quotation and citation omitted).

²⁸ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *see also* FED. R. EVID. 404(b) (prior acts not admissible).

²⁹ *Deatherage*, 530 P.2d at 152.

³⁰ *Hackett*, 736 F. Supp. at 9 (invoking the "danger that the jury might draw the inadmissible inference that because the [driver] had been negligent on other occasions he was negligent at the time of the accident") (citation omitted).

and result in the ‘danger that the jury might draw the impermissible inference that because the [driver] had been negligent on other occasions he was negligent at the time of the accident.’”³¹

3. *Direct Negligence Claims Invite a Jury to Improperly Assess the Negligence of the Employer Twice*

If a jury finds an employer negligent on the direct negligence claims, it is likely that the jury will allocate a greater percentage of fault to the employer than is attributable to the employee for his negligence, if any, in the accident. In other words, if the employee is found to be forty percent at fault based on his driving, the fact the employer was also negligent in its hiring practices cannot raise the fault of the employee to fifty or sixty percent in the accident—the driver’s conduct in relation to that of other actors remains the same. Such an assessment would be “plainly illogical.”³² “To allow both causes of action to stand would allow the jury to assess or apportion the principal’s liability twice”³³ and for no legally acceptable reason.

To illustrate, we will again use Johnny’s situation. For example, a jury determines that the plaintiff is thirty percent at fault for darting out in the road, Little Johnny is twenty percent at fault for not maintaining a proper lookout, and Joe Blow is fifty percent at fault for rear-ending Johnny.

What if the judge allowed the jury to also consider PDQ’s alleged negligence and the jury found PDQ failed to check Johnny’s driving record and failed to provide any training? What difference does any of this possibly make with respect to the apportionment of fault for the cause of the accident? The answer, quite obviously, is none. But, will some juries be angry enough with PDQ (or confused by the comparative fault jury instructions) to find PDQ some percentage at fault? If so, where does that fault come from—is the fault of Johnny, Blow, or Plaintiff reduced? If so, why? Can PDQ’s negligence increase the amount of plaintiff’s compensatory damages? If PDQ is fault free does that mean the plaintiff’s damages are reduced? Of course not, the special and general damages are still the same. The bottom line is, the jury assesses the fault of the employer as part of the vicarious liability claim. Since the direct negligence claims are derivative of the employee’s negligence, it is improper and unfair to assess the employer’s fault a second time for the same occurrence.

³¹ *Bowman*, 832 F. Supp. at 1021, 1022 (citing *Hackett*, 736 F. Supp. at 9); see also *Hackett*, 736 F. Supp. at 9, 10 (citing, e.g., *Breeding*, 378 F.2d 171; *Hood*, 459 F. Supp. 684; *Elrod*, 628 S.W.2d 17; *Title v. Johnson*, 185 S.E.2d 627 (Ga. Ct. App. 1971); *Plummer*, 171 S.E.2d 330).

³² *McHaffie*, 891 S.W.2d at 826; see also *Wernke Order*, *supra* note 25, at 4. Obviously, this result depends in large part on the jurisdiction’s comparative fault system.

³³ *Thompson v. Ne. Ill. Reg’l Commuter R.R.*, 854 N.E.2d 744, 747 (Ill. App. Ct. 2006).

According to the majority view, even if Plaintiff pursues direct negligence claims, the employer's liability is limited to those compensatory damages proximately caused by the driver's fault in the accident in question.³⁴ Put another way, the negligence of the plaintiff and third parties is neither enhanced nor diminished by the employer's direct negligence or lack thereof. We could instruct juries to only assess fault for the negligence of the driver, but it makes more sense to simply dismiss the claim.³⁵

Another danger of proceeding with claims against the employer and employee in the same action is that a jury could determine that the employer acted negligently and then assess liability without determining that the driver was, in fact, negligent and a proximate cause of the accident. If the jury finds the employer negligent, but not the employee, the claim against the employer must fail for a lack of proximate cause.³⁶ Since direct negligence claims are "predicated initially on, and therefore entirely derivative of, the negligence of the employee,"³⁷ the employer's overall liability cannot exceed the liability of the employee.³⁸ Instead, the liability of the employer is fixed by the amount of employee liability.³⁹

When two or more persons may be vicariously liable for the negligence of the defendant employee, it may be necessary to have a trial to determine which party pays what. This situation arose in *Beavis v. Campbell County Memorial Hospital*, which is discussed in more detail later. The *Beavis* court properly bifurcated the direct negligence claims from the claims against the employee.⁴⁰ Since the employee's negligence must be established to satisfy the proximate cause element of the direct negligence claims, it made sense to try the claims against the employee first. If the employee prevailed, there would be no need to determine whether any other party was vicariously liable for the employee's negligence. Of course, if the plaintiff proved the employee's negligence, a subsequent proceeding would determine whether the employee's negligence should be imputed to either of the other parties, and, if so, in what percentages. The *Beavis* trial court wisely realized that attempting to try all of these issues in one proceeding would likely confuse the issues and may invite error; thus, bifurcation achieved justice.⁴¹

³⁴ *Gant*, 770 N.E.2d at 1159.

³⁵ If, for some reason, the claim remains viable, the direct negligence claims should be tried if and only if the jury first finds the employee at fault.

³⁶ *Browder v. Morris*, 975 S.W.2d 308, 310 (Tenn. 1998) ("By definition, one who is vicariously liable is not one who has 'caused or contributed to' another's injuries."). The causal connection between the employer's conduct and the injury is the act of the employee.

³⁷ *Gant*, 770 N.E.2d at 1159 (discussing a negligent entrustment claim).

³⁸ *Id.*

³⁹ *McHaffie*, 891 S.W.2d at 826 (citing *Helm v. Wismar*, 820 S.W.2d 495, 497 (Mo. 1991)).

⁴⁰ *Beavis*, 20 P.3d at 514–17.

⁴¹ *See id.* at 515.

4. *Evidence of Direct Negligence is Prejudicial to the Driver*

Simply put, if evidence of direct negligence is admitted (e.g., a bad driving record), then “the jury might draw the inadmissible inference that because the [driver] had been negligent on other occasions, he was negligent at the time of the accident.”⁴² All courts recognize that evidence such as a bad driving record or prior bad acts are inadmissible because such evidence will prejudice the jury with respect to the determination of the driver’s negligence.⁴³

Seventy years ago, the Nebraska Supreme Court aptly explained the reason behind excluding such evidence:

The reputation of a driver and his conduct at other times and places are not reliable or safe criteria by which to determine what his conduct was at a particular time and place.

Most automobile drivers operate their vehicles over many thousands of miles without accident and in the presence of the ever-present hazard of other traffic, and yet we are appalled by too many thousands of serious accidents. This situation justifies the conclusion that most motor vehicle accidents chargeable to man-failure are due to lapses from the customary skill and care of the drivers involved. A very poor or careless driver may have been wholly free from fault in the particular instance involved and, likewise, the most skilful driver, accustomed to exercising the utmost care, may be grossly negligent on one particular occasion. In either situation, to hold that the rights and liabilities of the parties should be determined, not solely by what they did, but by their conduct on other occasions and in different situations would put us on a tortuous trail—tedious, difficult and expensive to follow, and leading in the end only to intolerable injustice.⁴⁴

The answer from the majority of jurisdictions is to dismiss the direct negligence claims and not inject error into the proceedings.

⁴² *Hackett*, 736 F. Supp. at 9.

⁴³ See, e.g., FED. R. EVID. 404(b) and similar state rules of evidence. “It is well settled that evidence of other accidents is not admissible to show negligence. Behavior in a remote time and place tells us nothing of the care exercised in the instant accident.” *Deatherage*, 530 P.2d at 152.

⁴⁴ *Holberg v. McDonald*, 289 N.W. 542, 543 (Neb. 1939) (quoted by *Washita Valley Grain Co. v. McElroy*, 262 P.2d 133, 138 (Okla. 1953)); see also *Clooney*, 352 So. 2d at 1220 (“Ordinarily, the evidence of a defendant’s past driving record should not be made a part of the jury’s considerations.”).

5. *Direct Negligence Claims Waste Time and Resources*

Finally, if all of the theories for attaching liability to one person for the negligence of another were recognized and all pleaded in one case where the vicarious liability is admitted, “the evidence laboriously submitted to establish other theories serves no real purpose,” so “the energy and time of courts and litigants is unnecessarily expended.”⁴⁵ Obviously, time, money and energy spent on discovery increases as does the trial time to present evidence of company policies and industry standards with regard to hiring, training and supervision, not to mention the possibility of several mini-trials to determine whether each prior act was really bad or not.

Once vicarious liability for negligence is admitted under respondeat superior, the employer (to whom negligence is imputed) becomes strictly liable to the plaintiff for damages attributable to the conduct of the employee (the person from whom negligence is imputed). This is true regardless of the “percentage of fault” as between the person whose negligence directly caused the injury and the one whose liability for negligence is derivative.⁴⁶ Simply put, the direct negligence claims are superfluous and there is no need for the court or the litigants to expend the time, money and energy to pursue and defend against claims that will not (or should not) affect the outcome. Since allowing these claims to go forward serves no purpose other than to invite error, why take the chance?

B. *Minority View*

Some courts, nevertheless, permit a plaintiff to pursue a direct negligence claim even when the defendant admits it is vicariously liable for the acts of the wrongdoer. The depth of analysis made by these courts is typically very shallow and rarely goes beyond the simple fact that direct negligence claims are independent causes of action requiring proof of the employer’s negligence in a manner different from that of the employee who was actually involved in the accident.

Other courts seize on snippets from other cases without giving any real thought as to the practical effect of such a ruling. Other courts seem to simply misunderstand the law or, worse, misquote the controlling law.⁴⁷ Some of these courts fail to closely evaluate the facts of a specific case before relying on such facts to deny a motion to dismiss the direct negligence claims.⁴⁸ Others essentially hold that the admitted prejudice occurring from the admission of otherwise

⁴⁵ *McHaffie*, 891 S.W.2d at 826; *see also* *Rebstock v. Evans Prod. Eng’g Co.*, No. 4:08CV01348 ERW, 2009 U.S. Dist. LEXIS 96884 (E.D. Mo. Oct. 20, 2009).

⁴⁶ *McHaffie*, 891 S.W. 2d at 826.

⁴⁷ *See, e.g., James*, 661 S.E.2d 329.

⁴⁸ *See, e.g., Poplin v. Bestway Express*, 286 F. Supp. 2d 1316, 1319 (M.D. Ala. 2003).

inadmissible evidence to support a direct negligence claim is justified because of the nature of the conduct of the employer, parent, or entrustor.⁴⁹ These bad decisions then serve as the basis for other courts to perpetuate these and similar errors without principled and complete analysis.⁵⁰

1. *Direct Negligence Claims Are Not Derivative of the Employee's Negligence*

This is a common thread that runs through the minority position. Rarely, however, does the court's analysis go beyond this simple statement or does the court explain how and why the claim is not derivative. Are these courts implying that an employer can be held liable for negligent hiring even if the employee acted (drove) appropriately at the time of the accident? If minority courts would complete the analysis, presumably they would conclude that the only way negligent hiring can be the proximate cause of an accident is if the employee is also negligent.

2. *Unfair Prejudice is o.k.*

For example, in *Perin v. Peuler (Perin II)*, a slim majority reversed the trial court's denial of a motion to amend the pleadings to include a claim of negligent entrustment.⁵¹ The *Perin II* court believed the resulting prejudice was warranted based on the conduct of the parents. Perin was a passenger in an automobile that collided with another vehicle owned by Peuler and driven by his son. Perin claimed the son was negligent in his operation of the vehicle and that the father was liable "solely on the basis of imputation of the driver's negligence under the ownership liability statute."⁵² The father was included as a party since he was the owner of the vehicle. Michigan law provided that an owner of a vehicle could be held liable for negligently inflicted injuries by someone other than the owner provided the owner had given his consent to the vehicle's use and the operation of the vehicle at the time of the accident was within such consent. Defendant-father admitted that he was liable for his son's negligence pursuant to Michigan's owner liability statute.⁵³ In short, the father admitted vicarious liability.

At the pretrial conference, Plaintiff sought to amend her complaint to add a claim for negligent entrustment. The admitted purpose of the amendment was to enable Plaintiff to introduce evidence of the son's driving record in an effort to

⁴⁹ See, e.g., *Perin II*, 130 N.W.2d 4.

⁵⁰ *Poplin*, 286 F. Supp. 2d at 1319 (discussed in more detail *infra*.)

⁵¹ *Perin II*, 130 N.W.2d 4.

⁵² *Perin v. Peuler (Perin)*, 119 N.W.2d 552, 553 (Mich. 1963), *overruled by Perin II*, 130 N.W.2d 4.

⁵³ MICH. COMP. LAWS § 257.401 (2003).

show action in conformity therewith.⁵⁴ Such evidence was otherwise inadmissible pursuant to a Michigan statute similar to Rule of Evidence 404(b).⁵⁵ The trial court denied the motion to amend, finding,

[i]t appears therefore, that the sole purpose of the proposed amendment is only to bring in the driving record of defendant-driver and thereby influence the jury. Since the defendant has admitted that the car was being driven with the knowledge and consent of defendant-owner, the defendant-owner will be liable if defendant-driver is negligent.⁵⁶

In other words, since the purpose of a negligent entrustment claim is to hold the entrustor liable for the negligence of the trustee–driver, there is no need to prove the claim when the owner has already admitted vicarious liability under an alternative theory.

The *Perin* case was appealed to the Michigan Supreme Court, which reversed. The Michigan Supreme Court then granted a request for re-hearing and then, on its own motion, reheard the case again.⁵⁷

The *Perin II* majority recognized a crucial factor often overlooked by other minority courts; namely, there must be a causal connection between the entrustor's negligence and the accident in question, which derives from the negligence of the driver.⁵⁸ The *Perin II* majority correctly observed the entrustor's liability "is in part vicarious for it cannot arise unless the person entrusted with the automobile uses it negligently; but, the primary basis for the owner's liability is said to be his own negligence in permitting its use by an incompetent or inexperienced person with knowledge of the probable consequences."⁵⁹

The *Perin II* majority appeared to recognize the prejudicial effect that would come from admitting evidence of traffic convictions. Nevertheless, the *Perin II* court ruled that not only was such evidence admissible, but the decision seemed to

⁵⁴ *Perin*, 119 N.W.2d at 553–54.

⁵⁵ See, e.g., FED. R. EVID. 404(b). Note that the legacy of the *Perin* decision had more to do with a legislature's power to enact a rule of evidence than whether the admission of such evidence was proper in the face of an admission of vicarious liability.

⁵⁶ *Perin II*, 130 N.W.2d at 19 (Kelly, J., dissenting). The trial court also noted that it typically granted leave to amend, even at such a late date, provided the amendment did not prejudice the rights of the defendant. This amendment obviously did not pass that test.

⁵⁷ *Id.* at 13–14.

⁵⁸ *Id.* at 8–9 (majority opinion). "It could not be sensibly contended, for instance, that the entrusted driver, thus known to be unfit or incompetent, had started any chain of causation back to the entrustor if such entrusted driver, in the operation of the entrusted car, had himself committed no act or omission constituting actionable negligence." *Id.* at 9.

⁵⁹ *Id.* at 8.

encourage its use in the hope that such evidence would, in fact, prejudice the jury and skew the verdict. In effect, the *Perin II* majority *wanted* the jury to misuse the evidence of the son's prior bad acts to send a message to parents by allowing the jury to render a verdict contrary to the evidence or to inflate the damages in a case that did not include a claim for punitive damages. The following quotes from the *Perin II* majority evidence this judicial sanction of improper use of inadmissible evidence:

[T]his defendant parent should take stoically the bitters all like parents neglectfully brew for themselves.⁶⁰

* * * *

The common-law rule of negligent entrustment is both time tried and valuable, and we are not disposed to dilute its worth on assigned ground that the sad proof of junior's record of court-conviction and parental knowledge thereof will "prejudice the entrustor and the trustee before the jury."⁶¹

* * * *

It may, at very least, awaken some overindulgent parent to the fact that, from the beginning in instances disclosed as at bar, his personal, distinguished from vicarious, toes have been exposed to the heavy boot-step of liability whether he is owner or lender of the motor car that known-to-be unfit son or daughter has driven to the casually actionable injury of another.⁶²

* * * *

Provided always the requisite proof is made . . . , such "prejudice" is due solely to the negligence of those who decry it. That kind of prejudice manufactures no judicial error, reversible or otherwise.⁶³

According to the *Perin II* majority, if the evidence causing the prejudice is due solely to the negligence of the party opposing its admission, it becomes admissible. Such evidence is admissible regardless of such "time-tried and valuable" Rules of Evidence such as Rules 402, 403, 404, 802, etc. This is simply incredible!

⁶⁰ *Id.* at 11.

⁶¹ *Id.* This suggests that a proper purpose of a compensatory award is to punish the entrustor.

⁶² *Id.* at 6. It is typically improper to argue in a trial for compensatory damages that the jury should send a message to the defendant and those similarly situated; yet, this court not only approved, but endorsed, such a result.

⁶³ *Id.* at 11. Quite obviously, this position is inconsistent with the rules of evidence.

It should come as no surprise that the *Perin II* majority misused various cases in support of its indefensible position. As aptly noted by the *Perin II* dissent, the three cases cited by the majority all involved instances where the owner had not admitted liability under the applicable owner liability statute.⁶⁴ Obviously, when an owner (or an employer) does not admit vicarious liability in some form, the plaintiff is certainly entitled to pursue his theory of imputed liability.⁶⁵ Where, however, vicarious liability is admitted under an alternate theory, there is no need “for this [c]ourt to possibly prejudice the defendants’ rights to a fair hearing.”⁶⁶ Rather, the vicarious liability part of the case “was completed at the termination of the pleadings.”⁶⁷ After all, the purpose of complaint and answer is to remove from the trial those issues not disputed.⁶⁸

3. *The Comparative versus Contributory Fault Explanation*

In *Lorio v. Cartwright*, an Illinois court also misused precedent in refusing to dismiss direct negligence claims.⁶⁹ Prior to *Lorio*, Illinois courts were squarely in the majority with respect to the viability of a direct negligence claim in the face of an admission of vicarious liability.

Issues relating to negligent entrustment become irrelevant when the party so charged has admitted his responsibility for the conduct of the negligent actor. The liability of the third party in either case is predicated initially upon the negligent conduct of the driver and absent the driver’s negligence the third party is not liable. Permitting evidence of collateral misconduct such as other automobile accidents or arrests for violation of motor vehicle laws would obscure the basic issue, namely, the negligence of the driver, and would inject into the trial indirectly, that which would otherwise be irrelevant.⁷⁰

⁶⁴ *Id.* at 14. Certainly, if the employer defendant does not admit it is vicariously liable for the conduct of its employee driver, then the majority “rule” is never triggered because respondeat superior is still an issue.

⁶⁵ “If they controvert by denial of ownership or consent and put a plaintiff to his proof, he may prove his case of liability by any proof of the driver’s prior incompetence and his necessary scienter thereof.” *Id.* at 20 (O’Hara, J., dissenting); see also *Breeding*, 378 F.2d 171.

⁶⁶ *Perin II*, 130 N.W.2d at 15.

⁶⁷ *Id.* at 15–16 (Kelly, J., dissenting).

⁶⁸ *Id.* at 16.

⁶⁹ *Lorio v. Cartwright*, 768 F. Supp. 658 (E.D. Ill. 1991).

⁷⁰ *Id.* at 659 (quoting *Neff*, 268 N.E.2d at 575).

The *Lorio* court, however, concluded that *Neff* and similar cases decided while contributory fault was the law of Illinois,⁷¹ were inapplicable after the adoption of comparative negligence. While the *Lorio* court acknowledged evidence of negligent entrustment as “highly prejudicial,” the same would be admissible in a comparative negligence case because it is necessary for the trier of fact to determine percentages of fault for both the plaintiff and each defendant.⁷² The *Lorio* court relied on an inapposite case, *King v. Petefish*, to support this reasoning.⁷³

In *King*, the issue was whether the theory of negligent entrustment was available to an entrustee in a claim for damages against the entrustor.⁷⁴ In other words, when the entrustor knows the entrustee is unfit, can the entrustee maintain a claim for negligent entrustment? *King* relied on Restatement (Second) of Torts § 390 for the proposition that the negligent entrustment theory also provides a means of asserting liability for damages suffered by the entrustee.⁷⁵ The defendant argued that, historically, negligent entrustment was a theory only allowed in Illinois when an injured third-party has sued the entrustor for damages. Therefore, a negligent entrustment claim should not be permitted where the plaintiff is the entrustee, especially when the entrustee’s negligence was the proximate cause of the accident.⁷⁶ Plaintiff asserted that even if the user was at fault, she was entitled to a comparative negligence trial and the theory was therefore viable. Plaintiff further argued that Comment c to § 390 was inapplicable in a comparative negligence jurisdiction since the comment contemplates an outcome based on contributory negligence.

⁷¹ Contributory negligence used to be the law of almost all states. This doctrine essentially provided that if a plaintiff was at all negligent in causing his own injuries, with some exceptions, he was barred from recovery. “A number of rationalizations have been advanced in the attempt to justify the harshness of the ‘all-or-nothing’ bar. Among these: the plaintiff should be penalized for his misconduct; the plaintiff should be deterred from injuring himself; and the plaintiff’s negligence supersedes the defendant’s so as to render defendant’s negligence no longer proximate.” *McIntyre v. Balentine*, 833 S.W.2d 52, 54 (Tenn. 1992) (citing W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 452 (5th ed. 1984); J.W. Wade, W.K. Crawford, Jr. & J.L. Ryder, *Comparative Fault in Tennessee Tort Actions: Past, Present and Future*, 41 TENN. L. REV. 423, 424 (1974)).

⁷² *Lorio*, 768 F. Supp. at 660.

⁷³ *King v. Petefish*, 541 N.E.2d 847 (Ill. App. Ct. 1989).

⁷⁴ *Id.* at 847.

⁷⁵ Section 390 provides for liability when an owner of a chattel allows an incompetent or inexperienced person to use the chattel in a manner involving an unreasonable risk of harm to himself or others even if the user may also be liable to third parties for negligence. RESTATEMENT (SECOND) OF TORTS § 390 cmt. c (1965). Comment c, however, contemplates that the contributory fault of the user may bar recovery. *Id.* A detailed analysis of the providence of § 390 is beyond the scope of this article; although, there seem to be sound reasons why the theory, if even viable, should be limited in scope.

⁷⁶ *King*, 541 N.E.2d at 847.

In response to the defense's assertion that negligent entrustment was unavailable as a matter of law where the negligence of the trustee was at least a proximate cause of the accident, the *King* court held:

It is absurd to argue the trustee's negligence is the sole proximate cause of a negligent entrustment plaintiff's injuries, not only because such a suggestion runs counter to comparative negligence law, but because it would always cut off the liability of an entrustor to a third-party plaintiff. If the entrustor cannot be considered a partial cause of the injury, a third-party plaintiff's only remedy would be against the trustee. Such a result would frustrate the theory behind negligent entrustment actions, which is to put the burden of the expense caused by the accident on the owner who, unlike the driver, is expected to carry the necessary insurance to cover such risks.⁷⁷

Thus, the *King* court simply noted that the negligence of a plaintiff did not serve to bar a case based on negligent entrustment. Notably, *King* did not involve a situation where a plaintiff sought to impute the driver's negligence to another party based on a direct negligence theory.

Nevertheless, the *Lorio* court seized on the above quote to hold that direct negligence claims must always go forward so the jury can compare the negligence of the entrustor to that of the trustee, which quite obviously, was not the issue before the *King* court. The trial judge apparently never considered that the courts in the majority were predominately comparative negligence states. Not surprisingly, Illinois courts refused to follow the erroneous lead of *Lorio*, and subsequent decisions moved Illinois back into the majority.⁷⁸ Logically, "[t]he fault of the employer for negligent entrustment, in a comparative negligence jurisdiction, is still derived from the negligence of the employee, therefore, additional liability cannot be imposed on the employer where the employer has already admitted it is liable for 100 percent of the fault attributable to the negligent employee."⁷⁹

⁷⁷ *Lorio*, 768 F. Supp. at 660 (quoting *King*, 541 N.E.2d 853). The *King* court quite obviously was wrong. Nothing in § 390 or its comments suggests that the negligence of the trustee cannot be imputed to the entrustor. In fact, illustration 7 specifically discusses a situation where the entrustor may be liable when the trustees are also negligent. The only exception is when the third-party plaintiff also knows the trustee is incompetent. The *Lorio* court perpetuated this error in finding direct negligence claims are not superfluous in comparative negligence states.

⁷⁸ See, e.g., *Gant*, 770 N.E.2d 1155; *Campa*, 2002 U.S. Dist. LEXIS 15032; *Thompson*, 854 N.E.2d 744; *Rozhon v. GTL Truck Lines*, No. 09 C 4755, 2009 U.S. Dist. LEXIS 87868 (N.D. Ill. Sept. 24, 2009).

⁷⁹ *Campa*, 2002 U.S. Dist. LEXIS 15032, at *3-4 (citation omitted).

At least the *Lorio* and *Perin* courts attempted to provide some rationale behind their decisions. Other courts have simply found that because negligent entrustment is a theory that requires negligence on the part of the employer, it must be allowed to go forward.

4. *The South Carolina Debacle*

South Carolina has an especially checkered past in this regard. In *Bowman v. Norfolk Southern Railway*, the defendant railroad admitted vicarious liability for the engineer's negligence and moved for summary judgment on the negligent entrustment claim.⁸⁰ The railroad argued the direct negligence claim was superfluous in the face of an admission of vicarious liability on other grounds. The United States District Court acknowledged that the South Carolina Supreme Court had never addressed the issue, but held the South Carolina Supreme Court would likely follow the majority rule and granted defendant's motion for summary judgment. Specifically, the trial court acknowledged, "Obviously, plaintiff's motivation behind his negligent entrustment theory is to get the engineer's prior driving record into evidence. Such evidence would otherwise be inadmissible under Federal Rule of Evidence 404(b), but would be admissible in a negligent entrustment action to show notice on the part of the railroad company."⁸¹ Since the claim was superfluous and carried with it the very real danger that the jury "might draw the impermissible inference that because the [driver] had been negligent on other occasions he was negligent at the time of the accident," the trial court dismissed the direct negligence claims.⁸²

Then, in *Longshore v. Saber Security Services, Inc.*, the South Carolina Court of Appeals disagreed.⁸³ There, Longshore sued security guard Schafer and his employer, Saber Security, for a gunshot wound Longshore received during an event where Saber provided security services.⁸⁴ In the first count alleging negligence on the part of Schafer and vicarious liability on the part of Saber, the jury found Longshore and Schafer to each be fifty percent at fault for the shooting, but awarded zero damages.⁸⁵ Likewise, the jury found in favor of the defense on an assault and battery charge against both Schafer and Saber.⁸⁶ Yet, on

⁸⁰ 832 F. Supp. at 1021.

⁸¹ *Id.*

⁸² *Id.* at 1021, 1022 (quoting *Hackett v. Wash. Metro. Area Transit Auth.*, 736 F. Supp. 8, 9 (D.D.C. 1990)).

⁸³ 619 S.E.2d 5, 9–10 (S.C. Ct. App. 2005)

⁸⁴ *Id.* at 7.

⁸⁵ *Id.* at 8.

⁸⁶ *Id.*

the direct negligence claims against Saber only, the jury found Saber 100 percent at fault and found no comparative negligence on the part of Longshore.⁸⁷ How could Longshore be both negligent and fault-free for the same accident?

On appeal, the South Carolina Court of Appeals attempted to reconcile the obviously inconsistent verdict.⁸⁸ The *Longshore* court held that the jury could have found the shooting was an act of negligence and was partially caused by Longshore's negligence.⁸⁹ Since the act was negligent, the jury could have found for the defense on the assault and battery claim because that claim requires an intentional act.⁹⁰ As to the direct negligence claims, the South Carolina Court of Appeals "reasoned" that even though Longshore caused the shooting as between Longshore and Schafer, the jury could have found that Saber's negligence in hiring, training, or supervising Schafer was the sole cause of the shooting as between Longshore and Saber.⁹¹ The *Longshore* court made no attempt to explain how a person could negligently cause an event in one breath and then not even be negligent for the exact same event in the other.

Notably, the *Longshore* court skirted the issue of whether a required element of direct negligence claims is that the employee first commit an actionable tort. Since the jury found Schafer was negligent and partially at fault, the court decided it need not answer that specific question.⁹² Of course, the court needed to answer this question, but could not do so and let the verdict stand.

In *Becker v. Estes Express Lines, Inc.*, the issue arose again.⁹³ Defendant moved for summary judgment, relying in part on the majority of jurisdictions that hold direct negligence claims should be dismissed when the defendant admits vicarious liability.⁹⁴ While the *Becker* trial court did not adopt the *Longshore* reconciliation of the inconsistent verdict, it did cite *Longshore* for the proposition that "[n]either current statutory law nor jurisprudence in this state has specifically required a plaintiff, in an action against an employer for negligent hiring, training, and supervision, to prove the employee committed an actionable tort."⁹⁵ In other words, the *Becker* court removed the proximate cause element from direct negligence claims.⁹⁶

⁸⁷ *Id.*

⁸⁸ *See id.* at 9.

⁸⁹ *See id.* at 10. Schafer argued that Longshore continued to advance towards him with a hand behind his back even after Schafer ordered him to stop and put both hands in the air. *Id.* at 8.

⁹⁰ *See id.* at 10–11.

⁹¹ *Id.* at 10.

⁹² *Id.* at 9.

⁹³ No. 8:07-716-HMH, 2008 U.S. Dist. LEXIS 20400, at *9, *10 (D.S.C. Mar. 13, 2008).

⁹⁴ *Id.* at *8–9.

⁹⁵ *Id.* at *10 (quoting *Longshore*, 619 S.E.2d at 9).

⁹⁶ *Id.* at *10–11.

The *Becker* court also acknowledged the majority position, citing *McHaffie*, but noted that a few other states take the minority position.

These jurisdictions reason that liability under theories of negligent entrustment, hiring, supervision, training, and retention the employer's liability is direct and not derivative. These theories do not rest on the employer-employee relationship, but rather involve the employer's own negligence in entrusting, hiring, supervising, training, or retaining an employee with knowledge, either actual or constructive, that the employee posed a risk of harm to others. Therefore, a plaintiff must be allowed to proceed under both respondeat superior, a theory of imputed liability, and negligent entrustment, hiring, supervision, training, retention, theories of direct liability, when the employer admits the agency of the alleged tortfeasor.⁹⁷

To assert that negligent hiring, training, retention and supervision claims do not rest on the employer-employee relationship is indefensible. Employers hire employees, train employees, supervise employees and retain employees. If the employee was never hired, there would be no claim for negligent hiring *because* an employer-employee relationship was never established. If the employee was terminated rather than retained, there would be no claim for negligent retention. Obviously, an employer has no duty to train or supervise people who are not his employees.

The *Becker* court essentially dispensed with the notion that direct negligence claims are predicated on some wrongful act by the employee or the entrustee. In short, *Becker*, like other minority courts, held that an employer can be held liable for negligent hiring, training, supervision, or entrustment, even if the employee is completely free from fault. If the *Becker* court had been presiding over the *Longshore* matter, it would have upheld the verdict on the direct negligence claims, even if Schafer was found not negligent. Even the *Longshore* court did not go this far. Once a court acknowledges the basic fact that direct negligence claims are derivative of the employee's negligence, there is no logically consistent way to deny a motion to dismiss direct negligence claims in the face of an admission of vicarious liability. It seems obvious that the direct negligence of the employer must manifest itself through the actions of the employee to satisfy the causation element of a negligence claim.

At the same time *Becker* was pending, another United States District Court in South Carolina certified the question to the South Carolina Supreme Court.⁹⁸ *James v. Kelly Trucking Co.* was actually decided three days before *Becker*, but not

⁹⁷ *Id.* at *9–10 (quoting *Poplin*, 286 F. Supp. 2d at 1319 (internal citations omitted)).

⁹⁸ *James*, 661 S.E.2d at 329.

cited therein. Interestingly, the *James* court did not analyze or even cite either *Longshore* or *Bowman*.⁹⁹

Instead, the *James* court relied on the overly simplistic notion that liability on direct negligence theories “does not rest on the negligence of another, but on the employer’s own negligence.”¹⁰⁰ The *James* court purported to rely on Restatement (Second) of Torts § 317, but misread, misunderstood or misinterpreted that section. Section 317 provides:

§ 317 Duty of Master to Control Conduct of Servant

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

- (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
- (ii) is using a chattel of the master, and

(b) the master

- (i) knows or has reason to know that he has the ability to control his servant, and
- (ii) knows or should know of the necessity and opportunity for exercising such control.¹⁰¹

By its plain language, this section only applies to situations where the employee is acting outside the scope of his employment. The *James* court wrote that this scope of employment limitation is only *suggested* in Comment a of § 317.¹⁰² This is quite obviously wrong. The *James* court also ignored that § 317 specifically

⁹⁹ See *id.* U.S. District Court Judge Anderson certified the question. *Id.* Judge Anderson just happens to be the author of the *Bowman* decision. *Bowman*, 832 F. Supp 1014.

¹⁰⁰ *James*, 661 S.E.2d at 331.

¹⁰¹ RESTATEMENT (SECOND) OF TORTS § 317 (1965).

¹⁰² See *James*, 661 S.E.2d at 331 n.1.

requires the employer to prevent the employee from intentionally harming another or creating an unreasonable risk of bodily harm.¹⁰³ Incredibly, the *James* court read this section to dispense with the necessity of employee misconduct.¹⁰⁴ Yet, employee misconduct is exactly what the employer must prevent. Simply put, the *James* court sanctioned the notion that an employer can be held liable, even when the employee does nothing wrong.

Presumably, these South Carolina courts do not really mean that employers can be held liable when their employees acted reasonably. One can only imagine that even these courts would be quick to affirm Judge Learned's summary dismissal of Dr. Blow's direct negligence action when there is no evidence that Little Johnny did anything wrong or caused anyone any harm. Yet, due to shallow and shortsighted analysis, direct negligence claims are currently viable in the face of an admission of vicarious liability in South Carolina and other minority states.

5. *An Alabama Atrocity*

In *Poplin v. Bestway Express*, Poplin was injured in an accident with a Bestway tractor-trailer driven by employee Billau.¹⁰⁵ Bestway admitted Billau was acting in the course and scope of his employment at the time of the accident.¹⁰⁶ Bestway moved for partial summary judgment on the direct negligence claims.¹⁰⁷ The *Poplin* court first acknowledged that Alabama recognized direct negligence claims, but had not decided whether they survive an employer's admission of respondeat superior.¹⁰⁸

The analysis deteriorated from there. First, the *Poplin* court acknowledged the majority view.¹⁰⁹ The *Poplin* court then cited "snippets" from minority courts without giving much thought to the implications of the decisions. For example, relying on Kansas law, the court found "these theories do not rest on the employer-employee relationship, but rather involve the employer's own negligence in entrusting, hiring, supervising, training, or retaining an employee

¹⁰³ RESTATEMENT (SECOND) OF TORTS § 317. As we all know, negligence is failing to act as a reasonable person under the same or similar circumstances.

¹⁰⁴ See *James*, 661 S.E.2d at 330, 331.

¹⁰⁵ 286 F. Supp. 2d at 1317.

¹⁰⁶ *Id.* at 1317.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1318.

¹⁰⁹ *Id.* ("Many state courts and federal courts applying state law have held that it is improper to allow a plaintiff to proceed under two theories of recovery once the corporation admits that the alleged tortfeasor was its agent acting with the scope of his employment. . . . This position appears to be the majority view.") (citing Debra E. Wax, Annotation, *Propriety of Allowing Person Injured In Motor Vehicle Accident to Proceed Against Vehicle Owner Under Theory of Negligent Entrustment Where Owner Admits Liability Under Another Theory of Recovery*, 30 A.L.R. 4th 838 (1984)) (additional citations omitted).

with knowledge, either actual or constructive, that the employee posed a risk of harm to others.”¹¹⁰ The *Poplin* court apparently never considered how a theory resting on an *employer’s* hiring, training, supervision and retention of an *employee* can logically be said *not* to arise out of the employment relationship. This is faulty logic.

The *Poplin* court also cited the Alabama Supreme Court case of *Bruck v. Jim Walter Corp.* for the proposition that “the tort of negligent entrustment ‘does not arise out of the relationship between the parties but rather is an independent tort resting upon the negligence of the entrustor in entrusting the vehicle to an incompetent driver.’”¹¹¹ Furthermore, according to the *Poplin* court, *Bruck* was allowed to pursue direct claims against the employer in addition to its negligence claims against the driver.¹¹² As a result, the *Poplin* court denied *Bestway’s* motion.¹¹³ A principled reading of *Bruck*, however, fails to support *Poplin’s* position.

Bruck died in a collision with a Jim Walter truck driven by Reynolds.¹¹⁴ Initially, he sued Reynolds and Jim Walter Corporation for Reynolds’s negligence.¹¹⁵ Plaintiff then added a claim for negligent entrustment against Jim Walter and Reynolds’s employer TLI.¹¹⁶ The corporate defendants admitted Reynolds was their agent at the time of the accident. On the first day of trial, the *Bruck* trial court granted a defense motion in limine to exclude evidence of Reynolds’s driving record.¹¹⁷ At the close of the plaintiff’s case in chief, the defendants moved for a directed verdict on the negligent entrustment count.¹¹⁸ The trial court granted the motion.¹¹⁹ The jury later returned a defense verdict and *Bruck* appealed.¹²⁰

The Alabama Supreme Court acknowledged that negligent entrustment was a viable cause of action in Alabama and that the plaintiff presented this action in the form a valid, well-pleaded complaint consisting of two separate and distinct counts. The court also was “keenly aware” that evidence of the driving record

¹¹⁰ *Poplin*, 286 F. Supp. 2d at 1319 (citing *Kan. State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 819 P.2d 587, 589 (Kan. 1991)).

¹¹¹ *Id.* at 1320.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Bruck v. Jim Walter Corp.*, 470 So. 2d 1141, 1142 (Ala. 1985).

¹¹⁵ *Id.*

¹¹⁶ *Id.* Reynolds was employed by TLI, Inc. which was hauling a load for Jim Walter Transportation.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

might prejudice the jury against the driver.¹²¹ The *Bruck* court, relying on Alabama precedent, followed the minority view that a plaintiff should be able to proceed with direct negligence claims even when respondeat superior is admitted.¹²² Accordingly, the Alabama Supreme Court found the *Bruck* trial court committed error when it granted the motion in limine.¹²³

The corporate defendants, however, argued that any error was harmless since the jury found in favor of the driver on the negligent operation of the vehicle count.¹²⁴ As such, “Reynolds’s conduct could not have been the proximate cause of the decedent’s injuries, and any claim for negligent or wanton entrustment could not be sustained.”¹²⁵ The *Bruck* court agreed.¹²⁶

Specifically, the *Bruck* court held that “an entrustor is not liable for injury resulting from negligent entrustment of a vehicle to an incompetent driver unless the injury is proximately caused by his legal culpability.”¹²⁷ Typically, an element of a negligent entrustment claim is the underlying negligence of the driver. The only exception would be “in those rare instances where the trustee’s incompetence results from non-culpable inability to function as a driver (as in the case of a minor under the age of legal accountability or a mental incompetent).”¹²⁸ In other words, direct negligence claims are derivative of the employee’s underlying negligence.¹²⁹

Why then did the *Bruck* court hold it was error to exclude admittedly prejudicial evidence of Reynolds’s driving record when the direct negligence claims were clearly superfluous? Obviously, the *only* result from admitting such evidence would be to inject prejudice into the trial.

What would be the need of ordering separate trials in a case like *Bruck*? If the jury found the driver at fault for negligent operation of the vehicle, the defendants would have been responsible for all of the damages caused by that negligence. A second trial, following a verdict in favor of the plaintiff, would be a monumental waste of time and judicial resources. Undoubtedly, had the trial court admitted

¹²¹ *Id.* at 1144.

¹²² *Id.* at 1143.

¹²³ *Id.* at 1145. The court acknowledged, however, that a trial court could order separate trials to avoid prejudice, if necessary. *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 1145–46.

¹²⁸ *Id.* at 1146.

¹²⁹ *Id.*

evidence of the driving record, and if the jury found in favor of the plaintiff, the second trial on the direct negligence claims would never have occurred. That is, unless there was a need to apportion fault between the two corporate defendants.¹³⁰

If the *Poplin* court had thought this through, it would have realized that while the Alabama Supreme Court may say it is in the minority, the underpinnings of its holdings are identical to those cited by the majority. It would have also realized that denying the motion for partial summary judgment served no real purpose other than to inject prejudice into the trial.

C. Wyoming's Treatment of the Issue

1. *Beavis v. Campbell County Memorial Hospital*

The Wyoming Supreme Court has not specifically decided this issue in the context of a motor vehicle accident, but provided important guidance on the matter in *Beavis v. Campbell County Memorial Hospital*.¹³¹ The *Beavis* court correctly held that direct negligence claims are derivative of the employee's negligence.¹³²

In *Beavis*, plaintiffs asserted a medical malpractice claim against Campbell County Memorial Hospital (CCMH), Dr. Horan, and nurse Deb Hazlett.¹³³ The claim alleged Hazlett negligently administered an allergy shot to Pamela Beavis.¹³⁴ Plaintiffs claimed Dr. Horan negligently supervised and trained Hazlett.¹³⁵ CCMH admitted Hazlett was its employee and that it was vicariously liable for her negligence and that of Dr. Horan, if any.¹³⁶ There were no claims of negligence on the part of Dr. Horan for anything other than a failure to train and supervise Hazlett.¹³⁷

¹³⁰ See, e.g., *Beavis*, 20 P.3d at 515.

¹³¹ 20 P.3d at 515 (addressing the issue of negligent hiring). In *Beavis*, the Wyoming Supreme Court cited to *McHaffie* as authority on a negligent hiring claim. *Id.* The *Beavis* court did not address the issue of when such claims are irrelevant and prejudicial to the determination of a negligence claim. Rather, another element of the negligent hiring claim cited in *McHaffie*, that a negligent hiring claim rests upon the predicate of the employee's alleged negligence, ended the need for further analysis in *Beavis*. *Id.*

¹³² *Id.* at 515, 517. The *Beavis* court also affirmed the trial court's determination that evidence of negligent training, which included unrelated errors by Hazlett, were inadmissible pursuant to WYO. R. EVID. 403. *Id.* at 514.

¹³³ *Id.* at 510.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 511.

¹³⁷ *Id.* at 516.

The district court bifurcated the trial, initially trying only the negligence case against the nurse. “The issues at trial were limited to whether Hazlett had properly performed the injection and what damages, if any, occurred as a result.”¹³⁸ The jury returned a verdict in nurse Hazlett’s favor and judgment was entered in favor of all three defendants.¹³⁹

On appeal, the Wyoming Supreme Court reasoned that even assuming the doctor was negligent in his supervision or training of the nurse, or that CCMH was negligent in hiring Hazlett, such negligence could not have been the proximate cause of the plaintiff’s injuries unless the jury first determined that Hazlett was negligent in administering the shot.¹⁴⁰

The *Beavis* court affirmed the judgment.¹⁴¹ The Wyoming Supreme Court determined that the issue of negligence in administering the injection was separable from the claims of negligent hiring, training and supervision.¹⁴² Likewise, it agreed that the district court’s “bifurcation decision is consistent with the purposes of Rule 42, to avoid prejudice by (omitting potentially unfairly prejudicial evidence of Hazlett’s qualifications and training).”¹⁴³

As a legal matter, the Beavises’ negligent hiring theory against CCMH rests upon the predicate of Hazlett’s alleged negligence Indeed, ‘one element of negligent hiring is some form of misconduct by the employee that caused damages to the plaintiff.’ . . . Thus, even assuming CCMH was negligent in the manner the Beavises claim, *i.e.*, breached some duty in hiring Hazlett, it is clear such negligence could not be the proximate cause of Pamela Beavis’ injuries unless the predicate negligence of Hazlett was first found.¹⁴⁴

The *Beavis* court did not, however, dismiss the claims against Horan and CCMH until the jury determined that Hazlett’s actions were not wrongful, or in any manner negligent.¹⁴⁵ Had the jury determined Hazlett acted wrongfully,

¹³⁸ *Id.* at 511.

¹³⁹ *Id.* Specifically, the judgment provided, “Plaintiffs’ claims against Mitchell Horan, M.D. are dependent upon establishing negligence of Deb Hazlett. Having failed to establish negligence of Deb Hazlett, judgment is entered in favor of co-defendant Mitchell Horan, M.D.”

¹⁴⁰ *Id.* at 515, 516.

¹⁴¹ *Id.* at 515.

¹⁴² *Id.* (stating the claims were not “so interwoven” as to preclude a fair trial).

¹⁴³ *Id.* (citation omitted); *see also* Christiansen v. Silfies, 667 A.2d 396, 399 (Pa. Super. Ct. 1995) (holding bifurcation of claim of negligence against driver from negligent entrustment claim against employer is not an abuse of discretion).

¹⁴⁴ *Beavis*, 20 P.3d at 515 (citations omitted). Even though Dr. Horan was not Hazlett’s employer, the same reasoning applied to the claims for his alleged negligent supervision. *Id.* at 516.

¹⁴⁵ *See id.* at 511.

thereby satisfying the predicate for direct negligence claims, then the jury would have had to apportion fault between CCMH and Horan.¹⁴⁶ Since the jury exonerated Hazlett, the claims against CCMH and Horan had to fail for lack of proximate cause and the Wyoming Supreme Court affirmed dismissal of those claims following the jury verdict.¹⁴⁷

2. DeWald v. State

Similarly, in *DeWald v. State*, the Wyoming Supreme Court determined that direct negligence claims against an employer are derivative of the employee's negligence.¹⁴⁸ In *DeWald*, two Wyoming Highway Patrolmen were pursuing a motorist suspected of drunk driving.¹⁴⁹ The motorist then collided with DeWald's vehicle at an intersection, killing Mr. DeWald.¹⁵⁰ Ms. DeWald filed suit, claiming the patrolmen were at fault for her husband's death by negligently failing to take the necessary steps to prevent the accident.¹⁵¹ Ms. DeWald also claimed the State of Wyoming negligently trained and supervised the patrolmen and failed to establish and implement appropriate procedures for this type of situation.¹⁵²

The defendants moved for summary judgment, claiming the patrolmen acted reasonably and were, therefore, immune from suit.¹⁵³ The *DeWald* court affirmed the trial court's dismissal of the claims against the officer based on qualified immunity.¹⁵⁴ With respect to the claims for direct negligence against the State of Wyoming:

Having held the patrolmen not liable, we must also hold that the appellee, State of Wyoming, cannot be held liable, the reason being that if the conduct of the patrolmen did not amount to negligence that caused the accident, then neither could their training by the State nor could rules have been a cause of the accident. Stated another way, it would have had to appear that,

¹⁴⁶ *Id.* at 516–17.

¹⁴⁷ *Id.* at 517.

¹⁴⁸ 719 P.2d 643, 652 (Wyo. 1986).

¹⁴⁹ *Id.* at 645.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 645–46.

¹⁵² *Id.* at 646.

¹⁵³ *See id.* at 646. The defendants claimed immunity pursuant to the Wyoming Governmental Claims Act (WGCA) as well as common law qualified immunity. *See id.* at 646, 647. The *DeWald* court held that the WGCA contained an express waiver of statutory immunity for the operation of motor vehicles, but that the WGCA retained common law defenses. *Id.* at 647, 648.

¹⁵⁴ *Id.* at 651–53.

because of inadequate training or failure to follow departmental rules, the officers acted in a negligent manner and caused this accident. We have held that did not occur.¹⁵⁵

Simply put, even if the State of Wyoming was negligent with regard to the training or supervision of the officers and had failed to implement appropriate rules, since the officers acted reasonably under the circumstances, the State's negligence could not possibly be the proximate cause of the accident. As such, the direct negligence claims were dismissed and summary judgment was affirmed.¹⁵⁶

3. *Wernke v. Powder River Coal*

In an unpublished opinion, the United States District Court for the District of Wyoming also accepted the majority view, albeit for somewhat different—but equally practical—reasons.¹⁵⁷ In *Wernke v. Powder River Coal, L.L.C.*, the plaintiff claimed he was injured in a mining accident when a coal shovel allegedly struck his haul truck during loading.¹⁵⁸ Plaintiff alleged that the mine's employee was negligent and that the mine negligently failed to train its employee in the proper operation of the shovel. The District Court dismissed the direct negligence claims in light of the employer's admission of respondeat superior liability.¹⁵⁹

Recognizing that “[t]he logic of the majority view is readily apparent,” the district court reasoned that direct negligence claims are dependent upon, or even derivative of, the employee's negligence.¹⁶⁰ Thus, “Where a defendant employer would already be entirely responsible for his employee's actions through respondeat superior liability, the additional negligence cause of action would be needlessly duplicative.”¹⁶¹

Additionally, the *Wernke* court examined the issue against the backdrop of Wyoming's comparative fault system:

The [c]ourt notes with some concern that if separate negligence claims against an employer are allowed in circumstances such as those presented by this case, they may well become a common

¹⁵⁵ *Id.* at 652.

¹⁵⁶ *Id.* at 653.

¹⁵⁷ Order Granting Defendant's Motion for Partial Summary Judgment at 9, *Wernke v. Powder River Coal, L.L.C.*, Civ. No. 00132-D (D. Wyo. Feb. 20, 2009) (*Wernke Order*).

¹⁵⁸ *Id.* at 1–2.

¹⁵⁹ *Id.* at 9.

¹⁶⁰ *Id.* at 7 (citing *Beavis*, 20 P.3d at 515).

¹⁶¹ *See id.* at 4, 7 (“[T]he employer Defendant's liability would be the same under either a direct or vicarious cause of action.”) (citation omitted).

litigation tactic utilized to overcome § 1-1-109's fifty percent bar by piling on additional claims. If a plaintiff can simply allege additional, independent negligence in an employer's training or hiring, he may succeed in convincing a jury that his own relative fault is less than it actually is, thereby recovering where damages would otherwise be precluded.¹⁶²

Despite this holding, the *Wernke* court acknowledged that there may be circumstances where an independent action against the employer is appropriate. These circumstances could potentially include a claim for punitive damages "where the plaintiff must overcome the additional hurdle of showing willful and wanton misconduct bordering on the criminal in nature" or other unique scenarios.¹⁶³ While the potential exists for a viable claim in the face of an admission of respondeat superior, this case did not present such a scenario. This is because the defendant employer will be fully accountable to the plaintiff—less whatever damages may have resulted from plaintiff's own negligence—via respondeat superior.

D. Exceptions to the Majority View

Because the primary basis for dismissing direct negligence claims is that the claims are superfluous in the face of an admission of vicarious liability, it stands to reason that should a situation arise where the employer faces additional liability beyond that imputed to it by virtue of the employee's negligence, such claims should not be dismissed.¹⁶⁴ This reasoning is logically consistent, but appears to be more theoretical than realistic.

There are three primary situations where majority courts have acknowledged this broad exception. The first, and the most sound of these exceptions, occurs where the entrustment of a chattel was negligent, but the trustee was not independently negligent. Second, some courts have cited a situation where the entrustor knows of a dangerous condition of the chattel, but fails to inform the trustee. Finally, the most often cited exception occurs when a claim for punitive damages is initiated against the employer and is based on the employer's own conduct in hiring, training, supervising, or retaining the employee.

¹⁶² See *id.* at 7–8. See also WYO. STAT. ANN. § 1-1-109 (2009) (indicating Wyoming's Comparative Fault Statute bars recovery where a plaintiff is more than fifty percent at fault for the accident).

¹⁶³ *Wernke Order*, *supra* note 157, at 8.

¹⁶⁴ See, e.g., *McHaffie*, 891 S.W.2d at 826 (citation omitted).

1. *Direct Negligence Claims Not Derivative of the Employee's Negligence Remain Viable*

The first two “exceptions” are not really exceptions at all, since these situations are not derivative of the entrustee’s negligence. For example, if a parent gives a loaded gun to a young child, who then shoots someone, it may be determined the child was not negligent because of his age.¹⁶⁵ In that case, there is no negligence to impute to the parent. Rather, it is the direct negligence of the parent that was the proximate cause of the accident. Similarly, in rare circumstances, a defendant may be held liable when the driver is otherwise free from fault.¹⁶⁶

In the above examples, since neither the child nor the driver was negligent, there is no negligence to impute to the employer or parent. But, unlike the *DeWald* case, there is still a causal link between the accident and the negligence of the employer or parent. The majority rule is simply inapplicable. While the above situations can arise in theory, courts should not allow baseless assertions to subsume the majority rule. Rather, consistent with the standards of review for motions to dismiss for failure to state a claim and for summary judgment,¹⁶⁷ courts should determine whether such claims are actually supported by any facts.

2. *The Punitive Damages Exception*

On the other hand, even when a plaintiff claims the negligence of the employer in hiring, training, supervising, retaining, or entrusting a chattel to an employee was especially egregious, there is still a break in the causal chain if the employee was not negligent. Does it really matter whether the hiring practices were simply negligent or incredibly outrageous if the employee drove reasonably at the time of the accident? If the employee drove his vehicle in a reasonable manner at the time of the accident, what the employer did at some remote time cannot possibly be the proximate cause of the accident.¹⁶⁸

¹⁶⁵ See, e.g., *Keller v. Kiedinger*, 389 So. 2d 129, 133 (Ala. 1980) (“If, however, the person to whom the chattel is supplied is one of a class which is legally recognized as so incompetent as to prevent them from being responsible for their actions, the supplier may be liable for harm suffered by him, as when a loaded gun is entrusted to a child of tender years.”).

¹⁶⁶ See, e.g., *Syah v. Johnson*, 247 Cal. App. 2d 534, 538 (Cal. Ct. App. 1966). The employer was held liable for an accident even though the driver was found free of fault. *Id.* Employer knew driver was prone to dizzy spells and just blacked out in this case. *Id.* at 545. Since the driver was not at fault, vicarious liability was not an issue. *Id.* at 538. Presumably, a vehicle owner may also be held liable where the vehicle is defective, but the driver is unaware of the defect. See *id.* at 539 (citation omitted).

¹⁶⁷ See FED. R. CIV. P. 12(b)(6), 56.

¹⁶⁸ See, e.g., *Rodgers v. McFarland*, 402 S.W.2d 208, 210 (Tex. App. 1966) (“Even if the owner’s negligence in permitting the driving were gross, it would not be actionable if the driver was guilty of no negligence.”).

a. Can the Conduct that Supports a Direct Negligence Claim Ever Support a Punitive Damages Award?

Questions arise when the evidence suggests the employee may have been negligent and the employer's direct negligence was especially egregious. Punitive damages are generally available "to punish the person doing the wrongful act and to deter him, as well as others, from similar conduct in the future."¹⁶⁹ Typically, to support an award of punitive damages, the defendant's conduct must be willful and wanton (that is, outrageous), evidence an evil intent or motive, or show a conscious disregard for the safety of others.¹⁷⁰ Importantly, punitive damages can only be awarded for the misconduct that actually caused the harm.¹⁷¹ Realistically, it appears that it would be a very rare case where an employer's misconduct in hiring, training, retaining, or supervising its employees or in entrusting a vehicle to an employee is so egregious that the conduct could support a punitive damages award.

The reason such a situation is unlikely to occur is because it requires, practically speaking, the employer to show a conscious disregard for its own self interest. In motor vehicle accident cases, the result of this "outrageous" conduct is a motor vehicle accident. Obviously, motor vehicle accidents, in addition to potentially harming people, also damage property, often including the expensive tractor-trailer units owned by the motor carrier. Accidents also often cause damage to the goods being hauled by the motor carrier or cause delays in the delivery of the goods, which can result in a breach of the shipping contract. Loss of a tractor or trailer can also result in lost business income, because the unit is not available to generate income for the motor carrier. Even when there are no personal injuries arising out of an accident, the motor carrier is almost assuredly going to suffer some loss in the form of repairs to the vehicle, damage claims by shippers, and lost income for the time the equipment is out of service.

It is simply counterintuitive to assert that a motor carrier is going to willfully and wantonly send an untrained driver out on the road in expensive equipment if the motor carrier believes there is a high likelihood that the driver will be involved in an accident. Unless a motor carrier acted with conscious disregard of its own rights, it cannot be said it acted the same with respect to the rights of others. At least with respect to cases arising out of motor vehicle accidents, it seems that direct negligence typically will not support a punitive damages award.

¹⁶⁹ *Smith v. Williams*, No. 05C-10-307, 2007 Del. Super. LEXIS 266, at *7 (Del. Super. Ct. June 22, 2007) (citation omitted); *see also Danculovich v. Brown*, 593 P.2d 187, 191 (Wyo. 1979).

¹⁷⁰ *Smith*, 2007 Del. Super. LEXIS 266, at *7; *Danculovich*, 593 P.2d at 191.

¹⁷¹ *See Smith*, 2007 Del. Super. LEXIS 266, at *8; *Danculovich*, 593 P.2d at 189 (discussing exemplary damages in context of wrongful death action).

With respect to commercial motor vehicles, these employers and their drivers are subject to federal regulations. The Federal Motor Carrier Safety Regulations (FMCSR) provide the framework specifying driver qualification and training requirements.¹⁷² The FMCSR specifies when a driver must be disqualified from driving.¹⁷³ The FMCSR also provides license standards, requirements and penalties that must be followed by the states in issuing and regulating commercial driver licenses.¹⁷⁴ In short, if a truck driver has obtained a CDL and is not disqualified from driving, any negligence on the part of his employer with respect to hiring, training, and retention simply cannot be viewed as so egregious as to warrant the imposition of punitive damages, because the employer has complied with federal regulations.¹⁷⁵

Moreover, the Federal Motor Carrier Safety Administration (FMCSA) inspects motor carrier operations for compliance with the regulations.¹⁷⁶ Specifically, the FMCSR contains procedures for the FMCSA “to determine the safety fitness of motor carriers, to assign safety ratings, to direct motor carriers to take remedial measures when required, and to prohibit motor carriers receiving a safety rating of ‘unsatisfactory’ from operating a CMV.”¹⁷⁷ The FMCSA conducts on-site inspections of motor carriers as well as inspections of vehicles and drivers at weigh stations and ports of entry across the country. Motor carriers, especially smaller outfits, might make missteps while trying to operate in a heavily regulated industry, but these missteps are negligence at most.¹⁷⁸ If the FMCSA has not disqualified a motor carrier from operating CMVs, then the manner in which the motor carrier runs its business was not so egregious as to warrant punitive damages.

¹⁷² 49 C.F.R. § 391.1(a) (2009).

¹⁷³ § 391.15(a)–(d).

¹⁷⁴ §§ 383.1, 384. “The purpose of this part is to help reduce or prevent truck and bus accidents, fatalities, and injuries by requiring drivers to have a single commercial motor vehicle driver’s license and by disqualifying drivers who operate commercial motor vehicles in an unsafe manner.” § 383.1(a).

¹⁷⁵ See, e.g., *Smith*, 2007 Del. Super. LEXIS 266, at *13–14. The court conducted a thorough analysis of the evidence presented for and against punitive damages and concluded punitives were not warranted against the defendant motor carrier. *Id.* at *14. This analysis included that Williams was a licensed driver, passed his physical, and was certified to drive. *Id.* at *13–14.

¹⁷⁶ 49 C.F.R. § 385.1 *et seq.*

¹⁷⁷ § 385.1(a).

¹⁷⁸ Even this negligence, however, cannot serve as a basis of liability in the absence of driver negligence that caused the accident. For example, if the motor carrier negligently failed to verify the driver’s medical certificate, it does not mean the driver was medically unfit to drive. Similarly, even if the driver has an expired medical certificate, it does not mean he actually has a disqualifying medical condition. Even if the driver is medically unfit to drive, it does not mean this condition manifested at the time of the accident. Finally, even if the condition manifested at the time of the accident, it does not mean it caused him to drive negligently. Maybe he was rear-ended by another vehicle and was totally fault free as to the cause of he accident. If the driver was fault free, the rest is irrelevant for purposes of a tort action.

The FMCSA is staffed by professionals who are given the authority to disqualify both drivers and motor carriers for especially egregious conduct. Certainly, the FMCSA is better qualified and equipped to determine whether the hiring, training, retention and supervision of a driver is so egregious as to merit penalty, than is a jury typically hearing a case in an emotionally charged environment, on a body evidence quite properly limited by the rules of evidence, and often with a pre-determined bias against big trucks. If a driver or motor carrier has not been disqualified by the FMCSA, then punitive damages simply are not warranted except in the most unusual circumstances.

b. Artful Pleading Should Not Subsume the Rule

As discussed above, it seems the “punitive damages” exception cited by some majority courts is more theoretical than practical. Nevertheless, even the theoretical deserves a court’s attention to determine whether or not the plaintiff’s punitive damages claim is viable or should also be dismissed. Just as it is dangerous to have a hard and fast rule that all direct negligence claims should be dismissed in the face of an admission of vicarious liability, it is equally dangerous to adhere to an inflexible rule that when a plaintiff asserts a claim for punitive damages, the direct negligence claims must necessarily survive summary dismissal.

To the contrary, for the very reasons that majority courts dismiss direct negligence claims in the first place, these courts should make sure to closely scrutinize punitive damage claims so that artful pleading does not subsume the rule. Plaintiffs should not be able to inject prejudicial evidence into a proceeding simply by adding a paragraph to a Complaint.¹⁷⁹

E. How to Handle These Claims at Trial

As described above, there is rarely good reason to allow direct negligence claims to go forward when vicarious liability has been admitted under a different theory. The one valid exception is when direct negligence claims can impose liability beyond that of the employee and such claims are supported by competent evidence. If the Plaintiff presents facts that support a claim for punitive damages—or to support the rare case where the employer may be held liable in the absence of employee negligence—then the case should be bifurcated to ensure the defendant receives a fair trial on the underlying negligence claim against the driver. If—and

¹⁷⁹ See *James*, 661 S.E.2d at 332. The defendant proposed that the court adopt the majority rule with the punitive damages exception. *Id.* at 331. The court declined the invitation and noted the futility of a hard and fast exception for punitive damages. *Id.* “As requests for punitive damages are commonplace in cases of this type, we think traveling the road the [defendant] proposes would create an exception which swallows the rule.” *Id.*; see also *Wernke Order*, *supra* notes 157–63 and accompanying text.

only if—the driver is found negligent should the trial proceed to the second phase where the plaintiff is given a fair opportunity to present the claim for punitive damages.

In such cases, the only means to prevent substantial prejudice on the primary negligence claim is to bifurcate the proceedings and try the driver negligence claims first.¹⁸⁰ This is necessary because even when the direct negligence claims may impose additional liability on the employer, the direct negligence claims are almost always derivative. Absent this necessary element, judgment as a matter of law is proper on the direct negligence claims.

Although bifurcated trials may pose an additional demand on our busy trial courts, “[e]fficiency cannot be permitted to prevail at the expense of justice.”¹⁸¹ Moreover, bifurcation will actually save time and avoid unnecessary prejudice in cases where the employee was not at fault. Jury instructions, while often touted as a means to allow both types of claims to go forward, cannot protect against the substantial prejudice to the employee driver.¹⁸²

IV. LOGICAL CONCLUSION

Upon a review of the various perspectives, the logical conclusion appears to be consistent with that of the majority—when an employer admits it is vicariously liable for its employee’s negligence, claims of negligent hiring, supervision, training, retention, and entrustment should be dismissed in virtually every case. The reasons are apparent: (1) evidence needed to prove a direct negligence claim is inadmissible with respect to the negligence of the employee, regardless of whether the employee is a named party or not; (2) allowing the direct negligence claim to survive adds nothing, other than prejudice, to the trial; (3) neither the percentage of fault nor the amount of damages can be increased or decreased based on the ultimate finding on the direct negligence claims.

¹⁸⁰ See *Martin v. Minnard*, 862 P.2d 1014, 1016 (Colo. App. 1993) (“An abuse of discretion occurs where the court’s failure to order separate proceedings virtually assures prejudice to a party.”) (citation omitted); *Christiansen*, 667 A.2d at 399 n.3 (determining that bifurcating the liability phase of a trial so that the jury would hear the case against the defendant driver independently from that against the tractor-trailer owner and lessee was a proper exercise of discretion). The court reasoned, “The critical factor, however, is that the prejudicial negligent entrustment evidence be kept separate from the initial determination of the driver-defendant’s negligence.” *Id.*; *Angelo v. Armstrong World Indus.*, 11 F.3d 957, 964 (10th Cir. 1993) (“Bifurcation is not an abuse of discretion if such interests [as convenience, *avoiding prejudice*, expedition, and economy] favor separation of issues and the issues are clearly separable.”) (citation omitted).

¹⁸¹ *State v. McCraime*, 588 S.E. 2d 177, 205 (W. Va. 2003) (citation omitted).

¹⁸² See, e.g., *Martin*, 862 P.2d at 1016 (indicating that even with a curative limiting instruction, the jury could improperly use the evidence to show a propensity of negligent driving).

Importantly, there is no mechanical rule that a court can or should apply in lieu of factual analysis. There may be some causes of action where the defendant truly faces liability beyond respondeat superior. The court must then assess the practical outcome of the claims before dismissing the direct negligence claims.

There may be a rare situation where the employer's actions in hiring, training, supervising, or retaining an employee may give rise to punitive damages. It is hard to imagine what such a case looks like, especially in a motor vehicle case, but *if* it occurs, then the case should be bifurcated. *If* the jury finds the driver at fault, then the jury can assess whether the direct claims are so egregious as to warrant punitive damages. But first, the court should carefully review the allegations and the evidence supported in summary judgment proceedings to make sure a punitive damages claim actually states a cause of action and is not merely a case of artful pleading.¹⁸³

If a court allows direct negligence claims to go to the jury in the face of an admission of vicarious liability, it should always bifurcate the trial, as did the *Beavis* court. Knowing that evidence to support a direct negligence claim is routinely excluded when the employer is not a party should be sufficient basis to bifurcate every such case. Bifurcation will often save time in the end. The first phase of the trial should focus on only the accident. The number of witnesses and the scope of the subject matter will be greatly reduced since there will be no need to receive evidence related to hiring practices, other acts of either the employer or the employee, or what is necessary to reasonably train the employee. Obviously, the results at trial will often alleviate the need for the second proceeding.

At the end of the day, this is first and foremost a fairness issue that is not susceptible to mechanical determinations. If courts will avoid the mechanical application of any position, whether majority or minority, apply a reasoned and complete analysis of the practical effects of the decision, and decide each case on its relative merits, the rights of *all* litigants to a fair trial will be preserved.

¹⁸³ It is also a determination that should be given careful scrutiny even at the motion to dismiss stage where all well-pled factual allegations are taken as true. Courts that routinely deny all 12(b)(6) motions should appreciate that such a decision costs all parties a substantial amount of time and money during the discovery phase. While a plaintiff's hurdle to survive a 12(b)(6) motion may not be all that high, courts should faithfully apply the standard of review for these motions.

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THE NECESSITY OF “RIGHT TO TRAVEL” ANALYSIS IN CUSTODIAL PARENT RELOCATION CASES

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INTRODUCTION

The most complex issue facing judges today during post divorce modifications is proposed relocations by the custodial parent. “As our society has become increasingly mobile and migratory, the number of relocation cases has continued to expand at an astounding rate.”¹ Throughout America, courts facing this issue have not found any uniform response to this relocation quagmire. Some states place the burden on the non-custodial parent to demonstrate why such a relocation is against the best-interest of the child.² Other states place the burden of

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¹ See *In re Marriage of Burgess*, 913 P.2d 473, 480 (Cal. 1996); David M. Cotter, *Oh, the Places You’ll (Possibly) Go! Recent Case Law in Relocation of the Custodial Parent*, 16 DIVORCE LITIG. 152, 152 (2004).

² See CAL. FAM. CODE § 7501 (West 2009); TENN. CODE ANN. § 36-6-108(d) (2007); W. VA. CODE § 48-9-403(d)(1) (2001); WIS. STAT. ANN. § 767.481 (West 2009); *Chesser-Witmer v. Chesser*, 117 P.3d 711, 717 (Alaska 2005); *Hollandsworth v. Knyzewski*, 109 S.W.3d 653, 662–63 (Ark. 2003); *Tarlan v. Sorensen*, 702 N.W.2d 915, 921 (Minn. Ct. App. 2005); *In re Marriage of Robinson*, 53 P.3d 1279, 1282–83 (Mont. 2002); *Flynn v. Flynn*, 92 P.3d 1224, 1228 (Nev. 2004); *Evans v. Evans*, 530 S.E.2d 576, 578–79 (N.C. Ct. App. 2000); *Berens v. Berens*, 689 N.W.2d 207, 212 (S.D. 2004); *Bates v. Texar*, 81 S.W.3d 411, 421–22 (Tex. Ct. App. 2002); *Hudema v. Carpenter*, 989 P.2d 491, 498 (Utah Ct. App. 1999); *In re Marriage of Horner*, 93 P.3d 124, 130 (Wash. 2004); *Harshberger v. Harshberger*, 117 P.3d 1244, 1252 (Wyo. 2005).

proof on the custodial parent to prove the relocation is in the child's best interest.³ Furthermore, several states do not shift a burden to either parent.⁴ Additionally, a few of these state courts have created qualified standards, where the custodial parent must prove a legitimate reason for the relocation before the best interest standards are even entertained by the court.⁵ To confuse matters even more, jurisdictions have restricted these varying relocation standards to apply only when certain conditions are met, such as when the custodial parent relocates out-of-state, relocates beyond a given distance from the residence of the non-relocating parent, or only lives a certain distance away from the non-custodial parent.⁶

³ ALA. CODE § 30-3-169.4 (2003); ARIZ. REV. STAT. ANN. § 25-408(G) (2008); DEL. CODE ANN. tit. 13, § 729(c) (2008); 750 ILL. COMP. STAT. 5/609 (2008); LA. REV. STAT. ANN. § 9:355.13 (2009); *Roberts v. Roberts*, 64 P.3d 327, 331 (Idaho 2003); *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000); *Fowler v. Sowers*, 151 S.W.3d 357, 359 (Ky. Ct. App. 2004); *Kinter v. Nichols*, 722 A.2d 1274, 1276 (Me. 1999); *Grew v. Knox*, 694 N.W.2d 772, 774 (Mich. Ct. App. 2005); *Baures v. Lewis*, 770 A.2d 214, 233 (N.J. 2001); *Paul v. Pagnillo*, 786 N.Y.S.2d 662, 664 (N.Y. App. Div. 2004); *Maynard v. McNett*, 710 N.W.2d 369, 373 (N.D. 2006); *In re Marriage of Colson*, 51 P.3d 607, 612 (Or. Ct. App. 2002); *Gruber v. Gruber*, 583 A.2d 434, 440 (Pa. Super. Ct. 1990); *Surles v. Mayer*, 628 S.E.2d 563, 576 (Va. Ct. App. 2006).

⁴ FLA. STAT. § 61.13001 (2008); *In re Marriage of Ciesluk*, 113 P.3d 135, 146–47 (Colo. 2005); *Bodne v. Bodne*, 588 S.E.2d 728, 730 (Ga. Ct. App. 2003); *In re Marriage of Bradley*, 899 P.2d 471, 473 (Kan. 1995); *Braun v. Braun*, 750 A.2d 624, 636 (Md. Ct. App. 2000); *Jaramillo v. Jaramillo*, 823 P.2d 299, 307–10 (N.M. 1991); *Dupre v. Dupre*, 857 A.2d 242, 254 (R.I. 2004); *Latimer v. Farmer*, 602 S.E.2d 32, 34–35 (S.C. 2004).

⁵ IND. CODE § 31-17-2.2-5 (2008); MO. REV. STAT. § 452.377 (2003); N.H. REV. STAT. ANN. § 461-A:12 (2005); *Ireland v. Ireland*, 717 A.2d 676, 682 (Conn. 1998); *Rosenthal v. Maney*, 745 N.E.2d 350, 358–59 (Mass. Ct. App. 2001); *McLaughlin v. McLaughlin*, 647 N.W.2d 577, 581 (Neb. 2002).

⁶ See ALA. CODE § 30-3-169.4 (2003) (providing a standard that applies to any out-of-state moves or moves that are more than 60 miles from the non-custodial parent in-state); ARIZ. REV. STAT. ANN. § 25-408(B) (2008) (providing a standard that applies to any out-of-state moves or moves that are more than 100 miles from the non-custodial parent in-state); IOWA CODE § 598.21D (2009) (providing that it can be considered a material change of circumstance to modify custody if the custodial parent relocates more than 150 miles away from the child's residence when custody was originally awarded); LA. REV. STAT. ANN. § 9:355.1(4) (2009) (providing that relocation tests only apply if the custodial parent is moving out of state or if moving 150 miles away from the child's residence in-state); ME. REV. STAT. ANN. tit.19-A, § 1657(2) (2009) (providing a standard that only applies if the custodial parent moves out-of-state or more than sixty miles from either parent's residence in-state); MICH. COMP. LAWS ANN. § 722.31(1) (West 2009) (providing that the relocation standard does not apply (1) if the custodial parent does not move more than 100 miles away from the child's residence at the time of the original custody order or (2) if the parents' homes are more than 100 miles apart at the time of the move); N.D. CENT. CODE § 14-09-07 (2009) (providing that relocation is permitted if the non-relocating parent has moved out-of-state or more than fifty miles from the other parent's residence); TENN. CODE ANN. § 36-6-108(a) (2007) (providing that the relocation standard only applies when the custodial parent moves out-of-state or 100 miles from the non-relocating parent in-state); UTAH CODE ANN. § 30-3-37(1) (2008) (providing that the relocation standard applies if the custodial parent relocates out-of-state or 150 miles from the child's residence in-state); WIS. STAT. ANN. § 767.327(1)(a)(2) (West 2009) (providing that the relocation standard applies if the custodial parent relocates out-of-state or 150 miles from non-relocating parent); *In re Marriage of Seitzinger*, 775 N.E.2d 282, 288 (Ill. Ct. App. 2002) ("It is not necessary

With these differing standards and burdens of proof governing custodial parent relocations, exactly whose interests are these courts ultimately trying to protect? Are these courts protecting the state's interest in maintaining contact with the child? Are they protecting the autonomy of the custodial parent or the non-custodial parent's relationship with the child? Or, maybe these courts are purely protecting the best interest of the child? Regardless of the articulated protected interest, the underlying policy behind the relevant standard for custodial parent relocation must be analyzed because a rigid application of these relocation standards can allow for absurd results. Conversely, if courts continue to produce a hodgepodge of relocation decisions, the predictability and stability that lawyers and litigants should expect from recent decisions is absent, resulting in more relocation litigation.⁷ The recent Nebraska Court of Appeals decision *Curtis v. Curtis* is the quintessential example of an appellate court's rigid application of a state's common law relocation standards, thereby producing absurd results.⁸ In *Curtis*, the Nebraska Court of Appeals overturned the trial court's order, allowing a custodial mother's relocation of 17.6 miles from the non-custodial parent.⁹ The basis of the Nebraska Court of Appeals's decision was the finding that the mother's desire to relocate to live with her boyfriend was not one of the pre-determined "legitimate reasons" that a custodial parent is allowed to relocate out of the State of Nebraska.¹⁰ However, after the mother's relocation in *Curtis*, the father's visitation remained the same and the mother's standard of living improved.¹¹ Thus, the

for a custodial parent or a parent with primary physical custody to obtain permission from a court before moving to another location in Illinois."); *McLaughlin*, 647 N.W.2d at 591–92 (Stephen, J., dissenting) (stating that a custodial parent does not need to seek permission to relocate within the state).

⁷ See Katherine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 471–72 (1999); Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 41 (1996) (citing *DeBeaumont v. Goodrich*, 644 A.2d 843, 857–58 (Vt. 1994) (Johnson, J., dissenting)).

⁸ 759 N.W.2d 269 (Neb. Ct. App. 2008).

⁹ *Id.* at 273.

¹⁰ *Id.* ("Clearly, [the mother's] desire to move from Nebraska is not based on an employment opportunity for her . . . and is not based on remarriage. [The mother's] sole reason for wanting to move is her desire to continue living with [her boyfriend] as she has been doing since moving out of the marital home. Because [the boyfriend] is selling his house in Fall City where [the mother and child] have been living, [the mother and child] have to find someplace else to live. However, [the mother] has not demonstrated a legitimate reason as to why their new home has to be with [her boyfriend] in Missouri.").

¹¹ *Id.* Testimony revealed the father's visitation would remain the same after the mother's relocation to Missouri and that the boyfriend's new home in Missouri would provide "newer and more spacious housing" for the mother and child than the mother would be able to afford on her own. *Id.* It is also worth noting that the reason the mother could not obtain housing on her own was because her credit was ruined when the father allowed the marital home to be foreclosed on, which he was awarded in the divorce and ordered to hold the mother harmless against the mortgage. *Id.* at 272.

only logical conclusion is that the Nebraska Court of Appeals has made a judicial determination that the State of Nebraska has a policy of maintaining its children within the jurisdiction.¹² However, such a policy ignores the custodial parent's constitutional right to travel.

This article will discuss the underlying policies behind relocations standards in various jurisdictions, such as those articulated in *Curtis*.¹³ This article will also analyze a custodial parent's constitutional right to travel, and review how balancing the custodial parent's right to travel with other competing interests would avoid some unnecessary relocation litigation.¹⁴

I. CUSTODIAL PARENT'S CONSTITUTIONAL RIGHT TO TRAVEL

A custodial parent's constitutional right to interstate and intrastate travel is rarely analyzed by courts in relocation cases.¹⁵ The current paradigm is finding courts and legislatures moving away from presumptions and rights based analysis, and toward an emphasis on the elusive "child's best interest" standard.¹⁶ However, as analysis of *Curtis* will demonstrate, a failure by courts to recognize and analyze a parent's constitutional right to travel will, at times, yield absurd results.

Although state courts often fail to acknowledge an individual's right to travel when deciding whether to approve a custodial parent's relocation, the right to travel has been unequivocally recognized by the United States Supreme Court.¹⁷

¹² Since in *Curtis* the child was not harmed and the father's visitation schedule was not altered by the mother's relocation to Missouri, the only logical conclusion can be that the State of Nebraska has a policy of keeping its children within its borders. See, e.g., *Vanderzee v. Vanderzee*, 380 N.W.2d 310, 311 (Neb. 1986) ("Generally, the best policy in divorce cases is to keep minor children within the jurisdiction . . .").

¹³ See *infra* notes 160–67 and accompanying text.

¹⁴ See discussion *infra* Parts I, II, and III.

¹⁵ See Lance Cagle, *Have Kids, Might Travel: The Need for a New Roadmap in Illinois Relocation Cases*, 25 N. ILL. U. L. REV. 255, 259–60 (2005); Arthur B. LaFrance, *supra* note 7, at 3; Tabitha Sample & Teresa Reiger, *Relocation Standards and Constitutional Considerations*, 10 J. AM. ACAD. MATRIM. LAW. 229, 237 (1998); Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 613 (2001).

¹⁶ See Storrow, *supra* note 15, at 637.

¹⁷ See *Saenz v. Roe*, 526 U.S. 489, 498 (1999) ("The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence.") (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)); *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 254 (1974) ("The right of interstate travel has repeatedly been recognized as a basic constitutional freedom."); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), *overruled on other grounds by* *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this

In *Saenz v. Roe*, the United States Supreme Court declared that an individual's right to interstate travel is guaranteed by the Privileges and Immunities Clause of the Fourteenth Amendment of the United States Constitution.¹⁸ Justice John Paul Stevens, in his majority opinion, stated:

The word "travel" is not found in the text of the Constitution. Yet the "constitutional right to travel from one State to another" is firmly embedded in our jurisprudence. Indeed, as Justice Stewart reminded us . . . the right is so important that it is "assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all."¹⁹

The United States Supreme Court has further stated that the right to travel encompasses the right to "migrate, resettle, find a new job, and start a new life."²⁰ Furthermore, the United States Supreme Court has clearly stated that a person's right to interstate travel cannot be impinged on absent a compelling state interest.²¹

Appellate courts in at least thirty different states have, at a minimum, discussed a custodial parent's constitutional right to interstate travel in the context of a custodial parent's relocation.²² Of these appellate courts, courts in Wyoming and

movement.""). For a complete a review of the constitutional right to travel, see Nicole I. Hyland, *On the Road Again: How Much Mileage is Left on the Privileges or Immunities Clauses and How Far Will it Travel?*, 70 *FORDHAM L. REV.* 187 (2001); see also Gregory B. Hartch, *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, 21 *WM. MITCHELL L. REV.* 457, 458 (1995) ("[N]o Supreme Court justice in American history has voiced opposition to the general concept of a right to travel.").

¹⁸ 526 U.S. at 502.

¹⁹ *Id.* at 498 (citations omitted).

²⁰ *Shapiro*, 394 U.S. at 629.

²¹ *Mem'l Hosp.*, 415 U.S. at 253.

²² See *Everett v. Everett*, 660 So.2d 599, 601 (Ala. Civ. App. 1995); *Pollock v. Pollock*, 889 P.2d 633, 635 (Ariz. Ct. App. 1995); *In re Marriage of Fingert*, 221 Cal. App. 3d 1575, 1582 (1990); *In re Marriage of Ciesluk*, 113 P.3d 135, 138 (Colo. 2005); *Azia v. DiLascia*, 780 A.2d 992, 995 (Conn. App. Ct. 2001); *Fredman v. Fredman*, 960 So.2d 52, 53 (Fla. 2d Dist. Ct. App. 2007); *Tetreault v. Tetreault*, 55 P.3d 845, 851 (Haw. Ct. App. 2002); *Bartosch v. Jones*, 197 P.3d 310, 314 (Idaho 2008); *In re Marriage of Manuele*, 438 N.E.2d 691, 764 (Ill. Ct. App. 1982); *Baxendale v. Raich*, 878 N.E.2d 1252, 1254 (Ind. 2008); *Wohlert v. Toal*, No. 02-1981, slip op. (Iowa. Ct. App. Aug. 27, 2003); *Carlson v. Carlson*, 661 P.2d 833, 834 (Kan. Ct. App. 1983); *Burch v. Burch*, 814 So.2d 755, 759 (La. Ct. App. 2002); *Braun v. Headey*, 750 A.2d 624, 628-29 (Md. Ct. Spec. App. 2000); *Mason v. Coleman*, 850 N.E.2d 513, 515 (Mass. 2006); *Beaton v. Beaton*, No. 202753, 1998 WL 1993003, at *4 (Mich. Ct. App. Feb. 3, 1998); *LaChapelle v. Mitten*, 607 N.W.2d 151, 156 (Minn. Ct. App. 2001); *In re Marriage of Cole*, 729 P.2d 1276, 1280 (Mont. 1986); *Reel v. Harrison*, 60 P.3d 480, 482 (Nev. 2002); *Murnane v. Murnane*, 552 A.2d 194, 198 (N.J. Super. Ct. App. Div. 1989); *Jaramillo v. Jaramillo*, 823 P.2d 299, 302-03 (N.M. 1991); *McRae v. Carbn*, 404 N.W.2d 508, 509 (N.D. 1987); *Rozborski v. Rozborski*, 686 N.E.2d. 546, 548 (Ohio Ct. App. 1996); *Clapper v. Clapper*, 578 A.2d 17, 19 (Pa. Super. Ct. 1990); *Africano v. Castelli*, 837 A.2d

California have specifically recognized a parent's constitutional right to interstate travel includes the constitutional right to intrastate travel as well.²³ Furthermore, most of the courts that have discussed a parent's constitutional right to travel, have recognized that an individual's right to travel, as a fundamental right, can only be restricted in furtherance of a compelling state interest.²⁴

Most of the courts addressing a custodial parent's right to travel have acknowledged that this right is implicated when a custodial parent attempts to relocate with the child.²⁵ However, courts have not agreed on how to balance the right to travel with the rights of the non-custodial parent in the context of the best interest of the child analysis.²⁶ There appear to be five classifications developed by courts when addressing the right to travel in the framework of custodial parent relocation: (1) the right to travel is absolute; (2) creation of a pure balancing test of the right to travel with other compelling state interests; (3) finding the best interest of the child is a compelling state interest which does not require balancing the parent's right to travel; (4) finding the non-custodial parent's right to visitation is a compelling state interest which does not require a balancing of the right to travel; and (5) finding the parent's right to travel is not implicated in the context of custodial parent relocations.

A. *Right to Travel is Absolute*

The Wyoming Supreme Court's interpretation of a custodial parent's right to travel elevates the relocating parent's right to travel over other competing interests.²⁷ In *Watt v. Watt*, the custodial mother desired to move from Upton, Wyoming to Laramie, Wyoming to attend a pharmacy program at the University of Wyoming, a distance of approximately 270 miles.²⁸ In a modification action,

721, 724 (R.I. 2003); *In re C.R.O.*, 96 S.W.3d 442, 445 (Tex. Ct. App. 2002); *Lane v. Schenck*, 614 A.2d 786, 789 (Vt. 1992); *Momb v. Ragone*, 130 P.3d 406, 412–14 (Wash. Ct. App. 2006); *Rowsey v. Rowsey*, 329 S.E.2d 57, 61 (W. Va. 1985); *Watt v. Watt*, 971 P.2d 608, 614–16 (Wyo. 1999).

²³ See *In re Marriage of Fingert*, 221 Cal. App. 3d at 1582; *Watt*, 971 P.2d at 614–16; see also *Hyland*, *supra* note 17, at 242–53 (“[The right to travel] was granted federal protection against state abridgement by the Framers of the Fourteenth Amendment who intended to protect fundamental rights from state abridgement. Consequently, the right to travel is guaranteed protection against state abridgement within the borders of the state by the Privileges or Immunities Clause of the Fourteenth Amendment. Therefore, the states may not abridge the right to intrastate travel.”).

²⁴ See, e.g., *In re Marriage of Cole*, 729 P.2d at 1280 (“As a fundamental right, the right to travel interstate can only be restricted in support of a compelling state interest.”).

²⁵ See *In re Marriage of Ciesluk*, 113 P.3d at 142–43.

²⁶ See *id.* at 143.

²⁷ See *Watt*, 971 P.2d at 615–16.

²⁸ *Id.* at 612.

the District Court for Weston County changed custody to the father.²⁹ In reversing the trial court's decision, the Wyoming Supreme Court held:

The custodial parent's right to move with the children is constitutionally protected, and a court may not order a change in custody based upon that circumstance alone. Some other change of circumstances, together with clear evidence of the detrimental effect of the other change upon the children, is required. Such a circumstance necessarily would have to be sufficiently deleterious to the welfare of the children that by itself it would serve as a substantial and material change in circumstances even in the absence of a relocation.³⁰

In *Watt*, the Wyoming Supreme Court stated that when reviewing a relocation case, the reviewing court "must remember that the best interest of the child standard was applied at the time of the initial custody award."³¹ In essence, the best interest standard cannot be revisited in Wyoming due to the relocation of a parent because of the parent's constitutional right to travel.³²

B. *Pure Balancing Test*

In Colorado, New Mexico, Indiana, Maryland, and Florida, appellate courts have adopted what appears to be a pure balancing test between a custodial parent's constitutional right to travel, rights of the non-custodial parent, and the best interest of the child, without any burdens or presumptions to any of the aforementioned interests.³³

In *In re Marriage of Ciesluk*, the Colorado Supreme Court recognized that a majority time parent's right to travel was not the only fundamental right at stake.³⁴ The *Ciesluk* court, citing the United States Supreme Court case of *Troxel v. Granville*, held that "a minority time parent has an equally important constitutional right to the care and control of the child."³⁵ The Colorado Supreme

²⁹ *Id.*

³⁰ *Id.* at 616–17.

³¹ *Id.* at 614.

³² See Emilia P. Wang, *Unenumerated Rights—Are Unenumerated Rights a Viable Source for the Right to Intrastate Travel?* *Watt v. Watt*, 971 P.2d 608 (Wyo. 1999), 31 RUTGERS L.J. 1053, 1056–59 (1999).

³³ See *In re Marriage of Ciesluk*, 113 P.3d at 142; *Fredman*, 960 So.2d at 57–59; *Baxendale*, 878 N.E.2d at 1259; *Braun*, 750 A.2d at 628–29; *Jaramillo*, 823 P.2d at 304–06.

³⁴ 113 P.3d at 142.

³⁵ *In re Marriage of Ciesluk*, 113 P.3d at 142 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

Court further found that intertwined with parents' competing constitutional rights is concern for the best interest of the child.³⁶ Thus, the *Ciesluk* court concluded that "relocation disputes present courts with a unique challenge: to promote the best interest of the child while affording protection equally between a majority parent's right to travel and a minority parent's right to parent."³⁷ Interestingly, the Colorado Supreme Court noted that "in the absence of demonstrated harm to the child, the best interest of the child standard is insufficient to serve as a compelling state interest overruling the parents' fundamental rights."³⁸ *Ciesluk* recognized that a trial court in Colorado must consider and make findings based on the twenty-one factors set out in Colorado Statute § 14-10-129 for a majority time parent's relocation.³⁹ Furthermore, *Ciesluk* required that both parents share equally the burden of demonstrating how the child's best interests will be served.⁴⁰ The *Ciesluk* court held that in a relocation case, it must balance the competing constitutional rights of each parent with the child's best interests, with neither party having a presumption or burden of proof. The Colorado Supreme Court in *Ciesluk* held that this balancing test was required for a trial court to properly rule on the relocation of a majority time parent.⁴¹ Subsequent to the Colorado Supreme Court's holding in *Ciesluk*, appellate courts in Indiana and Florida have adopted the pure balancing analysis found in *Ciesluk*.⁴²

The *Ciesluk* court borrowed this balancing test from the New Mexico Supreme Court.⁴³ In *Jaramillo v. Jaramillo*, the New Mexico Supreme Court not only considered both the majority time parent's right to travel and the state's concerns in protecting the best interests of the child, but also the minority time parent's right to maintain close association and frequent contact with the child.⁴⁴ In *Jaramillo*, the parents had joint legal custody and the mother had "physical custody" of the child.⁴⁵ The mother requested to move with the child to New Hampshire because of new employment and to be closer to her family.⁴⁶ The trial

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* (noting that no Colorado court has held that the best interests of the child are a compelling state interest that obviates the need to balance the competing constitutional rights of parents).

³⁹ *Id.* at 148.

⁴⁰ *Id.* at 147.

⁴¹ *See id.* at 148.

⁴² *Fredman*, 960 So.2d at 57–59; *Baxendale*, 878 N.E.2d at 1259 ("In short, we agree with the recent well-reasoned opinion of the Colorado Supreme Court that the trial court is to balance these considerations.").

⁴³ *Jaramillo*, 823 P.2d at 304–06.

⁴⁴ *Id.*

⁴⁵ *Id.* at 301. The court defined "physical custody" as meaning the parent in which the child resides "more than half the time." *Id.* at 304.

⁴⁶ *Id.* at 302.

court applied a presumption in favor of a custodial parent's relocation and granted the mother's move to New Hampshire.⁴⁷ After the New Mexico Court of Appeals reversed and remanded the case for a new determination of the best interest of the child based on a presumption against the move, the New Mexico Supreme Court reviewed the case.⁴⁸ The New Mexico Supreme Court determined that a parent wishing to relocate should not be burdened by an adverse presumption because it "unconstitutionally impairs the relocating parent's right to travel."⁴⁹ It also determined that the non-primary parent should not be burdened with a presumption in the relocating parent's favor, because the resisting parent has a fundamental liberty interest in parenting.⁵⁰ Instead, the New Mexico Supreme Court concluded that:

[N]either parent will have the burden to show that relocation of the child with the removing parent will be in or contrary to the child's best interests. Each party will have the burden to persuade the court that the new custody arrangement or parenting plan proposed by him or her should be adopted by the court, but that party's failure to carry this burden will only mean that the court remains free to adopt the arrangement or plan that it determines best promotes the child's interests.⁵¹

The *Jamarillo* court found that although the best interests of the child are of primary importance in making this determination, these interests alone do not automatically overcome the constitutional rights of the parents, which must be weighed against each other in the best interest analysis.⁵² The Maryland Court of Special Appeals has directly adopted the *Jamarillo* court's balancing test for a parent's right to travel.⁵³

C. *Best Interest of Child is Controlling State Interest*

The appellate courts of Minnesota, Idaho, West Virginia, Alabama, Arizona, Kansas, Rhode Island, New Jersey, Nevada, Montana, Massachusetts, and Washington all recognize that a parent's right to travel is a fundamental right protected by the United States Constitution and should be protected when

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 305.

⁵⁰ *Id.* at 306.

⁵¹ *Id.* at 309.

⁵² *See id.*

⁵³ *Braun*, 750 A.2d at 635.

the parent desires to relocate.⁵⁴ However, these appellate courts found that the furtherance of the best interests of children may constitute a compelling state interest worthy of reasonable interference with a parent's right to travel.⁵⁵ In essence, these appellate courts still recognize and analyze a parent's right to travel, but these courts simply "elevate the child's welfare to a compelling state interest, thereby obviating the need to balance the parents' competing constitutional rights."⁵⁶

The Montana Supreme Court was one of the first courts to recognize and analyze a custodial parent's right to travel in the context of a relocation action.⁵⁷ In *In re Marriage of Cole*, the Montana Supreme Court announced for the first time that the United States Constitution protects the custodial parent's right to interstate travel and such a right is clearly implicated when the custodial parent desires to relocate with his or her child.⁵⁸ However, the *Cole* court also noted that "[w]e believe that furtherance of the best interest of a child, by assuring the maximum opportunities for the love, guidance and support of both natural parents, may constitute a compelling state interest worthy of reasonable interference with the right to travel interstate."⁵⁹ The *Cole* court concluded its analysis with a word of caution, stating that "any interference with this fundamental right must be made cautiously, and may only be made in furtherance of the best interest of the child."⁶⁰

In these state appellate courts, placement of the burden of proof to demonstrate whether the relocation is in the best interest of the child plays a factor in determining the weight the court places upon the parent's right to

⁵⁴ See *Everett*, 660 So.2d at 601–02; *Pollock*, 889 P.2d at 635 ("The competing rights at the heart of this case are the Mother's right to travel and the Father's right to maintain a meaningful relationship with his child. These rights must be adjusted in accordance with the best interests of the child."); *Bartosz*, 197 P.3d at 322–24; *Carlson*, 661 P.2d at 836; *Mason*, 850 N.E.2d at 521 (holding the right of parent to relocate with child is subject to the State's power to promote child's best interests); *LaChapelle*, 607 N.W.2d at 163; *In re Marriage of Thorner*, 190 P.3d 1063, 1068–69 (Mont. 2008); *Reel*, 60 P.3d at 482–84; *Murnane*, 552 A.2d at 198; *Momb*, 130 P.3d at 412–14; *Africano*, 837 A.2d at 724; *Rowsey*, 329 S.E.2d at 61 ("The paramountcy of child welfare may, however, supersede the right to travel.").

⁵⁵ See, e.g., *In re Marriage of Cole*, 729 P.2d at 1280 ("We believe that furtherance of the best interests of a child, by assuring the maximum opportunities for the love, guidance and support of both natural parents, may constitute a compelling state interest worthy of reasonable interference with the right to travel interstate.").

⁵⁶ *In re Marriage of Ciesluk*, 113 P.3d at 144 (citing *LaChapelle*, 607 N.W.2d at 163).

⁵⁷ *In re Marriage of Cole*, 729 P.2d at 1280.

⁵⁸ *Id.* (citing *Shapiro*, 394 U.S. at 634, *overruled on other grounds by Edelman*, 415 U.S. at 671).

⁵⁹ *Id.* (citing *Ziegler v. Ziegler*, 691 P.2d 773 (Idaho 1984)).

⁶⁰ *Id.*

travel.⁶¹ When a court places this burden on the non-moving parent, the parent must necessarily provide sufficient proof that a travel restriction is, in fact, in the best interest of the child in order to sufficiently defeat the custodial parent's right to travel.⁶² Whereas, in states where the custodial parent must bear the burden of demonstrating that the relocation is in the best interest of the child, the parent's right to travel is even more encumbered because the custodial parent begins on unequal footing in an attempt to enforce his or her constitutional right to travel.⁶³

D. Non-Custodial Parent's Right to Visitation is Controlling

In Illinois, New Jersey, and North Dakota, appellate courts have found that the protection of the non-custodial parent's right to visitation would justify a compelling governmental interest to restrict the custodial parent's right to travel.⁶⁴ These jurisdictions hold that the non-custodial parent's right to visitation with the child is a compelling state interest, thereby precluding the court's need to balance such right against the custodial parent's right to travel.⁶⁵ These jurisdictions, in particular, appear to be guided by a general principle that the well-being of the minor child is often dependent upon maintaining a loving and supportive relationship with the non-custodial parent.⁶⁶ In determining that the non-custodial parent's right to visitation is a compelling state interest, the North Dakota Supreme Court, in *McRae v. Carbno*, recognized this relationship interest, stating that "in our state, there is a legally recognizable right of visitation between a child and the noncustodial parent which is considered to be in the best

⁶¹ Of these aforementioned states, Minnesota, Washington, and West Virginia place the burden on the non-moving parent to demonstrate that the best interest of the child requires that the child not be removed from the state, whereas Alabama, Arizona, Idaho, and New Jersey require the moving custodial parent to demonstrate the move is in the child's best interest. Kansas, Nevada, Rhode Island and Montana do not place a burden on either parent. See *supra* notes 2–4.

⁶² See *In re Marriage of Cole*, 729 P.2d at 1280.

⁶³ See *Jaramillo*, 823 P.2d at 307 (quoting *Stanley v. Illinois*, 405 U.S. 645, 656–57 (1972)) ("[Placement of burdens in relocation cases] needlessly risks running roughshod over the important interests of both parent and child."). But see *Bartosz*, 197 P.3d 310 (stating that placing the burden on the moving parent to show that it is in the best interest of the child to relocate is not tantamount to placing a presumption against relocation). See also Theresa Glennon, *Still Partners?: Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 124 (2007) ("Legal tests favoring the relocating parent often, but not always, resulted in more favorable decisions for the relocating parent.").

⁶⁴ See *In re Marriage of Manuele*, 438 N.E.2d at 695; *Murnane*, 552 A.2d at 198 (finding a compelling state interest is "the visitation rights of the noncustodial parent and the interest of the child in maintaining a close relationship with that parent"); *McRae*, 404 N.W.2d at 509–10.

⁶⁵ See, e.g., *In re Marriage of Manuele*, 438 N.E.2d at 695 ("[A] person's right to travel may be restricted if done for the promotion of a compelling government interest. Here, the protection of petitioner's rights of visitation would justify a reasonable residential restriction as a condition of respondent's custody of the children.").

⁶⁶ See, e.g., *Baures v. Lewis*, 770 A.2d 214, 223–33 (N.J. 2001).

interests of the child.”⁶⁷ The *McRae* court also found that placing a burden upon the custodial parent to relocate with the child did not unnecessarily interfere with the custodial parent’s right to travel.⁶⁸ In justifying this presumption in favor of the non-custodial parent, the *McRae* court stated:

The statutory recognition of visitation rights between a child and the noncustodial parent is consistent with placing the burden upon the custodial parent to show that moving the child to another state is in the child’s best interest. We conclude that there is no presumption that a custodial parent’s decision to change the child’s residence to another state is in the child’s best interests. We are unpersuaded that it would be consistent with our statutes or otherwise appropriate to adopt such a presumption, and we refuse to do so.⁶⁹

Although these appellate courts recognize the right to travel in the context of relocation cases, these courts found that a non-custodial parent’s right to visitation with his or her child is a compelling state interest, which can trump the custodial parent’s right to travel. These courts further find no harm in placing the burden on the moving parent to show it is in the child’s best interest to move with the custodial parent.⁷⁰

E. Custodial Parent’s Right to Travel Not Implicated in Relocation

The Texas Court of Appeals has held that removal cases do not implicate a parent’s right to travel because the custodial parent is never actually prohibited from outright travel.⁷¹ Rather, the parent is only prohibited from traveling with the child.⁷² In *In re C.R.O.*, the parents were divorced in Georgia, where the mother was awarded primary custody of the two minor children.⁷³ A few months later, the mother remarried and moved to Fort Bend County, Texas to

⁶⁷ *McRae*, 404 N.W.2d at 509.

⁶⁸ *See id.*

⁶⁹ *Id.* at 509–10 (citation omitted).

⁷⁰ Each of the three states place the burden to prove the relocation is in the child’s best interest upon the moving custodial parent. *See* 750 ILL. COMP. STAT. § 5/609(a) (2008); *Baures*, 770 A.2d at 218; *Maynard v. McNett*, 710 N.W.2d 369, 371 (N.D. 2006).

⁷¹ *In re C.R.O.*, 96 S.W.3d 442, 452 (Tex. App. 2002); *Bates v. Texar*, 81 S.W.3d 411, 435–36 (Tex. Ct. App. 2002); *Lenz v. Lenz*, 40 S.W.3d 111, 118 (Tex. App. 2000), *rev’d on other grounds*, 79 S.W.3d 10 (Tex. 2002).

⁷² *See, e.g., Lenz*, 40 S.W.3d at 118 (holding because the domicile restriction is only upon the child, and not the custodial mother, the mother is free to travel anywhere she desires and her right to travel is unabridged).

⁷³ 96 S.W.3d at 445.

live with her new husband. The father moved to Florida to begin a new job.⁷⁴ Approximately five years after moving to Texas, the mother notified the father of her intent to relocate with their two children to Hawaii so her new husband could take a position with a substantial pay increase.⁷⁵ The father filed a motion requesting the children's domicile be restricted to Fort Bend County.⁷⁶ After filing his motion, the father rented an apartment in Fort Bend County, quit his job in Florida and began working in Texas.⁷⁷ The 387th District Court in Fort Bend County, Texas granted the father's motion and restricted the children's domicile to "Fort Bend County and the contiguous counties so long as [the father] continues to reside in that area."⁷⁸ The mother appealed, arguing *inter alia*, that the trial court's order violated her constitutionally protected right to travel.⁷⁹ However, the Texas Court of Appeals dismissed the mother's argument and upheld the district court's domicile restriction, stating that "[t]he domicile restriction imposed by the trial court applied only to the children and did not affect [the mother's] ability to exercise any of the aforementioned rights."⁸⁰

The Michigan Court of Appeals has also refused to analyze a custodial parent's right to travel.⁸¹ In the unpublished decision of *Beaton v. Beaton*, the mother appealed a trial court's order of joint physical custody which required the children be enrolled in the Marysville School District.⁸² The mother contended that a number of provisions within the court's order violated her constitutional right to travel, including the court's provision that the children must be kept in the Marysville School District. The court summarily found that a parent's right to travel was not worth analyzing, stating "given the compelling interest of Michigan in the 'best interest of the children,' as they are affected by the dissolution of their parents' marriage . . . we are aware of no characterization of a constitutional 'right to travel' that would enable such a right to prevail over a judicial 'best interests' determination."⁸³ Similarly, in *Clapper v. Clapper*, the Pennsylvania Superior Court found the custodial parent's right to travel did not warrant analysis when determining the parent's ability to relocate and concentrated solely on the best interests of the child.⁸⁴

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 445–46.

⁷⁸ *Id.* at 446.

⁷⁹ *Id.* at 452.

⁸⁰ *Id.*

⁸¹ *Beaton v. Beaton*, No. 202753, 1998 WL 1993003, at *4 (Mich. Ct. App. Feb. 3, 1998).

⁸² *Id.* at *1.

⁸³ *Id.* at *4.

⁸⁴ 578 A.2d at 21.

In *Lane v. Schenck*, the custodial mother notified the non-custodial father that she was planning to relocate with the children from Vermont to Iowa to attend law school.⁸⁵ The father moved the Caledonia Family Court to change the custodial arrangement to one which would prohibit the mother from relocating with the children.⁸⁶ The court responded to the father's motion by prohibiting the mother to relocate any further than a drive of "four hours one way" from the father.⁸⁷ The mother appealed, arguing, *inter alia*, that the trial court's order, which conditioned her right to continued custody on the requirement she remain within a four hour drive from the father's residence, violated her constitutionally protected right to travel.⁸⁸ The Vermont Supreme Court reversed the Caledonia Family Court's decision, thus allowing the mother to relocate to Iowa.⁸⁹ However, the Vermont Supreme Court dismissed the mother's constitutional right to travel argument, stating:

We do not view the issue as falling solely within the right to travel, since either party is free to move wherever the party wants. The issue actually involves a determination of the proper parental custodian, given the best interests of the children. While freedom of movement from state to state is implicated, it is unnecessary to elevate the issue presented here to a constitutional dimension. Where a parent lives in relation to the other parent is just one factor of many to be considered in formulating a custody decision. Certainly, the visiting parent could not defeat the custodial parent's rights and responsibilities by asserting a constitutional right to travel.⁹⁰

In essence, the Vermont Supreme Court has ruled it unnecessary to perform a constitutional analysis of a parent's right to travel, because the best interest of the child is the paramount issue before the court in a relocation case.

Perhaps the most troubling relocation analysis comes from the Louisiana Court of Appeals.⁹¹ In *Bezou v. Bezou*, the custodial mother left the state of Louisiana with her children to take a position as an attorney in Washington, D.C.⁹² The Civil District Court for the Parish of Orleans modified the custody arrangement, awarding custody of the youngest of the two children to the father

⁸⁵ 614 A.2d at 787.

⁸⁶ *Id.* at 787–88.

⁸⁷ *Id.* at 788.

⁸⁸ *Id.* at 789.

⁸⁹ *Id.* at 789–92.

⁹⁰ *Id.* at 789.

⁹¹ 436 So. 2d 592 (La. Ct. App. 1983).

⁹² *Id.* at 593.

still residing in Louisiana.⁹³ At trial, the mother argued that custody modification based on her relocation would interfere with her right to travel.⁹⁴ In the trial court's order, the judge stated the following:

She accuses this court of "placing a chill on her constitutional right to travel." She does not accept the notion that she placed a chill on her right to travel when she bore and started to raise two children. She does not want this court to restrict her legal right to travel. She does not realize that her right to travel, though not legally, was from a practical point of view restricted when she chose to play the role of mother years ago.⁹⁵

Upon examination of the record, the Court of Appeals of Louisiana found no abuse of discretion by the trial judge, and ignored the constitutional right to travel issue entirely.⁹⁶

II. ANALYSIS OF OTHER COMPETING RIGHTS AND INTERESTS

There are a plethora of reasons given by courts when justifying the restriction on a custodial parent's ability to relocate with his or her child. However, the underlying cause behind each justification is safeguarding the welfare of the child.⁹⁷ Therefore, almost every relocation case is couched in terms of whether or not the move is in the child's best interest.⁹⁸ In large part, courts have found two reasons to justify a majority of restrictions on custodial parent's relocation: (1) it is the best interest of the child to live within the particular state, and (2) the move detrimentally affects the non-custodial parent's visitation rights.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Anne L. Spitzer, *Moving and Storage of Postdivorce Children: Relocation, The Constitution and the Courts*, 1985 ARIZ. ST. L.J. 1, 25 n.195 (1985) (quoting *Bezou v. Bezou*, No. 81-11606 (C.D.C. Orleans June 3, 1983)).

⁹⁶ *Id.* (citing *Bezou*, 436 So. 2d at 593).

⁹⁷ Edward Sivin, *Residence Restrictions on Custodial Parents: Implications for the Right to Travel*, 12 RUTGERS L.J. 341, 350 (1981).

⁹⁸ *See, e.g.*, *Thomas v. Thomas*, 739 A.2d 206 (Pa. Super. Ct. 1999) (remanding a case because the trial court failed to make sufficient findings regarding whether the custodial parent's proposed move would be in the child's best interest).

A. *State's Interest in Protecting Welfare of the Child by Maintaining Child Within Jurisdiction*

Several jurisdictions have made both judicial and legislative policy stating it is generally best to keep minor children within the state.⁹⁹ To further this policy, several states place a burden on a custodial parent to prove the relocation is in the best interest of the child before the parent can relocate outside the state.¹⁰⁰ Additionally, every state except Michigan requires the custodial parent request permission before relocating outside the state with the child.¹⁰¹ The United States Supreme Court has held that a state has the “right” and the “duty” to protect its minor children.¹⁰² Federal courts agree, finding that “a state seeks to further a legitimate state interest when it sets out to protect the welfare of its citizens of tender age.”¹⁰³

Courts often justify, in part, that denying a custodial parent’s petition to relocate on the basis of maintaining the child within the state allows the state to protect the child and assists the court in exercising its jurisdiction over the child.¹⁰⁴ However, the fallacy behind this logic is simple: no state can claim that another state could not equally protect the child.¹⁰⁵ In reality, a state’s interest in keeping the child within the state is based upon two overriding issues: (1) the antiquated concerns of parental kidnapping and parental forum shopping, and (2) protecting the visitation rights of the non-custodial parent.

Residential restrictions on the custodial parent have historically been justified as necessary to enforce the home state’s custody decree.¹⁰⁶ There was traditionally great concern that if a custodial parent was allowed to move, the custodial parent would petition the court of the new state and nullify the former state’s order.¹⁰⁷

⁹⁹ See, e.g., *Vanderzee v. Vanderzee*, 380 N.W.2d 310, 311 (Neb. 1986) (“Generally, the best policy in divorce cases is to keep minor children within the jurisdiction, but the welfare of the child is the paramount consideration.”).

¹⁰⁰ See *supra* note 3.

¹⁰¹ See *supra* note 6.

¹⁰² *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

¹⁰³ *Alsager v. District Court*, 406 F. Supp. 10, 22 (S.D. Iowa 1975), *aff’d in part*, 545 F.2d 1137 (8th Cir. 1976).

¹⁰⁴ *Murnane v. Murnane*, 552 A.2d 194, 198 (N.J. Super. Ct. App. Div. 1989).

¹⁰⁵ *LaFrance*, *supra* note 7, at 137.

¹⁰⁶ *Sivin*, *supra* note 97, at 351.

¹⁰⁷ See, e.g., *Stuessi v. Stuessi*, 307 S.W.2d 380, 381 (Mo. Ct. App. 1957) (“Generally speaking, it is against the policy of the law to permit the removal of a minor child to another jurisdiction, due principally to the fact that upon entry of a decree of divorce, the child becomes the ward of the court, and that upon its removal to another state, any subsequent order made pursuant to the court’s continuing jurisdiction may be difficult, if not impossible, of enforcement.”).

However, this concern is outdated. All fifty states, the District of Columbia, and the U.S. Virgin Islands have adopted some form of the Uniform Child Custody Jurisdiction Act (UCCJA), first promulgated in 1968.¹⁰⁸ In 1997, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in an effort to rectify shortcomings perceived in the UCCJA.¹⁰⁹ To date, forty-six states, along with the District of Columbia and the U.S. Virgin Islands, have adopted the UCCJEA.¹¹⁰ Both the UCCJA and the UCCJEA provide that a state has jurisdiction to make an initial custody determination if it is the home state of the child on the date of the commencement of the proceedings for the past six months, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from the state but a parent or person acting as a parent continues to live the state.¹¹¹ Furthermore, with only a few exceptions, both the UCCJA and the UCCJEA do not allow a state court to modify a child custody determination made by a court of another state, unless the other state court acquiesces.¹¹²

Further justifying the containment of minor children within the state is the concern about parental kidnapping. However, on December 20, 1980, Congress enacted the Parental Kidnapping Prevention Act of 1980. Section 8 of the Act provides for recognition and enforcement of out-of-state custody decrees and limits a court's ability to modify such decrees.¹¹³ The combined results of the Parental Kidnapping Prevention Act and the UCCJA / UCCJEA are that child custody decrees are enforceable in sister states, and courts are severely limited in their ability to modify those decrees. Thus, the purpose of maintaining and enforcing decrees is no longer a compelling reason for imposing residential restrictions on custodial parents.

¹⁰⁸ UNIF. CHILD CUSTODY JURISDICTION ACT (1968) [hereinafter UCCJA]; see also Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. REV. 301, 302 (1999); David Carl Minneman, Annotation, *Construction and Operation of Uniform Child Custody Jurisdiction and Enforcement Act*, 100 A.L.R. 5th 1, § 2 (2002).

¹⁰⁹ UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT (1997) [hereinafter UCCJEA]. See also *In re McCoy*, 52 S.W.3d 297, 302 (Tex. App. 2001).

¹¹⁰ Uniform Law Commissioners: The National Conference of Commissioners on Uniform State Laws, A Few Facts About The Uniform Child Custody Jurisdiction & Enforcement Act, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uccjea.asp (last visited Nov. 11, 2009); UCCJEA Adoptions, <http://www.nccusl.org/nccusl/docs/UCCJEAadoptions.pdf> (last visited Nov. 11, 2009) lists states that have adopted the Uniform Act.

¹¹¹ UCCJA § 3; UCCJEA § 201.

¹¹² UCCJA § 14; UCCJEA § 203.

¹¹³ Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, §§ 6–10, 94 Stat. 3568–73 (1980) (codified in scattered sections of 28, 42 U.S.C. (2006)).

In relocation cases, it is evident from each court's rhetoric that they are protecting the state's interest in the child's welfare. However, courts only act when the non-custodial parent opposes the custodial parent's proposed relocation. Hence, the reality is that the state is often attempting to act as the agent of the non-custodial parent.¹¹⁴ Such is the case, for instance, in *Murnane v. Murnane*, where the custodial mother argued the trial court's prohibition against her move to Orlando, Florida violated her constitutional right to travel.¹¹⁵ At the time of the divorce, the mother lived in Pennsylvania and the non-custodial father lived in New Jersey, where the parties' homes were approximately forty miles from each other.¹¹⁶ The mother subsequently sought permission of the court to move to Florida with the child. In rejecting the mother's argument that her right to travel was infringed by restricting her from moving to Florida, the New Jersey Superior Court stated:

In a case such as the present one, the State has a strong interest in properly adjudicating custody in order to assure the welfare of a minor. If the two parties claiming custody each proposes to live in a different jurisdiction, the court is bound to take that fact into consideration. If the court has adjudicated custody on the assumption of residence within New Jersey so as to protect, among other things, the visitation rights of the noncustodial parent and the interest of the child in maintaining a close relationship with that parent, the court must necessarily have the right to prevent the custodial parent from thereafter moving the child to a location whose distance would thwart the interests of the child and of the noncustodial parent.¹¹⁷

Clearly, the *Murnane* court found it permissible to act as an agent for the non-custodial parent. However, only the non-custodial parent has a legal right to visitation with his or her child, as the state itself should have no interest in visitation rights. To hold otherwise would allow the state to act as an agent for the non-custodial parent and find that the state's interests are adverse to the custodial parent. The state's interest should only be adverse to that of a parent's in cases when the parent's actions or inactions are causing harm to the welfare of the child.¹¹⁸ Therefore, without any demonstration of endangerment to the child, a

¹¹⁴ LaFrance, *supra* note 7, at 91.

¹¹⁵ 552 A.2d at 198.

¹¹⁶ *Id.* at 196.

¹¹⁷ *Id.* at 198.

¹¹⁸ See *In re A.I.*, 825 N.E.2d 798, 804 (Ind. Ct. App. 2005) (stating that the traditional right of a parent to establish a home and raise his or her children is protected by the Fourteenth Amendment of the U.S. Constitution; this right can only be interfered upon by the state to protect the child from endangerment).

state itself would *not* have a compelling interest to prohibit the custodial parent from relocating outside of the state and, thus, could not inhibit the parent's right to travel.

B. Visitation Rights of Non-Custodial Parent

A custodial parent's right to travel is not the sole constitutional right involved in a relocation case.¹¹⁹ The United States Supreme Court has held that parenting is a fundamental right that cannot be significantly diminished or abrogated without a compelling state interest.¹²⁰ The right of parents to control the upbringing of their children was first acknowledged by the United States Supreme Court in 1923 in *Meyer v. Nebraska*.¹²¹ Some courts have found that the non-custodial parent has an equally important right to the care and control of the child as the custodial parent, and such right should be included when considering whether to allow the custodial parent to relocate with the minor child.¹²² However, the constitutional protections of parental rights are likely inapplicable in a dispute between two natural parents.¹²³ For instance, in *Arnold v. Arnold*, the father argued that the trial court violated the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution when he was awarded 102 days a year in parenting time with his children during divorce proceedings.¹²⁴ Specifically, the father claimed the unequal physical placement of his children deprived him of a fundamental liberty interest in equal participation in the raising of his children.¹²⁵ In rejecting the father's constitutional argument, the Wisconsin Court of Appeals held that a parent's fundamental right to the care and custody of his or her children is inapplicable to a dispute between two natural parents after a divorce.¹²⁶

¹¹⁹ David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1474–84 (2006).

¹²⁰ Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345, 1351 (2005) (citing several United States Supreme Court cases, including *Troxel v. Granville*, 530 U.S. 57 (2000)).

¹²¹ 262 U.S. 390, 401 (1923).

¹²² See *In re Marriage of Ciesluk*, 113 P.3d 135, 142 (Colo. 2005) (citing *Troxel*, 530 U.S. at 65 (“The liberty interest at issue in this case—interest of the parents in the care, custody, and control of their children—is perhaps the oldest fundamental liberty interest recognized by this Court.”)).

¹²³ *Meyer*, *supra* note 119, at 1478.

¹²⁴ 679 N.W.2d 296, 298 (Wis. Ct. App. 2004).

¹²⁵ *Id.*

¹²⁶ *Id.* at 299; see also *McDermott v. Dougherty*, 869 A.2d 75, 808–09 (Md. 2005); *In re R.A.*, 891 A.2d 564, 576 (N.H. 2005); *Griffin v. Griffin*, 581 S.E.2d 899, 902 (Va. Ct. App. 2003); *Jacobs v. Jacobs*, 507 A.2d 596, 599 (Me. 1986).

A parent's right to visitation with his or her minor child is "considered natural, inherent, and arising from the very fact of parenthood."¹²⁷ However, so far, no United States Supreme Court case has recognized visitation as a fundamental interest of non-custodial parents entitling them to substantial due process.¹²⁸ Although not considered a constitutional right, courts have consistently found that a non-custodial parent has a "right" to visitation with his or her child.¹²⁹ In particular, courts have often allowed or disallowed a custodial parent's request to relocate on the basis of whether or not the non-custodial parent could maintain a "meaningful" relationship with his or her child after relocation.¹³⁰ Furthermore, at least one state court has held that a non-custodial parent has a "constitutionally protected 'inherent right' to a meaningful relationship with his children."¹³¹

Although courts have found that the non-custodial parent has a right to visitation with his or her child, these same courts have found that maintaining existing visitation patterns should not be the sole justification precluding a custodial parent's relocation.¹³² Perhaps no court has laid out the difficulties involved in relocations cases better than in *Gruber v. Gruber*, where the Pennsylvania Superior Court stated:

¹²⁷ Ayelet Blechet-Prigat, *Rethinking Visitation: From a Parental to Relational Right*, 16 DUKE J. GENDER L. & POL'Y 1, 3 (2009) (citing *In re Marriage of L.R.*, 559 N.E.2d 779, 789 (Ill. App. Ct. 1990)); accord *Chandler v. Bishop*, 702 A.2d 813, 817–18 (N.H. 1997).

¹²⁸ Blechet-Prigat, *supra* note 127, at 3.

¹²⁹ Elizabeth Weiss, *Nonparent Visitation Rights v. Family Autonomy: An Abridgment of Parents' Constitutional Rights?*, 10 SETON HALL CONST. L.J. 1085, 1092–97 (2000); see, e.g., *Murnane*, 552 A.2d at 198 (finding that the visitation rights of the noncustodial parent and the interest of the child in maintaining a close relationship with that parent can trump a custodial parent's constitutional right to travel and relocate to another state with the minor child).

¹³⁰ See, e.g., *Farnsworth v. Farnsworth*, 597 N.W.2d 592, 601 (1999) (allowing a mother to move from Omaha to Denver, a distance of over 500 miles, because a reasonable schedule allowed the father to maintain a meaningful relationship with the child even though the father had never missed any of his visitation and he spent time with the child throughout the year equal to approximately one-half of all the days in the year); *Stout v. Stout*, 560 N.W.2d 903, 919 (N.D. 1997) (finding that moving from North Dakota to Arkansas still allowed for a father to have a meaningful relationship with his child); *Tropea v. Tropea*, 665 N.E.2d 145, 149 (N.Y. 1996) (allowing a mother to move 2 1/2 hours away because it would still allow the father to have "meaningful access" to his son); *Baldwin v. Baldwin*, 710 A.2d 610, 614 (Pa. Super. Ct. 1998) (not allowing a mother to move from Pennsylvania to South Carolina because such move "could very well thwart the development of a healthy relationship between [the child] and her father"); see also *In re Marriage of Leyda*, 355 N.W.2d 862, 866 (Iowa 1984) ("[The Iowa Supreme Court] has long recognized the need for a child of divorce to maintain meaningful relations with both parents.").

¹³¹ *Schutz v. Schutz*, 581 So.2d 1290, 1293 (Fla. 1991).

¹³² See *Hicks v. Hicks*, 388 N.W.2d 510, 515 (1986) (holding a reduction in visitation does not necessarily preclude a custodial parent from relocating for a legitimate reason); see also *Auge v. Auge*, 334 N.W.2d 393, 398 (Minn. 1983); *D'Onofrio v. D'Onofrio*, 365 A.2d 27, 30 (N.J. 1976).

“Every parent has the right to develop a good relationship with the child, and every child has the right to develop a good relationship with both parents.” The task of this court is to sacrifice the non-custodial parent’s interest as little as possible in the face of the competing and often compelling interest of a custodial parent who seeks a better life in another geographical location.¹³³

While no court has found that a non-custodial parent has a constitutionally protected right to a set visitation schedule, the Florida Supreme Court has held a non-custodial parent *does* have a constitutionally protected right to a meaningful relationship with his or her child.¹³⁴ Moreover, in the 1978 case *Quillon v. Walcott*, the United States Supreme Court found the “relationship between parent and child is constitutionally protected.”¹³⁵ In *Franz v. United States*, the United States Court of Appeals for the District of Columbia Circuit held that a father’s right to the companionship of his son is constitutionally protected.¹³⁶ Furthermore, some state courts have held that a parent has a constitutionally protected liberty interest to visitation with his or her children.¹³⁷ The bottom line is that visitation rights provide the only means for a non-custodial parent to maintain a meaningful relationship with a child.¹³⁸ Given this truth, it must be acknowledged by courts that a non-custodial parent has a constitutional right to visitation with his or her child, absent a compelling reason to deny such right.¹³⁹

Generally, a parent’s ability to visit his or her child is limited only by the welfare of the child.¹⁴⁰ Furthermore, most states hold as a matter of policy, it is generally in the child’s best interest for the child to have regular contact with

¹³³ 583 A.2d 434, 438 (Pa. Super. Ct. 1990) (citations omitted); Blechet-Prigat, *supra* note 127, at 5 (“Visitation provides the only means to enable a non-custodial parent to maintain a relationship with the child. In essence, denying visitation is tantamount to terminating the parental rights of the non-custodial parent. Nevertheless, the constitutionality of parent’s visitation rights remains debatable . . .”).

¹³⁴ *Schultz*, 581 So.2d at 1293.

¹³⁵ 434 U.S. 246, 255 (1978).

¹³⁶ 707 F.2d 582, 594–602 (D.C. Cir. 1983).

¹³⁷ *In re C.J.*, 729 A.2d 89, 94 (Pa. Super. Ct. 1999) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

¹³⁸ Blechet-Prigat, *supra* note 127, at 5.

¹³⁹ *See, e.g.*, *Hoversten v. Superior Court*, 74 Cal. App. 4th 636, 641 (Cal. Ct. App. 1999) (“[T]he relationship between parent and child is so basic to the human equation as to be considered a fundamental right, and that relationship should be recognized and protected by all of society, no less jailers. Interference with that right should only be justified by some compelling necessity, i.e., a parent dangerously abusing a child . . .”) (quoting *In re Smith* 112 Cal. App. 3d 956, 968–69 (Cal. Ct. App. 1980)).

¹⁴⁰ *See, e.g.*, *McAlister v. Shaver*, 633 So.2d 494, 496 (Fla. Dist. Ct. App. 1994) (“Visitation with a child should never be denied as long as the visiting parent conducts himself or herself, while in the presence of the child, in a manner which will not adversely affect the child’s morals

both parents.¹⁴¹ However, there can be no assertion that a non-custodial parent is constitutionally entitled to a given schedule of visitation. Moreover, in situations of relocation by the custodial parent, courts have often noted the flexibility of a non-custodial parent's visitation when allowing the custodial parent to relocate.¹⁴² For example, the Wisconsin Supreme Court stated:

Visitation is a flexible arrangement that the parents and the court can modify as circumstances require without undermining the relationship of the child and the noncustodial parent. . . . Visitation arrangements depend on circumstances, such as the proximity of the child's residence to that of the noncustodial parent and the needs of the child. In short, visitation arrangements reflect a variety of approaches to encouraging a relationship between the child and the noncustodial parent—they do not reflect the existence of a noncustodial parent's inviolate right to any particular arrangement.¹⁴³

Therefore, a non-custodial parent's right to visitation must be balanced with the custodial parent's right to travel. In doing so, the court must consider the possible adverse effect of elimination or curtailment of a child's association with non-custodial parent; in this context, reasonableness of an alternative visitation arrangement should be assessed and the fact that visitation by non-custodial parent will be changed to his or her disadvantage cannot be controlling.¹⁴⁴

C. *Best Interest of the Child*

The “best interest” doctrine “affects the placement and disposition of children in divorce, custody, visitation, adoption, the death of a parent, illegitimacy proceedings, abuse proceedings, neglect proceedings, crime, economics, and all forms of child protective services.”¹⁴⁵ In custodial relocation cases, the cardinal

or welfare.”). *But see* Dawn D. v. Superior Court of Riverside County, 952 P.2d 1139, 1148 (Cal. 1998) (holding that the biological father of a child born to woman married to another man did not have a constitutionally protected liberty interest in being allowed to form a parental relationship with his child).

¹⁴¹ *See, e.g.*, Mize v. Mize, 621 So.2d 417, 419 (Fla. 1993) (stating the law seeks to assure that the child have frequent and continuing contact with both parents after a divorce).

¹⁴² *See, e.g.*, Taylor v. Taylor, 849 S.W.2d 319, 331 (Tenn. 1993) (noting that a non-custodial parent is not entitled to a finite parenting schedule); *see also* Rosenthal v. Maney, 745 N.E.2d 350, 357–58 (Mass. Ct. App. 2001) (recognizing that a court must realize that after divorce a child's subsequent relationship with both parents can never be the same as before the divorce and that a child's quality of life is provided in large part by the custodial parent).

¹⁴³ Long v. Long, 381 N.W.2d 350, 356 (Wis. 1986) (citation omitted).

¹⁴⁴ *See Rosenthal*, 745 N.E.2d at 361.

¹⁴⁵ Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 337 (2008).

consideration for the courts is almost always exclusively based upon what the court determines is in the “best interest” of the child.¹⁴⁶ Even though the best interest of the child is the central issue in custodial parent relocations, there is a divergence among courts and commentators as to whether or not the “best interest of the child” standard constitutes a compelling state interest to interfere with a parent’s constitutional rights.

The United States Supreme Court proclaimed it the “highest order” of a state to protect the interest of minor children.¹⁴⁷ Furthermore, several courts and commentators contend that the best interest of the child is a compelling state interest which may infringe upon the fundamental liberties afforded to parents under the Constitution.¹⁴⁸ Specifically, in the context of custodial parent relocation, several courts have found that the best interest of a child is a compelling state interest justifying infringement upon a parent’s constitutional right to travel.¹⁴⁹

However, there are a growing number of courts and commentators who opine that the child’s best interest standard is not a compelling state interest that may infringe upon a parent’s constitutionally protected rights.¹⁵⁰ One commentator has argued: “The ‘best interests’ of the child is simply too broad and amorphous a concept to qualify categorically as a compelling state interest.”¹⁵¹ In *In re Ciesluk*, a parental relocation case, the Colorado Supreme Court held that “[s]hort of preventing harm to the child, the standard of ‘best interest of the child’ is insufficient to serve as a compelling state interest overruling a parent’s fundamental rights.”¹⁵² The *Ciesluk* court gave the following as a reason for its holding:

¹⁴⁶ See, e.g., *Weaver v. Kelly*, 18 S.W.3d 525, 528 (Mo. Ct. App. 2005) (“In determining whether to grant the custodial parent’s motion to remove a child from the state, the paramount concern is the best interest of the child.”).

¹⁴⁷ *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

¹⁴⁸ See, e.g., *In re Joseph*, 416 N.E.2d 857, 858 (Ind. Ct. App. 1981); *McGuire v. Morrison*, 964 P.2d 966, 968 (Okla. Civ. App. 1998); *Michael v. Hertzler*, 900 P.2d 1144, 1148 (Wyo. 1995); *Brinig*, *supra* note 120, at 1358.

¹⁴⁹ See *Everett v. Everett*, 660 So.2d 599, 601–02 (Ala. Civ. App. 1995); *Pollock v. Pollock*, 889 P.2d 633, 635 (Ariz. Ct. App. 1995); *Bartosz v. Jones*, 197 P.3d 310, 322 (Idaho 2008); *Carlson v. Carlson*, 661 P.2d 833, 836 (Kan. Ct. App. 1983); *Braun v. Headey*, 750 A.2d 624, 632 (Md. Ct. Spec. App. 2000); *Mason v. Coleman*, 850 N.E.2d 513, 521 (Mass. 2006); *LaChapelle v. Mitten*, 607 N.W.2d 151, 164 (Minn. Ct. App. 2001); *In re Marriage of Cole*, 729 P.2d 1276, 1280 (Mont. 1986); *Murnane*, 552 A.2d at 198; *Jaramillo v. Jaramillo*, 823 P.2d 299, 309 (N.M. 1991); *Africano v. Castelli*, 837 A.2d 721, 730 (R.I. 2003); *Rowsey v. Rowsey*, 329 S.E.2d 57, 61 (W. Va. 1985).

¹⁵⁰ See, e.g., *In re Marriage of Ciesluk*, 113 P.3d 135, 144–45 (Colo. 2005); *In re Parentage of C.A.M.A.*, 109 P.3d 405, 410 (Wash. 2005); *Mizrahi v. Cannon*, 867 A.2d 490, 497 (N.J. Super. Ct. App. Div. 2005); *LaFrance*, *supra* note 7, at 135–47; *Meyer*, *supra* note 119, at 1490.

¹⁵¹ *Meyer*, *supra* note 119, at 1490.

¹⁵² 113 P.3d at 144 (quoting *In re Parentage of C.A.M.A.*, 109 P.3d at 410).

[F]rom a practical standpoint, adopting the best interests of the child as a compelling state interest to the exclusion of balancing the parents' rights could potentially make divorced parents captives of Colorado. This is because a parent's ability to relocate would become subject to the changing views of social scientists and other experts who hold strong, but conflicting, philosophical positions as to the theoretical "best interests of the child."¹⁵³

Moreover, it is questionable that a court can truly determine what is in a child's best interest with any level of precision. Perhaps the Tennessee Supreme Court put it best, stating that "[t]he goal of facilitating the child's best interest is certainly a noble one, but the notion that courts can ever know with any certainty what will truly be in a given child's best future interest is perhaps unrealistic."¹⁵⁴

There are strong arguments that the best interests of a child is insufficient as a compelling state interest which may infringe upon a parent's constitutionally protected liberty interests. Nonetheless, upon closer examination, the only reasonable conclusion is that the best interest of children standard is a compelling state interest. Children are our nation's most protected resource, and, thus, protecting the best interests of a child must certainly be a compelling state interest.¹⁵⁵ Certainly, if a custodial parent's move greatly affected the child's physical or mental well-being, there would be a compelling state interest to infringe upon a custodial parent's constitutionally protected right to travel.¹⁵⁶ However, courts must recognize that prohibiting a custodial parent's relocation purely upon the best interest standard "can potentially mean nothing more than a marginal advantage over closely matched alternatives."¹⁵⁷ Thus, in cases involving

¹⁵³ *Id.* at 145; John C. Duncan, Jr., *The Ultimate Best Interests of the Child Enures From Parental Reinforcement: The Journey of Family Integrity*, 83 NEB. L. REV. 1240, 1254 (2005) ("The illusive 'best interest of the child' has become a cliché. Without a concrete legal definition, it has been subject to overuse and misuse. Too often, the 'best interest of the child' is determined by dispassionate third parties relying on empirical data gathered by social scientists."); Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 193 (2005).

¹⁵⁴ *Taylor*, 849 S.W.2d at 326.

¹⁵⁵ *See, e.g., Palmore*, 466 U.S. at 433 ("The State, of course, has a duty of the highest order to protect the interests of minor children . . ."); *Lehr v. Robertson*, 463 U.S. 248, 257 (1983) ("[T]he rights of the parents are a counterpart to the responsibilities they have assumed [for the minor children]."); *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981) ("[T]he State has an urgent interest in the welfare of the child . . ."); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (holding that when the interests of the parent and the child conflict to the point where the child is threatened with harm, the state has an obligation to protect the welfare of the child).

¹⁵⁶ *See, e.g., Dozier v. Dozier*, 334 P.2d 957, 959 (Cal. Ct. App. 1959) (prohibiting a change in residence because the medical evidence showing that the child's asthmatic condition would be exacerbated by the proposed move).

¹⁵⁷ *Meyer, supra* note 119, at 1490.

a custodial parent's proposed move, a court must balance the best interests of the child with the custodial parent's right to travel and the non-custodial parent's visitation rights, in determining whether or not the custodial parent can relocate with the child. To do otherwise, is not only unwise, it is a potential violation of the custodial parent's constitutionally protected right to travel.¹⁵⁸

III. UNCONSTITUTIONAL INFRINGEMENT ON CUSTODIAL PARENT'S RIGHT TO TRAVEL

It is well-recognized that a United States citizen has the right to travel between states.¹⁵⁹ Moreover, this right to travel is a constitutionally protected fundamental right.¹⁶⁰ As a fundamental right, the right to travel interstate can only be restricted in support of a compelling state interest.¹⁶¹ The only two compelling state interests worthy of restricting a custodial parent's constitutional right to travel are the best interests of the minor child and the non-custodial parent's visitation rights.¹⁶² Furthermore, even if the travel restriction is only placed upon the child, the parent's right to travel is affected because "a legal rule that operates to chill the exercise of the right, absent a sufficient state interest to do so, is as impermissible as one that bans exercise of the right altogether."¹⁶³ Despite the fact that the United States Supreme Court has repeatedly articulated citizens' constitutionally protected right to travel, trial courts are still reluctant to consider the parent's right to travel in the context of geographical relocations. The legal issues of parental relocation are perpetual, as one in six Americans move at least once every year and the "average American" makes 11.7 moves in a lifetime.¹⁶⁴ As noted by several courts, the simple truth is that mobility is a fact of life.¹⁶⁵ Therefore, it is paramount that the issue of a parent's right to travel is raised in relocation cases, and that such right is balanced with the compelling state interests of the child's best interest and the non-custodial parent's visitation rights.

¹⁵⁸ Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 499–50 (1990) (stating that the best interest standard, without more, "risks unwise results, stimulates litigation, permits manipulation and abuse, and allows a level of judicial discretion that is difficult to reconcile with an historic commitment to the rule of law").

¹⁵⁹ *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969), *overruled by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

¹⁶⁰ *Saenz v. Roe*, 526 U.S. 489, 501–02 (1999).

¹⁶¹ *Shapiro*, 394 U.S. at 634.

¹⁶² *See supra* Part II.

¹⁶³ *Jaramillo v. Jaramillo*, 823 P.2d 299, 306 (N.M. 1991) (citing *Shapiro*, 394 U.S. at 631).

¹⁶⁴ *In re Marriage of Ciesluk*, 113 P.3d 135, 147 (Colo. 2005) (citations omitted).

¹⁶⁵ *See, e.g., In re Marriage of Day*, 314 N.W.2d 416, 420 (Iowa 1982); *In re Marriage of Bard*, 603 S.W.2d 108, 109 (Mo. Ct. App. 1980); *Marez v. Marez*, 350 N.W.2d 531, 534 (Neb. 1984).

A custodial parent's request to relocate often means moving hundreds, if not thousands, of miles away from the non-custodial parent.¹⁶⁶ However, there are several cases where the custodial parent wishes to move a much lesser distance from the non-custodial parent. Although the custodial parent's right to travel has not been given as a basis, several courts and state legislatures have enacted rulings and laws indicating that a parent should be allowed to move with the child a small distance away from the non-custodial parent. This is certainly because these judges and legislatures have recognized that the best interest of the child and the non-custodial parent's visitation rights are not substantially affected by relatively minor relocations.¹⁶⁷ For instance, the South Dakota Supreme Court in *Fossum v. Fossum* found that a custodial mother's seventy mile intrastate relocation was not a substantial change of circumstance warranting a modification of custody.¹⁶⁸ The court upheld the well-reasoned proposition of law that "insignificant geographical changes generally will not constitute a substantial change in circumstances."¹⁶⁹ Legislatures in Alabama, Arizona, Iowa, Louisiana, Maine, Michigan, Tennessee, Utah, and Wisconsin have passed laws allowing custodial parents to relocate without permission of the court. These laws usually require the relocation be in-state and within a certain distance from the non-custodial parent's residence, ranging from 60 miles to 150 miles.¹⁷⁰

In *Curtis v. Curtis*, the custodial mother's proposed move was out-of-state from Fall City, Nebraska, where the father resided, to Big Lake, Missouri.¹⁷¹ Given the close proximity of the two cities, the proposed out-of-state move only placed the child 17.6 miles away from the non-custodial father.¹⁷² The mother's move to Big Lake would still allow the child "to go to the same school, and [the father's] visitation schedule [would] not change."¹⁷³ Furthermore, the mother also volunteered to provide transportation of the child to and from the father's residence, so that the father would not have to drive to Missouri to pick up the child.¹⁷⁴ However, in Nebraska, the threshold question when deciding parental

¹⁶⁶ See, e.g., *Curtis v. Curtis*, 759 N.W.2d 269, 273 (Neb. Ct. App. 2008) ("[M]ost removal cases involve the custodial parent asking to move hundreds or thousands of miles away from his or her current location.").

¹⁶⁷ See Ericka Domarew, *Michigan Keeps it Within Limits: Relocating No More than "100 Miles"*, 20 T.M. COOLEY L. REV. 547, 563-65 (2003) (stating that Michigan legislators believed a distance of less than 100 miles allowed a non-custodial parent to have access to his or her children).

¹⁶⁸ 545 N.W.2d 828, 832 (S.D. 1996); see also *Howe v. Howe*, 471 N.W.2d 902 (Iowa 1991) (finding that 42-mile move within the state of Iowa could not be a basis for a material change of circumstance warranting the modification of custody).

¹⁶⁹ *Fossum*, 545 N.W.2d at 832.

¹⁷⁰ See *supra* note 6 and accompanying text.

¹⁷¹ *Curtis*, 759 N.W.2d at 271.

¹⁷² *Id.* at 274.

¹⁷³ *Id.* at 272.

¹⁷⁴ *Id.* at 272.

relocation cases is “whether the parent wishing to remove the child from the state has a legitimate reason for leaving.”¹⁷⁵ The mother’s reason for moving was to live with her long-time boyfriend who was building a new home in Big Lake, a fact which would clearly enhance the living conditions for her and her child.¹⁷⁶ The appellate court noted that Nebraska has never found the desire to live with a boyfriend to be a “legitimate reason” to relocate from the state.¹⁷⁷ The appellate court, in reversing the trial court’s decision to allow the move, stated:

[The trial court] focused on the fact that the move to Missouri is less than 20 miles from Falls City. The short distance does present a unique removal case in that most removal cases involve the custodial parent asking to move hundreds or thousands of miles away from his or her current location. However, no matter the distance involved, we still must apply the well-established law and determine if [the mother] met her burden to demonstrate a legitimate reason for removing [the child] from Nebraska.

Under the circumstances revealed by the evidence in this case, we conclude that [the mother’s] desire to continue living with her current boyfriend is not a legitimate reason to remove [the child] from Nebraska.¹⁷⁸

The Nebraska Court of Appeals never considered the mother’s constitutionally protected right to travel when it prohibited her from moving a few miles out of state. Instead, the court relied on the mechanical, judicially created two-part test which first required the mother to prove a legitimate reason to leave the state.¹⁷⁹ In *Curtis*, the father’s visitation would have remained the same if the mother had moved 17.6 miles away. There was also no showing of any harm upon the child due to the mother’s proposed move of 17.6 miles.¹⁸⁰ Therefore, there was no

¹⁷⁵ *Id.* at 273 (citing *Farnsworth*, 597 N.W.2d at 592).

¹⁷⁶ *Curtis*, 759 N.W.2d at 273.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Jafari v. Jafari*, 284 N.W.2d 554, 555 (Neb. 1979) (announcing for the first time that a custodial parent must have a “legitimate reason” to be allowed to relocate out of the state with minor children). Subsequently, in *Farnsworth*, 597 N.W.2d at 598–601, the Nebraska Supreme Court created the current two-part test that a custodial parent must meet before being allowed to relocate out of the state with the minor children. This test first requires the custodial parent satisfy to the court that he or she has a legitimate reason for leaving the state. *Id.* at 598. If the custodial parent meets this initial threshold, then the custodial parent must also prove that removing the child from Nebraska is in the child’s best interest. *Id.* at 599–601.

¹⁸⁰ *Curtis*, 759 N.W.2d at 272. The only evidence the father presented regarding why he did not want the child to relocate was because “all of [the child’s] family and friends are in Falls City, as well as her school, and because Falls City is where she was born and has always lived.” *Id.*

compelling state interest for the Nebraska Court of Appeals to prohibit the mother from moving and the court's ruling was a clear violation of her constitutionally protected right to travel.

Statutory and judicially created tests, like that found in *Curtis*, require a custodial parent to *first* prove a legitimate reason to relocate *before* analyzing the child's best interest or the effect upon the non-custodial parent's visitation. For instance, in *Curtis*, the Nebraska Court of Appeals summarily dismissed the mother's petition to move 17.6 miles without even analyzing the compelling state interests of protecting the best interest of the child or the non-custodial parent's visitation.¹⁸¹ Because maintaining the child in the jurisdiction is not a compelling state interest which may infringe upon the parent's right to travel, there is no need for a parent to first prove a "legitimate reason" to move out-of-state.¹⁸² Nebraska, Indiana, New Hampshire, Connecticut, and Massachusetts all have unconstitutional statutory or judicially created tests, which unnecessarily impinge upon the custodial parent's right to travel when analyzing a custodial parent's desire to relocate with the minor children.¹⁸³ These tests are unconstitutional because they allow a court to deny the custodial parent's ability to relocate for reasons other than the best interest of the child or the effect of the move on the non-custodial parent's visitation.¹⁸⁴ Simply, a court cannot prohibit a custodial

¹⁸¹ *Id.* at 274 ("Because [the mother] failed to satisfy the initial threshold of showing a legitimate reason to move, it is not necessary for this court to determine if it is in [the child's] best interest to move to Missouri with [the mother].").

¹⁸² See *supra* notes 99–118 and accompanying text.

¹⁸³ IND. CODE § 31-17-2.2-5 (2008) (stating the best interests of the children are only analyzed after the "relocating individual has [met] the burden of proof that the proposed relocation is made in good faith and for a legitimate reason"); N.H. REV. STAT. ANN. § 461-A:12 (2005) (stating that the parent seeking permission to relocate must first demonstrate by a preponderance of the evidence that the "relocation is for a legitimate purpose" and that the "proposed location is reasonable in light of that purpose" before the trial court focuses on the best interests of the children); Ireland v. Ireland, 717 A.2d 676, 681 (Conn. 1998) (finding that the custodial parent first bears the burden of proving that the move is for a "legitimate purpose" before the best interests of the child regarding the move are analyzed); Rosenthal v. Maney, 745 N.E.2d 350, 358 (Mass. Ct. App. 2001) (the first consideration before allowing a relocation is whether there is a "good reason" for the move); Rosloniec v. Rosloniec, 773 N.W.2d 174, 176 (Neb. Ct. App. 2009) ("In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state."). *But see* Bretherton v. Bretherton, 805 A.2d 766, 775 (Conn. App. Ct. 2002) ("[T]he temptation [is] to end the inquiry when a custodial parent intends to relocate without a legitimate purpose. That procedural stumbling block, however, would thwart the overarching statutory mandate of the best interest of the child.").

¹⁸⁴ See, e.g., Wild v. Wild, 737 N.W.2d 882, 898 (2007) (finding that whether or not the parent has a legitimate reason to leave the state is a "threshold matter for the court to determine prior to evaluating the best interest factor"); Vagts v. Vagts, No. A-02-1055, 2004 WL 235040, at *5 (Neb. Ct. App. Feb. 10, 2004) (not proceeding to conduct a best interest analysis since the trial court found the custodial parent did not have a legitimate reason for seeking to remove the children from the jurisdiction).

parent from relocating and thus infringe upon his or her right to travel without a compelling state interest, with the only two compelling state interests at issue being the best interest of a child and the non-custodial parent's visitation rights.¹⁸⁵ Therefore, requiring a parent to prove a legitimate reason to relocate before other compelling state interests are analyzed is blatantly unconstitutional.

Requiring a compelling state interest to prohibit a custodial parent from relocating with the child, as well as striking down these "legitimate reason" tests, is in harmony with the very purpose of the right to travel. This purpose encompasses the right to "migrate, resettle, find a new job, and start a new life."¹⁸⁶ Consequently, a custodial parent has the constitutional right to move for the simple purpose of wanting to have a new beginning. Such was the case in *Tomasko v. Dubuc*, where the custodial mother wanted to start a new life with her new husband; she purchased a cattle ranch in Montana and requested the court allow her to relocate.¹⁸⁷ However, the Superior Court for the Northern Judicial District of Hillsborough found the mother's desire to start a cattle ranch in Montana was not a "legitimate reason" to leave the state of New Hampshire with her child.¹⁸⁸ Rulings like these are simply unconstitutional because a parent is only allowed to leave a state if they meet certain pre-determined legitimate reasons for moving, meaning a parent's right to travel may be infringed upon without a compelling state interest.¹⁸⁹

Opposition to minor parental relocations should be put to an end. This can be achieved by a court balancing a parent's right to travel with the child's best interest and the non-custodial parent's visitation rights. There have been several appellate decisions demonstrating ridiculous attempts to prevent the custodial parent from relocating short distances. For instance, there has been an attempt to prevent the custodial mother from moving the children out of the marital home.¹⁹⁰ In

¹⁸⁵ See *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 253 (1974); *supra* Part II. But see *Watt v. Watt*, 971 P.2d 608, 614–16 (Wyo. 1999), where the Wyoming Supreme Court went too far by making the right to travel absolute without considering the other compelling state interests of the child's best interest and the non-custodial parent's visitation rights.

¹⁸⁶ *Shapiro*, 394 U.S. at 629, *overruled by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

¹⁸⁷ 761 A.2d 407, 408 (N.H. 2000).

¹⁸⁸ *Id.* at 410.

¹⁸⁹ See, e.g., *Ireland*, 717 A.2d at 682 (Conn. 1998) (citing examples of legitimate reasons to relocate as being close to family, for health reasons, to protect the safety of the family, to pursue employment or education opportunities, or to be with one's spouse); *Gerber*, 407 N.W.2d at 503 ("Before a court will permit removal of a child from the jurisdiction, generally, a custodial parent must establish that such removal is in the best interests of the child and must demonstrate that departure from the jurisdiction is the reasonably necessary result of the custodial parent's occupation, a factually supported and reasonable expectation of improvement in the career or occupation of the custodial parent, or required by the custodial parent's remarriage.").

¹⁹⁰ *Middlekauf v. Middlekauf*, 390 A.2d 1202, 1205 (N.J. Super. Ct. App. Div. 1978) (father attempted to restrict the mother and the children to the former marital residence in Wyckoff, New Jersey).

Pennsylvania, a non-custodial father tried to preclude the custodial mother from moving twenty-five miles within the same county.¹⁹¹ In other states, there are two reported cases of non-custodial fathers suing custodial mothers over relocations of four miles.¹⁹² Finally, there is a reported case in which a non-custodial father attempted to prevent the custodial mother from moving to a location only 3.3 miles further from the father's residence in New Castle, Pennsylvania.¹⁹³ In such cases where the geographical distance is not far enough to substantially alter the relationship between the child and the non-custodial parent, the custodial parent's constitutional right to travel should clearly prevail. Furthermore, in these minor relocation cases, the court should also admonish the opposing non-custodial parent by forcing the opposing parent to pay the custodial parent's attorney fees and costs for such an unreasonable opposition to the constitutional move.

CONCLUSION

Absent from a clear majority of courts' analysis in relocation cases is the consideration of the custodial parent's right to travel.¹⁹⁴ However, the United States Supreme Court has clearly recognized a citizen's constitutionally protected right to travel, which includes the right to travel among states in order to "migrate, resettle, find a new job, and start a new life."¹⁹⁵ Citizens do not "check their constitutional rights at the door" the day they become parents, thus, constitutional rights should be considered in relocation cases.¹⁹⁶

Courts often exclusively decide relocation cases based on the elusive best interest of a child standard.¹⁹⁷ Some of these courts also infuse the "legitimate reason" test in the relocation analysis, usually finding it is a prerequisite that the parent prove by a preponderance of the evidence that the parent has a legitimate reason to leave the state *before* the court will even indulge in best interest of the child analysis.¹⁹⁸ However, courts must recognize they are ill-equipped to determine the best interest of a child with any level of certainty.¹⁹⁹ Courts must also recognize

¹⁹¹ Zoccole v. Zoccole, 751 A.2d 248, 249 (Pa. Super. Ct. 2000).

¹⁹² Kellen v. Kellen, 367 N.W.2d 648, 649 (Minn. Ct. App. 1985); Commonwealth *ex rel.* Steiner v. Steiner, 390 A.2d 1326, 1327 (Pa. Super. Ct. 1978).

¹⁹³ Slagle v. Slagle, 1 Pa. D. & C.5th 44, 48 (Pa. Com. Pl. 2006).

¹⁹⁴ See *supra* note 15 and accompanying text.

¹⁹⁵ See *supra* notes 17–21 and accompanying text.

¹⁹⁶ See *supra* Part III.

¹⁹⁷ See *supra* note 16 and accompanying text.

¹⁹⁸ See *supra* note 5 and accompanying text.

¹⁹⁹ See *supra* notes 152–56, 159 and accompanying text.

that these “legitimate reason” tests are an unconstitutional infringement upon the custodial parent’s right to travel, because keeping the child within the state by itself is not a compelling state interest which may infringe upon the custodial parent’s right to travel.²⁰⁰ By analyzing a custodial parent’s right to travel in the context of relocations—recognizing that the only compelling state interests which may infringe upon the parent’s right to travel are the best interest of the child and the non-custodial parent’s visitation rights—absurd results like that found in *Curtis* would be avoided.²⁰¹ Furthermore, by recognizing a custodial parent’s right to travel, more certainty would arise in relocation cases because a custodial parent would only be prohibited from relocating upon a showing that the move would either harm the child or substantially alter the relationship between the child and the non-custodial parent.²⁰²

²⁰⁰ See *supra* Parts II(A) and III and accompanying text.

²⁰¹ See *supra* Part III.

²⁰² See *supra* Parts II(B)–(C) and III.

CASE NOTE

BUSINESS LAW—The *Hall Street* Hangover: Recovering and Discovering Avenues for Review of Arbitration Awards; *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008)

*Codie Henderson**

INTRODUCTION

In 1925, Congress enacted the Federal Arbitration Act (FAA) under its Commerce Clause power in order to make arbitration clauses just as enforceable as other common contract provisions.¹ The FAA has sixteen sections, but only three will be important for this study: §§ 9, 10, and 11. When the FAA is the controlling law, § 9 allows a party who is victorious in arbitration to seek judicial enforcement of the arbitration award within one year of the arbitrator's decision.² When entering judgment on the award, "the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections ten and eleven."³ Section 10 allows a court to vacate an award if the arbitrator made one of four errors.⁴ Whether these four errors, coupled with three opportunities in § 11 to modify or correct an award, are the exclusive instances when a court may alter an arbitration decision became the epicenter of *Hall Street Associates v. Mattel, Inc.*⁵

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¹ Cynthia A. Murray, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 76 ST. JOHN'S L. REV. 633, 635 (2002) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270–71 (1995)).

² Brief for Respondent-Appellee at 3, *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (No. 06-989), 2007 WL 2731409 [hereinafter Respondent].

³ 9 U.S.C. § 9 (2006).

⁴ 9 U.S.C. § 10 (2006). A court may vacate an arbitration award under the FAA in four instances:

(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id.

⁵ 128 S. Ct. at 1401.

The dispute that gave rise to this litigation emerged from a simple rental agreement between landlord (Hall Street) and tenant (Mattel).⁶ The lease stipulated the tenant must indemnify the landlord for any costs resulting from a violation of environmental law.⁷ In 1998, testing discovered high levels of contamination in the leased property's well water.⁸ When Mattel attempted to vacate the property and terminate the lease, Hall Street sought indemnification from Mattel for contamination clean up costs.⁹ At trial, Mattel emerged victorious on the termination issue but agreed to arbitrate the indemnification claim.¹⁰ Again, the result was for Mattel.¹¹

The parties' arbitration agreement gave the district court power to vacate the arbitration award if the arbitrator committed legal error.¹² Legal error, however, is not an established standard of review within the FAA.¹³ Thus, this was a nonstatutory—contract-based—ground for review.¹⁴ Twice the district court vacated or modified the arbitration award based on party motions by invoking the parties' nonstatutory standard of review.¹⁵ On appeal, the United States Court of Appeals for the Ninth Circuit declared the award should be confirmed unless there were grounds for vacating or modifying the award in §§ 10 and 11 of the FAA.¹⁶

The United States Supreme Court agreed with the Ninth Circuit, holding that §§ 10 and 11 of the FAA provide the exclusive grounds for modifying or vacating an arbitration award.¹⁷ Ostensibly, this decision precludes nonstatutory

⁶ *Id.* at 1400.

⁷ *Id.* The lease stated Mattel was also responsible for its predecessor's environmental violations. *Id.*

⁸ *Id.* The main contaminant that was the impetus of Mattel's environmental violation was trichloroethylene (TCE). *Id.* Mattel's predecessors, the GAF Corporation and Sawyers, Inc., used TCE as a degreaser until 1981. Respondent, *supra* note 2, at 4. They disposed of the degreaser waste through the use of a septic tank and a drain field, both of which were on the property. *Id.*

⁹ *Hall Street*, 128 S. Ct. at 1400. Arbitration was not the party's first choice. *Id.* They first attempted mediation, but when that failed the parties drafted an arbitration agreement. *Id.* The agreement was not a part of the original contract. *See id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1404–05.

¹⁴ *See id.* at 1400–01 (alluding to the dispute between FAA review standards and those based in contract).

¹⁵ Respondent, *supra* note 2, at 11–12.

¹⁶ *Hall Street*, 128 S. Ct. at 1401 (citing *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 994 (9th Cir. 2003)).

¹⁷ Alan Scott Rau, *Fear of Freedom*, 17 AM. REV. INT'L ARB. 469, 471–72 (2006).

grounds of review.¹⁸ However, despite appearances, *Hall Street* may not have completely eliminated opportunities for contract drafters to expand beyond the FAA.¹⁹

This case note argues the Supreme Court correctly decided *Hall Street* on the whole, but grounds for review—outside of the FAA—may still exist.²⁰ First, this note discusses why the decision is correct in light of the purposes of litigation and arbitration.²¹ Second, is an explanation of how this decision fulfills the historical goals of the FAA.²² Third, is a search for viable nonstatutory grounds of review in order to give practitioners a list courts may accept.²³ Finally, this note explores alternatives to using nonstatutory grounds of review for those who desire a method of appealing an arbitration award that does not tread near *Hall Street*.²⁴

BACKGROUND

Mere decades ago arbitration clauses were common only in contracts involving construction and labor agreements; however, today such clauses seem ubiquitous.²⁵ Early courts did not deem arbitration a suitable alternative to litigation until 1925.²⁶ These courts viewed arbitration as a threat to judicial power and often refused to acknowledge contractual agreements to arbitrate.²⁷ Courts used theories, such as the “revocability doctrine” to dismiss arbitration agreements on the rationale that arbitrators were partisans loyal only to the party who chose them.²⁸ Thus, by appearing concerned for justice, courts rationalized their hostility for arbitration by masking it in benevolence.²⁹ However, arbitration’s

¹⁸ Jon Polenberg & Quinn Smith, *Can Parties Play Games with Arbitration Awards? How Mattel May Put an End to Prolonged Gamesmanship*, 83 FLA. B.J. 36, 36 (2009).

¹⁹ See *infra* note 91 and accompanying text.

²⁰ See *infra* notes 89–94 and accompanying text.

²¹ See *infra* notes 95–120 and accompanying text.

²² See *infra* notes 121–30 and accompanying text.

²³ See *infra* notes 131–67 and accompanying text.

²⁴ See *infra* notes 168–75 and accompanying text.

²⁵ Kenneth F. Dunham, *Binding Arbitration and Specific Performance Under the FAA: Will This Marriage of Convenience Survive?*, 3 J. AM. ARB. 187, 188–89 (2004).

²⁶ Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration’s Finality Through Functional Analysis*, 37 GA. L. REV. 123, 137–38 (2002).

²⁷ *Id.*; see also *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 120–21 (1924) (noting courts previously declined to enforce arbitration agreements).

²⁸ Schmitz, *supra* note 26, at 138.

²⁹ *Id.*

potential as an expedient, cost-effective, and private means of dispute resolution soon caught on, and a reform movement spawned in the early 1900s.³⁰ The movement culminated with the passage of the FAA in 1925.³¹

The precursors to the FAA are found in the 1920 New York Act, which has been coined the “nation’s first ‘modern’ arbitration statute.”³² In fact, sections of the FAA came directly from the New York Act.³³ One of the hallmarks of the New York Act is that it advocated limited judicial review.³⁴ In contrast to the New York Act was the Illinois Arbitration Statute, preceding the New York Act by three years.³⁵ The 1917 Illinois statute allowed for broad judicial review and court interference when arbitration did occur.³⁶ During the reform movement eventually leading to the FAA, Congress recognized two conflicting approaches to judicial review.³⁷ On one hand, it could have chosen the Illinois model that sanctioned judicial interference in every step of the arbitration process, including review of awards.³⁸ Alternatively, it could have chosen the New York approach that buttressed the reform movement’s objective of creating a method of dispute resolution insulated from “judicial second-guessing.”³⁹ Congress settled on the New York tenet of limited review as its framework; however, which proposition the FAA stood for was not always clear to courts.⁴⁰

Up until *Hall Street*, many courts accepted nonstatutory standards of review for arbitration awards.⁴¹ These standards included review when an award was

³⁰ Brief for United States Council for International Business as Amicus Curiae Supporting Respondent at 6–7, *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (No. 06-989), 2007 WL 2707883 [hereinafter *International Business*].

³¹ *Id.*

³² *Id.* (citing IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION—NATIONALIZATION—INTERNATIONALIZATION* 34–37, 84–88 (Oxford Univ. Press 1992)).

³³ *Id.* at 8; see N.Y. LAW § 7511 (McKinney 1920).

³⁴ *International Business*, *supra* note 30, at 8.

³⁵ *Id.*; see 710 ILL. COMP. STAT. 5/12 (1917).

³⁶ *International Business*, *supra* note 30, at 8.

³⁷ Bradley T. King, “*Through Fault of Their Own*”—Applying Bonner Mall’s *Extraordinary Circumstances Test to Heightened Standard of Review Clauses*, 45 B.C. L. REV. 943, 955–56 (2004) (indicating the presence of two conflicting statutes).

³⁸ *Id.* (noting the Illinois statute conflicted with the New York Act’s limited review procedure).

³⁹ *Id.* at 956.

⁴⁰ See generally Stanley A. Leasure, *Arbitration After Hall Street v. Mattel: What Happens Next?*, 31 U. ARK. LITTLE ROCK L. REV. 273, 283 (2009). Prior to *Hall Street*, two inconsistent views of the FAA proliferated. *Id.* The Ninth and Tenth Circuits refused contractual expansion of review for arbitration awards while the First, Third, Fourth, Fifth, and Sixth Circuits approved expansion. *Id.* Thus, *Hall Street* can be viewed as the attempted resolution of the circuit splits and court confusion regarding FAA application. See *id.* at 288–97.

⁴¹ See Polenberg & Smith, *supra* note 18, at 36 (“[*Hall Street*] challenged *long-held notions* about the available standards of review governing arbitration awards.”) (emphasis added).

arbitrary and capricious, completely irrational, or when the arbitrator disregarded the essence of the party's contract.⁴² An award could also be overturned if it manifestly disregarded the law or violated public policy.⁴³ Many nonstatutory standards of review can be traced back to one United States Supreme Court case: *Wilko v. Swan*.⁴⁴ *Wilko* referenced the term "manifest disregard" of the law as a nonstatutory standard of review, but never accurately defined it.⁴⁵ This ambiguity left the door open for parties to create nonstatutory grounds for review while leaving courts in limbo regarding whether nonstatutory grounds could be upheld.⁴⁶

While many seized upon *Wilko's* vague "manifest disregard" of the law standard to validate nonstatutory standards of review, another more conservative line of thought developed foreshadowing the *Hall Street* decision.⁴⁷ In *Bowen v. Amoco Pipeline Co.*, the United States Court of Appeals for the Tenth Circuit stated its ability to review an arbitration award was extremely limited; in fact, the court believed it to be one of the narrowest review standards in the law.⁴⁸ The court

⁴² See, e.g., *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1134 (3d Cir. 1972) (noting an award may be set aside if it is completely irrational); *Van Horn v. Van Horn*, 393 F. Supp. 2d 730, 746 (N.D. Iowa 2005) (listing arbitrary and capricious as an accepted standard of review); *Evans Indus., Inc. v. Int'l Bus. Machs. Co.*, No. Civ.A. 01-0051, 2004 WL 241701, at *5 (E.D. La. Feb. 6, 2004) (recognizing an arbitration award can be vacated if it fails to draw its essence from the contract).

⁴³ See, e.g., *Sarofim v. Trust Co. of the W.*, 440 F.3d 213, 216 (5th Cir. 2006) (clarifying an arbitration award may be vacated when it is contrary to public policy); *Tanoma Mining Co. v. Local Union No. 1269*, 896 F.2d 745, 749 (3d Cir. 1990) (declaring "manifest disregard" of the law is an accepted standard of review).

⁴⁴ *Polenberg & Smith*, *supra* note 18, at 36 (citing *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953)).

⁴⁵ See 346 U.S. at 436–37.

⁴⁶ *Leasure*, *supra* note 40, at 283. Some amiable appellate courts believed expanded review was acceptable. *Id.* In *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 996 (5th Cir. 1995), the Fifth Circuit declared judicial review for errors of law would be permitted because arbitration, at its core, is a facet of contract where private parties' wishes should not be circumvented by a policy in favor of arbitration. See *Leasure*, *supra* note 40, at 289 (citing *Gateway*, 64 F.3d at 996). Moreover, the Fifth Circuit noted the FAA may not prevent parties from creating standards of review that fall outside of the FAA. *Id.* at 289–90 (quoting *Gateway*, 64 F.3d at 996). To do so would be contrary to the FAA's purpose of guaranteeing arbitration agreements are enforced as the parties agreed. See, e.g., *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001) (holding nonstatutory grounds for review of arbitration awards is in agreement with the purpose of the FAA). Courts reaching these decisions usually found a party's freedom to contract trumped limited review. *Leasure*, *supra* note 40, at 288. The First Circuit followed a similar line of thinking. See *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005) (noting that even if following the FAA provided a more efficient means of resolving disputes, enforcing party's agreements would still be more important).

⁴⁷ *Murray*, *supra* note 1, at 633.

⁴⁸ 254 F.3d 925, 932 (10th Cir. 2001) (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995)).

believed narrow review standards were essential if arbitration was to maintain its virtue as an economical and expeditious method of dispute resolution.⁴⁹ Staying steadfast in its belief, the Tenth Circuit declared, except for a few judicially created exceptions, the FAA provided the only grounds for review.⁵⁰ Support for the *Bowen* decision came from the court's belief that if review standards outside of the FAA were forced upon courts, private parties would be impermissibly modifying the judicial process.⁵¹ The court also based this conclusion on its recognition of a Supreme Court decision allowing parties to dictate how arbitration was administered, but precluding provisions requiring courts to review awards for defects not listed in the FAA.⁵²

The Tenth Circuit was not alone in its holding that the FAA provides the exclusive grounds for review of arbitration awards. In *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, the Ninth Circuit reached a similar conclusion.⁵³ Moreover, in similar fashion to the Supreme Court in *Hall Street*, the Ninth Circuit cited efficiency, flexibility, informality, and simplicity as determinative factors.⁵⁴ Thus, while one line of thinking advocated expanded judicial review by purporting to defend freedom of contract from attack, the other analyzed the repercussions of expanded review and reached a conclusion vindicated by *Hall Street*.⁵⁵

PRINCIPAL CASE

Hall Street Associates v. Mattel, Inc. presented the question of whether parties could draft an arbitration agreement allowing a court to review an arbitration award for errors of law.⁵⁶ However, in a broader sense, the question was whether the FAA provided the exclusive grounds for vacatur of an arbitration award, or

⁴⁹ *See id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 933.

⁵² *Leasure, supra* note 40, at 284 (citing *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989)).

⁵³ 341 F.3d 987, 994 (9th Cir. 2003) (“The [FAA] enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award. Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard.”).

⁵⁴ *Id.* at 998–1000.

⁵⁵ *See Leasure, supra* note 40, at 283. The development of nonstatutory standards of review began after *Wilko* and continued until *Hall Street* was decided. *See Polenberg & Smith, supra* note 18, at 36–37. This was also the period where different lines of thinking developed between the federal circuit courts necessitating the granting of certiorari by the United States Supreme Court. *See Leasure, supra* note 40, at 283.

⁵⁶ *Polenberg & Smith, supra* note 18, at 36; *see Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008).

whether a private party could contractually add review standards not contained in the FAA.⁵⁷

The original reason for filing suit in *Hall Street* bears little resemblance to the protracted case it became. Originally, the dispute centered on Mattel's ability to terminate a lease agreement and whether, upon termination, Mattel must indemnify Hall Street for violations of environmental law by previous tenants.⁵⁸ When litigation in the United States District Court for the District of Oregon failed to resolve the indemnification question, the parties resorted to arbitration.⁵⁹ The arbitration agreement provided that "the [c]ourt shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."⁶⁰ After arbitration rendered an award in favor of Mattel, Hall Street made a motion in district court to vacate or modify the award.⁶¹ The court invoked the standard of review contracted for by the parties and vacated the award.⁶² Citing *LaPine Technology Corp. v. Kyocera Corp.*, the court held parties can create nonstatutory grounds for review.⁶³ On remand, the arbitrator found for Hall Street.⁶⁴ Both parties then sought modification under the agreement's review standards; however, only interest calculations were changed.⁶⁵ Both parties then appealed to the Ninth Circuit.⁶⁶

The Ninth Circuit had recently overruled *LaPine* in *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*⁶⁷ As a result, Mattel altered its argument to

⁵⁷ *Hall Street*, 128 S. Ct. at 1400. Although one standard of review caused the controversy, the Court expanded the issue to consider the exclusivity of the FAA instead of focusing on the party's review standard specifically. *Id.* at 1401.

⁵⁸ *Id.* at 1400.

⁵⁹ *Id.* The parties also attempted to mediate the indemnification claim, however, when that too was unsuccessful they resorted to arbitration. *Id.*

⁶⁰ *Id.* at 1400–01.

⁶¹ *Id.* at 1401.

⁶² *Id.* The standard of review contracted for contained "errors of law," and it was on this basis the court remanded to the arbitrator. *Id.* The original contract provided for indemnification if either Mattel or its predecessors violated Oregon environmental law. *Id.* at 1400. The high levels of chemical contamination found in the property's well water violated the Oregon Drinking Water Quality Act; however, the arbitrator's original decision was that the water quality act was not applicable environmental law. *Id.* at 1401.

⁶³ 130 F.3d 884, 889 (9th Cir. 1997). *LaPine Tech.* was the first decision of three. See Leasure, *supra* note 40, at 286–88. In this case, the Ninth Circuit found expanded judicial review preferable; however, it later overruled this case in the third and final decision. *Id.*

⁶⁴ *Hall Street*, 128 S. Ct. at 1401. On remand, the arbitrator concluded the Oregon Drinking Water Quality Act was an environmental law. *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 341 F.3d 987, 1000 (9th Cir. 2003).

reflect the ruling and contended legal error was no longer an enforceable judicial review standard.⁶⁸ The Ninth Circuit then reversed in favor of Mattel.⁶⁹ The district court, on remand, found for Hall Street again and the Ninth Circuit again reversed.⁷⁰ The United States Supreme Court finally granted certiorari to ultimately resolve the issue.⁷¹

Majority Opinion

The Court reached its 6 to 3 decision by initially explaining that the FAA's purpose was to give arbitration agreements the same enforceability as other contract provisions.⁷² However, the Court acknowledged uncertainty as to what extent review standards for arbitration awards were also enforceable.⁷³ The resulting issue is typically whether grounds for vacating or modifying an award are limited or expansive.⁷⁴ With this in mind, the Court addressed Hall Street's efforts to demonstrate the FAA was not exclusive.⁷⁵ As expected, Hall Street focused on *Wilko* to establish the acceptance of nonstatutory grounds for review.⁷⁶ The Court, however, clarified that while *Wilko* may support the proposition that courts can expand judicial review when necessary, *Wilko* does not support an inference that private parties can do the same.⁷⁷ Moreover, a close reading of *Wilko* seems to reject general judicial review of awards.⁷⁸

⁶⁸ *Hall Street*, 128 S. Ct. at 1401.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 1402. Chief Justice Roberts and Justices Souter, Thomas, Ginsburg, Alito and Scalia, made up the majority. *Id.* at 1399. Justices Stevens and Breyer both filed dissenting opinions, while Justice Kennedy joined in Justice Stevens's dissent. *Id.*

⁷³ *Id.* at 1403 ("The Courts of Appeals have split over the exclusiveness of these statutory grounds when parties take the FAA shortcut to confirm, vacate, or modify an award, with some saying the recitations are exclusive, and others regarding them as mere threshold provisions open to expansion by agreement.").

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *Id.* (citing *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953)). Hall Street claimed that *Wilko* established "manifest disregard" of the law as grounds for judicial review. *Id.* Many courts believed *Wilko* stood for this proposition and Hall Street used these cases as ammunition for its argument. *See, e.g.,* *McCarthy v. Citigroup Global Mkts. Inc.*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003).

⁷⁷ *Hall Street*, 128 S. Ct. at 1404.

⁷⁸ *Id.* Hall Street purported that *Wilko* implicitly sanctioned standards of review outside of the FAA. Brief of Petitioner-Appellant at 13–14, *Hall Street*, 128 S. Ct. 1396 (No. 06-989), 2007 WL 2197585. However, while *Wilko* did use the term manifest disregard, the Court rejected the idea that it was a standard of review in federal courts. *Wilko*, 346 U.S. at 436–37. Thus, the Court in *Hall Street* failed to believe general review was permissible given the context and disapproval in *Wilko*. *Hall Street*, 128 S. Ct. at 1398–99.

Central to the Court's holding was its conclusion that the policy of enforcing arbitration agreements can only go as far as the textual elements of the FAA allow.⁷⁹ The Court was mindful of the enforcement policy but concluded the FAA text gives no hint of flexibility.⁸⁰ Specifically, the Court was persuaded by the FAA's provision declaring a court "must grant" an order confirming an arbitration "unless" review is warranted under §§ 10 through 11.⁸¹ Thus, any agreement allowing for expanded judicial review appeared at odds with the text of the FAA.⁸² The Court concluded this point by clarifying that parties should not fight the FAA text and instead should recognize a "national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."⁸³ The review standards, of course, were only those enumerated in §§ 10 through 11 of the FAA.⁸⁴

Dissenting Opinion

Justice Stevens filed a dissent, with which Justice Kennedy joined and Justice Breyer agreed.⁸⁵ The dissent concluded if the policy behind the FAA is truly to encourage enforcement of agreements to arbitrate then the clearly expressed intentions of the parties should be honored.⁸⁶ This point was highlighted when Justice Stevens declared the FAA should be a "shield meant to protect parties from hostile courts, not a sword with which to cut down parties' . . . agreements to arbitrate."⁸⁷ Moreover, if a subsidiary purpose of the FAA is to encourage use of arbitration then courts should not refuse to honor valid and negotiated arbitration agreements for fear of undermining this purpose.⁸⁸

ANALYSIS

In *Hall Street*, the United States Supreme Court correctly concluded that judicial review of arbitration awards should be limited to situations listed in the FAA.⁸⁹ Any other conclusion would undermine the fundamental qualities of

⁷⁹ *Hall Street*, 128 S. Ct. at 1405.

⁸⁰ *Id.*

⁸¹ *Id.* (quoting 9 U.S.C. § 9 (2000)).

⁸² *Id.* The Court also rejected an argument that the FAA was a default statute parties could use when the agreement did not provide the review standards. *Id.* The Court supplemented this conclusion by providing an example of what a flexible, default provision would look like. *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1408 (Stevens, J., dissenting).

⁸⁶ *Id.* at 1408–09. Justice Breyer's dissenting opinion merely cited the same points found in Justice Stevens's dissent. *See id.* at 1410 (Breyer, J., dissenting).

⁸⁷ *Id.* at 1409 (Stevens, J., dissenting).

⁸⁸ *Id.*

⁸⁹ *See supra* notes 20–22 and accompanying text.

arbitration, as well as blur the line between arbitration and litigation.⁹⁰ Although the Court reached the correct holding, the decision is not as decisive as it may appear at first blush. Late in the opinion, the Court declared that perhaps there could be other “more searching [grounds for] review based on authority outside the statute.”⁹¹ Thus, while *Hall Street* seems to limit judicial review to grounds listed in the FAA, it appears there is still opportunity to seek judicial review on a nonstatutory basis.

In reaching its decision, the United States Supreme Court concerned itself with whether letting parties expand the grounds for judicial review would make arbitration a prelude to litigation.⁹² If parties were able to contract for a court to review the award for any possible error occurring during arbitration, then judicial review would almost certainly follow arbitration as a means of escaping an unfavorable ruling.⁹³ However, it appears that not only would arbitration be a prelude to litigation, but the line between the two may become blurred, resulting in increased demand on courts and arbitrators alike.⁹⁴

Impacts of an Alternative Holding

If parties were free to weave a tapestry of various grounds for judicial review, courts would be forced to undergo a time consuming review of a case’s merits.⁹⁵ This could result in arbitration becoming the first stage of a trial and district courts becoming appellate divisions.⁹⁶ Aside from the obvious fact that docket loads could also increase, review of arbitration cases would be difficult due to the dissimilarity between litigation and arbitration.⁹⁷ As one commentator put it, “arbitration and litigation are fundamentally different games played according

⁹⁰ See *infra* notes 95–120 and accompanying text.

⁹¹ *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 (2008).

⁹² *Id.* at 1405.

⁹³ See David W. Rivkin & Eric P. Tuchmann, *Protecting Both the FAA and Party Autonomy: The Hall Street Decision*, 17 AM. REV. INT’L ARB. 537, 540–41 (2006).

⁹⁴ *Id.*

⁹⁵ *Id.*; see also Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT’L ARB. 147, 150 (1997) (postulating parties’ vast ability to shape the arbitration process decreases the need for judicial review, thus saving precious judicial resources).

⁹⁶ See Rivkin & Tuchmann, *supra* note 93, at 540–41. Making district courts a type of appellate court would be a burden, as the district courts’ traditional role is merely to affirm an arbitration award expediently. See *id.* at 541.

⁹⁷ International Business, *supra* note 30, at 17. Litigation has stricter rules of evidence and more rigid rules of procedure compared with arbitration. See Rivkin & Tuchmann, *supra* note 93, at 541. Because litigation and arbitration are so different, reviewing courts may have little idea from the record, if a record even exists, as to what actually occurred during arbitration. See Schmitz, *supra* note 26, at 192–95 (“[I]n most cases such [judicial] review [of arbitration awards] is awkward and unrealistic because the arbitration record and opinion will not be sufficient for a court’s substantive review.”).

to different rules.⁹⁸ Courts would be forced to reconstruct cases using rules they are unfamiliar with, possibly resulting in a skewed interpretation by the judge.⁹⁹ However, by limiting judicial review to certain grounds in the FAA, courts will be aware of what standard they are to use instead of being subject to any creative standard a party can fathom.¹⁰⁰

If any nonstatutory grounds for review were permissible, arbitrators, like courts, would also be forced into unfamiliar territory. For example, arbitrators may adopt stricter rules of evidence, hoping that if a party appealed the decision it would withstand judicial scrutiny.¹⁰¹ Arbitration's flexibility would be undermined by rigid procedure markedly like litigation, resulting in a prolonged dispute that contravenes the fundamental purpose of arbitration.¹⁰²

Congress's goal of making arbitration quick and cost effective would also be frustrated if the Court held in favor of Hall Street.¹⁰³ One of the principle features of arbitration is that the time needed to resolve a dispute is substantially shorter than litigation.¹⁰⁴ While cases awaiting trial may be prolonged for years, parties submitting to arbitration can often times have their case resolved within a month.¹⁰⁵

Shortening the time a dispute is pending should result in parties saving money.¹⁰⁶ The Supreme Court has previously recognized that arbitration is effective as a means of reducing the expenses of litigation usually associated with

⁹⁸ Schmitz, *supra* note 26, at 193.

⁹⁹ See International Business, *supra* note 30, at 17–18 (arguing courts will be substantially burdened if forced to use unfamiliar rules, reconstruct an arbitrator's finding of facts, and discern the arbitrator's legal reasoning years after arbitration took place).

¹⁰⁰ See Schmitz, *supra* note 26, at 190, 195 (noting expanded review would give the courts unexpected work and authority that was not specifically assigned to them by the legislature under the FAA).

¹⁰¹ Rivkin & Tuchmann, *supra* note 93, at 541 (declaring arbitrators would feel compelled to judicialize their procedures given the likelihood of judicial review).

¹⁰² *Id.*

¹⁰³ Brief for American Arbitration Association as Amicus Curiae Supporting Respondent at 8–9, *Hall Street*, 128 S. Ct. 1396 (No. 06-989), 2007 WL 2707884. One of the principle problems with typical litigation is the time it takes to get a case heard by the courts. Leon Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME L. REV. 182, 188–89 (1965–1966).

¹⁰⁴ Sarpy, *supra* note 103, at 188–89.

¹⁰⁵ *Id.*; see also Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 403 (2002) (noting statistics support the proposition that arbitration resolves disputes within a year while litigation averages two and one-half years).

¹⁰⁶ Sarpy, *supra* note 103, at 189. Lawyers' fees are often the most recognized savings, as the shorter the dispute, the less time clients are charged. *Id.* Private arbitration also has another advantage because it does not involve a public venue where resolving disputes becomes plagued by bailiff and

prolonged disputes.¹⁰⁷ Moreover, if the parties to a dispute are businesses, they can allocate funds to new business ventures that may have been saved to pay for an adverse judgment.¹⁰⁸

A further testament that the *Hall Street* decision is correct rests on the fact that arbitration is private, while litigation is not. Parties are able to resolve their dispute without subjecting themselves to the scrutiny of the public forum.¹⁰⁹ This is especially important if the parties are businesses. Businesses who are involved in trials that in rare instances become public spectacles risk alienating consumers and tarnishing their reputations.¹¹⁰ Arbitration allows these businesses—and their management—to discretely resolve a dispute, thereby limiting information released to the public.¹¹¹

A fundamental problem with judicial review on the whole is that judges have the opportunity to second guess arbitrators who are experts in their fields.¹¹² When chosen for their expertise, arbitrators bring with them knowledge of customs and standards specific to the field at issue.¹¹³ In a world that operates on increasingly specialized and technical language, expert arbitrators have become a necessity.¹¹⁴ More often than not, judges are not equipped with knowledge regarding engineering or construction, for example.¹¹⁵ However, an alternate holding in *Hall Street* would make these experts subservient to judges who do not possess the equivalent knowledge necessary to reach the best possible conclusion.¹¹⁶

Not to be ignored is the finality and certainty arbitration was designed to provide. One of the many goals of the FAA was to see that arbitration awards were final by protecting them from judicial interference.¹¹⁷ The FAA provides that

clerk fees. *Id.* Private arbitration comes at no cost to the public, thus, parties should expect a savings by eliminating the court fees. *Id.*; see also Wharton Poor, *Arbitration Under the Federal Statute*, 36 YALE L.J. 667, 676 (1927) (explaining a case which goes to trial may be prolonged by multiple appeals and reversals, ultimately resulting in costs exceeding the amount in dispute).

¹⁰⁷ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

¹⁰⁸ Sarpy, *supra* note 103, at 189.

¹⁰⁹ See Nickolas J. McGrath, *McCauley v. Halliburton Energy Services, Inc.: Treatment of a Motion to Stay Proceedings Pending an Arbitrability Appeal*, 83 DENV. U. L. REV. 793, 794 (2006).

¹¹⁰ Sarpy, *supra* note 103, at 189.

¹¹¹ See Schmitz, *supra* note 26, at 158.

¹¹² See *id.* at 161–62.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Gregg A. Paradise, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform*, 64 FORDHAM L. REV. 247, 254–55 (1995).

¹¹⁷ Rivkin & Tuchmann, *supra* note 93, at 538.

arbitrators will conduct the arbitration and weigh the merits of the case; courts will only step in to review the case when necessary according to §§ 9 through 11.¹¹⁸ Moreover, the statute's inflexible language, which declares a court "must" confirm an award unless grounds for vacatur or modification are established in §§ 10 and 11, is a testament that arbitration awards were to be final.¹¹⁹ Finally, arbitration has been described as an act which "settle[s] or end[s] disputes through final and binding third party determinations."¹²⁰ This distinguished arbitration as a separate process, not a mere prologue to litigation.

The Correct Decision in Light of Legislative History

The benefits of arbitration listed above are buttressed by the legislative history of the FAA. The FAA's drafters modeled it on sections of the New York Arbitration Act.¹²¹ Julius Cohen was the principle drafter of both the New York Act and the FAA.¹²² In 1924, during congressional hearings evaluating national adoption of the FAA, Cohen noted under the New York Act, courts vehemently supported arbitrators and the decisions they rendered.¹²³ Supporting the arbitrator also meant limiting judicial interference in the process.¹²⁴ Because Congress lifted sections of the FAA from the New York Act, it is logical that the meaning and purpose of the act transferred as well.¹²⁵ Thus, finality is an inherent goal of the FAA.¹²⁶ Cohen went on to express pride in participating in the FAA drafting, because it was a means to make "the commercial world less expensive and more expeditious."¹²⁷ Cohen's statements taken together with the known tenets of the New York Act

¹¹⁸ *Id.* (noting arbitrators are in charge of resolving the controversy, whereas, courts are only responsible for enforcing the final award).

¹¹⁹ *Id.* (quoting 9 U.S.C. §§ 9–11 (2000)).

¹²⁰ Schmitz, *supra* note 26, at 125.

¹²¹ King, *supra* note 37, at 955.

¹²² Respondent, *supra* note 2, at 29.

¹²³ *Id.* at 31 ("[Courts had] given the strongest support to the powers of the arbitrators thereunder and to the finality of their awards, and [had] refused to permit the invasion of technicalities in the application of the [Act] or the determination of rights under it." (quoting *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Senate and House Subcomms. of the Comms. on the Judiciary*, 68th Cong. 10, 40 (1924) [hereinafter 1924 Hearings])).

¹²⁴ *See id.* at 31–32.

¹²⁵ *Id.* at 31 ("In using the language of the New York Arbitration Act, Congress intended to adopt the settled meaning those terms had already acquired."); *see* Perkins v. Berger, 145 F.2d 856, 857 (D.C. Cir. 1944) (noting when Congress adopts a state statute, prior interpretation of that statute transfers as well); Hartford Accident & Indem. Co. v. Hoage, 85 F.2d 411, 413 (D.C. Cir. 1936) (clarifying when Congress borrows language from a state statute, the state's construction and understanding of that statute are deemed to transfer with the statute's text).

¹²⁶ *See* King, *supra* note 37, at 948.

¹²⁷ 1924 Hearings, *supra* note 123, at 10, 13.

demonstrate Congress purposely chose the New York Act as a model to protect arbitration's benefits by preventing expanded judicial review.¹²⁸

The Supreme Court correctly decided *Hall Street* because any other conclusion would ignore history, as well as undermine the time-honored benefits of arbitration.¹²⁹ Expanded review would cost more, take longer, burden courts and arbitrators, call finality into question, expose private matters to public scrutiny, and take the decision out of the most qualified hands.¹³⁰ Fortunately, the Supreme Court reached the correct conclusion and recognized an alternate holding would destroy all the FAA drafters helped create.

Expanding Review Despite the Hall Street Decision

The *Hall Street* decision is correct on the whole, and ostensibly stands for the proposition that expanded judicial review of arbitration awards, outside the FAA, is forbidden.¹³¹ The Court, however, did not completely exclude opportunities to add nonstatutory grounds for review.¹³² In what appears to be a moment of inconsistency, the Court declared, "we do not purport to say that [§§ 10 and 11] exclude more searching review based on authority outside the statute as well."¹³³ This fortuitous statement may be an opening which practitioners can slip nonstatutory grounds for review through in order to give their clients one more layer of protection.¹³⁴

One of the first nonstatutory grounds to be considered is the enigmatic "manifest disregard" of the law.¹³⁵ *Hall Street* attempted to prove manifest disregard of the law was a viable standard of review based on *Wilko*.¹³⁶ While *Hall Street* has come to represent the demise of nonstatutory standards of review in general, the Court was forced to address manifest disregard specifically in response to *Hall Street's* argument.¹³⁷ Instead of eliminating the standard, the Court declared manifest disregard was merely a reference to review exceptions in FAA § 10.¹³⁸

¹²⁸ See Respondent, *supra* note 2, at 32–33 (quoting 1924 Hearings, *supra* note 123, at 34).

¹²⁹ See Rivkin & Tuchmann, *supra* note 93, at 537. For those who agree with limited review there is evidence that the international trend has also been in this direction. International Business, *supra* note 30, at 21–28.

¹³⁰ See *supra* notes 95–120 and accompanying text.

¹³¹ See Rau, *supra* note 17, at 502–03.

¹³² *Id.* at 502–06.

¹³³ *Hall Street*, 128 S. Ct. at 1406.

¹³⁴ Rau, *supra* note 17, at 502–06.

¹³⁵ Polenberg & Smith, *supra* note 18, at 36.

¹³⁶ *Hall Street*, 128 S. Ct. at 1403.

¹³⁷ *Id.* at 1403–04

¹³⁸ *Id.* at 1404 ("Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them.")

By addressing and dismissing manifest disregard specifically, it would seem the issue should be resolved; however, confusion about the standard's existence has survived.¹³⁹ Courts have avoided discussing whether manifest disregard is still viable in light of *Hall Street*, instead of unequivocally declaring that the standard is no longer an option for review.¹⁴⁰ However, within this confusion there may still exist an opportunity to use the standard.

In *Vaughn v. Leeds, Morelli & Brown, P.C.*, the United States Court of Appeals for the Second Circuit recognized that although the *Hall Street* decision severely limits the grounds for judicial review of arbitration awards, manifest disregard of the law is still a viable option.¹⁴¹ The Second Circuit even goes so far as to provide a three-part test for courts to use in deciding whether an arbitrator's decision is in manifest disregard of the law.¹⁴² The Supreme Court's choice in *Hall Street* not to unequivocally exclude review standards outside of the FAA has allowed manifest disregard to be resurrected after its apparent demise.¹⁴³

The *Vaughn* court is not alone in its decision to continue to acknowledge the manifest disregard standard. Wisconsin courts have since kept the standard as well. In *Sands v. Menard, Inc.*, the court noted it was content with its conclusion that manifest disregard remained viable due to the Supreme Court's declaration that

¹³⁹ Robert Ellis, *Imperfect Minimalism: Unanswered Questions in Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), 32 HARV. J.L. & PUB. POL'Y 1187, 1192–93 (2009).

¹⁴⁰ See *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 (1st Cir. 2008) (declining to decide whether *Hall Street* precludes use of manifest disregard because the parties' claim did not invoke FAA review); *Halliburton Energy Servs., Inc. v. NL Indus. Inc.*, 306 F. App'x 843, 843 (5th Cir. 2009) (per curiam) (refusing to decide whether manifest disregard survived *Hall Street* because the plaintiffs would not meet the burden even if it still existed); *Franko v. Ameriprise Fin. Servs., Inc.*, No. 09-09, 2009 WL 1636054, at *4 (E.D. Pa. June 11, 2009) (noting the parties would not meet the manifest disregard burden and, as a result, there is no need to examine whether the standard remains valid in light of the *Hall Street* decision).

¹⁴¹ 315 F. App'x 327, 330 (2d Cir. 2009).

¹⁴² *Stolt-Nielsen SA v. AnimalFeeds Int'l. Corp.*, 548 F.3d 85, 93 (2d Cir. 2008). The Second Circuit explained the test as follows:

First, we must consider whether the law that was allegedly ignored was clear, and in fact explicitly applicable to the matter before the arbitrators. . . . Second, once it is determined that the law is clear and plainly applicable, we must find that the law was in fact improperly applied, leading to an erroneous outcome. . . . Third, once the first two inquiries are satisfied, we look to a subjective element, that is, the knowledge actually possessed by the arbitrators. In order to intentionally disregard the law, the arbitrator must have known of its existence, and its applicability to the problem before him.

Id. (citation omitted).

¹⁴³ *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1281 (9th Cir. 2009). *But see* *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355–58 (5th Cir. 2009) (disagreeing with other federal circuit courts' continued acceptance of manifest disregard as a valid standard or review).

“the FAA is not the only way into court for parties wanting review of arbitration awards.”¹⁴⁴ The *Sands* court used this language as an example of the Supreme Court’s willingness to let state courts expand beyond the FAA.¹⁴⁵

Another possible nonstatutory ground for vacatur is the “public policy exception.”¹⁴⁶ The resilience of this standard of review may be related to its historical presence and value to courts.¹⁴⁷ Preceding *Hall Street*, courts were willing to enforce arbitration agreements that allowed vacatur if the award violated defined public policy.¹⁴⁸ Courts may still accept public policy as a viable standard of review for arbitration awards because public policy is dissimilar to other review standards.¹⁴⁹ The difference is challenging an award on public policy grounds does not require a review of the merits of the case.¹⁵⁰ A court can simply defer to the arbitrator’s method for reaching the decision and come to a conclusion.¹⁵¹ This should alleviate any concern that expanded review will undermine arbitration’s efficiency. Additionally, public policy has an established history in the law and would be difficult to supplant.¹⁵² At least one court, the United States District

¹⁴⁴ 767 N.W.2d 332, 335 (Wis. Ct. App. 2009) (quoting *Hall Street*, 128 S. Ct. at 1406). Some courts have also been willing to expand review on their own volition, using manifest disregard as a judicially created exception to the rule that review is limited to §§ 10 and 11 of the FAA. See *DMA Int’l, Inc. v. Qwest Comm’ns Intern.*, No. 08-CV-00358-WDM-BNB, 2008 WL 4216261, at *4–5 (D. Colo. Sept. 12, 2008) (implying a distinction between private agreements to expand review and judicially created grounds for vacatur may not have eliminated judicial expansion for review of arbitration awards).

¹⁴⁵ See *Sands*, 767 N.W.2d at 335.

¹⁴⁶ Richard C. Reuben, *Personal Autonomy and Vacatur after Hall Street*, 113 PENN ST. L. REV. 1103, 1106–07 (2009).

¹⁴⁷ See Jonathan A. Marcantel, *The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L. 597, 615 (2009) (“[F]ederal courts began using the public policy exception as an extra-statutory basis for vacatur under the FAA, reasoning the public policy exception was inherent in all contracts, and arbitrations were essentially dispute mechanisms generated by contract.”). But see Stuart M. Widman, *Hall Street v. Mattel The Supreme Court’s Alternative Arbitration Universes*, DISP. RESOL. MAG., Fall 2008, at 24, 27 (implying *Hall Street* signals the end for nonstatutory review standards, including review for violation of public policy).

¹⁴⁸ Aaron S. Bayer & Joseph M. Gillis, *Significant Questions, Little Guidance Arbitration After Hall Street*, FOR THE DEF., Nov. 2008, at 44, 48 (citing *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987)); Murray, *supra* note 1, at 652.

¹⁴⁹ Bayer & Gillis, *supra* note 148, at 48.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* (“Courts have long refrained from enforcing, and thereby putting the State’s imprimatur on, contracts that violate important public policies.”); see also Rau, *supra* note 17, at 501–02. Appalled at the Court’s failure to declare public policy as a necessary exception to the holding, commentator Rau noted:

Since externalities—negative social effects—necessarily limit every exercise of contractual autonomy, vacatur for violation of “public policy” is a necessary fail safe, universally understood in every existing legal system as a ground (whether

Court for the District of Massachusetts, has recognized a public policy exception, even though it declined to address whether *Hall Street* precluded the manifest disregard standard.¹⁵³ This post-*Hall Street* decision may prove useful to those trying to vacate an arbitration award using grounds for review outside the FAA.

The “arbitrary and capricious” standard of review has also been called into question by *Hall Street*.¹⁵⁴ Because it is a nonstatutory ground for review, apparently it has been abolished like many others by *Hall Street*.¹⁵⁵ However, on one occasion a court examined the possibility of vacating an award under this standard.¹⁵⁶ The court acknowledged *Hall Street* brought into question whether the standard still existed, but nevertheless decided to examine the dispute using the arbitrary and capricious standard because that is what the parties contracted for.¹⁵⁷ While this standard does seem less likely to be a viable option, parties should at least consider it.

A Saving Grace for the Hesitant

A tactic noted by some commentators is to parallel a contract-based grounds for review with one present in the FAA.¹⁵⁸ The theory proposes, the more a party’s contract-based grounds for review appear to merely be a unique way of expressing an FAA standard, the greater the chance of court acceptance.¹⁵⁹ There is at least some evidence to support this theory. In *Franko v. Ameriprise Financial Services Inc.*, the United States District Court for the Eastern District of Pennsylvania

“statutory” or “non statutory”) for refusing to honor an award. However rarely successful, it must somehow be made to fit within the architecture of our law of arbitration.

Id.

¹⁵³ *Globe Newspaper Co. v. Int’l Ass’n of Machinists*, No. 08-cv-11945-DPW, 2009 WL 2425798, at *3 (D. Mass. Aug. 5, 2009). The court traced public policy’s validity as a standard of review to the common law principle that courts do not have to enforce illegal contracts. *Id.* Public policy allows the award to be vacated if it violated excepted public policy standards, which should be determined by prevailing laws and precedents. *Id.*

¹⁵⁴ Widman, *supra* note 147, at 27.

¹⁵⁵ Polenberg & Smith, *supra* note 18, at 36.

¹⁵⁶ See *Waddell v. Holiday Isle*, No. 09-0040-WS-M, 2009 WL 2413668, at *11 (S.D. Ala. Aug. 4, 2009); see also *Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 431 F.3d 1320, 1326 (11th Cir. 2005).

¹⁵⁷ *Waddell*, 2009 WL 2413668, at *11.

¹⁵⁸ See *Bayer & Gillis*, *supra* note 148, at 49; *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 351 (N.Y. Sup. Ct. 2008) (declaring so long as the public policy exception is merely a court’s interpretation of § 10(a)(4) of the FAA it would survive *Hall Street* so long as a party did not claim it was a nonstatutory standard of review).

¹⁵⁹ *Bayer & Gillis*, *supra* note 148, at 49. The statutory requirement that arbitrators not exceed their power may be broad enough to encompass many nonstatutory standards. *Id.*

noted the previously discussed “manifest disregard” of the law standard closely mirrors § 10 of the FAA allowing a court to vacate the award if an arbitrator exceeded his or her powers.¹⁶⁰ Moreover, standards allowing review when the arbitrator “fails to draw [his or her decision from the] essence” of the contract is also similar to § 10 because arbitrators are bound by the contract.¹⁶¹ Therefore, if nonstatutory grounds for review are close enough in purpose to statutory grounds for review, it may survive the *Hall Street* limitation.

Another option may be to use state law to avoid the *Hall Street* decision. In *Cable Connection, Inc. v. DIRECTV, Inc.*, the California Supreme Court recognized that *Hall Street* left a loophole allowing a state court to use state law to expand judicial review.¹⁶² This loophole was of course the Supreme Court’s reference to allowing a “more searching review [for expanded judicial review] based on authority outside the statute.”¹⁶³ The contract in *Cable Connection* provided: “The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error.”¹⁶⁴ The court concluded that *Hall Street* only restricted arbitration under the FAA and does not preempt state arbitration statutes allowing expanded review.¹⁶⁵ The court rationalized its decision by noting the intention of the FAA is to see that private parties’ arbitration agreements are enforced.¹⁶⁶ Thus, so long as the parties’ valid arbitration agreement is being enforced in accordance with FAA policy, the court felt free to use the state’s arbitration act and allow expanded judicial review.¹⁶⁷

Alternatives to Nonstatutory Review Standards

Parties can always attempt to protect themselves by carefully defining the arbitration process in the agreement.¹⁶⁸ Parties are free to decide how arbitrators are selected, what issues can be arbitrated, and even what qualifications an

¹⁶⁰ *Franko*, 2009 WL 1636054, at *4; see also *Comedy Club*, 553 F.3d at 1290; *Stolt-Nielsen*, 548 F.3d at 94 (noting manifest disregard is “a judicial gloss on the specific grounds for vacatur enumerated in § 10 of the FAA”).

¹⁶¹ *Bayer & Gillis*, *supra* note 148, at 49.

¹⁶² 190 P.3d 586, 596 (Cal. 2008).

¹⁶³ *Hall Street*, 128 S. Ct. at 1406.

¹⁶⁴ *Cable Connection*, 190 P.3d at 590.

¹⁶⁵ *Id.* at 599.

¹⁶⁶ *Id.* The FAA policy favoring enforcement of arbitration agreements was meant to stem the tide of judicial hostility towards arbitration agreements but was never meant to sanction expanded judicial review. See Schmitz, *supra* note 26, at 144–45.

¹⁶⁷ *Cable Connection*, 190 P.3d at 599. The court believed so long as FAA policy was being met, there was no need to make state arbitration statutes conform, especially in light of the Court’s recognition of grounds for review based on state law. See *id.* at 598–99.

¹⁶⁸ See Rivkin & Tuchmann, *supra* note 93, at 540–41 (explaining the *Hall Street* decision only limited subsequent review of arbitration awards, not the procedures used to conduct arbitration).

arbitrator must possess.¹⁶⁹ This freedom, of course, comes with the caveat that parties are free to define arbitration procedure but not judicial review, except for very limited circumstances as addressed above.¹⁷⁰

If parties are set on contracting for expanded review of the award, and fear using nonstatutory grounds for judicial review, then contracting for review by an appellate arbitration panel is a viable option.¹⁷¹ Appellate arbitration services, such as the American Arbitration Association, allow parties to contract for a panel of arbitrators to review the award using standards of review to which the parties agree.¹⁷² These can even include review for “manifest disregard of the law or facts,” “clear errors of law,” and “because of clear and convincing factual errors.”¹⁷³ If parties wish to have an element of the judiciary present they can also place a retired judge on the panel.¹⁷⁴

While at first glance it may appear that *Hall Street* has eliminated all grounds for judicial review of arbitration awards, clever drafters in courts sympathetic to expanded review may be able to go beyond the FAA in order to seek favorable terms for their clients. Some courts still recognize manifest disregard of the law, as well as the public policy exception.¹⁷⁵ Moreover, carefully drafting the procedure used during arbitration and allowing for review by an appellate arbitration panel may provide the safeguards that have in many ways been taken away by *Hall Street*.

CONCLUSION

On the whole, the United States Supreme Court correctly decided *Hall Street* by limiting review of arbitration awards to circumstances present within the FAA.¹⁷⁶ It recognized allowing expanded judicial review would place undue pressure on arbitrators and courts alike, as well as undermine the qualities that

¹⁶⁹ 4 AM. JUR. 2D *Alternative Dispute Resolution* § 17 (2009); see also Smit, *supra* note 95, at 150 (“[P]arties have a large measure of freedom to shape the arbitration in the way they see fit.”).

¹⁷⁰ See *supra* notes 131–67 and accompanying text.

¹⁷¹ See Rivkin & Tuchmann, *supra* note 93, at 542–43; see also Poor, *supra* note 106, at 676 (concluding if parties are unwilling to accept an arbitrator’s decision it is within their power to agree for review by an appeal board).

¹⁷² AMERICAN ARBITRATION ASSOCIATION, *DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE* 37 (2007); see also THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & DISPUTE RESOLUTION, *ARBITRATION APPEAL PROCEDURE* (2007), <http://www.cpradr.org/ArbitrationAppealProcedure/tabid/79/Default.aspx>.

¹⁷³ AMERICAN ARBITRATION ASSOCIATION, *supra* note 172, at 37.

¹⁷⁴ Respondent, *supra* note 2, at 48 (citing IAN R. MACNEIL, RICHARD E. SPEIDEL & THOMAS J. STIPANOWICH, *FEDERAL ARBITRATION LAW* § 27.2.3, at 27:4–7 (1995)).

¹⁷⁵ See *supra* notes 135–53 and accompanying text.

¹⁷⁶ See *supra* notes 89–90 and accompanying text.

make arbitration an actual alternative to traditional litigation.¹⁷⁷ However, while the decision was correct, it is not as decisive as it may appear.¹⁷⁸ Grounds for review still exist, in some courts, outside of the statute in the forms of manifest disregard, public policy, state law, and possibly arbitrary and capricious.¹⁷⁹ If parties fear challenging *Hall Street* or believe courts in their jurisdictions are hostile to nonstatutory review standards, then carefully tailoring the arbitration agreement and allowing for review by an appellate arbitration panel may give parties the protective review parachute purportedly taken away by *Hall Street*.¹⁸⁰

¹⁷⁷ See *supra* notes 95–130 and accompanying text.

¹⁷⁸ See *supra* notes 91–94 and accompanying text.

¹⁷⁹ See *supra* notes 131–67 and accompanying text.

¹⁸⁰ See *supra* notes 168–74 and accompanying text.

CASE NOTE

CONSTITUTIONAL LAW—Faded Lines: Another Attempt to Delineate Reasonableness in Automobile Searches Incident to Arrest; *Arizona v. Gant*, 129 S. Ct. 1710 (2009)

*Devon M. Stiles**

INTRODUCTION

On August 25, 1999, Tucson police dispatched two officers to investigate a residence implicated by an anonymous tip as the site of a drug-dealing operation.¹ Upon answering the door, the respondent Rodney Gant identified himself and informed the officers he expected the owner of the household to return later.² The officers left and checked Gant's background, discovering he had a suspended driver's license.³ The officers returned to the residence later and arrested two individuals: one for providing a false name and the other for possession of drug paraphernalia.⁴

Shortly thereafter, another man arrived in a car; the officers recognized the car as belonging to Gant.⁵ After Gant exited his vehicle, the police arrested him for driving on a suspended license.⁶ After handcuffing Gant, the police placed him in the backseat of a patrol car and called for additional officers to assist at the crime scene.⁷ After the additional officers arrived on the scene, the police searched Gant's car.⁸ The officers found Gant's jacket on the backseat of his car, searched the pockets of the jacket, found a bag of cocaine, and charged him with possession of a narcotic drug for sale and possession of drug paraphernalia.⁹ After Gant's failed attempt to suppress the evidence at trial, his subsequent conviction and numerous appeals, the United States Supreme Court granted Gant's petition for certiorari.¹⁰

* Candidate for J.D., University of Wyoming College of Law, 2011. I would like to thank Lisa Rich, Kevin Marshall, Allen Johnson and the members of the *Wyoming Law Review* Board for their tremendous assistance throughout this process. I would also like to thank my wife Megan for her enduring love, patience, and support.

¹ *Arizona v. Gant*, 129 S. Ct. 1710, 1714–15 (2009).

² *Id.* at 1715.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

In a 5 to 4 decision, the *Gant* majority issued two holdings reinterpreting the existing federal cases guiding police practices in automobile searches made incident to arrest, thus creating a new bright-line rule.¹¹ The first holding served to reinterpret and limit the boundaries set by the seminal case *New York v. Belton*.¹² The second holding adopted Justice Scalia's concurring opinion in *Thornton v. United States* and established a new standard of suspicion to initiate automobile searches incident to arrest.¹³

The two *Gant* holdings represent a radical departure from the past two decades of Fourth Amendment automobile jurisprudence.¹⁴ This case note critiques the two *Gant* holdings as lacking clarity and providing scant guidance to law enforcement.¹⁵ The background section of this note details the history of warrantless searches incident to arrest, focusing on three seminal United States Supreme Court cases involving automobile searches incident to arrest: *Chimel v. California*, *New York v. Belton*, and *Thornton v. United States*.¹⁶ Further, this note outlines the automobile exception to the Fourth Amendment warrant requirement, established in *United States v. Carroll*, *United States v. Ross*, *California v. Acevedo*, and *Wyoming v. Houghton*.¹⁷ Finally, after critiquing the two holdings in *Gant*, this note advocates for a return to the probable cause standard and the adoption of the automobile exception as an alternative to *Gant*'s unclear bright-line rule.¹⁸

BACKGROUND

The Fourth Amendment to the United States Constitution protects individuals from "unreasonable searches and seizures" and invokes probable cause

¹¹ *Id.* at 1716–24.

¹² *See infra* notes 87–90 and accompanying text (outlining the first *Gant* holding).

¹³ *See infra* notes 91–93 and accompanying text (outlining the second *Gant* holding).

¹⁴ *See infra* notes 24–59, 105–36 and accompanying text (discussing the history of automobile searches incident to arrest and the effects of the *Gant* ruling).

¹⁵ *See infra* notes 105–36 and accompanying text (discussing the lack of clarity in the two *Gant* holdings).

¹⁶ *See infra* notes 24–59 and accompanying text (outlining the federal bright-line approach to Fourth Amendment challenges involving automobile searches incident to arrest which commence without probable cause).

¹⁷ *See infra* notes 60–73 and accompanying text (explaining the automobile exception to the Fourth Amendment warrant requirement which defines the boundaries of reasonableness in automobile searches commencing with probable cause).

¹⁸ *See infra* notes 114–33 and accompanying text (arguing *Gant*'s lack of clarity provides scant guidance to law enforcement); *infra* notes 137–54 and accompanying text (contending the probable cause automobile exception solves the problems in *Gant* by simultaneously providing broad search authority to police and limiting when law enforcement may commence searches).

as the baseline standard for determining reasonableness.¹⁹ Whether a search is reasonable, however, requires a detailed factual analysis which balances a suspect's privacy interests with the government's need to conduct a search.²⁰

The United States Constitution proscribes warrantless searches as per se unreasonable, subject to certain limited exceptions.²¹ Searches conducted by police incident to the arrest of a suspect are reasonable under the Fourth Amendment if the searches adhere to a series of bright-line rules.²² The United States Supreme Court originally created these rules to govern all warrantless searches occurring incident to the arrest of a suspect, then later established a separate set of rules governing searches incident to arrest if the searches specifically targeted the vehicles of suspects.²³

Searches Incident to Arrest

Nearly a century of jurisprudence defines the boundaries of reasonableness in searches incident to arrest.²⁴ In the first half of the twentieth century, the Supreme Court defined reasonableness on a case-by-case basis, with no specific rule or test

¹⁹ See, e.g., James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1130–31 (1992) (discussing how the framers intended the Fourth Amendment to protect Americans from writs of assistance and general warrants issued in colonial times, which helped push the country toward the American Revolution).

²⁰ *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (quoting *Camara v. Mun. Court*, 387 U.S. 523, 534–37 (1967)).

²¹ *Gant*, 129 S. Ct. at 1716 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967) (“Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”)). The Court has adopted numerous exceptions to the warrant requirement: investigative stops; frisks for weapons; stops of cars to check drivers' licenses and registration; customs searches of vehicles and persons at borders; luggage detention; mail detention; special needs searches which make the warrant and probable cause requirements impossible; public school searches; government workplace searches; searches of parolees; searches of businesses in heavily regulated industries; searches of property in government safekeeping; drug testing; hot pursuit; searches incident to arrest; and searches of vehicles with probable cause (the automobile exception). See Russell W. Galloway, Jr., *Basic Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 737, 753–65 (1992).

²² See 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.1 (4th ed. 2008) (discussing the history of searches incident to arrest).

²³ *Id.*; see also Rachel Moran, *Motorists Are People Too: Recalculating the Vehicular Search Incident to Arrest Exception by Prohibiting Searches Incident to Arrest for Nonevidentiary Offenses*, 44 NO. 4 CRIM. L. BULL. ART. 3 (2008) (outlining the history of the search incident to arrest doctrine as applied to vehicles).

²⁴ See 3 LAFAVE, *supra* note 22, § 6.3 (discussing the history of the search incident to arrest exception to the Fourth Amendment); Cecil J. Jones, Jr., *Thornton v. United States: Expanding the Scope of Search Incident to Arrest on America's Roadways*, 30 AM. J. TRIAL ADVOC. 627, 631–38 (2007) (providing an overview of the search incident to arrest exception).

providing guidance.²⁵ This trend ceased in 1950 with *United States v. Rabinowitz*, which allowed police to search the entire premises surrounding a suspect if the search commenced incident to the suspect's arrest.²⁶ In 1969, the Court overruled *Rabinowitz* and established the first bright-line rule governing searches incident to arrest in *Chimel v. California*.²⁷ Under *Chimel*, a search is unreasonable if the police search outside the area in the suspect's "immediate control," defined as the area where the suspect could obtain a weapon or destroy evidence.²⁸ Whether *Chimel* permitted police to search the interior of a suspect's vehicle incident to an arrest remained unsettled.²⁹

The Problem of Vehicles

The Court considered the challenge of defining reasonableness in warrantless automobile searches incident to arrest in *New York v. Belton*.³⁰ In *Belton*, an officer stopped the defendant's vehicle for a speeding violation.³¹ After approaching

²⁵ 3 LAFAVE, *supra* note 22, § 6.3; see also Stephen A. Saltzburg, *The Fourth Amendment: Internal Revenue Code or Body of Principles?*, 74 GEO. WASH. L. REV. 956, 960–75, 977–83, 988–1001 (2006) (detailing the history of Fourth Amendment jurisprudence).

²⁶ 3 LAFAVE, *supra* note 22, § 6.3 n.25 (citing *Smith v. United States*, 254 F.2d 751, 755 (1958)). In *Smith*, police officers searched for drugs upstairs shortly after arresting the defendant downstairs. *Smith*, 254 F.2d at 753. Since the police arrested the defendant downstairs, he could never have gained access to the drugs upstairs or hindered the evidence-gathering process. *Id.* However, in response to the defendant's evidentiary challenge, the court quoted the majority in *United States v. Rabinowitz*, 339 U.S. 56, 65 (1950):

[W]e cannot agree that [the requirement of procuring a warrant prior to a search] should be crystallized into a *sine qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant.

Smith, 254 F.2d at 755. The court in *Smith* interpreted this as a rule preventing judges from retrospectively judging the reasonableness of a search incident to arrest. *Id.* at 753–55.

²⁷ See 3 LAFAVE, *supra* note 22, § 6.3 (summarizing *Chimel v. California*, 395 U.S. 752 (1969)).

²⁸ *Chimel*, 395 U.S. at 768. The *Chimel* opinion addressed the increasing expansion of the range in which the police could conduct a reasonable search incident to the arrest of a suspect. *Id.* The majority argued once the boundary of reasonableness expands outside the immediate control of the suspect, the distinction essentially becomes an artifice attempting to maintain some semblance of the *Rabinowitz* rationale. *Id.* at 759, 762–66. The Court could thus think of no rational reason for police to search beyond an area where the suspect presented a danger to evidence or officers. *Id.* at 766. After police secured a suspect, they faced little risk in taking the time to obtain a warrant to search the suspect's premises since the suspect no longer presented a threat. *Id.* at 754–56, 763–68.

²⁹ See 3 LAFAVE, *supra* note 22, § 7.1(a) (describing how lower courts would often overlook the immediate control test in *Chimel* if the disputed search involved a vehicle).

³⁰ *New York v. Belton*, 453 U.S. 454, 460–61 (1981); see also Carol A. Chase, *Cars, Cops, and Crooks: A Reexamination of Belton and Carroll With an Eye Toward Restoring Fourth Amendment Privacy Protection to Automobiles*, 85 OR. L. REV. 913, 913–18 (2006) (analyzing each opinion in *Belton*).

³¹ *Belton*, 453 U.S. at 455.

the car and requesting the driver's license and registration, the officer smelled burnt marijuana emanating from within the car and saw a bag on the floor of the car labeled "Supergold," which the officer associated with marijuana.³² These circumstances provided the officer with probable cause to believe the occupants of the vehicle illegally possessed marijuana.³³ The officer subsequently arrested the defendant and the other individuals in the defendant's car for possession of marijuana.³⁴ The officer searched the vehicle after detaining the suspects and discovered the defendant's jacket in the back seat of the car.³⁵ The officer discovered cocaine in the jacket pocket.³⁶

The defendant challenged the constitutionality of the search of his jacket, alleging it commenced without probable cause and thus violated the Fourth Amendment.³⁷ In its holding, the United States Supreme Court found the search reasonable, extending the *Chimel* immediate control rule to include passenger compartments into which a "recent occupant" of the vehicle had access.³⁸ *Belton* thus expanded the reasonableness of a search incident to arrest to include the entire car rather than merely the area where a suspect could destroy evidence or harm officers.³⁹

In *Thornton v. United States*, the Court expanded the definition of "recent occupant" to include *any* individuals, including passengers, who exited a vehicle prior to detainment by officers.⁴⁰ The defendant in *Thornton* cautiously passed an officer while driving a Lincoln Town Car.⁴¹ The officer subsequently checked the car's tags and found they were registered to a different make and model than the defendant's car.⁴² The officer pursued, but the defendant parked the car and

³² *Id.* at 455–56.

³³ *Id.* at 456.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 460 ("The police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.").

³⁹ See Barry Kamins, *Automobile Searches: Supreme Court Confesses Error*, N.Y. L.J., Sept. 17, 2009, at 3 (col. 1); Carson Emmons, Comment, *Arizona v. Gant: An Argument for Tossing Belton and All Its Bastard Kin*, 36 ARIZ. ST. L.J. 1067, 1078–80 (2004) (discussing *Belton*).

⁴⁰ *Thornton v. United States*, 541 U.S. 615, 623–24 (2004); see also George Dery & Michael J. Hernandez, *Turning a Government Search Into a Permanent Power: Thornton v. United States and the "Progressive Distortion" of Search Incident to Arrest*, 14 WM. & MARY BILL RTS. J. 677, 689–701 (2005) (discussing and critiquing the Court's opinion in *Thornton*).

⁴¹ *Thornton*, 541 U.S. at 617–18.

⁴² *Id.* at 618.

exited the vehicle before the officer stopped him.⁴³ The defendant appeared nervous and incoherent when the officer confronted him in the parking lot.⁴⁴ Upon consenting to a pat down search, which revealed a bulge in his pants, he admitted to possessing narcotics.⁴⁵ He then revealed two containers to the officer: one containing three bags of marijuana, and another containing a large amount of crack cocaine.⁴⁶ The officer handcuffed the defendant, placed him in the patrol car, and initiated a search of the defendant's car.⁴⁷ During the search, the officer discovered a handgun.⁴⁸ The jury convicted Thornton of several crimes, including possession of a firearm after having been previously convicted of a felony.⁴⁹

In its ruling, the *Thornton* Court expanded the scope of reasonableness in a search incident to arrest beyond the boundaries defined in *Belton*.⁵⁰ Similar to *Belton*, this expansion allowed officers to search anywhere in a vehicle the suspect could have hidden evidence or weapons.⁵¹ However, the rule in *Belton* only addressed searches that commenced incident to the arrest and forcible removal of the defendant from the vehicle.⁵² In contrast, the *Thornton* Court expressly rejected an analysis of whether the officer made the arrest outside the vehicle or forcibly removed the suspect from the vehicle prior to initiating the search.⁵³ This rendered irrelevant the temporal or spatial proximity of the suspect to the vehicle at the time of the search, allowing police to expand the scope of a search incident to arrest to include the suspect's entire vehicle.⁵⁴

Justice Scalia wrote a concurring opinion in *Thornton*, joined by Justice Ginsburg.⁵⁵ Justice Scalia believed the *Belton* rule did not require an inquiry into the *Chimel* dual interests of officer safety and the preservation of evidence.⁵⁶

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 620–21.

⁵¹ See Carson, *supra* note 39, at 1069–70 (describing how *Belton* expands the search incident to arrest exception beyond the area of immediate control).

⁵² *Belton*, 453 U.S. at 456.

⁵³ *Thornton*, 541 U.S. at 620–21 (“There is simply no basis to conclude that the span of the area generally within the arrestee’s immediate control is determined by whether the arrestee exited the vehicle at the officer’s direction, or whether the officer initiated contact with him while he remained in the car.”).

⁵⁴ *Id.*

⁵⁵ *Id.* at 625–32 (Scalia, J., concurring).

⁵⁶ *Id.* at 626–28.

Instead, he reasoned the *Belton* rule allowed the type of broad, sweeping searches authorized by *Rabinowitz*.⁵⁷ He supported both the *Rabinowitz* and *Chimel* interpretations of the search incident to arrest exception as constitutionally valid, but found the *Thornton* majority's attempts to tether *Belton* to *Chimel* functionally disingenuous, since he found no examples of a defendant who successfully escaped and gained access to a vehicle after detainment.⁵⁸ He thus argued a reasonable search incident to arrest commences when officers have reason to believe evidence of the crime of arrest exists in the vehicle at the time of the search.⁵⁹

The Automobile Exception

The Fourth Amendment to the United States Constitution mentions probable cause as a standard of suspicion limiting when courts may issue warrants.⁶⁰ Over time, courts have interpreted the language of the Fourth Amendment to render probable cause the baseline standard of suspicion required for reasonableness in warrantless searches.⁶¹ *Belton–Thornton* addressed the scope of reasonableness in a search incident to a suspect's arrest when the searches commenced without probable cause or a warrant.⁶² When officers—absent a warrant—have probable cause to believe evidence of a crime exists in a suspect's vehicle, a different set of case law applies, allowing officers to search the entire vehicle and the contents of passenger belongings for evidence of wrongdoing.⁶³

The United States Supreme Court in the seminal case *United States v. Carroll* first established the “automobile exception” to the Fourth Amendment warrant requirement allowing warrantless searches of a vehicle when law enforcement

⁵⁷ *Id.* at 629; *see supra* note 26 and accompanying text (discussing *Rabinowitz*).

⁵⁸ *Thornton*, 541 U.S. at 625–26 (Scalia, J., concurring).

⁵⁹ *Id.* at 630.

⁶⁰ U.S. CONST. amend. IV. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

⁶¹ *See* *United States v. Ross*, 456 U.S. 798, 806–09 (1982) (describing the history of the probable cause standard); *see also* Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment's Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 637–45 (2008) (discussing probable cause as a presumptive standard for searches and seizures).

⁶² *See supra* notes 30–59 and accompanying text (discussing the history of the *Belton–Thornton* bright-line approach).

⁶³ *See infra* notes 64–73 and accompanying text (discussing the cases underpinning the automobile exception).

officers possess probable cause to search sufficient to obtain a warrant.⁶⁴ In *United States v. Ross*, the Court expanded the automobile exception to allow searches of the passenger compartments of vehicles.⁶⁵ The Court affirmed this expansion in *California v. Acevedo*, holding that a search of a closed container in a vehicle is reasonable when law enforcement officers have probable cause to believe it contains evidence or contraband.⁶⁶

The Court fully expanded the automobile exception in *Wyoming v. Houghton*.⁶⁷ In *Houghton*, an officer pulled over a vehicle with a faulty brake light and noticed a hypodermic needle in the driver's front pocket.⁶⁸ After leaving the vehicle at the demand of the officer, the driver admitted he used the needle to take drugs.⁶⁹ The officer then ordered the two passengers, including Houghton, out of the vehicle.⁷⁰ The officer proceeded to search the vehicle and discovered Houghton's purse, in which he discovered a brown pouch containing methamphetamine.⁷¹ The officer also noticed hypodermic needle marks on Houghton's arms and subsequently arrested her for felony possession of methamphetamine.⁷² The Court held that when an officer has probable cause to search a suspect's car for contraband, the automobile exception allows the officer to reasonably search any *passenger's* belongings found in the car at the time of the search.⁷³

Wyoming's Alternative Approach

When confronted with the dilemma of determining the reasonableness of automobile searches incident to arrest, several states—including Wyoming—have

⁶⁴ *United States v. Carroll*, 267 U.S. 132, 147, 155–57, 162 (1924) (holding when police possess probable cause to believe evidence of a crime exists in a vehicle, sufficient to procure a warrant, the police may search the vehicle without first obtaining a warrant); *see also* Alex Chan, *No, You May Not Search My Car! Extending Georgia v. Randolph to Vehicle Searches*, 82 WASH. L. REV. 377, 384–88 (2007) (outlining the automobile exception to the Fourth Amendment warrant requirement).

⁶⁵ *Ross*, 456 U.S. at 825 (holding the automobile exception allows police to search compartments in a vehicle, including the trunk, if the officers have probable cause to believe evidence or contraband is hidden somewhere in the vehicle, since a warrant issued by a court would allow a full search of passenger compartments).

⁶⁶ *California v. Acevedo*, 500 U.S. 565, 579–80 (1991) (determining a warrantless search commencing with probable cause may extend to closed containers capable of concealing evidence or contraband).

⁶⁷ *Houghton*, 526 U.S. at 298.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 307.

chosen to adopt approaches different from the *Belton–Thornton* rule.⁷⁴ Article 1, § 4 of the Wyoming Constitution contains a provision similar to the Fourth Amendment which protects citizens from unreasonable searches and seizures.⁷⁵ In Wyoming, defendants often challenge the reasonableness of automobile searches incident to arrest under both Article 1, § 4 of the Wyoming Constitution and the Fourth Amendment to the United States Constitution.⁷⁶ Challenges made under the Wyoming Constitution adhere to a factor-based “reasonable under all the circumstances” approach created in a series of Wyoming Supreme Court cases.⁷⁷ However, any challenges made under the Fourth Amendment must now adhere to *Gant* rather than *Belton*.⁷⁸

PRINCIPAL CASE

After leaving the alleged drug house, police officers discovered Gant’s suspended license after a check of police records.⁷⁹ When they returned later, Gant arrived in his car, after which the police arrested him for driving on a suspended license.⁸⁰ After handcuffing and securing him in a police car, the officers searched his vehicle incident to his arrest.⁸¹ The officers found Gant’s jacket on the back seat and discovered cocaine in the jacket pocket.⁸² The state charged Gant

⁷⁴ *Gant*, 129 S. Ct. at 1718 n.8 (referencing all relevant case law from the states which decided to repudiate *Belton–Thornton* in favor of alternative approaches).

⁷⁵ WYO. CONST. art. 1, § 4. The Wyoming Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.

Id.

⁷⁶ See, e.g., *Holman v. State*, 183 P.3d 368, 371–72, 380–82 (Wyo. 2008); *Pierce v. State*, 171 P.3d 525, 529, 531–32 (Wyo. 2007); *Vasquez v. State*, 990 P.2d 476, 481–83 (Wyo. 1999) (challenging the reasonableness of searches under both Article 1, § 4 of the Wyoming Constitution and the Fourth Amendment to the United States Constitution).

⁷⁷ See Kenneth Decock & Erin Mercer, Comment, *Balancing the Scales of Justice: How Will Vasquez v. State Affect Vehicle Searches Incident to Arrest in Wyoming*, 1 WYO. L. REV. 139 (2001) (investigating how *Vasquez* rejected the federal bright-line approach in favor of a factor-based “reasonable under all of the circumstances” analysis); Maryt L. Fredrickson, Note, *Recent Developments in Wyoming’s Reasonableness Requirement Applied to the Search Incident to Arrest Exception*, 9 WYO. L. REV. 195 (2009) (analyzing how several cases have shaped the Wyoming definition of reasonableness); Mervin Mecklenberg, Comment, *Fixing O’Boyle v. State—Traffic Detentions under Wyoming’s Emerging Search-and-Seizure Standard*, 7 WYO. L. REV. 69 (2007) (examining one of the earliest decisions applying Wyoming’s “reasonable under all the circumstances” approach); .

⁷⁸ See *infra* notes 87–93 and accompanying text (outlining the separate holdings of *Gant*).

⁷⁹ *Arizona v. Gant*, 129 S. Ct. 1710, 1714–15 (2009).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

with two offenses: possession of a narcotic drug for sale and possession of drug paraphernalia.⁸³ Gant moved to suppress the evidence.⁸⁴ The trial judge denied Gant's motion, and the jury convicted Gant of both offenses.⁸⁵ After a lengthy set of appeals, the United States Supreme Court granted certiorari.⁸⁶

Majority Opinion

Justice Stevens wrote the majority opinion, joined by Justices Ginsburg, Souter, Thomas, and Scalia.⁸⁷ Justice Scalia issued a separate concurring opinion critiquing the majority's reasoning, but joined the majority to avoid creating a plurality opinion.⁸⁸ In its first holding, the majority rejected broad State readings of *Belton* as unconstitutionally expanding the search incident to arrest exception to establish an automatic authorization of all searches of a suspect's vehicle.⁸⁹ Accordingly, the Court retethered *Belton* to the *Chimel* doctrine, rendering a warrantless automobile search incident to arrest reasonable when the suspect is

⁸³ *Id.*; ARIZ. REV. STAT. ANN. § 13-3408 (2009) (possession of a narcotic drug for sale); ARIZ. REV. STAT. ANN. § 13-3415(A) (2009) (possession of drug paraphernalia).

⁸⁴ See Defendant's Motion to Suppress at 1, *State v. Gant*, No. CR-20000042 (Ariz. Super. Ct. Apr. 26, 2000), 2000 WL 34566317 (arguing the police conducted an unreasonable search incident to arrest pursuant to *Chimel* since police had secured Gant in a police car prior to commencing the search); Response to Defendant's Motion to Suppress at 1, *State v. Gant*, No. CR-20000042 (Ariz. Super. Ct. May 18, 2000), 2000 WL 34566316 (contending *Belton* authorized the search automatically since it commenced incident to Gant's arrest).

⁸⁵ *Gant*, 129 S. Ct. at 1715; see also Minute Entry at 1, *State v. Gant*, No. CR-20000042 (Ariz. Super. Ct. June 5, 2000), 2000 WL 35630010 (denying Gant's motion to suppress).

⁸⁶ See, e.g., *State v. Gant (Gant I)*, 43 P.3d 188, 194 (Ariz. Ct. App. 2002) (determining police unreasonably searched Gant's vehicle because he presented no threat to either the police or to the evidence in the vehicle, and the police should thus have obtained a warrant prior to initiating the search); *State v. Gant (Gant II)*, 162 P.3d 640, 642 (Ariz. 2007) (holding the police search unreasonable under the Fourth Amendment).

⁸⁷ *Gant*, 129 S. Ct. at 1713–14.

⁸⁸ *Id.* at 1724–25 (Scalia, J., concurring). Although Justice Scalia did not agree with the majority's reasoning, he chose to join with the majority opinion to prevent the confusion of a 4 to 1 to 4 split decision:

It seems to me unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by Justice Stevens. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.

Id. at 1725; see also *infra* notes 94–97 and accompanying text (discussing Justice Scalia's concurring opinion in *Gant*).

⁸⁹ *Gant*, 129 S. Ct. at 1719–20.

“unsecured” and could gain access to the passenger compartment of the vehicle and destroy evidence or brandish a weapon.⁹⁰

In its second holding, the majority extended *Gant* beyond the *Chimel* doctrine by adopting Justice Scalia’s concurrence in *Thornton*.⁹¹ In addition to the dual interests of protecting officers and the integrity of evidence articulated in *Chimel*, a reasonable search incident to arrest includes a warrantless search commenced when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”⁹² The Court thus held the search of *Gant*’s car unreasonable not only because *Gant* could not have destroyed evidence or wielded a weapon, but also because the police could not have reasonably believed evidence related to *Gant*’s crime of arrest—driving on a suspended license—was located in the car at the time of the search.⁹³

Justice Scalia’s Concurring Opinion

Justice Scalia wrote a concurring opinion in which he agreed with the judgment but critiqued the majority’s reasoning.⁹⁴ He argued the majority maintained needless ties to *Belton* by retethering *Belton* to *Chimel*, thus requiring a suspect to present a risk to evidence or officers to invoke the rule.⁹⁵ As an alternative to *Belton–Thornton*, Justice Scalia proposed a partial return to probable cause, which renders the *Chimel* analysis of a suspect’s spatial proximity to the vehicle or potential threat to evidence or officers moot.⁹⁶ Under Justice Scalia’s proposed alternative, while officers could still commence a warrantless search of the suspect’s vehicle for evidence of the crime of arrest, they would need probable cause to search for evidence of other crimes.⁹⁷

Justice Alito’s Dissenting Opinion

Justice Alito wrote for the dissent, joined by Justice Kennedy and Chief Justice Roberts, with Justice Breyer joining in part.⁹⁸ Justice Alito criticized the majority on multiple points, focusing on the majority’s critique of *Belton*.⁹⁹ He argued

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* (quoting *Thornton*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

⁹³ *Id.* (“Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case.”).

⁹⁴ *Id.* at 1724–25 (Scalia, J., concurring).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 1725.

⁹⁸ *Id.* at 1726–32 (Alito, J., dissenting).

⁹⁹ *Id.* at 1727.

the majority in *Belton* meant solely to establish a bright-line rule allowing police to search the passenger compartments of a suspect's vehicle after every arrest.¹⁰⁰ Moreover, Justice Alito contended the majority's adoption of Justice Scalia's concurring opinion in *Thornton* with little explanation will result in confusion as to what constitutes reasonableness.¹⁰¹

Justice Breyer's Dissenting Opinion

Justice Breyer wrote a separate dissenting opinion.¹⁰² According to Justice Breyer, *Gant* failed to reach the burden necessary to overcome the presumption of stare decisis and persuade the Court to overrule *Belton*.¹⁰³ His opinion, however, separated him from Justice Alito's critique with respect to whether the *Gant* majority's reasoning was flawed; he chose instead not to address the *Gant* majority's reasoning.¹⁰⁴

ANALYSIS

The rule in *Arizona v. Gant* is another in a long line of attempts to delineate reasonableness in automobile searches incident to arrest through the use of bright-line rules.¹⁰⁵ With each iteration of a bright-line rule, however, the particular circumstances surrounding each disputed search have required the Court to stretch each bright-line rule to accommodate factually complicated challenges.¹⁰⁶ The Court in *Thornton* ultimately stretched the bright-line approach to the point where law enforcement gained an entitlement allowing broad searches of vehicles with neither probable cause nor a warrant.¹⁰⁷ The Court in *Gant* attempted to preserve the bright-line approach while addressing unconstitutionally broad

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1725–26 (Breyer, J., dissenting).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ 129 S. Ct. 1710, 1718–20 (2009); see also *supra* notes 20–59, 79–104 and accompanying text (describing the history of the bright-line approach from its inception to the current ruling in *Gant*).

¹⁰⁶ *New York v. Belton*, 453 U.S. 454, 460–61 (1981); see also *supra* notes 30–59 and accompanying text (discussing the expansion of the bright-line rule).

¹⁰⁷ *Thornton v. United States*, 541 U.S. 615, 620–21, 623–24 (2004); see also Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 825 (1994) (acknowledging the widely fluctuating level of Fourth Amendment protection offered by the United States Supreme Court).

readings of *Belton–Thornton*, but instead created a two-part rule that frustrated the purposes for which *Belton–Thornton* was originally adopted: clarity and guidance for law enforcement.¹⁰⁸

Applying *Gant* in practice will present numerous problems.¹⁰⁹ In the first holding, the majority retethered *Belton* to the *Chimel* dual interests of protecting officer safety and the integrity of evidence.¹¹⁰ Lower courts never fully defined *Chimel* as applied to vehicles, and now courts must face the same issue.¹¹¹ In the second holding, recognizing the diminished expectation of privacy in vehicles, the Court imposed the “reason to believe” standard.¹¹² The Court has never fully defined reason to believe: some courts have defined it as probable cause, and other courts have defined it as some lesser standard than probable cause.¹¹³

Neither Holding Provides Clarity

In its first holding, the *Gant* majority retethered the *Belton* rule to the *Chimel* immediate control test by limiting searches of vehicles incident to arrest to areas within which a defendant could reach to access a weapon or destroy evidence.¹¹⁴ The majority modified *Belton*, however, without first clarifying the required level of spatial proximity between a defendant and a vehicle necessary to trigger the rule.¹¹⁵ Instead, the holding stated a suspect must be “unsecured” and capable of

¹⁰⁸ See *infra* notes 114–33 and accompanying text (arguing the Court in *Gant* established a new bright-line test which lacks clarity and does not guide law enforcement as to the boundaries of reasonableness in automobile searches incident to arrest).

¹⁰⁹ See *infra* notes 110–13 and accompanying text (asserting *Gant* will prove difficult for practitioners to apply).

¹¹⁰ *Gant*, 129 S. Ct. at 1719–20.

¹¹¹ See Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing ‘Bright Lines’ and ‘Good Faith,’* 43 U. PITT. L. REV. 307, 330 (1982) (discussing the *Belton* majority’s assertion that the bright-line approach arose from a lack of a clear definition of *Chimel* as applied to vehicles); *infra* notes 114–18 and accompanying text (contending the first *Gant* holding remains unclear until further litigation resolves the *Chimel* definition of “immediate control” as applied to automobiles).

¹¹² *Gant*, 129 S. Ct. at 1719–20.

¹¹³ See *The Supreme Court 2008 Term—Leading Cases*, 123 HARV. L. REV. 172, 181–82 (2009) (noting neither Justice Scalia in *Thornton* nor the *Gant* majority defined the reason to believe standard); *infra* notes 124–28 and accompanying text (critiquing the reason to believe standard and outlining numerous cases utilizing different definitions of reason to believe).

¹¹⁴ *Gant*, 129 S. Ct. at 1719 (“Accordingly, we reject [the State’s] reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”); see also *Chimel v. California*, 395 U.S. 752, 768 (1969).

¹¹⁵ See Carson, *supra* note 39, at 1087–88 (describing the lack of a clear definition of the required level of temporal or spatial proximity to trigger the *Belton–Thornton* rule); *infra* notes 116–18 and accompanying text (describing the lack of clarity in the first *Gant* holding).

physically reaching into the vehicle to destroy evidence or brandish a weapon.¹¹⁶ Courts have never fully defined the level of spatial proximity necessary to satisfy the immediate control test.¹¹⁷ Though *Gant* may serve to constrict readings of *Belton* that allowed law enforcement complete access to a vehicle incident to an arrest, the lack of a precise definition of necessary spatial proximity provides little guidance to law enforcement.¹¹⁸

When the *Gant* majority adopted Justice Scalia's concurring opinion in *Thornton* as the second *Gant* holding, it did so without sufficiently explaining its potential effects on evidentiary offenses.¹¹⁹ The concurring opinion in *Thornton* addressed the admissibility of evidence obtained by a warrantless search incident to arrest which commenced after the discovery of evidence in a separate, lawful search of the defendant's clothing.¹²⁰ In contrast, the police arrested *Gant* for a non-evidentiary offense, which Justice Scalia's concurring opinion in *Thornton* did not specifically discuss.¹²¹ Rather than address evidentiary concerns, the *Gant* majority applied the *Thornton* concurring opinion by concluding officers did not have reason to believe they could find evidence of *Gant*'s crime in his car, as the crime—driving on a suspended license—required no further evidence

¹¹⁶ *Gant*, 129 S. Ct. at 1715.

¹¹⁷ See Myron Moskowitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 657–58, 661, 667–78 (2002) (concluding the *Chimel* bright-line rule fails to recognize the complex factual realities of searches, and as such is difficult to clarify).

¹¹⁸ See Albert W. Aschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 274 (1984) (noting the *Belton* bright-line rule arose because the United States Supreme Court believed lower courts never resolved how to apply the *Chimel* immediate control test to vehicles); Edwin J. Butterfoss, *Bright Line Breaking Point: Embracing Justice Scalia's Call for the Supreme Court to Abandon an Unreasonable Approach to Fourth Amendment Search and Seizure Law*, 82 TUL. L. REV. 77, 96–97 (2007) (discussing how *Belton* arose from the lack of a clear definition of *Chimel* as applied to vehicles).

¹¹⁹ *Gant*, 129 S. Ct. at 1719; see also Brief Amicus Curiae of the ACLU and the ACLU of Arizona in Support of Respondent at 21–22, *Gant*, 129 S. Ct. 1710 (No. 07-542) (arguing against the adoption of an evidentiary rule to resolve the issues presented by *Gant*'s non-evidentiary offense); Mark M. Neil, *The Impact of Arizona v. Gant: Limiting the Scope of Automobile Searches?*, PROSECUTOR, June 2009, at 38 (opining about the potential situations in which the *Gant* rule may or may not limit automobile searches); *infra* notes 120–28 and accompanying text (discussing the lack of clarity in the second *Gant* holding).

¹²⁰ *Gant*, 129 S. Ct. at 1718–19.

¹²¹ *Id.* at 1712. The police arrested *Gant* for driving on a suspended license, which is a non-evidentiary offense because it only requires evidence of a suspect driving a vehicle while possessing a suspended license. See ARIZ. REV. STAT. ANN. § 28-3473 (2008); *State v. Brown*, 986 P.2d 239, 241 (Ariz. Ct. App. 1999) (describing the elements of driving on a suspended license). The police could not have discovered any further evidence of driving on a suspended license in *Gant*'s car, since evidence of the suspended license existed intangibly in police records, wholly apart from *Gant*'s car. *Gant*, 129 S. Ct. at 1718–19. In contrast, the police arrested *Thornton* for felony possession of cocaine, which is an evidentiary offense because it requires tangible evidence of cocaine in the

to prove its commission.¹²² The *Gant* majority's application of Justice Scalia's concurring opinion in *Thornton* to *Gant*'s case failed to address the finer nuances of evidentiary arrests, such as how officers may demonstrate the reason to believe standard based on the evidence discovered through a prior lawful search.¹²³

Furthermore, the *Gant* majority adopted the unclear reason to believe standard from Justice Scalia's concurring opinion in *Thornton* without providing sufficient clarification.¹²⁴ Justice Scalia's concurring opinion in *Thornton* allows officers to conduct a warrantless search of the suspect's vehicle incident to arrest of the suspect when they have reason to believe the suspect's car contains evidence of the crime of arrest.¹²⁵ Justice Scalia in *Thornton* did not define reason to believe.¹²⁶ Since the *Gant* majority also failed to define the meaning of reason to believe, the standard remains unclear: some courts have defined reason to believe as probable cause, and some courts have defined it as some lesser standard.¹²⁷ Clarifying the precise definition of the reason to believe standard will thus require further litigation.¹²⁸

defendant's possession. *Thornton*, 541 U.S. at 631–32; see also 21 U.S.C. § 841(a)(1) (2006); *United States v. Cordoba-Murgas*, 422 F.3d 65, 68–69 (2d Cir. 2005) (discussing how the quantity of drugs possessed is an important element of the offense of felony possession of cocaine, which thus requires evidence of the possession of the cocaine to demonstrate).

¹²² *Gant*, 129 S. Ct. at 1719.

¹²³ Brief of the ACLU, *supra* note 119, at 25; *infra* notes 124–28 and accompanying text (discussing the lack of clarity in the reason to believe standard).

¹²⁴ See *infra* notes 125–28 and accompanying text (discussing the reason to believe standard).

¹²⁵ *Thornton*, 541 U.S. at 630–32; see also David S. Rudstein, *Belton Redux: Reevaluating Belton's Per Se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 WAKE FOREST L. REV. 1287, 1344–45 (2005). Professor Rudstein reads the reason to believe standard in Justice Scalia's concurring opinion in *Thornton* as a "less-than-probable-cause" standard. *Id.* But see *infra* notes 127–28 and accompanying text (discussing conflicting definitions of reason to believe).

¹²⁶ *Thornton*, 541 U.S. at 630–32. Justice Scalia did not explicitly define reason to believe, but quoted a criminal procedure treatise published in 1872 which described reason to believe as a justification for officers to search an arrestee. *Id.* at 630 (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 211, at 127 (2d ed. 1872)).

¹²⁷ *Gant*, 129 S. Ct. at 1720 (adopting Justice Scalia's concurring opinion in *Thornton* without defining reason to believe); see, e.g., *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (referring to probable cause as a "reasonable ground for belief"); *Illinois v. Gates*, 462 U.S. 213, 233 n.7 (1983) (citing *Ker v. California*, 374 U.S. 23, 36 (1963) (finding probable cause to search based on a reasonable belief *Ker* was in possession of marijuana)); Matthew A. Edwards, *Posner's Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299, 362 (2002) (explaining how some commentators, model procedural codes and legal institutes equate "reasonable cause to believe" and probable cause). But see, e.g., *California v. Carney*, 471 U.S. 386, 391–92, 394–95 (1982) (discussing how the presence of probable cause to search vehicles would trigger the automobile exception); *United States v. Lauter*, 57 F.3d 212, 215 (2d Cir. 1995) (applying "reasonable belief" as a lesser standard than probable cause); *United States v. Route*, 104 F.3d 59, 62 (N.D. Tex. 1997) (interpreting both standards as separate and distinct).

¹²⁸ See *Gant*, 129 S. Ct. at 1719; *Thornton*, 541 U.S. at 631–32 (describing a suspect's reduced privacy interest in his vehicle, and thus the lower degree of suspicion required to initiate a search); see also, e.g., *United States v. Kellam*, 568 F.3d 125, 136 n.15 (4th Cir. 2009) (referencing an

In addition, the *Gant* rule fails to protect privacy interests.¹²⁹ The majority in *Gant* held the “circumstances unique to the vehicle context” justified the adoption of Justice Scalia’s concurring opinion in *Thornton*, which likely refers to the lesser privacy interest afforded to vehicles due to their mobile and public nature.¹³⁰ However, searches of suspects’ vehicles must adhere to the constitutional protection of even reduced expectations of privacy.¹³¹ The *Belton–Thornton* bright-line approach resulted in no protection of privacy interests.¹³² *Gant* lacks a precise, clear definition; it therefore provides scant guidance to law enforcement and will prove incapable of protecting privacy rights until further litigation defines the unclear terms in both holdings.¹³³

officer’s probable cause to search to distinguish the *Gant* reason to believe standard); *People v. Osborne*, 96 Cal. Rptr. 3d 696, 705 (Cal. Ct. App. 2009) (applying the *Gant* reason to believe standard by referring to a separate search of the defendant’s clothing). *But see, e.g.*, James J. Franklin, Payton’s Probable Cause: Why Probable Cause and “Reason to Believe” Represent and Should Represent the Same Reasonableness Standard, 70 U. PITT. L. REV. 487, 489–98 (2009) (arguing probable cause and reason to believe function as the same standard); Michael A. Rabasa, Comment, Payton v. New York: Is “Reason to Believe” Probable Cause or a Lesser Standard?, 5 SETON HALL CIR. REV. 437, 441–50 (2009) (discussing conflicting definitions of reason to believe as applied to Fourth Amendment analyses of arrests); *supra* note 127 and accompanying text (describing the lack of clarity in the definition of reason to believe).

¹²⁹ See *infra* notes 130–33 and accompanying text (contending the *Gant* rule will not adequately protect privacy interests in automobiles).

¹³⁰ *Thornton*, 541 U.S. at 631–32; see also *Wyoming v. Houghton*, 526 U.S. 295, 298–99 (1999) (determining passengers in vehicles have reduced privacy interests while in vehicles); *Carney*, 471 U.S. at 391–92 (referencing the public nature of vehicles and the heavy regulation of vehicular travel as justifications for a reduced expectation of privacy in vehicles); Gerald A. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753, 766–68 (2006) (discussing the lesser privacy interests afforded to defendants in vehicles).

¹³¹ See *Gant*, 129 S. Ct. at 1720 (stating searches of vehicles must respect even reduced privacy interests); *Knowles v. Iowa*, 525 U.S. 113, 117, 119 (1998) (finding circumstances surrounding a search of a vehicle incident to arrest must fall into well-defined exceptions to justify invading a defendant’s implicit privacy interests).

¹³² See Peter W. Fenton, *Search & Seizure Commentary*, CHAMPION, July 2009, at 51 (drawing a parallel between the *Belton–Thornton* bright-line approach and older British general warrants which allowed for broad, sweeping invasions of privacy).

¹³³ See *Gant*, 129 S. Ct. at 1716, 1719 (adopting the *Chimel* immediate control test and Justice Scalia’s concurring opinion in *Thornton*); Aschuler, *supra* note 118, at 274 (discussing how the Court has never fully defined the *Chimel* immediate control test); Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OH. ST. J. CRIM. L. 649, 651 (2009) (criticizing Justice Scalia’s concurring opinion in *Thornton*); Dale Anderson & Hon. Dave Cole, *Search & Seizure After Arizona v. Gant*, ARIZ. ATT’Y, Oct. 2009, at 15–18 (pontificating about numerous issues which parties must litigate to clarify both *Gant* holdings); *supra* notes 114–33 and accompanying text (outlining the lack of clarity in both *Gant* holdings and the need for further litigation to define ambiguous terms).

The two *Gant* holdings rely on unclear reasoning.¹³⁴ By retethering *Belton* to the *Chimel* dual interests of officer safety and evidence preservation, the first holding resurrected the immediate control test, which courts have never fully defined in the context of automobiles.¹³⁵ In the second holding, the majority arbitrarily adopted the reason to believe standard of suspicion without explaining the definition of the standard or how it applies.¹³⁶

Probable Cause Solves the Issues

For decades, courts addressed searches of vehicles with two separate standards, depending upon whether officers arrested suspects prior to initiating searches or officers possessed probable cause to search.¹³⁷ The automobile search incident to arrest doctrine began as a doctrine meant to simplify the application of *Chimel* to vehicles, but has now resulted in *Gant*—a confusing two-part rule requiring further litigation to clarify.¹³⁸ Courts must instead cease the use of two separate standards and adopt probable cause—thereby triggering the automobile exception—as the sole standard for automobile searches in all situations.¹³⁹

Probable cause operates as a simple, straightforward standard, defined by decades of case law.¹⁴⁰ With few exceptions, probable cause governs all searches,

¹³⁴ See *supra* notes 114–33 and accompanying text (critiquing the two *Gant* holdings).

¹³⁵ See LaFave, *supra* note 111, at 330 (discussing how the United States Supreme Court decided *Belton* based on a belief that lower courts never defined *Chimel* as applied to vehicles); *supra* notes 114–18 and accompanying text (discussing how courts have never fully defined the immediate control test).

¹³⁶ See, e.g., Kinports, *supra* note 133, at 651 (arguing Justice Scalia's concurring opinion in *Thornton* lacks clarity); Rudstein, *supra* note 125, at 1344–45 (critiquing Justice Scalia's concurring opinion in *Thornton*); *supra* notes 114–33 and accompanying text (arguing both *Gant* holdings provide scant guidance to law enforcement).

¹³⁷ Compare *Gant*, 129 S. Ct. at 1720–22 (limiting *Belton* solely to areas in which an unsecured suspect could grab weapons or destroy evidence, as well as allowing searches of vehicles incident to arrest when officers have reason to believe evidence of the crime of the arrest exists in the vehicle) and *Thornton*, 541 U.S. at 620–21 (expanding *Belton* to allow searches of entire vehicles regardless of the suspect's proximity to the vehicle) and *Belton*, 453 U.S. at 460–61 (creating the first bright-line rule allowing searches of areas into which a “recent occupant” of a vehicle could reach) with *Houghton*, 526 U.S. at 298 (allowing officers who have probable cause to believe evidence exists in the vehicle to search the entire vehicle—including the belongings of all passengers—without further restrictions on where in the vehicle they may search).

¹³⁸ See *supra* notes 60–77 and accompanying text (outlining the history of the automobile search incident to arrest doctrine); *supra* notes 114–36 and accompanying text (critiquing both holdings in *Gant*).

¹³⁹ See *infra* notes 140–54 and accompanying text (advocating for the adoption of probable cause and the automobile exception as the alternative to *Gant*).

¹⁴⁰ See *infra* notes 141–47 and accompanying text (arguing probable cause operates as a straightforward standard, as opposed to the search incident to arrest doctrine, which remains vague).

regardless of whether the search targets a person, home, or vehicle.¹⁴¹ It serves as the definitive standard when balancing a suspect's expectation of privacy and the interests of law enforcement.¹⁴² An extensive number of cases fully inform law enforcement of the nature of probable cause and its application to automobile searches.¹⁴³ When law enforcement officers possess probable cause to search a vehicle, they satisfy the traditional constitutional standard to initiate searches, and can thus commence a presumably reasonable search.¹⁴⁴ Courts determine probable cause by analyzing the totality of the circumstances surrounding a search from the objective position of a reasonable law enforcement official at the time of the arrest.¹⁴⁵ This test is flexible because courts must analyze each challenge separately based on the facts of each individual search.¹⁴⁶ In contrast, the federal bright-line approach has proven incapable of addressing the factual intricacies of Fourth Amendment challenges, leading courts to adopt unconstitutionally broad or vague standards entitling law enforcement to search vehicles with little to no required level of suspicion.¹⁴⁷

¹⁴¹ *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) (referring to probable cause as the “textual and traditional standard” for searches); Brief of the ACLU, *supra* note 119, at 25.

¹⁴² *See Chambers v. Maroney*, 399 U.S. 42, 51 (1970) (referring to probable cause as the “minimum requirement” for a constitutional, reasonable search); 68 AM. JUR. 2D *Searches and Seizures* § 11 (2009) (detailing probable cause).

¹⁴³ *See, e.g., Houghton*, 526 U.S. at 306–07 (holding when law enforcement has probable cause to search a suspect's vehicle for evidence, they may reasonably search all compartments and the contents of passenger belongings in the vehicle); *United States v. Ross*, 456 U.S. 798, 825 (1982) (expanding the automobile exception to the Fourth Amendment warrant requirement to allow searches of vehicles and vehicular compartments without a warrant if officers have probable cause sufficient to obtain a warrant at the time of the search); *see also* 2 LAFAYETTE, *supra* note 22, § 3.2 (outlining numerous cases which define probable cause historically and practically, as well as how to demonstrate probable cause existed at the time of a search).

¹⁴⁴ *See Whren v. United States*, 517 U.S. 806, 818–19 (1996) (holding searches and seizures are presumed reasonable when police have probable cause); *see also, e.g., United States v. Coleman*, 458 F.3d 453, 458 (6th Cir. 2006) (holding a search reasonable under *Whren* since the officers had probable cause to search); *United States v. Tovar-Valdivia*, 193 F.3d 1025, 1028 (8th Cir. 1999) (referring to *Whren* when determining an officer did not have probable cause and thus did not commence a reasonable seizure).

¹⁴⁵ *See Gates*, 462 U.S. at 233 (determining probable cause operates as a “totality of the circumstances” inquiry); Lawrence Rosenthal, *Probability, Probable Cause, and the Law of Unintended Consequences*, 87 TEX. L. REV. SEE ALSO 63, 63–66 (2009), <http://www.texasrev.com/sites/default/files/seealso/vol87/pdf/87TexasLRevSeeAlso63.pdf> (discussing the probable cause standard).

¹⁴⁶ *See Gates*, 462 U.S. at 233 (establishing the fact-based “totality of the circumstances” approach to determining probable cause); *Brinegar v. United States*, 338 U.S. 170, 175 (1949) (“In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”); *The Warrant Requirement*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 21, 23 n.59 (2009) (discussing the *Gates* “totality of the circumstances” approach to probable cause).

¹⁴⁷ *See Thornton*, 541 U.S. at 620–21 (expanding the *Belton* “recent occupant” test to allow searches to commence after suspects exited vehicles of their own volition, resulting in carte blanche access to search the suspect's entire vehicle incident to arrest); *Belton*, 453 U.S. at 460–61 (expanding the *Chimel* immediate control test to include passenger areas into which “recent occupants” of a

Adopting the automobile exception as the alternative to *Gant* simultaneously protects privacy interests while enabling law enforcement total access to vehicles, without the need for further litigation.¹⁴⁸ When searches of vehicles commence with probable cause, numerous cases define the boundaries of reasonableness.¹⁴⁹ The probable cause automobile exception explicated in *Ross–Acevedo–Houghton* addresses the problems in *Gant* by allowing thorough searches of vehicles while simultaneously recognizing and protecting a suspect's privacy interests.¹⁵⁰ After circumstances surrounding the search give rise to probable cause, *Houghton* allows law enforcement to search the suspect's entire vehicle, including closed compartments and the contents of passenger belongings.¹⁵¹ Since *Houghton* allows officers possessing probable cause total access to a vehicle under the automobile exception, law enforcement requires no further litigation to understand the boundaries of reasonableness after commencing the search.¹⁵² *Gant* cannot currently protect privacy interests, however, since the two holdings remain unclear and require further litigation to clarify.¹⁵³ Adopting probable cause through the automobile exception as the sole standard for automobile searches thus simultaneously protects the privacy interests of suspects while enabling law enforcement to thoroughly search for evidence.¹⁵⁴

vehicle could reach); *Chimel*, 395 U.S. at 768 (limiting the area of a search incident to arrest to the area solely within the immediate control of the suspect in order to protect officers from hidden weapons and prevent the destruction of evidence).

¹⁴⁸ See *infra* notes 149–54 and accompanying text (contending courts must adopt the automobile exception to protect privacy interests).

¹⁴⁹ See *supra* notes 140–46 and accompanying text (explaining probable cause).

¹⁵⁰ See Brief of the ACLU, *supra* note 119, at 19–20 (arguing the Fourth Amendment requires the government to have probable cause to justifiably infringe on a suspect's privacy interests); Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 Miss. L.J. 341, 381–84, 406–07 (2004) (discussing the high degree of suspicion required to search under the automobile exception, and how the search incident to arrest exception erodes the privacy protections offered by probable cause); *infra* notes 151–54 and accompanying text (discussing the thorough searches allowed under *Houghton*).

¹⁵¹ See *Houghton*, 526 U.S. at 298 (holding the automobile exception allows law enforcement to search the belongings of passengers); *California v. Acevedo*, 500 U.S. 565, 579–80 (1991) (expanding the automobile exception to include closed passenger compartments capable of concealing contraband); *Ross*, 456 U.S. at 825 (holding the automobile exception allows officers who possess sufficient probable cause to obtain a warrant may search an entire vehicle including the trunk since a warrant would authorize the search of those areas).

¹⁵² See Michele M. Jochner, *Recent U.S. Supreme Court Fourth Amendment Rulings Expand Police Discretion*, 88 ILL. B.J. 576, 580–81 (2000) (noting *Houghton* expands police discretion to search passenger belongings, but remains limited by probable cause); Walter M. Hudson, *A Few New Developments in the Fourth Amendment*, ARMY LAW., Apr. 1999, at 39 (discussing how *Houghton* authorizes meticulous searches while still remaining restricted by probable cause).

¹⁵³ See *supra* notes 114–33 and accompanying text (discussing the lack of clarity in the *Chimel* immediate control test and the unclear definition of the reason to believe standard in Justice Scalia's concurring opinion in *Thornton*).

¹⁵⁴ See *United States v. Carroll*, 267 U.S. 132, 147, 155–57, 162 (1924) (establishing the automobile exception to the Fourth Amendment warrant requirement, but maintaining probable

CONCLUSION

In the first *Gant* holding, the majority retethered *Belton* to the *Chimel* dual interests of officer safety and evidence preservation.¹⁵⁵ In the second *Gant* holding, the majority extended the rule beyond *Chimel* by allowing searches to commence if officers have reason to believe evidence of the crime of the arrest exists in the vehicle at the time of the search.¹⁵⁶ The Court has never fully defined *Chimel* as applied to vehicles.¹⁵⁷ The Court also adopted the reason to believe standard without explaining its precise definition.¹⁵⁸ By doing so, the *Gant* ruling fails to protect privacy interests since clarifying both holdings requires further litigation.¹⁵⁹ As an alternative, the automobile exception explicated in *Ross–Acevedo–Houghton* solves the problems in *Gant* by protecting privacy interests while simultaneously providing total guidance to law enforcement.¹⁶⁰ When officers possess probable cause that evidence exists in a suspect's vehicle, they may search the entire vehicle, including all compartments and the contents of passenger belongings.¹⁶¹ While the automobile exception allows for thorough searches, it remains limited by probable cause, which properly balances privacy interests with the government's need to search.¹⁶² Since *Gant* fails to protect privacy interests, courts must protect these interests by adopting the automobile exception as the sole standard for automobile searches.¹⁶³

cause as the required level of suspicion); Davis A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 565–70 (1998) (discussing the automobile exception, which commences with probable cause sufficient to obtain a warrant, and the search incident to arrest exception, which offers little to no protection of privacy); Thomas B. McAfee, John P. Lukens & Thaddeus J. Yurek III, *The Automobile Exception in Nevada: A Critique of the Harnisch Cases*, 8 NEV. L.J. 622, 646 (2008) (observing the automobile exception provides greater privacy protection to suspects than the search incident to arrest exception).

¹⁵⁵ See *supra* notes 87–90 and accompanying text (discussing the first *Gant* holding).

¹⁵⁶ See *supra* notes 91–93 and accompanying text (discussing the second *Gant* holding).

¹⁵⁷ See *supra* notes 114–18 and accompanying text (contending courts have never defined the *Chimel* immediate control test).

¹⁵⁸ See *supra* notes 119–28 and accompanying text (arguing neither Justice Stevens in *Gant* nor Justice Scalia in *Thornton* defined reason to believe).

¹⁵⁹ See *supra* notes 129–33 and accompanying text (contending *Gant* cannot protect privacy rights since both holdings are unclear).

¹⁶⁰ See *supra* notes 148–54 and accompanying text (advocating for the adoption of probable cause and the automobile exception as the sole standard for automobile searches).

¹⁶¹ See *supra* notes 148–50 and accompanying text (explaining the boundaries of reasonableness defined in *Houghton*).

¹⁶² See *supra* notes 137–47 and accompanying text (arguing probable cause protects privacy interests while enabling law enforcement to thoroughly search the vehicles of suspects).

¹⁶³ See *supra* notes 148–54 and accompanying text (concluding the automobile exception should operate as the sole standard for vehicle searches).

CASE NOTE

CRIMINAL LAW—All Mixed Up and Don't Know What To Do: A Review of the Tenth Circuit's Approach to Sentencing in Federal Methamphetamine Production Cases; *United States v. Richards*, 87 F.3d 1152 (10th Cir. 1996) (en banc)

*Kevin L. Daniels**

INTRODUCTION

Methamphetamine, the substance at issue in *United States v. Richards*, is a burgeoning epidemic in the states that comprise the Tenth Circuit, including Wyoming.¹ The National Institute of Drug Abuse describes methamphetamine as a “powerfully addictive stimulant that dramatically affects the central nervous system.”²

The issue presented in *Richards*—whether it is proper to include the by-product of methamphetamine production when determining the drug quantity for sentencing purposes—is still relevant today.³ The present circuit split—centered

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¹ 87 F.3d 1152, 1152 (10th Cir. 1996) (en banc); see U.S. Sentencing Commission, 2008 Datafile, at 1, available at <http://www.ussc.gov/JUDPACK/2008/10c08.pdf>. According to statistics compiled by the United States Sentencing Commission, in fiscal year 2008, twenty-two percent of federally sentenced defendants in the states that comprise the Tenth Circuit committed drug offenses. *Id.* Thirty-five percent of these involved methamphetamine. *Id.*; see also U.S. Sentencing Commission, 2008 Datafile, at 1, available at <http://www.ussc.gov/JUDPACK/2008/wy08.pdf>. In Wyoming, forty-seven percent of federally sentenced defendants committed drug offenses. *Id.* Nearly seventy-five percent of these involved methamphetamine. *Id.*

² National Institute on Drug Abuse, Methamphetamine (2008), at 1–2, available at http://www.npaihb.org/images/epicenter_docs/Meth/RRMetham.pdf. According to the Institute:

[Methamphetamine] is a white, odorless, bitter tasting crystalline powder that easily dissolves in water or alcohol. The drug was developed early last century from its parent drug, amphetamine, and was originally used in bronchial inhalers. Like amphetamine, methamphetamine causes increased activity and talkativeness, decreased appetite, and a general sense of well-being. However, methamphetamine differs from amphetamine in that at comparable doses, much higher levels of methamphetamine get into the brain, making it a more potent stimulant drug. It also has longer lasting and more harmful effects on the central nervous system.

Id.

³ Petition for Writ of Certiorari at 17, *Clarke v. United States*, No. 09-455, 2009 WL 3341929 (Oct. 14, 2009), *cert. denied*, No. 09-455, 2009 WL 3344912 (U.S. Nov. 16, 2009) (asserting the need for the Court to resolve the existing circuit split); see *Richards*, 87 F.3d at 1152 (“Methamphetamine is commonly synthesized via a process that yields methamphetamine in a liquid solution. Operators of clandestine methamphetamine labs attempt to extract the pure methamphetamine from the liquid mixture.”).

on interpretations of *Chapman v. United States*—indicates a continuing chasm which must be resolved in order for uniformity and consistency in sentencing to occur as we work through today’s epidemic.⁴

The Drug Enforcement Agency has noted the increase of methamphetamine production in the United States.⁵ This increase in methamphetamine production—combined with the lack of resolution surrounding the circuit split—highlights the need to address the issue of whether it is proper to include the by-product of methamphetamine production when determining the drug quantity for sentencing purposes.⁶ Recently, the United States Supreme Court denied a petition for a writ of certiorari centered on this issue.⁷ Despite the denial, the petition for a writ of certiorari illustrates the sentencing issues surrounding the production of methamphetamine are still prevalent today.⁸ *Richards* is the controlling precedent in the Tenth Circuit for determining whether it is proper to include by-products of methamphetamine production in determining drug quantity for sentencing purposes.⁹

On August 10, 1990, law enforcement arrested Larry D. Richards for possession of a liquid mixture containing detectible amounts of methamphetamine.¹⁰ Richards pleaded guilty to possession of 1,000 grams or more of a liquid mixture containing a detectible amount of methamphetamine, with intent to manufacture methamphetamine in violation of 21 U.S.C. § 841.¹¹ Based upon the entire weight of the substance, Richards received a sentence of 188 months imprisonment.¹² The district court later reduced Richards’s sentence to 60 months imprisonment.¹³ A divided panel of the Tenth Circuit affirmed the sentence reduction and held Richards responsible for only 28 grams of methamphetamine, not the 32

⁴ See *Chapman v. United States*, 500 U.S. 453, 453 (1991) (holding blotter paper and LSD constitute a “mixture” under the plain meaning of the term because LSD crystals are diffused among the fibers of the blotter paper); *infra* note 97 and accompanying text.

⁵ U.S. Dep’t of Just., National Drug Threat Assessment (2009), available at <http://www.justice.gov/ndic/pubs32/32166/overview.htm#Outlook> (stating methamphetamine production will likely increase).

⁶ *Id.*; see *supra* notes 3–5 and accompanying text.

⁷ *Clarke*, 564 F.3d 949 (8th Cir. 2009), cert. denied, No. 09-455, 2009 WL 3344912 (U.S. Nov. 16, 2009).

⁸ *Id.* at 4–5.

⁹ *Richards*, 87 F.3d at 1152.

¹⁰ *Id.* at 1153.

¹¹ *Id.*; see 21 U.S.C. § 841(a) (2006) (“It shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .”).

¹² *Richards*, 87 F.3d at 1153.

¹³ *Id.* at 1154.

kilograms he was originally responsible for.¹⁴ The Tenth Circuit granted en banc review in order to clarify whether the United States Sentencing Guidelines or the statutory definition of mixture or substance controlled.¹⁵

This note will first argue the United States Supreme Court's precedent in *Chapman*, in defining the phrase "mixture or substance" as contained in § 841(b), is the only way to satisfy congressional intent with respect to methamphetamine drug trafficking.¹⁶ This analysis will reinforce the importance of giving statutes their plain and ordinary meaning when Congress does not provide a statutory definition.¹⁷ Second, this note will argue that non-consumable waste products of methamphetamine production should be included—as opposed to the market-oriented approach adopted in some circuits—when determining drug weight for sentencing purposes.¹⁸ Third, this note will challenge the success of United States Sentencing Guidelines § 2D1.1 (U.S.S.G. § 2D1.1) application note 1 in resolving circuit conflicts surrounding this issue and instead argue that application note 1 directly conflicts with congressional intent as interpreted in *Chapman*.¹⁹ Additionally, vague and ambiguous language in U.S.S.G. § 2D1.1 application note 1 serves as a harbinger of continued confusion.²⁰ Finally, this note will endorse the plain language approach adopted by the Tenth Circuit in dealing with by-products of methamphetamine production and determining drug quantity for sentencing purposes.²¹

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Chapman*, 500 U.S. at 453 (holding blotter paper and LSD constitute a "mixture" under the plain meaning of the term because LSD crystals are diffused among the fibers of the blotter paper); see *infra* notes 110–25, 131–33, 136 and accompanying text.

¹⁷ See *infra* notes 110–25, 131–33, 136 and accompanying text.

¹⁸ See *infra* notes 109–25, 131–33, 137 and accompanying text.

¹⁹ *Chapman*, 500 U.S. at 458–63; see *infra* notes 126–32, 134–35 and accompanying text.

²⁰ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 (2008) (stating phrases such as, "if such material cannot readily be separated from the mixture or substance" and "the court may use any reasonable method to approximate the weight of the mixture or substance to be counted" lead to confusion due, in part, to their ambiguity). It then becomes the responsibility of the court to determine what can be "easily separated." *Id.* Additionally, allowing the courts to "use any reasonable method" nullifies the purposes of the guidelines: uniformity, honesty, and consistency in sentencing. *Id.*

²¹ *United States v. Trefl*, 447 F.3d 421, 428–29 (5th Cir. 2006) (holding the weight of liquid containing trace amounts of methamphetamine could be considered for sentencing purposes); *Richards*, 87 F.3d 1152, 1152; *United States v. Sherrod*, 964 F.2d 1501, 1509 (5th Cir. 1992) ("[The] consideration of the total weight of a substance containing a detectable amount of methamphetamine is proper in determining the defendant's sentence.").

BACKGROUND

Legislative History of 21 U.S.C. § 841

The legislative history behind the issue of whether it is proper to include by-products of methamphetamine production in determining the drug quantity for sentencing purposes began with the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (CDAPCA).²² Congress constructed the CDAPCA to combat the growing drug abuse problem in the United States.²³ In 1984 Congress amended the CDAPCA with the passage of the Comprehensive Crime Control Act of 1984 (CCCA).²⁴ The two most relevant provisions of the CCCA are Chapter V, titled the Controlled Substances Penalties Amendments Act of 1984 (CSPAA), and the Sentencing Reform Act of 1984 (SRA).²⁵ The CSPAA made “punishment dependent upon the quantity of the controlled substance involved.”²⁶ The CSPAA also removed, for sentencing purposes, the distinction between narcotic and non-narcotic substances in Schedules I and II.²⁷

The Sentencing Reform Act of 1984 represented the first global attempt by Congress to enact legislation regarding sentencing criminal offenders within the federal system.²⁸ The senate report accompanying the SRA expressed Congress’s desire to eliminate sentencing disparities within the federal system.²⁹ One of the

²² Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236 (1970).

²³ H.R. REP. NO. 91-1444, pt. 1 (1970). The CDAPCA contained three titles: Title I set up drug abuse rehabilitation programs; Title II bestowed law enforcement authority upon the Department of Justice to address problems associated with drug abuse; and Title III dealt with the exportation and importation of drugs subject to abuse. *Id.* Title II, titled the Controlled Substances Act, affected 21 § U.S.C. 841 by classifying drugs into five different schedules based on the likelihood of abuse. *Id.* The law set punishments based on whether a drug was classified as a narcotic under the Act. *Id.* Drug weight, at this point, was irrelevant in determining an offender’s punishment. *Id.*

²⁴ Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, ch. V, 98 Stat. 1976, 2068 (1984) (codified as amended in various sections within 21 U.S.C. (2006)).

²⁵ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 2068 (1984) (codified as amended in various sections within 21 U.S.C. (2006)); *see also* Comprehensive Crime Control Act, Pub. L. No. 98-473, S. REP. NO. 98-225, at 255 (1983). The purpose of the CSPAA was to address three major problems arising out of the existing Controlled Substance Act (CSA). S. REP. NO. 98-225. First, the Senate Report noted that the CSA lacked any consideration as to the amount of the controlled substance involved in a particular offense, only accounting for the nature of the drug for sentencing purposes. *Id.* Second, the Senate report noted that the CSA did not set adequate fine levels. *Id.* The last problem mentioned in the Senate Report, lack of uniformity in sentencing when Schedule I and Schedule II drugs were involved, needed resolution. *Id.*

²⁶ *Chapman v. United States*, 500 U.S. 453, 460 (1991).

²⁷ *Id.* at 460–61.

²⁸ Sentencing Reform Act of 1984, Pub. L. No. 98-473, Ch. 2, 98 Stat. 1837 (1984).

²⁹ S. REP. NO. 98-225.

primary vehicles Congress created—within the SRA—to meet this goal was the United States Sentencing Commission.³⁰ The primary purpose of the Sentencing Commission is to promulgate a set of sentencing guidelines and policy statements to aid in eliminating sentencing disparity.³¹

The next piece of legislation aimed at combating the drug problem in the United States was the Anti-Drug Abuse Act of 1986 (ADAA).³² The ADAA amended the Controlled Substances Act by setting the sentences for drug trafficking based upon the aggregate quantity of the drug distributed.³³ Congress, by setting the penalties according to the weight of a “mixture or substance containing a detectable amount” of a controlled substance, adopted an approach designed to disable all levels of the drug market.³⁴ Within the framework of this approach, Congress determined the best way to combat drug abuse in the United States was to punish those “responsible for creating and delivering very large quantities of drugs.”³⁵ Congress also determined it was vital to target the “managers of retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping PCP in aluminum foil, and doing so in substantial street quantities.”³⁶

Chapman v. United States

Congress, in its legislation, never explicitly defined “mixture or substance.”³⁷ As a result, ambiguity regarding what constitutes a “mixture or substance” for

³⁰ *Id.*

³¹ U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A, introductory cmt. (2008). Congress saw a need, in creating the Sentencing Commission, to address a pre-Guidelines sentencing system where a defendant was subject to an “indeterminate sentence of imprisonment” that could later be greatly modified by the parole commission. *Id.* This practice often led to defendants only serving approximately one-third of their original sentence imposed by the court. *Id.* Second, Congress sought to narrow the wide disparities in sentences imposed “for similar criminal offenses committed by similar offenders.” *Id.* Third, “Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.” *Id.* The Sentencing Commission, through the authority given it by Congress, addressed each of the three objectives by producing a Sentencing Guidelines manual that could be used by all of the federal court system. *Id.* The inaugural Guidelines were submitted to Congress on April 13, 1987 and took effect on November 1, 1987. *Id.* In the Policy Statement created by the Sentencing Commission, the Commission outlined three objectives that, if met, would serve to fulfill the intent of Congress in enacting the SRA which was to “enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.” *Id.*

³² Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

³³ H.R. REP. NO. 99-845, pt. 1, at 14–15 (1986).

³⁴ H.R. REP. NO. 99-845, at 14–15, 18; *see* 21 U.S.C. § 841(b) (2006).

³⁵ H.R. REP. NO. 99-845, at 14; *United States v. Richards*, 87 F.3d 1152, 1152 (10th Cir. 1996) (en banc).

³⁶ H.R. REP. NO. 99-845, at 14; *accord Chapman*, 500 U.S. at 461–62; *Richards*, 87 F.3d at 1156.

³⁷ *See* 21 U.S.C. § 841.

purposes of sentencing under § 841(b) continued until the United States Supreme Court decided *Chapman v. United States*.³⁸ Prior to *Chapman*, there were great disparities in sentencing under § 841(b).³⁹ In *Chapman*, the Court addressed whether it is proper to include the weight of blotter paper containing LSD or the weight of pure LSD alone in determining a defendant's eligibility for a mandatory minimum sentence under § 841(b).⁴⁰ The Court held the phrase "mixture or substance" must be given its ordinary meaning.⁴¹ The Court also held the phrase "mixture or substance" was not ambiguous and that including the weight of the blotter paper for sentencing purposes would not lead to an absurd result.⁴² The Court noted that Congress did not offer distinctions between the varying types of mixtures and instead intended the "penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found—cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level."⁴³ The Court then concluded by unequivocally stating, "So long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence."⁴⁴

Neal v. United States

In 1996, the Court solidified its position in *Neal v. United States*.⁴⁵ The defendant in *Neal* argued the Sentencing Commission's definition of "mixture or substance" should be the controlling definition when determining drug quantity for sentencing purposes under § 841(b).⁴⁶ The Court rejected this argument and held *Chapman*'s plain meaning definition of "mixture or substance" is controlling.⁴⁷

The Court, in reaching its decision in *Neal*, affirmed that *Chapman* set forth the controlling definition of "mixture or substance" for sentencing under § 841.⁴⁸ It is also important to note that the defendant in *Neal* asserted the Sentencing Commission's amended commentary to U.S.S.G. § 2D1.1 controlled the mandatory minimum calculation under § 841(b).⁴⁹ However, the Court rejected

³⁸ *Chapman*, 500 U.S. 453.

³⁹ *Id.* at 458–59.

⁴⁰ *Id.* at 461–62.

⁴¹ *Id.* at 468.

⁴² *Id.* at 454.

⁴³ *Id.* at 461.

⁴⁴ *Id.* at 459.

⁴⁵ 516 U.S. 284 (1996).

⁴⁶ *Id.* at 285–87.

⁴⁷ *Id.* at 290; see also Julie S. Thomerson, *Drug Sentencing*, 74 DENV. U. L. REV. 435, 438–39 (1997) (describing the rationale of the *Neal* Court in affirming the holding in *Chapman*).

⁴⁸ *Id.*

⁴⁹ *Id.* at 289–90.

this argument and reiterated its commitment to the doctrine of *stare decisis*.⁵⁰ As such, the Court was bound to follow the definition of “mixture or substance” as articulated in *Chapman*.⁵¹

Circuit Split Surrounding Interpretation of Chapman

Following the clearly articulated decisions in *Chapman* and *Neal*, the federal courts nevertheless failed to uniformly determine drug weights for sentencing purposes.⁵² This lack of uniformity can be traced to the various courts’ interpretations of *Chapman*.⁵³ After *Chapman*, the Second, Third, Sixth, Seventh, and Eleventh Circuits held “only usable or consumable mixtures or substances are included in the drug quantity for sentencing purposes.”⁵⁴ Throughout this note, the approach of these circuits will be termed the market-oriented approach.

By contrast, two circuits, the First and Tenth, adopted a two-step approach to determining whether to include nonmarketable waste products in calculating drug weight for sentencing purposes.⁵⁵ First, the sentencing court determines whether the defendant is subject to a mandatory minimum term of incarceration.⁵⁶ That determination is made using the gross weight, including unmarketable material.⁵⁷ Second, if the defendant is not subject to a mandatory minimum, the sentencing court determines the guideline offense level by using the net weight, excluding

⁵⁰ *Id.* at 290.

⁵¹ *Id.*

⁵² See *infra* note 97 and accompanying text.

⁵³ *Chapman*, 500 U.S. at 453–54 (holding the words “mixture or substance” in § 841 had to be given their ordinary meaning because Congress did not provide a statutory definition). The Court went on to determine the ordinary meaning of “mixture” includes:

[A] portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly comingled are regarded as retaining a separate existence. *Webster’s Third New International Dictionary* 1449 (1986). A “mixture” may also consist of two substances blended together so that the particles of one are diffused among the particles of the other. 9 *Oxford English Dictionary* 921 (2d ed. 1989).

Id. at 454; see also *infra* notes 54–60 and accompanying text.

⁵⁴ *United States v. Stewart*, 361 F.3d 373, 377–79 (7th Cir. 2004) (stating only usable or consumable mixtures or substances can be used in determining drug quantity under § 841(b)); accord *United States v. Johnson*, 999 F.2d 1192, 1195–96 (7th Cir. 1993); *United States v. Rodriguez*, 975 F.2d 999, 1006–07 (3d Cir. 1992); *United States v. Acosta*, 963 F.2d 551, 554–55 (2d Cir. 1992); *United States v. Jennings*, 945 F.2d 129, 135 (6th Cir. 1991); *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1237–38 (11th Cir. 1991).

⁵⁵ FED. SENT. L. & PRAC. § 2D1.1 (2009 ed.).

⁵⁶ *Id.*

⁵⁷ *Id.*

unmarketable waste material.⁵⁸ Because the case at hand deals with § 841(b), only the first step in this process will be examined in this note. The Fifth and Eighth Circuits also include *any* detectable waste products pursuant to the plain language of § 841(b).⁵⁹ For the purposes of this note, the approach taken by the First, Fifth, Eighth, and Tenth Circuits will be designated as the plain language approach. As the various circuit splits show, the issue of what to include when determining drug quantity for sentencing purposes remains.⁶⁰ This was the primary issue at hand when the Tenth Circuit ruled, en banc, in *United States v. Richards*.⁶¹

PRINCIPAL CASE

United States District Court for the District of Utah

On August 10, 1990, law enforcement arrested Larry D. Richards for possession of a liquid mixture containing detectible amounts of methamphetamine.⁶² Law enforcement seized the 32 kilogram solution before Richards could separate the 28 grams of pure methamphetamine suspended in the liquid.⁶³

Pursuant to the United States Sentencing Guidelines in effect at the time, the United States District Court for the District of Utah sentenced Richards to 188 months of imprisonment.⁶⁴ Pursuant to U.S.S.G. § 2D1.1, which then called for the use of the entire mixture as part of the calculation, the court calculated the sentence using the entire 32 kilogram mixture rather than the amount of pure methamphetamine it contained.⁶⁵ Richards did not appeal his sentence.⁶⁶ Instead,

⁵⁸ *Id.* (illustrating the second step is only to be used when a defendant is not subject to a mandatory minimum sentence); see Brief of Appellant at 25–26, *United States v. French*, 200 Fed. App'x 774 (10th Cir. 2006) (No. 04-5168), 2005 WL 3657815 (distinguishing the holding in *Richards* because French was charged under a statute lacking a mandatory minimum).

⁵⁹ 21 U.S.C. § 841(b); *United States v. Clarke*, 564 F.3d 949, 954–56 (8th Cir. 2009); *United States v. Trefl*, 447 F.3d 421, 422 (5th Cir. 2006); *United States v. Kuenstler*, 325 F.3d 1015, 1023 (8th Cir. 2003).

⁶⁰ Petition for Writ of Certiorari at 17, *Clarke v. United States*, No. 09-455, 2009 WL 3341929 (Oct. 14, 2009), *cert. denied*, No. 09-455, 2009 WL 3344912 (U.S. Nov. 16, 2009).

⁶¹ *Richards*, 87 F.3d at 1153.

⁶² *United States v. Richards*, 87 F.3d 1152, 1153 (10th Cir. 1996) (en banc).

⁶³ *Id.*

⁶⁴ *Id.*; see also U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (1990). At the time of Richards's sentencing, the Guidelines were mandatory. *Booker v. United States*, 543 U.S. 220, 222 (2005). In 2005, the Supreme Court determined the guidelines violated a defendant's Sixth Amendment right to have a jury determine the facts which lead to a greater sentence. *Id.* In doing so, the Court rendered the guidelines effectively advisory. *Id.*

⁶⁵ *Richards*, 87 F.3d at 1153.

⁶⁶ *Id.*

he filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255.⁶⁷ The court denied that motion.⁶⁸ Richards filed a second § 2255 motion arguing the court misapplied the Guidelines when it sentenced him according to the entire weight of the liquid and not merely the 28 grams of pure methamphetamine.⁶⁹ The district court granted this motion and ordered Richards's sentence vacated.⁷⁰

United States Court of Appeals for the Tenth Circuit: Panel Decision

The United States Court of Appeals for the Tenth Circuit reversed the district court and ruled granting the motion to be an abuse of the writ.⁷¹ However, the court noted a pending Sentencing Commission amendment to the commentary to U.S.S.G. § 2D1.1 could afford Richards relief if adopted and applied retroactively.⁷² The amendment proposed to exclude waste materials requiring separation from the pure drug prior to use from the drug weight calculation required under U.S.S.G. § 2D1.1.⁷³ The amended commentary took effect November 1, 1993.⁷⁴ The Sentencing Commission designated the amendment for retroactive effect.⁷⁵

⁶⁷ *Id.* at 1153; *see also* 28 U.S.C. § 2255 (2006). A writ under 28 U.S.C. § 2255 provides a prisoner in custody with the ability to move the court which imposed the sentence to vacate, set aside or correct the sentence if the sentence was in violation of the Constitution, in violation of the laws of the United States, the sentence was in excess of what was permissible by the law, or the court lacked jurisdiction to impose the sentence. 28 U.S.C. § 2255.

⁶⁸ *Richards*, 87 F.3d at 1153.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* (stating Richards's 28 U.S.C. § 2255 motion is an abuse of the writ).

⁷² *Id.* Congress gave the Sentencing Commission authority to set its own effectiveness dates:

The Commission . . . may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments.

28 U.S.C. § 994(p) (2006).

⁷³ *Richards*, 87 F.3d at 1154. Specifically, the amendment provides:

“Mixture or substance” as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot be readily be separated from the mixture or substance that is appropriately counted in the Drug Quantity table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 (2008).

⁷⁴ U.S. SENTENCING GUIDELINES MANUAL app. C.

⁷⁵ *Richards*, 87 F.3d at 1153. Congress gave the Sentencing Commission authority to make its amendments retroactive by providing:

Based on the amended commentary to U.S.S.G. § 2D1.1, Richards sought a reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2).⁷⁶ Richards asserted the amended commentary to U.S.S.G. § 2D1.1 required the court to exclude the liquid by-products seized by law enforcement and recalculate his sentence based only upon the 28 grams of pure methamphetamine.⁷⁷ Richards conceded the mandatory minimum under § 841(b) still applied.⁷⁸ The government challenged the reduction, asserting the amended commentary failed to alter the definition of “mixture or substance” in § 841, which set the statutory penalties for methamphetamine trafficking.⁷⁹ Based on this theory of statutory construction, the government argued Richards’s sentence should be no less than 120 months.⁸⁰

The district court reduced Richards’s sentence to sixty months, concluding § 841 and U.S.S.G. § 2D1.1 should be subject to a congruent interpretation in order to avoid inconsistent results.⁸¹ Thus, the district court interpreted § 841’s phrase “mixture or substance” consistent with the amended Guidelines definition and sentenced Richards based on 28 grams of methamphetamine, instead of 32 kilograms of a mixture containing methamphetamine.⁸²

If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

28 U.S.C. § 994(u); *see also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 (stating a reduction in term of imprisonment as a result of an amended guideline range occurs in cases “in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines”).

⁷⁶ *Richards*, 87 F.3d at 1153–54; *see also* 18 U.S.C. § 3582(c)(2) (2006). A court may modify a term of imprisonment “in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” § 3582(c)(2).

⁷⁷ *Richards*, 87 F.3d at 1154.

⁷⁸ *Id.* The mandatory minimums for methamphetamine apply as follows:

50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall not be less than 20 years or more than life.

21 U.S.C. § 841(b)(1)(A)(viii) (2006).

⁷⁹ *Richards*, 87 F.3d at 1154.

⁸⁰ *Id.*; *see also* 21 U.S.C. § 841(b)(1)(A)(viii).

⁸¹ *Richards*, 87 F.3d at 1153–54.

⁸² *Richards v. United States*, 796 F. Supp. 1456, 1461–62 (D. Utah 1992) (holding a sentence for possession of controlled substance should have been based on actual detectable amount of methamphetamine and any standard carrier medium, and not on entire weight of mixture where mixture contained unusable, uningestible, or poisonous materials that rendered the mixture unmarketable).

A divided panel of the United States Court of Appeals for the Tenth Circuit agreed, refusing to sentence Richards based upon the entire 32 kilogram solution.⁸³ The panel reasoned that sentencing Richards according to the 32 kilogram solution would contradict congressional intent by ignoring the panel's interpretation of the Supreme Court's holding in *Chapman v. United States*.⁸⁴ The divided panel interpreted *Chapman* as holding "Congress's 'market-oriented' approach dictates that we not treat unusable drug mixtures as if they were usable."⁸⁵

The United States Court of Appeals for the Tenth Circuit Rehearing En Banc

Majority Opinion

The United States Court of Appeals for the Tenth Circuit granted en banc review in order to determine whether the Guideline or statutory definition of "mixture or substance" controlled.⁸⁶ The *Richards* court, after hearing arguments from both parties, deemed it necessary to interpret the phrase "mixture or substance" as found in § 841.⁸⁷ The court recognized that while Congress left "mixture or substance" undefined, the court was bound to the interpretation articulated in *Chapman*.⁸⁸ The *Chapman* Court concluded the phrase "mixture or substance" must be given its plain and ordinary meaning because Congress was silent regarding the definition.⁸⁹

Richards argued the Tenth Circuit should follow the reasoning of the Second, Third, Sixth, Seventh, and Eleventh Circuits.⁹⁰ These circuits—centered on a market-oriented approach—hold that only usable and marketable materials should be used when calculating drug quantity for sentencing purposes under § 841(b). The Tenth Circuit rejected Richards's argument based on its holding that *Chapman's* definition of what constitutes a "mixture or substance" is controlling.⁹¹ Additionally, the Tenth Circuit refused to adopt the version of the market-oriented approach Richards advocated because it disregards the congressional intent to target offenders involved in the large-scale manufacturing and trafficking of methamphetamine.⁹²

⁸³ *Richards*, 87 F.3d at 1153–54.

⁸⁴ *Id.*; see *Chapman v. United States*, 500 U.S. 453, 453 (1991) (holding blotter paper and LSD constitute a "mixture" under the plain meaning of the term because LSD crystals are diffused among the fibers of the blotter paper).

⁸⁵ *Richards*, 87 F.3d at 1153–54; see *Chapman*, 500 U.S. 453, 453.

⁸⁶ *Richards*, 87 F.3d at 1154. Circuit Judge Baldock wrote the majority opinion. *Id.* at 1152.

⁸⁷ *Id.* at 1154.

⁸⁸ *Id.* at 1155.

⁸⁹ *Chapman*, 500 U.S. at 461–62.

⁹⁰ *Richards*, 87 F.3d at 1154–55.

⁹¹ *Id.* at 1157–58.

⁹² *Id.*

The Tenth Circuit held that any substance chemically bonded to the pure drug should be included in the base sentencing weight.⁹³ The majority rejected the market-oriented approach by stating that a “detectable amount”—as opposed to an ingestible or marketable amount—is the nexus of what constitutes a “mixture or substance.”⁹⁴ The court noted that the plain language of 21 U.S.C. § 841(b)(1)(A)(viii), indicating that a “mixture or substance containing a *detectable* amount of methamphetamine,” was incongruent with the amended commentary adopted by the Commission in its 1993 amendment to U.S.S.G. § 2D1.1.⁹⁵ The nexus of the incongruence is the word “detectable” as noted in § 841(b)(1)(A)(viii) and the explicit statement of the Commission—“mixture or substance does not include materials that must be separated from the controlled substance before the substance can be used. Examples of such materials include . . . waste water from an illicit laboratory used to manufacture a substance.”⁹⁶ As a result of this incongruence, the issue of whether to include waste water for purposes of calculating drug weight varies throughout the federal court system.⁹⁷

The *Richards* court also held that applying the plain meaning of “mixture or substance” would mean liquid by-products containing a detectable amount of methamphetamine constitute a “mixture or substance” when determining drug quantity for sentencing purposes under § 841.⁹⁸ Following this line of reasoning, the en banc court held *Richards* responsible for the entire 32 kilogram mixture, thus putting him in violation of § 841(b)(1)(A)(viii) and subjecting him to a mandatory minimum prison sentence of ten years.⁹⁹

⁹³ *Id.* at 1157.

⁹⁴ *Id.*

⁹⁵ *Id.* (emphasis added).

⁹⁶ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1.

⁹⁷ *Richards*, 87 F.3d at 1152–54. The Second, Third, Sixth, Seventh, and Eleventh Circuits do not count waste water or liquid by-products of drug production when determining drug quantity for purposes of sentencing under 21 U.S.C § 841(b). *E.g.*, *United States v. Johnson*, 999 F.2d 1192, 1196–97 (7th Cir. 1993); *United States v. Rodriguez*, 975 F.2d 999, 1006–07 (3d Cir. 1992); *United States v. Acosta*, 963 F.2d 551, 553–54 (2d Cir. 1992); *United States v. Jennings*, 945 F.2d 129, 136–37 (6th Cir. 1991); *United States v. Rolande-Gabriel*, 938 F.2d 1231, 1237–38 (11th Cir. 1991). The Fifth, Eighth, Ninth, and Tenth Circuits hold it proper to include waste water or liquid by-products of drug production when determining drug quantity for purposes of sentencing under 21 U.S.C § 841(b). *E.g.*, *United States v. Kuenstler*, 325 F.3d 1015, 1023 (8th Cir. 2003); *United States v. Sherrod*, 964 F.2d 1501, 1510–11 (5th Cir. 1992); *United States v. Walker*, 960 F.2d 409, 412–13 (5th Cir. 1992); *United States v. Beltran-Felix*, 934 F.2d 1075, 1076 (9th Cir. 1991).

⁹⁸ *Richards*, 87 F.3d at 1157–58.

⁹⁹ *Id.*

Furthermore, the Tenth Circuit noted neither § 841 nor its legislative history mentions the words “marketable,” “usable,” or “consumable.”¹⁰⁰ Therefore, the *Richards* court held the phrase “detectable amount”—not “usable,” “consumable,” or “marketable”—is the hallmark of the phrase “mixture or substance” under § 841(b).¹⁰¹

Dissenting Opinion

The dissenting opinion in *Richards* expressed four primary objections. First, the dissent opined the majority’s interpretation of the plain language of § 841 will lead to a result that is “demonstrably at odds with the intentions of the statute’s drafters.”¹⁰² Second, the dissent concurred with other circuits by holding Congress intended the phrase “mixture or substance” in § 841(b) to refer to a marketable or usable mixture.¹⁰³ Third, the dissent believed that while the majority was correct in holding *Chapman* was controlling precedent in the case at hand, the dissent believed the majority “divorced the holding in *Chapman* from its underlying circumstances and rationale.”¹⁰⁴ Finally, the dissent asserted Congress designed the Sentencing Commission to create and promulgate sentencing policy and practices for the federal system, and the amended commentary to U.S.S.G. § 2D1.1 unambiguously excluded the weight of waste water from the measurement of a “mixture or substance.”¹⁰⁵ Along these lines, the dissent noted that unnecessary conflict and confusion would result from the adoption of any interpretation contrary to that of the Sentencing Commission.¹⁰⁶

ANALYSIS

The United States Court of Appeals for the Tenth Circuit applied the correct reasoning in *United States v. Richards* and reached the correct conclusion regarding the proper determination of methamphetamine drug weight for sentencing purposes. First, the court properly rejected Richards’s reliance on the market-oriented approach of the Second, Third, Sixth, Seventh, and Eleventh Circuits.¹⁰⁷

¹⁰⁰ *Id.* at 1158.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1158–59 (Seymour, J., dissenting) (citing *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1989)). Chief Judge Seymour’s dissenting opinion was joined by Circuit Judges Porfilio and Henry. *Id.* at 1158.

¹⁰³ *Id.* at 1158–59; *see supra* note 97 and accompanying text.

¹⁰⁴ *Richards*, 87 F.3d at 1158–59.

¹⁰⁵ *Id.* at 1160.

¹⁰⁶ *Id.*

¹⁰⁷ *See infra* notes 109–25, 131, 132–33, 137 and accompanying text.

Second, the court correctly held *Chapman's* plain meaning interpretation of “mixture or substance” controls and is congruent with congressional intent.¹⁰⁸ Finally, the court correctly rejected Richards’s assertion that § 841 should be defined in accordance with U.S.S.G. § 2D1.1 application note 1.¹⁰⁹

In contrast to the holding of the court in *Richards*, the Second, Third, Sixth, Seventh, and Eleventh Circuits adhere to a much different version of the market-oriented approach.¹¹⁰ Under the approach adopted by these circuits “only usable or consumable mixtures or substances are included in the drug quantity for sentencing purposes.”¹¹¹ Under this approach to sentencing defendants under § 841, many offenders involved in large-scale methamphetamine production will not be punished in accordance with Congressional intent.¹¹²

The legislative history for § 841(b) illustrates Congress intended to punish drug traffickers through the plain language approach adopted by the First, Fifth, Eighth, and Tenth Circuits.¹¹³ The Court remarked that Congress constructed § 841(b) in a manner that would penalize drug offenders based on the weight of the “mixture or substance containing a detectable amount” of the drugs.¹¹⁴ Congress, in enacting § 841, desired to combat the drug problem in the United States by targeting both the major traffickers and those participating in the drug market on the retail or manufacturing level.¹¹⁵

In light of Congress’s desire to disable both the major traffickers and those involved on retail or manufacturing levels, it is necessary to consider the role liquid by-products play in the production and distribution of methamphetamine.

¹⁰⁸ See *infra* notes 110–25, 130–32, 136 and accompanying text.

¹⁰⁹ See *infra* notes 126–32, 134–35 and accompanying text.

¹¹⁰ *United States v. Richards*, 87 F.3d 1152, 1152–53 (1996) (en banc); see *supra* note 97 and accompanying text (identifying circuits excluding by-products of methamphetamine production for sentencing purposes).

¹¹¹ *United States v. Stewart*, 361 F.3d 373, 377 (7th Cir. 2004).

¹¹² *Id.*; see H.R. REP. NO. 99-845, at 14 (1986) (asserting law enforcement ought to focus efforts on disabling “major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs”).

¹¹³ *Id.* (“[Q]uantities . . . of mixtures, compounds, or *preparations* that contain a *detectable* amount of the drug—these are not necessarily quantities of pure substance.”) (emphasis added). Congress’s utilization of the word “preparation” seems to indicate a desire, with respect to methamphetamine, to disable those involved in the preparation of the drug. *Id.* Methamphetamine, being produced via liquid synthesis, requires major traffickers and producers to mix a variety of chemicals in order to reach a street-market product. *Id.*

¹¹⁴ *Chapman v. United States*, 500 U.S. 453, 459 (1991); 21 U.S.C. § 841(b) (2006).

¹¹⁵ H.R. REP. NO. 99-845, at 14; see also *supra* notes 110–11.

Every major method of producing methamphetamine involves the use of some type of liquid.¹¹⁶ Therefore, if liquid by-products are excluded when determining drug quantity for the purposes of sentencing, those offenders who Congress intended to disable would be given lenient sentences that would not reflect their roles in the drug market.¹¹⁷ Typically, those involved in the manufacture of methamphetamine do not wish to exclusively create a supply to meet their personal demand; instead, they are seeking to profit from the promulgation of the drug.¹¹⁸ Therefore, the plain language of the phrase “mixture or substance,” as provided in *Chapman*, should be used when determining whether to include liquid by-products of methamphetamine production when calculating drug quantity for sentencing purposes.¹¹⁹

Opponents of the plain language approach argue inclusion of by-products of methamphetamine production will lead to absurd results.¹²⁰ Adopting the plain language meaning of “mixture or substance” would not lead to absurd results—such as the inclusion of packing agents when determining drug quantity for sentencing purposes.¹²¹ There is a glaring difference between liquid by-products of methamphetamine production and packing agents such as a plastic container used to carry marijuana from one place to another.¹²² Under the definition of “mixture or substance,” the liquid by-product containing a “detectable” amount of methamphetamine should be included when calculating drug quantity for sentencing purposes due to the nature of the methamphetamine production

¹¹⁶ See *United States v. Brown*, 400 F.3d 1242, 1245–48 (10th Cir. 2005); see, e.g., *United States v. Layne*, 324 F.3d 464, 467–71 (6th Cir. 2003).

¹¹⁷ *United States v. Kuenstler*, 325 F.3d 1015, 1023 (8th Cir. 2003) (stating “market oriented” analysis supports finding liquid solutions in clandestine laboratories as constituting a “mixture or substance” containing methamphetamine). The *Kuenstler* court further noted “the market for this type of methamphetamine is based on its manufacture in labs . . . and that process involves creation of a liquid solution . . . a process that results in a product for distribution.” *Id.*

¹¹⁸ *Id.* at 1018, 1023; see also, e.g., *United States v. Clarke*, 564 F.3d 949, 954–56 (8th Cir. 2009); *United States v. Trefl*, 447 F.3d 421, 422 (5th Cir. 2006); *United States v. Sherrod*, 964 F.2d 1501, 1511 (5th Cir. 1992).

¹¹⁹ See *Chapman*, 500 U.S. at 454 (“Since neither the statute nor the Sentencing Guidelines define ‘mixture,’ and it has no established common-law meaning, it must be given its ordinary meaning, which is ‘a portion of matter consisting of two or more components . . . that however thoroughly commingled are regarded as retaining a separate existence’ . . .”) (citations omitted).

¹²⁰ *United States v. Johnson*, 999 F.2d 1192, 1196 (7th Cir. 1993) (providing an example of an absurd result from following the plain language approach). “[I]magine a marijuana farmer who harvests his crop, leaving a few traces of the illegal plants on the ground. The farmer then plows his field to prepare for next year’s crop and in so doing mixes the traces of marijuana with the soil.” *Id.*

¹²¹ *United States v. Innis*, 7 F.3d 840, 847 (9th Cir. 1993) (“[U]nlike a mere packing agent like crème liqueur . . . or cornmeal . . . the entire liquid mixture can be said to facilitate the distribution of methamphetamine because the methamphetamine could not have been produced without it.”).

¹²² *Id.*; see *infra* notes 121–25 and accompanying text.

process.¹²³ However, the plastic container would not be subject to the same inclusion because the bowl and the marijuana do not “consist of two substances blended together so that the particles of one are diffused among the particles of the other.”¹²⁴ The definition provided by the *Chapman* Court for the phrase “mixture or substance” would prevent such items as the plastic container or a car used to transport cocaine from being included to determine the weight of a substance for sentencing purposes.¹²⁵ This interpretation is in line with both a plain language interpretation of § 841 and the intent of Congress.¹²⁶

With the enactment of the Sentencing Reform Act of 1984 and the establishment of the Sentencing Commission, Congress created an entity meant to provide consistency, fairness, and clarity to the federal sentencing process.¹²⁷ For the most part, the Sentencing Commission accomplished these goals; however, in the case of the amended commentary to U.S.S.G. § 2D1.1, the Sentencing Commission created confusion instead of clarity.¹²⁸ The Sentencing Commission stated in application note 1 to U.S.S.G. § 2D1.1 that “‘mixture or substance’ as used in this guideline has the same meaning as in 21 U.S.C § 841, except as expressly provided.”¹²⁹ The application note expressly states “waste water from an illicit laboratory used to manufacture a controlled substance” should be excluded from the definition of “mixture or substance” under § 841(b).¹³⁰

The exclusion of waste water from drug quantity calculation is incongruent with the time-honored practice of statutory construction and illustrates a complete disregard for the plain language definition of “mixture or substance” determined by the United States Supreme Court in *Chapman*.¹³¹ Legislative history reflects

¹²³ *Innie*, 7 F.3d at 847.

¹²⁴ *Chapman*, 500 U.S. at 454, 462 (“Using the dictionary definition would not allow the clause to be interpreted to include LSD in a bottle or in a car, since, unlike blotter paper, those containers are easily distinguished and separated from LSD.”).

¹²⁵ *Id.*

¹²⁶ *Id.*; see *supra* notes 110–24 and accompanying text.

¹²⁷ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2008).

¹²⁸ See Matthew Thomas Geiger, Note, *Diagram of a Drug Sentence—Defining “Mixture or Substance” on the Basis of Utility in United States v. Richards*, 51 OKLA. L. REV. 119, 131–32 (1998) (noting the amended language in the Guidelines is in direct conflict with the Tenth Circuit’s holding in *Richards*); cf. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 (2008) (stating materials that cannot be readily separated should not be included when determining drug quantity for sentencing purposes).

¹²⁹ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 (2008).

¹³⁰ *Id.*; see also 21 U.S.C. § 841(b).

¹³¹ *Chapman*, 500 U.S. at 462–66.

the intentions of Congress when dealing with controlled substances that could be subject to the phrase “mixture or substance.”¹³² Congress was cognizant of the nature of drug trafficking and the different methods employed, depending on what type of drug was being produced.¹³³

The current split among the circuits regarding this issue must be resolved to provide uniformity and consistency within the federal sentencing system.¹³⁴ The disconnect between the *Chapman* definition of “mixture or substance” and the alternative definition presented in U.S.S.G. § 2D1.1 application note 1 must be reconciled.¹³⁵ Due to the disparate treatment of methamphetamine offenders, the following steps should be taken. First, the Sentencing Commission should repeal U.S.S.G. § 2D1.1 application note 1 and reinstitute the Guideline scheme in operation prior to 1993.¹³⁶ Second, Congress should amend 21 U.S.C. § 841(b) to expressly define what is meant by “mixture or substance.”¹³⁷ Third, the United States Supreme Court should grant certiorari the next time a case dealing with the issue presented in *Richards* arises.¹³⁸

CONCLUSION

Given the plain language of § 841, its legislative history, and the substantial body of case law indicating the necessity of including liquid by-products of methamphetamine production, the en banc court in *Richards* correctly held it

¹³² *Id.*

¹³³ See *supra* notes 110–12 and accompanying text.

¹³⁴ See Petition for Writ of Certiorari at 17, *Clarke*, No. 09-455, 2009 WL 3341929 (Oct. 14, 2009) (asserting the need for the Court to resolve the existing circuit split).

¹³⁵ See *Chapman*, 500 U.S. at 462; *Innie*, 7 F.3d at 847 (suggesting the pre-1993 amendment Guidelines were “consistent with Congress’s directive to impose sentences based on quantity rather than purity”). The court’s holding in *Innie* suggests there was uniformity between the pre-1993 amendment Guidelines and the congressional intent behind § 841. *Innie*, 7 F.3d at 847; U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 (2008).

¹³⁶ See *supra* notes 126–32 and accompanying text.

¹³⁷ *Freeborn v. Smith*, 69 U.S. 160, 175 (1864) (opining that legislative action to correct mistakes and provide remedies are peculiar subjects of legislation and lay outside the providence of the judiciary).

¹³⁸ Petition for Writ of Certiorari at 17, *Clarke*, No. 09-455, 2009 WL 3341929 (Oct. 14, 2009), *cert. denied*, 2009 WL 3344912 (U.S. Nov. 16, 2009); see also *Richards*, 87 F.3d 1153, *cert. denied*, 519 U.S. 1003 (1996); *Walker*, 960 F.2d 409, *cert. denied*, 506 U.S. 967 (1992); *Fowner v. United States*, 947 F.2d 954 (10th Cir. 1991), *cert. denied*, 504 U.S. 933 (1992). Justice White, in the *Fowner* dissent, expressed concern that the issue of whether waste by-products of methamphetamine production should be included in calculating the weight of a “mixture or substance” for purposes of sentencing is a recurring one. *Fowner*, 504 U.S. at 933–35 (White, J., dissenting). Justice White also noted the conflict among the circuits: “identical conduct in violation of the same federal laws may give rise to widely disparate sentences in different areas of the country.” *Id.*

proper to include liquid by-products of methamphetamine production when determining drug quantity for sentencing purposes under § 841.¹³⁹ First, the en banc court in *Richards* correctly held Congress intended to adopt the plain language approach as interpreted by the First, Fifth, Eighth, and Tenth Circuits to drug sentencing as opposed to the market-oriented approach adopted by other circuits.¹⁴⁰ Second, the plain language of § 841 is indicative of Congress's desire to include liquid by-products of methamphetamine production for sentencing purposes.¹⁴¹ Finally, the en banc court in *Richards* correctly held § 841 should not be defined in conformity to U.S.S.G. § 2D1.1 application note 1.¹⁴² The split among the various circuits surrounding this issue should compel the United States Supreme Court to revisit this issue and grant certiorari.¹⁴³ If certiorari is not granted, the lack of uniformity will continue to result in disparate sentences and defendants will not be afforded any degree of certainty when engaged in the federal criminal justice system.¹⁴⁴

¹³⁹ See *supra* notes 109–37 and accompanying text.

¹⁴⁰ See *supra* notes 109–25, 131–33, 137 and accompanying text.

¹⁴¹ See *supra* notes 110–25, 130–32, 136 and accompanying text (arguing it is proper to include non-ingestible waste products of methamphetamine production when determining drug quantity for sentencing purposes).

¹⁴² See *supra* notes 126–32, 134–35 and accompanying text (arguing U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 cmt. n.1 should be revised in accordance with the plain language of § 841).

¹⁴³ See *supra* notes 3, 7, 133 and accompanying text.

¹⁴⁴ See *supra* notes 126–32 and accompanying text.

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