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Ways for the Wind

By Ted Olson
Diplomat and Journalist
Laramie, Wyoming
1931

Run with the wind, like sand.
Quarrel with the wind, like the tree.
Ignore the wind, like rock.
The wind takes all in the end,
but the rock last.

Ted Olson, *Footnotes To Time: Selected Poems by Ted Olson*, copyright 1986, University of Wyoming. Reprinted with permission.

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LEVELS OF GREEN: STATE AND REGIONAL EFFORTS, IN WYOMING AND BEYOND, TO REDUCE GREENHOUSE GAS EMISSIONS

*Joshua P. Fershee**

I. INTRODUCTION

Greenhouse gas (GHG) emissions are created by nearly every human activity[1] and are believed to be a leading cause of climate change (or "global warming"), which, in turn, is a likely cause of droughts, heat waves, hurricanes, heavy storms, and floods.[2] Policies designed to reduce GHG emissions began emerging in the late 1980s, and such efforts have increased dramatically in the past ten years.[3] Although the concept that ever-increasing GHG emissions are "bad" is approaching consensus, how to deal with GHG emissions is hotly contested at all levels of

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[1] Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 692 (1999). ("[V]irtually every human activity directly or indirectly emits GHGs: fossil fuel combustion, biomass combustion, leaks from natural gas pipelines and coal mines, the clearing of forests and grasslands, . . . the raising of ruminant animals . . ., the use of nitrogen fertilizers to grow crops, and the disposal of wastes in landfills.").

[2] *See, e.g.*, Fiona Harvey, *Review Finds Temperature Rise Is Due to Human Action*, FIN. TIMES (London), Feb. 2, 2006, at 9 (discussing the most recent draft report of the Intergovernmental Panel on Climate Change, convened by the United Nations, which is charged with assessing climate-change science).

[3] *See* Fiona Harvey, *Lose-Lose: The Penalties of Acting Alone Stall Collective Effort on Climate Change*, FIN. TIMES (London), Dec. 6, 2006, at 17.

government.[4] Nonetheless, local communities, state and federal governments, and international organizations have contemplated, and in some cases implemented, programs to reduce GHG emissions. However, before taking an active role to set policies designed to reduce GHG emissions, lawmakers and government regulators need to consider whether the actions they are contemplating are likely to be effective at their given level of government. That is, although a program may be theoretically capable of achieving its desired effect, GHG reduction programs will be significantly impeded if the implementing authority chooses programs that are too broad or too limited in scope.

State and regional initiatives have unique benefits and drawbacks that should be recognized and embraced when states attempt to develop GHG emissions reduction policies. The Bush Administration has, at least for the first six years, adamantly opposed worldwide GHG reductions plans[5] and has effectively kept mandatory federal GHG emissions reduction policies off the table.[6] Therefore, this article focuses on state and regional efforts, using some recent efforts of the energy-rich state of Wyoming as a model.

This article analyzes recent Wyoming GHG emissions reduction initiatives at the state and regional level and considers these programs in the context of other proposed GHG emissions reduction plans. Part II of this article considers a major state-level GHG emissions reduction plan in Wyoming: the Wyoming carbon sequestration project. Wyoming's state-level efforts are especially interesting because Wyoming has a law expressly prohibiting mandatory GHG emissions reductions. Part III of this article first discusses the Regional Greenhouse Gas Initiative, which was created to design and implement a flexible, market-based "cap-and-trade program" to reduce carbon dioxide (CO_2) emissions from power plants in the northeastern United States. Part III then discusses two Wyoming-related regional efforts established via separate but related Memoranda of Understanding (Wyoming MOUs). The first is an MOU between the governors of Wyoming, California, Nevada, and Utah, which is designed to facilitate

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[4] *Id.* ("For more than a decade after large numbers of scientists and policymakers started focusing on climate change in 1988, critics exploited uncertainties in the evidence to cast doubt on the emerging scientific consensus that human actions were leading to climate change by burning fossil fuels.").

[5] Peter Baker & Steven Mufson, *Bush's Climate Remarks Weighed for Policy Shift*, WASH. POST, Jan. 27, 2007, at A1 (stating that the 2007 State of the Union Address was "the first time in Bush's six years in office that he mentioned [climate change] in a State of the Union.").

[6] *Energy Promises a Focus of Bush's State of the Union*, CHI. TRIB., Jan. 22, 2007, at 9 (RedEye Ed.) (stating that, according to White House aides, "the president remains opposed to mandatory cuts in carbon dioxide and other heat-trapping 'greenhouse' gases as has been proposed in Congress"). The recently elected Democratic majority will likely attempt to move some programs forward. *See infra* Part IV. However, a federal program is still likely years away because a veto of any aggressive programs is nearly certain, and it is highly unlikely any plan would have sufficient support to override a presidential veto.

the development of new interstate electric transmission lines; the second is an MOU between the governors of Wyoming and California designed to facilitate reductions of GHG emissions in California. The differing scope of each MOU provides valuable insight into the problems and potential of regional energy programs designed, at least in part, to reduce GHG emissions. Part IV concludes by briefly discussing the promise of mandatory federal programs designed to reduce GHG emissions and discusses some of the recently proposed federal plans. This part then recommends a coordinated approach that maximizes the expertise of each level of government, provides adequate autonomy for localized efforts, and provides incentives to businesses to participate actively in the development of GHG emissions reductions strategies.

II. SUCCESSFUL STATE-LEVEL PROGRAMS MUST BALANCE ECONOMIC REALITIES WHILE REDUCING EMISSIONS

State-level programs aimed at addressing climate change are often viewed as impractical and making "little economic sense"[7] and as a means to pressure federal regulation.[8] Although all such labels can be accurate for many state-level proposals, there are state climate change related programs that can be sensible, economic, and effective where large-scale programs are lacking.[9]

The State of Wyoming's GHG reduction strategies offer an interesting case study in how and why states consider certain types of programs. Wyoming, as a leading coal supplier, has a significant interest in protecting both coal suppliers and coal users from restrictions (such as CO_2 emissions caps) that would limit coal consumption. In fact, the Wyoming legislature has specifically forbidden the Wyoming Department of Environmental Quality (DEQ) and the Wyoming Environmental Quality Council (EQC) from "propos[ing] or promulgat[ing] any new rule or regulation intended . . . to reduce emissions as called for by the Kyoto Protocol, from the residential, commercial, industrial, electric utility, transporta-

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[7] *See* Kirsten Engel, *State and Local Climate Change Initiatives: What is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1021 (2006).

[8] *See* Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change,* 32 ECOLOGY L.Q. 183, 223 (2005) ("We suggest that based upon past history, regulation at a lower jurisdictional level can trigger regulation at a higher level . . . ."); *see also* Mekaela Mahoney, *State and Local Governments Take the Reins in Combating Global Warming*, 38 Urb. Law. 585, 591 (2006) ("The efforts by . . . states and local governments have been met with varying success, but . . . [t]he number of states and cities taking part in efforts to reduce greenhouse gas emissions has increased and continues to increase, putting pressure on the federal government to take more aggressive measures of its own.").

[9] *See supra* note 8, at 196 ("In the absence of unitary global regulation, the asymmetry between costs and benefits . . . makes the standard-setting problem for subglobal environmental regulators into a strategic interaction: each actor's welfare depends in part on what other actors do.").

tion, agricultural, energy or mining sectors."[10] The United States has refused to ratify the Kyoto Protocol,[11] which requires member states to reduce emissions to five percent below 1990 levels between 2008 and 2012.[12] The Wyoming statute expressly mentions the Kyoto Protocol, but the statute plainly prohibits any type of mandatory regulations requiring GHG emissions reductions. However, voluntary initiatives are permitted.

To explore such voluntary initiatives, the Wyoming legislature created the Carbon Sequestration Advisory Committee (Carbon Committee) in 2001 to research and recommend ways in which the state could assist Wyoming landowners develop additional income sources through carbon sequestration.[13] Carbon sequestration is the long-term storage of carbon in "terrestrial sinks" (i.e., soil organic matter and above-ground plants) and "geologic sinks" (i.e., underground storage of CO_2 in depleted oil and gas reservoirs).[14] Carbon sequestration provides benefits to the environment by providing a net removal of CO_2 from the atmosphere, thus mitigating the impacts of human activities such as fossil fuel consumption and cultivation of croplands. The financial incentive is tied to carbon trading via "offsets"[15] created by carbon sequestration programs. These offsets have potential value to CO_2 emitters, such as energy producers, transportation companies, and agricultural companies, which must or desire to obtain a net reduction in their emissions.

The Carbon Committee was specifically charged with recommending policies or programs that would "enhance the ability of Wyoming agriculture and forest

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[10] WYO. STAT. ANN. § 35-11-213.

[11] Jim VandeHei, *Bush, Blair Agree on Aid For African Famine Relief; But Leaders Disagree on Amount and on Global Warming*, WASH. POST, June 8, 2005, at A13 ("On global warming, Bush and Blair did not appear to make much progress. Bush has long opposed the 1997 Kyoto treaty that the United States refused to ratify.").

[12] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol], *available at* http://unfccc.int/resource/docs/convkp/kpeng.pdf. The Bush Administration has repeatedly argued that the Kyoto Protocol is "fatally flawed." *See* Maura Reynolds & James Gerstenzang, *Updating His Spin on Climate Change*, L.A. TIMES, Feb. 11, 2007, at A30 (stating that President Bush "declared the Kyoto Protocol—the United Nations' consensus document on climate change—'fatally flawed in fundamental ways' and announced that the United States was withdrawing from the pact").

[13] *See* 2001 Wyo. Sess. Laws ch. 173 § 2(a)(ii), amended by 2002 Wyo. Sp. Sess. Laws ch. 75 and 2004 Wyo. Sess. Laws ch. 38 (extending the committee's mandate until July 1, 2009).

[14] Brochure, Wyo. Carbon Sequestration Advisory Comm., Wyoming Carbon Sequestration Program [hereinafter Carbon Brochure], *available at* http://www.wyomingcarbon.org/Brochure12-05_new.pdf (last visited Mar. 21, 2007).

[15] Offsets are GHG emissions reductions tied to a unique emissions source and are not actual reductions in GHG emissions from a traditional source like, for example, an electric plant. They are instead separate programs that have the net effect of reducing emissions. Offsets either reduce the amount of GHG emissions in the air (such as carbon sequestration) or reduce the amount of emissions created by a separate source (installing electric heaters in trucks so that a driver can shut off the engine).

landowners to participate in systems of carbon trading."[16] By creating offsets via carbon sequestration, the additional carbon storage created is a commodity that can be traded through various carbon credit trading brokers.[17] Such credits can be sold on the Chicago Climate Exchange (CCX), which is "the world's first and North America's only legally binding rules-based greenhouse gas emissions allowance trading system."[18] The Carbon Committee concluded that Wyoming lands could sequester 2.9 to 7.8 million tons of carbon per year, which could lead to annual sales receipts of $9,100,000 to $22,000,000.[19]

Wyoming's carbon sequestration program is a solid example of a climate change program that has a sensible and economic basis for operating on the state level to reduce GHG emissions. First, the most appropriate types of carbon sequestration programs will vary from state to state, because each state's resources (land, water, etc.) vary considerably. Although resources within a state also can vary significantly, state-level agencies are in the best position to analyze potential programs because those conducting the assessments know (or should know) the geography and geology of the state. Because carbon sequestration is obtained via terrestrial and geologic sinks,[20] assessments of land management practices can be especially effective at the state level. Unlike tracking emissions that are in the atmosphere and are not constrained by political boundaries, the measure of sequestered carbon is based on a specific land- or water-based footprint that can be effectively drawn at a state line. Thus, a carbon sequestration program can run effectively on the state level because the net benefit from the offsets created can be effectively measured on a state level.

Furthermore, a carbon sequestration program like that proposed in Wyoming does not require the same kinds of economic and infrastructure investments found in other "green" programs.[21] Obviously, there are some costs involved to changing "business as usual" when undertaking a sequestration project, but the investments for many carbon sequestration projects are more modest and more readily available than building cleaner electric generation facilities.[22] Similarly, if the federal

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[16] 2001 Wyo. Sess. Laws ch. 173 § 2(a)(ii).

[17] Carbon Brochure, *supra* note 14.

[18] Press Release, Chicago Climate Exchange, United Technologies to Join Chicago Climate Exchange (Dec. 20, 2006), *available at* http://www.chicagoclimatex.com/news/press/release_20061220_UTC.pdf.

[19] Carbon Brochure, *supra* note 14 (stating as part of this assumption that "Carbon recently sold for $3.14 per ton ($0.85 per ton of CO2)").

[20] *Id.*

[21] *See* Wyo. Carbon Sequestration Advisory Comm. Home Page, http://www.wyomingcarbon.org/ ("Enhancing the natural processes that remove CO2 from the atmosphere is thought to be one of the most cost-effective means of reducing atmospheric levels of CO2, and forestation and deforestation abatement efforts are already under way.").

[22] *See* Press Release, Sen. Dianne Feinstein, Senator Feinstein Outlines New Legislation to Curb Global Warming, Keep Economy Strong (Mar. 20, 2006), *available at* http://www.feinstein.senate.gov/06releases/r-global-warm320.pdf. Sen. Dianne Feinstein has touted increased access

government ever implements a GHG emissions reduction plan nationwide, thus preempting state efforts, carbon sequestration projects run less risk of becoming completely useless[23] because a federal program would likely include such projects. Even the Bush Administration, which opposed virtually all climate change efforts, supports a carbon sequestration program.[24] The Department of Energy is in the process of developing "low cost carbon sequestration technology for both new and existing coal plants" as part of its greenhouse gas mitigation strategy.[25]

Finally, for states rich with energy resources, like Wyoming, a carbon sequestration program at the state level provides a way to reduce GHG emissions without negatively impacting sales of its energy resources. In fact, such a program may help ensure the consistent consumption of Wyoming's energy exports because the offsets could continue to make consumption feasible. Furthermore, a carbon sequestration program is focused enough that it can avoid the concerns related to state-level GHG emissions reductions programs, i.e., that they are impractical and irrational.[26]

This is not to say that the Wyoming Carbon Sequestration Project is without flaws. In fact, although it is a promising concept, the program remains "in development" more than five years after the initial legislation forming the Carbon Committee. In 2004, the Carbon Committee developed a work plan to research and "recommend policies and programs that augment the ability of Wyoming cropland, rangeland, and forestland owners and producers to implement management practices that enhance carbon storage,"[27] but no information about these projects has been released publicly.

Furthermore, although there has been no outward indication that the Carbon Committee is moving rangeland efforts forward, there are indications from

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to low-cost farm and afforestation credits in the United States as a win-win for farmers and the economy. *Id.* Farmers can earn revenue by selling earned carbon credits; the economy benefits because such a program "allows electric utilities and other large emitters to meet emission caps by switching to low-emitting technologies on a gradual schedule and buying lower-cost credits to cover their emission reductions while they gear up to make the transition." *Id.*

[23] Here, "completely useless" refers to the value to the party implementing the program; the value of reduced GHG emissions would remain as long as the project endures, regardless of whether financial benefits from trading or other credits are available.

[24] Frank D. Roylance, *Scientists Dig Deep for Global Solution; Carbon Capture Could Help to Curb World Warming*, BALT. SUN, Feb. 4, 2007, at 1A.

[25] *FY 2008 Budget Request for the Department of Energy, Before the Committee on Energy and Natural Resources of the U.S. Senate*, 110th Cong. 7 (2007) (testimony of Sec'y of Energy Samuel W. Bodman), *available at* http://energy.senate.gov/public/_files/BodmanTestimony.pdf.

[26] *See* Engel & Saleska, *supra* note 8, at 186-88.

[27] Wyo. Carbon Sequestration Advisory Comm., Work Plan 1-2 (Sept. 14, 2004), *available at* http://www.wyomingcarbon.org/CSAC%20Work%20Plan.doc.

other sources that rangeland carbon sequestration projects hold great promise in Wyoming.[28] In defense of the Carbon Committee, a significant reason rangeland projects have not moved forward is that neither the CCX nor any other entity provided a rangeland standard until March 2007,[29] which meant that potential participants did not know what the trading and verification requirements would be. As such, they could not make an economic assessment of their potential interest in participation.[30] Until the program requirements were made clear, Wyoming (and the Carbon Committee) could not make a determination of who should administer the program (e.g., create an aggregator, use an existing aggregator), much less determine who might be willing and able to participate.[31] Nonetheless, the slow progress of the Carbon Committee's work does not diminish the potential value or the rationale for creating it.

III. HIGH-PROFILE REGIONAL PROGRAMS HAVE PROMISE, BUT FACE CHALLENGES IN THE EAST AND WEST

At the regional level, several states have considered or initiated plans to reduce GHG emissions, especially CO_2 emissions. This is, in part, because there is no comprehensive federal plan in place to reduce CO_2 emissions, and in fact there is arguably a federal policy of not regulating such emissions.[32] It is well documented that the Bush administration has ardently opposed the Kyoto Protocol and

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[28] Sara Campbell et al., *Can Ranchers Slow Climate Change?*, RANGELANDS, Aug. 2004, at 16, (examining "the economics of creating carbon credits on a 41,577 acre, cow/calf operation in central Wyoming"); *id.* at 21 (concluding that "ranchers can likely compete in the new emerging market for carbon credits and provide a part of the solution for global climate change, benefiting both their immediate income as well as protecting our nation's resources and environment for future generations").

[29] Press Release, Chicago Climate Exchange, Rangeland Management Soil Carbon Offsets Approved by Chicago Climate Exchange, Beartooth Capital LLC joins the Exchange as the first Rangeland Offset Aggregator (Mar. 8, 2007), *available at* http://www.chicagoclimatex.com/news/press/release_20070308_Rangeland.pdf ("This represents the first standardized protocol that brings carbon capturing rangeland management into an organized market for reducing and trading greenhouse gas emissions.").

[30] State-level programs, of course, are often impacted by other private, regional, or federal programs, even when they are working toward similar or complementary goals.

[31] *See* Chicago Climate Exchange, Chicago Climate Exchange Offset Projects, http://www.chicagoclimatex.com/environment/offsets/index.html ("Offset projects involving less than 10,000 metric of CO2 equivalent per year should be registered sold through an Offset Aggregator.").

[32] *See* Tseming Yang, *The Problem of Maintaining Emissions "Caps" in Carbon Trading Programs Without Federal Government Involvement: A Brief Examination of the Chicago Climate Exchange and the Northeast Regional Greenhouse Gas Initiative*, at 17 (Sept. 22, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900918 (unpublished essay presented at Fordham Environmental Law Review, Climate Symposium, March 20, 2006) (stating that "the federal government has essentially rejected any federal effort to limit carbon emissions by government regulation" and that a regional cap and trade program "could be interpreted by emissions limits opponents as an attempt to defy federal government policy").

consistently refused to consider federal emissions caps.[33] Given that most GHG emissions come from U.S. sources,[34] many have criticized the United States for not being more aggressive.[35] The Bush Administration, in particular, has avoided GHG-emissions-reduction programs such as the Kyoto Protocol because of a belief that such programs would lead to a reduction in energy supply.[36] However, programs that provide incentives for reducing GHG emissions via new and renewable energy sources could have exactly the opposite effect.[37]

The lack of a federal program cannot, however, be easily solved at the state level. State programs are often too small to accomplish their goals and are subject to problems such as "leakage," which occurs when electricity suppliers within a regulated area import power from outside the regulated area thus avoiding the emissions cap and essentially negating any potential emissions reductions.[38] Although leakage issues are not eliminated with a regional program, they are least reduced as compared to a state-level program.[39] Regional initiatives, therefore, are fast becoming an attractive option.

Part III first considers the Regional Greenhouse Gas Initiative (RGGI), which is a regional program that would ideally be national in scope. Because a similar

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[33] *See* Reynolds & Gerstenzang, *supra* note 12, at A30.

[34] James Kanter & Andrew C. Revkin, *World Scientists Near Consensus on Warming*, N.Y. TIMES, Jan. 30, 2007, at A13 (stating that the United States is "the world's largest emitter" of greenhouse gases).

[35] *See, e.g.*, Eli Sanders, *Rebuffing Bush, 132 Mayors Embrace Kyoto Rules*, N.Y. TIMES, May 14, 2005, at A9 (stating that Seattle Mayor Greg Nickels and 131 other U.S. mayors joined a "nationwide effort to do something the Bush administration will not: carry out the Kyoto Protocol on global warming").

[36] Mark A. Drumbl, *Poverty, Wealth, and Obligation in International Environmental Law*, 76 TUL. L. REV. 843, 884 & n.165 (2002).

[37] *Id.* at 884 n.165. ("[F]ailing to exploit substitute and more environmentally friendly energy sources will only embed the United States in its dependency on fossil fuels, which are a leading cause of greenhouse gas emissions, and unsustainable in the long run.").

[38] The Kyoto Protocol, for example, uses the following definition for leakage: "That portion of cuts in greenhouse-gas emissions by developed countries—countries trying to meet mandatory limits under the Kyoto Protocol—that may reappear in other countries not bound by such limits. For example, multinational corporations may shift factories from developed countries to developing countries to escape restrictions on emissions." *See* United Nations Framework Convention on Climate Change, Glossary, http://unfccc.int/essential_background/glossary/items/3666.php (last visited Mar. 21, 2007).

[39] Leakage will always be a problem to some degree as long as there is an area that is not regulated from which a supplier can import power. This has led some to argue that only global GHG emissions reduction programs are viable. *See* Engel & Saleska, *supra* note 8, at 187-88 (challenging "the conventional wisdom that unilateral action [by individual countries] to restrain despoliation of the global commons is always presumptively irrational"). Others have recognized that, although not perfect, smaller scale programs still have the potential to reduce GHG emission. *See id.* at 232 (concluding "that unilateral subglobal regulation is a viable, if not optimal, approach to global commons environmental problems").

federal program is, at best, far off, the region took matters into its own hands. While laudable in its goals, the regional nature of the program makes it unlikely to succeed. Part III then compares two Wyoming efforts to reduce GHG emissions by using regionally focused agreements aimed at new infrastructure and technology. Although the Wyoming efforts, too, could have increased success on a national scale, these efforts address specific needs of the region, making success more likely.

A. RGGI: A Regional Program That Needs to "Grow Up"

RGGI is one of the higher profile emissions reduction programs proposed in the United States and provides specific, mandatory targets for GHG emissions reductions. RGGI is a multi-state regional initiative that was developed by the governors of several Northeast states.[40] Seven states have signed an agreement to implement RGGI: Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont.[41] Legislation in Maryland requires the state to join by June 30, 2007.[42] RGGI was created to design and implement a flexible, market-based "cap-and-trade program" to reduce carbon dioxide emissions from power plants in the Northeast.[43] The initial emissions cap, according to RGGI, is approximately the same as 1990 emissions levels.[44]

Launched in 2003 by New York Governor George Pataki, RGGI requires the approximately 300 power plants in the region (with capacity in excess of twenty-five megawatts) to reduce their CO_2 emissions levels.[45] The proposal would cap regional emissions at 121.3 million short tons of CO_2 through 2014.[46] This initial emissions cap would remain in place until 2015, when plants would step down their emissions over a four-year period to ten percent below the initial level in 2018.[47] In perhaps the most significant achievement, the RGGI states agreed to the specific amount of the regional initial emissions budget that would be appor-

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[40] RGGI, Frequently Asked Questions 1 (Dec. 20, 2005), *available at* http://www.rggi.org/docs/mou_faqs_12_20_05.pdf.

[41] RGGI, Memorandum of Understanding, at Recitations (Dec. 20, 2005), *available at* http://www.rggi.org/docs/mou_12_20_05.pdf.

[42] Kari S. Larsen & Athena Y. Vellie, *Emissions Trading Programs Are Evolving*, ELEC. LIGHT & POWER, July 1, 2006, at 46.

[43] RGGI, Frequently Asked Questions, *supra* note 41, at 1.

[44] RGGI, Overview 1 (Dec. 16, 2005), *available at* http://www.rggi.org/docs/mou_rggi_overview_12_20_05.pdf.

[45] RGGI, Frequently Asked Questions, *supra* note 41, at 1.

[46] RGGI, Overview, *supra* note 45, at 1.

[47] *See id.*

tioned to each RGGI state.[48] RGGI would be the first mandatory cap-and-trade program in the United States to reduce GHG emissions.[49]

RGGI provides a unique and aggressive model. The plan uses specific emissions targets that must be met and then permits emission sources to use the market to "reduce" their GHG emissions. Additionally, while RGGI focuses on the reduction of carbon emissions, it could also reduce energy consumption.[50] The RGGI cap-and-trade program seeks "real emissions reductions" at the lowest possible cost and includes the following basic components:[51] First, the individual states will determine the power plant emission sources to be covered by the cap.[52] Second, each state will establish an "emissions cap," which is the total amount of emissions that will be allowed from all covered sources.[53] Third, each state will issue one allowance for each ton of emissions, up to their emissions cap; those allowances are to be distributed to the generators and the market.[54] Finally, every covered source must have enough allowances to cover its emissions at the end of each compliance period.[55] If a source lacks enough allowances to cover projected emissions, the source can reduce emissions, buy allowances on the market, or gen-

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[48] RGGI, Memorandum of Understanding, *supra* note 42, at § 2; *see also* Mary Anne Sullivan & Joshua P. Fershee, *States Get Together on Greenhouse Gases*, LEGAL TIMES, at 36 (June 12, 2006) ("Perhaps the most significant achievement of the plan is the specific amount of the regional initial emissions budget that would be apportioned to each RGGI state.").

[49] RGGI, Frequently Asked Questions, *supra* note 41, at 1. On the federal level, Senator Dianne Feinstein recently circulated a draft cap-and-trade program that, when fully implemented, would reduce U.S. greenhouse gas emissions by 7.25% of today's emissions levels. *See* Press Release, Sen. Dianne Feinstein, Senator Feinstein Outlines New Legislation to Curb Global Warming, Keep Economy Strong (Mar. 20, 2006), *available at* http://feinstein.senate.gov/06releases/r-globalwarm320.htm. RGGI appears to have spurred (or renewed) interest in a national cap-and-trade program, but it remains to be seen if a federal program is politically feasible at this point. *See, e.g.*, 151 Cong. Rec. S6885 (daily ed., June 21, 2005) (statement of Sen. Voinovich) (discussing the Energy Policy Act of 2005) ("The bottom line is, if you kill coal with a mandatory cap on carbon, you force more people to go to natural gas to produce electricity. We just add to the crisis that we already have.").

[50] *See* RGGI Model Rule XX-10.3(a)(1)(iv) (Jan. 5, 2007), *available at* http://www.rggi.org/docs/model_rule_corrected_1_5_07.pdf (allowing offsets to be earned for reducing or avoiding "CO2 emissions from natural gas, oil, or propane end use combustion due to end-use energy efficiency"), ; *see also* Marc Breslow, *Carbon Dioxide Cap-and-Trade for Electric Generation: Should Permits to Pollute be Auctioned or Given Away?* (and understanding RGGI, the northeast Regional Greenhouse Gas Initiative) (May 10, 2004) (draft), *available at* http://www.massclimateaction.org/PrimerCarbonCap&Trade2.doc ("Particularly in the Northeast, energy consumption is a drain on the economy, as virtually all our fossil fuels are purchased from outside the region. The [RGGI] carbon cap itself will reduce this drain, as our consumption of coal, oil, and natural gas is reduced.").

[51] RGGI, Frequently Asked Questions, *supra* note 41, at 2.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

erate credits through an emissions offset project.[56] Any covered source that reduces its emissions below required levels may bank or sell its excess allowances.[57]

A mandatory cap-and-trade program would create immediate incentives to reduce GHG emissions. A program like the RGGI plan would also reduce fossil fuel consumption in the short-term and have the potential to motivate long-term investment in more efficient infrastructure. However, at the regional level, such a program is likely to fail.[58]

First, the program will face significant legal hurdles, including constitutional challenges under the Compact Clause, Dormant Commerce Clause, and Supremacy Clause (claims of preemption).[59] Second, and partly as an effort to avoid Compact Clause problems, the program lacks the necessary enforceability.[60] Finally, RGGI effectively penalizes proactive companies by not allowing offsets to those companies already participating in voluntary federal programs designed to reduce greenhouse gases.[61] Most of these problems would be eliminated if the program were at the federal level. Therefore, while the program is based on sound (if controversial) principles, a cap-and-trade program such as RGGI would be far more efficient and effective on a national scale.

B. The Wyoming MOUs: Satisfying Regional Power Needs While Reducing Emissions

Recognizing the growing power needs in the West, particularly California, and the potential resources available from western states, Wyoming has been

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[56] *Id.*

[57] RGGI, Frequently Asked Questions, *supra* note 41, at 2.

[58] Although not confirmed, there are many who believe that RGGI was not intended to succeed directly and was instead designed to facilitate (and provide a model for) federal legislation. *Northeast GHG Trading Rule Sets Stage For State-Level Battles*, ENERGY WASHINGTON WEEK (Aug. 30, 2006), *available at* http://energywashington.com/secure/energy_docnum.asp?f=ew_2002.ask&docnum=EWWEEK-3-35-5 (stating that while some believe RGGI is a perfect model for a national cap-and-trade program, "[a]lready, disagreements can be heard about whether RGGI is a national model"). If a similar federal program were to follow RGGI's lead, even RGGI's "failure" could be deemed a success.

[59] Thomas G. Echikson & Jim Wedeking, *Compacts, Commerce and Federal Supremacy*, CONST. LAW TASK FORCE NEWSL. (Am. Bar Ass'n, Wash., D.C.), Apr. 2006, at 8-10.

[60] *See* Yang, *supra* note 32, at 15 ("Lack of enforceability was built-in by design since a binding multistate cooperative agreement might require Compact Clause approval by Congress.").

[61] RGGI Model Rule XX-10.3(d)(4) ("CO_2 offset allowances shall not be awarded to an offset project or CO_2 emissions credit retirement that is awarded credits or allowances under any other mandatory or voluntary greenhouse gas program."); *see also* Sullivan & Fershee, *supra* note 48, at 36 ("It is hard to imagine a clearer message to those participating in any voluntary greenhouse-gas reduction efforts: You participate at your competitive peril.").

active in the Western Governor's Association's (WGA) energy initiatives,[62] and Wyoming Governor Dave Freudenthal has pursued and signed two Memoranda of Understanding that seek to promote and facilitate the creation and transmission of green power.

The first is the Memorandum of Understanding Among the Governors of California, Nevada, Utah, and Wyoming Concerning Electric Transmission Development (Frontier Line MOU), which was signed in April 2005.[63] The proposed Frontier Line is an up to 1,300-mile transmission line from Wyoming to California (through Nevada and Utah),[64] and "is expected to leverage up to 6,000 megawatts of wind power and 6,000 megawatts of clean coal power."[65] The project is estimated to cost $3.3 billion, and the estimated annual benefits for the region are between $926 million and $1.7 billion annually.[66] As such, western electricity consumers should see a net benefit within a few years of construction.[67]

The second is an April 2006 Memorandum of Understanding Between the Governors' Offices of California and Wyoming (Clean Coal MOU), which created a joint task force between the two states to support advanced coal technology development.[68] The MOU was driven largely by GHG emissions reduction goals for California established by Governor Schwarzenegger, seeking to reduce state emissions levels to 2000 levels by 2010, to 1990 levels by 2020, and to 80% below 1990 levels by 2050.[69] This partnership makes sense given Wyoming's "abundant reserves of coal and renewable wind resources that can provide a secure and reliable source of domestic energy."[70] To help achieve the stated goals, the Clean Coal MOU seeks to "take advantage of federal funding opportunities,"[71] such

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[62] *See* W. Govs. Ass'n, Clean and Diversified Energy Initiative, *at* http://www.westgov.org/wga/initiatives/cdeac/index.htm (last visited Mar. 21, 2007) ("Under the leadership of Govs. Bill Richardson (N.M.), Arnold Schwarzenegger (Calif.), Dave Freudenthal (Wyo.) and John Hoeven (N.D.) the governors have hit the ground running and many states have already begun work on the necessary measures to advance the region's energy portfolio.").

[63] Calif. Gov. Arnold Schwarzenegger, et al., Memorandum of Understanding Among the Governors of California, Nevada, Utah, and Wyoming (Apr. 2005), *available at* http://www.ftloutreach.com/images/FiveStateMOUonTransmission.pdf [hereinafter Frontier Line MOU].

[64] *Western Governors Back Four-State, $3.3B Line to Bring Energy to West Coast Load Centers*, ELEC. UTIL. WEEKLY, Apr. 11, 2005, at 16.

[65] Frontier Line Backgrounder at 2, *available at* http://www.frontierline.org/docs/Frontier_Line_backgrounder.pdf (last visited Mar. 21, 2007).

[66] *Id.*

[67] *Id.*

[68] Calif. Gov. Arnold Schwarzenegger & Wyo. Gov. Dave Freudenthal, Memorandum of Understanding Between the Governors' Offices of California and Wyoming (Apr. 2006), *available at* http://www.frontierline.org/summit/WY_CA_MOU.pdf.

[69] *Id.*

[70] *Id.*

[71] *Id.*

as the $200 million authorized each fiscal year from 2006 to 2014 for clean coal research in coal-based gasification technologies under the Energy Policy Act of 2005 (EPAct 2005)[72] and the $54 million included in the 2007 Department of Energy budget for a next-generation power plant that "would generate electricity and hydrogen from coal with near-zero atmospheric emissions."[73]

The Wyoming MOUs are sensible examples of regional programs that provide great promise for the reduction of GHG emissions because they strike the right balance between maximizing local expertise, while reaping the benefits of economies of scale and expanded markets. The Frontier Line MOU has the potential to fulfill a significant regional need while maximizing the regional benefits of additional western transmission infrastructure. Similarly, the Clean Coal MOU provides California one potential mechanism to use in pursuit of its GHG emissions reduction goals and, at the same time, provides Wyoming with a means to maintain and protect its coal market share.[74]

1. *The Frontier Line MOU*

a. *Regional Action Is Necessary for Interstate Transmission Construction to Succeed*

The potential value in regional oversight of certain electricity transmission functions is well recognized, if not always universally embraced.[75] For example, in 1996, the Federal Energy Regulatory Commission (FERC) required that public utilities functionally "unbundle" wholesale generation and transmission services and offer open access transmission services equally to all potential customers under an open access transmission tariff to be filed with FERC.[76] Through unbundling, FERC sought "to remedy both existing and future undue discrimination in the

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[72] Energy Policy Act of 2005 § 401, 42 U.S.C.A. § 15,961 (West Supp. 2006).

[73] Budget of the United States Government, Fiscal Year 2007, Dep't of Energy 93 (Feb. 10, 2006), *available at* http://www.whitehouse.gov/omb/budget/fy2007/pdf/budget/energy.pdf.

[74] *See The Future of Wyoming Coal: Hearing Before the Senate Comm. on Energy and Natural Resources*, 109th Cong. (Apr. 12, 2006), *available at* http://www.wyia.org/Docs/Comments/Testimony%20-%20Waddington%20-%20April%2012%202006.pdf (statement of Steve Waddington, Exec. Dir., Wyo. Infrastructure Authority).

[75] *See, e.g.*, Clinton A. Vince, et al., *What is Happening and Where in the World of RTOs and ISOs?*, 27 ENERGY L.J. 65, 65 (2006) (discussing FERC's support for regional oversight of open access transmission) ("[T]his noble experiment has not been without controversy, complexity, and uncertainty. Indeed, there has been considerable tension between state and federal regulators, generators and load interests, and other industry members, as to which regional approaches will be reliable, yet cost-effective for consumers.").

[76] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, FERC Order No. 888, 61 Fed. Reg. 21,540, 21,552 (May 10, 1996) [hereinafter Order No. 888] ("We conclude that functional unbundling of wholesale services is necessary to implement non-discriminatory open access transmission . . . .").

industry and realize the significant customer benefits that will come with open access." [77] Thus, FERC decided to "eliminate the remaining patchwork of closed and open jurisdictional transmission systems and ensure that all these systems . . . cannot use monopoly power over transmission to unduly discriminate against others."[78]

FERC supported the concept of Independent System Operators (ISOs) "as a way for existing tight power pools to satisfy the requirement of providing non-discriminatory access to transmission."[79] In Order No. 2000, "FERC encouraged the voluntary formation of Regional Transmission Organizations (RTOs) to administer the transmission grid on a regional basis throughout North America (including Canada)."[80] FERC has embraced the use of ISOs/RTOs, which seek "to promote efficiency in wholesale electricity markets and the lowest price possible for reliable service."[81] Because FERC has jurisdiction over all wholesale electric transmission transactions and operations,[82] FERC has the power to authorize and support this regional approach directly.[83]

However, FERC does not have jurisdiction for the siting and construction of transmission lines except in limited circumstances, where FERC was recently granted "backstop authority."[84] Otherwise, siting and construction jurisdiction

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[77] *Id.* at 21,541.

[78] *Id.*

[79] Fed. Energy Regulatory Comm'n, Frequently Asked Questions, http://www.ferc.gov/o12faqpro/default.asp?Action=Q&ID=261 (last visited Mar. 21, 2007).

[80] *Id.* ISOs and RTOs are similar, but there is no "scope" requirement for ISO status, whereas an RTO must be of sufficient regional scope. *Id.* There are now six ISOs/RTOs: the California Independent System Operator (CAISO); Midwest ISO; ISO New England; PJM Interconnection, an RTO; New York ISO; and Southwest Power Pool (SPP), an RTO. Fed. Energy Regulatory Comm'n, Regional Transmission Organization Activities, http://www.ferc.gov/industries/electric/indus-act/rto.asp (last visited Mar. 21, 2007).

[81] Fed. Energy Regulatory Comm'n, Regional Transmission Organization Activities, *supra* note 80.

[82] *See* 16 U.S.C. § 824(b) (2005); New York v. FERC, 535 U.S. 1, 17 (2002) (stating that FERC's "jurisdiction includes 'the transmission of electric energy in interstate commerce' and 'the sale of electric energy at wholesale in interstate commerce'" (quoting 16 U.S.C. § 824(b)).

[83] *See* Public Util. Dist. No. 1 v. FERC, 272 F.3d 607, 614-15 (D.C. Cir. 2001) (finding that FERC properly chose to promote the voluntary use of RTOs even though FERC had concluded that 'it [was] clear that RTOs [were] needed to resolve impediments to fully competitive markets'" (quoting Order No. 2000)).

[84] *See* Energy Policy Act of 2005 § 1221, 16 U.S.C.A. 824p (West Supp. 2006). "Backstop" authority is limited authority available only where the states lack the authority or otherwise have failed to act. *See id.* Backstop authority can only be exercised in areas the Department of Energy (DOE) identifies as a "national interest electric transmission corridor" (NIETC). *Id.* DOE must file a report that will "designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor." *Id.*

resides with each state through which the line would be built. This need for multi-state approvals to build an interstate electric transmission line makes regional cooperation (like that represented in the Frontier Line MOU) a necessity for the construction of interstate transmission lines.[85] Increased transmission capacity is necessary to make large-scale green power programs viable.

This regional commitment significantly raises the likelihood that the new transmission line will be built, but the Frontier Line still faces significant hurdles. First, siting authority still remains with each state in which construction would occur. This has historically been a sticking point, as each state must approve construction and determine where and how the transmission line from each state will interconnect.[86] Several options exist to help ensure siting approvals. In Wyoming, Gov. Freudenthal issued Executive Order 2003-4, "implementing the protocol governing the siting and permitting of interstate electric transmission lines."[87] This order is designed to help streamline the approval process by coordinating the review process of the "Wyoming Public Service Commission and other Wyoming agencies that have a role in environmental siting and permitting."[88] Although this is a good step forward, it still requires separate state siting approvals, which could lead to significant delays.

The Energy Policy Act of 2005 (EPAct) allows states to cede their siting authority to a regional transmission siting agency,[89] which would further streamline the permitting process.[90] The signatory states may consider this option to enhance their cooperation, but it is not clear this mechanism will make the process significantly faster, given that the signatory states have already made significant

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[85] *See* ERIC HIRST, EXPANDING U.S. TRANSMISSION CAPACITY 11 (Aug. 2000) ("There is a widespread perception in the [electricity] industry that siting new electric transmission lines has become almost impossible because of the obstacles encountered in the process of regulatory review and approval." (quoting "a report from the federal Office of Technology Assessment (1989)") (modification in original)), *available at* http://www.eei.org/industry_issues/energy_infrastructure/transmission/hirst2.pdf; *see also* Steven J. Eagle, *Securing a Reliable Electricity Grid: A New Era in Transmission Siting Regulation?*, 73 TENN. L. REV. 1, 2 (2006) ("Perhaps the greatest obstacle to the construction of new [electric] transmission [capability] . . . is the age-old problem of gaining approval for new transmission lines." (quoting Hirst, *supra*) (modification in original)).

[86] *See* Eagle, *supra* note 85, at 13 (stating that every affected state must approve an interstate transmission project).

[87] Wyo. Exec. Order 2003-4 (May 2003), *available at* http://psc.state.wy.us/htdocs/sub-regional/exec.pdf.

[88] *Id.*

[89] Energy Policy Act of 2005 § 1221, 16 U.S.C. 824p (2006).

[90] *See* Eagle, *supra* note 85, at 45. Some commentators have urged the mandatory use of regional transmission siting agencies, arguing that there would then "be no concerns about the precise delineation of transmission corridors, states 'passing the buck' to the federal government on siting decisions, or regional benefits ever being given less than appropriate consideration." *Id.* at 43.

strides forward, and siting for portions of the Frontier Line that would run on federal land would still require federal siting approvals.[91]

The second major hurdle facing the Frontier Line is that siting authority and eminent domain authority are separate powers. Once siting is approved, to ensure that construction can actually commence, each state will need to exercise its eminent domain authority individually, as well. Despite providing options for regional siting approvals, EPAct 2005 did not provide for a comprehensive use of eminent domain power unless a federal permit is issued.[92] The use of a regional agency to streamline the process would not likely provide much benefit in this area because the regional siting agency would need to have state-based eminent domain powers. To do so would probably require congressional approval.[93] As such, it would be imprudent to pursue such an option because of the time needed to (1) negotiate agreement among all the signatory states to grant the regional siting agency eminent domain authority and (2) then obtain approval from Congress.[94]

The high-level of cooperation and commitment to date under the Frontier Line MOU indicates that the signatory states are likely better off moving forward in the coordinated, state-by-state manner in which they began. Further, the signatory states have wisely urged FERC to continue the EPAct 2005 "368 process"[95]

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[91] *See* Energy Policy Act of 2005 § 1221, 16 U.S.C.A. 824p(i)(3) (West Supp. 2006) ("The regional transmission siting agencies shall have the authority to review, certify, and permit siting of transmission facilities, including facilities in national interest electric transmission corridors (other than facilities on property owned by the United States).").

[92] *See* Eagle, *supra* note 85, at 42. ("[T]he Act allows use of the federal power of eminent domain, but only for those projects that receive federal permits.").

[93] U.S. CONST., art. I § 10, cl. 3 ("No state shall, without Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."); Eagle, *supra* note 85, at 42-43.

[94] I have argued elsewhere that Congress should have granted FERC siting authority for all interstate transmission lines, thus eliminating many of the obstacles slowing construction of much-needed infrastructure like the Frontier Line. *See* Joshua P. Fershee, *Misguided Energy: Why Recent Legislative, Regulatory, and Market Initiatives Are Insufficient to Improve the U.S. Energy Infrastructure*, 44 HARV. J. ON LEGIS. (forthcoming 2007). However, because many (if not all) states would adamantly oppose such legislation, and because Congress opted to "compromise" and grant FERC only backstop siting authority, the western states are better served pursuing their current course of action. *See* Eagle, *supra* note 85, at 45. ("The industry has clamored for legislation that would transfer siting authority . . . to regional or national entities that can adequately account for the vast regional benefits of interstate transmission lines. State organizations and officials, on the other hand, have protested against any such measures . . . .").

[95] Section 368 provides:

> Sec. 368. ENERGY RIGHT-OF-WAY CORRIDORS ON FEDERAL LAND.
>
> (a) Western States.—Not later than 2 years after the date of enactment of this Act, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Defense, the Secretary of Energy, and the Secretary of the Interior (in this section referred to collectively as "the Secretaries"), in consultation with the Federal

to help facilitate siting on federal land.[96] Section 368 directs the secretaries of the relevant agencies (i.e., Agriculture, Commerce, Defense, Energy, and Interior) to designate "energy corridors" in the western states for oil, gas and hydrogen pipelines, and electricity transmission and distribution facilities.[97] If DOE grants the requested section 368 energy corridors, the likelihood of the Frontier Line succeeding will have taken a big step forward, helping the states clear "hurdles rang[ing] from securing approval for siting permits on federal lands to working through necessary steps involved in the Endangered Species Act, the National Environmental Policies [sic] Act and other regulatory processes."[98] Despite many remaining obstacles,[99] by using the recently created mechanisms to facilitate acquisition of necessary siting approvals on federal lands while continuing to move the process forward at the regional level, the Frontier Line has the potential to be the largest clean energy transmission project ever built in the western United States.[100]

b. Enhanced Interstate Transmission Infrastructure Is the Key to Opening the Door to Green Power

A major obstacle to significant investment in readily available renewable energy is a technological issue: the current electricity transmission system is designed for

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> Energy Regulatory Commission, States, tribal or local units of governments as appropriate, affected utility industries, and other interested persons, shall consult with each other and shall—
>
> (1) designate, under their respective authorities, corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on Federal land in the eleven contiguous Western states (as defined in section 103(o) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1702(o));
>
> (2) perform any environmental reviews that may be required to complete the designation of such corridors; and
>
> (3) incorporate the designated corridors into the relevant agency land use and resource management plans or equivalent plans.

Energy Policy Act of 2005 § 368, 42 U.S.C. 15,926.

[96] *Before the House Committee Natural Resources, Subcommittee on Water and Power*, 109th Cong. 6 (2006) [hereinafter *Nelson Testimony*] (testimony of Laura Nelson, Ph.D.) ("We believe further that successful completion of the 368 process will be essential to the development of projects such as the Frontier Line."), *available at* www.ftloutreach.com/images/FTL_Nelson_testimony_6-28.pdf.

[97] Energy Policy Act of 2005 § 368, 42 U.S.C. 15,926.

[98] *Nelson Testimony*, *supra* note 96, at 6.

[99] *See* Al Senia, *Battle on the Frontier*, ENERGYBIZ MAG., July-Aug. 2006, at 10 (stating the Frontier Line "will likely face up to three years of intense scrutiny before construction even begins").

[100] *Nelson Testimony*, *supra* note 96, at 3.

power plants that are proximate to end users.[101] However, some renewable energy sources, especially wind energy, require that the power be sent thousands of miles to market.[102] For example, wind power generated in the plains could provide substantial amounts of green energy to California (or any other part of the country) if the necessary transmission lines were available.[103] The Frontier Line was proposed in recognition of the technological constraint and could provide the necessary infrastructure to spur significant investment in renewable energy sources.

As Dr. Laura Nelson, Energy Advisor to Utah Governor Jon Huntsman, stated in her testimony to the House Resources Subcommittee on Water and Power, the Frontier Line "represents a collective vision of our Governors to encourage the construction of what would be the single largest clean-energy enabling infrastructure project ever built in the American West."[104] States like "Wyoming are anxious to utilize their expansive resource base to develop abundant renewable and clean coal power supplies for export," but the lack of sufficient transmission infrastructure limits the expansion of access to such green power sources.[105]

The Frontier Line, rather than a solution unto itself, should be a model for additional regional transmission lines, both in the West and throughout the country. Because generated electricity cannot be stored easily or efficiently until there are significant changes in technology,[106] additional transmission lines are necessary to tap often-remote resources, like wind, for power. Of the top seven states for "wind energy potential,"[107] only one state (Texas) is in the top half of the country in terms of population.[108] Therefore, adequate transmission infrastructure could

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[101] Lakshman D. Guruswamy, *A New Framework: Post-Kyoto Energy and Environmental Security*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 333, 342 (2005) ("[T]he present hub and spoke energy transmission networks that form the grid system were designed for central power plants close to users.").

[102] *Id.*

[103] *See id.* ("[T]the absence of necessary transmission lines and grids presently prevents the transfer of wind power from North Dakota [and other states] to the Pacific or Atlantic Coast.").

[104] *Nelson Testimony*, *supra* note 96, at 3.

[105] *See id.* at 4.

[106] *See* Richard J. Pierce, Jr., *Completing the Process of Restructuring the Electricity Market*, 40 WAKE FOREST L. REV. 451, 464 (2005) ("Electricity demand varies over time by as much as a factor of ten, it cannot be economically stored, and it flows around an integrated transmission grid in constantly changing patterns in inverse proportion to the impedance on each of the thousands of lines that comprise the grid.").

[107] Am. Wind Energy Ass'n., Wind Energy: An Untapped Resource, http://www.awea.org/pubs/factsheets/Wind_Energy_An_Untapped_Resource.pdf [hereinafter Wind Energy Fact Sheet] (last visited Mar. 21, 2007). The top seven states, in order, are North Dakota, Texas, Kansas, South Dakota, Montana, Nebraska, and Wyoming. *Id.*

[108] Texas is the second largest U.S. state by population. Press Release, U.S. Dep't of Commerce, State Rankings (July 21, 1998), *available at* http://www.census.gov/Press-Release/state01.prn.

provide enormous amounts of clean energy: "the total amount of electricity that could potentially be generated from wind in the United States has been estimated at 10,777 billion kilowatts hours annually—three times the electricity generated in the U.S. today."[109]

Of course, wind energy is not a cure-all because the wind is "not always on."[110] Thus, other resources, such as clean coal, are needed to ensure adequate power sources in all weather conditions. An improved and expanded transmission infrastructure would provide access to such renewable resources, regardless of their location.

Finally, the Frontier Line MOU wisely focused on a specific plan for the four signatory states, but also remained open to expanding the project to include other states, as long as the expansion would not serve to delay the project.[111] This strikes the right balance between moving the project forward, without unnecessarily limiting the potential benefits of the undertaking.

2. *The Clean Coal MOU*

To the extent the concept proves commercially feasible, the Clean Coal MOU provides a model agreement between producer and consumer. For Wyoming, clean-coal technology provides a way for the state to preserve and potentially enhance its market position for a critical resource. For California, the technology would provide a way to meet the state's aggressive GHG emissions reduction goals. The Clean Coal MOU would thus seem to be the obvious solution, and in many ways, it is. However, complementary regulatory and market developments make the Clean Coal MOU particularly important and promising.

The Frontier Line project, for one, would create a market for the power created by clean-coal technology. As with problems facing many wind energy proposals, any power generated in Wyoming is of little value if there is no way to deliver it to

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[109] Wind Energy Fact Sheet, *supra* note 107.

[110] *See, e.g.*, Sen. Frank H. Murkowski, Policy Essay: *The Kyoto Protocol Is Not the Answer to Climate Change*, 37 HARV. J. ON LEGIS. 345, 359 (2000) ("There are also issues of reliability and availability of energy sources: the wind does not always blow, and the sun is not there to provide solar energy at night when heating is needed.").

[111] The Frontier Line MOU provides:

> The Coordinating Committee will investigate proposals made for complementary western transmission projects to determine whether the Transmission Project should be expanded to incorporate such other projects in whole or in part. However, it is important to keep the work of the Coordinating Committee on the Transmission Project on track. Accordingly, any work investigating other transmission projects should be undertaken only if it does not delay work on the Transmission Project.

Frontier Line MOU, *supra* note 63, at 3.

end users.[112] Having a direct line to potential buyers would provide the necessary economic incentives for the development and construction of clean-coal power facilities. California's commitment to GHG emissions reductions creates a more concrete market and further increases the likelihood that clean-coal plants will come to fruition, as long as the power can be delivered.

Beyond that, for Wyoming (and any other state) to benefit from sales of electricity from coal-fired plants to California via the Frontier Line, the energy must be "generated in a facility that emits no more greenhouse gas than a combined-cycle power plant fueled by natural gas."[113] Although a direct connection between the Frontier Line MOU and the Clean Coal MOU has been denied, clean-coal plants will be needed to address emissions concerns of states like California, regardless of whether the Frontier Line is ever built.[114]

Additionally, the high price of natural gas, which is increasingly the fuel of choice for electric generating facilities, has created a hot potential market for more cost-friendly, cleaner burning energy sources.[115] Natural gas supplies are also becoming increasingly tight, in part because demand is more constant on a year-round basis than ever before.[116] The construction of facilities needed to increase natural gas supplies, namely liquefied natural gas (LNG)[117] facilities,[118] is also heavily contested.[119] Finally, coal is a domestically available resource, whereas

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[112] *See* Phillip G. Oldham & Joseph P. Younger, *Lighting the Lone Star: The Texas Experience with a Competitive Electricity Market*, 40 WAKE FOREST L. REV. 709, 722 (2005) ("In addition to the massive infrastructure necessary for wind power, there are numerous other transmission projects that must be built in order to mitigate congestion that has been brought about through the operation of market forces.").

[113] Colin Sullivan, *Calif. Energy Chief Defends "Clean Coal" in Frontier Project*, GREENWIRE, Apr. 19, 2006.

[114] *See id.*("I think anybody in coal-producing states understands that's part of the landscape going forward." (quoting Wyoming Governor Dave Freudenthal)).

[115] *See* Mary Anne Sullivan, *Voluntary Plans Will Not Cut Greenhouse Gas Emissions in the Electricity Sector*, SUSTAINABLE DEV. L. & POL'Y, Winter 2006, at 47 (stating that the recent "decline in carbon intensity is largely a function of the increase over the last decade in the use of natural gas for power generation, a trend that is now starting to reverse as a result of increases in natural gas prices").

[116] Peter Behr, *No Help for Natural Gas Users: Stagnant Production Keeps Prices High*, WASH. POST, May 21, 2003, at E1 ("More than 90 percent of the power plants built since the beginning of electricity deregulation in the late 1990s run on natural gas, and that is the primary fuel for producing peak power supplies when air-conditioning demand soars.").

[117] LNG is natural gas that is condensed into a liquid after having being cooled to minus 260° F or less. Monica Berry, *Liquefied Natural Gas Import Terminals: Jurisdiction over Siting, Construction, and Operation in the Context of Commerce Clause Jurisprudence*, 26 ENERGY L.J. 135, 137 (2005).

[118] Kenneth T. Kristl, *A Boundary Dispute's Effect on Siting of an LNG Terminal*, 21 NAT. RESOURCES & ENV'T 34, 35 (2006) (discussing the "growing need for LNG").

[119] *See* Jacob Dweck, et al., *Liquefied Natural Gas (LNG) Litigation After the Energy Policy Act of 2005: State Powers in LNG Terminal Sitting*, 27 ENERGY L.J. 473, 473 (2006) ("As the United States

new natural gas supply providers are increasingly from oversees,[120] which makes clean coal a politically appealing option because it would also reduce dependence on foreign energy sources.[121] The Clean Coal MOU, by coordinating market needs and political appeal, is thus another example of a sound regional effort to help reduce GHG emissions.

IV. CONCLUSION

Despite the apparent lack of willingness on the part of Congress and the Bush Administration, pressure is growing for a mandatory federal program, which would facilitate larger-scale GHG emissions reductions than state or regional programs.[122] Some have argued that only a global program has any real promise of success, but, as the largest emitter of GHGs,[123] the United States could have a significant impact on its own. Furthermore, if a federal program gained serious traction, the United States might even reconsider participating actively in a global initiative like the Kyoto Protocol.

There are two main federal programs that have garnered significant support. The first is a national carbon tax; the second is some form of emissions trading program.

A carbon tax would place an excise tax on fossil fuel sales, i.e., sales of coal, petroleum products, and natural gas, based on the fuel's carbon content.[124] A federal carbon tax has been promoted by several, and diverse, sources. Duke Energy, one of the largest energy companies in the United States, is an ardent supporter of a carbon tax, arguing that it "is an effective fiscal policy option that would simultaneously support federal tax reform initiatives, reduce carbon dioxide emissions, and promote sound energy policies."[125] On the other end of the spectrum,

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moves toward increasing LNG importation and developers race to construct import terminals, the relatively young U.S. LNG industry is experiencing expected growing pains that have created obstacles and opposition to the LNG movement, including infrastructure concerns . . . .").

[120] *See* Kristl, *supra* note 118, at 35 ("According to FERC, Indonesia, Algeria, Malaysia, Qatar, and Trinidad are the leading exporters of LNG.").

[121] Jeffrey Immelt & Jonathan Lash, *The Courage to Develop Clean Energy*, WASH. POST, May 21, 2005, at A19 (stating that clean energy sources are desperately needed because of declining oil and natural gas reserves, a continued reliance on foreign energy sources, and global climate concerns).

[122] Robert R. Nordhaus & Kyle W. Danish, *Assessing the Options for Designing a Mandatory U.S. Greenhouse Gas Reduction Program*, 32 B.C. ENVTL. AFF. L. REV. 97, 97 (2005) ("[T]he U.S. government is facing pressures—from both domestic and international sources—to establish a federal mandatory reduction program to address the risk of global climate change.").

[123] *See* Kanter & Revkin, *supra* note 34, at A13.

[124] Craig Hanson & James R. Hendricks Jr., *Taxing Carbon to Finance Tax Reform*, DUKE ENERGY/WORLD RESOURCES INSTITUTE ISSUES BRIEF 1 (Mar. 2006), *available at* http://pdf.wri.org/taxing_carbon_full.

[125] *Id.*

former Vice President Al Gore is also a strong proponent of carbon taxes[126] and has even suggested using a carbon tax in place of some payroll taxes.[127]

Despite growing appeal at both the federal and global level,[128] increased carbon taxes have, to date, proven politically untenable in the United States. As noted above, the Bush Administration[129] and many members of Congress adamantly oppose carbon taxes,[130] arguing that such a tax would improperly impose economic harm.[131] Although there are some indications that politicians from both sides of the aisle are more open to (at least some) carbon taxes than ever before,[132] no serious proposals are on the horizon.[133]

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[126] Charles Komanoff, *Forward-Thinking Idea For a Trendsetter*, SEATTLE POST-INTELLIGENCER, Aug. 2, 2006, at B7 ("We should sharply reduce payroll taxes and make it all up in CO_2 taxes so the low- and middle-income people don't bear the cost burden of this big transition in energy sources." (quoting from a speech Vice President Gore gave at Wal-Mart's headquarters)).

[127] Robert Walker, *Making a Lean-Green Tax Shift*, PHILADELPHIA INQUIRER, Oct. 3, 2006, at A11 ("Al Gore gave a speech at New York University recently in which he proposed lowering the payroll tax and substituting a 'carbon tax' to make up the lost revenue.").

[128] *See* Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 845, 858 ("When regulators lack information about the likelihood and magnitude of a risk, it makes sense to spend extra resources to buy an 'option' to protect against irreversible harm until future knowledge emerges.") ("The argument for a global carbon tax is significantly strengthened by an appreciation of the option value of conserving the atmospheric environment.").

[129] H. Josef Hebert, *Findings Shift Debate from Cause to Cost*, PITT. POST-GAZETTE, Feb. 3, 2007, at A8 ("The Bush administration doesn't like any [proposals for cutting greenhouse gas emissions], arguing that arbitrary pollution limits would be too costly, threaten certain carbon-intensive industries and result in lost jobs as business shifts to other countries.").

[130] Richard E. Cohen & Peter Bell, *Insiders Poll*, NAT'L J., Feb. 3, 2007, at 6-7 (indicating that only 3% of Republicans and 50% of Democrats polled would support a carbon tax to reduce global warming).

[131] *President Bush's FY 2008 Budget and Revenue Proposals: Hearing Before the S. Budget Comm.*, 110th Cong. (2007), 2007 WLNR 2754619 (statement of Sen. Domenici) ("I submit to you that everybody's looking for a law that will [fix global warming], which will put in all kinds of impacts on business, and it will become just another master of bureaucracy on trying to collect carbon tax, or whatever it is."); *see also* 149 Cong. Rec. S10021 (daily ed. July 28, 2003) (statement of Sen. Inhofe) (stating "that the motives for Kyoto are economic, not environmental; that is, proponents favor handicapping the American economy through carbon taxes and more regulations").

[132] For example, N. Gregory Mankiw, former Chairman of the President's Council of Economic Advisers (2003-05) and current professor of economics at Harvard University, recently proposed a carbon tax on gasoline of $1 per gallon, to be phased in at ten cents per year over the next 10 years. N. Gregory Mankiw, *Raise the Gas Tax*, WALL ST. J., Oct. 20, 2006, at A12; *see also* Daniel Gross, *Raise the Gasoline Tax? Funny, It Doesn't Sound Republican*, N.Y. TIMES, Oct. 8, 2006, § 3 (Econ. View), at 3 (stating that former Federal Reserve Board Chairman Alan "Greenspan isn't the only Republican-aligned economist to have discovered, or rediscovered, a fondness for higher energy taxes since leaving government service").

[133] Although many "Republican-leaning economists . . . may think [an increased carbon tax on gasoline] is a good idea, the Republican politicians who control the levers of power in Washington think that it's an awfully bad one, even though gas taxes in the United States are far lower than those in other industrialized countries." Gross, *supra* note 132, § 3 (Econ. View), at 3.

The other oft-discussed federal program option is an emissions trading program, which would operate similar to the regional cap-and-trade program proposed in RGGI (Part III, *supra*). A comprehensive federal cap-and-trade program would generally allocate or auction "a fixed number of tradable allowances to emitters and requires them to surrender allowances equal to their emissions in a particular compliance period—known as 'downstream' cap-and-trade."[134] Another option is an upstream cap-and-trade program, which "requires firms to surrender allowances equal to the carbon content of the fuel and the GHG content of certain other products they sell each year."[135] There have been a number of proposed programs at the federal level,[136] and there is continued[137] and growing support for such programs.[138] There are several proposals currently active in the U.S. Senate,[139] but implementation of a mandatory national cap-and-trade program remains unlikely in the near future.[140]

One or both of these programs may well be the best way to achieve reductions in GHG emissions. For the time being, however, GHG emissions reductions will have to come at the state and regional level. In doing so, states should maximize local needs and resources.

At the state level, any GHG emissions reduction program must be manageable and enforceable for state agencies. When creating programs at the state level, offset projects, such as conservation measures and land-based initiatives, are the

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[134] Nordhaus & Danish, *supra* note 122, at 109-10.

[135] *Id.* at 110.

[136] *See, e.g.*, Climate Stewardship and Innovation Act of 2005, S.1151, 109th Cong. (2005); Climate Stewardship Act of 2003, S.139, 108th Cong. (2003). "Various bills proposing the implementation of an economy-wide cap-and-trade system have been introduced over the years, but none have been approved by Congress." Jennifer Rohleder & Jillian Button, *The Legal Dimensions of Climate Change: Conference Report*, SUSTAINABLE DEV. L. & POL'Y, Winter 2006, at 57, 59 (reporting the presentation of Robert Nordhaus).

[137] *Kerry Seeks Middle Ground on CO_2 Reductions with New Climate Bill*, CLEAN AIR REP. § 3, Feb. 8, 2007, 2007 WLNR 2343212 ("Sen. John Kerry (D-MA) is touting his new legislation as the middle ground among several competing proposals to deal with climate change . . . ."); *see also* Press Release, Senator Dianne Feinstein, Senator Feinstein Calls for Immediate Steps to Reduce U.S. Emissions to Combat Climate Change (Feb. 2, 2007), *available at* http://www.feinstein.senate.gov ("We need national cap-and-trade programs tailored for the electricity and industrial sectors.").

[138] Pew Center on Global Climate Change, Summary of The Lieberman-McCain Climate Stewardship Act, http://www.pewclimate.org/policy_center/analyses/s_139_summary.cfm (stating that, although the Climate Stewardship Act of 2003 "failed by a vote of 43 to 55, the vote demonstrated growing bipartisan support for a genuine climate change policy") (last visited Mar. 21, 2007).

[139] *See, e.g.,* Electric Utility Cap and Trade Act of 2007, S.317, 110th Cong.; Global Warming Pollution Reduction Act, S.309, 110th Cong.; Climate Stewardship and Innovation Act of 2007, S.280, 110th Cong.

[140] *White House Rejects CO_2 Caps*, INVESTOR'S BUS. DAILY, Feb. 2, 2007, at A01 ("Despite a strongly worded global warming report from the world's top climate scientists, the Bush administration still opposes caps on greenhouse gases.").

most likely to have success. Good examples of state-level programs include: natural gas, heating oil and propane energy efficiency projects; carbon sequestration projects; landfill methane capture and destruction projects; and "avoided methane emissions from agricultural manure management operations" projects.[141] State legislatures and regulators can monitor progress and provide incentives for such programs that are most beneficial for their constituents.

It is worth noting that state programs are not completely isolated, so regional or national market opportunities will be part of a state's program analysis. For example, as discussed in Part II, *supra*, Wyoming (solely at the state level) can provide incentives and help analyze the best market for carbon sequestration projects. However, the market for carbon credits earned would be at the regional, national, or even the international level. Such a program still makes sense at the state level, though, because the state can further the program and help participants enter existing markets.

At the regional level, states should focus on developing programs where the participants have specific emissions reduction needs or where the parties have complementary resources. That is, to maximize the effectiveness of a regional program, there should be specific synergies or other reasons to limit the effort to the region (instead of seeking a national program). The Wyoming MOUs, for example, would always be appropriate at the regional level, because the states in the region have unique needs and resources that can best be analyzed by those in the region. This holds true, even if program portions (like siting approval and eminent domain authority) would be more efficiently accomplished at the federal level.

Given the current reluctance to develop programs at the federal level, regional programs (like RGGI) that would be more appropriate at the national level also still warrant consideration. To the extent regional action can provide a model for national action or raise the public awareness needed to trigger federal action, such programs also have value. However, in the long-run, the states would be better served to focus efforts on state and regional programs that complement federal initiatives (rather than developing their own programs) where the program is almost inherently national in scope (like a cap-and-trade program).

Reducing greenhouse gas emissions is a daunting problem that requires coordination at all levels of government. Wyoming has managed to initiate and participate in programs at both the state and regional level by balancing political

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[141] Note that all of these examples are included "offset" projects as part of the RGGI "cap-and-trade" program in the RGGI Model Rule XX-10.3(a)(1). "Offsets allowances (or 'credits') are certified emissions reductions or carbon sequestration that take place outside the electric generating sector in project areas that meet the program requirements. RGGI, Frequently Asked Questions, *supra* note 41, at 3. Although a regional program, RGGI's offset program would be monitored and administered by each member state. *See* RGGI MOU 4, pt. F(1)(b).

realities with the need to reduce GHG emissions. Wyoming is a coal-producing state that is simply not going to promote initiatives that would cripple its own economy. However, rather than hide from the issue, Wyoming has pursued partners with similar needs and is promoting solutions that could have a real, if somewhat limited, impact. Other states should follow Wyoming's lead and seek additional state and regional opportunities to reduce GHG emissions. Similarly, on the federal level, Congress and the administration should follow Wyoming's example of embracing a difficult issue by pursuing new technologies and aggressively facilitating access to domestic and renewable energy sources.

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HIGH TIMES IN WYOMING: REFLECTING THE STATE'S VALUES BY ELIMINATING BARRIERS AND CREATING OPPORTUNITIES FOR WOMEN IN THE EQUALITY STATE

*Dona Playton and Stacey L. Obrecht**

"*Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it's the only thing that ever has.*"[1]

The Women's Rights Movement in the United States began in 1848, almost 160 years ago.[2] The fight for equal rights and opportunities was fueled by women organizing to change their status privately, socially, and economically. Wyoming is often touted as a pioneer for many of the rights that women now enjoy, including being the first state to grant women the right to vote and hold public office, hence our "Equality State" motto.[3] Yet today, many continue to fight deliberately to secure action on a wide variety of issues important to women, not the least of which involves economic security.

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[1] WIKIQUOTE, MARGARET MEAD (stating a conclusion reached after a lifetime of observing very diverse cultures around the world), http://en.wikiquote.org/wiki/Margaret_Mead (last visited Apr. 10, 2007).

[2] BONNIE EISENBERG & MARY RUTHSDOTTER, NATIONAL WOMEN'S HISTORY PROJECT, HISTORY OF THE MOVEMENT (1998), http://www.legacy98.org/move-hist.html.

[3] STATE OF WYOMING, WYOMING HISTORICAL DATES, http://wyoming.gov/state/wyoming_news/general/chronology.asp. (last visited April 27, 2007). Wyoming was the first state to give women the right to vote in 1869. In 1870, Esther Hobart Morris was the first woman ever to be appointed justice of the peace. Also in 1870, the first women were empanelled for jury service. Estelle Reel

Historically, women have not been passive recipients of the rights bestowed upon them, nor will they be as they face the changing environment of the future. Even in light of a substantial economic windfall in the state, many women are still burdened with disproportionate wages; high rates of domestic violence and divorce; limited access to quality child care; affordable housing; and legal representation in civil matters; all of which elevate barriers to improving material well-being. This article will explore whether women are benefiting from what many are still calling a "boom" and ways to eliminate the economic barriers facing many women and their children in the state. Through initiatives aimed at reducing the wage disparity, improving employment opportunities and conditions, and campaigns to reduce violence against women and to increase civil legal assistance to the poor, the authors suggest that our state can effect tangible results.

WYOMING'S INDUSTRY WORKFORCE

Wyoming is unique in its avoidance of the financial crises faced by many other states. The energized oil, gas, and mining industry in Wyoming has meant plentiful and well-paying jobs, a bustling economy and an estimated $1.8 billion surplus.[4] Industry in Wyoming "has experienced both 'booms' and 'busts' over the years, illustrating the cyclical relationship between the price of oil and employment. During periods of high oil and gas prices, the industry expands exploration and production and hires more workers. The opposite occurs during periods of low prices."[5]

No one knows for sure how many workers have come from out of state, but the small Sweetwater County community of Wamsutter has seen its population grow from 247 people to about 1,200 in two years.[6] The population of Sublette County, another county hit hard by the boom, jumps from around 6,000 to between 50,000 and 80,000 during the summer.[7] The vast majority of this popu-

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Meyer was one of the first women in the United States to be elected to a state office; in 1894, she was elected State Superintendent of Public Instruction. And in 1925, Wyoming elected the first woman governor in the United States, Nellie Tayloe Ross. Ms. Morris was the first judge elected, yet even in 2007, there are only three women district court judges in Wyoming, and only one woman was ever appointed to the Supreme Court of Wyoming, Justice Marilyn Kite. In 1925, Ms. Ross was elected as the first ever woman governor, yet more than eighty years later, we have not had another woman governor. *Id*.

[4] Bob Moen, *Wyoming Energy Boom Puts Strain on Police, Health Care*, SALT LAKE CITY DESERET NEWS, Mar. 7, 2006, *available at* http://findarticles.com/p/articles/mi_qn4188/is_20060307/ai_n16170011/print.

[5] BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, OIL AND GAS EXTRACTION: NATURE OF THE INDUSTRY (last modified Dec. 22, 2005), http://www.bls.gov/oco/cg/cgs005.htm#conditions.

[6] Moen, *supra* note 4.

[7] Blaine Harden, *Gas Boom is Both Boon, Bane for Wyoming County,* WASHINGTONPOST.COM, Mar. 6, 2006, at A02, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/03/05/AR2006030500809.html.

lation increase appears to be out-of-state men.[8] Combined with other factors, the shortage of housing has forced many of the workers to leave their wives and families behind, finding little option other than to live with other roughnecks in company-built man camps.[9]

Additionally, employment growth accelerated to four percent in the fourth quarter of 2005.[10] Construction and mining (including oil and gas) were the fastest growing sectors and created the largest numbers of new jobs.[11] Economic growth can affect women and men differently, particularly when the growth is concentrated in natural resource-based industries, which seem to constitute more favorable economic environments for men.[12] Predominately male industries, such as construction and mining, pay higher wages.[13] These are also the job sectors with the fewest women employees.[14]

In 1997, a study was done on women in Canada's oil and gas sector.[15] The study focused on identifying the current percentage of females participating in the Canadian petroleum sector labor force, barriers to women's entry and promotion, and strategies used by oil and gas companies to encourage the full contributions of their female employees.[16] Positive trends were identified, including "significant growth in the last ten years in female enrollment in petroleum-related university programs (i.e. petroleum and chemical engineering, geology, and geophysics). This trend indicates that female participation in the petroleum industry in Alberta is likely to grow as these women graduate and enter the workforce."[17] Another positive trend identified includes growth in the number of oil and gas companies that are developing policies and organizational initiatives to address inequities in

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[8] Harden, *supra* note 7. The article states that thousands of roughnecks are coming into Wyoming from Texas, Oklahoma, and Louisiana "chasing boomtown money." *Id*.

[9] Harden, *supra* note 7.

[10] David Bullard, *Total Payroll Up, Job Growth Continued in Fourth Quarter 2005*, 43(7) WYO. LABOR FORCE TRENDS 6, 11 (2006), *available at* http://wydoe.state.wy.us/LMI/0706/a2.htm.

[11] *Id*.

[12] HEIDI HARTMANN, OLGA SOROKINA & ERICA WILLIAMS, INST. FOR WOMEN'S POLICY RESEARCH, BRIEFING PAPER R334, THE BEST AND THE WORST STATE ECONOMIES FOR WOMEN 2 (2006), http://www.iwpr.org/pdf/R334_BWStateEconomies2006.pdf.

[13] Stephanie Boraas & William M. Rodgers, III, *How Does Gender Play a Role in the Earnings Gap? An Update*, 126(3) MONTHLY LABOR REVIEW 9, 10 (Mar. 2003), *available at* http://www.bls.gov/opub/mlr/2003/03/art2full.pdf.

[14] *Id*. at 14.

[15] SUSAN SHERK, AGRA EARTH AND ENVTL. LTD. WOMEN IN CAN.'S OIL AND GAS SECTOR 1 (1997), http://www.mun.ca/cwse/Sherk,Susan.pdf.

[16] *Id*.

[17] *Id*.

the workplace.[18] Diversity in the labor market can promote productivity which, in turn, can enhance the competitive edge of an industry.[19]

According to the Canadian study, it has become an economic necessity to ensure a corporate culture that values and capitalizes on its total human resources.[20] Many oil and gas companies have now established diversity management initiatives that deal with gender-related issues and address barriers to women's participation. Examples of initiatives that have been implemented include: child care and summer-care facilities within company offices subsidized by the company; bridging programs to introduce training opportunities for non-traditional occupations; introduction of harassment prevention policies and training that require managerial accountability and support; gender awareness training, as well as diversity-sensitive hiring and selection processes.[21] Major barriers obstructing women's equal participation in the oil and gas industry were also identified in the Canadian study, including engrained values, beliefs, and behaviors that made change difficult.[22] Furthermore, to advance in the petroleum industry one must have significant experience working in the field—a requirement often more challenging for women with the lack of alternative work schedules (e.g., job-sharing and part-time positions) and child care arrangements.[23] In Canada, women were able to overcome industry barriers by enrolling in petroleum-related university programs and through the organizational changes promoting diversity within companies.[24]

Though more women in Wyoming have secured positions in the oil and gas industry, statistics alone, if you can find them, may be deceiving. The positions held by women in this area still remain predominately in lower paying occupations.[25] Every mining and construction industry in Wyoming is male-dominated with the lowest percentage at 87.3.[26] The Wyoming labor statistics from 2005 report approximately nine percent of the workers in the "Natural Resources

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[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] SUSAN SHERK, AGRA EARTH AND ENVTL. LTD. WOMEN IN CAN.'S OIL AND GAS SECTOR 1 (1997), http://www.mun.ca/cwse/Sherk,Susan.pdf.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] BRETT JUDD & GREGG DETWEILER, RESEARCH AND PLANNING, DEPT. OF EMPLOYMENT, STATE OF WYO., THE RELATION OF AGE AND GENDER TO EMPLOYMENT IN WYOMING, PART ONE OF A NEW ANALYSIS UTILIZING WAGE RECORDS, http://wydoe.state.wy.us/lmi/0596/0596a1.htm (last visited April 27, 2007). A Canadian study found, of women employed in the petroleum sector, a majority are clustered in support, sales, and service jobs (60%). *See* SHERK, *supra* note 15.

[26] JUDD ET AL., *supra* note 25.

and Mining" industry to be women.[27] In contrast, 68.5% of working women are employed in retail trade and services industries, which pay among the lowest average wage of all industries.[28] Unlike most service-sector jobs, non-traditional jobs—in construction, mining, and other skilled trades—provide higher salaries and better benefits.[29] The average salary in the mining sector, which now employs one in ten of Wyoming's workers, is $61,000—double the average in other industries.[30] An oil-field worker, or roughneck, can often earn $90,000 in a year.[31]

Currently, many of the jobs provided in the oil and gas industry, and the policies governing them, are not conducive to high numbers of women employees. One reason is that many oilfield workers are away from home for weeks or months at a time.[32] Exploration field personnel and drilling workers frequently move from place to place as work at a particular field is completed.[33] The work is hard, the hours long, and the pressures immense.[34] Working conditions in the industry vary significantly by occupation.[35] Roustabout jobs and jobs in other construction and extraction occupations may involve rugged, outdoor work in remote areas in all kinds of weather.[36] This work involves standing for long periods, lifting moderately heavy objects, and climbing and stooping to work with tools that often are oily and dirty.[37] Work in the oil field, with its "[r]elentless work pace and the constant danger of working around heavy machinery, with the risk of accidents including gas-well leaks and fires, takes a toll on people."[38] Opportunities for part-time work in this industry are rare. In fact, a higher percentage of workers in oil and gas extraction work overtime than in all industries combined.[39] Drilling

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[27] DEPT. OF EMPLOYMENT, STATE OF WYO., 2005 NATURAL RESOURCES & MINING, MEAN EARNINGS BY AGE, GENDER, AND INDUSTRY, http://doe.state.wy.us/lmi/wfdemog/natres05.htm. "Natural Resource and Mining" includes Mining, Oil and Gas Extraction, Agriculture, Forestry, Fishing and Hunting. *Id.*

[28] RICH PETERS, DEPT. OF EMPLOYMENT, STATE OF WYO., THE IMPORTANCE OF MAJOR INDUSTRY TO WYOMING'S GENDER PAY GAP: PART ONE (2000), http://doe.state.wy.us/lmi/0700/a1.htm.

[29] Lisa Takeuchi Cullen, *Bittersweet Boom,* TIME, Sept. 3, 2006, *available at* http://www.time.com/time/insidebiz/article/0,9171,1531311,00.html.

[30] *Id.*

[31] *Id.*

[32] BUREAU OF LABOR STATISTICS, *supra* note 5. In contrast, well operation and maintenance workers and natural gas processing workers usually remain in the same location for extended periods. *Id.*

[33] *Id.*

[34] *See id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Ray Ring, *When a Boom is a Bust*, 36 HIGH COUNTRY NEWS.ORG 7 (Sept. 13, 2004), *available at* http://www.hcn.org/servlets/hcn.PrintableArticle?article_id=14984.

[39] BUREAU OF LABOR STATISTICS, *supra* note 5.

rigs operate continuously.[40] On land, drilling crews usually work six days in a row, eight hours a day, and then have a few days off.[41]

To date, it is unclear whether or to what extent comprehensive research has been undertaken on women's participation in Wyoming's oil and gas sector, but doing so could provide important insight into potential avenues for increasing economic self-sufficiency for Wyoming women and families. According to the Women's Policy Institute, "[e]mployers should actively recruit women into male-dominated fields that pay well compared with female-dominated jobs with lower pay but that require similar skills and education. They can also work proactively to prevent harassment of women workers, which is thought to be higher in these nontraditional fields."[42] The increased number of women in the workforce has changed the work environment and workplaces have been slow to consider the complex lives of today's workforce when making organizational decisions.[43]

Subsequently, more funding for training women for careers in the oil and gas industry would create greater opportunities for women to enter these occupations. Communities need to assess demand among women for non-traditional training and employers' willingness to hire women in nontraditional fields. This will ensure interest in programs and encourage job training administrators to provide such programs. Local, county, or state welfare performance should be evaluated, in part, on the basis of training for, and placement in, non-traditional jobs or other higher-paying jobs.[44]

Climb Wyoming, a program operated under the auspices of Our Families, Our Future,[45] is training single mothers for higher-paying, non-traditional careers for women, such as construction trades and truck driving.[46] This program has been successful in doubling or tripling wages for many women who have completed the training.[47] The program lasts from four to five months, depending on the job

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[40] *Id.*

[41] *Id.*

[42] HARTMANN ET AL., *supra* note 12, at 2.

[43] Jennifer E. Swanberg et al., *Intimate Partner Violence, Employment, and the Workplace: Consequences and Future Directions*, 6(4) TRAUMA, VIOLENCE, & ABUSE 286, 286 (2005).

[44] CYNTHIA NEGREY, PH.D. ET AL., INST. FOR WOMEN'S POLICY RESEARCH & NOW LEGAL DEF. AND EDUC. FUND, IWPR # D443, WORKING FIRST, BUT WORKING POOR, EXECUTIVE SUMMARY (2001), *available at* http://legalmomentum.org/pub/workingfirstworkingpoor.pdf.

[45] Our Families Our Future™ is a Wyoming non-profit organization that trains and places low-income single mothers in careers that successfully support their families.

[46] Ilene Olson, *Economic Outlook for Wyoming Women Troubles Governor*, WYOMING TRIBUNE-EAGLE, Nov. 27, 2004, *available at* http://www.wyomingnews.com/articles/2004/11/27/news/import-103932.txt.

[47] *Id.*

training curriculum.[48] Income-eligible, single mothers receive comprehensive services, including life skills training and job placement services.[49] Our Families, Our Future works closely with local employers to ensure their training programs meet the workforce needs.[50] Increasing outreach to women, including single mothers, in order to promote self-sufficiency for themselves and their families is a laudable goal for the state.[51] Additionally, continuing to invest in education, particularly in training in the use of new technologies will improve economic growth for all. To recruit women, employment practices and social policies need to stay in step. "Ensuring equal access to these opportunities is important if disadvantaged populations are to be able to improve their status."[52]

WYOMING'S WAGE GAP

Although Wyoming boasts of a huge windfall from royalties and severance taxes, Wyoming's 60.7% female-male earnings ratio is the worst in the nation.[53] Wyoming has ranked at the bottom of the states for the wage ratio since the 2000 rankings (based on 1996-98 data).[54] Female wages are lower than average, and male wages are considerably higher than average.[55] In addition, in Wyoming and nationally, the wage gap is not getting better, it is getting worse. In 2003, the Institute for Women's Policy Research reported a 1.4% decrease in the national wage ratio and "the first decline in women's real earnings since 1995."[56]

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[48] Our Families Our Future, *Climb Wyoming for Young Parents Web page*, *available at* https://www.ourfamiliesourfuture.org/ (click "CLIMB phases" on bar at the top of the page) (last visited March 2, 2007).

[49] *Id*. Services include: extensive job training in well-paid careers and demand occupations, such as construction trades and healthcare fields; life skills training, including parenting, relationships, money management, work readiness and accessing community resources; individual and group counseling addresses barriers to personal growth; an all women support group offers an environment where participants receive support from their peers and highly trained staff; and job placement where participants are matched with employment opportunities. *Id*.

[50] Olson, *supra* note 46.

[51] *See* DEPT. OF WORKFORCE SERVICES, STATE OF WYO., EMPLOYMENT AND TRAINING FOR SELF-SUFFICIENCY, http://www.wyomingworkforce.org/how/etss_gwe.aspx (a program that "train[s] and place[s] women in demand occupations and careers that successfully support their families, such as healthcare fields and construction trades") (last visited May 19, 2007).

[52] HARTMANN ET AL., *supra* note 12, at 19.

[53] *Id*. at 9.

[54] *Id*. at 9-10.

[55] ANN M. ALEXANDER ET AL., WYO. COUNSEL FOR WOMEN'S ISSUES, STATE OF WYO., A STUDY OF THE DISPARITY IN WAGES AND BENEFITS BETWEEN MEN AND WOMEN IN WYOMING, 5 (2003), http://www.wyomingwomenscouncil.org/_pop-up_content/wage_disparity_intro.pdf.

[56] Press Release, Inst. For Women's Policy Research, Women's Earnings Fall; U.S. Census Bureau Finds Rising Gender Wage Gap (Aug. 27, 2004), *available at* http://www.iwpr.org/pdf/WageRatioPress_release8-27-04.pdf.

There are ripple effects of having such a wide wage gap and those effects must be considered as the state devises strategies to encourage workers to bring their families with them to Wyoming. While increasing affordable, quality child care options is critical, more is needed to encourage women to join their male partners in Wyoming. The message sent by the wage gap is a lower value is being placed on women's contributions in the workforce. "If women are undervalued, the youth 'brain drain' will cause both technically skilled and unskilled women to leave the region to seek opportunity elsewhere."[57] Of course there are several factors that contribute to the wage gap, including occupations or jobs held by women and men, time spent at work and education differences,[58] but the fact that it exists should be investigated carefully when considering the future of our state.

Wyoming ranks in the bottom third on The Economic Policy Environment Composite Index.[59] This index "combines four indicators of the women-friendliness of state economic policy: women's educational level (measured by the share of women with at least a four-year college degree), women's business ownership, women's poverty, and women's health insurance coverage."[60] There are so many benefits that can be reaped by the state, employers, and employees that this issue must be brought to the forefront of discussions involving Wyoming's economy and workforce.

> Reduction of the gender wage gap would improve productivity of the existing workforce, as human capital resource utilization would be increased. Labor turnover rates would likely fall. This, in turn, would reduce lost wages, benefits, and training invested in employees and decrease employer search and training costs. . . . Of immediate interest to the state, direct fiscal benefits would also be realized by reduction of the gender wage gap. . . . This could result not only in a larger, better workforce in the state, but in increased private spending. . . . Savings to the state government would also ensue: fewer payouts to women and families in the form of welfare, Medicaid, and other forms of means-tested state support could be reduced as average household incomes rose.[61]

Further, reducing the wage gap will improve women's opportunities to obtain self-sufficiency, including the ability to secure affordable housing, a critical component for any working family.

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[57] ALEXANDER ET AL., *supra* note 55, at 15.

[58] *Id.* at 12.

[59] *Id.* at 12-13.

[60] HARTMANN ET AL., *supra* note 12, at 12.

[61] ALEXANDER ET AL., *supra* note 55, at 15-16.

WYOMING'S ECONOMY AND HOUSING

While hundreds of men are rushing to the state to work in the oilfields, housing is extremely scarce. Most of the out-of-state workers coming to Wyoming for high-paying extraction work cannot find stable housing for themselves, let alone for their families. Instead, they end up "staying long term in motel rooms, living in tents in campgrounds and plunking trailers and RVs wherever they can park them."[62]

Due to the housing shortage, many oil and gas companies have set up man camps or temporary housing units for their employees. In Wamsutter, Wyoming, hundreds of workers are housed in these transient camps.[63] The camps are around the community of Wamsutter, in the middle of the desert, and consist of hundreds of trailers, each filled with bunk beds.[64] Man camps are known for their tendency to bring drugs and crime to a community.[65] Recently, the town of Farson, Wyoming, fought the development of a man camp in their small rural community.[66]

Currently, there appears to be a housing shortage in every county in the state, leaving low-income people with little to offer in comparison to the workers in the oil and gas fields. In an attempt to ease the worker shortage, the *Field of Dreams* mantra "build it and they will come" seems to echo throughout this mountainous state. So while Wyoming's efforts continue to recruit out-of-state workers and encourage imported workers to bring their families with them, the topic of how the state will deal with the hardships of those families already here is rarely broached. The focus is on the workers, not on the fact that nearly half of all homeless people in Wyoming are women and children, and of those, at least 80% of the homeless women report a history of domestic violence and many attribute their homelessness to the violence in their lives.[67]

> Today there are eight community housing authorities in Wyoming administering a combined total of slightly more than 700 public housing units and 2,000 Housing Choice Vouchers.

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[62] DAWN BALLOU, PINEDALE ONLINE!, (Sept. 1, 2005), http://www.pinedaleonline.com/news/2005/09/OilGasFieldJobs.htm.

[63] Ring, *supra* note 38.

[64] *Id.*

[65] Jeff Gearino, *Farson Folks Fight Man Camp*, CASPER STAR-TRIBUNE, Aug. 25, 2006, *available at* http://www.casperstartribune.net/articles/2006/08/25/news/wyoming/e9f69f7bf13c0c74872571d400834331.txt.

[66] *Id.*

[67] Jared Miller, *Amid Strong Economy, Homelessness on Rise in Wyo.*, CASPER STAR-TRIBUNE, Nov. 26, 2006, at A1, *available at* http://www.casperstartribune.net/articles/2006/11/26/news/top_story/1f9a3367e0fa395687257231002689ff.txt.

> Yet the combined waiting lists total more than 3,000 applicants likely to wait more than 18 months each. More than 80% of the households applying for and receiving low income housing assistance are single female head of household.[68]

The "lack of affordable housing can dramatically reduce options for women experiencing domestic violence, trapping them in abusive situations or forcing them and their children to become homeless if they leave."[69]

The governor has proposed increased funding for housing, though how much of it will be "affordable housing" remains in the hands of the Wyoming Business Council.[70] Seen as a critical infrastructure need, the housing will be primarily designed to help those families with a household income of $30,000 to $40,000 per year.[71] Of course, workers in the oil and gas industry will likely be able to afford these prices so long as they budget wisely, but what about Wyoming's low-income population? Wyoming's homeless population continues to rise, and much of the reason has been attributed to the booming energy economy and the influx of out-of-state workers.[72]

> The average price of existing housing in Wyoming has risen to over $130,000. The average monthly rent for a two bedroom dwelling exceeds $520 per month. Average wages in Wyoming are not keeping pace with the increased cost of housing particularly in high energy development communities, leaving badly needed workers without housing and causing serious problems for low income and disabled persons.[73]

Just as necessary as "affordable" housing is the development of strategies to encourage Wyoming businesses to recruit, train, and hire qualified women to work in higher-wage positions. So far, many women in Wyoming are stuck with the option of service-industry jobs. Though many of those employers have had to increase their hourly wages in order to stay in operation, the workers are unlikely to be able to compete with oilfield workers for the limited housing options.

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[68] STATE OF WYO., CHILDREN AND FAMILIES INITIATIVE REPORT, RECOMMENDATION SYNOPSIS 16 (Dec. 9, 2005), *available at* http://dfsweb.state.wy.us/PDF/SummaryRedesign.pdf.

69 THE FAMILY VIOLENCE PREVENTION FUND, THE FACTS ON HOUSING AND DOMESTIC VIOLENCE, *available at* http://endabuse.org/resources/facts/Housing.pdf (last visited Apr. 10, 2007).

[70] Joan Barron, *Plan Pushes Affordable Housing*, CASPER STAR-TRIBUNE, Nov. 21, 2006, *available at* http://www.casperstartribune.net/articles/2006/11/21/news/wyoming/0a2d10f18b1c70378725722d00078279.txt.

[71] *Id.*

[72] Miller, *supra* note 67, at A1. *See also* WYO. INTERAGENCY COUNCIL ON HOMELESSNESS, STATE OF WYO., HOMELESSNESS IN WYO. (May 2005), *available at* http:/wdh.state.wy.us/rural/pdf/HomelessnessReportfinal0505.pdf.

[73] STATE OF WYO., *supra* note 68, at 16.

Long-term efforts to address homelessness must include increasing the supply of affordable housing, ensuring adequate and fair wages and income supports, and providing necessary supportive services.[74]

ECONOMIC IMPACTS OF DIVORCE

Another major barrier to women's economic parity is the financial consequences of divorce. Because so few choose to see the impacts of the oil and gas boom through a gender lens, the evidentiary basis for drawing certain correlations is often circumstantial. As stated previously, Wyoming has the largest wage gap in the country between what men and women earn. "This is particularly damaging to families when Wyoming's higher than average divorce rate means one in four households is headed by a single parent, most often a mother."[75] According to Wyoming's 2001 Vital Statistics, Wyoming's divorce rate is forty-five percent higher than the national average.[76] Many of these separations involve children. Wyoming is essentially a no-fault divorce state; therefore it is difficult to determine what eventually led to the divorce. The causes of divorce are often complex, as several factors can lead a person or couple to become dissatisfied with the marriage. Commonly-cited causes for divorce include any combination of the following factors: quality of premarital relationship, partner's relationship styles, poor communication, lack of commitment, infidelity, problem behaviors, financial problems, differences in parenting styles, changes in life priorities, and abusive or neglectful behaviors.[77] Whatever the reasons for the divorce, it is clear that women and children suffer financially afterwards.[78]

"Women going through divorce have a unique set of challenges to contend with including financial insecurity, potentially re-entering the job market, and juggling the responsibilities of children and career."[79] Men customarily retain more than half of the assets of the marriage and leave with an enhanced earning

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[74] NATIONAL COALITION FOR THE HOMELESS, NCH FACT SHEET #7, DOMESTIC VIOLENCE AND HOMELESSNESS (2006), *available at* http://www.nationalhomeless.org/publications/facts/domestic.pdf.

[75] STATE OF WYO., *supra* note 68, at 22.

[76] DEPARTMENT OF HEALTH, STATE OF WYOMING, WYOMING VITAL STATISTICS 2001 (2003), *available at* http://wdh.state.wy.us/vital_records/01DATA/ANNUAL%20REPT.pdf.

[77] *See* ONLINE LAWYER SOURCE, CAUSES OF DIVORCE (2007), http://www.onlinelawyersource.com/divorce/family-law/children/index.html.

[78] FORD FOUNDATION, WOMEN, CHILDREN AND POVERTY IN AMERICA 10 (1985), http://www.fordfound.org/elibrary/documents/0183/006.cfm.

[79] NICOLE R. GERBER, DIVORCE MAGAZINE.COM, WOMEN AND DIVORCE (2007), http://www.divorcemag.com/articles/Women_and_Divorce/women_and_divorce.html.

capacity.[80] The remaining family members are left with less than half of the marital assets and a severely diminished and declining earning capacity.[81]

Post-divorce families headed by women are the fastest growing segment of those living in poverty.[82] Older women whose marriages end in divorce are most likely to have abandoned their own aspirations or to have devoted their lives to furthering their husbands' careers. They are not adequately compensated by application of the present system of alimony and equitable distribution of marital assets.

Increases in single parent households compel more women to secure employment outside the home. "Studies show that in the first year after divorce, the wife's standard of living may drop almost 27 percent while the husband's may increase by as much as 10 percent."[83] While the politicians herald the decline of welfare or TANF recipients in the nation, [84] they fail to mention the record growth of women and children in poverty. The poverty rate for women continues to increase, especially for single mothers.[85] In fact, a woman in the United States is 45 percent more likely to be poor than a man.[86] The statistics also "show a jump in child poverty that was the largest in a decade."[87] Poverty rates among children living apart from at least one of their parents are more than three times as high as those for children who live with both of their natural parents.[88]

In light of the wage gap and types of jobs available to women, wages are often not enough to make ends meet. Wyoming conducted a study to identify

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[80] *See* FLA. SUP. CT., GENDER BIAS STUDY COMM'N: EXECUTIVE SUMMARY 5 (1990), http://www.floridasupremecourt.org/pub_info/documents/bias.pdf.

[81] *See id.*

[82] *See id.*

[83] GINITA WALL, PLAN FOR WEALTH, *The Twelve Financial Pitfalls of Divorce* (2006), http://www.planforwealth.com/dollars/pitfallsofdivorce.htm.

84 Temporary Assistance for Needy Families (TANF) Program was created by the Welfare Reform Law of 1996. TANF became effective July 1, 1997, and replaced what was then commonly known as welfare: Aid to Families with Dependent Children (AFDC) and the Job Opportunities and Basic Skills Training (JOBS*)* programs. TANF was reauthorized in February 2006 under the Deficit Reduction Act of 2005.

[85] MARIANNE SULLIVAN, WOMEN'S ENEWS, WOMEN'S POVERTY DEEPENS AMID SLOW 2003 RECOVERY 2 (Aug. 30, 2004), *available at* http://ncdsv.org/images/WomenPovertyDeepensAmidSlow2003Recovery.pdf.

[86] LEGAL MOMENTUM, READING BETWEEN THE LINES: WOMEN'S POVERTY IN THE UNITED STATES, 2005, 1 (2006), *available at* http://legalmomentum.org/legalmomentum/files/povertyreport2005.doc.

[87] SULLIVAN, *supra* note 85, at 2.

[88] ELAINE SORENSEN & CHAVA ZIBMAN, URBAN INST., TO WHAT EXTENT DO CHILDREN BENEFIT FROM SUPPORT? 1 (2000), http://www.urban.org/publications/309299.html.

"self-sufficiency standards" for all the counties in Wyoming.[89] This standard calculates how much money working adults require to meet their basic needs without any subsidies of any kind.[90] Necessities or basic living costs compiled for this study include: housing, child care, food, transportation, health care, and taxes.[91] For example, in Laramie County, for a single adult and an infant and a preschooler, the adult would need to make at least $13.46 per hour to pay for just the basic living costs. This does not include school field trips, outings, eating out, and other miscellaneous costs.[92] Wyoming's minimum wage is $5.15 per hour.[93] "The Wyoming Self Sufficiency Standard reveals that more than 11,000 families struggle to exist on wages below the poverty level."[94]

A woman needs to earn almost three times the minimum wage just to provide the basic necessities for herself and her children. In 2002, the most recent year for which this data are available, child care expenditures alone for employed mothers with child care costs averaged $412 a month.[95]

> As recently as 2001, American sociologists decried that "gender inequality remains alive and well in both the workplace and the couple." In order for women ever to achieve true equality to men, they must be able to achieve financial independence. In order to achieve financial independence, women must work. Because most women do not have "housewives" to care for their children while they are at work and because men usually will not forego their careers to accept the full-time responsibility of child care, women need affordable and reliable daycare in order to attain true equality to men.[96]

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[89] *See* UNIV. OF WASH. & WIDER OPPORTUNITIES FOR WOMEN, THE WYOMING SELF-SUFFICIENCY STANDARD: WHAT IS IT AND WHY IT MATTERS (2005), http://wyoming.gov/governor/policies/documents/FESSQ_A.pdf, *full report available at* http://wyoming.gov/governor/policies/documents/WyomingSelf-SufficiencyStandard2005_000.pdf.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] INFOPLEASE, STATE MINIMUM WAGE RATES AS OF JANUARY 1, 2007, http://www.infoplease.com/ipa/A0930886.html.

94 STATE OF WYO., *supra* note 68.

[95] *See* U.S. CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: WINTER 2000 Table 6 (2005), *available at* http://www.census.gov/population/www/socdemo/child/ppl-177.html. This figure is based on a mother who is between the ages of 25 and 34 and has a child who is 15 years of age or younger. *Id.*

[96] Heath S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561, 564 (2005).

Women in the United States, in general, have fewer economic resources than their male counterparts.[97] This is particularly true of women with children. The passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) in 1996 renewed interest in child support enforcement because regular child support payments were viewed as a key to helping single-parent families become self-sufficient.[98] "Women and children experience life after divorce far differently than men. While all family members suffer the trauma of divorce, only the women and children's pain is compounded by being deprived of their economic well-being."[99]

Importance of Child Support to Wyoming Children

It has been noted that the problem of child support enforcement has been the single most studied, debated, and legislated issue in family law over the past fifteen years.[100] A key motivational factor for the national effort and expense devoted to the child support revolution was the promise that better support enforcement would help keep single-parent families off the welfare rolls.[101] Yet neither the poverty rate of children in single-parent households nor the disparity in post-divorce living standards of children has declined.[102]

A primary objective governing child support is that parents share income with a child "in order that the child enjoy a minimum decent standard of living when the combined incomes of the parents is insufficient to achieve such result without impoverishing either parent, and a standard of living not grossly inferior to that of either parent."[103] Equally important goals include treating both parents fairly, ensuring that the rules do not discourage participation in the labor force of either parent, and that children be afforded important life opportunities that

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[97] *See* CARMEN DENAVAS-WALT, ET AL., U. S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2003 2 (2004), *available at* http://www.census.gov/prod/2004pubs/p60-226.pdf. According to the United States Census Bureau, the median income for women is $30,724, while the median income for men is $40,668. *Id.*

[98] KAREN N. GARDINER ET AL., U.S. DEPT. OF HEALTH & HUMAN SERVICES OFFICE OF CHILD SUPPORT ENFORCEMENT, ADMINISTRATIVE AND JUDICIAL PROCESSES FOR ESTABLISHING CHILD SUPPORT ORDERS, FINAL REPORT 9, (June 2002) [hereinafter Final Report], *available at* http://www.acf.hhs.gov/programs/cse/pol/DCL/2003/dcl-03-15a.doc.

[99] FLA. SUP. CT., *supra* note 80, at 4.

[100] Ann Laquer Estin, *Moving Beyond the Child Support Revolution*, 26 LAW & SOC. INQUIRY 505, 505 (2001).

[101] *Id.*

[102] *Id.* (summarizing recent research on the impact of child support reforms and finding "there is considerable evidence that reforms have failed to accomplish one of the most important objectives of child support, that of reducing child poverty").

[103] ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.04 (1) (2002).

parents are able to afford "without undue hardship to themselves or their other dependents."[104]

Child support is highly relevant to children who receive it, especially poor children not on cash assistance. The problem, however, is that most poor children eligible for child support do not receive it.[105] "Nine of every ten (89.8 percent) custodial parents due child support were mothers."[106]

> Society has an interest in not being called upon to support children whose parents have adequate resources to shoulder the burden themselves. Yet even when children are not in danger of becoming public charges, society has a strong interest in assuring that adequate resources are devoted to the care, nutrition, education, and general well-being of the next generation of citizens. From a societal perspective, widespread economic inadequacy in one-parent families is not only a grievous harm to children; it is also an unwise underinvestment in a vital social resource.[107]

While the hardships faced by low-income non-custodial parents do not elude the authors, parents able to afford their support obligations certainly owe it to their children to do so. When non-custodial parents are financially able to support their children but choose not to or evade enforcement, custodial parents disproportionately bear the costs of child-rearing. There is much more to raising a child than what is accounted for in a standard child support calculation. Too often figures are rounded or arbitrarily "imputed" for the sake of alleviating overwhelming caseloads and judicial dockets, without giving proper consideration to the short- and long-term impacts on the custodial parent and child's economic predicament. "In terms of child support, the residential parent's interest is not to bear disproportionately the financial costs of child rearing. The residential parent has an interest in having the other parent share the out-of-pocket costs of child rearing."[108]

> The average amount of child support received by the 5.5 million custodial parents who received at least some of the support they were due ($4,600) represented 16.0 percent of their average income in 2003 ($28,600). Child support represented 9.2 per-

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[104] *Id.* § 3.04 (2).

[105] *See* SORENSEN & ZIBMAN, *supra* note 88, at 10.

[106] TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT 7 (July 2006), *available at* http://www.census.gov/prod/2006pubs/p60-230.pdf.

[107] ALI, *supra* note 103 § 3.04 cmt. [b].

[108] *Id.* § 3.04 cmt. [e].

> cent of income for the 2.3 million parents who received less than full support due and 19.3 percent for the 3.3 million custodial parents who received all child support due.[109]

Often the responsibilities that go along with being the custodial parent prevent custodial parents from taking advantage of financial opportunities, thus lowering their earning capacity. Courts and lawyers assisting with child support need to be more cognizant of the additional financial impediments that ongoing caretaking responsibilities present for custodial parents. As the adage goes, "Every mother is a working mother."

In light of the workforce and industry issues previously addressed, it is important to consider the economic impacts for children when one parent relocates. Children who have a parent living elsewhere are at tremendous risk of being poor.[110] "In the United States, more than half of children in one-parent families live in poverty."[111] "As a result of their low incomes, a relatively high percentage of children with a parent living elsewhere rely on public assistance."[112] Child support reduces child poverty and income inequality among children with a parent living elsewhere and is, therefore, a very important source of income for single women raising their children.[113]

"The universal problem is that single mothers frequently have low earnings and that low-earning mothers have difficulty maintaining full labor-force participation, increasing their earnings, and supporting their households."[114] Consistent receipt of adequate child support actually improves a single mother's ability to participate actively in the workforce.[115]

> Residential parents[116] who receive child support work longer hours and earn higher wages than those who do not. Some residential parents are able to avoid public-welfare dependency only by combining child support and gainful earnings. In such

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[109] GRALL, *supra* note 106, at 9 n.21 ("The average child support received by custodial parents who received at least some support due ($4,600) was not statistically different from the average support received by custodial mothers below poverty who received any payments ($3,700).").

[110] *See* SORENSEN & ZIBMAN, *supra* note 88, at 6.

[111] ALI, *supra* note 103 § 3.04 cmt. [h].

[112] SORENSEN & ZIBMAN, *supra* note 88, at 2.

[113] *Id.* at 12.

[114] ALI, *supra* note 103 § 3.04 cmt. [h].

[115] GRALL, *supra* note 106.

[116] ALI, *supra* note 103 § 3.02 (4) (defining "residential parent" as "a parent who has primary residential responsibility for the child and who is not a dual residential parent"). By virtue of providing the child's primary residence, the residential parent incurs most child expenditure and is therefore the support obligee. *Id.*

> case, the savings to the public purse is not merely the amount of child support paid by the nonresidential parent; it is instead the entire cost that would be incurred in supporting the residential household on public assistance.[117]

When a custodial parent contemplates increasing her income potential, "she faces constraints that are not usually experienced by the nonresidential parent."[118] The custodial parent is often charged with weighing the benefits of increased employment opportunities with the costs of child care.[119] This work disincentive for custodial parents also needs to be taken into consideration when calculating child support. Obviously, this work disincentive should be limited to its unavoidable minimum.[120] But again, too often, many involved in the legal system see the custodial parent as voluntarily choosing not to work to her full capacity. Subsequently, she is then, perhaps inadvertently, punished by courts unfairly imputing wages which, in reality, are not achievable—at least not without accounting for the increased child care expenses that will flow as a natural consequence of the custodial parent's unavailability while at work. In short, courts often fail to consider the totality of the economic realities facing custodial parents.

Courts should consider a child's need for care, both parentally and by a child care worker to enable a custodial parent to pursue gainful employment.[121] Both parents benefit from the availability of child care; however, all too often the custodial parent and the state are left to pick up the tab when capable, non-custodial parents do not. The costs of child-rearing should be fairly apportioned between the parties.[122] Attorneys should consider requesting an upward deviation from the support guidelines when assisting families where child care is an issue.[123] Further awareness about the potential economic consequences a single parent may face needs to be created throughout the state and the nation. Even today, some judges in Wyoming are not willing to order a back child support obligation for a parent while the divorce action is pending—which in some counties can be in excess of a year—adding up to thousands of dollars of back support being waived.

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[117] *Id.* § 3.04 cmt. [l] (ii).

[118] *Id.* § 3.04 cmt. [l] (iii).

[119] *Id.*

[120] *Id.*

[121] *Id.* § 3.04 cmt. [n].

[122] *See Id.* § 3.04 cmt. [e]. Too often attorney and judges are quick to split costs equally between the parties even in cases where one party's income is substantially higher than the other's.

[123] WYO. STAT. ANN. § 20-2-307 allows a court to deviate from the presumptive child support established by the guidelines upon a specific finding that the application of the presumptive child support would be unjust or inappropriate in that particular case. WYO. STAT. ANN. § 20-2-307(b) (2005). Costs of necessary child day care is a factor, though how often it is calculated in or even requested to be by a party or her attorney is uncertain. *Id.*

As set forth more fully below, custodial parents benefit from having legal counsel and judges familiar with the realities of the labor force, availability of housing and child care and economic impacts of social occurrences, including domestic violence and divorce.

LACK OF LEGAL ASSISTANCE AS A BARRIER FOR WOMEN IN WYOMING

Low-income people living in rural areas are often overlooked in the delivery of legal services, despite the prevalence and persistence of poverty in these areas.

> According to the 2000 Census, rural counties with poverty rates above the national average outnumber urban counties in that category at nearly a 5 to 1 ratio. Of the 500 poorest counties in the country, 459 are rural, and, of the 500 lowest per capita income counties, 481 are rural.[124]

Despite the need for pro bono or reduced-fee legal services, there are several barriers facing lawyers in rural areas, including travel demands, minimal support staff, and conflicts of interest.

Currently, Wyoming's Legal Services Committee is exploring funding opportunities to identify the unmet legal needs in the state. In addition to those easily identifiable unmet legal needs, Wyoming's legal community ought to survey the increased legal needs that may be occurring as a result of the changes currently taking place in the state. Furthermore, the legal needs of women, as a diverse and distinct constituency, must be taken into account.[125] For example, the lack of affordable housing and child care presents a unique challenge for women. "By comprehensively identifying actual, emerging, and traditionally unrecognized legal needs, a program enhances its ability to make rational decisions regarding its operations and facilitates planning for its future."[126] A legal needs assessment in Wyoming must focus not only on issues related to economic development but issues pervasive to the low income population, including domestic violence, child abuse, substance abuse, and housing.

> Contemporary assessments of legal aid services for women confirm that women do not find legal aid services easy to access. Women with disabilities, immigrant and refugee women, abused

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[124] STANDING COM. ON PRO BONO & PUB. SERV., AM. BAR ASS'N, RURAL DELIVERY (May 8, 2006), http://www.abanet.org/legalservices/probono/rural_delivery.html.

[125] LISA ADDARIO, NATIONAL ASSOCIATION OF WOMEN AND THE LAW, GETTING A FOOT IN THE DOOR: WOMEN CIVIL LEGAL AID AND ACCESS TO JUSTICE i (1998), http://dsp-psd.communication.gc.ca/Collection/SW21-34-1998E.pdf.

[126] STANDING COM. ON PRO BONO & PUB. SERV., AM. BAR ASS'N, STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS (1996), http://www.abanet.org/legalservices/probono/standards.html.

> women and Aboriginal women encounter additional difficulties trying to access legal aid. Women, in their diversity, also have experienced difficulty getting legal aid coverage for their legal problems.[127]

For many low-income citizens, appropriate and well-executed legal services mean the difference between poverty and self-sufficiency. In August, 2006, the American Bar Association adopted the Principles of a State System for the Delivery of Civil Legal Aid.[128] The principles encourage states to develop access to justice commissions in order to develop and oversee funding for civil legal assistance for low-income and vulnerable populations. Many state governments provide much of the funding for legal aid services.[129] Currently, Wyoming is one of only six states that do not appropriate funds to support general civil legal aid for low-income individuals.[130] Further, in October 2005, the Legal Services Corporation released the results of its year-long study, "Documenting the Justice Gap in America."[131] The study documents that one in every two individuals who qualify for and actually seek assistance from LSC-funded programs are turned away because of a lack of resources.[132] This 50% denial of service figure does not include the number of individuals who are eligible but do not seek assistance for whatever reason. The study also verifies that

> at least 80 percent of the legal needs of the poor are not addressed. . . . Since the ABA completed its study in the early 90s, the unmet need has remained the same and even increased. Although private and state funding has increased, federal funding has declined, and the number of individuals eligible for assistance has increased as poverty has increased.[133]

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[127] ADDARIO, *supra* note 125.

[128] AM. BAR ASS'N, REPORT TO HOUSE OF DELEGATES, ABA PRINCIPLES OF A STATE SYSTEM FOR DELIVERY OF CIVIL LEGAL AID 7 (approved Aug. 7, 2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112B.pdf.

[129] *Id.* at 6 (noting that according to data gathered by the Project to Expand Resources for Legal Services, a project of the ABA Standing Committee on Legal Aid and Indigent Defendants, in 2005 LSC funds provided less than a majority of funding in 38 states and less than 30% of funding in 15 states).

[130] AM. BAR ASS'N, UPDATE FROM ABA PROJECT TO EXPAND RESOURCES FOR LEGAL SERVICES (PERLS), ANOTHER SUCCESSFUL LEGISLATIVE SESSION FOR LEGAL SERVICES PROGRAMS (2006), http://www.nlada.org/DMS/Documents/1161369586.16/PERLS%20Update%209-20-06.pdf.

131 HYDI MILLER, LEGAL SERVICES CORP., LSC RELEASES REPORT ON JUSTICE GAP IN AMERICA (2005), http://www.lsc.gov/press/pr10170501.php.

132 *Id.*

133 LEGISLATIVE AND GOVERNMENTAL ADVOCACY GOVERNMENTAL AFFAIRS OFFICE, AM. BAR ASS'N, ACCESS TO LEGAL SERVICES: LEGAL SERVICES CORP., *Other Developoments*, http://www.abanet.org/poladv/priorities/legal_services/ (last visited Apr. 10, 2007).

When considering funding projects or programs in the state, the legislature must look beyond basic infrastructure and toward promotion of self-sufficiency for Wyoming's ever-present low-income population.

> Women's experiences of economic inequality and dependency make them less able to pay for civil legal aid services at a time when they have a heightened need of such representation. Failure of the substantive law to take account of women's experiences has further entrenched their disadvantage in the provision of civil legal aid services.[134]

By funding civil legal assistance for low-income and vulnerable populations, many Wyoming residents will be given opportunities to overcome several of the barriers which have kept them from achieving some level of economic independence. For instance, the division of assets and the determination of child support upon divorce usually result in disparity in the standard of living of the custodial households.[135] A study found that for children whose fathers leave, family income can drop by about twenty-three percent.[136] Additionally, research shows that child support reduces child poverty. [137] Thus, receiving competent legal representation in a child support or divorce case may reduce income inequality by redistributing assets and income from non-custodial parents to custodial parents. Clear initiatives are required to address the legal needs of low-income people.

Despite some recent improvements in programs providing civil legal assistance to low-income people in Wyoming, there are still far too many who are forced to interpret and resolve complex legal matters with little or no competent legal assistance. For people suffering from abuse or attempting the journey from victim to survivor, legal services are essential.

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[134] ADDARIO, *supra* note 125, at ii. The author stated,

> The purpose of this report is to articulate principles that can be used to design and deliver civil legal aid services. We have started with the premise that legal aid is an essential element in the administration of justice and have based this report on the knowledge that the clientele for legal aid services in civil matters is overwhelmingly female: approximately two thirds of civil legal aid certificates are given to women, primarily for family law matters.

Id. at 1.

[135] Vicky Barham, Rose Anne Devlin, & Jie Yang, *Public Policies and Private Decisions: The Effect of Child Support Measures on Marriage and Divorce*, 35 J. LEGAL STUD. 441,467 (2006).

[136] Jay D. Teachman & Kathleen M. Paasch, *Financial Impact of Divorce on Children and Their Families*, 4(1) FUTURE OF CHILDREN; CHILDREN & DIVORCE 63, 67 (1994) (citing R. Burkhauser, G. Dunca & R. Hauser, *Wife or Frau, Women do Worse: A Comparison of Men and Women in the United States and Germany Following Marital Dissolution*, 28(3) DEMOGRAPHY 353 (1991)).

[137] SORENSEN & ZIBMAN, *supra* note 88, at 10 (citing Daniel Meyer & Mei-Chen Hu, *A Note on the Antipoverty Effectiveness of Child Support Among Mother-Only Families*, 34(1) J. OF HUMAN RESOURCES 225 (1999) *and* ANN NICHOLS-CASEBOLT, URBAN INST., THE ECONOMIC IMPACT OF CHILD SUPPORT REFORM ON THE POVERTY STATUS OF CUSTODIAL AND NONCUSTODIAL FAMILIES (1992)).

> Legal services are the most expensive support service, the service to which the fewest women have access, and, according to our research, the only service that decreases the likelihood women will be battered. Since legal services help women achieve economic power and self-sufficiency, they are a good place to spend public money.[138]

Lack of civil legal assistance to low-income people, especially women, remains an obstacle to economic equality.[139] A study on Canada's civil legal assistance for low-income women found that "[w]omen wishing to receive subsidized legal services for family law matters have encountered significant difficulties accessing lawyers willing to act on their behalf, even in urgent cases."[140] Women in Wyoming also frequently experience difficulty locating lawyers who are prepared to advocate on their behalf. "Lawyers who can provide effective and sensitive representation to abused women are few in number, especially in rural regions. Individuals with disabilities are sometimes labeled 'difficult to work with' and, as a result, have similar difficulties finding lawyers sensitive to their experiences and prepared to represent them."[141] Now is the time for the state to invest in civil legal representation for the poor and vulnerable. The state should advocate on behalf of a law reform agenda that seeks to influence the political and legislative attitudes responsible for poverty.[142]

The solution to the inadequate resources allocated to civil legal aid services lies in educating politicians and legal aid programmers about the significant role the law plays in resolving family law matters. The availability of competent legal services for those who could not otherwise afford it promotes income equality and encourages self-sufficiency, making funding for such services a wise investment in Wyoming's future.

OTHER IMPACTS ON SOCIAL WELL-BEING

While the oil and gas companies' financial prosperity continues to grow, so too do certain social ills. Wyoming's economy and workforce issues cannot be

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[138] Press Release, Prairie State Legal Services, Economists at Colgate University and the University of Arkansas Final Access to Legal Services, Rather Than Shelters, Hot Lines, or Counseling, Contributes to Dealing in Domestic Violence (Dec. 6, 2002), *available at* http://www.pslegal.org/Articles/DomViolenceDecline.htm.

[139] BERNADETTE PROCTOR & JOSEPH DALAKER, U.S. CENSUS BUREAU (2002), POVERTY IN THE UNITED STATES: 2001, *available at* http://www.census.gov/prod/2002pubs/p60-219.pdf. Sixty percent of adults (i.e., age 18 or above) who were poor in 2001 were women. Women were over 40% more likely to be poor than men. The Census Bureau reports key poverty statistics for the prior year in an annual report which is issued in the fall. *Id.*

[140] ADDARIO, *supra* note 125, at 12.

[141] *Id.*

[142] *Id.* at 5.

properly analyzed without consideration of the social and economic well-being of its citizens. A recent article in *The New Yorker* magazine refers to a report stating that the crime rate in Sublette County rose by 30% from 2004 to 2005, a period when drilling activity increased by 15%.[143] Aside from barroom brawls, substance abuse and domestic violence remain steadfast occurrences across the state, including in towns impacted by the oil and gas industry.

> Wyoming's rates of domestic violence remain high.
>
> In 2004, 6,600 Wyoming women and children sought support and refuge from violence in their homes, and more than 65% of Wyoming women have identified domestic violence as the most serious issue affecting their community.[144]

By all accounts, domestic violence is an extremely underreported crime;[145] therefore, it is difficult to gauge an accurate rate of occurrence in the state. In 2005, there were 3,129 reported incidents of domestic violence in Wyoming.[146] Of that figure, 2,296 of the victims were women.[147] In 2003, Wyoming ranked thirteenth in the nation for the rate of females murdered by males in single victim/single offender homicides.[148] By 2004, the most recent year for which statistics are available, Wyoming ranked second (tied with New Mexico) for the number of women killed by men.[149]

Law enforcement and social service professionals report substantial increases in the number of cases involving substance abuse and domestic violence in com-

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[143] Alexandra Fuller, *Letter from Wyoming, Boomtown Blues, How Natural Gas Changed the Way of Life in Sublette County*, THE NEW YORKER, Feb. 5, 2007, at 40 ("Reported crimes and arrests have been increasing at an exponential rate since the year 2000 and have been shown to be highly statistically correlated with gas and oil-field activity within Sublette County.").

[144] STATE OF WYO., *supra* note 68, at 22.

[145] CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEPT. OF HEALTH & HUMAN SERVS., INTIMATE PARTNERS VIOLENCE: OVERVIEW (last modified Oct. 2, 2006), http://www.cdc.gov/ncipc/factsheets/ipvfacts.htm. The National Center for Injury Prevention and Control states,

> Most IPV [intimate partner violence] incidents are not reported to the police. About 20% of IPV rapes or sexual assaults, 25% of physical assaults, and 50% of stalkings directed toward women are reported. Even fewer IPV incidents against men are reported. . . . Thus, it is believed that available data greatly underestimate the true magnitude of the problem.

Id.

[146] STATE OF WYO., 2005 ANNUAL REPORT—CRIME IN WYOMING 58 (2005), *available at* http://attorneygeneral.state.wy.us/dci/pdf/2005%20Annual%20Published.pdf.

[147] *Id.*

[148] VIOLENCE POLICY CENTER, WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2003 HOMICIDE DATA App. 16 (2005), http://www.vpc.org/studies/wmmw2005.pdf.

[149] *Id.* Wyoming ranked fifth in the nation for the rate of women killed by men in 2002. *Id.*

munities central to the Wyoming energy boom.[150] Police report marked increases in the number of violent and drug-related crimes.[151] According to some reports coming out of Sublette County, "there have been substantial increases in assault, domestic violence, methamphetamine addiction, theft, and traffic accidents—none of which the sheriff's department has the manpower to deal with. A county report found a 94 percent increase in arrests since 2000."[152]

Domestic violence not only has criminal, but economic impacts as well.[153] Studies indicate that economic independence is one of the best predictors of whether a victim will be able to leave and stay away from her abuser. "However, domestic violence, dating violence, sexual assault, and stalking often negatively impacts victims' ability to maintain employment."[154] It is not at all uncommon for abusers "to exert financial control over their partners by actively interfering with their ability to work, including preventing their partners from going to work, harassing their partners at work, limiting the access of their partners to cash or transportation, and sabotaging the child care arrangements of their partners."[155] "Domestic violence also affects perpetrators' ability to work. A recent study found that 48% of abusers reported having difficulty concentrating at work and 42% reported being late to work. 78% reported using their own company's resources in connection with the abusive relationship."[156]

From medical expenses, homelessness, and costs to employers, domestic violence carries a hefty price tag. As shown, domestic violence is a worsening epidemic in our society.[157] The economic consequences of domestic violence for battered

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[150] Moen, *supra* note 4 (quoting Rodger McDaniel the director of the Wyoming Department of Family Services: "Anytime you have quick growth in the economy, it brings with it a variety of social problems—drug use, alcohol abuse, child abuse").

[151] *See* Moen, *supra* note 4. The article states that "the number of people using the [Rock Springs, Wyoming] YWCA's safehouse for domestic violence and sexual assault victims has risen 59% over a year's time." *Id.*

[152] Harden, *supra* note 7.

[153] TENN. ECONOMIC COUNCIL ON WOMEN, THE IMPACT OF DOMESTIC VIOLENCE ON THE TENNESSEE ECONOMY, A REPORT TO THE TENNESSEE GENERAL ASSEMBLY 2 (2006), *available at* http://www.state.tn.us/sos/ecw/domestic_violence_report.pdf. Tennessee seems to be the only state that has done a study of this kind within a particular state.

[154] STOPFAMILYVIOLENCE.ORG, DOMESTIC VIOLENCE AND ECONOMIC INSECURITY (2005), http://www.stopfamilyviolence.org/ocean/host.php?folder=52.

[155] *Id.* (citing JODY RAPHAEL & RICHARD M. TOLMAN, TAYLOR INST. & UNIV. OF MICH. RESEARCH DEVELOPMENT CENTER ON POVERTY, RISK AND MENTAL HEALTH, TRAPPED IN POVERTY, TRAPPED BY ABUSE: NEW EVIDENCE DOCUMENTING THE RELATIONSHIP BETWEEN DOMESTIC VIOLENCE AND WELFARE (1997)).

[156] *Id.*

[157] Erin Meehan Richmond, *The Interface of Poverty and Violence Against Women: How Federal and State Welfare Reform Can Best Respond*, 35 NEW ENG. L. REV. 569, 569 (2001).

women, their children, and for society at large are staggering.[158] Conservative estimates show 15 to 30% of women on welfare are currently living with domestic violence, and at least "50-60% have experienced domestic violence previously in their adult lives."[159] Women who cannot support themselves and their children have far fewer options for dealing with domestic violence and overcoming other obstacles to their well-being than women with sufficient job skills and financial resources.[160] "Women who experience severe aggression by men (e.g., not being allowed to go to work or school, or having their lives or their children's lives threatened) are more likely to have been unemployed in the past, have health problems, and be receiving public assistance."[161]

Promoting resources for victims of domestic violence to secure and maintain employment is vital to establishing economic independence from their abusers. Women who have adequate financial resources will likely find it easier to live independently from their abusive partners, at least economically, socially, and legally.[162]

> Advocates and others concerned with violence against all women and with the well-being of all women and their families must become vocal advocates for education, training, and jobs that pay living wages and provide reasonable benefits. Reducing the number of women trapped in poverty will reduce the number of women who experience domestic violence and sexual assault.[163]

Resources such as child support enforcement, case plans in juvenile court cases, and welfare benefits must address the impacts of domestic violence faced by so many of those seeking assistance, yet silenced by those oblivious to the realities

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[158] *See* NOW LEGAL DEFENSE & EDUCATION FUND, SURVIVING VIOLENCE AND POVERTY: A FOCUS ON THE LINK BETWEEN DOMESTIC AND SEXUAL VIOLENCE, WOMEN'S POVERTY, AND WELFARE 1-6 (2002), *available at* http://www.legalmomentum.org/issues/wel/Surviving.pdf.

[159] Erin Meehan Richmond, *The Interface of Poverty and Violence Against Women: How Federal and State Welfare Reform Can Best Respond*, 35 NEW ENG. L. REV. 569, 572 (2001).

[160] PATRICIA R. COLE, PH.D., TEX. DEPT. OF HUMAN SERVS., REACHING AND ASSISTING TANF RECIPIENTS WHO ARE IN VIOLENT RELATIONSHIPS (Jan. 2000). Dr. Patricia Cole a part of a grant with the Texas Department of Human Services wrote this article. It was originally distributed at the Challenges and Opportunities for Domestic Violence Victims in Welfare and Related Programs—How Can Advocates Help? A Conference for Texas Advocates for Victims of Domestic Violence, January 24-25, 2000. The conference was sponsored by the National Training Center on Domestic and Sexual Violence, 2300 Pasadena Drive, Austin, Texas, 78757, 512/407-9020, 512/407-9022 (fax), http://www.ncdsv.org.

[161] CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 145 (citing Susan Lloyd & Nina Taluc, *The Effects of Male Violence on Female Employment*, 5(4) VIOLENCE AGAINST WOMEN 370 (1999)).

[162] Angela M. Moe & Myrtle P. Bell, *Abject Economics: The Effect of Battering and Violence on Women's Work and Employability*, 10(1) VIOLENCE AGAINST WOMEN 29, 29 (2004).

[163] COLE, *supra* note 160.

faced by the help-seekers. Furthermore, private and state employers should adopt policies that eliminate and educate about discrimination against domestic and sexual violence victims, including discrimination motivated by sex and stereotypic notions about women.

Mineral wealth has associated costs which cannot be overlooked for the sake of development. Among these costs are "an increase in crime, drug use, violence, and the costs of living, and a decrease in just about everything good, except money."[164] It is not uncommon to hear people talk of the "lifestyle" of the oil and gas workers. Many say they work hard and they play hard. There have been connections drawn between the high rate of methamphetamine use in the state and the influx of workers in the oil and gas and mineral industries.[165] "[M]ethamphetamine-related arrests [in Wyoming] soared sevenfold from 1992 to 2004. Critics blame the rise in part on the influx of oil-industry workers, one in five of whom come from out of state."[166]

According to some energy industry insiders, meth use has recently become epidemic on the oil and gas rigs.[167] According to one former roughneck, methamphetamine use seems to be especially widespread in the oil and gas fields, "where the long, hard hours mean a lot of money, and a little extra pick-me-up can get a working stiff through his shift."[168] It has been said that three in ten Gillette-area workers screened for drug use by one private testing company came back with positive results.[169] And in Sublette County, the problem is no better. "There is no doubt that methamphetamine had made it into the community before the current boom, but the injection of a large testosterone-heavy workforce, assigned to tough and repetitive work, and the lack of anything else to do in the area have made a small-town problem a big deal."[170] While these problems are challenges that exist in many communities, the increases are measurable in those with a great deal of industry development.[171]

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[164] Fuller, *supra* note 143, at 40 (citing Eldean V. Kohrs, Ph.D., Social Consequences of Boom Growth in Wyoming (paper presented at a meeting of the Rocky Mountain American Association of the Advancement of Science, April 24-26, 1974, Laramie, Wyo., *available at* http://www.sublette-se.org/files/Social_Consequences_of_Boom_Growth_In_Wyoming_-_Kohrs.pdf)).

165 Lisa Takeuchi Cullen, *Bittersweet Boom,* TIME, Sept. 3, 2006, *available at* http://www.time.com/time/insidebiz/article/0,9171,1531311,00.html.

166 *Id.*

167 Patrick Farrell, *Methamphetamine Fuels the West's Oil and Gas Boom*, HIGH COUNTRY NEWS, Oct. 3, 2005, available at http://www.hcn.org/servlets/hcn.Article?article_id=15811.

[168] *Id.*

[169] FREE AND TRUE WYO., STATE OF WYO., WAKE UP CALL: METHAMPHETAMINE ("METH") IS READILY AVAILABLE IN WYOMING—IN OUR SCHOOLS, OUR STREETS AND OUR NEIGHBORHOODS (2003), *available at* http://www.freeandtrue.com/drugs/?nsectionid=1 ("Officials are both shocked and worried about the emergence of this drug into nearly every fiber of the state's fabric.").

[170] Fuller, *supra* note 143, at 41.

[171] *See* Moen, *supra* note 4.

CONCLUSION

As policy discussions continue in our state, policy makers are urged to consider the impact of the economy on women and children. No longer can the wage disparity and economic status of women in our state be excused as a side effect of the nature of the industry in Wyoming. We must do more to ensure secure and decent training opportunities for stable employment, quality child care, housing and access to affordable legal services for women and children. Government can, of course, play a role by exploring policies and practices to reduce the wage gap, enforcing equal employment opportunity laws, and increasing resources for quality child care and access to legal assistance. "In most cases, local, state, and national policies lag behind the changing realities of women's lives. Such policy lags retard economic growth. States with long-standing commitments to public investment in important factors that influence economic growth, education for example, have strong economies generally favorable to women."[172]

When considering issues that have a substantial impact on women as compared to men, any viable solution will, necessarily, focus on women. The World Bank has noted that if you feed a woman, you feed a family; if you educate a woman, you educate a family; if a woman is economically secure, a family is economically secure.[173] The economic success of women is critical to the success and growth of Wyoming. "When women are able to contribute as full and equal participants in work, politics, and community life, they unleash the potential of cities, states, and the nation as a whole."[174]

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[172] HARTMANN ET AL., *supra* note 12, at 19.

[173] YOU THINK!, THE WORLD BANK, HELPING WOMEN HELPS EVERYONE (2007), http://youthink.worldbank.org/4kids/gender/genderstory2.php.

[174] HARTMANN ET AL., *supra* note 12, at 3.

ENERGY SYMPOSIUM TRANSCRIPT: THE EFFECT OF ENERGY DEVELOPMENT ON THE COURTS

*Hon. John R. Perry**

My thanks for the opportunity to address you today. I hope to add some color and flesh out what happens in the judiciary [in Wyoming]. To get that done, one of the things I need to do is I need to talk a little bit about the different court levels because the information that I have may be somewhat anecdotal, but there is a fairly good explanation for that. As many of you in litigation might know, we have, essentially, two types of courts in Wyoming: we have constitutional courts and we have statutory courts. The constitutional courts are the [Wyoming] Supreme Court and district courts; circuit courts in Wyoming are the statutory courts. The significance of that is that as budgetary authorities, each court is treated differently. By way of example, the circuit courts, being statutory courts, report directly to the supreme court on budgetary matters. In other words, all of the circuit courts' budgets are included in the supreme court's budget when they go before the legislature. Each district judge in Wyoming is a separate budgetary agency. The significance of that is found in the fact that circuit courts are entirely administered in a linear fashion. That is, they employ their clerks. As a consequence, much of the information that they have available is subject to relatively uniform reporting requirements. Given that circuit courts are courts of limited jurisdiction, many of the models that are used for that reporting are fairly straightforward. District courts are not that way. We have twenty-three elected clerks of court in the state of Wyoming who administer their counties, their individual counties, in some cases, in remarkably different fashions. We have at least five major docketing control programs that are being employed at the county levels in Wyoming. While the information gathering model that is employed by the court administration in Cheyenne is, certainly, an excellent model, the problem we find in trying to rely on that data is that the clerks do not report it all the same. I was made aware of this in the Sixth Judicial District's efforts to get a third district judge. And, when I

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* The following is a transcript from the Honorable John R. Perry, from Wyoming's Sixth Judicial District, addressing participants of The *Wyoming Law Review*'s Energy Symposium, February 23, 2007 at the University of Wyoming, College of Law. Judge Perry was part of a panel discussing the community impacts of energy development in Wyoming. Justice William U. Hill of the Wyoming Supreme Court moderated the panel. Other panelists included, Lynne Boomgaarden, Director of Wyoming State Lands and Investments; and Dona Playton, Director of the University of Wyoming Domestic Violence Legal Services Clinic. Perry offers some background on Wyoming's court system and analyzes the impacts of energy development related to the recent population surge on Wyoming's judicial resources. *Wyoming Law Review* expresses its heart-felt appreciation to Judge Perry and all the participants and speakers that attended the Energy Symposium.

started going through those reporting forms, and I would come across a line-item that said that a particular judge had forty-seven domestic jury trials in the last reporting year, it just kind of jumps right out at you. For those of you that are not in litigation, you do not get a jury trial in domestic relations cases in Wyoming. It is, while probably not impossible, darn near impossible for any district judge to impanel forty-seven juries and [conduct] those trials in one year. And as I looked through those reports, it was apparent, that once again while the model is fine, the information may cause some controversy when it gets to the other end.

So, what I attempted to do to flesh this out for you today was, number one, I surveyed every district judge in the state, particularly those in the eight counties that Lynne [Boomgaarden] addressed, and I found, by and large, that the problems that we confront in Campbell County, which is one of the counties in the Sixth Judicial District, are far and away representative of the other impacted counties. The one distinction that I might draw for you is that there is, or at least appears to be, a distinct social difference between the people that work in the coal industries as opposed to the people that work in oil and gas and coal-bed methane. The coal industries have been there, and their support structure has been there, for many, many years. As a consequence, they have developed a culture all their own. It is a very stable community. We rarely see some of the boom effects from the coal industry. There is certainly an ebb and flow that may happen with the price per ton of coal, but it is dissimilar from the types of things that we see in the oil and gas industry. I give you that explanation so that, again, you will understand that when I use Campbell County I use that as being representative and at least made some effort to validate the effect with the other impacted counties and some of the counties that are not directly impacted but indirectly impacted that essentially become bedroom communities.

Okay, let's talk about what happened in Campbell County and in our efforts there to establish good statistics, good data. Very simply put, from 2000 to 2004, which is really just past the threshold of coal-bed methane development, the caseload in Campbell County exploded. In 2005, the legislature authorized our [Sixth District] third district judge—we were very happy with that. To give you an idea of why we needed that, seven years ago when I came to the district bench, Campbell County was handling 14,187 docket entries. Okay, what are docket entries? Docket entries are not necessarily the start or the finish of a case; they can be each individual filing in a new or ongoing litigation. So, we have 14,187 when I get there, and three years later, in 2003, for the two of us that were handling those 14,187, the Campbell County Clerk of District Court had 40,932 docket entries. The next year, 2004, we had 48,349 docket entries; 2005: 51,873; 2006: 55,494. If this holds true to form, based on what has happened since January 1, we are on track for docket entries exceeding 60,000 for the year 2007. The impact on the judicial system has been staggering. To put it as one of my former law clerks put it to a presentation of our local bar association—on a daily basis we

do not measure our documentary trail in pages, we measure it in feet. Seriously, what has that meant? All right, I want to talk about each of the levels of litigation, the impact not only on the court system, but on the users of that system and on the significance, as it boils down to an economic underclass, that seems to follow CBM-type development around.

From 2000 to 2004, we represented to the Wyoming Legislature that our criminal case load had doubled. In fact, our criminal case load had increased more than four times. We did not use those numbers because, quite frankly, I did not think anybody would believe them. We went from stacking criminal cases from four or five deep in each rotation of trial to stacking them between eighteen and twenty-two deep. While we are not doing it at quite that level [today]—we do have three judges—the impact of our criminal load has not changed. A significant part of that is certainly due to coal-bed methane development. While a lot of this will be long-term development, most of the evidence shows (and the reason that I am familiar with this is extensive coal-bed methane litigation that has occurred in our courts, my court in particular where the expert testimony is) that these fields are time-limited. As a consequence, the quicker the extraction process is completed regarding coal-bed methane, the better off, arguably, the state is. But certainly, the mineral owners and the lessees are [better off]. While the footprints of those wells are smaller, the well spacing is closer. The goal, quite frankly, based on the expert testimony, is to have as many wells as possible, to pull as much gas as quickly as you can, with the idea that some of those fields may have lives as short as five to six years; others may go up to twelve, but at some point in time they are going to be done. To run those fields, there is a substantial class of workers that engage in what Dona [Playton] talked about as very difficult, long hours, cold weather, and, quite frankly, a lot of it that is cash-based. A significant part of that is paid under the table, sometimes while not paid under the table, really a cash transaction where the cash is available—it is almost like a Sutter's Mill effect. If the money is there, and the want is there, then whatever the product might be, it is going to be available for cash. And we see that in Campbell County. During the last three years, we have seen multiple cases that involved major drug distribution efforts, not only domestic efforts, but efforts coming out of Mexico. There have been multiple cases where cash seizures have been in excess of $100,000 by way of some of the transactions that are happening with methamphetamine. Certainly, this precipitates the filing of many more criminal cases and puts additional strains on not only the prosecutor's office, but the public defender's office. Right now, our public defender's office, by virtue of the cost of the housing and the cost of living, is down three people. Each of our public defenders right now is handling about 250 active cases; impossible for any one lawyer.

The impact alone on the criminal justice system is not just drug and drug-related or conspiracy-related cases. It also manifests itself in other ways. We see an increase in theft crimes, major larceny cases. By way of example, many of these operations are mobile operations. It is not uncommon to see a theft where the

allegations are that someone merely backs up to the pump or whatever it happens to be, puts it on the trailer hitch, and drives off with a $30,000-plus piece of equipment. Given the fact that we do have a significant part of our economy that is cash-based, you have people that have one of everything. They have snowmobiles, Sea-Doos, four-wheelers, and we see an awful lot of those cases where literally somebody either from within the district, more often [from] without the district, backs up to those trailers, hooks them [up], drives them down to Colorado, and repaints. It takes a while to find them but we have a significant number of those theft crimes.

We also have a significant number of crimes that are sexually based. While certainly I do not want to overplay this, the types that are common to see are, once again, within these support industries for CBM. You find young men who are there alone. And more often than not, when there are sexually-related crimes, we find that they have to do with third-degree sexual assault, what some would refer to as statutory rape, indecent liberty crimes, that are not focused on high school kids, but on junior high kids. As a consequence, we have staggering juvenile and health statistics that I will talk about momentarily.

Of course, with this as well as with the drug culture, naturally we see some increase in crimes of violence—robbery, armed burglary. During the last year, [there have been] eight different homicide cases in Campbell County, arguably they might tangentially be related to drugs. I think that is a weak argument at best. Most of the time those types of homicide cases just happen for different sets of circumstances. But the effect is still the same for all of us in the trial courts, whether at the circuit court level or the district court level. We see a dramatic increase of criminal pretrial hearings, whether those are motions to suppress searches or statements, competency hearings, motions to transfer cases to juvenile court, and by necessity—given the fact that under our rules of criminal procedure, absent compelling cases, criminal cases must be tried in 180 days—those pretrial hearings must be given a priority. The effect of that then is to delay many cases that are also important, but do not have the same types of [procedural or constitutional] time constraints: child support enforcement, domestic relations cases, [and] paternity cases. Again, the strain on court personnel and the lawyers [is] almost beyond comprehension.

I want to talk a little bit about drug courts and some of the causes and effects that happen with the legislature—very well-intended measures as some of you may know. About five or six years ago, the legislature began working on the Addicted Offender Accountability Act, which encouraged the creation of both juvenile and adult drug courts, as Justice Hill told you. We in Campbell County started with the first felony-only level drug court, essentially to deal with some of these problems at the local level. We have a jail that essentially is capable of handling 109 inmates that routinely has 150-plus. We have major problems. We have to try to deal with some of these measures at the local level. Moreover, we assign some significance

to the fact that this is the direction the Legislature wants us to go. We started out with the drug court trying to focus on first-level offenders. In the six years we have done that, we have changed it now to where we deal with the most severe offenders; in other words, people with the most severe substance abuse problems. The reason I wanted to talk to you about that [is to] bring this into focus, [especially] how it relates to the cause and effect. You may remember that, in July 2004, the legislature enacted the Child Endangering Statute. Which statute is that? [WYO. STAT. ANN. § 6-4-405 (2005)] What does that do? That statute essentially says that no person shall knowingly and willfully cause or permit a child to absorb, inhale, or otherwise ingest methamphetamine, remain in a room, dwelling or vehicle where the person knows methamphetamine is being manufactured, or sold, or remain in a room, dwelling or vehicle, on and on. The effect of that has been in the Campbell County Adult Drug Court, to take a drug court that was primarily focused on males between the ages of seventeen and twenty-five and completely turn that around where predominantly our drug court now is young women, seventeen to twenty-five. In fact, my multi-disciplinary team calls this statute the "Meth Mom Statute." Why is that? It is because, most often as a natural effect of what law enforcement does, the person who gets caught with the meth while the kids are there is mom, not the person who is out working. So, I do not know if the legislature could have anticipated that, but that is part of the effect . . . we see. To follow up on one of things that Dona [Playton] said, we are using "Our Families, Our Future." It is a great program and it seems to really help some of those young women get back on track.

An interesting effect of that drug court is that we actually have employers that call every week and ask if we have drug court candidates who are ready to come back into the employment stream—because they are heavily supervised. The employers know that they are going to be clean and sober. The employers know that we make them show up to work on time all the time, so we do not have any problem getting these people jobs given our economy.

So now we have the "Meth Mom Statute," obviously part of the effect there is that we have any of a number of children who are in protective custody with the Department of Family Services. [For example] in one morning, in three separate cases, I had three moms, thirteen kids in protective custody, and part of that is that the science and research shows that methamphetamine, particularly long-term methamphetamine, hyper-sexualizes people. Consequently, we see many of these families that have multiple dads, multiple children; it is not uncommon. I mention those three once again to give you a feel for what is representative when we see methamphetamine and how it relates to the Sutter's Mill effect. It is not uncommon to have a young woman who is subject then to both criminal and juvenile court jurisdiction be under the age of thirty and have four children that are under the supervision of the Department of Family Services. How that has further impacted your court system and the users of the court system is that again, with very good intentions, the legislature decided that these juvenile cases needed

to be attended to as quickly as possible. Consequently, effective July 1, 2004, it changed so that district courts, not juvenile courts, have to administer those trials. The statute now says that in no case shall the trial be conducted more than sixty days from the date of the filing of the petition. The effect of that then is to take much of the other very important civil litigation and bump it. It just goes away.

As administrators, we do not have a choice. The legislature says we have to do these cases in this period of time, and as a consequence we had some of our docketing in 2004 even for divorces that would go out as far as forty-eight months for complex civil litigation. It was going out as far as fifty-four months to even get a setting on the calendar. Those juvenile filings have continued to increase. The most dramatic of those was in 2004-2005, after the enactment of the "Meth Mom Statute;" our juvenile filing on neglect and abuse more than doubled in the first five months of 2005.

[Another] problem in this type of economy is that it is almost impossible to get representation for these people, lawyers to step up. Why is that? Well, number one: there is a limitation on what counties will authorize on a per hour rate for lawyers. Lawyers in my district right now as a threshold can very reasonably charge $140 per hour and be more than competitive and that is with virtually no experience. Many of the firms that hire associates bill their associate time out at between $140 per hour and $150 per hour. In the Sixth Judicial District, lawyers are compensated for this type of work by the county at about $80 per hour if they have less than five years of experience. Moreover, the legislature decided that we needed to have specialized categories of training for guardians ad litem in neglect and abuse cases, and while those lawyers can get compensated at $100 per hour, sometimes we are pulling guardians as far as five counties away to get representation for the children. Similarly, we are pulling right now to get representation for those parents who are swept up in the juvenile system. We are pulling lawyers from six different counties. It is hard work and the cost to the taxpayer on these cases can be staggering. While certainly I do not mean to tell you that it is representative, when the district judges' conference meets quarterly, we talk about the cost of those cases, many of which are not disclosed on a per case basis. You can find the bill in the Department of Family Services budget, what the total cost is. But I am aware of at least three cases this last quarter where the cost per child to the taxpayers through the Department of Family Services, has exceeded $1 million. Now, if you think about it, you could take that $1 million, you could house the child and their family under supervision in a separate setting and literally pay for that child's college tuition, room and board, books and get it all done for less than $1 million. But that is the cost.

Let us turn to civil litigation. By the end of 2004, our trial dockets for civil litigation extended out more than two and a half years; that is due in part to the complexity of that litigation. Much of that litigation is related to the extractive industries. The time that is requested for trial is far greater in those cases. It is not

unusual for us to get trial requests of fifteen trial days or more. I got one [this week] for thirty-five trial days. The effect of that essentially is to bring one-third of our docket to a complete stop for that period of time. We have had cases that have extended for thirty-plus trial days. What happens then is that all of those criminal cases, all of those juvenile cases, the emergency matters and domestic relations cases are shifted on to the remaining judge or judges, and as a result the [dates] that practitioners have waited so long to get often have to be bumped because of the types of litigation that we see. We see personal injury law that has to do with the extractive industries, contractual problems, insurance-reinsurance problems, absolutely unbelievable expenditures in cost of litigation and time. As an effect then, many of the people Dona [Playton] referred to cannot find lawyers for domestic relations cases.

Consequently, every district judge in the state has seen an increase in pro se filings, essentially where people attempt to represent themselves. I mean, certainly we have domestic relations practitioners in the Sixth Judicial District and they have all of the cases they can handle. There are many of those practitioners right now who will not take a case unless their client understands that the chances are that the case is not going to get any place for about ten months. And that is a practical effect: [it is] just the way it works. And two, these domestic relations practitioners get their money up front. I mean, that is just a competent way to do business in the practice of law. Many of these people who follow this Sutter's Mill syndrome, the underclass, cannot afford to pay that. Moreover, we fall prey at the trial courts to the idea that domestic relations law is simple enough [for] do-it-yourselfers. And, while it may be true of some individuals who have a higher degree of sophistication, it is almost always untrue of the people that we see attempting to use the system. They wind up with provisions in their decrees regarding property, debts, and visitation that are virtually unenforceable. About the best we can do as trial judges is to review those cases from the Wyoming Child Support Guidelines presumptive levels, make sure that [the] presumptive support amounts are correct, make sure that they have an appropriate income withholding order in place, and pass over those cases.

What happens now in default cases (very justifiably if you take a look at the effects of Rule 55(b)(2) of the Rules of Civil Procedure) where they involve children, since children really are in most of those cases third parties who are unrepresented, you really do have to have some type of a hearing to know and understand what the effect is going to be on those children. Imagine the shock the pro se litigant faces when he or she shows up and realizes that it is not like it is on TV. There is not some burly bailiff who is going to swear them in and stand between them while they try to mudsling back and forth in front of a district judge; it just does not happen. [It is a] very difficult matter, [and] very hard to explain to many of those poor folks who try that. The other part of that too is that it is very difficult to know how to allocate pro se time on a court calendar.

Let me turn just for a moment to those cases that are mineral-industry-specific cases and the effects they have on the local court system. Of course, we have the tax evaluation cases, the cases that will be coming up that have to do with split estates, and environmental quality issues. I want to talk briefly about the taxation cases in particular. Those cases have become so highly specialized that each time the legislature changes that law, they all become the subject of new and distinct litigation before the State Board of Equalization. As an administrative effect, we have to review those cases. In most of those cases, the records are voluminous. They involve a degree of expertise that quite candidly at the trial court level we just do not have. Now, there are some of us who have had to acquire [the knowledge], but still, many of those cases for the purposes of review could become essentially matters that a single trial judge and a law clerk could very easily spend thirty days on that they just do not have. It is not unusual for trial judges in mineral-impacted districts to have as many as sixteen settings a day on their calendars. That is not unusual. So, the question then becomes how do we deal with these voluminous records, these tax cases that are of paramount importance, not only to the litigants but to the state as a source of income? Some of them are subject to certification under the Rules of Appellate Procedure, many are not, and we have to deal with those.

We are just now beginning to deal with the water discharge cases. Many of those are being litigated around the state. Of course, given the competitive nature of the coal industries, the next thing on the horizon will be the [Dakota, Minnesota & East Coast Railroad project] trying to get a new rail spur into Campbell County so that they can become competitive with the other rail providers: essentially, exporting coal out of Campbell County. There are at least fifty of those eminent domain cases now or condemnation cases for rights of way that we are aware of that encompass four judicial districts. It is entirely conceivable that out of those fifty we are looking at in excess of 200 trial days to get those days if we assume that half of them settle. And, by the way, all of those are jury demand cases. So, collectively at the district bench, we cannot help but wonder how we are going to deal with that, particularly in the north half of the state that is most affected by those railroad matters.

I do not mean to exclude the circuit courts in all of this. Certainly they are the courts of entry, and they have been impacted as well, separate and apart from felony level drug courts. You will see that many of these circuit courts given their load are attempting to put into place DUI courts to deal with those offenders. They just do not have the ability to incarcerate everybody and are trying alternatives at local supervision. Campbell County's Circuit Court has the second highest DUI load in the state. They have to deal with the domestic violence cases under the Family Violence Protection Act. One of the effects that I have discussed with the circuit court judges, as some of you may know, the circuit court now may extend a family violence protection order for up to a year if the litigants are represented by counsel. Then, often those hearings become mini-custody battles

where attorneys will request a day or two days to try those cases in front of circuit court judges. Circuit judges, quite frankly, are not equipped to handle that when they are doing—as in my district—as many as seventy arraignments a day. So, that too is an impact on the court systems and on the people who use them.

I want to talk finally a little bit about one of the topics that Lynne [Boomgaarden] broached; that is the disparity in county funding and the types of things that need to happen at the county level. Certainly, when we see our impacts, they impact court personnel as well. It is hard in impacted districts to get law clerks. It is hard in impacted districts to get court reporters. They cannot find housing. When they cannot find housing, the prices are so radically inflated, that it often times causes court personnel to put in a request that they reside in another county and actually commute to the impacted county. But the bigger problem is—turning back then to the difference in the types of systems that we have and the fact that district courts are administered at the county level with elected clerks of district court—those counties are the ones that are responsible for the brick, the mortar, the courtrooms, and the support facilities that deal with impacted court systems. Without the support of those local officials, the foresight and courage of those local officials, much as Lynne [Boomgaarden] said, to move beyond the notion that this is all going to go away, it does not matter how many judges we put in place; it does not matter how many times we try [alternative dispute resolution] or drug courts. Without the facilities, without the brick and mortar to administer those cases, they do not get done. Natrona County is a perfect example of that where, understandably, they do not have the facilities at the district court level that they need to effectively administer Natrona County's ongoing case load. That is not one of our problems in the Sixth Judicial District, but it will continue to grow as a problem statewide. If you take a look at many of the outlying courts (Weston, Niobrara, just to name a few), those courtrooms are old, they are not secure, and they do not lend themselves to the types of things that we have come to see now before the judiciary during this century.

So, once again, without that courage, without that support, of local county governments, this just is not going to get done. Many thanks again.

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WYOMING PRE-STATEHOOD LEGAL MATERIALS: AN ANNOTATED BIBLIOGRAPHY—PART II

*Debora A. Person**

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INTRODUCTION

The legal materials collected during the pre-statehood years can be narrowly described as those that established the governments that extended their law over the area. Those resources directly related to Wyoming's formation as a territory and state are the focus of Part I of this two-part work, "Wyoming Pre-Statehood Legal Materials: an Annotated Bibliography."[1] Part II broadens the scope of the work to explore the background and history of Wyoming's pre-statehood, with a deeper discussion of the foreign law and other United States territorial law that governed the current geographical area that is now the state of Wyoming. From the earliest days of European discovery to federal Indian policy to preemptive land laws and homesteading, the laws that impacted our geographical area dealt with ownership and land use, those elements that signify power to some, and to others, sustenance.

I. FOREIGN SOVEREIGNTIES

To evaluate the influence of sovereignties and territories over Wyoming's geographical area, most resources begin with the explorations of European

[1] Debora A. Person, *Wyoming Pre-Statehood Legal Materials: An Annotated Bibliography, in* 2 PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA 1395 (Michael Chiorazzi and Marguerite Most, eds., 2005). This collection was originally intended as a series of articles on the territorial period of each state and so length of individual articles was strictly limited. The article was reprinted in 7 WYO. L. REV. 49 (2007).

countries and their claims to the New World. While the predominant European influences were Spanish, French, and English, portions of what is currently the state of Wyoming or territories of which Wyoming was once a part also fell within land contested or claimed by Russia, Mexico, and the Republic of Texas. As it is generally believed that the first white person to walk parts of Wyoming was John Colter, a member of the Lewis and Clark expedition who decided to explore south of the Missouri River on the return trip from the Pacific in 1806,[2] it could also be argued that these foreign laws do not apply in the instance where there is no person to govern. But rights to newly discovered land were not viewed that way historically by the powers that claimed the territory, nor by other powers that might wish to claim possession, and so these claims become part of the legal history of the state.

While the European propensity toward exploration and expansion can be dated to the time of the First Crusade, for the New World, it is generally believed that the initial legal document relative to land claims was the Papal Bull issued by Pope Alexander VI in 1493, giving Spain sovereignty over lands to be discovered in the New World not already under the dominion of any Christian powers. The Spanish monarchy granted Columbus a monopoly of exploration in the region. This grant was revoked in 1495, and freedom of navigation was opened to all "merchant adventurers." The monopoly was reassigned in 1497, but by that time, Americus Vespucci had set sail, destined to rediscover the lands that would later be named after him.[3] Spain lay sweeping claims to the continent, without regard to boundaries, by virtue of its exploration and discovery. Interestingly, it was generally accepted that while European nations proclaimed the lands theirs, these claims were not considered binding on any indigenous rights to the property. It was, rather, to prevent similar claims from other European powers.[4]

Spain was not alone in claiming large portions of the new continent. France claimed portions Spain had already staked out, arguing that Spain had not colonized the region and France's explorers had made deeper inroads, having come south from Canada and north from Louisiana. England, as well, lay claim to the northeastern states, Canada, and the Pacific Northwest. Russia moved down from Alaska and established settlements along the Pacific Coast, with forts nearly as far south as San Francisco, which it retained until 1842.[5] And the United States, through its expeditions, claimed rights to the land in the Northwest based on discovery of the Columbia River.

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[2] 5 WESTON ARTHUR GOODSPEED, PROVINCE AND THE STATES: A HISTORY OF THE PROVINCE OF LOUISIANA UNDER FRANCE AND SPAIN, AND OF THE TERRITORIES AND STATES OF THE UNITED STATES FORMED THEREFROM 334 (1904).

[3] *Id.* at 18.

[4] FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 15 (2005).

[5] HAYES, HISTORICAL ATLAS OF THE PACIFIC NORTHWEST: MAPS OF EXPLORATION AND DISCOVERY 109 (1999).

Both Spain and France, during the peak of their presence in the New World, held that portion of the country that would become the Louisiana Purchase. Running up high debts to Spain in its struggle against the English in the Seven Year's War, France ceded the territory to Spain in 1762 in a secret treaty. Following this, Spain and France became engaged in the Napoleonic Wars at home. Spain accumulated war debts and, by 1800, ceded the Louisiana region back to France.[6] Further impacting foreign claims in the New World, Mexico, an established Spanish colony, set up a provisional government in 1810. The revolt segmented into local fighting until Spain's revolution in 1820. This gave Mexico the opportunity to consolidate its forces and claim independence. In 1821, Mexico seceded from Spain, ending the holdings of Spain in the region and supplanting Spain's colonial laws in the region with those of the Republic of Mexico.

Russian and English claims did not extend as far inland as Wyoming, but they certainly included lands along the coast of Oregon Country, and Oregon Country extended as far east as the summit of the Rocky Mountains, a portion of which lay within modern-day Wyoming. In fact, before Wyoming became a territory of its own, it was claimed not only by these foreign powers, it was also incorporated all or in part into the District of Louisiana, Louisiana Territory, Missouri Territory, Unorganized Country, Indian Country, Nebraska Territory, Dakota Territory, Idaho Territory, Oregon Country, Oregon Territory, Washington Territory, the Republic of Texas, and the State of Texas.

- Pope Alexander VI, Papal Bull, Inter Caetera (Alexander VI), May 3, 1493. 1 EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES IN 1648, 56 (Frances Gardiner Davenport, ed., 1917).[7]

Granting Spain sovereignty over lands both discovered and yet to be discovered in the New World by Columbus not previously possessed by any Christian owner. An additional Papal Bull on May 3 and another Bull Inter Caetera on May 4, 1493, reinforced and strengthened the grant to the Spanish.

- Treaty of Utrecht, Fr.-Gr. Brit., Apr. 11, 1713, 3 EUROPEAN TREATIES 193.

This treaty was part of the series of treaties ending the War of Spanish Succession and long-lasting disputes between France and Great Britain regarding

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[6] There is considerable discussion among scholars whether the European nations at this time found the area to be a prize or a burden. While there was the potential for riches, the cost of maintaining the region, especially in light of the British and Indian presence, was extensive. Some representations of the exchange reflect a reluctance to receive the land and no particular distress at returning it.

[7] Hereinafter EUROPEAN TREATIES.

the Hudson Bay Basin. France ceded this property as well as other land holdings in what is now Canada.

- Treaty of Fontainebleau, Fr.-Spain, Nov. 3, 1762, 4 EUROPEAN TREATIES 86.

As a result of losing the French and Indian War with Britain and being heavily indebted to Spain for its assistance during the war, France ceded title to all of its interests west of the Mississippi River to Spain in a secret treaty.

- Treaty of Paris, Feb. 10, 1763, 4 EUROPEAN TREATIES 92.

Treaty between France, Great Britain, Spain, and Portugal that ended the French and Indian War (the American conflict of the Seven Years' War). France ceded land east of the Mississippi River to Great Britain and both France and Spain ceded other New World holdings, extending England's rule broadly outside of Europe.

- Treaty of Escurial, Oct. 28, 1790. Gr. Brit.-Spain. William Ray Manning, THE NOOTKA SOUND CONTROVERSY 284-85, 1905.[8]

By the 1790s, Russia claimed portions of the Oregon Country based on settlements as far south as fifty-five degrees north latitude. The Spanish seized two British ships in Nootka Sound at Vancouver Island. War was averted through this treaty, known as the Nootka Convention. Both powers reserved the right to trade and Spain conceded the British right to establish settlements in any unpopulated area nominally claimed by Spain by right of prior discovery but never occupied. This began a shift away from the policy of basing claims to lands on initial exploration of a region and toward the idea of more permanent colonization as proof of possession.

- Treaty of San Ildefonso, Fr.-Spain, Oct. 1, 1800, 4 EUROPEAN TREATIES 181.

Under pressure from Napoleonic France, Spain ceded the Louisiana Territory back to France.

- Treaty of Cession, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200.[9]

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[8] For English translation, *see* p. 454-56.

[9] Volume 8 of the *United States Statutes at Large* is entitled "Treaties between the United States of America and foreign nations from the Declaration of Independence of the United States to 1845; with notes" and is the preferred cite among treaty sources for U.S. statutory cites before 1845.

Treaty between U.S. and France to enable the President to take possession of the Louisiana Territory ceded by France; also available at the U.S. National Archives and Records Administration (NARA) Web site at http://www.archives.gov/research_room/arc/index.html. There were three agreements in total, one for the cession of the land and two to provide for the exchange of payment. *See also* 8 Stat. 206 and 3 Stat. 208.

- Convention signed at London, U.S.-Gr. Brit., Oct. 20, 1818, 8 Stat. 248.

Agreement for joint occupation for "any country that may be claimed by either party on the northwest coast of America, westward of the Stony Mountains . . . for a term of ten years."

- Treaty of Amity, Settlement, and Limits, U.S.-Spain, Feb. 22, 1819. 8 Stat. 252.

Spain relinquished its claim to Oregon Country. This set definite boundaries of the Spanish holdings from the Pacific Ocean to the Gulf of Mexico.

- Treaty to grant Mexico Independence, Cordoba, Mex.-Spain, Aug. 24, 1821. 1 WYOMING BLUE BOOK 4 (Virginia Cole Trenholm, ed. 1974).

Mexico seceded from Spain and becomes the Republic of Mexico.

- Convention Regarding Navigation, Fishing, Trading and Establishments on the Northwest Coast of America, U.S.-Russ., Apr. 5, 1824, 8 Stat. 302 and Convention Concerning the Limits of Respective Possessions on the North-West Coast of America and the Navigation of the Pacific Ocean, Gr. Brit.-Russ., Feb. 16, 1825, 75 Consol. T.S. 95.

Both the U.S. and Russia extended settlements into the region after the Nootka Convention. Russia objected to the encroachments of the Lewis and Clark Expedition and the settlement of Astor's Pacific Fur Company. Formal talks to set an American/Russian boundary were unsuccessful.[10] These two conventions with Russia set the northernmost boundary of Oregon Country for both the U.S. and Britain, leaving only the United States and Great Britain with claims to the region south of fifty-four degrees north latitude.

- Convention Continuing in Force, Article 3 of the Convention of October 20, 1818, U.S.-Gr. Brit., Aug. 6, 1827, 8 Stat. 360.

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[10] Joseph R. Wilson, *The Oregon Question*, 103 OR. HIST. Q. 29 (2002).

Extended the agreement for joint occupation and allowed for a more definite settlement of claims of each party to the territory.

- Treaty of Velasco, May 14, 1836, *available at* http://www.yale.edu/lawweb/avalon/velasco.htm.

Between Republic of Texas and Mexico (Santa Ana); ended the Texas War of Independence.

- Oregon Treaty, U.S.-Gr. Brit., June 15, 1846. 9 Stat. 869.

Also known as the Washington Treaty, this established the boundary in the territory on the Northwest Coast of America lying westward of the Rocky Mountains. It ended the joint occupancy claims that had existed since 1818.

- Treaty of Guadalupe Hidalgo, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922.

Treaty of peace between Mexico and the United States of America. It established new boundaries and added lands to the United States.

General Reference Sources

- EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES IN 1648 (Frances Gardiner Davenport, ed., 1917).

This four-volume set published treaties chronologically. The treaties in volumes one and two and many in volume three are preceded by a short article and, when necessary, include a translation. Treaties in volume four, published after the death of Ms. Davenport, do not contain these valuable additions. Treaties in the collection cover 1455 to 1815.

- TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA (Hunter Miller, ed., 1931).

Collection of U.S. treaties since the founding of the country. This is a standard among early American resources.

II. FOREIGN AND COLONIAL LAW

In most cases, the European countries established colonial rule over their claims in the Americas. In some cases, charters were given as a form of self-govern-

ment. These foreign laws governing holdings in American can often be found in early compilations of territorial or state laws along with their constitution and organic laws. Frequently, they are reprinted in other compilations of territorial laws as well.

England

English laws have considerable relevance throughout the United States. Quite apart from the fact that for a long period England had claims to the area, several United States jurisdictions, including Texas (in 1840) and Wyoming (in 1869), adopted the English common law in the early days of their government.

Relevant Acts

- An act for regulating the fur trade, and establishing a criminal and civil jurisdiction, within certain parts of North America, 1821, 1 and 2 Geo. 4, ch. 66 (Eng.).[11]

Enacted by the British Parliament, this act imposed the Laws of Upper Canada on British subjects in the Oregon Territory, regulated the fur trade, established criminal and civil jurisdiction within certain parts of North America, and vested the Hudson's Bay Company with authority to apply the laws.[12]

Codes

- STATUTES OF THE REALM: PRINTED BY COMMAND OF HIS MAJESTY KING GEORGE THE THIRD . . . FROM ORIGINAL RECORDS AND AUTHENTIC MANUSCRIPTS.

Available online through subscription, in microfiche, and in print in various sources, this resource includes statutes from 1235 to 1713, as well as the Magna Carta and other early documents.

- STATUTES IN FORCE (1972-).

Contains all acts from 1325 to the 1990s. Available in microform and print.

- THE STATUTES: FROM THE TWENTIETH YEAR OF KING HENRY THE THIRD TO THE TENTH CHAPTER OF THE TWELFTH, THIRTEENTH,

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[11] *See* J. HENRY BROWN, BROWN'S POLITICAL HISTORY OF OREGON 24-29 (1892).

[12] Joe K. Stephens, *Oregon Law Before Statehood: History and Sources*, *in* 2 PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA 959 (Michael Chiorazzi and Marguerite Most, eds., 2005).

AND FOURTEENTH YEARS OF KING GEORGE THE SIXTH A.D. 1235-1948 (Robert Harry Drayton, ed., 3rd rev. ed., 1950).

- CHRONOLOGICAL TABLE OF THE STATUTES (1947-).

Annual publication that indexes statutes for the years 1235 to 2000 and indicates repeals and amendments; to be used with statutory sets.

Cases

- ENGLISH REPORTS (1900-1930).

"Complete verbatim re-issue of all the decisions of the English Courts prior to 1866," this reprints the nominative reports published between 1378 and 1865, and is considered the main source for early English cases. Available in paper, microform, and online through subscription with the Law Library Microfilm Consortium (LLMC).

- YEAR BOOKS SERIES, Selden Society.

Year books contain reports of English cases from 1270-1535. The Selden Society series includes original (usually French) text and English translation. Year books are organized by date and reign.

- EARLY ENGLISH BOOKS ONLINE and EARLY ENGLISH BOOKS, 1475-1700 (1950-).

Includes many printed year books before 1700. Available in multiple formats, including print, microform, and online through subscription with ProQuest.

France

Law in France was somewhat geographically divided. The southern region, called the "country of written law," for the most part maintained the Roman law known as Breviary of Alaric II. In the northern regions, including Paris, the Roman law was intermingled with the customary laws of the invading Teutonic tribes and the feudal system. This was the region of "customary law." It was prescribed by charter that the laws, edicts, and ordinances of the realm of a general character, and the Custom of Paris, should be extended to the new possessions.[13]

France appears to have had the only original slave code to be imposed in the American colonies.[14] In 1685, Louis XIV decreed the Black Code (Code Noir),

[13] William Wirt Howe, *Law in the Louisiana Purchase*, 14 YALE L. J. 77 (1904).

[14] Spain, France, and England all used similar "black codes" to regulate slaves in their colonies. Spain's "black codes" were taken from the *Recopilacion* (see *infra* n. 16-17 and accompanyng text.)

first in effect in Louisiana in 1724. Under these laws, Jews were forbidden to settle in French colonies, the only religion was Catholic, and relations between masters and slaves were regulated.[15]

Spain

The law of Spain is found in compilations of royal authority. With a basis in Roman and canon law, the royal orders were compiled into the first Spanish code, *Las Siete Partidas,* or *De Partidas*, in 1348 and enacted in the New World in 1530. The law was extended by the *Ordinance of Alcala* regarding courts, contracts, wills, and criminal law; Laws of Toro, regulating forms for wills and intestate and probate procedures; Ferdinand and Isabella's *Royal Ordinances* in 1496; Philip II's *Recopilacion of Castille* in 1657 regarding the system of Spanish legislation; and the *Recopilacion of the Indies* specific to North and South America in 1661.[16] These laws are reprinted in English in a number of resources.

- LAWS OF LAS SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA (L. Moreau Lislet and Henry Carleton, trans., 1820).

- NEW LAWS OF THE INDIES FOR THE GOOD TREATMENT AND PRESERVATION OF THE INDIANS (1893).

This is a facsimile reprint of the original Spanish edition promulgated by Charles V, 1542-43, with an English translation. With oversight in Madrid, these laws were generally considered the collection of Spanish colonial laws (*Recopilacion of the Indies* above). After the secret treaty that ceded French holdings in Louisiana to Spain, the French inhabitants revolted. To maintain control, Spain established a new government. The Cabildo assembled December 1, 1769 and adopted new laws based on the Roman Civil Code, which were the same laws as governing all Spanish Colonies, including Council of the Indies.[17] The Black Code (Code Noir) of France was re-enacted and remained in effect until 1803.

- HENRY S. GEYER, A DIGEST OF MISSOURI TERRITORY, TO WHICH HAVE BEEN ADDED A VARIETY OF FORMS USEFUL TO MAGISTRATES (1818).

Louis XIV's "Edict concerning Negro Slaves in Louisiana" can be found in DONALD J. HEBERT, SOUTHWEST LOUISIANA RECORDS: CHURCH AND CIVIL RECORDS OF SETTLERS (1974-).

[15] For a more in-depth discussion of the Code Noir, *see* Thomas N. Ingersoll, *Slave Codes and Judicial Practice in New Orleans, 1718-1807*, 13 L. & HIST. REV. 23 (Spring 1995).

[16] JOHN SAYLES & HENRY SAYLES, 1 EARLY LAWS OF TEXAS 154 (1888).

[17] GOODSPEED, *supra* note 2, at 273-75.

Early guide to Missouri law arranged by broad subject, with index and table of contents. Reprints Treaty of Cession, organic laws, Spanish regulations for the allotment of lands (p. 438; when searching electronically, p. 450), and laws of the U.S. for adjusting title to lands (p. 451, or searching electronically, p. 463). Available in microfilm of Jenkins and Hamrick's *Early State Records* and Shaw and Shoemaker's *Early American Imprints, Series II, no. 44874*.

- LOUIS HOUCK, THE SPANISH REGIME IN MISSOURI: A COLLECTION OF PAPERS AND DOCUMENTS RELATING TO UPPER LOUISIANA PRINCIPALLY WITHIN THE PRESENT LIMITS OF MISSOURI DURING THE DOMINION OF SPAIN, FROM THE ARCHIVES OF THE INDIES AT SEVILLE (1909).

- JOHN SAYLES & HENRY SAYLES, EARLY LAWS OF TEXAS (1888).

Secondary Sources

- LEWIS HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA (1965).

Spanish colonial policy toward American Indians.

Mexico

When Mexico was claimed by Spanish explorers in the early 1500s, it was divided into kingdoms and provinces and placed under the jurisdiction of the Supreme Council of the Indies in Madrid. For centuries Mexico was governed by Spanish law until its independence in 1821, and the resulting laws of the new country reflected that connection.

- H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897 (1898).

Includes the Federal Constitution of the United Mexican States and Spanish and Mexican land and civil law in ten volumes, *available at* http://texinfo.library.unt.edu/lawsoftexas.

- FREDERIC HALL, THE LAWS OF MEXICO: A COMPILATION AND TREATISE RELATING TO REAL PROPERTY, MINES, WATER RIGHTS, PERSONAL RIGHTS, CONTRACTS, AND INHERITANCES (1885).

Available in print and online through The Making of Modern Law: Legal Treatises, 1800-1926 database.

- HAMILTON'S MEXICAN LAW: A COMPILATION OF MEXICO LEGISLATION AFFECTING FOREIGNERS, RIGHTS OF FOREIGNERS, COMMERCIAL LAW (Leonidas Le Cenci Hamilton, ed., 1882).

Mining and public land laws, water rights, treaties, and the Mexican constitution.

- JOHN SAYLES & HENRY SAYLES, EARLY LAWS OF TEXAS (1888).

Includes laws from 1836 to 1879; laws and decrees of Spain relating to land in Mexico, laws of Mexico relating to colonization; laws of Coahuila and Texas; laws of Tamaulipas; colonial contracts; Spanish civil law (in English translation); and orders and decrees of the provisional government of Texas.

General Reference Sources

- JOSEPH M. WHITE. A NEW COLLECTION OF LAWS, CHARTERS AND LOCAL ORDINANCES OF THE GOVERNMENTS OF GREAT BRITAIN, FRANCE AND SPAIN: RELATING TO THE CONCESSIONS OF LAND IN THEIR RESPECTIVE COLONIES, TOGETHER WITH THE LAWS OF MEXICO AND TEXAS ON THE SAME SUBJECT, TO WHICH IS PREFIXED JUDGE JOHNSON'S TRANSLATION OF AZO AND MANUEL'S INSTITUTES OF THE CIVIL LAW OF SPAIN (1839).

Available on microfiche and online through The Making of the Modern World: Legal Treatises, 1800-1926 database.

III. UNITED STATES' GOVERNANCE OF ITS TERRITORIES

- Ordinance of 1787: the Northwest Territorial Government [The Confederate Congress, Articles of Confederation, July 13, 1787] (superseded by Northwest Territory Ordinance of 1789).[18]

Established under the Articles of Confederation, this act "for the government of the territory of the United States northwest of the river Ohio" predates our current Constitution. It established what was needed for territorial government: manner of appointment or election of officials, qualifications, duties, powers, terms, and numbers of justices, and Council and House members.

- Northwest Territory Ordinance of 1789, ch. 8, 1 Stat. 50 (1789) (codified at 1 U.S.C. § 17).

This act provided for the government of the Territory Northwest of the Ohio River. The Constitution under the new government that succeeded the Articles

[18] Published at the beginning of each set of United States Code, along with the Northwest Ordinance of 1879.

of Confederation gave Congress the power to dispose of, and make, all needful rules and regulations respecting territory or property of the United States.[19] This Act of 1789, known as the Northwest Ordinance of 1789, was meant to keep the Ordinance of 1787 in full force under the new Constitution and provided the procedure by which a unit of government or territory could be split.

- Act of Mar. 3, 1817, ch. 42, 3 Stat. 363.

This act permitted each territory to elect a delegate to Congress. Delegates had a seat in the House of Representatives and were permitted to share in the debates, but they had no vote. Wyoming's first delegate to Congress began his term with the Second Session of the Forty-First Congress, which convened December 6, 1869.[20] In 1871, the Second Wyoming Territorial Legislative Assembly memorialized Congress requesting that the Territorial Delegate be given a vote.[21] The request was not granted.

- FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe, ed., 1909).

This is an excellent resource for the political history of the states. The table of contents lists all documents that establish a government relevant to a particular state. For Wyoming, it lists foreign treaties and territorial organic laws for each territory of which Wyoming was a part or that impacted the territory's borders. Available on microfiche, LAC 22756-62.

- MAX FARRAND, LEGISLATION OF CONGRESS FOR THE GOVERNMENT OF THE ORGANIZED TERRITORIES OF THE UNITED STATES, 1789-1895 (1896).

Originally published as Farrand's Ph.D. thesis at Princeton University, this work outlines the general framework of territorial government. Appendix B contains acts of Congress relating to the government of the organized territories of the United States. Available in microform; reprinted by Hein in 2000; also available electronically through The Making of Modern Law: Legal Treatises, 1800-1926 database and HeinOnline.

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[19] U.S. CONST. art. IV, § 3.

[20] 1 WYOMING BLUE BOOK 282 (Virginia Cole Trenholm, ed. 1974).

[21] Memorial from the Legislative Assembly of the Territory of Wyoming To the Honorable Senate and House of Representatives of the United States in Congress Assembled, "Memorial And Joint Resolutions Representing the Right of the People in the Territories to a Voice in the Matter of their Government and Taxation," 1871 Wyo. Laws 135.

Legislative and Executive Documents

Materials produced by the federal government in its administration of the territories, such as congressional bills, reports, journals, manuals, committee prints, and debates (published in Annals of Congress, 1789 to 1824; Register of Debates, 1824-1837; Congressional Globe, 1833-1873; and Congressional Record 1873 to the present) are available in print and, to a limited extent, through online sources.

Because territories were administered by the federal government under the Northwest Ordinance Act, resources specific to a territory's governance are also considered federal documents. Administrators in each territory submitted reports to the Department of the State, and later the Department of the Interior, and were answerable to the President and his administration. While federal legislative materials are becoming more accessible online, many are still available only in print or microform.

The legislative history materials specific to Wyoming's territorial and state formation are referenced, for the most part, in Wyoming Pre-Statehood Legal Materials, Part I. By way of quick review, four bills to create a territory for Wyoming were introduced into the U.S. House of Representatives between the years 1865 and 1868 before the Senate bill introduced in 1868 was successful. All earlier versions were never reported out of the Committee on Territories. The Organic Act for a Wyoming Territory that established the territorial government is little changed from the bill introduced in the Senate in 1868 and similar to those organic acts of the territories formed around the same time period.

- Law Library of Congress—A Century of Lawmaking for a New Nation: U.S. Congressional documents and debates, 1774-1873, http://memory.loc.gov/ammem/amlaw/lawhome.html.

Full text search of records of the Continental Congress, Constitutional Convention, and 1st through 42nd Congresses (1774-1873), including journals; Elliot's Debates; Farrand's Records; Statutes at Large; House and Senate Journals; Maclay's Journal; Annals of Congress; Register of Debates; Congressional Globe; U.S. Serial Set; selected bills and resolutions, executive documents, including Secretaries of War, Interior, General Land Office, and Commissioner of Indian Affairs.

- NARA (U.S. National Archives and Records Administration), http://www.archives.gov.

NARA is one of the best resources for federal territorial materials, but only a fraction of its collection is available online. Materials include Records of the Senate and House Committees on Territories, committee reports (1844-1847), papers

(1849-1920), petitions, memorials, executive proceedings and correspondence, resolutions of state and territorial legislatures, and access to documents of the federal policy-making executive agencies responsible for territories (Department of State and Department of the Interior). Materials that are not available online can be found in microform or viewed at the regional reading rooms. *Territorial Papers of the U.S.* is the major set for territorial materials. Organized by territory and years, the most relevant groups are 46, Senate; 59, State Department; 48, Department of the Interior; 75, Indian Affairs; 98, Records of the U.S. Army; 107, Office of the Secretary of War; 233, House of Representatives. Only selected volumes are available online.

- LETTERS, 1869-1872, Secretary of State's Office.

Letters from the Secretary of State's office are available from NARA Record Group 59. Many of the letters relate solely to domestic duties of the department such as the administration of the territories, the printing and distribution of laws, the registration of copyrights, the taking of the census, and the publication of the Biennial Register. A number of the letters are addressed to governors of states, district attorneys, and other state and territorial officials on topics with some international aspect. Arranged in chronological order, these records are partially indexed by the series "Index to Domestic Letters, May 1, 1802-August 15, 1906" (ARC Identifier 582199).

- ROBERT B. MATCHETTE & ANNE BRUNER EALES, GUIDE TO THE FEDERAL RECORDS IN THE NATIONAL ARCHIVES OF THE UNITED STATES (1995), http://www.archives.gov/research_room/federal_records_guide.

Online guide to searching NARA documents. NARA's Web site and tools can be difficult to use without a tutorial.

- UNITED STATES CONGRESSIONAL SERIAL SET (1817-).

The U.S. Serial Set includes House and Senate reports, hearings, executive documents (materials received by Congress from the executive branch), miscellaneous documents, journals, manuals, internal publications, and annual federal executive agency reports, along with some non-governmental materials. The Serial Set, though available in print, is found in microform in most libraries and available online through Lexis.

- CIS U.S. SERIAL SET INDEX (1975-1998).

The Congressional Information Service's index is an alternate index to the U.S. Serial Set produced by the Government Printing Office. It covers congressional and non-congressional documents, administrative reports, congressional

journals, manuals, internal publications, congressional reports, and annual federal executive agency reports from 1789.

- CIS U.S. CONGRESSIONAL COMMITTEE PRINTS INDEX; FROM THE EARLIEST PUBLICATIONS THROUGH 1969 (1980).

Congressional committees prepare or commission documents to aid them in their work. This work indexes investigative reports, monographic studies, confidential reports, and hearings.

- BENJAMIN PERLEY POORE, DESCRIPTIVE CATALOGUE OF THE GOVERNMENT PUBLICATIONS OF THE UNITED STATES, SEPTEMBER 5, 1774-MARCH 4, 1881 (1885).

Indexes congressional records and documents. Entries are arranged chronologically with alphabetical index, by title.

- GUIDE TO THE RECORDS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AT THE NATIONAL ARCHIVES, 1789-1989: BICENTENNIAL EDITION AND GUIDE TO THE RECORDS OF THE UNITED STATES SENATE AT THE NATIONAL ARCHIVES, 1789-1989: BICENTENNIAL EDITION (1989).

These two volumes are organized by committee. Each section briefly describes the types of records retained and supplies the access information to retrieve the material from the National Archives. Also includes a brief tutorial for researching congressional materials.

- NEW AMERICAN STATE PAPERS (1973-).

Documents in this collection are from three sources: American State Papers, 1832-1861; official documents from Serials Index after 1817; and Legislative Records Section of NARA. Catalogued by topic and reproduced full-text, there is no index to the set. Sets of special interest to Wyoming's pre-statehood period may be: Public Lands, Explorations, Indians, Social Policy, and Railroads/Transportation.

- EARLY AMERICAN IMPRINTS.

Based on Charles Evans' *American Bibliography*, these provide full-text access to American books and pamphlets from every aspect of life. Series I: 1639-1800; Series II: 1801-19. Available electronically from Newsbank.

- WILLIAM SUMNER JENKINS & LILLIAN A. HAMRICK, EARLY STATE RECORDS (1900-1983).

Microfilm collection of 2,400 reels of primary source material for the states. Includes legislative, statutory, constitutional, executive, and court records. The authors also compiled a finding aid, published in 1950, titled *A Guide to the Microfilm Collection of Early State Records*.

- CIS INDEX TO U.S. EXECUTIVE BRANCH DOCUMENTS, 1789-1909: GUIDE TO DOCUMENTS LISTED IN CHECKLIST OF U.S. PUBLIC DOCUMENTS, 1789-1909, NOT PRINTED IN THE U.S. SERIAL SET (1990-1997).

- PRESIDENTIAL EXECUTIVE ORDERS AND PROCLAMATIONS, [1789-1983] (1987).

Two volumes, available in print and microfiche. Volume One covers the time period of Wyoming's pre-statehood. Accompanied by a printed index: *CIS Index to Presidential Executive Orders and Proclamations*.

- AMERICAN PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.

This site has full-text executive materials back to 1789, including addresses, State of the Union messages, signing messages, and proclamations and orders. Pre-1929 materials are more limited.

Judicial Documents

Early collections of decisions were published privately and lack consistency in their coverage. The first volume of the *United States Reports* (a nominative volume compiled by Alexander Dallas) contains only Pennsylvania decisions. 2 Dallas is the first collection of U.S. Supreme Court decisions, but also includes Pennsylvania cases; volumes 3 and 4 include Delaware and New Hampshire cases as well. The Supreme Court of the United States had no official reporter until 1817.[22] By 1880, West Publishing Company was publishing decisions from both circuit and district courts and the Circuit Courts of Appeals in *Federal Reporter*.[23]

- FEDERAL CASES: COMPRISING CASES ARGUED AND DETERMINED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES

[22] Act of March 3, 1817, ch. 63, 3 Stat. 376 (providing for the reporting of decisions of the Supreme Court).

[23] MORRIS L. COHEN, ROBERT C. BERRING & KENT C. OLSON, HOW TO FIND THE LAW 17-18 (9th ed. 1989).

FROM THE EARLIEST TIMES TO THE BEGINNING OF THE FEDERAL REPORTER, ARRANGED ALPHABETICALLY BY THE TITLES OF THE CASES, AND NUMBERED CONSECUTIVELY (1894-1897).

West compiled historic decisions from lower federal courts that had been published in over sixty nominative reporters throughout the country. This set includes a digest that cross-indexes cites from the nominative reporters.

- NARA (National Archives and Records Administration), http://www.archives.gov.

In addition to legislative and executive documents, NARA also houses court materials. Records of the United States District Courts for the territorial appellate courts and other court administrative documents can be accessed through the NARA's General Records of the Department of Justice.

IV. WYOMING'S TERRITORIAL DAYS

The portion of the country that was to become Wyoming, like most of the future central plains states, fell within a number of other territories before the Wyoming Territory was established. The timeline below indicates territorial legal influences.[24] In instances where the dates overlap, modern-day Wyoming was divided among two or more territories. The materials listed here are those that are relevant only for the time period during which any portion of Wyoming was included in the territory, in many cases, only a couple of years.[25]

District of Louisiana/Indiana Territory, 1804
Indiana Territory, 1804
Louisiana Territory, 1805-1812
Territory of Missouri, 1812-1820
Unorganized Country, 1821-1834
Indian Country, 1834-1854
Nebraska Territory, 1854-1861; 1861-1863
Dakota Territory, 1861-1863; 1864-1868
Idaho Territory, 1863-1864
Oregon Country, 1846
Oregon Territory, 1848-1859
Washington Territory, 1859-1861; 1861-1863

[24] *See* Trenholm, *supra* note 20, at 5-50 for modern-day Wyoming boundaries in their historical context relative to surrounding territories.

[25] For a more complete listing of resources of pre-statehood materials for any of these territories, *see* PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA (Michael Chiorazzi & Marguerite Most, eds., 2005).

Republic of Texas, 1836-1845
State of Texas, 1845-1850
Utah Territory, 1850-1868
Unorganized Territory (Mexico), 1848-1850

District of Louisiana/Indiana Territory, 1804

Between the time of the Louisiana Purchase and the federal statute establishing a government for the territory, the upper Louisiana area was under the military and civil rule of a United States agent who accepted the land from Spain for France, and then again accepted the land from France on behalf of the United States.

Relevant Federal Laws

- Act of Oct. 31, 1803, ch. 1, 2 Stat. 245.

Enabled the President of the United States to take possession of the territories ceded by France to the United States.

- Act of Nov. 10, 1803, ch. 2, 2 Stat. 245.

Authorized the creation of a stock, in the amount of $11,250,000, to purchase Louisiana, and it made provision for payment.

- Act of Mar. 26, 1804, ch. 38, 2 Stat. 283.

Split Louisiana into two territories and provided for the temporary government, establishing the Territory of Orleans and temporary government for the Louisiana Purchase south of the Mississippi Territory, as well as a government for "the residue of the province of Louisiana," to be called the District of Louisiana. Placed under the governance of the Indiana Territory.

Session Laws

- LAWS FOR THE GOVERNMENT OF THE DISTRICT OF LOUISIANA PASSED BY THE GOVERNOR AND JUDGES OF THE INDIANA TERRITORY AT THEIR FIRST SESSION BEGUN ON OCT. 1, 1804 (1804).

Also available in the microfilm collection, *Early State Records* by Jenkins and Hamrick.

Territory of Louisiana, 1805-1812

Relevant Federal Laws

- Act of Mar. 2, 1805, ch. 26, 2 Stat. 324.

Ascertaining and adjusting the titles and claims to land within the Territory of Orleans and the District of Louisiana.

- Act of Mar. 3, 1805, ch. 31, 2 Stat. 331.

Further providing for the government of the district of Louisiana.

Session Laws

- LAWS OF THE TERRITORY OF LOUISIANA: COMPRISING ALL THOSE WHICH ARE NOT ACTUALLY IN FORCE WITHIN THE SAME (1808-).

Title varies slightly between 1808 and 1810 publications. Session Laws of 1810 revise and supplement the 1808 laws. Available in the microfilm collection of Jenkins and Hamrick's *Early State Records* and Shaw and Shoemaker's *Early American Imprints, Series II*.

Territory of Missouri, 1812-1820

Relevant Federal Laws

- Act of June 4, 1812, ch. 95, 2 Stat. 743.

Act provided for the government of the Territory of Missouri from the Territory of Louisiana; structured a territorial government apart from the Indiana Territory.

- Act of April 26, 1816, ch. 155, 3 Stat. 328.

Altered certain parts of government of the Territory of Missouri relating to judges of the circuit courts and biennial assembly meetings to be held at St. Louis.

Session Laws

- ACTS PASSED BY THE GENERAL ASSEMBLY OF THE TERRITORY OF MISSOURI IN ST. LOUIS: JOSEPH CHARLESS (1813-).

Available in *Early American Imprints*, *Series II, no. 29180*. Relevant years for Wyoming are 1813 through 1820.

Codes

- LAWS OF A PUBLIC AND GENERAL NATURE OF THE DISTRICT OF LOUISIANA OF THE TERRITORY OF LOUISIANA, THE TERRITORY OF MISSOURI, AND THE STATE OF MISSOURI, UP TO THE YEAR 1824 (1842).

Volume one contains laws of the Territory of Missouri from 1813 to 1823; volume two, state laws from 1824-1836.

Reporters and Digests

- RECORDS OF THE SUPERIOR COURT OF THE TERRITORY OF MISSOURI FROM MAY, 1811 TO NOV., 1826.

Manuscript of handwritten court records available in microfilm in *Early State Records*.

General References

- HENRY S. GEYER. A DIGEST OF MISSOURI TERRITORY, TO WHICH HAVE BEEN ADDED A VARIETY OF FORMS USEFUL TO MAGISTRATES (1818).

Early guide to Missouri law arranged by broad subject, with index and table of contents. Reprints Treaty of Cession (Louisiana Purchase), organic laws, Spanish regulations for the allotment of lands, and laws of the U.S. for adjusting title to lands. Available in microfilm in Jenkins and Hamrick's *Early State Records* and Shaw and Shoemaker's *Early American Imprints*, *Series II, no. 44874*. Also part of The Making of Modern Law database. Note: page numbers vary among electronic sources.

- LOUIS HOUCK, THE SPANISH REGIME IN MISSOURI: A COLLECTION OF PAPERS AND DOCUMENTS RELATING TO UPPER LOUISIANA PRINCIPALLY WITHIN THE PRESENT LIMITS OF MISSOURI DURING THE DOMINION OF SPAIN, FROM THE ARCHIVES OF THE INDIES AT SEVILLE, ETC., TRANSLATED FROM THE ORIGINAL SPANISH INTO ENGLISH, AND INCLUDING ALSO SOME PAPERS CONCERNING THE SUPPOSED GRANT TO COL. GEORGE MORGAN AT THE MOUTH OF THE OHIO, FOUND IN THE CONGRESSIONAL LIBRARY (1909).

Secondary Sources

- STUART BANNER. LEGAL SYSTEMS IN CONFLICT: PROPERTY AND SOVEREIGNTY IN MISSOURI, 1750-1860 (2000).

Explores the civil law of France and Spain in the Upper Louisiana region and the transition to American common law.

- WILLIAM E. FOLEY, A HISTORY OF MISSOURI: 1673 TO 1830 (2000).

A multi-volume set with various authors, the first volume is most pertinent to Wyoming.

Unorganized Country, 1821-1834

There was no central government in this region during this time. The region was under the military supervision of the Western Department of the U.S. Army. Military forts and garrisons were established to protect trade and settlers from Indian attacks. The Indian Agency known as Upper Missouri Agency was established in 1818 at Council Bluffs to administer tribes on the Missouri River.[26]

Indian Country, 1834-1854

Relevant Federal Laws

- Act of June 30, 1834, ch. 161, 4 Stat. 729.

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers. Lands east and west of Missouri not part of any state or territory and also east of the Mississippi not within any state to which the Indian title had not been extinguished were deemed Indian Country and placed under the government of a Commissioner of Indian Affairs within the War Department.

- Act of Mar. 3, 1849, ch. 108, 9 Stat. 395.

Established the Department of the Interior with authority over territories and federal Indian policy.

- WAR DEPARTMENT. OFFICE OF THE SECRETARY. LETTERS.

Held by NARA, RG 107. After 1800, letters were addressed to a wide variety of correspondents dealing with Indian treaties and boundaries.

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[26] Trenholm, *supra* note 20, at 40.

Nebraska Territory, 1854-1861; 1861-1863

Relevant Federal Laws

- Act of May 30, 1854, ch. 59, 10 Stat. 277.

An act to organize the territories of Nebraska and Kansas, define boundaries, establish territorial government, outline procedures for relationship with Indians, and address slavery within the new territories. There was considerable contention over this act in the federal legislature as it impacted the Missouri Compromise. During this time the discussion of slavery was fundamental to the establishment of new territories and states. H.D. Johnson, delegate from the Territory of Nebraska, submitted a memorial to the Senate claiming the right to make the decision for the inhabitants of the territory.[27]

- Act of Mar. 2, 1861, ch. 86, 12 Stat 239.

An act to provide a temporary government for the territory of Dakota, which effectively split the area that is now Wyoming in half between Nebraska Territory and the newly created Dakota Territory.

Session Laws and Journals

- LAWS, RESOLUTIONS, AND MEMORIALS PASSED AT THE REGULAR SESSION OF THE GENERAL ASSEMBLY OF THE TERRITORY OF NEBRASKA.

Published annually. Sessions from 1855-1863 are relevant to Wyoming.

- LAWS, JOINT RESOLUTIONS, AND MEMORIALS PASSED AT THE SESSIONS OF THE TERRITORIAL AND STATE LEGISLATURES OF NEBRASKA, TOGETHER WITH THE ORGANIC LAWS, AND THE PROCLAMATIONS ISSUED IN THE ORGANIZATION OF THE TERRITORIAL GOVERNMENT; THE ENABLING ACT, ADMITTING NEBRASKA TO THE UNION; AND THE REVISED STATUTES OF 1866 (1886).

Organized into sections, each covering one legislative assembly. The First Session adopted part of the Iowa Code as the basis for Nebraska law, and the Fifth Session Laws include criminal code forms and governor's proclamations.[28] The first compilation of state codes was published in 1866, after Wyoming was no longer part of the Nebraska Territory.

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[27] S. Misc. Doc. No. 23 (1854) Feb. 20, 1854.

[28] Sandra B. Placzek, *Nebraska Pre-statehood Legal Materials*, *in* 2 PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA 681 (Michael Chiorazzi and Marguerite Most, eds., 2005).

- HOUSE JOURNAL OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF NEBRASKA.

The relevant years are 1857-1861.

- JOURNAL OF THE COUNCIL AT THE REGULAR SESSION OF THE GENERAL ASSEMBLY OF THE TERRITORY OF NEBRASKA.

The relevant years are 1855, 1857-1861.

Reporters and Digests

- REPORTS OF CASES IN THE SUPREME COURT OF NEBRASKA (1860-).

Volume 1, pages 411-73 contain cases decided by the Supreme Court in the Territory of Nebraska, not dated, but apparently decided between 1860 and 1870. Also available in microfiche and in LLMC digital online.

- ARTHUR K. DAME & RALPH S. MOSELEY, A DIGEST OF THE DECISIONS OF THE SUPREME COURT OF NEBRASKA FROM 1855 TO JULY 10, 1928 (1929).

Executive

- MESSAGES AND PROCLAMATIONS OF THE GOVERNORS OF NEBRASKA, 1854-1941 (1941).

A product of the Works Projects Administration, volume one covers the territorial and early statehood period, organized chronologically.

Dakota Territory, 1861-1863; 1864-1868

The main portion of what was to become Wyoming was joined with Idaho Territory briefly in 1863. With the discovery of gold in Montana, the Montana Territory was established to provide a separate jurisdiction for the mining towns, and most of Wyoming was moved back into Dakota Territory where it would stay until it became a territory of its own.[29] The Dakota Territorial Legislature set up the first four Wyoming (Lincoln) counties during their Fifth through Eighth Territorial Legislative Assemblies.[30] In 1868, in response to the Wyoming inhabitants' request for their own territory, a memorial was sent to the U.S. Congress by

[29] HERBERT SAMUEL SCHELL, HISTORY OF SOUTH DAKOTA 82 (2nd ed. rev., 1968).

[30] See *infra* Wyoming Counties for the specifics of the legislation.

the Dakota Territorial Assembly.

Relevant Federal Laws

- Act of Mar. 2, 1861, ch. 117, 12 Stat 239.

An act to provide a temporary government for the Territory of Dakota, which effectively split the area that is now Wyoming in half between Nebraska Territory and the newly created Dakota Territory. Established physical boundaries, declared that the rights of Indians would not be impaired, and vested power in the governor and legislative assembly.

- Act of May 26, 1864, ch. 155, 13 Stat 92.

Provided a temporary government for the Territory of Montana, re-established the Dakota Territory, and redefined Idaho Territory outside of Wyoming borders.

Session Laws and Journals

- GENERAL LAWS, MEMORIALS AND RESOLUTIONS OF THE TERRITORY OF DAKOTA, PASSED AT THE . . . SESSION OF THE LEGISLATIVE ASSEMBLY, COMMENCED AT THE TOWN OF YANKTON, MARCH 17, AND CONCLUDED MAY 15, 1862. TO WHICH ARE PREFIXED A BRIEF DESCRIPTION OF THE TERRITORY AND ITS GOVERNMENT, THE CONSTITUTION OF THE UNITED STATES, THE DECLARATION OF INDEPENDENCE, AND THE ACT ORGANIZING THE TERRITORY (1862).

Title varies slightly. Session laws from 1862-1868 are relevant to Wyoming (1st through 8th Sessions). In the 1863 Session, a justice code was enacted and the code of civil procedures was adopted from Ohio. By 1865, new civil and criminal codes written by the New York Commission were adopted. The first Dakota code was compiled in 1877, after Dakota statehood.

- COUNCIL JOURNAL OF THE . . . SESSION OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY (1862-).

- HOUSE JOURNAL OF THE . . . SESSION OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF DAKOTA (1862-).

Reporters and Digests

- REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE TERRITORY OF DAKOTA, FROM ITS ORGANIZATION TO AND INCLUDING THE DECEMBER TERM, 1877 (1879).

Includes Wyoming cases to 1868; also available online through LLMC Digital.

- JOSEPH HENRY HILL, DIGEST OF THE DECISIONS OF DAKOTA, NORTH DAKOTA, AND SOUTH DAKOTA AND OF ALL FEDERAL DECISIONS IN DAKOTA CASES FROM THE ORGANIZATION OF DAKOTA TERRITORY DOWN TO AND INCLUDING VOL. 93 NORTHWESTERN REPORTER, WITH ALL THEIR CITATIONS BY STATE, FEDERAL, OR TERRITORIAL COURTS (1903-1918).

- CALLAGHAN'S DAKOTA DIGEST: A COMPLETE DIGEST OF DECISIONS OF THE SUPREME COURTS OF NORTH AND SOUTH DAKOTA, AND DAKOTA TERRITORY, AND ALL FEDERAL DECISIONS PASSING ON QUESTIONS OF LOCAL LAW (William H. Mason, ed., 1930).

Secondary Sources

- GEORGE W. KINGSBURY, HISTORY OF DAKOTA TERRITORY (1915).

- HERBERT SCHELL, HISTORY OF SOUTH DAKOTA (2nd ed. rev., 1968).

Idaho Territory, 1863-1864

Relevant Federal Laws

- Act of Mar. 3, 1863, ch. 117, 12 Stat. 808.

An act to provide a temporary government for the Territory of Idaho, eliminating Dakota, Nebraska, and Washington (formerly Oregon Country) Territories and the Mexican cession from the area that is to become Wyoming Territory.

Session Laws and Journals

- LAWS OF THE TERRITORY OF IDAHO, FIRST SESSION (1864).

- JOURNAL OF THE FIRST SESSION OF THE HOUSE OF REPRESENTATIVES, IDAHO TERRITORY (1864).

- JOURNAL OF THE FIRST SESSION OF THE COUNCIL OF IDAHO

TERRITORY (1864).

Governors' messages are also included in the *Journals of the Assembly*.

Codes

- IDAHO CODE ANNOTATED (LexisNexis).

Table in volume one, "Acts of Congress Affecting the Territory and State of Idaho," (p. 517-522 in the 2004 edition) lists selected federal acts affecting Idaho from 1818-1978.

Reporters and Digests

1 Idaho Reports begins with the January 1866 term after Wyoming had been rejoined with the Dakota Territory.

Oregon Country, 1846-1848

The Oregon Country was hotly contested among European powers. Through successive joint occupancy treaties, the crest of the Rocky Mountains was eventually set as the eastern boundary. That part of Oregon Country that was situated within Wyoming was that which lay west of the Continental Divide and north of forty-two degrees north latitude, most of current-day Teton and Sublette counties.

The United States' presence in the Northwest began to grow after the Lewis and Clark Expedition. The Northwest was opening to commerce as John Jacob Aster's Pacific Fur Company established the first American settlement at Fort Astoria in 1811. With a growing presence of Americans in the region, the populace began petitioning Congress for recognition. For several years Congress was hesitant to address their petitions, in part due to the extensive diplomatic efforts that would be required with Russia and Britain.

Finally, Americans in Oregon Country set up their own provisional government in 1843, for the most part adopting the Iowa Territorial Statutes as their laws. Controversy followed. The new statutes claimed jurisdiction over the entire region of the Oregon Country covered under joint occupancy treaties with England, "until such time as the United States of America extend their jurisdiction over us."[31] The Organic Laws themselves proved to be a problem. The Organic Laws of 1843 had, in some instances, adopted large portions of the

[31] BROWN, *supra* note 11, at 81.

Iowa Territorial Statutes en masse. In trying to amend these laws, it was debated whether they constituted a constitution or statutes, which, to some, meant that change without a proper amendment process was revolutionary.[32] Until 1848 and the U.S. Congress' organization of the Territory of Oregon, the Oregon Country had no officially recognized government.

Provisional Government's Laws

- STATUTE LAWS OF THE TERRITORY OF IOWA, ENACTED AT THE FIRST SESSION OF THE LEGISLATIVE ASSEMBLY OF SAID TERRITORY, HELD AT BURLINGTON, A.D. 1838-39 (Du Buque, Russell and Reeves, Printers, 1839).

These statutes are what were to become known as the "Little Blue Book" that governed Oregon Country throughout the provisional government and were still in force in the early days of the territory as the 1848 Organic Act did not repeal them.[33]

- LA FAYETTE GROVER, THE OREGON ARCHIVES, INCLUDING THE JOURNALS, GOVERNOR'S MESSAGES AND PUBLIC PAPERS OF OREGON (1853).

First publication of papers of the provisional government, including minutes, reports, resolutions, journals, statutes, and Organic Laws of 1843.[34]

- David C. Duniway & Neil R. Riggs, *The Oregon Archives, 1841-1843*, 60 OR. HIST. Q. 211 (1959).

Updating Grover's collection, including the Organic Law of 1844, this article includes texts of documents for establishing and maintaining the provisional government from 1841-1843. The authors attempted to reproduce lost records by using other publications and personal recollections. The initial comments are followed by sixty-four pages of minutes, reports, and other documents with annotations.

- OREGON ACTS AND LAWS PASSED BY THE HOUSE OF REPRESENTATIVES AT A MEETING HELD IN OREGON CITY, AUGUST, 1845 (1921).

Unofficial publication of the 1845 provisional government's enacted laws.

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[32] Stephens, *supra* note 12, at 961.

[33] *Id.* at 974.

[34] Compiled pursuant to An Act to Provide for the Collection and Publication of the Laws and Archives of Oregon, 1852-1853 *Laws of Oregon* 65-66 [1853]; Stephens, *supra* note 12, at 963.

- LAWS OF A GENERAL AND LOCAL NATURE PASSED BY THE LEGISLATIVE COMMITTEE AND LEGISLATIVE ASSEMBLY, AT THEIR VARIOUS SUCCESSIVE SESSIONS FROM THE YEAR 1843, DOWN TO AND INCLUSIVE OF THE SESSION OF THE TERRITORIAL LEGISLATURE, HELD IN THE YEAR 1849, EXCEPT SUCH LAWS OF SAID SESSION AS WERE PUBLISHED IN THE BOUND VOLUME OF OREGON STATUTES, DATED OREGON CITY, 1851 (1853).

Compilation of statutes of the provisional government still in effect under the 1848 Organic Act plus three acts from the territorial session: an act to provide for a special term of the Supreme Court; an act to establish a seminary in Washington County; and an act to enact and cause to be published a code of laws. Does not include Organic Laws of 1843 and 1845; includes laws from 1844-1846, 1849.

Oregon Territory, 1848-1859

Relevant Federal Laws

- Act of Aug. 14, 1848, ch. 177, 9 Stat. 323.

Organic Act establishing Oregon Territory and recognizing the laws of the provisional government.

Session Laws and Journals

- ACTS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF OREGON, PASSED AT THEIR SESSIONS, BEGUN AND HELD AT OREGON CITY, IN JULY 1849, AND MAY 1850 (1850).

First collection of Oregon laws known as "Twenty Acts" and viewed as a handbook of the most important statutes in force.

- STATUTES OF A GENERAL NATURE PASSED BY THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF OREGON: AT THE SECOND SESSION, BEGUN AND HELD AT OREGON CITY, DECEMBER 2, 1850 (1851).

First publication of the 1845 Organic Law and all the laws of the session from 1849 through December, 1850. Those not included were considered to be repealed through implication. Known as "Hamilton's Code" after the territorial secretary.

- LAWS OF A GENERAL AND LOCAL NATURE OF THE TERRITORY OF OREGON; PASSED BY THE LEGISLATIVE ASSEMBLY (1852).

Title varies slightly. Laws published for 1851 until statehood.

- JOURNAL OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF OREGON, FIRST-TENTH REGULAR SESSIONS AND SPECIAL SESSIONS, 1849-1859 (1851-1859).

Title and content vary.

Codes

- REVISED STATUTES OF THE TERRITORY OF IOWA, REVISED AND COMPILED BY A JOINT COMMITTEE OF THE LEGISLATURE—SESSION 1842-43 (1843).

Known as the "Big Blue Book," this is a collection of 162 statutes, 72 of which were adopted with amendments by the First Legislative Assembly of the Territory of Oregon. This "Chapman Code" was never published as the act required. Controversy arose over the fact that these laws were adopted in groups, violating the "one object" rule of the 1848 Organic Law.[35]

- REPORT OF THE COMMISSIONERS ELECTED TO PREPARE A CODE OF LAWS FOR THE TERRITORY OF OREGON (1853).

Draft of the "Kelly Code," enacted the following year.

Reporters and Digests

- OREGON SUPREME COURT RECORD: AN ORIGINAL PRINTING OF CASES AND OTHER MATTER CONTAINED IN A MANUSCRIPT LABELED BOOK 1, 1844-1848 (1938).

Includes cases, petitions, court rules, and other documents.

- RECORDS OF THE SUPREME COURT, DECEMBER TERM 1851 AND 1852: SUPREME COURT RECORD BOOK NO. 2

Not decisions, but rather brief case information, available at the State of Oregon Law Library.

- REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE TERRITORY OF OREGON AND OF THE STATE OF OREGON (1862).

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[35] *Id.* at 974.

First volume of Oregon Reports, containing territorial supreme court cases from 1853-1858 and state supreme court and federal district court cases from 1859-1861.

- HOUSE JOURNAL AND COUNCIL JOURNAL, 5th-8th Sessions.

Territorial cases were published as appendices in these journals.

Washington Territory, 1859-1861; 1861-1863

The people of the Territory of Oregon north of the Columbia River requested their own territory in accordance with the Northwest Ordinance, and in 1853 Congress established the Washington Territory. Upon creation, the borders of both Washington and Oregon Territories stretched to the summit of the Rocky Mountains, with Wyoming still located within Oregon Territory. When Oregon became a state in 1859 and its state boundaries were drawn, that portion of the territory that was no longer within Oregon's boundaries, which now included a small portion of Wyoming's western border, was added to Washington Territory. In 1861, Washington Territory within Wyoming was reduced by the expansion of the Nebraska Territory, and when the Idaho Territory was created in 1863, it included the portion of Wyoming that had been part of Washington, bringing to an end any territorial relationship with the Pacific Northwest.

Relevant Federal Laws

- Act of Mar. 2, 1853, ch. 90, 10 Stat. 172.

An act to establish the Territorial Government of Washington.

- Act of Mar. 3, 1863, ch. 117, 12 Stat. 808.

An act to provide a temporary government for the Territory of Idaho, establishing Washington's eastern boundary, and moving the west-central portion of Wyoming into Idaho territory.

Session Laws and Journals

- LAWS OF WASHINGTON: A PUBLICATION OF THE SESSION LAWS OF WASHINGTON TERRITORY, INCLUDING THE GENERAL LAWS AND RESOLUTIONS OF THE YEARS 1854 TO 1888 INCLUSIVE; THE FEDERAL AND COLONIAL ORDERS, TREATIES, ACTS AND ORDINANCES AFFECTING LAND TITLES IN WASHINGTON (1896).

Volume 1, 1854-1861-2; Volume 2, 1862-3 to 1867-8; Volume 3, 1869-1875; Volume 4, 1877-1887-8; Volume 5, Code of 1881.

- ACTS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF WASHINGTON, PASSED AT THE . . . REGULAR SESSION, BEGUN AND HELD AT OLYMPIA, DECEMBER . . . , IN THE . . . YEAR OF AMERICAN INDEPENDENCE (1854-).

Publisher and title vary slightly.

- INDEX TO THE LAWS, MEMORIALS AND RESOLUTIONS PASSED BY THE WASHINGTON TERRITORIAL LEGISLATURE, 1853-1887 (1993).

- INDEX, LAWS OF WASHINGTON, INCLUDING ALL THE GENERAL, LOCAL AND PRIVATE LAWS, MEMORIALS AND RESOLUTIONS. ALSO MISCELLANEOUS LAWS AFFECTING LAND TITLES, 1854-1897 (1898).

- JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE TERRITORY OF WASHINGTON: TOGETHER WITH THE MEMORIALS AND JOINT RESOLUTIONS OF THE . . . SESSION OF THE LEGISLATIVE ASSEMBLY, BEGUN AND HELD AT OLYMPIA (1855-).

Title and publisher vary slightly.

- JOURNAL OF THE COUNCIL OF THE TERRITORY OF WASHINGTON: TOGETHER WITH THE MEMORIALS AND JOINT RESOLUTIONS OF THE . . . LEGISLATIVE ASSEMBLY, BEGUN AND HELD AT OLYMPIA (1855-).

Title and publisher vary slightly.

- DAVID W. HASTINGS, LEGISLATIVE RECORDS OF WASHINGTON, 1854-1983 (1984).

Describes contents of legislative committee archives; laws, memorials, resolutions, petitions, and fiscal records.

Codes

- STATUTES OF THE TERRITORY OF WASHINGTON, BEING THE CODE PASSED BY THE LEGISLATIVE ASSEMBLY, AT THEIR FIRST SESSION BEGUN AND HELD AT OLYMPIA, FEBRUARY 28TH, 1854 (1885).

Referred to as "Code of 1854."

- T.O. ABBOTT, REAL PROPERTY STATUTES OF WASHINGTON TERRITORY, FROM 1843 TO 1889, COMPRISING THE LAWS AFFECTING REAL PROPERTY ENACTED BY THE LEGISLATIVE COMMITTEE AND LEGISLATIVE ASSEMBLY OF OREGON TERRITORY PREVIOUSLY TO 1853, INCLUDING THE STATUTES OF IOWA OF 1839 AND 1843, TOGETHER WITH THE ORGANIC ACTS, ENABLING ACT, STATE CONSTITUTION AND TREATIES, PROCLAMATIONS AND SPECIAL LAWS OF CONGRESS, SUCH AS THE DONATION ACTS, RAILROAD GRANT AND OTHER PRIVATE ACTS, INDIAN TREATIES, EXECUTIVE ORDERS, ETC. (1892).

Reporters and Digests

- OPINIONS OF THE SUPREME COURT OF THE TERRITORY OF WASHINGTON, IN CASES ARGUED AND DETERMINED IN SAID COURT, FROM ITS ORGANIZATION TO THE TERM ENDING JANUARY 29, 1864 (1864).

- REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE TERRITORY OF WASHINGTON, FROM 1854 TO 1879 (1879).

- INDEX-DIGEST OF THE WASHINGTON REPORTS EMBRACING ALL THE DECISIONS OF THE SUPREME COURT OF WASHINGTON FOUND IN THE TERRITORIAL REPORTS AND IN THE STATE REPORTS FROM VOLUME ONE TO VOLUME NINE INCLUSIVE (J.E. Horan, comp., 1895).

- DIGEST OF THE DECISIONS OF THE TERRITORIAL AND STATE SUPREME COURTS, CONSTRUING THE CONSTITUTION AND LAWS OF THE STATE OF WASHINGTON TO SEPTEMBER 8, 1903 (Frank Pierce, comp., 1903).

- DIGEST OF THE REPORTS OF THE SUPREME COURT OF WASHINGTON AS REPORTED IN VOLUMES ONE TO TWENTY-FOUR INCLUSIVE AND THREE TERRITORIAL REPORTS. (A.L. Miller, comp., 1903).

- DIGEST OF THE DECISIONS OF THE SUPREME COURT OF WASHINGTON, COVERING ALL CASES IN THE THREE WASHINGTON TERRITORIAL REPORTS AND VOLUMES ONE TO ONE HUNDRED AND THREE OF WASHINGTON REPORTS, WITH ANNOTATIONS TO THE CENTURY DIGEST, DECENNIAL DIGEST, CIRCUIT COURT OF APPEALS REPORTS, AMERICAN DECISIONS, AMERICAN REPORTS, AMERICAN STATE REPORTS, AMERICAN ANNOTATED CASES, LAWYERS REPORTS ANNOTATED, ETC. (Arthur Remington, comp., 1919-26).

Other Court Documents

- Briefs: see the University of Washington Gallagher Law Library for materials submitted to the Supreme Court of Washington Territory.

- FRONTIER JUSTICE: GUIDE TO THE COURT RECORDS OF WASHINGTON TERRITORY, 1853-1889 (1987).

In print and microform.

- WASHINGTON TERRITORIAL SUPREME COURT, 1853-1889 (Pat Hopkins, comp., 1983).

Archival papers.

Executive

- MESSAGES OF THE GOVERNORS OF THE TERRITORY OF WASHINGTON TO THE LEGISLATIVE ASSEMBLY, 1854-1889 (Charles M. Gates, ed., 1940).

- WASHINGTON TERRITORIAL DAYBOOK.

Two microfilm reels from the Washington State Archives that contain day-to-day records of governors' official acts from 1856-1864 and 1880-1884.

- GOVERNOR'S PAPERS.

Microfiche from the Washington State Archives of governor's papers for McMullen, 1857-1859, and Gholson, 1859-1861.

General References

- REFERENCE LIST OF PUBLIC DOCUMENTS 1854-1918 FOUND IN THE FILES OF THE STATE LIBRARY (1920).

Covers publications of state departments and institutions; legislature, courts, and governors' correspondence to the U.S. Department of the Interior.

- FINDING AIDS AND MICROFILM AVAILABLE FROM THE WASHINGTON STATE ARCHIVES: GUIDES TO ARCHIVAL RECORDS, INDEXES, DOCUMENT FACSIMILES, MICROFILM (2000), http://www.secstate.wa.gov/archives/pubs/publist.pdf.

Identifies guides and indexes to materials in the archives.

- HISTORICAL RECORDS OF WASHINGTON STATE: GUIDE TO RECORDS IN STATE ARCHIVES AND ITS REGIONAL DEPOSITORIES (David Hastings & Timothy Eckert, eds., 1981).

- WASHINGTON TERRITORIAL GOVERNMENT PAPERS, 1853-1875, AT THE UNIVERSITY OF WASHINGTON LIBRARIES (1965).

A guide to archival collections of the library that contain records of the territorial government of Washington.

Republic of Texas, 1835-1845; State of Texas, 1845-1850

Until Mexico seceded from Spain in 1821, Texas was a Spanish province, ruled by governors appointed by the viceroy of Mexico and sanctioned by the king of Spain.[36] After Mexico won independence, Texas became one of the states of the Republic of Mexico, and in 1824, Texas was joined with Coahuila to form the state of Coahuila-Texas. Unhappy with the new constitution, Texas declared independence and established a provisional government in 1835. There followed the Texas War of Independence, ending in 1836 with Texas seceding from the Republic of Mexico and forming its own country, the Republic of Texas, under the Treaties of Velasco.

The Republic of Texas claimed as its boundaries the land to the source of the Rio Grande River, which followed along the Continental Divide up to forty-two degrees latitude, the northernmost tip of Texas thus taking a small chunk out of the south central border into what is now Wyoming's Carbon County. This piece of land remained part of Texas when it joined the Union in 1845. In 1850, the United States redrew the border of Texas and purchased this land from them at which time that portion in Wyoming east of the Continental Divide was added to Indian Country and west of the Divide became part of Utah Territory.[37]

Texas was an independent nation for nine years until applying for statehood to the United States. The civil law of Spain remained in force in Texas until the adoption of the English common law and some elements of English criminal law, with amendments, in 1840.[38]

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[36] D.W.C. BAKER, A BRIEF HISTORY OF TEXAS FROM ITS EARLIEST SETTLEMENT 26-27 (1873).

[37] Trenholm, *supra* note 20, at 47.

[38] A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY: SOURCES AND DOCUMENTATION 1 (Karl T. Gruben & James E. Hambleton, 2nd ed., 1987).

Relevant Republic of Texas Laws

- ORDINANCES AND DECREES OF THE CONSULTATION AT SAN FELIPE, *reprinted in* 1 H.P.N. GAMMEL, THE LAWS OF TEXAS, 1822-1897 (1900-).

Established the provisional government in 1835. This is considered the first Texas legal document.[39]

- A DIGEST OF THE GENERAL STATUTE LAWS OF THE STATE OF TEXAS: TO WHICH ARE SUBJOINED THE REPEALED LAWS OF THE REPUBLIC AND STATE OF TEXAS, BY THROUGH, OR UNDER WHICH RIGHTS HAVE ACCRUED; ALSO, THE COLONIZATION LAWS OF MEXICO, COAHUILA AND TEXAS, WHICH WERE IN FORCE BEFORE THE DECLARATION OF INDEPENDENCE BY TEXAS (1859).

This resource includes An Act to Define the Boundaries of the Republic of Texas, Dec. 19, 1836.

- Republic of Texas, Act of the Ninth Congress, Special Session, June 23, 1845, ch. 19, art. 1531.

Joint resolution giving the consent of the existing government to the annexation of Texas to the United States.[40]

Relevant Federal Laws

- Act of Mar. 1, 1845, 5 Stat. 797.

Joint resolution no. 8 of the House and Senate for the annexation of Texas. The vote was closer than expected: 120-98 in the House and 27-25 in the Senate.[41]

- Act of Sept. 9, 1850, ch. 49, 9 Stat. 446.

An act to re-establish the northern and western boundaries of Texas by purchase of the panhandle (northern portion) of Texas.

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[39] *Id.* at 3.

[40] SAYLES, *supra* note 16, at 567.

[41] Trenholm, *supra* note 20, at 20.

Constitutions

- JOURNALS OF THE CONVENTION, ASSEMBLED AT THE CITY OF AUSTIN ON THE FOURTH OF JULY, 1845, FOR THE PURPOSE OF FRAMING A CONSTITUTION FOR THE STATE OF TEXAS (1845).

- JOHN SAYLES, THE CONSTITUTIONS OF THE STATE OF TEXAS (4th ed., 1893).

Includes constitutions and background documents for the Constitution of the Republic of Texas and Constitution of the State of Texas.

- University of Texas School of Law, The Texas Constitutions Digitization Project, http://tarlton.law.utexas.edu/constitutions/index2.html.

Session Laws and Codes

- H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897 (1898).

Volumes 1 through 10 are online at http://texinfo.library.unt.edu/lawsoftexas/default.htm. Original copies of session laws for the republic and the state are rare. This set serves as the standard source. An index, *Index to Gammel's Laws of Texas 1822-1905*, was published in 1906.

- LAWS OF THE REPUBLIC OF TEXAS (1838-1845).

Available in microform in *Texas Session Laws of American States and Territories*.

- GEORGE W. PASCHAL, A DIGEST OF THE LAWS OF TEXAS (4th ed., 1873-74).

First printing of annotated laws; includes laws promulgated between 1754 and 1873.

- JOHN SAYLES & HENRY SAYLES, EARLY LAWS OF TEXAS (1888).

General laws from 1836-1879; laws of 1731-1835 as found in the laws and decrees of Spain relating to Land in Mexico, and of Mexico relating to colonization; Laws of Coahuila and Texas; Laws of Tamaulipas; Colonial Contracts; Spanish Civil War; Orders and Decrees of the Provisional Government of Texas.

Reporters and Digests

- JAMES WILLIAM DALLAM, OPINIONS OF THE SUPREME COURT OF TEXAS FROM 1840 TO 1844 INCLUSIVE (1883).

The first cases were heard in the Supreme Court of Texas in 1840. There was no official publication of decisions, but this is the unofficial reporter of cases from the Supreme Court of the Republic of Texas, with index to cases. Considered part two of Dallam's digest; part one, *Digest of the Laws of Texas*, was the original publication that compiled Supreme Court decisions. However, the language of the decisions was paraphrased and the collection was incomplete. The *Opinions* take up page numbering where the *Digest* left off.

- James Hambleton & David A. Greenblatt, *Better Late Than Never: Publication of the Decisions from the 1845 Term of the Republic of Texas Supreme Court*, 50 TEX. BAR J. 664 (1987).

There may have been an expectation that Texas would join the Union earlier than it did, and the compilation of decisions from the Supreme Court of the Republic of Texas was completed before the last term of the court actually ended. It was a century before the cases from the final session were compiled and first published in this article.[42]

- TEXAS REPORTS (1847-1962).

Though this title began in 1846, decisions from 1860 and 1861 were never published as part of this set and can be found in 25 *Texas Supplement*, published specifically to cover these cases.

- WILLIAM ALEXANDER, DIGEST OF THE DECISIONS OF THE SUPREME COURT OF TEXAS (1854).

Digest of cases of the Supreme Court of Texas and Supreme Court of the Republic of Texas.

- GEORGE W. PASCHAL, A DIGEST OF DECISIONS (1872).

Digests decisions of the supreme courts of Texas and Republic of Texas.

- WALTER MALINS ROSE, NOTES ON TEXAS REPORTS: A CHRONOLOGICAL SERIES OF ANNOTATIONS (1902).

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[42] Brandon D. Quarles & Matthew C. Cordon, *Texas Pre-statehood Legal Materials, in* 2 PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA 1395 (Michael Chiorazzi & Marguerite Most, eds., 2005).

Annotations to Texas cases in chronological order, including Supreme Court of the Republic of Texas.

Court Rules

- TEXAS REPORTS (1847-).

Reports of cases argued and decided in the supreme court of the state of Texas. Cases argued and decided in the supreme court of the state of Texas. Reprinted in *Texas Law Review*, December 1986.

General References

- D.W.C. BAKER, A BRIEF HISTORY OF TEXAS FROM ITS EARLIEST SETTLEMENT (1873).

- A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY: SOURCES AND DOCUMENTATION (Karl T. Gruben & James E. Hambleton, 2nd ed., 1987).

Unorganized (Mexico), 1848-1850

That portion of what had been Mexico before the Treaty of Guadalupe Hidalgo in 1848 was left unorganized until 1850 when it was absorbed by the Territory of Utah. However, from 1821 when Mexico seceded from Spain until 1848, this area was under Mexican rule, and before that time, it was claimed by Spain. (See the discussion of laws of foreign countries above for relevant laws of the period).

Utah Territory, 1850-1868

Utah became a territory on September 30, 1850, already with a fully-functioning provisional government established as the "State of Deseret." The portion of Wyoming that was part of Utah Territory is the southwest corner of the state from Carbon County to the western border, that which had been ceded from Mexico and Texas. The history of Utah cannot be separated from the history of the Mormon Church, a fact that lengthened the territorial and statehood application process. The federal legislature resisted Utah's requests to form a territory and refused to accept its constitution until it was clear that polygamy would not be tolerated.

Relevant Federal Laws

- Act of Sept. 9, 1850, ch. 51, 9 Stat. 453.

This act established the territory of Utah.

- Act of July 1, 1862, ch. 126, 12 Stat. 501.

"An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States and Other Places, and Disapproving and Annulling Certain Acts of the Legislative Assembly of the Territory of Utah," specifically those regarding polygamy and incorporation of The Church of Jesus Christ of Latter-Day Saints. It also restricts the church's ownership of property.

Constitutions

It took seven attempts at a constitution by the government of Deseret before the U.S. Congress accepted it and granted statehood. Long before Utah's Constitution was accepted (1890), Wyoming had become a territory of its own. Only the first, second, and third attempts were relevant to the time period during which Wyoming was part of the territory. In fact, the constitutions of both Wyoming and Utah at the time of statehood had provisions for women's suffrage, Wyoming being admitted to the Union just months before Utah.

- CONSTITUTION OF THE STATE OF DESERET: WITH THE JOURNAL OF THE CONVENTION WHICH FORMED IT, AND THE PROCEEDINGS OF THE LEGISLATURE CONSEQUENT THEREON (1849).

Based in part on the Iowa Constitution of 1846 and the Illinois Constitution of 1818.

- LETTER OF THE DELEGATE OF THE TERRITORY OF UTAH IN CONGRESS, ENCLOSING THE MEMORIAL OF DELEGATES OF THE CONVENTION WHICH ASSEMBLED IN GREAT SALT LAKE CITY, AND ADOPTED A CONSTITUTION WITH A VIEW TO THE ADMISSION OF UTAH INTO THE UNION AS A STATE, TOGETHER WITH A COPY OF THAT CONSTITUTION (1858).

The second constitution, it was never presented to Congress "due to the hostile atmosphere generated by the practice of polygamy and the unsettled political temper of the times caused by the slavery controversy."[43]

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[43] John Flynn, *Federalism and Viable State Government—The History of Utah's Constitution*, 10 UTAH L. REV. 311, 316 (1966).

- CONSTITUTION OF THE STATE OF DESERET: MEMORIALS OF THE LEGISLATURE AND CONSTITUTIONAL CONVENTION OF UTAH TERRITORY, PRAYING THE ADMISSION OF SAID TERRITORY INTO THE UNION AS THE STATE OF DESERET: JUNE 9, 1862: REFERRED TO THE COMMITTEE ON TERRITORIES, AND ORDERED TO BE PRINTED (1862).

Third constitution, differing from the first two only in organization and incidentals.

- PROPOSED STATE OF DESERET. MEMORIAL OF THE LEGISLATIVE ASSEMBLY OF THE PROPOSED STATE, FOR THE ADMISSION OF THE STATE OF DESERET INTO THE UNION AND ACCOMPANYING PAPERS (1867).

Not generally considered the fourth constitution as it was legislative and not the result of a constitutional convention. It took Utah four more attempts to get Congress to approve its constitution, long after Wyoming had become a territory of its own.

Session Laws and Journals

- ACTS, RESOLUTIONS AND MEMORIALS, PASSED BY THE FIRST ANNUAL AND SPECIAL SESSIONS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF UTAH, BEGUN AND HELD AT GREAT SALT LAKE CITY, ON THE 22ND DAY OF SEPTEMBER, A.D., 1851, ALSO THE CONSTITUTION OF THE UNITED STATES AND THE ACT ORGANIZING THE TERRITORY OF UTAH (1852).

Title and publisher vary.

- JOURNALS OF THE HOUSE OF REPRESENTATIVES, COUNCIL, AND JOINT SESSIONS OF THE . . . ANNUAL AND SPECIAL SESSIONS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF UTAH, HELD AT GREAT SALT LAKE CITY.

Title and publisher vary slightly. Journals of House and Senate were published together until 1880. The fifth session, 1855-56, is not extant, and the seventh session, 1857-58, was published as an article in 1956 and bound separately.[44]

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[44] Robert Lee Warthen, *Legal Research in the State of Deseret and the Utah Territory, 1847-1896*, *in* 2 PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA 1248. (Michael Chiorazzi & Marguerite Most, eds., 2005).

- TERRITORIAL LEGISLATIVE RECORDS, 1851-1894.

Available from the Utah State Archives, series 03150, these include acts, bills, resolutions, memorials, and petitions of the first through thirty-first sessions of the Assembly.

Codes

- ORDINANCES PASSED BY THE GENERAL ASSEMBLY OF THE STATE OF DESERET (1851).

Full compilation of all the laws of the State of Deseret as of 1851, also available in microform.

- ACTS AND RESOLUTIONS PASSED AT THE . . . ANNUAL SESSION OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF UTAH (1852-).

Title and publisher vary slightly. Codes are published for the 1852, 1855, and 1866 congresses while Wyoming is part of the territory.

Reporters and Digests

- REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE TERRITORY OF UTAH, FROM THE ORGANIZATION OF THE TERRITORY, UP TO AND INCLUDING THE JUNE TERM, 1876 (Albert Hagan, ed., 1877).

Volume one of Utah Reports, this contains only a few decisions prior to 1873.

- JUDSON S. RUMSEY, A DIGEST OF DECISIONS OF THE SUPREME COURT OF UTAH: REPORTED IN VOLUMES 1 TO 36 INCLUSIVE: TOGETHER WITH CROSS-REFERENCES, AFFIRMANCES AND REVERSALS BY THE UNITED STATES SUPREME COURT, PARALLEL CITATIONS TO THE NATIONAL REPORTER SYSTEM AND MORRISON'S MINING REPORTS. LIST OF FORMS FOUND IN THE OPINIONS, TABLE OF CASES, AND COURT RULES (1912).

Executive

- MESSAGES TO THE LEGISLATURE (1851-).

Utah State Archives. Governors' messages to the legislature.

- EXECUTIVE RECORD BOOKS (1850-1949).

Official acts of the governor, housed at the Utah State Archives.

- LETTERBOOK [OF GOVERNOR BRIGHAM YOUNG, 1850-1857] 1853-1857.

Outgoing correspondence of Governor Young, housed at the Utah State Archives.

Secondary Sources

- HUBERT H. BANCROFT, HISTORY OF UTAH, 1540-1886 (1889).

Some details about early legal and political institutions within the Territory and State of Utah.

- Leland H. Creer, *The Evolution of Government in Early Utah*, 26 UTAH HIST. Q. 23 (1958).

Wyoming Territory, 1868-1890[45]

The Organic Act[46] to establish the government for the Territory of Wyoming was approved by President Johnson on July 25, 1868. Immediately, the new territory became a pawn to the feuding politicians in Washington and was not officially organized until May of 1869. The territorial government was formally inaugurated when the governor, the secretary of the territory, the chief justice, and two associate justices were appointed on April 7, 1869, by the President with the consent of the Senate, and organization of the territory was not completed until the last officer qualified by taking his oath of office on May 15, 1869.[47]

This situation left Wyoming without a legal government for ten months. According to the Organic Act, the laws of Dakota Territory (except the mining laws) were in effect until the Legislative Assembly of the Wyoming Territory should repeal them, which was not possible until the governor was able to arrange for a census, establish voting districts, and call for an election, which, of course, was not possible until a governor was appointed.

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[45] See Part I, 7 WYO. L. REV. 49 (2007) for basic primary materials on Wyoming's territorial and statehood process.

[46] Act of June 25, 1868, ch. 235, 15 Stat. 178.

[47] Trenholm, *supra* note 20, at 83-84.

Relevant Federal Laws

- H.R. 633, 38th Cong. (1865).

Act for the temporary government of the Territory of Lincoln. The Act was read a first and second time, but not reported out of the Committee on Territories.

- H.R. 86 40th Cong. (1867).

Act for the temporary government for the Territory of Lincoln (Wyoming). Discharged from consideration by the Committee on Territories.

- H.R. 540, 40th Cong. (1868).

Act for the temporary government of the Territory of Wyoming. The Act was read first and second time, but not reported out of the Committee on Territories.

- S. 357 40th Cong. (1868).

Passed by Senate June 3; passed by the House on July 23, and signed by the President on July 25.

- INDEX OF THE HISTORICAL MATERIAL CONCERNING THE STATE OF WYOMING AS FOUND IN THE CONGRESSIONAL DOCUMENTS, 1803-1936, ALSO MAPS SHOWING BOUNDARY DEVELOPMENTS OF WYOMING 1609-1931 (Marie H. Erwin, comp., 1937).

Volume one is an alphabetical index; volume two is organized by series; volume three by congressional session, and volume four contains maps. Includes American State Papers, Indian affairs, military affairs, expeditions to the Rockies, defense of frontier, wagon roads, and treaties. The author includes some materials covering territories to which Wyoming belonged before it became its own territory.

Executive

The salary of a territorial governor was set by the Organic Act of a territory and varied throughout the years as the federal legislature altered its appropriations. For instance, in 1876, the salaries of the governor and justices were $3,000 per year;[48] in the next appropriation bill, the salaries were lowered to $2,600 per year.[49] However, up until 1876 it was common for the governor of a territory to

[48] Act of Aug. 15, 1876, ch. 287, 19 Stat. 159.

[49] Act of Mar. 3, 1877, ch. 102, 19 Stat. 309.

be appointed as the Superintendent of Indian Affairs of the Territory and, as such, to receive extra salary for the duties. The governor of a territory was frequently not a resident of the area, the position usually being awarded to political allies of the current president. In Wyoming, as in many of the western territories, this was a source of frustration for the Legislative Assembly. Still, the task of the early steps of establishing a government fell to the governor as outlined in the Organic Act.

Governor Proclamations and Other Agency Documents

The Organic Act that established the territory listed certain powers and responsibilities of the governor, especially concerning the initial formation of the government. The governor was to direct the U.S. Marshal to take a census and apportion the state into legislative districts and judicial districts. After this, he was to call for an election to elect a delegate to the U.S. Congress and members to the Legislative Assembly, as well as designate election precincts, voter qualifications, and election rules. He was to specify when the First Legislative Assembly would convene, and the procedures to adopt a constitution. All of these functions were done through gubernatorial proclamations.

- GENERAL LAWS, MEMORIALS, AND RESOLUTIONS OF THE TERRITORY OF WYOMING, PASSED AT THE FIRST SESSION OF THE LEGISLATIVE ASSEMBLY (1870-).

The session laws of the First Legislative Assembly include gubernatorial proclamations from May 25, 1869, through November 11, 1869.

- COMPILED LAWS OF WYOMING INCLUDING ALL THE LAWS IN FORCE IN SAID TERRITORY AT THE CLOSE OF THE FOURTH SESSION OF THE LEGISLATIVE ASSEMBLY OF SAID TERRITORY, TOGETHER WITH SUCH LAWS OF THE UNITED STATES AS ARE APPLICABLE TO SAID TERRITORY; ALSO THE TREATIES MADE WITH THE SIOUX AND SHOSHONE TRIBES OF INDIANS IN THE YEAR 1868; WITH A SYNOPSIS OF THE PRE-EMPTION, HOMESTEAD AND MINING LAWS OF THE UNITED STATES (1876).

Includes proclamations by the governors from September 22, 1869 through November 12, 1875.

Executive Reports to the Federal Government

- TRANSCRIPTS OF EXECUTIVE PROCEEDINGS AND RELATED CORRESPONDENCE, 1878-1890.

NARA Record Group 48: Records of the Office of the Secretary of the Interior, 1826-1981, includes records of official acts of the Governor of Wyoming Territory and includes copies of proclamations, extradition orders, certificates of

reapportionment, writs for special elections, and lists of appointments for notaries public, commissioners of deeds, livestock commissioners, commissioners of the insane asylum, and other officials.

- OCCASIONAL REPORTS TO SECRETARY OF STATE AND DEPARTMENT OF INTERIOR FROM SURVEYOR GENERAL OF THE TERRITORY, 1870-1878.

- MEMORIAL TO THE PRESIDENT AND CONGRESS FOR THE ADMISSION OF WYOMING TERRITORY TO THE UNION (1889).

Executive Reports to Territory

- STATE OF THE STATE ADDRESS (1869-).

Title varies. See also *Message to the Legislature; Message to the Legislative Assembly of the State of Wyoming; Governor's Message to the Legislature*. Delivered biennially during the territorial period, these remarks of the Governor are also printed in the house journal for each legislative session.

Legislature

The Organic Act of the territory stipulated the setup of the legislature, as it did for the executive branch, according to a template used for most territories across the country. It set the number of members of each house of congress, their salaries and terms of office, times to convene, length of sessions, including special sessions (none were held in Wyoming), and officers of the congress. Once elected, the First Territorial Legislature assembled on December 10, 1869, repealed the Dakota Territory laws, and established new laws effective January 1, 1870.

The governor's message to the First Legislative Assembly asked the legislature to appoint a commission of chief justices and others to write a criminal and civil code.[50] The council responded to the governor stating a preference for a joint committee of the two houses to write the code rather than accepting the work of outsiders. They expected the task would not be overly labor-intensive, asking for up to five weeks, as it would be primarily a matter of "adopting as a basis codes of other states and territories."[51] The new laws established the election laws, civil and criminal code, and a variety of property and corporation issues.

At this same legislative session, the Secretary of the Territory responded to Council Resolution number 5, a request for copies of Law of Nevada[52] and

[50] 1869 COUNCIL J. 18.

[51] 1869 COUNCIL J. 39-40.

[52] 1869 COUNCIL J. 30.

copies of the Council Journals of the Territory of Colorado, Seventh Session, 1868 (Colorado's first compiled statutes were a result of this Seventh Legislative Session). A large number of the territorial criminal statutes were taken directly from the Indiana Statutes.[53] That legislative session also adopted the common laws of England, "as modified by judicial decisions prior to the fourth year of James I," with exceptions.[54] The laws were first compiled into a code in 1876, and again in 1887 when the statutes were adopted in their entirety and all laws not in the compilation were to be considered repealed.

The strain of governing under the eye of the federal government caused considerable frustration. Almost from the foundation of the territory, there were rumblings to push for statehood. Very shortly after being made a territory, the governors were requesting of the Secretary of the Interior in their annual reports that statehood be considered.[55]

Finally, without benefit of an enabling act from the federal government that would normally invite a territory to write a constitution and apply for statehood, a constitutional convention was called and a document written. After the drafting of the constitution, a committee was appointed to write an address to the people of Wyoming to urge adoption of the new constitution and to explain the decision to move the territory toward statehood. The introductory paragraph stated, "A Territory can not have a settled public policy. The fact that Congress may at any time annul its legislation on any matter of purely local concern prevents active co-operation by the people on those higher planes of public life . . . . For twenty years and more Wyoming has been laboring under the disadvantages of a Territorial form of government . . . . Territorial representation in Congress is a delusion—the Territories of these United States have no representation."[56]

- GENERAL LAWS, MEMORIALS, AND RESOLUTIONS OF THE TERRITORY OF WYOMING, PASSED AT THE FIRST SESSION OF THE LEGISLATIVE ASSEMBLY CONVENED AT CHEYENNE, OCTOBER 12, 1869, AND ADJOURNED SINE DIE, DEC. 11TH, 1869, TO WHICH ARE PREFIXED THE DECLARATION OF INDEPENDENCE, CONSTITUTION OF THE UNITED STATES, AND THE ACT ORGANIZING THE TERRITORY, TOGETHER WITH EXECUTIVE PROCLAMATIONS (1870).

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[53] Theodore E. Lauer, *Goodbye 3-Card Monte: The Wyoming Criminal Code of 1982*, 19 LAND & WATER L. REV. 107, 110 (1984).

[54] Act of Dec. 2, 1869, ch. 15, 1869 Wyo. Laws 291.

[55] Trenholm, *supra* note 20, at 83-84.

[56] Constitutional Convention Committee, Address to the People of Wyoming (Oct. 1, 1889) (unpublished manuscript, available at the University of Wyoming Law Library), *quoted in* GOODSPEED, *supra* note 2, at 373-74.

In 1869 the Territorial Assembly passed a law that increased the salary of an assemblyman by six dollars a day and the salary of the speaker of the house and president of the council by twelve dollars a day over the federal compensation of four dollars a day during session, which, of course, was beyond its authority.[57] Though the law was vetoed by the governor, it was passed over his veto, and in the end the courts had to declare the Wyoming law unconstitutional.[58]

- Act of Dec. 10, 1869, ch. 54, 1869 Wyo. Laws.

Set time to convene the Legislative Assembly for 1871 at the first Tuesday in November and every other year after 1871.

- Act of Dec. 2, 1873, ch. 27, 1873 Wyo. Laws.

The Territorial Assembly increased its membership to thirteen in the House and twenty-seven in the Council bringing the total to forty for the next legislative session, as allowed by the Organic Act. The U.S. Congress eventually changed the number of territorial legislators not to exceed twelve in the House and twenty-four in the Council, which remained in force until Wyoming became a state.[59]

- Act of Dec. 8, 1879, ch. 52, 1879 Wyo. Laws.

Changed the date to convene the Assembly to the second Tuesday in January, 1882, and every second Tuesday in January every two years thereafter, altering the sessions from even numbered years to odd numbered years. There were no legislative sessions held from the Sixth Assembly in November 1879 until the Seventh Assembly in January 1882.

- H.R.J. Res. 8, 10th Legislative Assembly (1888).

Requesting the governor take steps to obtain from Congress such legislation as would enable the people of the territory to form a constitution and state government.

Rules

Both Houses established a Committee on Rules during the First Territorial Legislative Session in October, 1869. The House of Representatives voted to adopt the standing rules of the State of Nebraska until the committee reported

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[57] Act of June 19, 1878, ch. 329, 20 Stat. 193. From 1873 to 1878, territorial assemblymen received six dollars a day, which was reduced again after 1878. Members of territorial legislatures were not allowed to receive any compensation other than from the U.S. Government.

[58] Trenholm, *supra* note 20, at 139.

[59] Act of June 19, 1878, ch. 329, 20 Stat. 193.

their standing rules on October 15, 1869. The council went without standing rules until October 15, declining to adopt the rules of the Legislative Assembly of Dakota. Cushing's *Manual of Parliamentary Practice* and Jefferson's *Manual of Parliamentary Practice* were adopted for rules of parliamentary practice, as well as occasional use of *Robert's Rules of Order*.[60]

Judicial

Before the organization of the Wyoming Territory, justice dispensed through the Dakota courts was irregular. Even within the main portion of the Dakota Territory, judges tended to be untrained, unpredictable, untimely, and generally were not in demand. In the first ever meeting of the territory's Supreme Court, none of the three justices appeared.[61] Under those conditions, there was little hope that judges riding the circuit to Cheyenne would be of much assistance.

Apparently, jurisdictional authority was not clear to the people of Cheyenne either. A local attorney writing in 1867 noted, "[t]here was very much doubt about it, some maintaining that we were in Colorado and others in Dakota."[62] Taking the problem into their own hands, the business and social leaders of the community established a provisional government with a police court for civil and criminal matters up to $2,000 and a superior court for matters over $2,000.[63] As most of the people in the new town came from Colorado, they had some copies of the statutes of Colorado with them, and so they were adopted so far as they were applicable.[64]

Punishment was difficult as there was no place to keep the convicted, and, for serious crimes, the provisional government laws did not provide for capital punishment. Fines were not a deterrent as money was plentiful.[65] A vigilance committee was established by the same people who founded the provisional government, and, for the most part, unwanted characters were run out of town (usually to the next railroad town, Laramie). By spring of 1868, the county had been organized and there was a regularly established government.

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[60] Trenholm, *supra* note 20, at 174.

[61] SCHELL, *supra* note 29, at 100.

[62] W.W. CORLETT, FOUNDING OF CHEYENNE 5 (1884) (handwritten manuscript available on microfilm).

[63] Trenholm, *supra* note 20, at 111.

[64] CORLETT, *supra* note 62, at 5. Presumably THE REVISED STATUTES OF COLORADO: PASSED AT THE SEVENTH SESSION OF THE LEGISLATIVE ASSEMBLY, CONVENED ON THE SECOND DAY OF DECEMBER, A.D. 1867 (1868) as this was the first compilation of Colorado laws.

[65] CORLETT, *supra* note 62, at 6. Mr. Corlett stated, "[E]verybody had money. I never saw so many people with money." *Id.*

The judicial powers were vested in a supreme court, district courts, probate courts, and justices of the peace. Three supreme court justices were seated for four years, at the pleasure of the President. The territory was divided into three judicial districts, one district court assigned to each of the supreme court justices.

Territorial Legislation Specific to Courts

- COMPILED LAWS OF WYOMING, ch. 106 § 8 (1876).

This statute defines the duties of the supreme court, among them, to prescribe rules of practice for appellate and district courts at their first session. These rules were given binding authority as if they were enactments of the legislative assembly. The court was also directed that opinions be delivered in writing and an official reporter must be assigned to publish these decisions "when the number of cases decided in said court shall reach one hundred."

- COMPILED LAWS OF WYOMING, ch. 71 (1876).

The Justices' Code established and defined the jurisdictions of the courts of justices of the peace. The rules of procedure before these courts are spelled out within the statute.

Rules

- WYOMING REPORTS: CASES DECIDED IN THE SUPREME COURT OF WYOMING (1870-).

The rules of the courts established by the supreme court are on page 447 of Volume One of the *Wyoming Reports*. For succeeding volumes, only those rules as amended are printed. Rules of Civil Procedure and Rules of Criminal Procedure were incorporated into the Civil and Criminal Codes passed at the first Territorial Legislative Assembly in 1869.

Secondary Sources

- JOHN W. DAVIS, GOODBYE, JUDGE LYNCH: THE END OF A LAWLESS ERA IN WYOMING'S BIG HORN BASIN (2005).

Wyoming Counties

In 1864, Wyoming found itself back in the Dakota Territory without representation in the legislature until 1866. By 1867, the Dakota Legislature acknowledged the increase in population in the southwestern portion of their territory due primarily to the building of the Union Pacific Railway. Communities were growing quickly as a result of the increased traffic, and in response, the legislature

partitioned the area into counties. As of 1867, the Dakota Territory had created four counties in Wyoming.

- Act of Jan. 9, 1867, ch. 14, 1866-1867 Dakota Laws.

Set boundaries for Laramie County, which included most of the current state. Fort Sanders was the county seat.

- Act of Dec. 27, 1867, ch. 7, 1867-1868 Dakota Laws.

Created Carter County by splitting Laramie County in half with South Pass as the county seat. Set new western boundary for Laramie County, changed Laramie County seat from Fort Sanders to Cheyenne.

- Act of Dec. 16, 1868, ch. 28, 1868-1869 Dakota Laws.

Two new counties were sectioned from Laramie County: Albany County with Laramie as the county seat, and Carbon County with the county seat at Rawlings Springs.

- Act of Dec. 1, 1869, ch. 34, 1869 Wyo. Laws.

Uinta County was the first county established by the Wyoming Territorial Legislative Assembly.

- Act of Dec. 2, 1869, ch. 35, 37, 38, 1869 Wyo. Laws.

Redefined boundaries of Albany, Carbon, and Sweetwater counties and appointed officers of the counties and changed the name of Carter County to Sweetwater County. (The boundaries of Laramie County were redefined by the organic act which set the boundaries for the state.) However, the organic act empowered the governor to appoint county officers and so he vetoed the act.[66]

- Act of Dec. 10, 1869, ch. 4, 1869 Wyo. Laws.

An act declaring each organized county within the territory to be "a body corporate and politic" and defined duties of the county official.

- Act of Dec. 8, 1875, ch. 27, 1875 Wyo. Laws.

First law passed regarding counties stipulating that upon petition by residents, the governor should appoint a Board of Commissioners to organize the county. Created and defined boundaries of Crook and Pease counties.

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[66] Trenholm, *supra* note 20, at 330.

- Act of Dec. 13, 1879. ch. 31, 1879 Wyo. Laws.

Changed the name of Pease County to Johnson County and reduced the number of residents needed to petition to organize a county from 500 to 300.

- Act of Mar. 5, 1884, ch. 46, 1884 Wyo. Laws.

Created Fremont County.

- Act of Feb. 5, 1886, ch. 5, 1886 Wyo. Laws.

Adjusted boundaries of Albany, Carbon, and Sweetwater counties.

- Act of Mar. 9, 1888. ch. 90, 1888 Wyo. Laws.

Created Converse, Natrona, and Sheridan counties.

- Act of Mar. 12, 1890, ch. 47, 1890 Wyo. Laws.

Created Weston County.

- Act of Mar. 12, 1890, ch. 48, 1890 Wyo. Laws.

Created Big Horn County.

- DUTIES OF COUNTY OFFICES, TERRITORY OF WYOMING, 1869 (handwritten manuscript) (available from the Laramie County Clerk's Office).

Municipal Ordinances

- JOHN A. RINER, CHARTER AND ORDINANCES OF THE CITY OF CHEYENNE (1883).

- WILLIAM J. MCINTYRE, CHARTER AND ORDINANCES OF THE CITY OF LARAMIE (1885).

- C.E. CARPENTER, CHARTER AND ORDINANCES OF THE CITY OF LARAMIE (1887).

V. WOMAN SUFFRAGE

Women in Wyoming were given the right to vote and hold office in the initial stages of the territory's development. The first bill was introduced in 1869, at the First Territorial Legislative Assembly. While it was not without debate and

further legislative action, the bill carried, and rights were extended to women from the birth of the territory. During the constitutional convention there again was discussion whether voting rights and recognition of equal rights under the law should be included as part of the constitution or as a separate proposition. The discussion was highlighted with Delegate Coffeen of Sheridan County stating, "I am unwilling to stand here and by vote or word or gesture disfranchise one half the people of our territory, and that the better half."[67] The gesture was well-taken, and Wyoming women, in fact, women throughout the country, may owe a great deal to the support of these representatives of the constitutional convention. Had the issue been put to a popular vote, it may have fared the same fate as it did in other states, where "[w]oman suffrage was defeated in every case in which a state constitutional convention gave voters the opportunity to vote separately on the suffrage amendment."[68]

The reception this issue received in the federal legislature was not unexpected. One effort tried to admit Wyoming into the Union with the constitution to be drafted and approved by a vote of the people at a later time. One suggested that the constitution of Wyoming be resubmitted for a vote of males only in the territory. A motion was made to call a new constitutional convention with delegates elected by male citizens of the territory only, and an additional motion was made to resubmit the constitution to a vote of the males in the territory separately from the proposition of women's suffrage and eligibility to hold office. And finally, it was moved that Wyoming should not be admitted into the Union until the offending passage was struck from the constitution.[69] Narrowly defeated each time, the bill ultimately won passage and was signed by the President. Though there is some debate, Mrs. Louisa Swain of Laramie is noted as the first woman in the United States to cast her vote on September 6, 1870.[70]

The recognition of equal rights under the law included the right to serve on juries, at least for a time. The first mixed grand jury was convened in Laramie City in March, 1870. At the end of the trial, the judge remarked, "To those ladies who are members of the grand jury, the court also deems it but justice to say that by your intelligent, faithful, and conscientious discharge of duty, as well as by your great propriety of conduct, you have realized the just expectations of those who saw fit to confer upon you the right to participate in the administration of justice."[71]

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[67] JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING 350 (1889).

[68] RICHARD ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA 230 (2002). States that had voted down woman suffrage amendments were Colorado, 1877; Washington, 1889 and 1898; South Dakota, 1889; New Hampshire, 1902; and Ohio, 1912.

[69] Trenholm, *supra* note 20, at 377.

[70] *Id.* at 659.

[71] GOODSPEED, *supra* note 2, at 353.

Chief Justice Howe further wrote that:

> these women acquitted themselves with such dignity, decorum, propriety of conduct, and intelligence, as to win the admiration of every fair minded citizen of Wyoming. They were careful, painstaking, intelligent, and conscientious. They were firm and resolute for the right as established by the law and the testimony. Their verdicts were right, and, after three or four criminal trials, the lawyers engaged in defending persons accused of crime began to avail themselves of the right of peremptory challenge to get rid of the women jurors, who were too much in favor of enforcing the laws and punishing crime to suit the interests of their clients. After the grand jury had been in session two days, the dance-house keepers, gamblers, and demimonde, fled out of the city in dismay, to escape the indictment of the women grand jurors.[72]

When Justice Howe left the court after 1871, the balance of the court in favor of jury service as an adjunct to suffrage was lost, and women in Wyoming were not called for jury service again until 1950.[73]

Legislative History of Woman Suffrage in Wyoming

- 1869 COUNCIL J. 115.

Council Bill 70, "An Act to grant to the women of Wyoming Territory the right of suffrage and to hold office." Taken up (Nov. 27, 1869).

- 1869 COUNCIL J. 122.

Voted on for final passage in Council. Passed 6-2-1 (Nov. 30, 1869).

- 1869 HOUSE J. 152.

Bill received by House of Representatives, read first and second time and referred to committee of the whole. Special committee for its consideration was formed (Nov. 30, 1869).

- 1869 COUNCIL J. 189.

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[72] *Id.*

[73] T. A. Larson, *Petticoats at the Polls: Woman Suffrage in the Territory of Wyoming*, 44 PAC. NORTHWEST Q. 77 (1953).

Special committee recommended "do pass." Move to postpone indefinitely lost. Placed before committee of the whole, reported to House after discussion. Several motions lost and the House switched to other business (Dec. 4, 1869).

- 1869 Council J. 158.

Discussion of changes; some changes adopted; bill read third time and voted on for final passage, 7-4 (Dec. 6, 1869).

- Act of Dec. 10, 1869, ch. 31, 1869 Wyo. Laws.

Sent to governor, signed December 10, 1869.

- *Governor's Biennial Message to the House and Council, in* 1871 HOUSE J. 20.

The governor urged the legislature to continue this experiment of woman suffrage in the United States.

- 1871 HOUSE J. 47.

House Bill 4 is introduced to repeal right of women to vote. Read a first and second time. Engrossed (Nov. 16, 1871). Thus, attempt to repeal women's right to vote defeated.

1871 HOUSE J. 49-50.

Bill read a third time, considered by committee of the whole, and voted for final passage. Bill passed 9-3-1 (Nov. 17, 1871).

- 1871 COUNCIL J. 50.

Council received bill H.R. no. 4 (Nov. 28, 1871).

- 1871 COUNCIL J. 53.

Bill read first and second and third time. Placed on vote for final passage, passed 8-0-1 (Nov. 20, 1871).

- 1871 HOUSE J. 112-118.

Includes governor's veto statement. House overrides veto by 9-2-2 (Dec. 9, 1871).

- 1871 COUNCIL J. 84.

Council received governor's veto and vote of House (Dec. 11, 1871).

- 1871 COUNCIL J. 93-94.

Council committee of the whole recommended "do pass" over governor's veto (Dec. 13, 1871).

- 1871 COUNCIL J. 95.

Council vote. Bill passes 5-4. Does not receive the required 2/3 majority to pass over governor's veto (Dec. 14, 1871).

- JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING (1889).

Woman suffrage was introduced as Proposition File no. 25 on September 7, 1889. Debates addressed whether this should be a separate proposition or included as part of the constitution. As a separate amendment, it would have to be voted on individually, with the presumed outcome showing the strength of the sentiment in favor of it. It was decided instead to address these rights to vote and hold office "as a part of the fundamental law in the constitution of this State."[74]

Secondary Sources

- Miriam Gantz Chapman, The Story of Woman Suffrage in Wyoming (1952) (unpublished Master's thesis, Univ. of Wyoming) (on file with William Robertson Coe Library, University of Wyoming).

- Grace Raymond Hebard, *The First Woman Jury*, 7 JOURN. AM. HIST. 1293 (1931).

- GRACE RAYMOND HEBARD, HOW WOMAN SUFFRAGE CAME TO WYOMING [1920].

Possibly perpetuated some of the questionable stories of various women's involvement in the passage of the suffrage act. Many of the facts listed in this article have since been questioned by historians Larson and Massie.

- T. A. LARSON, HISTORY OF WYOMING (2nd ed., rev., 1978).

Larson's work deals with many of the myths surrounding woman suffrage, including the impetus for the act in Wyoming, who was responsible for the 1869

[74] GOODSPEED, *supra* note 2, at 372-73.

bill, and whether national lobbying groups targeted Cheyenne before and during the constitutional convention.

- T. A. Larson, *Petticoats at the Polls: Woman Suffrage in the Territory of Wyoming*, 44 PAC. NORTHWEST Q. 74 (1953).

- Michael A. Massie, *Reform Is Where You Find It: The Roots of Woman Suffrage in Wyoming*, http://wyoarchives.state.wy.us/articles/massie/page1.htm.

This article discusses the origins of the woman suffrage movement in South Pass City, Wyoming, and investigates some of the myths that Esther Morris, Wyoming's first justice of the peace, elicited a promise from Legislator Bright to introduce the bill into the Legislative Assembly. It is a brief but interesting description of South Pass City, its genesis as a mining town, and the surrounding suffrage controversy.

- WOMAN SUFFRAGE DOCUMENTS FROM HISTORICAL COLLECTIONS AND GOVERNMENT RECORDS (2004).

Available in CD-ROM format from the Wyoming State Archives and the American Heritage Center, this is a collection of digitized pages from the legislative materials for the sessions of 1869 and 1871, as well as articles and a bibliography of woman suffrage.

VI. NATIVE AMERICANS

Initially the United States dealt with Indians through treaties, as with other foreign sovereignties. Over time the shift in federal Indian policy moved away from recognizing the continent's natives as self-governing groups toward assimilation with Anglo-American culture. After 1871, treaties were no longer used in federal Indian relations, and court decisions since that time have bluntly stated that Indian nations are individual sovereignties only to the degree that the United States allows it, and there is no legal obligation to extend them that dignity.[75] This

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[75] United States v. Blackfeet Tribe of Blackfeet Indian Reservation, 364 F. Supp. 192 (D. Mont. 1973).

> The defendants urge that the Blackfeet Tribe is sovereign and that the jurisdiction of the tribal court flows directly from that sovereignty. No doubt the Indian tribes were at one time sovereign and even now the tribes are sometimes described as being sovereign. The blunt fact, however, is that an Indian tribe is sovereign to the extent that the United States permits it to be sovereign-neither more nor less. In the Blackfeet Treaty (11 Stat. 657, at 659, (1855)) the Blackfeet Tribe acknowledged its "dependence on the government of the

substantial shift in policy occurred over time as the government gained strength and the population looked to the vast open spaces to the West with an eye to cultivation and settlement.

Early European laws regarding colonization of new lands may have begun with the Crusades of the 13th century and Pope Innocent IV's papal bull authorizing the use of force against non-Christian peoples, when necessary, to punish violations of laws of nature as derived from Christian doctrines.[76] By the 1500s, scholars of the humanist movement were addressing political interactions with the indigenous peoples of the lands that European explorers were discovering. Francisco de Victoria, a Dominican theologian, concluded that consent of natives was required before Europeans could legally acquire their lands or dominion over them. Discovery of these lands alone did not confer title of the land.[77]

These works became the foundation for Spanish law in the Americas. Pope Paul III stated in his 1537 Papal Bull, Sublimis Deus,

> Notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property.[78]

The Dutch, British, and Americans adopted similar policies that all peoples, including, as Hugo Grotius stated "strangers to the true religion," had the right to enter into treaties.[79] Formal acquisitions of the land required individual purchases from tribal governments.[80]

> United States." While for many years the United States recognized some elements of sovereignty in the Indian tribes and dealt with them by treaty, Congress, by Act of March 3, 1871 (16 Stat. 566, 25 U.S.C. § 71), prohibited the further recognition of Indian tribes as independent nations. Thereafter the Indians and the Indian tribes were regulated by acts of Congress.

Id. at 194.

[76] ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 13-14 (1990).

[77] FRANCISCUS DE VICTORIA, DE INDIX ET DE IURE BELLI RELECTIONES 127-128 (Ernest Nys ed., J. Bate trans., Carnegie Institution 1917) (orig. ed. 1557).

[78] FRANCIS MACNUTT, BARTHOLOMEW DE LAS CASAS 429 (Arthur H. Clark Co. 1909).

[79] COHEN, *supra* note 4, at 13-15.

[80] *Id.*, at 15. Cohen cites other sources as incidents of early settlers' belief that compensation for land was necessary. *See* D'ARCY MCNICKLE, NATIVE AMERICAN TRIBALISM 29-30 (1973).

For the new colonies, it was general wisdom to maintain good relations with the natives. In 1777, the Articles of Confederation Article IX, conferred on the Continental Congress, "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with Indians not members of any of the states." This was rearticulated in the new Constitution[81] and was the first official step in the development of a federal Indian policy, the enforcement of which would present many difficulties. The protections and rights offered to Indians under the Northwest Ordinance of 1787 were likewise re-enacted as one of four statutes passed in the First Continental Congress dealing with Indian policy. In fact, as the country grew, it was common to find these rights restated in the organic acts of the territories and states of the Union.[82]

Early American Policies

- U.S. CONST. art. I, § 8.

Attempted to limit state interference with federal Indian policy by reserving to Congress the power to "regulate commerce with foreign nations, among the several states, and with the Indian tribes."

- Act of Oct. 22, 1784, 7 Stat. 15.

Treaty with hostile tribes of Six Nations, received the Indian tribes "into their protection" and would shape further interactions with Indians.

- Act of Jan. 21, 1785, 7 Stat. 16.

Treaty with the Wiandots, Delawares, Chippawas, and Ottawas. Indians retained their lands for hunting and living; white settlers in Indian lands forfeited protections of the federal government.

- Act of Aug. 7, 1789, ch. 7, 1 Stat. 49.

Established the Department of War and provided responsibility for military affairs and such matters relative to Indian affairs. These functions were later transferred to the Department of the Interior upon its establishment in 1849.

- Act of Aug. 20, 1789, ch. 10, 1 Stat. 54.

Appropriation of funds to deal with Indian tribes and appointment of commissioners to manage negotiations and treaties.

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[81] U.S. CONST. art. I, § 8.

[82] Volume 7 of the *Statutes at Large* is a collection of Indian treaties, "Treaties between the United States and the Indian Tribes," published in 1854.

- Act of Sept. 11, 1789, ch. 13, 1 Stat. 67.

Setting salary for Superintendent of Indian Affairs in the northern department. These duties generally fell within the duties of the territorial governor as listed in the organic acts of a new territory. Territorial governors acting as Superintendent of Indian Affairs received a salary increase, generally around $1,000 per year.

- Act of July 22, 1790, ch. 33, 1 Stat. 137.

An act to regulate trade and intercourse with the Indian tribes, this prohibited purchases of Indian lands and punished non-Indians committing crimes and trespasses against Indians.

- Indian Trade and Intercourse Act of Mar. 1, 1793, ch. 19, 1 Stat. 329.

Authorized provision of goods and services to secure friendship of tribes, stop crimes against the Indians, and prevent unauthorized acquisition of their lands. This statute would be amended several times, once as an adjunct act,[83] which established government trading houses set up in Indian country, with goods to be sold to Indians at cost and run by government agents, and a second revision in 1796,[84] clarifying what lands were held by Indians, requiring a passport to travel into Indian lands, and allowing the federal government the right to prosecute Indians if the tribes did not pursue the crime. The statute was revised in 1799 with only minor changes.[85]

- Trade and Intercourse Act of Mar. 30, 1802, ch. 13, 2 Stat. 139.

This permanent act replaced the four temporary acts above.

Moving West

Limited natural resources kept European explorers from being as interested in the plains as they were in the coastal areas of the country, causing the impact of new settlers in our region to be slow. During the Spanish period of the 17th and 18th centuries, there was little contact except trade involving Indian slaves and horses. As more aggressive tribes kidnapped Indians from other tribes to be sold as slaves and integrated the horse into their culture, their dominance increased,

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[83] Act of Apr. 18, 1796, ch. 13, 1 Stat. 452.

[84] Act of May 19, 1796, ch. 30, 1 Stat. 469.

[85] Act of Mar. 3, 1799, ch. 46, 1 Stat. 743.

resulting in an inequity of power among the Indian tribes.[86]

Within one year of the Louisiana Purchase, Lewis and Clark began their voyage of exploration, opening the region to commercial interests in the fur trade and the construction of federally operated trading posts. Some Indian tribes, frustrated by these intrusions and dissatisfied with continued requests for ceding of land to the United States, joined with the British in the War of 1812. After the Indians lost, the government accelerated a policy of removing Indians to lands in the West in exchange for their territory in the East. For the next few decades after the end of the war, treaties were concerned primarily with relocation.

Throughout the Mexican period from 1821 to 1846, there was increased contact, and gun trade became popular. Activity increased due to fur trade, exploration, and overland migration. Much of the traffic tended to pass through, but after 1847, sustained settlements began to alter the environment. Land holdings of the United States now extended from coast to coast. The California gold rush and open public lands brought miners, settlers, and soldiers through Indian lands and contact with the remote Indians increased.

Even this early, notions of assimilating natives into the Anglo-American culture were present. Proposals for an Indian state were not uncommon. A Western Territory Bill of 1834, which failed to pass due to concerns that it intruded on tribal sovereignty, stated, "Wherever their advance in civilization should warrant the measure, and they desire it . . . they may be admitted as a State to become a member of the Union."[87]

- Act of May 6, 1822, ch. 54, 3 Stat. 679.

Government-run trading posts were discontinued and turned over to private ownership. With no oversight, Indian abuses increased.

- Indian Removal Act of May 28, 1830, ch. 148 §§ 2, 7, 4 Stat 411.

An act providing for an exchange of land with the Indians residing in any of the states or territories, and for their removal west of the Mississippi River, this act authorized the President to provide lands west of the Mississippi in exchange for eastern lands. Although it did not authorize forcible removal, those tribes that did not leave were no longer under the protection of the federal government. By

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[86] 11 HANDBOOK OF NORTH AMERICAN INDIANS 499-503 (Warren L. D'Azevedo, vol. ed., 1978).

[87] COHEN, *supra* note 4, at 58. For a history of various proposals of an Indian state, *see* Annie H. Abel, *Proposals for an Indian State, 1778-1878*, 1 ANN. REP. AM. HIST. ASSN. 89 (1907).

the 1850s, the removal effort was complete.

- Act of June 30, 1834, ch. 162, 4 Stat. 735.

Comprehensive reform of the Indian Department, authorizing appointment of several superintendents of Indian affairs and agents and subagents answerable to the President with preference given to employees of Indian descent.

- Indian Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729.

Amended the 1802 act, changed boundaries, licensed trading, amplified provisions for dealing with Indian depredations, authorized President to use military force against undesirable whites in Indian Country.

- Act of March 3, 1849, ch. 108, 9 Stat. 395.

Established the Department of Interior, giving the secretary the authority previously exercised by secretary of the War Department in relation to Indian affairs.

- Treaty of Fort Laramie, 1851, 11 Stat. 749.

Also knows as Horse Creek Treaty, as the site of the treaty signing was moved to Horse Creek, Nebraska, to accommodate grazing of horses for 10,000 Indians. The Sioux were given lands north of the North Platte River; Cheyenne and Arapaho received land between North Platte and Arkansas; the Crow received land from Powder River to Wind River. The Shoshone were guests at the council, but received no land as they belonged in Utah and not in the Upper Platte Agency.[88] The Sioux, Cheyenne, Arapaho, Crow, Assinboine, Gros Ventre, Mandan, and Arikara signed treaties at Fort Laramie ceding lands.

- Treaty with the See-see-toan and Wah-pay-toan Bands of Dakotas or Sioux, 1851, 10 Stat. 949.

Ceding territory.

- Treaty with the Arapaho and Cheyenne, 1861, 12 Stat. 1163.

In this Treaty of Fort Wise, the Northern Cheyenne and Arapaho tribes signed an agreement relinquishing lands between the Arkansas and North Platte rivers for the Sand Creek Reservation in Colorado.

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[88] Trenholm, *supra* note 20, at 653.

Wyoming Indians and the Indian Wars

The predominant Indian tribe living in Wyoming during the years after the 1650s was the Eastern Shoshone, though bands of Teton Sioux, Comanche, Crow, Cheyenne, Arapaho, and Blackfeet frequented the area as well. Federal relations with the Shoshone were generally good. It is possible that the Shoshone were more amenable to the federal government because they saw in it protection against the roving tribes, historic enemies of the Shoshone, who had been encroaching on their lands and raiding since the 1700s. The Shoshone were treated with more deference than other Basin tribes. Whether because of their cooperation with the government or the strength of their leadership, the Shoshone was one of the only tribes in the region neither conquered nor displaced during the initial phases of Indian relocation. It is a mark of respect for that leadership that, during the treaty-making years of 1863-1868, references to the Eastern Shoshone within Wyoming are often cited as the "Washakie" band, referring to their leader and eventual chief.[89] In 1867, the Shoshone requested a reservation in the Wind River Valley. The 1868 treaty set aside a reservation for them, but in 1872, they were forced to cede back the southern portion of the reservation to pay for a surveying error that coincided with the discovery of gold at South Pass.[90]

The Shoshone protested when, in 1878, the U.S. military brought nearly 1,000 Northern Arapaho to stay temporarily on the Shoshone Reservation. The Northern Arapahos had refused to settle with the Southern Arapahos in Oklahoma and instead requested a reservation in their home lands of Wyoming. Eventually one-half of the Shoshone Reservation would be ceded to the Arapaho and the name of the reservation changed to Wind River Reservation.

The year 1865 records some of the bloodiest battles between Indians and the government in Wyoming's history. Near present-day Casper, clashes with the Sioux occurred at the Battle of the Platte River Bridge and at Red Buttes. Along the Bozeman Trail at the Tongue River Crossing, a road-building expedition was attacked by Arapahos. Fort Phil Kearney was the site of attacks nearly from the completion of its construction in 1867. The day the territorial government was organized, Sioux Indians raided Wind River Valley, resulting in the first official act of the territorial governor, calling for troops to put down an uprising.[91]

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[89] FREDERICK E. HOXIE, ENCYCLOPEDIA OF NORTH AMERICAN INDIANS, 586 (1966).

[90] *Id.* at 588. In *Shoshone Tribe of Indians of the Wind River Reservation, Wyoming v. U.S.*, 82 Ct. Cl. 23 (1935), the tribe sued the government for the value of the gold removed from the mines at South Pass prior to the ratification of the Brunot Agreement by the Senate on Dec. 15, 1874. The Engineer determined the gross value of gold production was $744,700 and the royalty value was $111,195. ERNEST OBERBILLIG, THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION, WYOMING V. THE UNITED STATES OF AMERICA: VALUE OF GOLD PRODUCTION OF SWEETWATER MINES WITHIN SHOSHONE RESERVATION BETWEEN JULY 3, 1868, AND DECEMBER 15, 1874 (1963), *available at* American Heritage Center, University of Wyoming.

[91] GOODSPEED, *supra* note 2, at 351.

Since 1855, the U.S. Army had taken up residence at forts along the Missouri to protect settlers moving West. By 1858, federal policy had shifted fully from removal to concentration on fixed reservations. Reservations were intended to be an intermediate step toward assimilation and were not meant to be voluntary.[92] The government would provide sufficient lands for Indian occupancy along with stock, tools, and other agricultural supplies. By encouraging farming over migration throughout the region, the commitment of land to the Indians could be reduced. The remaining areas could be consolidated and sold to non-Indians for settlement. With the opening of the Oregon and California Trails to emigrants in 1863 after the signing of the Fort Bridger Treaty, white traffic increased. Many of the Plains Indian tribes at this time were those relocated from their eastern lands within the last century. In the wake of the Civil War, with changes in the federal Indian policy and the land rush across the country, frustrations reached a new high. Ogalala Lakota Chief Red Cloud led the Sioux, Cheyenne, Arapaho, and Comanche in battle against the government in the Powder River War of 1866 and 1867.

- Treaty with the Eastern Shoshone, 1863, 18 Stat. 685.

Treaty of Fort Bridger, Utah Territory, to re-establish friendly and amicable relations and redefine Shoshone boundaries with land concessions for railway and telegraph lines; government offered reservations, homesteads, and farming supplies.

- Treaty with the Sioux, 1868, 15 Stat. 635.

Sought peace with the Northern Sioux, Crow, Cheyenne, and Arapaho. Some tribes held out until forts on Bozeman trails were closed.[93]

- Treaty with Shoshone and Bannock, 1868, 15 Stat. 673.

The Treaty of Fort Bridger ratified the earlier treaty, allowed for criminal prosecutions of whites and Indians by the federal government, set boundaries of reservations and offered education, clothing, and farming supplies.

End of Treaty-making

Though some in the federal government held opinions that "in a large majority of cases Indian Wars are to be traced to the aggressions of lawless white men,"[94] federal policy continued to work against the Indians. For nearly a century the

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[92] COHEN, *supra* note 4, at 65.

[93] *Id.* at 73.

[94] S. REP. NO. 39-156, at 5 (1867).

Executive Branch had made treaty arrangements with the Indians "by and with the Advice and Consent of the Senate."[95] Although the House appropriated money to carry out these treaties, it had no voice in the development of substantive Indian policy reflected in them. House resentment first resulted in legislation in 1867 repealing "all laws allowing the President, the Secretary of the Interior, or the commissioner of Indian affairs to enter into treaties with any Indian tribes."[96] The legislation was repealed a few months later.[97] After further unsuccessful House attempts to enter the field of federal Indian policy, the House refused to grant funds to carry out new treaties.[98] Finally, the Senate capitulated and joined the House in passage of the 1871 act as a rider to the Indian Appropriation Act of 1871.

Relevant Federal Laws

- Act of Mar. 3, 1871, ch. 120 § 1, 16 Stat. 544 (codified at 25 U.S.C. § 71).

Indians Appropriation Act ended treaty-making effectively through the refusal of allocating funds to continue.

- Act of Mar. 3, 1873, ch. 241 § 2, 17 Stat. 579.

Congressional committee appointed to prepare a compilation of treaties in force.

- Act of Feb. 8, 1887, ch. 72, 24 Stat. 388.

An act to ratify an agreement with certain bands of Sioux Nation, Northern Arapaho, and Cheyenne Indians. Known as the General Allotment Act of 1887 or the Dawes Act, this granted 160 acres of reservation land for private use to the heads of Indian households in an effort to begin the assimilation of Indians into American culture and curtail their nomadic activities. The remaining land from the reservations was sold to non-Indian settlers.

- Act of Mar. 3, 1885, ch. 341 § 9, 23 Stat. 385.

Congress extended federal jurisdiction over Indians for seven major crimes: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.

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[95] U.S. CONST. art. II, § 2.

[96] Act of March 29, 1867, ch. 13, 15 Stat. 7, 9.

[97] Act of July 20, 1867, ch. 34, 15 Stat. 18.

[98] UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 211 (1958).

Codes

Historic access to Indian codes and constitutions is generally not available, though Internet collections of current codes are. White settlers intermingling with Indians and living within their territories presented some problems for the U.S. government. Federal laws and protections did not extend into Indian territories, and those who had intermarried, leased Indian lands with permission, or were settled there, with or without permission of the Indian tribes, made administration of federal laws very difficult.[99]

Reporters and Digests

- DECISIONS OF THE DEPARTMENT OF THE INTERIOR RELATING TO PUBLIC LANDS (1881-).

Decisions of the courts relative to Indian land issues are included in this set. Other decisions are published in the West's publications that cover federal courts. Available electronically in The Making of Modern Law: Legal Treatises from 1800-1926 database.

General References

- COLONIAL AND AMERICAN INDIAN TREATIES: A COLLECTION [CD-ROM] (2004).

Full text, fully searchable collection of over 700 agreements dating back to the 17th Century.

- STEVEN L. JOHNSON, GUIDE TO AMERICAN INDIAN DOCUMENTS IN THE CONGRESSIONAL SERIALS SET, 1817-1899: A PROJECT OF THE INSTITUTE FOR THE DEVELOPMENT OF INDIAN LAW (1977).

Over 10,000 documents, listed chronologically, then by subject and Indian tribe, with a very brief abstract/title to identify the subject; followed by three appendices: 1) documents on Indian Affairs 1871-1881 not in the Serials Set; 2) Indian Affairs published in American State Papers and those published in Serial Set; 3) Guide to Records of the War of Rebellion. Claims documents are predominantly claims prosecuted against government for losses or Indian depredation.

- CHARLES JOSEPH KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1903-1904).

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[99] FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 740 (1984).

Content-wise, this resource is excellent. It compiles U.S. treaties, laws, and executive orders pertaining to Native American tribes, with some editorial comments included. Now digitized in *Kappler's Indian Affairs: Laws and Treaties*, University of Oklahoma, http://digital.library.okstate.edu/kappler/index.htm. Also available in The Making of Modern Law: Legal Treatises, 1800-1926 database. On the Internet site, materials are fully searchable from their own search engine, or one can browse by table of contents and index of each volume. The digitized works available on the Internet are difficult to read, but those in The Making of Modern Law are clear.

- INDIAN TREATIES, 1778-1883 (Charles J. Kappler, ed., 1972).

Secondary Sources

- FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005).
- FREDERICK E. HOXIE, ENCYCLOPEDIA OF NORTH AMERICAN INDIANS (1996).
- FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1995).

VII. PUBLIC LANDS

The history of the American West has its basis in land law. European claims and treaties, sales of land under the Articles of Confederation to raise revenue for the new country, federal Indian policy, mineral rights and mining law, mining camp laws, railroads, grazing, and the settlement of the West through preemptive land laws and homesteading are policies and claims that drove the move from the coasts inward into the heart of the continent.[100] These are the laws that make up the legal history of the country during its formation.

General Public Land Codes

- HENRY NORRIS COPP, PUBLIC LAND LAWS, PASSED BY CONGRESS FROM MARCH 4, 1875, TO APRIL 1, 1882, WITH THE IMPORTANT DECISIONS OF THE SECRETARY OF THE INTERIOR, AND COMMISSIONER

[100] Because of the general application of laws relating to public lands, volume one of the *United States Statutes at Large* includes a table of "Acts of Congress from 1789 to 1845, inclusive, relating to public lands." 1 Stat. xcvii.

OF THE GENERAL LAND OFFICE, THE LAND OPINIONS OF THE ATTORNEY GENERAL, AND THE CIRCULAR INSTRUCTIONS ISSUED FROM THE GENERAL LAND OFFICE TO THE SURVEYORS GENERAL AND REGISTERS AND RECEIVERS DURING THE SAME PERIOD (1883).

- HENRY NORRIS COPP, PUBLIC LAND LAWS PASSED BY CONGRESS FROM APRIL 1, 1882, TO JANUARY 1, 1890 (1890).

General Public Land Cases

- J. VANCE LEWIS, A COLLECTION OF LEADING CASES ON THE PUBLIC LAND LAWS OF THE UNITED STATES: WITH NOTES AND REFERENCES (1879).

- *Decisions of the United States Department of the Interior*. Washington, DC: Government Printing Office, (1881-).

Known as "Land Decisions," these are also available electronically in The Making of Modern Law: Legal Treatises from 1800-1926 database.

- DIGEST OF DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN APPEALED PENSION AND BOUNTY LAND CLAIMS: ALSO A TABLE OF CASES REPORTED, CITED, OVERRULED, AND MODIFIED, AND OF STATUTES CITED AND CONSTRUED, CONTAINED IN VOLS. 9 TO 15 INCLUSIVE, OF THE PENSION DECISIONS, WITH ANNOTATIONS (1905).

Emigration and Homesteading

Availability of vast regions of unsettled land in the new continent was attractive to independent farmers and settlers, especially those in Europe. Early methods of claiming this land were through settling, or squatting. Controlling use of the land from squatters was a difficulty for the federal government, and instead it became policy to legalize the preemption of public lands. Petitions to Congress for private land grants were not unusual, especially from those territories that bordered on the unsettled land. Offers to settle and cultivate the land, bringing manpower to the Indian borders were addressed to Congress regularly from the beginning of the 1800s.[101] From 1801-1854, Congress passed a series of legislation, each addressing squatting more leniently. By 1855, preemption laws required eventual

[101] HOMESTEAD ACT OF 1862: AMERICAN LANDMARK LEGISLATION: PRIMARY MATERIALS 4 (1975).

payment of the minimum prevailing statutory price of the land and those settlers' rights were recognized over the surveyors' division of lands.[102]

Beginning in 1845, regular bills were introduced into Congress in favor of homesteading, providing public land for free to those willing to settle and improve it. The Southern states, formerly in favor of this type of land use, began voting against such legislation, perhaps fearing the addition of non-slave states to the Union. As the Civil War approached, Southern representatives removed themselves from Congress, and the Legislature passed the Homestead Act of 1862.[103] This new federal policy to promote private land ownership required more than 3,500 federal statutes to facilitate the process of territorial expansion. It was necessary to develop policies and procedures to determine the scope of the property, subdivide and sell it, and provide for the administration of the laws within the land and guarantee protections of the property.[104] One means to do this was the establishment of a Surveyor General for each new territory specifically to survey the land and oversee the administration of the homestead and preemptive public land acts.[105]

Open availability of public lands drew crowds of settlers across the country. Emigrants crossing through Wyoming on the way to California, Oregon, and Utah increased the need for a military presence to offer protection from Indian attacks. Fort William (later Fort Laramie) was the first permanent structure in the state, built in 1834, followed by Fort Bridger, which was constructed eight years later, and originally a trading post though later used by the military. In 1841, it was believed that only eighty travelers had followed the Oregon Trail through Wyoming. By 1843, 1,000 emigrants had passed along the trails, and as of 1850, 60,000 emigrants had crossed through Wyoming.[106] Eventually some of those travelers decided to settle in Wyoming, making it possible to request statehood just over twenty years after receiving its territorial status.[107]

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[102] *Id.* at 3.

[103] *Id.* at 15-21.

[104] *See* Roderick L. Squires, *A Context for the Public Land Survey*, 6 MINN. SURVEYOR 8 (1999), *available at* http://www.geog.umn.edu/faculty/squires/research/RealProp/survey/MNSurveyor/surveycontext.html, for a brief discussion of surveying and its impact on land use.

[105] *See* TERRITORIAL PAPERS OF THE UNITED STATES at NARA, *available at* http://www.archives.gov (last visited May 15, 2007).

[106] Trenholm, *supra* note 20, at 652-653.

[107] Land use of the Plains before 1851 can be found in NARA's record groups 48, 59, 75, 77, 93, and 94. *See* Sarah Lanier Hollingsworth, *A Bibliographic Survey of Pre-statehood Legal Resources for the State of South Dakota*, *in* 2 PRESTATEHOOD LEGAL MATERIALS: A FIFTY-STATE RESEARCH GUIDE, INCLUDING NEW YORK CITY AND THE DISTRICT OF COLUMBIA 1124 (Michael Chiorazzi & Marguerite Most, eds., 2005).

Relevant Federal Laws

- Act of May 18, 1796, ch. 29, 1 Stat. 464.

An act providing for the sale of lands of the United States, in the territory northwest of the river Ohio, and above the mouth of the Kentucky River, it appoints a Surveyor General to survey and divide the region. Known as the Land Act of 1796, footnote (a) of the Act lists all statutes relevant to sales of public lands northwest of the river Ohio.

- Act of May 29, 1830, ch. 208, 4 Stat. 420.

An act to grant preemption rights to settlers on the public lands, this act applied to claims on public lands that had been settled before survey by the government. Rights were extended for one year only.

- Act of June 22, 1838, ch. 119, 5 Stat. 251.

An act to grant preemption rights to settlers on the public lands, this extended the Act of May 29 for two more years except for all lands to which Indians held title. The land was made available for personal use only.

- Act of Sept. 4, 1841, ch. 16, 5 Stat. 543.

An act to appropriate the proceeds for the sales of public lands and to grant preemption rights, the "Log Cabin Bill" allowed the head of the family to claim the land for the price of $1.25 per acre up to 160 acres. A percentage of the proceeds went to the states for infrastructure.

Homesteading Act Legislative History[108]

- S. 5, 19th Cong. (1826).

Bill introduced to decrease the price of land in proportion to the time it was on the market and to give lands that went unsold to settlers for a homestead.

- H.R. 2, 28th Cong. (1845).

Homestead bill was first introduced as an amendment to a price graduation bill for public land.

- H.R. 294, 29th Cong. (1846).

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[108] *See* Homestead Act of 1862, *supra* note 101, at 6-21.

The term "homestead" is first used in federal legislation to refer to free land, available to a head of household, up to 160 acres.

- H.R. 7, 32nd Cong. (1852).

To encourage agriculture, commerce, and industry, this act would grant a male head of household a homestead of 160 acres out of the public domain. Bill passed in the House of Representatives, but not the Senate.

- H.R. 37, 33rd Cong. (1854).

Passed by both houses. The conference committee was unable to reach consensus.

- H.R. 18, 34th Cong. (1856).

Bill was introduced in the House.

- H.R. 72, 35th Cong. (1857).

Bill was introduced in the House but never brought to vote. It was taken up again in 1859 and tabled.

- H.R. 280, 36th Cong. (1860).

The House and Senate both passed the House version of the bill though compromise was required. This bill still called for some cost to the settler. President Buchanan, however, declared the law unconstitutional and vetoed it. The Senate lacked one vote to pass the bill over his veto. This turned out to be fortuitous to those who backed a free-land bill as the bill that passed two years later did not require any payment for land.

- H.R. 125 37th Cong. (1861).

The House passed a new bill which died in the Senate.

- Homestead Act of 1862, ch. 75, 12 Stat. 392.

The bill was introduced and passed in the House in 1861. The Senate then passed it with amendments. A conference committee convened and worked out the differences. On May 20, 1862, President Lincoln signed the bill into law. It allowed for 160 acres free of all charges except filing claim for claimants who must live on the land for five years, build a home on the land, till and fence the land, and dig a well before title to the land was handed over.

Debates

- 2 REG. DEB. 719-754 (1826).

Speech by Senator Thomas Hart Benton, introducer of original bills and long-time supporter of free land acts.

- CONG. GLOBE, 37th Cong., 2d Sess. 49 (1862).
- CONG. GLOBE, 37th Cong., 2d Sess. 132 (1862).
- CONG. GLOBE, 37th Cong., 2d Sess. 909 (1862).
- CONG. GLOBE, 37th Cong., 2d Sess. 1030 (1862).
- CONG. GLOBE, 37th Cong., 2d Sess. 1871 (1862).
- CONG. GLOBE, 37th Cong., 2d Sess. 1915 (1862).
- CONG. GLOBE, 37th Cong., 2d Sess. 1937 (1862).
- CONG. GLOBE, 37th Cong., 2d Sess. 1951 (1862).
- CONG. GLOBE, 37th Cong., 2d Sess. 1972 (1862).
- CONG. GLOBE, 37th Cong., 2d Sess. 2061(1862).
- CONG. GLOBE, 37th Cong., 2d Sess. 2147 (1862).
- CONG. GLOBE, 37th Cong., 2d Sess. 2157 (1862).
- CONG. GLOBE, 37th Cong., 2d Sess. 2364 (1862).

Secondary Sources

- *Western Trails*, http://www.cdpheritage.org/exhibit/westernTrails/wt_collections.cfm.

Joint Web site of the routes through Colorado, Kansas, Nebraska, and Wyoming. This digitized collection contains maps, museum articles, and journals, among a variety of other interesting resources.

- JAMES C. BARSI, THE BASIC RESEARCHER'S GUIDE TO HOMESTEADS AND OTHER FEDERAL LAND RECORDS (1994).

Small paperback to be used as a handbook for researching homesteads for genealogical and legal purposes. Describes what to expect in the files for federal

land claims under different public land acts. Also discusses what information is necessary for a complete request to the National Archives and Records Department to obtain copies of records, and how to find that information specific to the public land act states, of which Wyoming is one.

Mining

Wyoming was not as rich a resource for gold and silver as neighboring territories during the 19th century, but some mining communities were established around South Pass and a few other areas. Wyoming's First Legislative Assembly passed an act that authorized miners "to form mining districts not to exceed twenty square miles" with the power to adopt local rules and regulations.[109]

Mining law in the United States can be traced back to the original European powers that claimed the region. In 1783 Mexico, a code was devised and accepted by the king for the government and regulation of mine towns, mine owners, and mine laborers.[110] The entire right to minerals was granted to Spain, which passed then to Mexico after 1820. Legal title was complete in the crown, and miners were emissaries for the crown, expected to increase the treasury. For lands Mexico later ceded to the U.S., the mineral rights remained in contention relative to the Ordinance of 1783 and the Tribunal de Mineria.[111] Mineral rights for regions as far north as Colorado and throughout the southwest and California fell under the jurisdiction of Mexican and Spanish land laws.

Codes

- UNITED STATES MINERAL LANDS: LAWS GOVERNING THEIR OCCUPANCY AND DISPOSAL, DECISIONS OF FEDERAL AND STATE COURTS IN CASES ARISING THEREUNDER, AND REGULATIONS AND RULINGS OF THE LAND DEPARTMENT IN CONNECTION THEREWITH, WITH MISCELLANEOUS MATTER (Henry N. Copp, ed., 1882).

- MATTHEW G. REYNOLDS, SPANISH AND MEXICAN LAND LAWS (1895).

- JOHN A. ROCKWELL, COMPILATION OF SPANISH AND MEXICAN LAW RELATING TO MINES AND TITLES TO REAL ESTATE (1851).

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[109] Act of Dec. 2, 1869, ch. 22, 1869 Wyo. Laws 311.

[110] CHARLES HOWARD SHINN, MINING CAMPS: A STUDY IN AMERICAN FRONTIER 50 (1885).

[111] *Id.* at 53-54.

Reporters and Digests

- HENRY NORRIS COPP, DECISIONS OF THE COMMISSIONER OF THE GENERAL LAND OFFICE AND THE SECRETARY OF THE INTERIOR : UNDER THE UNITED STATES MINING STATUTES OF JULY 26, 1866, JULY 9, 1870, AND MAY 10, 1872, WITH APPENDIX OF CIRCULARS AND FORMS (1874).

- R.S. MORRISON, DIGEST OF THE LAW OF MINES AND MINERALS AND OF ALL CONTROVERSIES INCIDENT TO THE SUBJECT-MATTER OF MINING, COMPRISING THE CASES IN THE ENGLISH AND AMERICAN REPORTS, FROM THE YEARBOOKS TO THE PRESENT TIME (1878).

Secondary Sources

- HANDBOOK OF MINING LAW (Henry Norris Copp, ed., 6th ed., 1878).

- Concise handbook and conveniently small, this text includes U.S. mining laws and instructions for the miner, digest of decisions, forms, and list of mining patents issued by territory or state from 1877 to 1879.

- CHARLES HOWARD SHINN, MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT (1885).

Miners determined their self-governance early in California and followed this tradition in other mining camps throughout the West. They retained records of claims, what was required to retain possession, forms of conveyance, rights and duties, water rights, criminal and civil infringements, and any number of related issues. This resource tracks mining from Germany's 12th century through Spanish and Mexican laws.

Railroads

For Wyoming, the construction of the Union Pacific railroad across the length of the state may have played the largest role in the development of the state from territory to statehood. The relatively sparse population, concentration of arid regions, and lack of mineral resources in the state did not draw settlers as the neighboring states did. However, with the Union Pacific came towns, and Wyoming's population grew. The railroads played an important enough role in the state to warrant including federal land grant legislation to railroads in the state's early compilations of statutes.

Relevant Federal Laws

- Act of July 1, 1862, ch. 120, 12 Stat. 489.

To aid construction of railroad and telegraph from Missouri River to Pacific.

- Act of July 15, 1862, ch. 179, 12 Stat. 577.

Extends above act for five years.

- Act of July 2, 1864, ch. 216, 13 Stat. 356.

Amends Act of July 1, 1862, includes taking of lands by railroad companies up to 100 feet on each side of the center line and apportioning as they see fit.

- AMIEL WEEKS WHIPPLE, REPORT OF EXPLORATIONS FOR A ROUTE FOR THE PACIFIC RAILROAD NEAR THE 38TH AND 39TH PARALLELS OF NORTH LATITUDE, FROM THE MOUTH OF THE KANSAS RIVER, MISSOURI, TO THE SEVIER LAKE, IN THE GREAT BASIN, H. Exec. Doc. No. 91 (1855).

Available in microform.

- REPORT OF THE SECRETARY OF WAR ON THE SEVERAL PACIFIC RAILROAD EXPLORATIONS (1855).

Available in microform.

VII. GENERAL REFERENCE SOURCES

- LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (3d ed., 2005).

- CHARLES PAULLIN, ATLAS OF THE HISTORICAL GEOGRAPHY OF THE UNITED STATES (1932).

Plates of territorial holdings throughout the territorial period. Also includes plates of Indian battles and reservations.

- WESTON ARTHUR GOODSPEED, PROVINCE AND THE STATES: A HISTORY OF THE PROVINCE OF LOUISIANA UNDER FRANCE AND SPAIN, AND OF THE TERRITORIES AND STATES OF THE UNITED STATES FORMED THEREFROM (1904).

Extensive treatment of European powers in America. Volume five is specific to Wyoming's history. The focus is social and political history, but it adds context to the legal aspects of Wyoming's development.

Archives

- Charles Griffin Coutant, Coutant Collection, [ca. 1867]-1940 (bulk 1882-1906), available at Wyoming State Archives.

- 5 WYOMING BLUE BOOK: A GUIDE TO THE ARCHIVES OF WYOMING (Jim Donahue, ed., 1991).

In two volumes; volume one collects county records and volume two contains state and municipal government cites.

COMMENT

Reconciling the Wyoming Wrongful Death Act with the Wyoming Probate Code: The Legislature's Wake-up Call for Clarification

Grant Harvey Lawson*

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I. Introduction

This comment is intended to help provide useful information to the Wyoming Legislature and Wyoming attorneys and judges related to unanswered questions regarding the Wyoming Wrongful Death Act ("Wrongful Death Act" or "Act").[1] Specifically, this comment will address whether provisions of the Wyoming Probate Code ("Probate Code") must be referred to when using the Wrongful Death Act, and what the Wyoming Legislature must do to successfully amend the Act.[2]

For an understanding of the issues presented herein it is helpful to consider this hypothetical: Ms. Pitiable, a young woman fresh out of law school, decides

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[1] Wyoming Wrongful Death Act, Wyo. Stat. Ann. §§ 1-38-101 to 102 (LexisNexis 2005).

[2] Wyoming Probate Code, Wyo. Stat. Ann. §§ 2-1-101 to 2-16-112 (LexisNexis 2005).

that she is not ready for the stresses of the legal world and moves to Wyoming to become a roughneck in the oil patch to pay off her enormous student loans. Not having a penny to her name, she takes the first job offer she gets from Colossal Oil Corporation and soon finds her way to the scenic and beautiful area known as the Jonah Field in western Wyoming. While working her fourth straight day without any significant sleep, Ms. Pitiable is taking part in a drilling operation with fellow employees and employees from other corporations when she is killed by a complication in the drilling procedure due to the negligence of several parties.

Mr. Greenback, who is Ms. Pitiable's brother, decides to bring a wrongful death action pursuant to the Wrongful Death Act against all liable parties. Although the incident occurred in Wyoming, and the responsible parties are all from corporations domiciled in Wyoming, Mr. Greenback brings the action in the Federal District Court of Wyoming, claiming diversity of citizenship under 28 U.S.C. § 1332 because he is a resident of California.[3] Mr. Greenback is appointed personal representative of Ms. Pitiable by the district court, according to the requirements of the Wrongful Death Act.[4]

As any well-trained attorney should do, counsel for the Colossal Oil Corp. proceeds to dissect the applicable provisions of the Wrongful Death Act. In doing so, counsel focuses on the requirement that a personal representative must be appointed on behalf of the deceased.[5] However, counsel finds no definition of "personal representative" in the Wrongful Death Act.[6] Counsel then examines other Wyoming statutes to find a pertinent definition. After much scrupulous research and many billable hours, counsel discovers a reference to "personal representative" in the Probate Code.[7] After even further research, counsel determines that another Probate Code provision is helpful in determining the validity of the appointment of Mr. Greenback as the personal representative of Ms. Pitiable. Probate Code section 2-4-201(c) states that if a person seeking to be appointed as an administrator of a decedent's intestate estate is not a Wyoming citizen, then a Wyoming co-administrator must be appointed for a decedent's intestate estate to be subject to probate matters.[8]

Counsel for Colossal exclaims, "Eureka!" as he recognizes a potential problem with Mr. Greenback's compliance with the Wrongful Death Act. Counsel files a motion to dismiss Mr. Greenback's wrongful death action, arguing that because no Wyoming co-administrator, or in-state co-personal representative,

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[3] 28 U.S.C. § 1332 (2005).

[4] *See* WYO. STAT. ANN. § 1-38-102 (LexisNexis 2005).

[5] WYO. STAT. ANN. § 1-38-102(a) (LexisNexis 2005).

[6] *See* WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

[7] *See* WYO. STAT. ANN. § 2-1-301(a)(xxviii) (LexisNexis 2005).

[8] *See* WYO. STAT. ANN. § 2-4-201(c) (LexisNexis 2005).

was appointed, Mr. Greenback has not complied with the Wrongful Death Act. Additionally, counsel argues that the two-year condition precedent requirement in the Wrongful Death Act has passed, leaving Mr. Greenback no opportunity to appoint an in-state co-personal representative and amend his complaint, essentially preventing Mr. Greenback from having his day in court.[9] To top it off, counsel for Colossal finds a discrepancy relating to Mr. Greenback's diversity with the liable parties under 28 U.S.C. §§ 1332(c)(2), as it is unclear whether he represents his sister's heirs, or his sister's estate, which could prevent him from claiming his own domicile for purposes of diversity.

In the State of Wyoming, when a person dies due to another's negligence or wrongdoing, a surviving family member has the option of bringing a wrongful death action against a responsible party under the Wrongful Death Act.[10] Certain conditions must be met to bring the action, including a requirement that the action "shall be brought by and in the name of the personal representative of the deceased person."[11] However, the Wrongful Death Act does not contain a definition of "personal representative," a provision relating to the requirements for the appointment of a personal representative, or a provision listing the beneficiaries for whom an action can be brought.[12] These aspects of the Wrongful Death Act remain unclear and unsettled. In fact, according to the Wyoming Supreme Court in *Corkill v. Knowles*, the Wrongful Death Act, when read as a whole is ambiguous.[13]

There are no references in the Wrongful Death Act to the Probate Code, nor does the Probate Code specifically mention the Act. However, the Wyoming Supreme Court, in struggling to interpret the Wrongful Death Act, has at times resorted to using definitions and provisions found in the Probate Code. The reasoning behind the Wyoming Supreme Court's reference to the Probate Code boils down to the intrinsic structure and function of the Wrongful Death Act and the lack of guidance it provides. The silence in the Wrongful Death Act regarding the applicability of Probate Code provisions and the lack of definitions in the Act has left the Wyoming Supreme Court to play pin the probate provision tail on the wrongful death donkey.

Whether certain Probate Code provisions apply to the appointment process of a personal representative for a wrongful death action is an important issue. Several provisions of the Probate Code, if found applicable to the Wrongful Death Act, could have serious implications, such as creating problems when obtaining

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[9] *See* WYO. STAT. ANN. § 1-38-102(d) (LexisNexis 2005).

[10] WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

[11] WYO. STAT. ANN. § 1-38-102(a) (LexisNexis 2005).

[12] *See* WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

[13] Corkill v. Knowles, 955 P.2d 438, 439 (Wyo. 1998).

diversity jurisdiction in a federal court.[14] Also, for wrongful death actions brought in either state or federal court, an out-of-state personal representative would be required to find an adequate in-state co-personal representative, which could prove to be difficult. The Wyoming Legislature did not identify these concerns in the original drafting of the Wrongful Death Act or in subsequent amendments to the Act.[15] The question of whether the related Probate Code provisions apply to the Wrongful Death Act must be addressed by the Wyoming Legislature.

The issues presented in this comment are not entirely new to the Wyoming Legislature or practicing attorneys in this state. The Wyoming Legislature has previously been directed to the complications presented by the Wrongful Death Act.[16] A comment written by the Honorable V.J. Tidball in 1947, which was published in the *Wyoming Law Journal*, called for the Wyoming Legislature to amend the Wrongful Death Act to provide better guidance for who can be considered as a beneficiary in a wrongful death action and to clarify the status and role of the "personal representative" in wrongful death actions.[17] However, Judge Tidball's recommendations were never implemented by the Wyoming Legislature. Much of the confusion which plagued Wyoming attorneys in the 1940s was never eliminated, and after nearly sixty years, the Wyoming Legislature is once again presented with the same issues that need to be addressed.[18]

This comment recommends that the Wyoming Legislature clarify, complete, and amend the Wrongful Death Act. It first addresses the background of the Wrongful Death Act and the Probate Code, and discusses how the Wyoming Supreme Court and the Federal District Court of Wyoming have interpreted the relationship between the two. Next, this comment looks to other states that have addressed whether out-of-state personal representatives should be allowed to bring actions in the decedent's state and examines the approaches these states have adopted for those allowed to bring wrongful death actions. In doing so, it considers how states with similar wrongful death acts and the courts interpreting them have addressed similar issues. Additionally, this comment addresses how the Federal Diversity Jurisdiction Statute, 28 U.S.C. § 1332(c)(2), impacts Wyoming

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[14] *See* 28 U.S.C. § 1332(c)(2) (2005). Section 1332 is the federal diversity statute and subsection (c)(2) pertains to representatives of a decedent's estate and presents an issue of whether a personal representative in a wrongful death action represents the decedent's estate or the heirs of the decedent for diversity purposes. *Id.*

[15] Note: No legislative history addressing these concerns and issues could be located.

[16] *See* V.J. Tidball, *Probate Jurisdiction in Wrongful Death Actions*, 2 WYO. L.J. 109 (1947).

[17] *Id.*

[18] Tidball's comment focused on the issue of whether the probate court had jurisdiction over wrongful death actions, approval of settlements of claims, and control of the personal representative to account to the probate court for the proper distribution of the sum recovered in wrongful death actions. Tidball, *supra* note 16.

wrongful death actions in federal courts and examines the true meaning of "personal representative" for purposes of the Wrongful Death Act.

Overall, whether the Probate Code applies to the Wrongful Death Act, completely or in part, is a complex question. It is the Wyoming Legislature's responsibility to navigate through the murky water in order to clarify what is required under the Wrongful Death Act and provide clear and concise provisions for those bringing a wrongful death action.

II. BACKGROUND

A. *Wyoming Wrongful Death Act*

The Wrongful Death Act was enacted for the purpose of benefiting persons who have been injured because of a relative's death.[19] The Wrongful Death Act is Wyoming's version of Lord Campbell's Act, which created a statutory remedy for a wrongful death in England in 1846.[20] Prior to 1846, no action existed at common law to "recover damages for wrongfully causing the death of a human being."[21] Lord Campbell's Act "created a new cause of action based upon the defendant's wrongful act, neglect or default, limited recovery to certain named beneficiaries, and measured damages with respect to the loss suffered by these beneficiaries."[22]

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[19] *See* Ashley v. Read Const. Co., 195 F. Supp. 727, 729 (D. Wyo. 1961).

[20] STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1.7 (1st ed. 1966). *See also* McDavid v. United States, 213 W. Va. 592 (W. Va. 2003) (providing a good synopsis of the history of wrongful death actions); Coliseum Motor Co. v. Hester, 3 P.2d 105, 106 (Wyo. 1931), providing Lord Campbell's Act as follows:

> That whensoever the death of a person shall be caused by the wrongful act, neglect, or default of another and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. That every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the before-mentioned parties in such shares as the jury, by their verdict, shall direct.

Coliseum, 3 P.2d at 106.

[21] Tuttle v. Short, 288 P. 524, 529 (Wyo. 1930).

[22] SPEISER, *supra* note 20, at § 1.7.

Not long after the English Parliament's passage of Lord Campbell's Act, many states in the U.S. adopted wrongful death statutes.[23]

Wyoming adopted its Wrongful Death Act in 1871, and patterned it almost exclusively after West Virginia's Wrongful Death Act, which will be addressed below.[24] The Wyoming Wrongful Death Act states:

> Whenever the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action to recover damages if death had not ensued, the person who would have been liable if death had not ensued is liable in an action for damages, even though the death was caused under circumstances as amount in law to murder in the first or second degree or manslaughter. If the person dies, the action may be brought against the executor or administrator of his estate. If he left no estate within the state of Wyoming, the court may appoint an administrator upon application.[25]

For a wrongful death action to accrue, there are certain statutory requirements. Section 1-38-102 of the Wrongful Death Act requires:

> (a) Every such action shall be brought by and in the name of the personal representative of the deceased person.
>
> (b) If the deceased left a husband, wife, child, father or mother, no debt of the deceased may be satisfied out of the proceeds of any judgment obtained in any action brought under the provisions of this section.
>
> (c) The court or jury, as the case may be, in every such action may award such damages, pecuniary and exemplary, as shall be deemed fair and just. Every person for whose benefit such action is brought may prove his respective damages, and the court or jury may award such person that amount of damages to which it considers such person entitled, including damages for loss of probable future companionship, society and comfort.

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[23] *Id.* § 1.8.

[24] *Coliseum*, 3 P.2d at 106; *see also* Corkill v. Knowles, 955 P.2d 438, 441 (Wyo. 1998).

[25] WYO. STAT. ANN. § 1-38-101 (LexisNexis 2005); *see* W. VA. CODE § 55-7-5 (2006).

(d) Every such action shall be commenced within two (2) years after the death of the deceased person.[26]

Provisions under section 1-38-102 require that two important condition precedents must be met in order to bring an action.[27] First, a personal representative of the decedent must be appointed to bring the action.[28] Second, the personal representative must bring the action within two years of the decedent's death.[29] For purposes of this comment, it is the first condition that will be considered and analyzed. The Wrongful Death Act is silent with regard to the definition of "personal representative" and the procedure for the appointment of a personal representative, thereby creating a multitude of problems for those attempting to comply with the Act and for courts overseeing compliance with the Act. Not only does the Wrongful Death Act fail to provide a definition of "personal representative," it does not point to another location where one can be found.[30]

B. Wyoming Probate Code

The Probate Code is a collection of statutes relating to probate matters. *Black's Law Dictionary* defines probate as "the judicial procedure by which a testamentary document is established to be a valid will," and "loosely, a personal representative's actions in handling a decedent's estate," and also "loosely, all the subjects over which probate courts have jurisdiction."[31] According to *Black's*, the phrase "probate code" is defined as "a collection of statutes setting forth the law (substantive and procedural) of decedent's estates and trusts."[32] The definition of "estate" in the Probate Code is "the real and personal property of a decedent, a ward or a trust, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions, additions or substitutions, or diminished by any decreases and distributions therefrom."[33]

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[26] WYO. STAT. ANN. § 1-38-102 (LexisNexis 2005) (entitled "Action to be brought by personal representative; recovery exempt from debts; measure and element of damages; limitation of action.").

[27] *Id.*

[28] Bircher v. Foster, 378 P.2d 901 (Wyo. 1961). The court in *Bircher* held that the appointment of a personal representative must be done by a state district court sitting in probate. *Id.* at 903. Nowhere in the provisions of the Wrongful Death Act is this requirement stated, setting forth the issue of whether this was the legislature's true intent. *Id.*

[29] WYO. STAT. ANN. § 1-38-102(d) (LexisNexis 2005).

[30] *See* WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

[31] BLACK'S LAW DICTIONARY 557 (2nd pocket ed. 2001).

[32] *Id.*

[33] WYO. STAT. ANN. § 2-1-301(a)(xiv) (LexisNexis 2005). It is important to note that the Wyoming Probate Code is located in Title 2 of the Wyoming Statutes, whereas the Wyoming Wrongful Death Act is located in Title 1 of the Wyoming Statutes, the Civil Code.

Under the Probate Code, a "personal representative" includes an executor or administrator.[34] Generally, administrators handle the estates of persons dying intestate (without a will), while executors are appointed from the will of a testate decedent. An "administrator of an estate is empowered to take into his possession all of the estate of the decedent, real or personal, to collect all debts due to the decedent or to the estate, ultimately to probate, administer and distribute the estate for the benefit of the heirs."[35] An executor is "any person appointed by the court to administer the estate of a testate decedent," and generally the duty of the executor is to execute the will of the decedent.[36]

Alternatively, the personal representative appointed for a wrongful death action is only "required to collect the amount received as damages from the wrongful death action and to distribute it in the manner provided by law."[37] The award does not benefit the decedent's estate.[38] Thus, the function of a personal representative in collecting damages for the beneficiaries of the wrongfully deceased has no connection to "administration" of a decedent's estate.

Nowhere in the Probate Code is there a reference to the Wrongful Death Act.[39] The essential focus of the Probate Code on a person's estate at death presents an immediate problem when Probate Code definitions are commingled with terms in the Wrongful Death Act. Any award from a wrongful death action is not considered part of a decedent's estate for purposes of probate.[40] The Wrongful Death Act's purpose is to compensate family members for their loss and is not to enhance the decedent's estate.[41]

Probate Code section 2-4-201, and whether it applies to the Wrongful Death Act, presents several issues. Section 2-4-201(a) states that a relative can be an administrator of a decedent's estate only when entitled to succeed to the decedent's personal estate or some portion thereof.[42] The list given for those entitled to administer under section 2-4-201 contains a provision for the creditors of the decedent, and a provision for any legally competent person.[43] These provisions

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[34] WYO. STAT. ANN. § 2-1-301(a)(xxviii) (LexisNexis 2005).

[35] Ashley v. Read Const. Co., 195 F. Supp. 727, 729 (D. Wyo. 1961); *see also* WYO. STAT. ANN. § 2-1-301(a)(i) (LexisNexis 2005).

[36] WYO. STAT. ANN. § 2-1-301(a)(xv) (LexisNexis 2005). *See also* BLACK'S LAW DICTIONARY 259 (2nd Pocket ed. 2001).

[37] *Ashley*, 195 F. Supp at 729.

[38] *Id.*

[39] *See* WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

[40] *See Ashley*, 195 F. Supp. at 728.

[41] *Id.*

[42] WYO. STAT. ANN. § 2-4-201(a) (LexisNexis 2005).

[43] WYO. STAT. ANN. § 2-4-201(a)(viii) (LexisNexis 2005).

present problems for the appointment of a personal representative for a wrongful death action and also contain language contrary to the purpose and limitations of the Wrongful Death Act.

Section 2-4-201 conflicts with the Wrongful Death Act, in that "the amount recovered [in a wrongful death action] does not become a part of the decedent's estate and is not liable for debts of the estate or subject to estate administration."[44] Section 2-4-201(a)(viii) allows creditors to administer a decedent's estate for recovering debts owed and damages recovered under a wrongful death action, which is not permissible under the Wrongful Death Act.[45] Subsection (c) of section 2-4-201 states "[n]o nonresident of the state of Wyoming shall be appointed as administrator unless a resident of Wyoming is appointed as coadministrator."[46] Provisions like section 2-4-201(c), which require an in-state personal representative, are typically for the protection of creditors of the decedent's estate.[47]

An important concern to note, regarding linking Probate Code provisions with the Wrongful Death Act, is the possible adoption of the Uniform Probate Code ("UPC") in Wyoming, which is currently being considered by the Wyoming Legislature.[48] If the Wyoming Legislature adopted the UPC, it could implicate certain provisions of the Wrongful Death Act. Although it is uncertain whether Wyoming will adopt the UPC, the Wyoming Legislature should recognize this possibility and amend the Wrongful Death Act now to prevent any further complications.

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[44] DeHerrera v. Herrera, 565 P.2d 479, 482 (Wyo. 1977) (quoting Jordan v. Delta Drilling Co., 541 P.2d 39, 42 (Wyo. 1975)). The conflict lies within the intestate statute, *see* WYO. STAT. ANN. § 2-4-201(a)(viii) (LexisNexis 2005).

[45] WYO. STAT. ANN. § 2-4-201(a)(viii) (LexisNexis 2005); *see also Ashley*, 195 F. Supp. at 728.

[46] WYO. STAT. ANN. § 2-4-201(c) (LexisNexis 2005). However, it must be noted that the requirement for an in-state co-representative does not apply to "executors" of decedents' estates. *See* WYO. STAT. ANN. §§ 2-1-101 to 2-16-112 (LexisNexis 2005).

[47] *See* Elliot v. Stevenson, 218 F. Supp. 90, 91-92 (D. Or. 1962).

[48] The UPC is a collection of provisions related to probate matters. U.P.C. § 1-102 (1977). Wyoming has not adopted the UPC. Recently, Senate Bill 06LSO-0468 was introduced in the Legislature to form a joint legislative and executive task force to research the possibility of adopting the UPC in Wyoming. S.F. 0110, 58th Leg., (Wyo. 2006). The bill failed and the Joint Judiciary Committee is currently considering forming a task force to research the possibility of adopting the UPC. If Wyoming were to adopt the UPC, the question arises whether there will be provisions which answer whether the Probate Code must be followed and cross-referenced when using the Wrongful Death Act. At this point, it is pure speculation whether Wyoming will adopt the UPC. Additionally, it would be a guessing game as to which UPC provisions would be adopted. Regardless of whether the state adopts the UPC, the Probate Code should have no affect or control over the Wrongful Death Act. The best solution for the Wyoming Legislature would be to avoid this complication by simply amending the Wrongful Death Act and establish its intent clearly. The Wrongful Death Act itself should provide all the necessary provisions, terms, definitions, and references, in order to circumvent the need for reliance on the Probate Code or UPC if adopted.

C. Wyoming Case Law

In some circumstances, the Wyoming Supreme Court and the Federal District Court of Wyoming have applied Probate Code provisions when deciding wrongful death cases, but the decisions are somewhat contradictory and give no clear guidance as to how, where, and by whom a wrongful death action can be brought. The Wyoming Supreme Court has held that at least one probate provision must be referenced when using the Wrongful Death Act, and that provision relates to who may recover for injuries in a wrongful death suit.[49] Further, the Federal District Court of Wyoming has distinguished between an administrator acting as a personal representative for a wrongful death action and an administrator of a decedent's estate.[50] However, the consequences of these rulings are unclear. In addition, it remains unclear whether a co-personal representative is required if the original personal representative is an out-of-state resident.[51]

1. Beneficiaries in a Wrongful Death Action

Currently, the Wrongful Death Act does not contain a provision relating to those who are entitled to recover in wrongful death actions.[52] To address this deficiency, the Wyoming Supreme Court, in *Butler v. Halstead*, held that Probate Code section 2-4-101, relating to intestacy succession, was applicable to the Wrongful Death Act.[53] Thus, spouses, children, parents and siblings, as well as grandparents, uncles, aunts, and cousins can recover.[54] The court noted that "[i]n our judgment, extending to those related persons the opportunity to participate in a wrongful death action does not unduly extend the class of persons for whose benefit such actions may be brought to the point that it would be unmanageable."[55] The *Butler* case is one of the few examples where the Wyoming Supreme Court has tied the Probate Code to the Wrongful Death Act.[56] It is important to recognize, however, that the court limited the applicability of the intestate succes-

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[49] Butler v. Halstead, 770 P.2d 698, 700 (Wyo. 1989). The issue in *Butler* was whether a decedent's mother and siblings are included in the statutory phrase "every person for whose benefit such action is brought" under the Act. *Id.* at 698. The district court in *Butler*, in relying on a previous holding from Wetering v. Eisele, 682 P.2d 1055 (Wyo. 1984), which stated that the child of a father who was wrongfully killed was the only person for whose benefit a wrongful death action can be brought, overruled this decision by holding that Probate Code § 2-4-101 contains the list of those for whom wrongful death actions are brought. *Id.* at 698-700.

[50] Ashley v. Read Const. Co., 195 F. Supp. 727, 729 (D. Wyo. 1961).

[51] *See* WYO. STAT. ANN. § 2-4-201 (LexisNexis 2005).

[52] *See* WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

[53] *Butler*, 770 P.2d at 700.

[54] *Id.*

[55] *Id.*

[56] *Id.*

sion statute under the Probate Code, stating that "the distribution of any proceeds will be controlled by [the Wrongful Death Act and not the Probate Code] . . . ."[57] The holding from *Butler*, establishing who may benefit from a wrongful death action, points out a deficiency in the Wrongful Death Act and demonstrates the Wyoming Supreme Court's superimposed role as the Legislature in this matter.

2. *The Personal Representative Requirement*

A handful of Wyoming Supreme Court cases have discussed the personal representative requirement in the Wrongful Death Act and its relation to the probate provisions. In *Corkill v. Knowles*, the court found that the definition of "personal representative" in the Probate Code should be referenced when looking to the personal representative requirement under the Wrongful Death Act.[58] Similarly, in *Wetering v. Eisele*, the court held that "the wrongful death action . . . is brought by the personal representative in his capacity as administrator of the decedent's estate."[59]

In *Bircher v. Foster*, the Wyoming Supreme Court considered a wrongful death action in a case where there was no probate pending and no administrator or executor appointed.[60] The *Bircher* court held that "it would seem clear that this court in the past has been consistent in holding that the only person who could bring an action for wrongful death was the personal representative of the deceased, the executor or administrator of decedent's estate."[61]

Without a clear definition of "personal representative" located in the Wrongful Death Act or elsewhere in the Civil Code, it appears that presently the only option is to refer to the Probate Code.[62] However, use of the Probate Code's definition of "personal representative" presents unanswered questions. For example, can a personal representative appointed for the wrongful death action be different

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[57] *Id.*

[58] Corkill v. Knowles, 955 P.2d 438, 444 (Wyo. 1998). The court held that "a personal representative may bring a wrongful death action within two years of the date on which the decedent is identified so the court may appoint a personal representative." *Id.* at 439. The court, in searching for a definition of personal representative, pointed to the definition found in the Probate Code § 2-1-301(a)(xxviii). *Id.* at 444.

[59] Wetering v. Eisle, 682 P.2d 1055, 1062 (Wyo. 1984). This statement by the court is both correct in part and incorrect in part. The personal representative, in a wrongful death action does act as an administrator of a decedent's intestate estate in that recovery from a wrongful death action is for the benefit of those listed in the Probate Code. But the personal representative does not represent the decedent's estate, contrary to this statement in *Wetering*. *See Ashley*, 195 F. Supp. 727 (D. Wyo. 1961); Jordan v. Delta Drilling Co., 541 P.2d 39 (Wyo. 1975); DeHerrera v. Herrera, 565 P.2d 479 (Wyo. 1977).

[60] Bircher v. Foster, 378 P.2d 901, 902 (Wyo. 1963).

[61] *Id.*

[62] *See* WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

from the personal representative appointed to administer or execute a decedent's estate?[63]

The decisions from *Butler*, *Corkill, Wetering,* and *Bircher* illustrate the Wyoming Supreme Court's view that the provisions under the Wrongful Death Act are somewhat tied to the provisions under the Probate Code.[64] However, other Wyoming cases emphasize the differences between probate matters and wrongful death actions.[65] In *Ashley v. Read Const. Co.*, the Federal District Court of Wyoming stated, "[w]e must not confuse an administrator acting as a personal representative with an administrator of an estate whose duties and powers are set out in [the probate statutes]." The court explained:

> It is not within the province of this court to qualify the statutory provision 'personal representative' by interpolating the words 'who is a resident of this state,' or 'who is appointed in this state,' or 'who is amenable to the jurisdiction of this state.' It would appear to make little difference what title the special representative might possess, whether it be administrator or executor, foreign or domestic, so long as the amount collected inures to the benefit of the persons designated by law.[66]

The *Ashley* court emphasized that a wrongful death cause of action is brought to benefit those who would share in the distribution of the decedent's estate as if the decedent died intestate, but not to enhance the estate of the deceased.[67] The amount recovered in a wrongful death action may not be "tapped to pay the debts or liabilities of the deceased."[68]

Similarly, the Wyoming Supreme Court case, *Jordan v. Delta Drilling Co.*, sets forth two important distinctions between the position of the personal representative in a wrongful death action and an administrator in a probate proceeding.[69]

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[63] *Id.* The Wyoming Wrongful Death Act is located under the Civil Code of the Wyoming Statutes. *Id.*

[64] Butler v. Halstead, 770 P.2d 698 (Wyo. 1989); Corkill v. Knowles, 955 P.2d 438 (Wyo. 1998); *Wetering*, 682 P.2d 1055.

[65] *See* Ashley v. Read Const. Co., 195 F. Supp. 727 (D. Wyo. 1961); Jordan v. Delta Drilling Co., 541 P.2d 39 (Wyo. 1975); DeHerrera v. Herrera, 565 P.2d 479 (Wyo. 1977).

[66] *Ashley*, 195 F. Supp. at 729.

[67] *Id.* at 728.

[68] *Id.*

[69] *Jordan*, 541 P.2d at 42. In *Jordan*, the decedent was killed in the oil field and the decedent's illegitimate child brought the wrongful death action as the personal representative and administratrix of the decedent's estate. *Id.* at 40. The trial court held that the illegitimate child was not an heir and, therefore, the intestacy laws of Wyoming barred the child from recovery. *Id.* On appeal to the Wyoming Supreme Court, the court held that Wyoming's wrongful death statute could not constitutionally deny an illegitimate child the right to bring a wrongful death action to recover damages for the death of his or her parent. *Id.*

The court still referred to the personal representative in a wrongful death action as an administrator, but said that the "administrator acts but in the capacity of a trustee."[70] This conceptualization of a personal representative as a "trustee" has no parallel in the Probate Code, which defines "personal representatives" as either administrators or executors of a decedent's estate.[71] In *Jordan*, the court also recognized that "the Wyoming Statute authorizing wrongful death actions is part of the civil code of this state and not a part of the probate code."[72] This opinion echoes Judge Tidball's previous comments that "the Wyoming Statute giving a right of action for wrongful death is not a part of the Probate Code, but of the Civil Code," and that the personal representative acts as a trustee and not as an administrator or executor.[73] It is essential that the Wyoming Legislature make this distinction when amending the Wrongful Death Act.

In *DeHerrera v. Herrera*, the Wyoming Supreme Court distinguished the roles a personal representative has in the wrongful death context and a survival action context.[74] In doing so, the court noted that although an administrator must be appointed for a wrongful death action:

> [t]he designation of an administrator as a trustee is only a device to provide a party to file suit and pay over any damages collected to the beneficiaries designated by statute. The amount recovered does not become a part of the decedent's estate and is not liable for debts of the estate or subject to estate administration.[75]

Contrary to a wrongful death action, the court stated that "a survival statute permits recovery by the decedent's personal representative on behalf of the estate," and "the wrongful death statute creates a new cause of action for the benefit of designated persons who have suffered the loss of a loved one and provider."[76]

Since the decision in *DeHerrera*, the court has added to the confusion regarding the status of the personal representative in wrongful death actions. While in *DeHerrera*, the Wyoming Supreme Court said a personal representative in a

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[70] *Id.*; *see also* Bircher v. Foster, 378 P.2d 901. The *Bircher* court stated that the only person entitled to bring the action was the administrator or executor of the decedent's estate. *Id.* at 902. However, a personal representative in a wrongful death action acts as trustee and not as an administrator or executor of a decedent's estate, as it has been pointed out that wrongful death actions do not benefit the estate of the decedent. *Jordan*, 541 P.2d at 42.

[71] WYO. STAT. ANN. § 2-1-301(a)(xxviii) (LexisNexis 2005).

[72] *Jordan*, 541 P.2d at 42.

[73] Tidball, *supra* note 16, at 109.

[74] DeHerrera v. Herrera, 565 P.2d 479, 482 (Wyo. 1977).

[75] *Id.* at 482.

[76] *Id.*

wrongful death action is not related to the administrator of the decedent's probate estate, it contradicted itself in *Corkill*, saying that the personal representative is the same thing as an executor of a decedent dying with a will or an administrator of a decedent dying intestate.[77]

Corkill is the most recent discussion by the Wyoming Supreme Court on this topic.[78] In *Corkill*, the court referred directly to the definition in the Probate Code for "personal representative."[79] However, the court did not address whether the Wyoming Legislature intended for the Probate Code definition to apply to the Wrongful Death Act. Thus, the actual intent of the Legislature remains unclear.[80]

The classification of a personal representative in the wrongful death context with that of an administrator or executor in the probate context fails to recognize two important concepts. First, as the Wyoming Supreme Court and Federal District Court of Wyoming have already established, a personal representative for a wrongful death action must not be confused with an administrator or executor for probate matters.[81] Second, the decedent's estate for purposes of probate is entirely separate from the wrongful death action, and the current definition under the Probate Code presumes that a decedent will have an estate, whether he or she dies intestate or testate.[82] However, it is possible for a decedent to die and leave no estate, ruling out the possibility of a personal representative in either category of administrator or executor. There is clearly a distinction between a wrongful death action and probate matters. Thus, it would be reasonable to assume that the Wrongful Death Act does not require the personal representative for a wrongful death action to be the same person as the probate administrator or executor. While this is contrary to the decision in *Bircher*, it seems to be the most logical conclusion.[83]

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[77] *Id.*; Corkill v. Knowles, 955 P.2d 438, 444 (Wyo. 1998).

[78] *Corkill*, 955 P.2d at 441.

[79] *Id.*

[80] *Id.*

[81] Ashley v. Read Const. Co., 195 F. Supp. 727, 729 (D. Wyo. 1961).

[82] WYO. STAT. ANN. § 2-1-301(a)(xxviii) (LexisNexis 2005).

[83] Bircher v. Foster, 378 P.2d 901 (Wyo. 1963). The Wyoming Supreme Court held that because the father of the decedent did not timely file for personal representative of his son for a wrongful death action, the time had passed and his claim had to be dismissed. *Id.* The father attempted to be appointed as personal representative after the two year limitation period and after he filed his complaint for the wrongful death of his son. *Id.* The court, in addressing whether the father could bring the action without being appointed as the personal representative, stated that "it would seem clear that this court in the past has been consistent in holding that the only person who could bring an action for wrongful death was the personal representative of the deceased, the executor or administrator of the decedent's estate." *Id.* at 902.

A recent Federal District Court of Wyoming case, *Schwartz v. Hawkins & Powers Aviation, Inc.*, sheds some light on the personal representative requirement.[84] The *Schwartz* court stated that "while generally, the personal representative is an executor or administrator of the decedent's estate, this is not a requirement. The personal representative simply acts as a trustee for any beneficiaries or heirs, collecting any damages, and paying them over to those entitled to share in the estate."[85] Through the court's opinion in *Schwartz*, it is apparent that the *Ashley* case is still relied upon and provides important guidance in this area of law for the Federal District Court of Wyoming.[86] In *Ashley*, the court addressed the residency requirement of the personal representative and stated, "there is nothing whatever in this statute which indicates any intention on the part of the Wyoming Legislature to exclude a non-resident administrator from acting as personal representative. Certainly he or she can resort to the federal court under diversity provisions of the Code."[87] In *Ashley*, a California resident appointed as the personal representative in California brought the wrongful death suit in the Federal District Court of Wyoming under the Wrongful Death Act and the court held that this was proper and allowed under the Act.[88]

Neither the Wyoming Supreme Court, nor the Wyoming Legislature has addressed the question of whether Probate Code section 2-4-201(c), which would require the appointment of an in-state co-administrator, applies to the Wrongful Death Act. The question is what real purpose would this requirement serve? The general rule is that an out-of-state personal representative (foreign personal representative) for probate purposes has no capacity to sue outside the state of his or her appointment.[89] However, the modern trend, sometimes referred to as "the modern liberal doctrine," excludes this rule from applying to foreign personal representatives in wrongful death actions.[90] The personal representative in a wrongful death action

> sues not in his capacity as such, but in the capacity of a trustee for such beneficiaries, and, as the doctrine denying the personal representative right to sue in a jurisdiction other than that of his appointment is predicated on the idea that local creditors must be first satisfied before the representative may be permitted to

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[84] Schwartz v. Hawkins & Powers Aviation, Inc., 2006 WL 1028392 * 8 (D. Wyo. 2006).

[85] *Id.* (citing *Ashley*, 195 F. Supp. at 729).

[86] *See id.*

[87] *Ashley*, 195 F. Supp. 727, 729 (D. Wyo. 1961).

[88] *Id.* at 728-29.

[89] E.H. Schopler, Annotation, *Capacity of Foreign Domiciliary, or of Ancillary, Personal Representative to Maintain Action for Death, Under Statute of Forum Providing for Action by Personal Representative*, 52 A.L.R.2d 1048 § 2 (2006).

[90] *Id.*

> recover local assets and remit them to another jurisdiction, the reason for the rule ceases to exist when the recovery is not subject to claims of deceased's creditors, but is to be distributed among the statutory beneficiaries.[91]

D. Wrongful Death in Other States

1. The Personal Representative Approach

The Wyoming Wrongful Death Act follows the majority of states in requiring that a personal representative must bring the action.[92] The basic question for the Wrongful Death Act is whether out-of-state personal representatives should be allowed to bring wrongful death actions in Wyoming and, if so, must in-state co-personal representatives be appointed in such cases.

As mentioned above, the Wyoming Wrongful Death Act was modeled almost entirely after the West Virginia Wrongful Death Act.[93] The West Virginia Act, like Wyoming's, contains a provision that "every such action shall be brought by and in the name of the personal representative of such deceased person . . . ."[94] However, unlike the Wyoming Wrongful Death Act, it continues on to state "who has been duly appointed in this state, *or in any other state*, territory or district of the United States, or in any foreign country."[95] Thus, out-of-state personal representatives may bring wrongful death actions in West Virginia. This was not always the case. Prior to 1967, the West Virginia Wrongful Death Act merely stated that "every such (wrongful death) action shall be brought by and in the name of the personal representative of such deceased person."[96] In 1940, a federal court held, in *Rybolt v. Jarret*, that the West Virginia Legislature intended to prohibit non-resident personal representatives from suing in West Virginia.[97] The West

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[91] *Id.* at § 4[a].

[92] States which limit wrongful death actions to be brought by the decedent's personal representative also include, Alaska, California, Illinois, Kentucky, Maine, Massachusetts, Michigan, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, and Washington. See statutes of individual states. For states that have chosen to take the personal representative-only approach with their wrongful death statutes, most contain a separate provision or language within the statute addressing for whose benefit wrongful death actions are brought. See statutes of individual states. For example South Dakota's Wrongful Death Act states that an action shall be brought in the name of the personal representative of the deceased person for the "exclusive benefit of the wife or husband and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused." S.D. CODIFIED LAWS § 21-5-5 (2006). This example is typical of most states that follow the personal representative requirement approach.

[93] Coliseum Motor Co. v. Hester, 3 P.2d 105, 106 (Wyo. 1931).

[94] W. VA. CODE § 55-7-6(a) (2006) (emphasis added).

[95] *Id.*

[96] *See* Rosier v. Garron, Inc., 199 S.E.2d 50, 52 (W. Va. 1973).

[97] *See id.*

Virginia Legislature disagreed with the court's decision and amended the wrongful death statute in 1967 to clearly state that non-resident personal representatives are allowed to sue under the wrongful death statute.[98]

Like West Virginia, the Virginia wrongful death statute is similar to that of Wyoming in that it requires wrongful death actions to be brought by, and in the name of, the personal representative of the deceased person.[99] Until 1996, the Virginia statute contained a provision which stated "a natural person, not a resident of this Commonwealth *shall not* be appointed or allowed to qualify or act as personal representative . . . of any decedent . . . unless there is also appointed to serve with the nonresident personal representative . . . a person resident in this Commonwealth . . . ."[100] However, in 1996, this condition was removed by the Virginia Legislature, which amended the provision to state "a natural person, not a resident of this Commonwealth, *may* be appointed or allowed to qualify or act as personal representative, or trustee under a will, of any decedent . . . ."[101]

The purpose of the amendment to Virginia wrongful death statute was to remove "the requirement that nonresident fiduciaries must have resident co-fiduciaries to be allowed to qualify as personal representatives, trustees, or guardians."[102] As discussed above and will be addressed further below, having an in-state co-administrator (co-personal representative) is a concern for creditors of a decedent's estate, which is not an issue with wrongful death actions.[103]

The Alaska wrongful death statute is also similar to that of Wyoming's Wrongful Death Act, and provides that "only a duly appointed personal representative can institute and prosecute the same for the benefit of the widow and children of the decedent."[104] The Federal District Court of Oregon, in *Elliot v. Stevenson*,

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[98] *Id. See also* W. VA. CODE § 55-7-6 (1967). An out-of-state appointed personal representative must meet the conditions of posting a bond with a corporate surety authorized to do business in the state, pay all costs adjudged against him or her, and comply with the provisions of the wrongful death act. *Id.*

[99] VA. CODE ANN. § 8.01-50 (2006).

[100] Wackwitz v. Roy, 418 S.E.2d 861, 863 (Va. 1992) (citing VA. CODE. ANN. § 25-59 (1992)) (emphasis added).

[101] VA. CODE. ANN. § 26-59 (2006) (emphasis added).

[102] Virginia General Assembly, 1996 Session (October 2006), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?ses+961&typ=bil&val=hb347. In Virginia, to qualify as a personal representative or trustee of any decedent, that person will be subject to VA. CODE ANN. § 64.1-116.

[103] *See supra* note 89, *infra* note 107 and accompanying text; *see also* Schieszler v. Ferrum College, 236 F. Supp. 2d 602, 613 (W.D.Va. 2002). It does appear that Virginia considers personal representatives to be of the same status as administrators for probate matters, and the 1996 amendment permits nonresidents to be "appointed or allowed to qualify as administrator so long as they consent to service of process in matters related to administration of the estate and post bond with surety." *Id.*

[104] Elliot v. Stevenson, 218 F. Supp. 90, 91 (D. Or. 1962). *See* ALASKA STAT. § 09-55-580 (2006).

clarified the question of whether out-of-state personal representatives may bring wrongful death action under the Alaska wrongful death statutes.[105] Here, the United States District Court of Oregon was presented with the issue of whether a personal representative, who was appointed in Alaska, could bring a wrongful death action under the Alaska wrongful death statute against an Oregon citizen in the Oregon Federal District Court.[106] The court, in considering the defendant's argument that the personal representative cannot act in her representative capacity in a state other than the one in which she received her appointment, stated:

> [T]he authority of a personal representative to sue does not extend beyond the territorial jurisdiction of the court from which he derives his appointment. *The rule which prohibits foreign administrators from bringing an action is founded upon policy reasons wherein the state seeks to protect local creditors who are entitled to recover their claims from the local assets of the deceased.* Most courts have, however, recognized an exception to the rule and permit an action by the foreign administrator where recovery is sought for designated beneficiaries under a wrongful death statute which provides that the action shall be brought by the personal representative of the decedent's estate. *The primary reason for this exception to the rule is that the personal representative merely acts as a nominal plaintiff under the statute and that any recovery will not become a part of the estate of the deceased to which local creditors might assert a claim.*[107]

The *Elliot* court went on to state that:

> [t]he rule barring foreign administrators from our courts is just and reasonable only if applied in cases, first, where there are domestic creditors, and second, where the foreign administrator sues to recover a fund in which such creditors may share. *Obviously, no prejudice threatens local creditors of the decedent if the wrongful death statute makes no provision for recovery on behalf of the general estate and, in fact, bars creditors' claims against the proceeds*. Suing under such a statute, plaintiff acts, not as an officer of the foreign court appointed by it as alter ego for the estate, but as a trustee for the designated beneficiaries, the actual and real parties in interest. In such a case, the amount recovered truly constitutes a special fund for their exclusive benefit, and, since it is not subject to the claims of others, no danger exists that failure

[105] *Elliot*, 218 F. Supp. 90.

[106] *Id*.

[107] *Elliot*, 218 F. Supp. at 92 (emphasis added).

> to require local qualification may harm or prejudice domestic creditors. With the primary and, perhaps, only reason for the rule thus removed, the rule itself has no sensible application and should not be invoked in this class of case.[108]

This line of reasoning laid out in *Elliot* is important for considering whether to apply section 2-4-201(c) to the appointment of a personal representative under the Wrongful Death Act.

2. *The Heir Approach*

Unlike Wyoming, West Virginia, and Virginia, a wrongful death action under Kansas law "may be commenced by any one of the heirs at law of the deceased who has sustained a loss by reason of the death."[109] Thus, Kansas' approach eliminates the need for a personal representative.[110] Kansas' approach is unique in allowing any heir at law to commence the suit, and the Kansas statute does not mention whether personal representatives appointed for a decedent are allowed to bring an action.[111] This approach is simplistic and recognizes that all wrongful death actions are brought for the benefit of the decedent's heirs.

3. *The Dual Approach*

While some states have chosen to take the "personal representative" approach for those allowed to bring wrongful death actions and others the "heir" approach, a third group of states have chosen to incorporate the two approaches into what is known as the "dual approach."[112] At least fourteen states currently use the dual approach, which allows wrongful death actions to be brought by either the decedent's heirs *or* a personal representative of the decedent.[113] Thus, those who are entitled to recover under these state's wrongful death statutes may bring the action directly, or through a personal representative, if preferred.

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[108] *Id.* (emphasis added).

[109] KAN. STAT. ANN. § 60-1902 (2006).

[110] *Id.*

[111] *Id.*

[112] For example, Arkansas, Utah, and Wisconsin are several states that have chosen to allow both personal representatives and decedent's heirs to bring wrongful death actions. *See* ARK. CODE ANN. § 16-62-102(b) (2006) (quoted in text below); UTAH CODE ANN. § 78-11-7 (2006) ("His heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death . . . ."); WIS. STAT. § 895.04 (2005) ("An action for wrongful death may be brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs.").

[113] Other states which have chosen to take the dual approach are Arizona, Arkansas, Delaware, Hawaii, Idaho, Mississippi, Missouri, North Dakota, Oklahoma, Pennsylvania, Tennessee, and Texas.

Among the dual approach states, North Dakota's Wrongful Death Act provides a straightforward system for determining who may bring an action:

> The action shall be brought by the following persons in the order named:
> 1. The surviving husband or wife, if any.
> 2. The surviving children, if any.
> 3. The surviving mother or father.
> 4. A surviving grandparent.
> 5. The personal representative.
> 6. A person who has had primary physical custody of the decedent before the wrongful act.
>
> If any person entitled to bring the action refuses or neglects so to do for a period of thirty days after demand of the person next in order, that person may bring the action.[114]

Hawaii is another state that has incorporated the dual approach.[115] Hawaii's wrongful death statute provides that the deceased's legal representative, or any of the persons enumerated in a sub-provision of the statute may maintain an action against the responsible parties.[116] Arkansas also follows the dual approach, requiring that "every action shall be brought by and in the name of personal representative of a deceased person. If there is no personal representative, then the action shall be brought by the heirs at law of the deceased person."[117] Arizona statute section 12-612 is another example of the dual approach, providing that a wrongful death action:

> [S]hall be brought by and in the name of the surviving husband or wife, child, parent or guardian, or personal representative of the deceased person for and on behalf of the surviving husband or wife, children or parents, or if none of these survive, on behalf of the decedent's estate.[118]

The approach used by Arizona presents an interesting issue as it allows an action to be brought on behalf of the decedent's estate if no other person qualifies.[119] Allowing this would possibly present an issue with 28 U.S.C. § 1332(c)(2), as discussed above. The Arizona statute, like most states' wrongful death statutes,

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[114] N.D. CENT. CODE § 32-21-03 (2006).

[115] HAW. REV. STAT. § 663-3 (2006).

[116] *Id.*

[117] ARK. CODE ANN. § 16-62-102(b) (2006).

[118] ARIZ. REV. STAT. § 12-612 (2006).

[119] *Id.*

regardless of the approach taken, explicitly lists who may recover from a wrongful death action, unlike Wyoming's Wrongful Death Act.[120]

Interestingly, prior to 1987, Montana followed the dual approach for wrongful death actions.[121] However, the Montana statute was amended in 1987 to eliminate the ability of the decedent's heirs to bring suit and clarified that only the personal representative of the decedent's estate, may bring a wrongful death action.[122]

E. Federal Diversity Jurisdiction Statute, 28 U.S.C. § 1332

Determining the meaning and status of a personal representative for wrongful death actions under the Wrongful Death Act is imperative for determining whether diversity will exist in a federal court. Title 28, § 1332 of the United States Code requires diversity of citizenship between all plaintiffs and all defendants before a case can be brought in federal court.[123] The title was amended in 1988 to include §1332(c)(2), which states:

> *The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent*, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.[124]

Section 1332(c)(2) was added to the federal diversity of citizenship statute as part of the Judicial Improvements and Access to Justice Act of 1988.[125] The purpose of this federal act was to curb the federal courts' inundation of diversity-based cases.[126] However, Congress did not definitively answer how, or if,

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[120] *Id.*

[121] MONT. CODE ANN. § 27-1-513 (1986) (stating in part "when the death of one person . . . caused by the wrongful acts or neglect of another, *his heirs or personal representatives* may maintain an action for damages against the person causing the death . . . ") (emphasis added).

[122] MONT. CODE ANN. § 27-1-513 (1987). The Montana State Senate Judiciary Committee Minutes of the Meeting on consideration of Senate Bill 375 contain discussion from various proponents and opponents of the bill. Mont. Legis. History, Chapter 449, S.B. 375 (1987). The main emphasis from the discussion of the purposed changes of the statute appears to focus on the issue of double recovery from both wrongful death actions and survival actions. *Id.* The change was intended to allow one court to handle the recovery from the two separate actions. *Id.* Prior to the amendment, the wrongful death action could be brought by the heirs of the decedent, whereas survival actions were brought by the decedent's personal representative. *Id.* The proposed changes simplified the process by eliminating the possibility of multiple recovery, *a concern presented by insurance providers. Id.* (emphasis added).

[123] 28 U.S.C. § 1332 (2005).

[124] 28 U.S.C. § 1332(c)(2) (2005) (emphasis added).

[125] Heather N. Hormel, Comment, *Domicile for the Dead: Diversity Jurisdiction in Wrongful Death Actions*, 2001 U. CHI. LEGAL. F. 519, 520 (2001).

[126] *Id.* at 535-36.

§ 1332(c)(2) applied to representatives in the wrongful death context.[127] Questions immediately arise: Is a personal representative of a decedent in a wrongful death action under Wyoming law a "legal representative" of the decedent's estate?[128] Is an opened wrongful death action appropriately labeled a wrongful death estate?[129] To date, there is a split in the federal courts regarding whether § 1332(c)(2) applies to representatives for wrongful death actions.[130] This provision could be interpreted to disallow Wyoming wrongful death actions in federal court by out-of-state personal representatives.

The Tenth Circuit considered the status of a personal representative for diversity purposes under the Kansas Wrongful Death Act in *Tank v. Chronister*.[131] In *Tank*, the defendants filed a motion to dismiss the out-of-state plaintiff's wrongful death action in federal district court, arguing that a wrongful death plaintiff in Kansas is deemed to be a citizen of the same state as the decedent, and therefore, did not qualify for diversity jurisdiction.[132] The court initially held that "one who brings a wrongful death action under Kansas law is a 'legal representative of a decedent's estate' for purposes of [diversity jurisdiction] and is, therefore, deemed to be a citizen of the same state as the decedent."[133] The plaintiff in *Tank* moved for reconsideration, and the district court reversed its ruling, "holding [that] § 1332(c)(2) did not apply to individuals who are authorized by state statute to pursue—in their individual capacities and not on behalf or for the benefit of decedent's estate—a claim for wrongful death."[134] On appeal, the Tenth Circuit, after addressing the legislative history of § 1332(c)(2), held that "although the

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[127] *Id.* at 520.

[128] Wrongful death actions are not on behalf of nor to enhance the decedent's estate, but in fact a civil action brought on behalf of the decedent's heirs. *See* Ashley v. Read Const. Co., 195 F. Supp. 727, 728 (D. Wyo. 1961); Jordan v. Delta Drilling Co., 541 P.2d 39, 42 (Wyo. 1975); Tidball, *supra* note 16, at 109.

[129] Although, referred to as separate estates, or "separate creatures" by at least one Wyoming Supreme Court Justice, it is not appropriate to label a wrongful death action as a wrongful death estate. *See* Saffels v. Bennett, 630 P.2d 505, 513 (Wyo. 1981) (Raper, J., dissenting). Justice Raper stated "we must understand that *the 'estate' concept that is utilized in a wrongful death action is an entirely different sort of creature than the probate estate* which administers the worldly assets left by a decedent." *Id.* (emphasis added).

[130] Hormel, *supra* note 125, at 530-35. The comment by Hormel addresses the split in views in considering § 1332(c)(2) applicable to representatives, and it lists several different methods courts have used to answer the question of whether the provision applies. Note: since the time Hormel's comment was written, *Steinlage v. Mayo Clinic Rochester* overruled *Green v. Lake of the Woods County* in the 8th Circuit. Steinlage v. Mayo Clinic Rochester, 435 F.3d 913 (8th Cir. 2006).

[131] Tank v. Chronister, 160 F.3d 597 (10th Cir. 1998).

[132] *Id.* at 598.

[133] *Id.*

[134] *Id.*

named plaintiff does serve as a representative, the plaintiff represents only the other heirs and not the estate itself," and § 1332(c)(2) is, therefore, not triggered.[135]

When examining the decision from *Tank*, it is important to note the distinction between the Kansas Wrongful Death Act and the Wyoming Wrongful Death Act. A wrongful death action in Kansas, may be brought by any one of the heirs of the deceased, whereas in Wyoming a wrongful death action must be brought by a personal representative.[136] This highlights the problem created by the ambiguity of the term "personal representative." The Wyoming Legislature must confront the confusion of whether a personal representative is bringing the action on behalf of the estate as an administrator or executor, or on the behalf of the beneficiaries as a trustee and make the proper amendments to the Wrongful Death Act.

Recently, the Eighth Circuit in *Steinlage v. Mayo Clinic Rochester* addressed the issue of the legislative intent of § 1332(c)(2) with respect to the meaning of "legal representative."[137] The question had been considered previously by the Federal District Court of Minnesota in *Green v. Lake of the Woods County*.[138] The *Green* court determined that it would be contrary to the purpose of § 1332(c)(2) to hold that the trustee provided for in Minnesota's wrongful death statute was not a "legal representative" of the decedent's estate, and, therefore, the domicile of the decedent was controlling for purposes of diversity and not that of the personal representative.[139] On the other hand, the Eighth Circuit, in *Steinlage* stated that, "[i]n *Green*, . . . the court . . . found it clear that Congress chose the single term 'legal representative' as a simple—and encompassing—term . . . [but] the court did not address the question of whether the wrongful death trustee actually represented the estate."[140] In addressing the statement made by the court in *Green* regarding the term "legal representative" applying broadly to trustees,

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[135] *Id.* Note: At least one federal district court has held that § 1332(c)(2) refers to a claim brought under a survival statute and not a wrongful death statute. *See* Winn v. Panola-Harrison Electric Cooperative, Inc., 966 F. Supp. 481 (E.D. Tex. 1997) (citing Marler v. Hiebert, 960 F. Supp. 253 (D. Kan. 1997)).

[136] KAN. STAT. ANN. § 60-1902 (2006); WYO. STAT. ANN. § 1-38-102 (LexisNexis 2005).

[137] Steinlage v. Mayo Clinic Rochester, 435 F.3d 913 (8th Cir. 2006) (discussing the different views taken by federal district courts and circuit courts regarding the applicability of § 1332(c)(2) to those bringing wrongful death actions under respective state law.); *See also* Green v. Lake of the Woods County, 815 F. Supp. 305 (D. Minn. 1993), *overruled by Steinlage*, 435 F.3d 913.

[138] *Green*, 815 F. Supp. 305 (D. Minn. 1993), *overruled by Steinlage*, 435 F.3d 913. Minnesota's wrongful death statute states that "[w]hen death is caused by the wrongful act or omission of any person or corporation, the trustee appointed . . . may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission." MINN. STAT. § 573.02 (2006). For a good discussion of the comparison of the different federal court views on the issue of whether § 1332(c)(2) applies to a wrongful death plaintiff, *see* Hormel, *supra* note 128, at 520.

[139] *Green*, 815 F. Supp. at 308.

[140] *Steinlage*, 435 F.3d at 920 (internal quotations omitted).

administrators, and executors, the court in *Steinlage* stated that "*substance rather than labels should drive analysis*," and that "we believe that it remains necessary to determine whether representative plaintiffs, variously labeled by a state legislatures [sic], represent the estates of decedents."[141]

As seen in the Eighth and Tenth Circuits, when faced with a challenge regarding diversity in wrongful death actions, some courts approach the problem by identifying the classification of those allowed to bring wrongful death actions under the applicable state law.[142] However, the Fourth Circuit, takes a strict approach to § 1332(c)(2).[143] The court requires that, regardless of the nomenclature of those allowed to bring wrongful death actions, "it is the deceased, not the beneficiary of the deceased or their estate, who must be diverse under § 1332(c)(2)."[144]

Therefore, the Wyoming Legislature must clarify the actual status of a "personal representative" under the Wrongful Death Act or diversity jurisdiction will remain a guessing game for the federal courts. Similar to the holding in *Tank*, the Federal District Court of Wyoming in *Ashley* found that Wyoming wrongful death actions are "brought neither on behalf [n]or for the benefit of the estate, but only on behalf and for the benefit of the heirs."[145] However, the Wyoming Legislature has yet to demonstrate its intention by clarifying who a personal representative represents in a wrongful death action and how it applies to federal diversity jurisdiction cases.

III. ANALYSIS

It is crucial that the Wyoming Legislature address the uncertainties the personal representative requirement has created in the wrongful death context. Should the Wyoming Legislature choose to keep the personal representative requirement in the Wrongful Death Act, it should be amended to include the following:

1. A definition of "personal representative" separate and distinct from that of the Probate Code. This definition could include administrators and executors previously appointed for a decedent's estate, but it must explicitly provide who can and cannot be appointed as a personal representative.

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[141] *Id.* (emphasis added).

[142] *See* Tank v. Chronister, 998 F. Supp. 1160 (10th Cir. 1998); *Steinlage*, 435 F.3d 913.

[143] *See* Holt v. Middlebrook, 214 F.2d 187 (4th Cir. 1954).

[144] Brumfield v. Farley, 243 F. Supp. 2d 574, 576 (S.D.W.V. 2002) (citing Kimzey v. Cuento, 1999 WL 33320923 at *2 (W.D.N.C. 1999)).

[145] *Tank*, 160 F.3d at 599; *see also Ashley v. Read Const. Co.*, 195 F. Supp. 727, 728 (D. Wyo. 1961).

2. A provision that lists those persons for whose benefit wrongful death actions can be brought. While beneficiaries have been specified in case law, the Wyoming Legislature should address this specifically within the Wrongful Death Act.

3. A provision clarifying the meaning of the "personal representative" as a representative of the heirs or beneficiaries and not a representative of the decedent's estate. Such a provision would resolve the current uncertainty about wrongful death cases qualifying for federal diversity jurisdiction under 28 U.S.C. § 1332(c)(2).

A. A Statement Addressing the Application of the Probate Code § 2-4-201(c) to the Wrongful Death Act.

One of the most troubling dilemmas the Wyoming Legislature must address is whether the Probate Code section 2-4-201 should be applied to the Wrongful Death Act. To understand the ramifications of each of the Wyoming Legislature's possible options, it is useful to revisit Mr. Greenback. As discussed earlier, counsel for Colossal has moved to dismiss Mr. Greenback's wrongful death action from federal district court. Counsel argues that Probate Code section 2-4-201 applies to the Wrongful Death Act and requires an in-state co-personal representative in a wrongful death action. Mr. Greenback does not have an in-state co-filer, and it is too late to appoint one and amend the complaint. If the federal district court were to apply the law as it presently stands, it would be forced to decide on its own whether Probate Code section 2-4-201 applies. Wyoming case law provides no definite answer to this question. Although the Federal District Court of Wyoming in *Ashley* and *Schwartz* has left the door open for out-of-state personal representatives to bring wrongful death actions in federal court, it could decide that a personal representative is in fact the administrator of a decedent's estate, like the Wyoming Supreme Court has previously done in *Corkill, Wetering,* and *Butler*.[146] If the court made this decision, it would require an out-of-state personal representative to have an in-state co-personal representative according to section 2-4-201(c).[147]

Applying section 2-4-201(c) to Mr. Greenback's situation would require that he, as a resident of another state, must have an in-state co-personal representative.[148] Even if the court allowed Mr. Greenback to find an in-state

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[146] *See* Corkill v. Knowles, 955 P.2d 438 (Wyo. 1998); Wetering v. Eisle, 682 P.2d 1055 (Wyo. 1984); Butler v. Halstead, 770 P.2d 698 (Wyo. 1989); WYO. STAT. ANN. § 2-4-201(c) (LexisNexis 2005).

[147] WYO. STAT. ANN. § 2-4-201(c) (LexisNexis 2005).

[148] *Id.*

co-representative, diversity would be ruined. The in-state co-personal representative would effectively destroy diversity, as the citizenship of Mr. Greenback would no longer be considered. Therefore, his case could not be brought in federal court. Mr. Greenback would then be left without the ability to bring suit against those responsible for the death of his sister. This situation would set a dangerous precedent, in denying relief to those injured by a wrongful death. This is certainly not the intent of the Wyoming Legislature.[149] Moreover, the entire rationale for having co-administrators (or co-personal representatives) when the original administrator is from out-of-state, is to protect local creditors, which has no relevance to wrongful death actions.[150]

Therefore, it would be improper for the court to officially determine that section 2-4-201(c) must be applied in this situation, without clear direction from the Wyoming Legislature. Furthermore, the outcome of applying section 2-4-201(c) to the Wrongful Death Act would be contrary to the policy of fairness for those bringing wrongful death actions and would, in essence, punish those seeking justice for the wrongful death of a loved one. Although Mr. Greenback's situation is merely hypothetical, the Wyoming Supreme Court has recently received a certified question from the Federal District Court of Wyoming on the exact question of whether section 2-4-201(c) applies to the Wrongful Death Act.[151] Regardless of the Wyoming Supreme Court's answer, it is the Wyoming Legislature's responsibility to clarify the Wrongful Death Act.

B. Addressing the Federal Diversity Statute and the Wrongful Death Act

On the other hand, if the Federal District Court of Wyoming found that Probate Code section 2-4-201 did not apply to Mr. Greenback's situation, he would still be faced with the issue of whether he is considered a legal representative of Ms. Pitable's estate, or rather, a representative of the heirs for purposes of diversity under § 1332(c)(2). Case law supports both interpretations.[152] If the court decided that Mr. Greenback represents his sister's estate, the residency

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[149] Wrongful death actions are civil actions, which are to be "liberally construed to promote its object and assist the parties in obtaining justice." WYO. STAT. ANN. § 1-1-101 (LexisNexis 2005). Restricting those bringing wrongful death actions from prosecuting their cases in a federal court does not assist the parties in obtaining justice. "[T]he Wyoming Legislature has expressed a social policy that favors compensation to ameliorate the certain damage to relational interests resulting from the death of a family member." Corkill v. Knowles, 955 P.2d 438, 441 (Wyo. 1998) (citing Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1175 (Wyo. 1990).

[150] Schopler, *supra* note 89, at § 4.

[151] *See Order Certifying Question to the Wyoming Supreme Court*, Gunter v. Halliburton Energy Services, Inc., Case No. 05-CV-231-D (D. Wyo. 2006).

[152] *See Corkill*, 955 P.2d at 443; Bircher v. Foster, 378 P.2d 901, 902 (Wyo. 1961); Wetering v. Eisele, 682 P.2d 1055, 1062 (Wyo. 1984); Coliseum Motor Co. v. Hester, 3 P.2d 105, 106 (Wyo. 1931); Ashley v. Read Contr. Co., 195 F. Supp. 727, 728-29 (D. Wyo. 1961); Jordan v. Delta Drilling Co., 541 P.2d 39, 42 (Wyo. 1975); DeHerrera v. Herrera, 565 P.2d 479, 482 (Wyo. 1977); Schwartz v. Hawkins & Powers Aviation, Inc., 2006 WL 1028392, *8 (D. Wyo. 2006).

of Ms. Pitiable would be controlling for determining diversity.[153] Once again, Mr. Greenback's case would be dismissed for lack of diversity.[154] The Wyoming Legislature must clarify the role of the personal representative and make clear that the role is that of a "trustee" of the decedent's heirs, not a representative of the decedent's estate.

C. Other Approaches for Allowing Wrongful Death Actions

Many other states have formulated their respective wrongful death statutes in ways that significantly resolve the problems currently facing the Wyoming Wrongful Death Act. Mr. Greenback would not face the same problems if Wyoming followed one of these other approaches. If, for example, Wyoming followed the heir approach used by Kansas or the dual approach used by other states such as North Dakota, Mr. Greenback would likely have no problem bringing his action in federal court.[155]

The heir approach followed by Kansas allows a suit to be brought by "any one of the heirs at law of the deceased who has sustained a loss by reason of death."[156] The heir approach does not require an in-state co-heir to bring the suit. Furthermore, an heir is not considered to represent the decedent's estate under § 1332(c)(2), but rather, represents all the beneficiaries. In Mr. Greenback's situation, as his sister's heir, he could bring the action in federal court without worries of obtaining an in-state co-heir, or being considered as representing his sister's estate.

Under the dual approach, which allows either heirs or personal representatives of decedents to bring actions, Mr. Greenback would fit both roles, as heir to his deceased sister and as the appointed personal representative. This method allows any heir, who is allowed under the law to recover for the wrongful death action, to bring the action, but also allows the heir(s) to have a personal representative appointed to bring the action. The all-encompassing dual approach provides every means possible for a wrongful death action to be pursued and is the most efficient method for allowing family members to recover for the death of a loved one. This method keeps in mind that a decedent's estate may have a personal representative already appointed for probate matters, who may be in the best position to act as

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[153] *See* Tank v. Chronister, 160 F.3d 597 (10th Cir. 1998); Steinlage v. Mayo Clinic Rochester, 435 F.3d 913 (8th Cir. 2006).

[154] This result seems unlikely in light of *Ashley*, *Jordan,* and *DeHerrera* cases which stand for the proposition that, although a personal representative in a wrongful death action does act as an administrator of a decedent's estate, it does not represent the decedent's estate. *Ashley*, 195 F. Supp. at 728; *Jordan*, 541 P.2d at 42; *DeHerrera*, 565 P.2d at 482. However, the possibility of a different outcome in Mr. Greenback's situation highlights the importance of this issue to the Wyoming Legislature.

[155] KAN. STAT. ANN. § 60-1902 (2006); N.D. CENT. CODE § 32-21-03 (2006).

[156] KAN. STAT. ANN. § 60-1902 (2006).

the personal representative for the wrongful death action. It also considers the fact that wrongful death actions are brought for the purpose of compensating the heirs and allows the heirs to bring the action directly.

D. Policy Considerations

From a policy perspective, parties should be given the ability to bring wrongful death actions in federal court if the representative, trustee or heir bringing the action has a different domicile than those parties against whom the action is brought.[157] According to the Federal District Court of Tennessee in *Winn v. Panola-Harrison Elec. Co-op., Inc.*, "although § 1332(c)(2) may have been enacted in an attempt to prevent the collusive appointment of out of state parties to create diversity jurisdiction, to construe [§ 1332(c)(2)] in the manner . . . [that where a person brings an action to recover damages for the death of the decedent, such person is acting as the 'legal representative' of the estate of the decedent], would unduly restrict the ability to bring wrongful death actions in federal court."[158]

The analysis from *Steinlage v. Mayo Clinic Rochester* is on point for determining what the Wyoming Legislature intended by requiring that a personal representative bring a wrongful death action under the Wrongful Death Act, and whether the personal representative represents the estate or the beneficiaries.[159] A personal representative, in an action under the Wrongful Death Act, is not a "legal representative" for purposes of § 1332(c)(2). The plaintiff in a wrongful death action represents only the heirs/beneficiaries and not the estate itself.[160] If the Wyoming Legislature maintains the personal representative requirement, it needs to make it clear that those bringing wrongful death actions are not classified as a legal representative of the decedent's estate. As other state legislatures have done, this can be easily accomplished by including language in the Wrongful Death Act that clarifies that the personal representative acts on behalf of the beneficiaries and not the decedent's estate.

In formulating a recommendation for the amendment of the Wrongful Death Act, it is important to look at the Act for what it actually is: a statutory device to allow those who have been injured by the loss of a loved one to seek justice.[161] The Federal District Court of Wyoming has said, "the whole import of the wrongful death act is to benefit those persons who have been injured because of the death of their relatives."[162] Further, the first section of the Wyoming Civil Code, states

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[157] *See* Winn v. Panola-Harrison Elec. Coop., Inc., 966 F. Supp. at 481, 483 (E.D. Tex. 1997).

[158] *Id.* at 483.

[159] Steinlage v. Mayo Clinic Rochester, 435 F.3d 913, 920 (8th Cir. 2006).

[160] Ashley v. Read Const. Co., 195 F. Supp. 727, 729 (D. Wyo. 1961).

[161] WYO. STAT. ANN. §§ 1-38-101 to 102 (LexisNexis 2005).

[162] *Ashley*, 195 F. Supp. at 729.

that the Code of Civil Procedure and all proceedings under it "shall be liberally construed to promote its object and assist the parties in obtaining justice."[163] Poor statutory construction should not be responsible for hindering the furthering of this policy in the Wrongful Death Act. As discussed above, the only rationale for requiring co-personal representatives is to protect the rights of creditors in collecting against a decedent's probate estate.[164] There exists no plausible argument as to why a plaintiff in a wrongful death action should be required to have an in-state appointed co-representative, like the requirement in section 2-4-201(c).[165] The Wyoming Legislature should amend the Wrongful Death Act with this policy in mind.

IV. CONCLUSION

The Wyoming Legislature should amend the Wrongful Death Act to provide clear, unambiguous provisions which set forth its true intention, and allow those seeking justice for the wrongful death of a loved one to bring an action successfully. The amendments should provide attorneys, judges, and those attempting to comply with the Wrongful Death Act with straightforward conditions to be followed. The Wrongful Death Act was initially enacted to allow those who suffered a loss due to the wrongful death of a loved one the ability to have their day in court. A plaintiff in a wrongful death action should be allowed to bring a case in the court of his or her choice. Probate matters, which involve concerns of creditors and debts associated with the probate estates of decedents, are not and should not be a concern in wrongful death actions. Without a clear statement of intent by the Wyoming Legislature regarding whether out-of-state personal representatives must have a corresponding in-state co-personal representative, diversity questions will continue to confront the courts and deny relief to plaintiffs. Plaintiffs should not be barred from bringing wrongful death actions due to a flawed technicality in the law.

The appropriate amendments to the Wrongful Death Act should include, at a minimum, a clear definition of personal representative, an explicit statement of who may benefit from wrongful death actions, and clarification that the heirs or beneficiaries of the decedent are represented in an action and not the estate of the decedent. Further, the Wyoming Legislature should consider adopting the dual approach, thus allowing wrongful death actions to be brought by an heir *or* a personal representative of the deceased. This approach would both simplify the law and allow the most flexibility in providing relief for those injured by a wrongful death. Above all, the Wrongful Death Act should be disentangled from

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[163] WYO. STAT. ANN. § 1-1-101 (LexisNexis 2005).

[164] Elliot v. Stevenson, 218 F. Supp. 90, 92 (D. Or. 1962).

[165] WYO. STAT. ANN. § 2-4-201(c) (LexisNexis 2005).

the Probate Code and allowed to stand on its own as a clear statement from the Wyoming Legislature that persons injured by the wrongful death of their loved ones are able to obtain justice in all Wyoming courts.

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A GUIDE TO THE TAX ASPECTS OF CONSERVATION EASEMENT CONTRIBUTIONS

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SUMMARY

There are five types of tax benefits available to easement donors and their families, all of which can be enjoyed in combination:

Income Tax Deduction: The gift of a permanent conservation easement to a qualified organization or governmental agency constitutes a charitable contribution and the value of the easement (generally, the difference in the value of the property subject to the easement before and after the easement is put in place)

may be deducted from the donor's income for purposes of calculating federal income tax and, in many states, state income tax.

Income Tax Credits: In some states (e.g. Virginia and Colorado), conservation easements generate credits against state income tax liability. Credits are more powerful incentives than deductions because they represent a direct offset against tax due rather than a reduction of the income against which tax is assessed.

Reduction in Taxable Estate: The restrictions imposed by a conservation easement reduce the value of real property in a decedent's estate. This reduction in value results in estate tax savings.

Exclusion from Taxable Estate: Section 2031(c) of the Internal Revenue Code allows the executor of a decedent's estate to exclude 40% of the restricted value of land subject to a qualified conservation easement (i.e., the value of the land after subtracting the value of easement). The maximum amount that may be excluded under this provision is $500,000 per estate.

Reduced Real Estate Tax Assessment: Under the provisions of many state and local laws, land subject to a conservation easement is entitled to a lower real estate tax assessment to reflect the restrictions of the easement. This can result in substantial local real estate tax savings.

A. DESCRIPTION OF A CONSERVATION EASEMENT

Conservation easements are voluntary restrictions on the use of land negotiated by a landowner and a private charitable conservation organization or government agency chosen by the landowner to "hold" the easement. Essentially, holding the easement means having the right to enforce the restrictions imposed by the easement.

The terms of conservation easements are entirely up to the landowner and the prospective easement holder to negotiate. However, the Internal Revenue Code establishes requirements that must be met if the donation of an easement is to qualify for federal tax benefits. Many states also grant tax benefits for easement donations that comply with the federal requirements.

Conservation easements do not generally provide third parties, or the public, with the right to access or use the land that is subject to the conservation easement. Unless the purpose of the easement is the conservation of some feature where public benefit is dependent upon public access, such as preservation of an historic structure, no public access is required to qualify for federal tax benefits.

The protection of farm land, ranch land, timber land, and open space (particularly where such land is under residential or commercial development pressure and where local planning identifies open space preservation as valuable to the

community) are typical objectives of conservation easements. In addition, the protection of wetlands, floodplains, important wildlife habitat, scenic views, and historic land areas and structures are also recognized purposes for easements.

Easements that are permanent, donated by the landowner (or conveyed pursuant to a qualified bargain sale), and that conserve publicly significant natural resource values (described in the preceding paragraph), typically qualify for federal and state tax benefits. The amount of the deduction must be determined by an independent appraisal of the value of the easement.

In addition, easements normally permit the continuation of the rural uses being enjoyed by the landowner at the time of the donation of the easement. Land subject to a conservation easement may be freely sold, donated, passed on to heirs and transferred in every normal fashion, so long as it remains subject to the restrictions of the easement. It is also possible to retain some rights to limited residential development (e.g. one dwelling unit per 100 acres), so long as the retention of such rights does not conflict with the conservation purposes of the easement.

To qualify for federal and state tax benefits, easements must be held either by a federal, state, or local government agency, or by a private charitable organization that has the capacity to enforce the terms of the easement. Such an organization does not need to be an environmental organization. A landowners association could qualify, so long as it includes land conservation among its purposes. For example, an association of ranch owners established for the purpose of protecting ranch land and qualifying as a charitable organization under section 501(c)(3) of the Internal Revenue Code would be qualified to hold easements on ranch land if it has the capacity to enforce the easement.

B. REQUIREMENTS FOR INCOME TAX BENEFITS

Section 170(h) of the Internal Revenue Code ("IRC") requires that the contribution of a conservation easement (often referred to in this Guide as an "easement") meet the definition of a "qualified conservation contribution" to be eligible for a federal income tax deduction. The Treasury Regulations ("Regulations") have elaborate provisions governing eligibility.[1] The provisions of IRC § 2031(c) providing federal estate tax benefits also require that an easement comply with IRC § 170(h). An excellent, detailed discussion of the requirements of § 170(h) can also be found in *The Federal Tax Law of Conservation Easements*, by Stephen J. Small, published by the Land Trust Alliance.

It is *extremely* important to recognize that the charitable deduction allowed for the donation of a conservation easement is entirely a "creature of statute." In

[1] Treas. Reg. § 1.170A-14 (as amended in 1999).

other words, the deduction *only* exists as a statutory measure. There is no inherent "right" to a charitable deduction for donating an easement. The deduction is only available if *all* of the statutory requirements for the deduction are met. Failure to do so may result in the permanent restriction of land subject to the defective easement, but no tax benefits. Under some circumstances gift tax may be due for the contribution of an easement that does not meet the requirements of § 170(h).

Further underscoring the importance of compliance with all statutory requirements is the fact that a conservation easement deduction is an exception to the general tax rule that no deduction is allowed for a gift of less than the donor's entire interest in property. Such gifts are called "partial interest" gifts. A conservation easement, being only a partial interest in the donor's interest in the property subject to the easement, is a partial interest.

1. TO QUALIFY FOR A TAX DEDUCTION A CONSERVATION EASEMENT MUST BE A "QUALIFIED CONSERVATION CONTRIBUTION"

Generally, the tax code does not permit a deduction for a gift of less than all of the donor's interest in property. For example, the gift of an apartment building with the retention of a forty-year lease by the donor would not qualify for a charitable deduction.[2]

However, an exception exists for a "qualified conservation contribution." A qualified conservation contribution qualifies for a tax deduction, provided that the following four requirements are met:

> (i) the contribution is of a "qualified real property interest;"
>
> (ii) the contribution is made to a "qualified organization;"
>
> (iii) the contribution is exclusively for "conservation purposes;"
>
> (iv) the conservation purposes of the gift are protected in perpetuity.[3]

These requirements are detailed below.

2. WHAT IS A "QUALIFIED REAL PROPERTY INTEREST?"

A "qualified real property interest" is (i) the donor's entire interest in property other than a "qualified mineral interest," or (ii) a "perpetual conservation restriction."[4]

---

[2] Treas. Reg. § 1.170A-14(a) (as amended in 1999).

[3] *Id.*

[4] I.R.C. § 170(h)(2)(c) (2004).

a. The "donor's entire interest other than a qualified mineral interest"

The first clause of this definition has been made somewhat more important with the passage of the Pension Protection Act's[5] new tax incentives for the contribution of a "qualified conservation contribution."[6] This is because the new benefits apply to contributions under *both* clauses of the foregoing definition.

A "qualified mineral interest" is the donor's "interest in subsurface oil, gas, or other minerals and the right of access to such minerals."[7]

Example

John Jones owns the Three Rivers Ranch. There are important oil and gas reserves on the ranch that John wants to retain for his grandchildren. However, he wants to give the ranch to a local land trust that he founded years before. John agrees to convey any surface mining rights with the ranch, reserving only the subsurface minerals.

This is a "qualified real property interest." However, is it a "qualified conservation contribution?" In order to fall within that definition the ranch must be conveyed to a "qualified organization;" be "exclusively for conservation purposes;" and the purposes must be protected in perpetuity.

If the land trust has the right to sell the ranch, does that disqualify John's gift as a "qualified conservation contribution" on the grounds that the gift is not exclusively for conservation purposes, which purposes are protected in perpetuity? *Arguably,* because the land trust to which the gift has been made has as its purpose land conservation, and any proceeds from the sale of the ranch would have to be used by the land trust for land conservation, and assuming that the land trust is a corporation with perpetual duration, the requirement has been met.

On the other hand, the definition may require that the ranch be permanently restricted to open space use and agriculture in order to comply with the requirement. There are no rulings or cases providing guidance at this time.

[5] Pension Protection Act, 29 U.S.C. § 1206 (2006).

[6] *See* discussion *infra* Part D.3.

[7] Treas. Reg. § 1.170A-14(b)(1)(i) (as amended in 1999).

b. A perpetual conservation restriction

A "perpetual conservation restriction" is "a restriction granted in perpetuity on the use which may be made of real property—including an easement or other interest in real property that under state law has attributes similar to an easement (e.g. a restrictive covenant or equitable servitude)."[8]

> State law governs the legal enforceability of a real property restriction. Absent statutory authority, a conservation easement is typically considered an "easement in gross" rather than an "easement appurtenant." An "easement in gross" is a mere personal interest in or right to use another's land, without being exercised in connection with the occupancy of the land. It differs from an "easement appurtenant" in that it does not require a dominant tenement. Ordinarily, it is not assignable or inheritable.
>
> ***
>
> "The principal distinction between an easement proper, that is an easement appurtenant, and a right in gross is found in the fact that in the first there is and in the second there is not a dominant tenement."[9] Courts are generally reluctant to enforce easements in gross because it is unclear who should have the right ("standing") to enforce such an easement. Enabling authority in the form of a statute cures this problem of enforceability for conservation easements. The best known statute is the "Uniform Conservation Easement Act" which has been adopted in a majority states. Many other states, including Wyoming, have enacted variations of the Uniform Act.[10]
>
> Again, because a conservation easement is a creature of statute, *compliance with all of the* ***state*** *statutory requirements for creating an easement is essential if the easement is to qualify under federal tax law as a "perpetual conservation restriction."*

---

[8] Treas. Reg. § 1.170A-14(b)(2) (as amended in 1999).

[9] 28A C.J.S. EASEMENTS § 11 (1996).

[10] WYO. STAT. ANN. § 34-1-201 (2006).

Example

Mary Evers contributes a conservation easement over her farm. The farm is located in a state that has enacted the Uniform Conservation Easement Act. However, the state added two provisions to the Uniform Act. One provision requires that in order to be qualified to hold a conservation easement under the Act an organization must have done business within the state for at least five years. The other provision requires that all conservation easements be reviewed by the local planning commission for compliance with the local comprehensive plan.

Unfortunately, Mary contributes the easement to an organization that has only been doing business in the state for three years. In addition, neither Mary nor the organization submits the easement to the local planning commission for review. Even more unfortunately, Mary's contribution is audited. The IRS points out that the easement is not a perpetual conservation restriction because it fails to comply with the statutory requirements. Mary's deduction is denied. In this case, because the restriction was unenforceable, Mary can start over.

3. THE EASEMENT MUST BE CONVEYED TO AN "ELIGIBLE DONEE"

The Regulations require that, in order to be an "eligible donee" of a tax deductible conservation easement, an organization must meet the following requirements:

> (i) the organization must be either a local, state, or federal governmental agency, or a public charity qualified under IRC § 501(c)(3);
>
> (ii) the organization must have a commitment to protect the conservation purposes of the donation (this is typically found in the articles of incorporation or by-laws of a private organization); and
>
> (iii) the organization must have the resources to enforce the restrictions imposed by the easement.[11]

a. What resources are required?

The Regulations expressly state that, in order to meet the resources requirement, a qualified organization *does not* need to set aside a special fund. However,

[11] Treas. Reg. § 1.170A-14(c)(1) (as amended in 1999).

it is unlikely that an organization that has neither staff nor funding available to monitor its easements on a regular basis, or to go to court to defend its easements, is a qualified organization. While this may seem a harsh assessment, when mere discovery in a lawsuit may consume several hundred thousand dollars, it is clear that more than several hundred dollars in the bank is necessary to defend an easement. By the same token, without regular, consistent, comprehensive monitoring of all easements an organization holds, it is impossible to know whether the easement restrictions are being honored. This takes both funding and staffing.[12]

b. Do public agencies automatically have the necessary "commitment to protect the conservation purposes?"

As a practical matter, not necessarily. Organizations seeking public charity status as land trusts now are confronted by several additional questions in the application for IRC § 501(c)(3) status. These questions are intended to determine whether an organization has the required "commitment to protect the conservation purposes." However, because public agencies are not required to comply with § 501(c)(3), no such questions are posed to public agencies and this raises the question of whether all public agencies, simply by virtue of being a public agency, are qualified to hold deductible easements. For example, the author knows of at least one public agency that simply terminated a conservation easement that it held because the landowner whose property was subject to the easement requested the termination.[13] This public agency did not appear to have the "commitment to protect the conservation purposes" required by the tax code.

c. Accreditation

As a result of Congressional concern over the qualifications of some existing land trusts to hold and enforce easements, the Land Trust Alliance ("LTA") has established a voluntary "accreditation" program for land trusts. Whether Congress will mandate such accreditation for all land trusts holding deductible easements is unknown at this time. Essentially, accreditation by the LTA requires adoption and implementation of the LTA's "Standards and Practices."

d. Transfers of easements

Regulation § 1.170A-14(c)(2) *requires* that the conservation easement include the following provisions for any future transfer or termination of the easement:

---

[12] Form 990 (required to be filed by exempt organizations) requires for 2006 returns that any organization holding conservation easements report how many of its easements have been physically monitored during the preceding tax year and the amount of staff hours and funds it spent in monitoring and enforcing its easements for that year. Form 990, Schedule A, Part III, line 3c, and Instructions.

[13] *See* Hicks v. Dowd, CV-2003-0057 (Wyo. 4th Dist. Ct. 2003), *aff'd*, 2007 WY 74 (Wyo. 2007).

> (i) the easement must prohibit the holder of the easement from transferring it to any organization that is not an "eligible donee" as described above;
>
> (ii) the easement must require that any transferee organization agree in writing to carry out the conservation purposes of the easement;
>
> (iii) the easement must require that, if a later unexpected change in the conditions surrounding the easement property makes impossible or impractical the continued use of the property for conservation purposes, any proceeds received by the easement holder resulting from the later sale or exchange of the easement property must be used in a manner that is consistent with the conservation purposes of the easement.[14]

4. THE EASEMENT MUST ADVANCE A QUALIFIED "CONSERVATION PURPOSE"

Qualified conservation purposes identified by the tax law fall into four categories:

> (i) the preservation of land areas for outdoor recreation by, or the education of, the general public;
>
> (ii) the protection of a significant, relatively natural habitat for fish, wildlife, or plants;
>
> (iii) the preservation of certain open space (including farm land and forest land) pursuant to a "clearly delineated" governmental conservation policy, or for scenic purposes, resulting in a significant public benefit; or
>
> (iv) the preservation of an historically important land area or certified historic structure.[15]

a. The importance of describing the conservation purposes

While it would not seem that the actual language of an easement can alter the quality or characteristics of the land being protected by the easement, the IRS

---

[14] Treas. Reg. § 1.170A-14(c)(2) (as amended in 1999)

[15] Treas. Reg. § 1.170A-14(d)(1) (as amended in 1999). Note that the IRS has recently begun challenging easements that it claims fail to meet the conservation purposes requirement. *See* Glass v. Comm'r, 124 T.C. No 16 (2005), *aff'd,* 471 F.3d 698 (6th Cir. 2006) (finding that taxpayer's deduction was valid); Turner v. Comm'r, 126 T.C. No. 16 (2006) (finding for the IRS).

has made it clear that it expects the easement document to include a thorough description of the conservation purposes of the conservation easement and of how protection of the property advances those purposes. This is best done in several ways:

> (i) the recitals ("whereas clauses") of the easement document should contain an explicit reference to one or more of the conservation purposes identified in the Regulations (preferably in the terms used by the Regulations to avoid confusion);
>
> (ii) the recitals should provide as much detail as reasonably practical describing and elaborating on the characteristics of the land being made subject to the easement that support the conservation purpose(s) of the easement; and
>
> (iii) the characteristics of the property being made subject to the easement should be detailed in the "natural resources inventory" required by the Regulations which should be incorporated into the recitals by reference.[16]

b. Public recreation or education

The Regulations provide that the donation of a "qualified real property interest" for the purpose of preserving land for outdoor recreation or education of the general public is a qualified conservation purpose.[17] The Regulations require that such a donation must provide for (i) substantial and (ii) regular use of the land by the public.[18]

---

[16] *See* discussion *infra* Part B.13.

[17] *See* discussion *supra* Part B.1.

[18] Treas. Reg. §§ 1.170A-14(d)(2)(i), (ii) (as amended in 1999).

Example 1

The James family owns a private, 80-acre lake. The family contributes a conservation easement over the lake and an access easement from the lake to a nearby public road, for the purpose of preserving the lake for public recreational use. The easement also grants to the public the right to use the lake and access road on alternating weekends throughout the year. The remainder of the weekends the lake is closed to public use, but the easement does not allow any use of the lake by the owners that would diminish the quality of the lake for public outdoor recreation. Such an easement should meet the requirements of the public recreation or education conservation purpose.

The only caveat to this example is that the easement does not allow year-round, 365-day use of the lake by the public. The Regulations do not elaborate on the amount or extent of use other than to say that a donation must allow for "substantial and regular use" by the public. Certainly, full-time access qualifies. Whether use limited to alternating weekends qualifies is not certain. Presumably, access limited to one day per year would be insufficient.

Example 2

The Roths own land that is geothermally active. At the same time each year a spectacular geyser erupts. The rest of the year the geyser is dormant. The Roths put a conservation easement on the area of their land where the geyser is located, and grant an access easement from a local public road for public access to the site. The easement provides that the access and geyser area will be open one day each year when the geyser erupts. The easement further provides that the family will provide an interpretive lecture on the geyser and other geothermal features of the property on that day, and will provide reasonable public notice of the event at least two weeks in advance. This easement should qualify as meeting the public recreational/educational conservation purpose, even though public access is severely restricted, because access is allowed on the one day of the year when something of public significance occurs on the property. Whether such an easement has any measurable economic value for deduction purposes is another question.

c. Preservation of a significant, relatively natural habitat for fish, wildlife, or plants

Habitat protection meeting the following criteria is a recognized conservation purpose:

> (i) the habitat is significant;
>
> (ii) the habitat is *relatively* natural (i.e. some human alteration of the habitat will not preclude it from qualifying under this provision);
>
> (iii) the habitat is for fish, wildlife, or plants.[19]

For this conservation purpose the term "significant" includes:

> (i) habitat for rare, endangered, or threatened species;
>
> (ii) natural areas representing "high quality" examples of a terrestrial or aquatic community (e.g. islands with relatively intact coastal ecosystems); and
>
> (iii) natural areas included in, or contributing to, the ecological viability of public parks or preserves.[20]

The United States Tax Court recently considered a conservation easement whose primary conservation purpose was habitat protection. In the case of *Glass v. Commissioner*, the IRS lost the case and appealed the decision to the United States Sixth Circuit Court of Appeals where the appellate court reaffirmed the Tax Court.[21]

There are at least two things of significance about this case relating to the conservation purposes requirement. The first is the size of the areas protected by the two conservation easements challenged by the IRS. The easement contributed by Mr. and Mrs. Glass in 1992 covered an area 150 feet wide by 120 feet deep, a total of 18,000 square feet. The second easement covered an area 260 feet wide by 120 feet deep, for an additional 31,200 square feet. Each easement was presented as an independent contribution, each meeting, individually, the conservation purpose of protecting a "significant, relatively natural habitat."[22]

Evidence showed that the Glass property was the location of a bald eagle roost (not nest), and that the Lake Huron tansy, an endangered species, grew on the property. The Tax Court and Court of Appeals both ruled that the each of the two conservation easements met the requirements of the habitat protection conservation purpose.[23]

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[19] Treas. Reg. § 1.170A-14(d)(3)(i) (as amended in 1999).

[20] Treas. Reg. § 1.170A-14(d)(3)(ii) (as amended in 1999).

[21] Glass v. Comm'r, 124 T.C. No. 16 (2006), *aff'd*, 471 F.3d 698 (6th Cir. 2006).

[22] *Id.*

[23] *Id.*

The second significant aspect of the decision was underscored by that failure of the grantors of the easement to protect more than a small portion of their property. It did not defeat the deductibility of the easements in question.[24]

d. Open space preservation

Easements protecting "open space" (and the Regulations expressly mention farm land and forest land as eligible) qualify if they fit one of two categories:

> (i) easements that preserve open space "for the scenic enjoyment of the general public;" and
>
> (ii) easements that preserve open space pursuant to a "clearly delineated federal, state, or local governmental conservation policy."[25]

1. Scenic Easements

A conservation easement that protects "the scenic character of the local rural or urban landscape" or "a scenic panorama that can be enjoyed from a park, nature preserve, road, water body, trail, or historic structure or land area" generally satisfies the requirements of the scenic enjoyment conservation purpose.[26]

The Regulations provide eight separate factors to be considered in determining whether a view over any given property qualifies as "scenic." However, the Regulations also state:

> "Scenic enjoyment" will be evaluated by considering all pertinent facts and circumstances germane to the contribution. Regional variations in topography, geology, biology, and cultural and economic conditions require flexibility in the application of this test, but do not lessen the burden on the taxpayer to demonstrate the scenic characteristics of a donation under this paragraph.[27]

In other words, you will know a scenic view when you see it.

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[24] *Id.* The Court of Appeals actually rejected the IRS's argument that the unrestricted nature of adjoining property owned by others defeated the conservation purposes. However, the fact that less than one-third of the Glass's property was protected by easements, and that one of the easements upheld by the Court comprised less than 4% of the Glass's property, was a significant feature of the case. *Id.*

[25] Treas. Reg. § 1.170A-14(d)(4)(i) (as amended in 1999).

[26] Treas. Reg. § 1.170A-14(d)(4)(ii)(A) (as amended in 1999).

[27] *Id.*

To qualify for the scenic conservation purpose, there needs to be visual (not physical) access over the property, or at least over a significant portion of the property, by the public.[28]

The Regulations provide the following examples of qualified scenic purposes:

> (i) The preservation of a unique natural land formation for the enjoyment of the general public.
>
> (ii) The preservation of woodland along a public highway pursuant to a government program to preserve the appearance of the area so as to maintain the scenic view from the highway. Note that the significance of this view is enhanced by the government program.
>
> (iii) The preservation of a stretch of undeveloped property located between a public highway and the ocean in order to maintain the scenic ocean view from the highway. Note that in this example, the land preserved is not the focus of the view, it merely provides an open foreground to the view itself.[29]

2. Easements pursuant to a "clearly delineated governmental conservation policy"

In order to qualify as an easement that preserves open space pursuant to a clearly delineated governmental conservation policy, a conservation easement must do more than be a "general declaration of conservation goals by a single official or legislative body."[30]

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[28] Treas. Reg. § 1.170A-14(d)(4)(ii)(B) (as amended in 1999).

[29] Treas. Reg. § 1.170A-14(d)(4)(iv)(B) (as amended in 1999).

[30] Treas. Reg. § 1.170A-14(d)(4)(iii)(A) (as amended in 1999).

Example 1

Doris Farm is located in the "A-2" agricultural zoning district of Quantum County. The A-2 zone allows agricultural uses, as well as single-family residential development on two-acre parcels. The zoning ordinance states that the purpose of the A-2 zone is to protect agricultural activity, while allowing flexibility for low-density residential use. The A-2 zone is also identified as implementing the local comprehensive plan's designation of the area around Doris Farm as one having traditionally been a farming area with high-quality agricultural soils that should be preserved for agricultural and low-density residential uses not requiring public utilities. The DEF Land Trust accepts a conservation easement on Doris Farm for the purpose of preserving its open space pursuant to a clearly delineated governmental policy. On audit, the IRS asks if there are more specific policies supporting the preservation of Doris Farm. Unfortunately, the answer is no, and the deduction would probably be denied.

Example 2

Assume the same facts as Example 1, except that in addition to the zoning and comprehensive plan designations, Quantum County also provides a special reduced real property tax assessment for farm land to encourage farmers to keep their land in farming. The cost to local taxpayers for the special reduced assessment on Doris Farm is around $5,000 per year in lost tax revenue. The combination of the planning policies, zoning, and preferential assessment probably collectively constitute a "clearly delineated governmental conservation policy." The Regulations call for a "significant commitment" by the governmental entity that has established the preservation policy to advance the policy, and the special assessment accorded Doris Farm establishes that significant commitment according to Regulation § 1.170A-14(d)(4)(iii)(A). The deduction should be allowed.

Example 3

Again, assume the same facts as Example 1. In addition, assume that Doris Farm is located within a state established "agricultural district" that identifies the land within the district as playing an important role in the state's agricultural economy. The district designation requires a special review of any subdivision application filed with the local government to insure that the division has minimal impact upon the agricultural viability of land within the district. The district also requires a special "agricultural impact assessment" of any publicly funded project proposed for land within the district, such as new schools, roads, utilities, etc. The state-sponsored agricultural district would appear to be a clearly delineated governmental conservation policy to "further a specific, identified conservation project" (Regulation § 1.170A-14(d)(4)(iii)(A)), and the deduction should be allowed.

Example 4

Assume the same facts as Example 1. However, in addition to its A-2 zoning status, assume that Doris Farm hosts a colony of blue-footed ferrets, a recently discovered endangered species. Therefore, preservation of the farm will be (in addition to preservation of a significant wildlife habitat) pursuant to a clearly delineated federal governmental conservation policy in the form of the Endangered Species Act, and a deduction should be allowed.

The foregoing examples attempt to illustrate a rather vague standard that seems to require something more than average zoning classifications, but less than a formal certification program. This is not an area where there have yet been any cases to provide guidance.

The Regulations do offer a sort of "safe harbor" for easements granted under this category of conservation purpose where a duly constituted governmental entity adopts a resolution specifically endorsing protection of a particular property as "worthy of protection for conservation purposes."[31] The problem with this approach is two-fold: First, if you ask for, but don't receive the resolution, is your project dead? Second, if you do receive a resolution, must you then do so on every project pursuant to this category of conservation purpose?

[31] Treas. Reg. § 1.170A-14(d)(4)(iii)(A) (as amended in 1999).

3. Open space easements must yield a "significant public benefit"

The Regulations provide that an easement whose conservation purpose is the protection of "open space" must "yield a significant public benefit."[32] Eleven criteria are listed for the evaluation of public significance. Because of their importance they are included in their entirety here:

> (1) The uniqueness of the property to the area;
>
> (2) The intensity of land development in the vicinity of the property (both existing development and foreseeable trends of development);
>
> (3) The consistency of the proposed open space use with public programs (whether federal, state, or local) for conservation in the region, including programs for outdoor recreation, irrigation or water supply protection, water quality maintenance or enhancement, flood prevention and control, erosion control, shoreline protection, and protection of land areas included in, or related to, a government approved master plan or land management area;
>
> (4) The consistency of the proposed open space use with existing private conservation programs in the area, as evidenced by other land protected by easement or fee ownership by organizations referred to in § 1.170A-14(c)(1) in close proximity to the property;
>
> (5) The likelihood that development of the property would lead to, or contribute to, degradation of the scenic, natural, or historic character of the area;
>
> (6) The opportunity for the general public to use the property or to appreciate its scenic values;
>
> (7) The importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area;
>
> (8) The likelihood that the donee will acquire equally desirable and valuable substitute property or property rights;
>
> (9) The cost to the donee of enforcing the terms of the conservation restriction;

[32] Treas. Reg. §§ 1.170A-14(d)(4)(i)(A), (B) (as amended in 1999).

(10) The population density in the area of the property; and

(11) The consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection.[33]

Example

There are many open space conservation easements that should satisfy these public significance criteria. However, could a conservation easement preserving a farm for farming purposes when the farm is located in a largely vacant region of a plains state, is surrounded by other farmland, and is more than twenty miles from any population center qualify? Evaluating such an easement pursuant to the foregoing criteria suggests that it probably would not.

The farm is not unique; there is neither existing nor foreseeable development in the area; there are unlikely to be any public or private conservation programs in the area with which preservation of the farm is consistent; while development of the farm could lead to degradation of the area, such development is highly unlikely; the remoteness of the farm makes it unlikely that there would be significant public enjoyment of its scenic value; there is virtually no tourism so preserving the land is unlikely to attract tourism or commerce; the cost of enforcement is likely to be marginal (and it is hard to tell whether this is a positive or negative factor under the Regulations); local population density is low; and there are unlikely to be any legislatively mandated protection programs including the farm.

Even if preservation of such a farm met one of the conservation purposes, it is unlikely that the easement would have any value economically, as it is likely that the highest and best use of the property is as a farm.

4. Prevention of intrusion or future development

To qualify for a deduction, an easement may not permit "a degree of intrusion or future development that would interfere with the essential scenic quality of the land or with the governmental conservation policy" that otherwise qualifies it as serving the conservation purpose of preserving open space.[34]

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[33] Treas. Reg. § 1.170A-14(d)(4)(iv)(A) (as amended in 1999).

[34] Treas. Reg. § 1.170A-14(d)(4)(v) (as amended in 1999).

This requirement addresses a misconception that some landowners have: "I should get a tax deduction because my conservation easement has reduced the development potential of my land by 50%; that is a huge loss in value." If the reserved development potential would interfere with the characteristics of the land that cause it to meet the open space requirements, even if there is a huge loss in value due to the restrictions, no deduction under this category of conservation purpose is allowed.

Example 1

Joe Doaks recently purchased Lost Oaks Farm, which consists of 200 acres of highly scenic pasture and woodland along a heavily traveled state road. Doaks puts a conservation easement on the farm reducing development potential from the 50 home sites (and lots) permitted (and feasible) under local zoning, to five home sites. However, the home sites are located squarely within the view of the property enjoyed by the traveling public. A deduction would likely be denied here because the reserved development permits "a degree of intrusion that would interfere" with the scenic quality of the property.

Note that the degree of intrusion is not qualified; i.e., the Regulations do not provide that the degree of intrusion must be significant, or substantial; it is sufficient merely that it "interfere."

Example 2

Assume the same facts as in Example 1, except that Doaks reserves 15 home sites, but restricts their location, and all other improvements on the property, to a portion of the property that is screened from the public view by the woodland and a hill. The easement prohibits removal of the trees, or re-contouring of the land. A deduction should be allowed here, assuming that the reserved uses don't impair other significant conservation interests.

Example 3

Assume that the Doaks easement only reserves one home site, to be determined by Doaks in his discretion, in the future. A deduction is unlikely because Doaks could choose to locate the home site squarely in the middle of the view-shed.

Example 4

Assume that the Doaks easement reserves ten home sites, the location of which is to be determined in the future, but subject to the prior approval of the land trust to which the easement has been granted. Approval is to be conditioned on location of the home sites and related improvements, in a manner consistent with the conservation purposes of the easement and the protection of other significant conservation interests. A deduction should be allowed because the land trust's control over the future location of the sites insures that the future sites will not be located so as to interfere with the view, or other significant conservation interests.

e. Historic preservation

Conservation easements providing for the preservation of an "historically important land area or a certified historic structure" satisfy the conservation purposes requirements.[35]

1. Historic land areas

An historically important land area includes:

(A) An independently significant land area including any related historic resources (for example, an archaeological site or a Civil War battlefield with related monuments, bridges, cannons, or houses) that meets the National Register Criteria for Evaluation in 36 CFR 60.4 (Pub.L. 89-665, 80 Stat. 915);

(B) Any land area within a registered historic district including any buildings on the land area that can reasonably be considered as contributing to the significance of the district; and

(C) Any land area (including related historic resources) adjacent to a property listed individually in the National Register of

[35] Treas. Reg. § 1.170A-14(d)(5) (as amended in 1999).

> Historic Places (but not within a registered historic district) in a case where the physical or environmental features of the land area contribute to the historic or cultural integrity of the property.[36]

The United States Tax Court recently provided comments on the requirements for land to qualify under the historic preservation provisions.[37] In *Turner*, the court found that the mere proximity of land to an important historic structure did not make that land historically significant if nothing of historic significance occurred there; nor did it qualify as protecting an historic structure if the easement did not apply to any historic structures.[38]

2. Historically significant structures

In 2006, as part of the Pension Protection Act, Congress amended IRC § 170(h) to substantially tighten the requirements for conservation easements that protect historic structures. Paragraph (B), quoted below from the new law, is entirely new; paragraph (C) is a revision of existing law:

> **(B) Special rules with respect to buildings in registered historic districts.**—In the case of any contribution of a qualified real property interest which is a restriction with respect to the exterior of a building described in subparagraph (C)(ii), such contribution shall not be considered to be exclusively for conservation purposes unless—
>
> (i) such interest—
>
> (I) includes a restriction which preserves the entire exterior of the building (including the front, sides, rear, and height of the building), and
>
> (II) prohibits any change in the exterior of the building which is inconsistent with the historical character of such exterior,
>
> (ii) the donor and donee enter into a written agreement certifying, under penalty of perjury, that the donee—

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[36] Treas. Reg. §§ 1.170A-14(d)(5)(ii)(A)-(C) (as amended in 1999).

[37] Turner v. Comm'r, 126 T.C. No. 16 (2006).

[38] *Id.* The court did not specifically consider the provisions of subparagraph (C) cited above, although it was clear that the court did not believe that there was anything about the physical or environmental features of the land in question that contributed to the historic structures on the adjoining land. *Id.*

(I) is a qualified organization (as defined in paragraph (3)) with a purpose of environmental protection, land conservation, open space preservation, or historic preservation, and

(II) has the resources to manage and enforce the restriction and a commitment to do so, and

(iii) in the case of any contribution made in a taxable year beginning after the date of the enactment of this subparagraph, the taxpayer includes with the taxpayer's return for the taxable year of the contribution—

(I) a qualified appraisal (within the meaning of subsection (f)(11)(E)) of the qualified property interest,

(II) photographs of the entire exterior of the building, and

(III) a description of all restrictions on the development of the building.

(C) Certified historic structure.—For purposes of subparagraph (A)(iv), the term "certified historic structure" means—

(i) any building, structure, or land area which is listed in the National Register, or

(ii) any building which is located in a registered historic district (as defined in section 47(c)(3)(B)) and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district.

A building, structure, or land area satisfies the preceding sentence if it satisfies such sentence either at the time of the transfer or on the due date (including extensions) for filing the transferor's return under this chapter for the taxable year in which the transfer is made.[39]

In addition, Congress added a requirement for the payment of $500 with the filing of any tax return claiming a deduction in excess of $10,000 for conservation easements contributed to protect historically significant structures, as provided in IRC § 170(h)(4)(B).[40]

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[39] I.R.C. §§ 170(h)(4)(B), (C) (2004).

[40] Pension Protection Act, 29 U.S.C. § 1206 (2006); I.R.C. § 170(f)(13) (2004).

5. THE CONSERVATION PURPOSES OF THE DONATION MUST BE PROTECTED IN PERPETUITY

To be eligible for an income tax deduction the "conservation purposes" advanced by the easement must be protected in perpetuity.[41]

Practically speaking, this means that the grantor of a conservation easement must permanently relinquish the right to terminate or modify the easement without the consent of the holder of the easement and that the easement must be binding upon future owners.[42]

Many people wonder if they can provide in their easement that the easement terminates if the tax benefits are denied for some reason, or if the tax benefits turn out to be less than anticipated. Of course the answer is that they cannot make such a provision because it violates the requirement that the easement be granted in perpetuity.

The Regulations do make an exception for potential remote events over which the parties have no control. The Regulations give the example of a state statutory requirement that all restrictions on the use of land be re-recorded every thirty years to remain valid (sometimes called a "Marketability of Title" statute).[43]

a. The "Rule Against Perpetuities" and perpetual conservation easements

Many states have either statutory or constitutional requirements regarding the "vesting" of property held in trust for others. These requirements are typically called the "Rule Against Perpetuities." The rule, again typically, requires that any property held in trust vest outright in a beneficiary, free of trust, within a stipulated period of time. "Vesting" in this sense, means "becomes owned outright," i.e., free of trust. Occasionally, it is argued that the requirement that a conservation easement be perpetual violates the rule. However, because a conservation easement "vests" immediately in the holder of the easement once the easement is conveyed, the rule does not apply.

Of course, this does not address the more fundamental question of whether it is appropriate for an easement donor to dictate to, in theory, all future generations, how his or her land is to be used. Such a question goes to the heart of our system of private property in which many land use decisions with long-lasting effects,

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[41] Treas. Reg. § 1.170A-14(a) (as amended in 1999).

[42] *See* discussion *infra* Part B.5.

[43] Treas. Reg. § 1.170A-14(g)(3) (as amended in 1999). It should be noted that such statutes may, in fact, cause easements to terminate unless affirmative action is taken to re-record the easement within the statutory time-frame. *Id.*

e.g., the development of subdivisions, shopping malls, and amusement parks, are delegated to individual owners, and should be considered in that context.

b. Conservation easement amendments and "Excess Benefit Transactions"

In spite of the requirement that a conservation easement be perpetual to be deductible, easements are inherently contracts and, like any contract, can be amended if all of the parties to the contract agree. While there have been arguments made that conservation easements should be considered to be governed by the "charitable trust" doctrine, which would substantially limit the powers of the parties to amend them, that doctrine has not been generally applied to date. In addition, the Uniform Conservation Easement Act provides that "a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements."[44]

However, the fact that easements are contracts does not mean that they can be freely terminated, or even amended, by land trusts. This is because to be an "eligible donee" to hold conservation easements, a land trust must be a public charity qualified as such under IRC § 501(c)(3), and "have the commitment to protect the conservation purposes of the donation."[45] An organization that allows easement terminations or amendments in a manner that is inconsistent with the conservation purposes of the easement fails to qualify as an "eligible donee" because it demonstrably lacks "the commitment to protect the conservation purposes of the donation."[46]

Public charity status under federal tax law also imposes substantial limitations on the actions of land trusts; in particular, land trusts are prohibited by tax law from participating in "excess benefit" transactions.[47] An excess benefit transaction is one in which a public charity, or other tax-exempt organization, directly or indirectly, provides an economic benefit to any "disqualified person" in excess of the value provided by that person to the organization in exchange for the benefit.[48] A disqualified person is any person who, for a period of five years *preceding* the transaction, was in a position to exercise substantial influence over the organization, including family members of such a person.[49] Excess benefit transactions violate the requirement that "no part of the net earnings of [a public charity] inures to the benefit of any private shareholder or individual."[50]

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[44] U.C.E.A. § 2 (1981).

[45] *See* discussion *supra* Part B.3.b; Treas. Reg. § 1.170A-14(c)(1) (as amended in 1999).

[46] Treas. Reg. § 1.170A-14(c)(1) (as amended in 1999).

[47] I.R.C. §§ 501(c)(3), 4958(c)(1) (2004).

[48] *Id.*

[49] I.R.C. § 4958(f)(1).

[50] I.R.C. §§ 4958(a), (c) (2004).

An additional limitation on land trusts' ability to amend or terminate conservation easements derives from the requirement that public charities be "organized and operated exclusively" for charitable purposes.[51] Organizations are allowed tax-exempt status only if they engage "primarily" in activities that accomplish one or more exempt purposes, i.e., if more than an "insubstantial part of [an exempt organization's] activities [are] not in furtherance of an exempt purpose."[52] Note that the prohibition against excess benefit transactions (private inurement) and the requirement that an exempt organization be operated exclusively for exempt purposes are separate.[53]

Violation of these rules can result in the imposition of stiff fines ("excise taxes") on the parties to the transaction, including land trust staff, and even the revocation of a land trust's charitable status. Therefore, such rules impose an important constraint on a land trust's ability to amend or terminate an easement.

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[51] *Id.*

[52] Treas. Reg. § 1.501(c)(3)-1(c) (as amended in 1990); *see* Airlie Found. v. United States, No. 93-5254, 1995 U.S. App. LEXIS 10681 (D.C. Cir. Apr. 24, 1995) (serving as an example of an organization that lost its exempt status for failure to serve exclusively public interests).

[53] United Cancer Council, Inc. v. Comm'r, 109 TC 326, (1997), *rev'd*, 165 F. 3d 1173 (7th Cir., 1999).

Example

Mrs. McCreedy donated a conservation easement on her farm in 1995. At that time she reserved three home sites, one for herself, and one for each of her two grandchildren. In 2000, her daughter had a third child. Mrs. McCreedy now wants to amend her easement to allow a fourth home site so that each of her grandchildren can have a house. From a contract law standpoint, if Mrs. McCreedy and the land trust both agree to amend the easement to allow the fourth home site, they can do it. However, such an amendment would violate the requirement that the land trust be operated "exclusively" for charitable purposes.

Mrs. McCreedy points out that she owns another farm about five miles down the road which consists of several hundred acres and which is not protected. She asks if she puts that farm under easement can the land trust agree to amend the existing easement to allow the fourth home site. She also owns fifty acres of prime timber that is a nesting ground for a bald eagle, that is not protected, and that adjoins the original easement.

Every land trust should have an amendment policy. However, at a minimum, to avoid the occurrence of an "excess benefit transaction" in responding to Mrs. McCreedy's request, the *net financial results* to Mrs. McCreedy of any amendment must be, at a minimum, neutral. To insure this, the land trust needs to arrange for an appraisal of the affects of an amendment, which must include an offset, either in the form of the protection of the farm down the road, or the adjoining 50-acre timber parcel, or both. The land trust should arrange for this appraisal, and should be reimbursed by Mrs. McCreedy for this cost, and any other costs incurred in undertaking the amendment.

This leaves the question of whether an amendment should be granted in any case, and if so, what the proper offset might be from a conservation standpoint. From a tax law standpoint it is clear that the results of the amendment must be financially neutral to Mrs. McCreedy. However, if there is no conservation offset (suppose Mrs. McCreedy simply makes an offsetting cash payment to the land trust), does this affect that status of the land trust as a "qualified organization," because it lacks the required "commitment to protect the conservation purposes of the donation" as required by Regulations § 1.170A-14(c)? It might.

Note that "amending" an existing easement to include additional property typically requires a formal conveyance of a new easement (even if it is on the same terms as the existing easement) over the additional acreage, not just an amendment of the existing easement, e.g., by changing the description of the property subject to the easement.

c. Judicial modifications/termination

The tax law contemplates that a conservation easement may be terminated by a court in the event that, "due to changed circumstances," the use of the property for the conservation purposes has become "impractical or impossible."[54]

Courts typically have the authority to terminate, or modify ("reform"), trusts where the original intent of the grantor of the trust can no longer be accomplished with the trust property.[55] This authority is necessary because trusts may last long after they were originally established, and many changes not contemplated in the trust document may occur that defeat the purpose of the trust. Conservation easements are similar to trusts in this respect, and the authority of courts to terminate and reform trusts is believed to extend to conservation easements as well.

The power of a court to terminate a conservation easement on the grounds that it can no longer achieve its original purpose, and the power of courts to modify easements for the same reason, is an exception to the tax rule that conservation easements must be permanent.

Example 1

Mr. Jax contributed a conservation easement on twenty-five acres on the outskirts of Tucson in 1980. At the time of the contribution, the acreage was the site of a magnificent group of saguaro cacti, each believed to be over two hundred years old. In 1995, a freak windstorm obliterated the stand of saguaros. At that time the land was owned by Mr. Jax's son, who went to court and sought to have the easement modified to allow public use of the property as a park, so that he could sell the parcel to the City of Tucson. The action was brought because the holder of the conservation easement did not believe it could allow the amendment because it would confer a substantial financial benefit on the landowner in violation of the holder's charitable status (i.e., it might constitute an excess benefit transaction.)

Whether the land trust's position was right or not, the court, considering all of the facts, agreed that the original purpose of the easement could no longer be accomplished and allowed the easement to be modified to allow use of the property as a public park. The court felt that use of the property as a public park at least advanced the original easement donor's intent to provide a public benefit with the land. Note that a portion of the sale's proceeds would be required to be paid to the easement holder.

[54] Treas. Reg. § 1.170A-14(g)(5)(ii) (as amended in 1999).

[55] *See generally*, GEORGE BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 433 (3d ed. 1951).

Example 2

Assume the same facts as the first example, except that the property is now surrounded by intense commercial and industrial development. The landowner petitions the court to terminate the easement on the grounds that there is no longer any public purpose that can be served by preservation of the 25 acres. The court considers requiring that the land be used for a public park, but recognizes that it is too remote from residential development and that the surrounding uses make it highly unlikely that anyone from the public would choose to use such a park. The court agrees to termination of the easement on the grounds that there is no longer any public purpose to be achieved by keeping the land open. The owner sells it to the adjoining textile mill, which promptly turns it into much needed parking lot. The owner receives $3 million for the land.

Under a provision of the easement required by the Regulations, the owner will be required to share the payment received for the land with the land trust.

According to the terms of the charitable trust doctrine, the court, had it applied that doctrine, could also have required that the proceeds of the sale go to some public purpose. How this would intersect with the regulatory requirement that the proceeds of the sale be shared with the land trust, is an unknown.

6. EXISTING MORTGAGES MUST BE SUBORDINATED TO THE EASEMENT

Existing mortgages must be subordinated to the conservation easement in order for the easement to be deductible.[56] Although this may appear a difficult requirement to meet, where landowners have sufficient equity in the property being placed under easement, it is rarely a problem.

Note that the Regulations do not specify when the subordination must occur. Best practice is for the mortgage holder to join in the easement deed. In any event, it seems likely that the subordination must be completed by the date of filing of the tax return on which the easement donation is first deducted.

It could be a grave mistake to record a conservation easement without the commitment of the mortgage holder to subordinate because if the mortgage holder fails to subordinate, the grantor of the easement may find his or her land permanently restricted by an easement that is not deductible.

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[56] Treas. Reg. § 1.170A-14(g)(2) (as amended in 1999).

7. USES INCONSISTENT WITH CONSERVATION VALUES MUST BE PROHIBITED

Generally, a deduction will be denied if the donor has retained rights to the use of land that would permit the destruction of significant conservation values, *even if those values are not specifically identified for protection in the easement*.[57]

The Regulations give an example of an easement, the purpose of which was to support a government flood control program. [58] The easement permitted the unrestricted use of pesticides that could destroy a naturally occurring ecosystem on the property. The example states that such an easement would violate the requirement that it prohibit the destruction of other significant conservation values, and it would not be deductible.

However, where uses inconsistent with "significant conservation values" are necessary for the specific conservation purposes of the easement, the reservation of the rights to such uses in the easement will not preclude deductibility.[59]

A deduction for an easement, the purpose of which is the preservation of scenic open space, or open space pursuant to a clearly delineated governmental conservation policy, will be denied if the landowner retains rights to use land that would interfere with the essential scenic qualities of the land or with the governmental policy to be furthered by the easement.[60]

The requirement that a conservation easement prohibit "inconsistent uses" is an important one that is currently drawing IRS attention. It is also a requirement that is not always easy to meet. It is important to remember that the easement must not only protect the values that are identified in the easement for protection, but *any other significant conservation values*, whether or not identified in the easement.[61]

It is also important to note a provision of the Regulations repeatedly cited by the Sixth Circuit Court of Appeals in its affirmation of the Tax Court ruling in the *Glass* case.[62] This provision states, referring to the prohibition against inconsistent use:

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[57] Treas. Reg. § 1.170A-14(e)(2) (as amended in 1999).

[58] *Id.*

[59] Treas. Reg. § 1.170A-14(e)(3) (as amended in 1999).

[60] *See* Treas. Reg. § 1.170A-14(d)(4)(v) (as amended in 1999).

[61] Treas. Reg. § 1.170A-14(e)(2) (as amended in 1999).

[62] *See* discussion *supra* Part B.4.d.2.

> However, this requirement is not intended to prohibit uses of the property, such as selective timber harvesting or selective farming if, under the circumstances, those uses do not impair significant conservation interests.[63]

Example 1

Mr. Green buys 600 acres along a heavily traveled public road in a small, western, resort town known for its spectacular scenery. He reserves the right to construct two houses on the property, one for himself, and one for his guests. The houses are required to be set back from the road by nearly a third of a mile. However, the property consists exclusively of open pasture land. The houses, likely to be substantial, will be visible from the road. Also, any screening established around the houses will be out of keeping with the rest of the property, which is completely open. The purpose of the easement is protection of the scenic view across the property.

This example raises the question of whether or not an easement has to be "perfect" to be deductible. Without the easement, the property could have been, and likely would have been, developed into forty large-lot home sites. With the easement in place, the development of the property is limited to two home sites. Nevertheless, the easement allows a use that will interrupt the current unsullied view across this expansive pasture.

I believe that this use is "inconsistent" with the conservation purpose of the easement to protect the scenic view over the pasture. Should it be deductible? Yes. There is no question that limiting the use of the property to two, rather than forty, home sites goes a very long way to protecting the view and provides a significant public benefit. Could the IRS argue that merely reserving two home sites violates the requirements of the Regulations? Yes. Would it win this case in court? It is doubtful that a court would apply so restrictive a standard. But we do not know for sure.

[63] Treas. Reg. § 1.170A-14(e)(2) (as amended in 1999).

Example 2

Assume the same facts as Example One, except that there is a small creek that runs through the property which is a spawning ground for cutthroat trout, an important and dwindling game species. The easement allows *no* development of the property, but does allow continued ranching on the property. The right to ranch reserved in the easement is very general, and the easement says nothing about protection of the creek or the cutthroat trout.

This easement is probably not deductible, even though its purpose was protection of a scenic view, not wildlife habitat; even though it eliminates all development potential on the ranch; and even though the value of the easement is appraised at $40 million. The reason? The easement allows ranching in a manner that could harm the creek and the cutthroat trout. This example, and the result, is very similar to the example found in Regulation § 1.170A-14(e)(2).

Example 3

Bill Gallo contributes a conservation easement over an historic vineyard. The easement permits no development and preserves the open space represented by the property, which has been specifically identified by the local county supervisors by resolution, and in the comprehensive plan, as a clearly delineated local government conservation policy. However, the continued use of the property as a vineyard requires use of harsh pesticides that may endanger the purple-topped grouse biter, a small endangered insect. Although this reserved use is inconsistent with protection of the biter, pesticide use is crucial to the maintenance of the vineyard, which is the goal of the clearly delineated governmental conservation policy and the principal conservation purpose of the easement. Pursuant to the exception to the inconsistent use prohibition found in Regulations § 1.170A-14(e)(3), described above, this easement should be deductible.

"Carving out" the inconsistent use

If the "inconsistent use" is limited physically to a specific area, it may be possible to carve that area out of the easement so that the inconsistent use does not taint the deductibility of the easement.[64]

One of the arguments made by the IRS in the *Glass*[65] case was that the easement did not accomplish a publicly significant conservation purpose because the donor did not protect his entire property, but only a very small portion. The Sixth Circuit Court of Appeals rejected this argument (albeit in terms of neighboring property owners) as follows:

> The Commissioner also argues that the Tax Court erred by not considering the building rights of neighboring property owners. This argument similarly fails. There is no statutory or regulatory provision requiring consideration of neighboring property owners' building rights when determining whether a conservation easement is a "qualified conservation contribution." Congress likely recognized the common sense truth that Taxpayers/Donors cannot realistically limit building on property outside of their control. Adoption of the Commissioner's position would unnecessarily preclude conservation donations permitted under the Tax Code.[66]

Remember that in the *Glass* case one of the easements challenged by the IRS, and upheld as deductible by the courts, only protected 18,000 square feet out of a total of eleven acres (less than four percent of the total acreage of the property) owned by the donor. The other easement protected 31,200 square feet of the eleven acres.[67]

Given the language, the ruling, the circumstances of the *Glass* case, and the complete lack of any provision to the contrary in the tax law, carving an area out of an easement on which to undertake uses that might have been "inconsistent uses" appears to be a reasonable strategy.

One note of caution in using this approach: if the donor decides to put a non-deductible restriction of some sort on the "carved out" portion of his property, the restriction itself must conform with all of the requirements of IRC § 170(h)

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[64] *See* discussion *supra* Part B.10.

[65] Glass v. C.I.R., 471 F.3d 698 (6th Cir. 2006).

[66] *Id.* at 711-12.

[67] *Id.* at 703, 705.

(except that the restriction need not meet the conservation purposes test)[68] or the contribution of the non-deductible restriction may be subject to federal gift tax.[69]

Note, too, that gift tax is imposed on any gift made by an individual, unless that gift is specifically exempt. IRC § 2522(d) exempts qualified conservation contributions from the gift tax; however, in order to qualify the gift must meet the requirements of IRC § 170(h). However, for gift tax purposes the easement need not meet the "conservation purposes" requirements of IRC § 170(h)(4)(A).

8. PUBLIC ACCESS IS NOT REQUIRED FOR MOST "OPEN SPACE" EASEMENTS

Easements to preserve open space pursuant to a governmental conservation policy normally are not required to provide public access in order to be deductible.[70]

Only when the purpose of the easement requires public access for there to be a public benefit is access required. Examples of easements requiring public access include scenic easements (scenic qualities must be publicly visible)[71] and historic easements (the public must have at least visual access to the historic area or structure).[72]

9. "REMOTE AND FUTURE EVENTS"

The Regulations do not deny a deduction in cases where some "remote, future event" that is "so remote as to be negligible" may cause a termination of the easement, notwithstanding the requirement of perpetuity.[73] The example given in the Regulations is of termination of an easement by operation of what is known as a "marketability of title" statute. Such statutes require that interests in land that do not involve physical possession ("inchoate interests") must be re-recorded periodically to remain in force.[74] A conservation easement constitutes such an inchoate interest, and may automatically terminate in the event that the easement is not re-recorded within the specified period of time.

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[68] *See* I.R.C. § 2522(d) (2004).

[69] I.R.C. § 2522(d) (2004); *see also* discussion *infra* Part D.2.

[70] Treas. Reg. § 1.170A-14(d)(4)(iii)(C) (as amended in 1999).

[71] Treas. Reg. § 1.170A-14(d)(4)(ii)(B) (as amended in 1999).

[72] Treas. Reg. § 1.170A-14(d)(5)(iv) (as amended in 1999).

[73] Treas. Reg. § 1.170A-14(g)(3) (as amended in 1999).

[74] *See* WYO. STAT. ANN. § 34-10-101 (LexisNexis 2007).

Unfortunately, the example given does not very well reflect the Regulatory requirement that circumstances triggering termination be "so remote as to be negligible."[75] Termination under a marketability statute is not "so remote as to be negligible" but is instead a completely predictable event that will occur at a specific time if the land trust does not re-record the easement prior to that time.

As noted previously, perhaps the most important lesson from this example is to alert land trusts that there are statutes in a number of states that can cause termination of conservation easements if the land trust does not re-record its easements within the statutory period.

10. NO DEDUCTION IS ALLOWED WHERE SURFACE MINING RIGHTS ARE RETAINED

An easement that reserves the right to recover a "qualified mineral interest" by any surface mining method is not deductible.[76] A "qualified mineral interest" is "the owner's interest in subsurface oil, gas, or other minerals and the right of access to such minerals."[77]

Provided that the easement prohibits surface mining, an exception to the no-deduction rule exists where mineral interests have been severed from the surface rights and are not owned by the grantor of the easement, *and* the probability of surface mining such minerals is "so remote as to be negligible."[78] A letter from a qualified geologist that the probability of surface mining on such property "is so remote as to be negligible" provides evidence (not necessarily conclusive) that this condition has been satisfied, in case of an audit.

Note that a right reserved in an easement to remove gravel from a riverbed on the protected property for use in maintaining roads on the property and for use in construction of a permitted structure on the property was considered by the United States Court of Claims to be a reserved surface mining right defeating a $19 million tax deduction.[79]

"Split Estate" issues

The problem of the "split estate," i.e., where mineral rights and surface rights are separately owned, is a major one in the western states, where minerals were typically retained by the U.S. government when the land was homesteaded. Where minerals have been retained by the government, or otherwise separated from the ownership of the surface, a conservation easement cannot control the

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[75] Treas. Reg. § 1.170A-14(g)(3) (as amended in 1999).

[76] Treas. Reg. § 1.170A-14(g)(4)(i) (as amended in 1999).

[77] Treas. Reg. § 1.170A-14(b)(1)(i) (as amended in 1999).

[78] Treas. Reg. § 1.170A-14(g)(4)(ii) (as amended in 1999).

[79] *See* Great Northern Nekoosa Corp. v. United States, 38 Fed. Cl. 645 (1997).

manner in which such minerals are removed from the property unless the owner of the minerals joins in the easement, or unless the easement preceded separation of the minerals from the ownership of the surface.

While it is difficult to make a deductible contribution of a conservation easement in split estate situations, the definition of "qualified conservation contribution" allows a deduction for the charitable gift of the donor's entire interest in property, other than a "qualified mineral interest." The Regulations expressly allow a deduction for such a contribution.[80] According to the Regulations, "a qualified mineral interest is the donor's interest in subsurface oil, gas, or other minerals and the right of access to such minerals."[81] These provisions of the Regulations offer some planning opportunities for the conservation of land in which *subsurface* mineral interests are owned separately from the surface.[82]

Example 1

Susan Jones wants to protect her ranch. She places a conservation easement over the ranch that reserves her right to remove gravel from a small creek for maintenance of ranch roads, a use that has been part of the ranch operation for over 100 years. The IRS audits the easement and denies the deduction based upon the *Nekoosa* decision described above. However, the ranch is located in Wyoming, and Wyoming law does not consider gravel a "mineral." Because the definition of the term "mineral" has been left by the Regulations to state law, Susan is able to retain her deduction. Had state law been different, the IRS might have been successful in denying the entire deduction.

[80] Treas. Reg. § 1.170A-14(b)(1) (as amended in 1999).

[81] Treas. Reg. § 1.170A-14(b)(1)(i) (as amended in 1999).

[82] Pension Protection Act, 29 U.S.C. § 1206 (2006). Note that such a contribution of a fee interest with reservation of a qualified mineral interest is eligible for the tax benefits made available by the Pension Protection Act. *Id.*

Example 2

Suppose that Wyoming law were different and that gravel was considered a mineral. Susan insists that she cannot economically operate the ranch if she has to purchase gravel to maintain the ranch's many miles of roads.

A solution *may* be to carve out from the easement property the area from which Susan obtains gravel. Provided that the easement over the remaining land constitutes a deductible conservation easement under IRC § 170(h), there is no *known* basis upon which the IRS can challenge the deductibility of the easement on the grounds that the gravel area was excluded. The IRS can only look at what is protected by the easement and the easement itself. It cannot look outside of the protected area and say "you should have preserved this as well."

Susan (or the land trust) may wish to put a non-deductible easement, or restriction, on the gravel area just to insure that some future owner cannot turn it into a cement factory. As noted previously, if Susan contributes a non-deductible easement over the gravel pit, she needs to make sure that the contribution is not subject to the gift tax.

11. RESERVATION OF OTHER MINING OR MINERAL EXTRACTION RIGHTS

No deduction will be allowed for any easement reserving the right to recover any qualified mineral interest by any method that is inconsistent with the conservation purposes of the easement.[83] This tracks the provisions of the "inconsistent use" rule.

However, a deduction will not be denied if the easement retains the right to engage in a form of mining (*but not surface mining*) that meets the following three criteria:

(i) the mining will have only a limited impact on the property;

(ii) the mining will have only a localized impact on the property; *and*

(iii) the mining will not be irremediably destructive of significant conservation interests.[84]

[83] Treas. Reg. § 1.170A-14(g)(4) (as amended in 1999).

[84] Treas. Reg. § 1.170A-14(g)(4)(i) (as amended in 1999).

Of course, the principal problem with mineral interests is not where the landowner granting the easement owns the minerals, but is the case of the split estate where the mineral rights have been separated from the surface rights. When mineral rights have been separated from the surface, assuming that commercially recoverable mineral deposits exist on the property, the requirements of the tax law cannot be met by inserting controls over extraction in the easement. Such provisions cannot bind persons who obtained (or retained) title to the minerals prior to the conveyance of the conservation easement. To do that, the mineral owner would have to subordinate his or her interest in the minerals to the provisions of the easement.

While the Regulations do provide two examples of easements in which the reservation of the right to extract minerals in an easement did not preclude a deduction, the examples are not particularly helpful.[85] The following examples are more specific, but have not been tested:

Example 1

Sam Murdo operates a ranch on 2,000 acres that was homesteaded by his grandfather in 1880. Sam's grandfather was a shrewd man and made sure that he obtained the mineral rights with the property.

Sam approaches the local land trust about the contribution of a conservation easement. Sam is willing to prohibit surface mining on the ranch. However, he wants to retain the right to explore for and extract the subsurface oil and gas reserves that are there. He agrees to an easement that 1) requires him to space the wells on 160-acre parcels; 2) strictly limits the land disturbed for each drilling and operations pad to no more than five acres; 3) requires the location of the pads to be reviewed by the land trust to insure that no significant habitat or scenic view is disrupted; 4) limits the roads accessing the pads to locations and designs agreeable to the land trust; 5) requires that all pipelines leading from the wells be located underground; 6) requires reclamation of any disturbed land to the condition of the surrounding undisturbed land; and 7) requires complete reclamation of the property at the completion of mineral extraction activities.

This easement should meet the requirements of the Regulations that the impact of exploration and extraction have no more than a limited, localized, impact not irremediably destructive of conservation values.

[85] Treas. Reg. § 1.170A-14(g)(4)(iii) (as amended in 1999).

Example 2

Assume the same facts as Example 1 above, except that Sam's grandfather failed in his efforts to obtain mineral rights to the ranch. The land trust explains to Sam the complication resulting from the separated mineral interest. Sam obtains a report on the minerals on the ranch from a qualified geologist. The report indicates that there are no surface minerals having any commercial value on the ranch; however, there are valuable and recoverable subsurface oil and gas reserves. Of course, these reserves are owned by the federal government, not Sam.

Sam proposes to make a "qualified conservation contribution" to the land trust in the form of a gift of the *fee interest* in his ranch. Such a gift will meet the requirements of the Regulations for a gift of the fee, in which the donor reserves a "qualified mineral interest." Sam retains a life estate in the ranch, so that he and his family can continue to enjoy the ranch during his lifetime. Sam could convey the ranch to his children (and grandchildren) as tenants in common prior to making the contribution to the land trust. This *might* allow Sam, his children, and grandchildren to all reserve life estates in the property and still qualify the gift under another exception to the prohibition against deducting gifts of partial interests, i.e., the exception for the gift of a personal residence or farm in which the grantor retains a life estate. *See* Treas. Reg. §§ 25.2522(c)(2)(ii) and (iii).

Note that if Sam reserved a right to lease the property for some period of years the gift would not qualify for a deduction, because retention of a lease constitutes the retention of a partial interest, which is not one of the exceptions to the prohibition against deducting partial interest gifts. On the other hand, if Sam were trusting, he could make the gift of the ranch with no strings attached and later negotiate a lease-back from the land trust. The issue for the land trust would be whether a lease-back on terms acceptable to Sam would constitute an "excess benefit" transaction.

12. AN INVENTORY OF NATURAL RESOURCES IS REQUIRED

If the donor retains any rights to use the property subject to the easement (e.g., farming, limited residential use, recreational use) a written "natural resource inventory" must be prepared and made available to the donor and the prospective holder of the easement *prior to the conveyance of the easement*.[86] The Regulations provide a list of suggested matters to be covered in the inventory.[87]

[86] Treas. Reg. § 1.170A-14(g)(5)(i) (as amended in 1999).

[87] *See* Treas. Reg. §§ 1.170A-14(g)(5)(i)(A)-(D) (as amended in 1999).

This inventory is critical to the ability of the holder of the easement to monitor and enforce the easement because it provides a starting point from which to measure change on the protected property over time. It should go without saying that knowing where the inventory is at all times is important; for that reason, some land trusts actually record the inventory with the easement, making it a matter of public record.

13. NOTICE REQUIREMENTS

The easement must require that the donor/landowner notify the easement holder prior to exercising any rights reserved in the easement if such exercise might impair the conservation interests.[88] This requirement is occasionally objected to by easement donors, who feel it is intrusive. However, to be safe, a conservation easement should expressly provide something along the following lines:

> The Grantor shall notify the Grantee prior to undertaking any use of the property that may impair the conservation interests protected by this Easement.

14. MONITORING OF THE PROPERTY MUST BE PROVIDED FOR

The easement must require that the easement holder have the right to enter the property at reasonable times to inspect the property for compliance with the terms of the easement.[89] Note that while providing for notice to the landowner prior to monitoring as a courtesy is typical, monitoring may not be conditioned upon landowner consent or it will defeat the requirement of the Regulations.

15. ENFORCEMENT TERMS REQUIRED

The easement must provide the easement holder with the right to enforce the terms of the easement, including the right to require restoration of the property subject to the easement to the condition that existed *on the date of the conveyance of the easement*.[90]

The emphasized language is contrary to the provisions of many easements, which provide that restoration must be to the condition existing prior to the violation. Such a provision is not in compliance with the requirements of the Regulations.[91] An exception for changes in the property that are consistent with the terms of the easement is probably not in violation of this requirement.

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[88] Treas. Reg. § 1.170A-14(g)(5)(ii) (as amended in 1999).

[89] *Id.*

[90] *Id.*

[91] *Id.*

Example

Sol Green donates a conservation easement over 200 acres, one-third of which is forested. The easement reserves the right to timber the forested portion of the property, subject to a plan for timber management that has been approved by the land trust. Sol timbers about twenty acres of the property consistent with the approved plan. The following year he sends in a bulldozer to clear debris. This clearing is in violation of the easement because it is contrary to the timber management plan that requires leaving debris to provide habitat.

The Regulations would require restoration of the improperly cleared area to the condition on the date of conveyance of the easement: i.e., fully forested with mature trees. Obviously, this is not possible. Also, removal of the trees was not a violation of the easement because it was done according to the approved plan. A restoration provision requiring restoration to the condition existing on the date of the easement conveyance "except for changes made that are consistent with the terms of the easement" would allow the property to remain in its timbered state, while requiring replacement of the removed debris, or the addition of comparable cover for wildlife.

16. EXTINGUISHMENT (TERMINATION) OF AN EASEMENT

The possibility that an easement may be extinguished will not defeat deductibility if:

a) the termination was by court order;

b) the termination was due to changed circumstances making continued use of the property for the conservation purposes impractical or impossible; *and*

c) the holder of the easement is required to use its share of any proceeds resulting from the termination of an easement in a manner that is consistent with the conservation purposes of the easement.[92]

Concerns about easement termination, other than by court order, are growing in the face of the occurrence of several easement terminations, or modifications amounting to termination, in recent years. Such cases are still extremely rare. However, they have started a debate nationally about application of the "chari-

[92] *Id.*

table trust doctrine" to conservation easements. Essentially, application of this doctrine would require judicial oversight of most all easement terminations *or* modifications. To date, this doctrine has not been applied generally, and some questions have been raised about the appropriateness of applying the doctrine at all.

Regardless of this debate, the Regulations do not contemplate that an easement may be terminated other than by judicial action in a manner more or less consistent with the charitable trust doctrine.[93] Absent application of the charitable trust doctrine, as a matter of common law, easements are contracts that can be modified by the parties regardless of provisions in an easement to the contrary.[94] However, it is important to keep in mind that easements cannot be modified or terminated with impunity because of the restrictions imposed by federal tax law on the ability of public charities to engage in "excess benefit transactions."[95]

17. DIVISION OF SALES PROCEEDS IN THE EVENT OF TERMINATION

The Regulations require that an easement must provide for a division of sales proceeds resulting from the termination of an easement in whole, or in part.[96] The Regulations require that a conservation easement contain the following provisions:

> a) that the easement holder's interest in the easement is a vested property interest;
>
> b) that the fair market value of the holder's interest is at least equal to the proportionate value that the easement, at the time of the donation, bears to the value of the unrestricted property as a whole at the time of the donation;
>
> c) that this proportionate value of the easement will remain constant; and
>
> d) that in the event that the easement is extinguished, the proceeds of any sale, exchange, or involuntary conversion of the property that was subject to the easement will be divided between the landowner and the easement holder on the basis of that proportionate value.[97]

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[93] *See* Treas. Reg. § 1.170A-14(g)(6)(i) (as amended in 1999).

[94] *See* discussion *supra* Part B.5.

[95] *See* discussion *supra* Part B.6.

[96] Treas. Reg. § 1.170A-14(g)(6)(ii) (as amended in 1999).

[97] *Id.*

Example

If River Ranch is worth $1,000,000 in its unrestricted state and $300,000 as restricted by a easement, the proportionate value of the unrestricted property represented by the easement is 70% ($700,000/$1,000,000). If the Ranch is subsequently condemned for public use as the site of a new school and the proceeds of the condemnation are $2,000,000, the proceeds must be divided and distributed $1,400,000 (70% x $2,000,000) to the easement holder and $600,000 (30% x $2,000,000) to the owner of the Ranch. Note that these values do not include improvements because it is assumed, in this example, that improvements are not restricted by the easement and are not, therefore, included in its value.

C. INCOME TAX BENEFITS

There are significant income tax benefits associated with the contribution of conservation easements provided that the easement document complies with all of the requirements of IRC § 170(h) and the accompanying Regulations (beginning at § 1.170A-14).

1. THE VALUE OF THE EASEMENT IS DEDUCTIBLE

The value of a conservation easement that complies with the requirements of IRC § 170(h) may be deducted from the donor's income for purposes of calculating federal income tax. The value of the easement for purposes of the deduction is typically the difference in the value of the easement property before the contribution and after the contribution.[98]

Example

Mr. Jones contributes an easement on land that is valued at $1,000,000 before the contribution. After the contribution the land is valued at $300,000. The value of the easement is $700,000 ($1,000,000 – $300,000), which is the difference in the before and after easement value.

2. CALCULATING THE MAXIMUM TAX BENEFIT

The *maximum* possible federal income tax benefit (i.e., tax savings resulting from a deduction) from any easement contribution is calculated by multiplying

[98] *See* discussion *infra* Part C.5; Treas. Reg. § 1.170A-14(h)(3)(ii) (as amended in 1999).

the value of the easement by the top federal tax rate. Many states with an income tax provide a deduction for easement contributions as well. In such cases, adding the applicable top federal and state tax rates together and multiplying the value of the easement by these combined rates provides the *maximum* possible combined federal and state income tax benefit of any easement contribution.

As of January 2007, the top federal income tax rate for individuals was 35% and the federal income tax rates for "C" corporations (i.e., corporations taxed as separate entities) ranged from 15% to 39%, but not incrementally. "S" corporations, and other entities such as limited liability companies and partnerships, pass both income and deductions through to their owners, which income is then taxed at the owner's individual tax rate.[99]

Example 1

If Mr. Jones, in the example on the preceding page, earned sufficient income that the entire $700,000 represented by the easement deduction was taxed at the current top federal rate of 35%, the value of his deduction would be $245,000 (35% x $700,000).

If Mr. Jones resides in a state with a 6% income tax that allows a deduction for the contribution of a conservation easement, he would enjoy an additional state income tax benefit of $42,000 (6% x $700,000).

Some states, in addition to allowing a charitable deduction for the contribution of a conservation easement, allow a credit against state tax due for easement contributions. For example, Virginia allows a tax credit equal to 40% of the value of any conservation easement donated by a Virginia taxpayer over land in Virginia (providing that the easement qualifies as a qualified conservation contribution under IRC § 170(h)).[100] State tax credit programs are few and can vary significantly from state to state.[101]

[99] *See* discussion *infra* Part C.13.b.

[100] *See* VA. CODE ANN. § 58.1-512 (2007).

[101] *See* discussion *infra* Part C.13.c (discussing the federal tax treatment of state tax credits for easements).

Example 2

Mr. Jones (the donor of the $300,000 easement in the previous examples) is a Virginia resident with a Virginia tax liability of $200,000. Virginia allows a state tax credit of 40% of the value of a qualified conservation easement, subject to certain other limitations. In addition to his federal and state charitable deductions, he can take a credit against his Virginia tax liability of $120,000 (40% x $300,000). This credit reduces his Virginia tax liability to $80,000.

3. THE AMOUNT OF THE FEDERAL DEDUCTION IS SUBJECT TO AN ANNUAL LIMITATION

Note that the following discussion of annual limitations is divided into "old law" and "new law." This is because in August, 2006, as part of the "Pension Protection Act of 2006," more generous limitations on charitable deductions for easement contributions were enacted by Congress.[102] However, because *the new law will only apply to easements donated in 2006 and 2007,* readers need to know both the old and new law. Whether the *new law* will be extended is not known at this time, although efforts are currently underway to make the *new law* permanent.

Old Law

Under the *old law*, when an individual made a contribution of "long-term capital gain" property (i.e., a capital asset held more than one year, for example, a conservation easement on land owned for more than one year by the donor), the federal income tax deduction for that donation was limited to 30% of the donor's "contribution base."[103] "Contribution base" is adjusted gross income without regard to the amount of the contribution and without regard to any "net operating loss carry-back."[104]

Under the *old law*, if the easement contribution were made in the first year of ownership, the deduction was allowed up to 50% of the donor's contribution base because the gift was considered a gift of "ordinary income property."[105] However,

[102] Pension Protection Act, 29 U.S.C. § 1206 (2006); IRC § 170(b)(1)(E) (2004).

[103] Treas. Reg. § 1.170A-8(e) (as amended in 1972).

[104] Treas. Reg. § 1.170A-8(d)(1) (as amended in 1972).

[105] I.R.C. § 170(e)(2) (2004); Treas. Reg. § 1.170A-8(b) (as amended in 1972).

a deduction for ordinary income property cannot exceed the donor's basis in the easement (this continues to be true under the *new law*).[106] Note that "basis in the easement" *is not* necessarily basis in the property subject to the easement.[107]

After the first year of ownership, an individual donor may *elect* to limit the amount of the deduction to his or her basis in the easement gift and thereby qualify for the 50% limitation rather than the 30% limitation.[108] This election is no longer needed under the *new law*.

In any event, the aggregate amount of *all* of a donor's charitable deductions (e.g. easement contributions and other contributions such as cash, securities, etc.) made during a tax year is limited to 50% of the donor's contribution base (including conservation easement deductions that are limited to 30% of the donor's contribution base). Thus, if the donor has made contributions for which charitable deductions are available in addition to the conservation easement gift, the value of the other contributions may reduce the amount of the deduction that may be taken for the easement contribution.

Note: "C" corporations are limited to deducting no more than 10% of their "taxable income" for charitable contributions, regardless of the length of time the property that is contributed has been owned by the corporation.[109] *This rule is* ***not*** *changed by the new law* ***unless*** *more than 50% of the corporation's income is from "the business of farming" and the stock of the corporation is not publicly traded.*[110]

Example 1 (Old Law)

Mr. Jones' easement is worth $700,000. He has owned the property that is subject to his easement contribution for five years. Therefore, the contribution is considered the contribution of long-term capital gain property subjecting him to the 30% limitation. Mr. Jones' income is $250,000 annually; therefore, he may only deduct $75,000 (30% x $250,000) of his easement contribution each year, even though the value of the easement is $700,000.

[106] I.R.C. § 170(e)(1) (2004).

[107] *See* discussion *infra* Part C.5.

[108] See Treas. Reg. § 1.170A-8(d)(2) (as amended in 1972).

[109] I.R.C. § 170(b)(2) (2004).

[110] *See* discussion *infra* Part C.3.

Example 2 (Old Law)

If Mr. Jones made other charitable gifts amounting to $100,000 during the year in which he donates the conservation easement, he may only deduct $25,000 of his easement gift because his total deduction for charitable gifts is limited to 50% of his contribution base ((50% x $250,000) – $100,000 = $25,000). However, as described below, Mr. Jones may "carry forward" the unused portion of his deduction to future tax years.

Note that under the *old law* it did not matter which charitable contributions were completely deductible in the year of the contribution and which had to be carried forward. This is not the case under the *new law*.

Example 3 (Old Law)

Mr. Jones contributes his easement six months after he purchases the property. Thus, the property is treated as "ordinary income property," and the deduction may be used up to 50% of his contribution base. In this case, he may deduct $125,000 (50% x $250,000) of the value of the easement and carry the unused balance of the contribution forward. However, Mr. Jones's deduction cannot exceed his basis in the easement.

New Law

The *new law* changes the annual limitation to 50% for all easement contributions, regardless of the length of time the land subject to the easement has been owned by the donor. In other words, the 30% limitation no longer applies to easements contributed on land owned for more than one year.[111]

In addition, if the easement were contributed by a "qualified farmer or rancher," the contribution may be taken against 100% of the donor's contribution base. A qualified farmer or rancher is someone (including a corporation, the stock of which is not "readily tradable on an established securities market"[112]) more than 50% of whose income comes from the "business of farming."[113]

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[111] I.R.C. § 170(b)(1)(E)(i) (2004).

[112] I.R.C. § 170(b)(2)(B)(i)(I) (2004). While it is clear that this new provision applies to "corporations," a limited liability company, in most cases, is treated as a partnership for federal tax purposes. While there is no guidance on this point yet, it seems likely that the greater than 50% of income from farming requirement, in the case of LLCs, must be met at the member level, not the entity level. *Id.*

[113] I.R.C. § 170(b)(1)(E)(iv) (2004).

IRC § 170(b)(1)(E)(v) provides that the definition of "farming" under the *new law* is the definition currently found in IRC § 2032A(e)(5), which is as follows:

> (A) cultivating the soil or raising or harvesting any agricultural or horticultural commodity (including the raising, shearing, feeding, caring for, training, and management of animals) on a farm;
>
> (B) handling, drying, packing, grading, or storing on a farm any agricultural or horticultural commodity in its unmanufactured state, but only if the owner, tenant, or operator of the farm regularly produces more than one-half of the commodity so treated; and
>
> (C) the planting, cultivating, caring for, cutting of trees, or the preparation (other than milling) of trees for market.[114]

The definition of "farm" for purposes of the foregoing is found in IRC § 2032A(e)(4):

> The term 'farm' includes stock, dairy, poultry, fruit, furbearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards and woodlands.[115]

In order for the 100% limit to apply, the conservation easement must insure that the land that is subject to easement remains "available" for agriculture. This is not a requirement that the easement mandate that the land be actively used for agriculture.[116] This requirement does not apply to 50% limit deductions.

Note that under the *new law* if the more than 50% of income from the business of farming requirement is met in the year of the easement contribution, it does not appear to matter what source the income is from in the carry-forward years; the 100% limit will continue to apply.

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[114] I.R.C. § 2032A(e)(5) (2004).

[115] I.R.C. § 2032A(e)(4) (2004).

[116] I.R.C. § 170(b)(1)(E)(iv)(II) (2004).

Example 1

Mr. Jones' easement is worth $700,000. He has owned the property that is subject to his easement contribution for five years. Although this is considered the contribution of long-term capital gain property subjecting him to the 30% limitation under the *old law*, under the *new law* the limitation is increased to 50%. Mr. Jones' income is $250,000 annually. Thus he may deduct $125,000 of his easement contribution (50% x $250,000), allowing him to deduct the entire value of the easement within a five-year period.

Example 2

Sam Evans is a rancher. He has a large ranch that he runs with his family through a family-owned corporation, the Lazy J LLC. Lazy J is a limited liability company (taxed like a partnership, not as a separate entity). Lazy J's adjusted gross income in 2007 is $1,000,000, which it passes through to its members in proportion to their ownership in the company (unless the "operating agreement" for the company provides for a different distribution). Of this income, $550,000 is from the "business of farming" and the rest is from investments. Sam Evans owns 80% of the company and, therefore, is entitled to $800,000 of the Lazy J's income, which comes to him 55% as farm income and 45% as investment income, the same as the percentage of income to the company. This constitutes Sam's sole source of income.

The Lazy J contributes a conservation easement in 2007 valued at $10 million. As a limited liability company, Lazy J passes the entire amount of this deduction through to its members. Therefore, Sam is entitled to an $8 million charitable contribution deduction. Because more than 50% of Sam's income is from the business of farming, the *new law* allows him to take this deduction against his entire $800,000 income annually until the deduction is used up. Under the *new law* Sam may spread this deduction over a total of sixteen years. In this case he will use-up the deduction in ten years, assuming his income does not change.

Example 3

XYZ Corporation is a "C" corporation, i.e., it is taxed separately from its shareholders, unlike an "S" corporation or limited liability company. XYZ's stock is not publicly traded and is wholly owned by a small group of farmers who have used the corporation to acquire and hold certain real property that they use for hay production for their various individual farming operations. All of XYZ's income is from the sale of its agricultural products. XYZ contributes a conservation easement that preserves the real property it owns for agricultural use and as scenic open space. The easement is valued at $1 million. XYZ's taxable income is $50,000 per year. Under the *old law* XYZ was only allowed to use a conservation easement deduction up to 10% of its *taxable* income. Under the *new law* XYZ is allowed to use the deduction up to 100% of its taxable income. As noted below, XYZ will be able to carry the unused portion of the deduction forward for fifteen years. Assuming that its income remains the same, this allows XYZ to use $800,000 (16 x $50,000) of the deduction.

4. UNUSED PORTIONS OF THE DEDUCTION MAY BE USED IN FUTURE YEARS

The law governing the number of years that unused portions of a conservation easement deduction may be "carried forward" has also changed for easements donated in 2006 and 2007.[117] Again, discussion will be divided into the *old law* and the *new law*.[118]

Old Law

Under the *old law* any unused portion of an easement deduction could be "carried forward" for five years after the year of the contribution (allowing a maximum of six years within which the deduction could have been utilized), or until the amount of the deduction has been used up, whichever came first.[119]

New Law

The new law increases the carry forward period from five years to fifteen years, or until the amount of the deduction has been used up, whichever comes first.[120]

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[117] *See* discussion *supra* Part C.3.

[118] *See* discussion *supra* Part C.3.

[119] Treas. Reg. § 170A-10(c)(1)(ii) (as amended in 1975).

[120] I.R.C. § 170(b)(1)(E)(ii) (2004).

Note that it appears that the *new law* also applies to contributions of the fee interest in real property, provided that the donor reserves a "qualified mineral interest" in the property contributed.[121] The contribution of the fee *including* mineral rights will not qualify. This unusual outcome is due to the incorporation by the new law of the definition of "qualified conservation contribution" as defined in IRC § 170(h)(1).

Note also that, because the *new law* provides a fifteen-year carry-forward period for conservation easement contributions, a donor with a conservation easement contribution, and other contributions subject to the five-year carry-forward period, should give priority to writing off the five-year carry-forward deductions over the conservation easement deduction.

Example 1

Assume that John Wells donates a conservation easement valued at $900,000. Assume also that his annual contribution base is $140,000. This would allow Wells to use up to $70,000 per year of this $900,000 deduction. Over the six-year period during which he could use the deduction under the *old law*, he could only deduct $420,000 (6 x $70,000). However, under the new law, and assuming no change in his contribution base, Wells can deduct the entire amount of the $900,000 contribution because he has fifteen years to carry the deduction forward and only needs thirteen ($900,000/$70,000).

[121] I.R.C. § 170(b)(1)(E)(i) (2004). By incorporating the definition of "qualified conservation contribution" from I.R.C. § 170(h)(1) (2004). *Id.*

Example 2

Assume, under the *new law*, that in 2007 Sam Wells' easement contribution is worth $1,000,000, and that he has other contributions amounting to $500,000. Also assume that his annual contribution base is $250,000. The maximum amount that Sam may deduct from his income in 2007 is $125,000 (50% x $250,000). Sam assumes that his contribution base will remain approximately $250,000 for the foreseeable future. He calculates that he has six years (including the year of the contribution) to use up his $500,000 deduction and sixteen (including the year of the contribution) to use up his $1,000,000 easement contribution.

Therefore, Sam claims $90,000 of his five-year carry-forward deductions and allocates the remaining $35,000 of his allowed annual deduction ((50% x $250,000) – $90,000) to the fifteen-year carry-forward deduction. Thus, at the end of the sixth year he has completely deducted the five-year carry-forward deduction and has used $250,000 of his fifteen-year carry-forward deduction, leaving $750,000 of the fifteen-year carry-forward deduction remaining. He has an additional ten years to use up this $750,000 balance, which (assuming he has no other charitable deductions) he can do over a period of six years ($750,000/$125,000).

Although there are no regulations providing guidance as to exactly how to differentiate between five-year and fifteen-year carry-forward deductions in claiming the deductions, Example 2 makes it clear that there is an advantage to giving priority to the deduction of five-year carry-forward deductions over fifteen-year carry-forward deductions.[122]

5. "PHASING" EASEMENT DONATIONS TO EXTEND INCOME TAX BENEFITS

As noted above, deductions for easement contributions under the *old law* were limited to either 30% or 50% of the donor's contribution base depending upon the length of time the donor had owned the property prior to the contribution, and under the *new law*, to 50% of the donor's contribution base, regardless of holding period. These limitations prevent some easement donors from deducting the full value of their easement gift (although the fifteen-year carry-forward period allowed under the *new law* should dramatically reduce this problem). This problem can be addressed by "phasing" easement gifts.

[122] *See* discussion *supra* Part C.4.

Example

Mrs. Blue donates a conservation easement over her 1,000-acre ranch. The value of the easement is $6,000,000. Mrs. Blue's average annual income is $500,000. The maximum deduction that Mrs. Blue can realize, assuming she is subject to the 50% annual limitation and that her income does not change, is $4,000,000 (50% x $500,000 x 16).

However, Mrs. Blue could increase the amount of the deduction she can use by protecting her ranch in two phases, using two separate easements donated at different times. For example, the first easement could cover 500 acres of her ranch. Assume that the value of that easement is $2,500,000 (taking into account the increase in the value of the unrestricted portion of the ranch due to the conservation easement).

Over a ten-year period Mrs. Blue will be able to fully deduct this gift (50% x $500,000 x 10 = $2,500,000). Once this gift has been fully deducted Mrs. Blue donates a second easement over the remaining 500 acres of the ranch. The second easement is worth $5,000,000 (considering appreciation). By the time of this gift, Mrs. Blue's average annual income has increased to $700,000. Over the fifteen years beginning with the second easement donation Mrs. Blue will be able to fully deduct this $5,000,000 gift (50% x $700,000 x 15 = $5,250,000).

Mrs. Blue could have phased her easement gifts differently by donating an easement over the entire ranch that eliminated only half of the development potential that she ultimately intended to eliminate. The second easement would eliminate the balance of the development potential. In any case, each easement must *independently* meet the standards of IRC § 170(h), including the generation of a significant public benefit. A reservation of such potential may raise "inconsistent use" issues.[123]

In a phased conservation plan, such as Mrs. Blue's, the donor should include a provision in her will directing her executor to contribute an additional conservation easement that completes protection of the property. A full draft of the intended easement should be incorporated into the will to avoid uncertainty. Such a conveyance will not qualify for any income tax benefits, but will qualify for full estate tax benefits, which may be significant.

[123] *See* discussion *supra* Part B.6.

6. THE LIMITATION TO "BASIS"

Another important limitation on the amount that may be deducted for the contribution of a conservation easement is the limitation to basis for easements contributed on property owned for one year or less by the donor.[124] This limitation *has not* been changed by the Pension Protection Act.

The limitation to basis limits the deduction to the donor's *basis in the easement*, not basis in the property subject to the easement, which is different. This limitation is an important consideration in timing an easement contribution.

The basis in the easement is a function of two factors: (1) the amount the donor paid for the property subject to the easement (basis in the property), and (2) the percentage of the *appraised* "before easement value" that is represented by the easement. The donor's basis in the property is multiplied by the appraised "before easement value" percentage to determine the donor's basis in the easement.

Where the appraised value of the property prior to the easement is the same as, less than, or only slightly more than, the donor's basis in the property, the limitation to basis will not make a significant difference in the amount of the deduction. However, where the appraiser determines that the "before easement" value of the property is substantially more than what the donor paid for the property, the limitation to basis can make a significant difference in the amount of the deduction.

Example

Assume that Mr. Blue's basis in the property he places under easement is $250,000 (which was the purchase price). He donates a conservation easement on the property six months later. The appraiser determines that the property before the easement is in place is actually worth $500,000, and that the restricted value of the property after the easement is in place is $250,000. Thus, the percentage of before easement value of the property represented by the easement is 50% ($250,000/$500,000). Although the value of the easement as determined by the appraisal is $250,000 ($500,000 – $250,000), Mr. Blue's basis in the easement is only $125,000 (50% x $250,000), therefore, his deduction is limited to $125,000. Had Blue waited for 366 days or more after his purchase of the property to contribute the easement, he would have been entitled to deduct the entire amount.

[124] I.R.C. § 170(e)(1) (2004); Treas. Reg. § 1.170A-4(a)(1) (as amended in 1994).

7. LIMITATION OF ITEMIZED DEDUCTIONS

For individuals whose adjusted gross income in 2006 exceeded the "threshold" level of $150,500 ($72,250 for married taxpayers filing separately), the amount of most itemized deductions, including charitable deductions for conservation easement gifts, must be reduced. The reduction required is 3% of the amount by which the taxpayer's income exceeds the threshold, or 80% of the total amount of itemized deductions, whichever is *less*.[125] This limitation is being phased out over the next several years.[126]

Example

Mrs. Blue (from previous example) earns $500,000 annually, jointly with her husband, which they report on a joint income tax return. In the year of the donation of her $2,000,000 conservation easement (2006) the Blues are allowed a deduction for the easement contribution in the amount of $250,000 due to the 50% limitation ($500,000 x 50%). The phase-out rule requires the Blues to reduce the amount of this deduction by the lesser of 3% of their income over the "threshold" amount (in 2006 $150,500 for individuals filing joint returns) or 80% of the total of their itemized deductions. Assume that the Blues have itemized deductions (including the deduction for the easement) totaling $200,000; 3% of their income over $150,500 amounts to $10,485 ($500,000 – $150,500 x 3%); 80% of the Blues' total itemized deductions amounts, to $160,000 ($200,000 x 80%). Therefore, the Blues must reduce the total of their itemized deductions by $10,485, which is the lesser of the two alternatives. However, under the phase-out of this limitation, the limitation is reduced by one-third for the tax years 2006 and 2007. This reduces the limitation to $6,920.10 (.66 x $10,485).

8. THE ALTERNATIVE MINIMUM TAX (AMT)

The AMT does *not* apply to conservation easement donations. Charitable contributions of conservation easements are not considered "tax preference items." The tax code provision treating gifts of appreciated property as tax preference items[127] was repealed for gifts of appreciated property, including conservation easements, effective December 31, 1992.[128]

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[125] I.R.C. § 68 (2004).

[126] I.R.C. § 68(f) (2004).

[127] I.R.C. § 57(a)(5)(C)(iv) (2004).

[128] P.L. 103-66 (1993).

9. THE EXTENT OF THE TAX DEDUCTION DEPENDS UPON THE VALUE OF THE EASEMENT

One of the most critical and frequently challenged aspects of easement deductions is the valuation of the easement. Easements resulting in reductions in fair market value have been judicially recognized ranging from 16% to over 90%.

a. The "Before and After" valuation method

In the before and after approach to valuing an easement, the property subject to the easement is valued before the easement is in place and after the easement is in place. The difference represents the value of the easement contribution for deduction purposes.[129] An experienced appraiser can estimate the value of a potential donation by knowing the terms of the proposed easement and assuming it is in place. Such pre-donation estimates can be a valuable tool for prospective donors.

The before and after value method typically relies upon the "comparable sales method" to determine the value of the property both before and after an easement is in place. This method requires the appraiser to determine the value of the easement property by looking at what comparable properties are selling for. A comparable property is one having comparable zoning, physical access, proximity to services, physical characteristics and size to the easement property. It is possible to adjust the sales of other properties that are not comparable to make them so. This is typically done using a "paired sales analysis" in which previously sold properties having comparable characteristics except for the one that is the subject of the analysis (e.g., great views) can be compared to determine effect on the value of the one characteristic not held in common.

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[129] Treas. Reg. § 1.170A-14(h)(3) (as amended in 1999); Rev. Rul. 73-339, 1973-2 C.B. 68; *see also*, Thayer v. Comm'r, T.C. Memo 1977-370.

Example

Haley Sears donates a conservation easement on a 500-acre farm just outside of Expensive, Pennsylvania. Land with comparable zoning, physical access, proximity to services, and physical characteristics is, at the time of the easement contribution, selling for approximately $50,000 per acre. The property has exceptional views over a large public reservoir and park. A "paired sales analysis" has determined that having such a view increases property value by about 10%. Therefore, the appraiser can estimate the "before" value of the property at $55,000 ($50,000 x 110%) per acre. However, the comparable sales are all of parcels smaller than the Sears' parcel, averaging only 50 acres each. The appraiser is required to discount the Sears' parcel to reflect this difference (smaller parcels generally having a higher per-acre value than larger ones) and applies a 30% discount. Thus, the final "before" value of the subject property is determined to be $38,500 (($50,000 x 110%) x 70%) per acre, or $19,250,000 ($38,500 x 500).

Determining the "after" easement value also depends upon the use of comparable sales. It happens that in the Expensive region, there have been a number of properties sold subject to conservation easements similar to the one contributed by Sears. These properties have sold for an average of $2,500 per acre; essentially their value for agricultural use. (No paired sales analysis was necessary in determining the value of the property as restricted by the easement.) Thus the value of the Sears' property, after the easement is in place, is $1,250,000 (500 x $2,500).

The difference between $19,250,000 (the before value) and $1,250,000 (the after value) is the value of the easement: $18,000,000.

b. Factors required to be considered in the "Before and After" method

The Regulations provide that, if the before and after valuation method is used, the fair market value of the property before contribution of the conservation restriction must take into account *all* of the following factors:

(i) The current use of the property.

(ii) An objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would in fact be developed.

> (iii) Any effect on the value of the property resulting from zoning, conservation, or historic preservation laws that already restrict the property.[130]

c. The "Development Method" of determining the "before value"

Appraisers will occasionally use what is known as the "development method" or "build-out" method, to determine the "highest and best use" value of property before the easement is in place. While this method is not prohibited by tax law, it lends itself to abuse because of the significant number of assumptions upon which it depends. Essentially, the method determines what the value of the property would be if it were fully developed into residential lots, rather than in its actual state.

In order to use the development method to determine the highest and best use value, an appraiser is required to consider the following factors:

> (i) *Legally permissible uses.* The appraiser *may not* consider uses that are not allowed by current zoning and subdivision regulations applicable to the property. The appraiser *must* consider restrictions imposed by law (e.g., the Endangered Species Act, federal wetlands regulations, etc.) or by private restrictions, such as restrictive covenants.
>
> (ii) *Physically possible uses.* The appraiser must take into account physical characteristics of property that limit its development potential. For example, an appraiser cannot assume that land on a 75% sandy slope is developable.
>
> (iii) *Financially feasible (and marketable) uses.* The appraiser must take into account the actual costs of development and sales, as well as the rate at which the local market will absorb any lots that may be developed. The appraiser must discount the projected selling price of lots to reflect such costs and absorption time.[131]

d. The "Comparable Sales" valuation method

Although the before and after method is recognized by the IRS when there are no comparable sales of easements, the comparable sales method is preferred, using actual easement sales (e.g., a "purchase of development rights" program) as comparables. However, the Regulations recognize that in many cases there will

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[130] Treas. Reg. § 1.170A-14(h)(3)(ii) (as amended in 1999).

[131] *See* THE DICTIONARY OF REAL ESTATE APPRAISAL 135 (Appraisal Inst., 4th ed. 2002).

not be a "substantial record" of comparable easement sales and in such cases the IRS will accept valuations based upon the before and after method.[132]

Example

Assume the same facts as the previous example regarding Haley Sears, except that there have been, pursuant to the Cheap County (within which Expensive lies) open space program, a number of conservation easement purchases. The current value being paid for a conservation easement comparable to the one contributed by Sears is $10,000 per acre. This value, while considerably lower than the value reflected in the before and after analysis, is preferred by the IRS because it represents actual easement sales, not speculation. Assuming that there is nothing significant differentiating the easement donated by Sears and the easements being purchased in the area (e.g., none of the other easements have been sold as "bargain sales"), the value of Sears' easement is $5,000,000 ($10,000 x 500 acres). It will be difficult, although not impossible, for Sears to overcome this valuation with the before and after method.

e. The value of the deduction must be substantiated

Any claim for a charitable contribution deduction exceeding $5,000 must be supported by a "qualified appraisal"[133] and conducted by a "qualified appraiser."[134] The Pension Protection Act revises the definition of "qualified appraisal and appraiser."[135]

Form 8283, "Noncash Charitable Contributions," must accompany any return claiming an easement deduction. The gift must be acknowledged by the donee organization. The organization is required to state whether the donor has received any goods or services in exchange for the gift.[136]

The law now requires that a person contributing a conservation easement valued in excess of $500,000 *must file the complete appraisal*, not just the summary Form 8283, with his or her return.[137]

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[132] Treas. Reg. § 1.170A-14(h)(3)(i) (as amended in 1999).

[133] Treas. Reg. § 1.170A-13(c)(2) (as amended in 1996).

[134] Treas. Reg. § 1.170A-13(c)(3) (as amended in 1996); *see* Treas. Reg. § 1.170A-13(c)(5) (as amended in 1996) (defining a "qualified appraiser").

[135] I.R.C. § 170(f)(11)(E) (2004). *See also* IRS Notice 2006-96 (providing for "interim guidance" on the implementation of the new law. These changes are not yet reflected in the Regulations).

[136] Treas. Reg. § 1.170A-13(f) (as amended in 1996).

[137] I.R.C. § 170(f)(11)(D) (2004).

In order to address certain "oversights" in the valuation process, Form 8283 now requires the donor of the easement to attach a statement to the form that does the following:

> —Identifies the conservation purposes furthered by the easement;
>
> —Shows the value of the property subject to the easement both before and after the easement contribution;
>
> —States whether the contribution was made to obtain a permit or other governmental approval, and whether the contribution was required by a contract; and
>
> —States whether the donor or any related person has any interest in other property near the easement property and, if so, describes that interest.

Substantiating appraisals are complex and typically costly. They must be conducted no earlier than 60 days prior to the conveyance, and no later than the due date for the tax return on which the deduction is first claimed.[138]

Regardless of when the appraisal is made, it must reflect the value of the easement *on the date of the conveyance*.[139]

f. Entire contiguous property rule

The Regulations provide that if a conservation easement covers only a portion of contiguous property (whether one or more parcels) owned by the easement donor, the value of the easement is the difference in the value of the *entire contiguous property* before and after the easement; not just that portion subject to the easement.[140]

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[138] Treas. Reg. § 1.170A-13(c)(3)(A) (as amended in 1996).

[139] Treas. Reg. § 1.170A-13(c)(3)(ii)(I) (as amended in 1996).

[140] Treas. Reg. § 1.170A-14(h)(3)(i) (as amended in 1999).

Example

Sonny Jacobs owns a 500-acre farm in western Pennsylvania. He decides to contribute a conservation easement over the eastern 250 acres. Local zoning allows Sonny to divide and develop houses on the remaining acreage at a density of one unit per five acres. The unrestricted portion of the property overlooks the eastern 250 acres, which includes a river and a series of springs and wetlands. There are four potential home sites on the eastern portion of the property under local zoning regulations.

The appraiser values the eastern 250 acres at $4,000 per acre before the easement (a total of $1,000,000) and at $500 per acre after the easement ($125,000). Sonny is pleased with this $875,000 deduction ($1,000,000 – $125,000) as it will help him offset the proceeds from development of the unrestricted balance of the property.

The IRS audits Sonny's return and denies all but $125,000 of his claimed deduction. The IRS appraiser, following the contiguous parcel rule, values Sonny's *entire* 500-acre farm before and after the easement. He finds that the western 250 acres of the farm is worth $6,000 an acre before the easement ($1,500,000) and the eastern portion $4,000 ($1,000,000). However, after the easement he finds that the western portion is worth $9,000 an acre ($2,250,000) because of protection of the eastern portion over which the western portion looks. The IRS agrees that the eastern portion after the easement is only worth $500 per acre. The net result, according to the IRS, is that the entire 500-acre property is worth $2,375,000, after the easement. Thus the easement is only worth $125,000 ($2,500,000 – $2,375,000).

The IRS also imposes a severe penalty on Sonny and Sonny's appraiser because the appraisal "grossly overvalued" the easement. In fact, the appraisal overvalued the easement by 700%, far more than the 150% over-valuation that triggers the penalty. See the penalty provisions of IRC § 6662(e)(1)(A), which were recently amended by the Pension Protection Act of 2006.

g. "Enhancement" may reduce the deduction

Enhancement is closely related (and sometimes confused with) the "contiguous parcel rule" described above. Enhancement occurs when a landowner donates an easement that has the effect of increasing the value of separate unrestricted land owned by the donor or a "related person," whether or not the unrestricted land is contiguous to the conservation easement.[141]

[141] Treas. Reg. §1.170A-14(h)(3)(i) (as amended in 1999).

A "related person" with respect to an individual donor is that person's siblings, spouse, ancestors, and lineal descendents. The term also includes relations between partnerships, corporations, and other title-holding entities.[142]

Note that if the separate land is contiguous to the easement property, and is owned by the grantor, the contiguous parcel rule applies, not the enhancement rule. If the unrestricted property is not contiguous, or if it is contiguous but under separate ownership from the easement property, the enhancement rule applies.

The net result of applying either the contiguous parcel rule or the enhancement rule should be the same in terms of the ultimate value of the easement; however, the appraisal methodology is different. In the case of the contiguous parcel rule the increase in value, if any, resulting to the unrestricted portion is simply a part of the before and after analysis. However, in the case of enhancement, the appraiser is required to determine the value of the unrestricted "enhanced" parcel before and after the easement as a separate calculation—subtracting the increase in the value of the unrestricted parcel from the value of the easement determined in a separate before and after analysis of the easement property.

Example

The land Mr. Jones placed under easement is just a quarter of a mile from 200 acres that overlooks the easement property. Mr. Jones' sister owns the 200 acres. The easement reduces the value of the easement property by $300,000, but the 200 acres increases in value by $100,000 because the view from this property will be permanently protected by the easement. This $100,000 "enhancement" must be subtracted from the $300,000 value of the easement. Therefore, Mr. Jones's deduction will be reduced to $200,000.

There is an additional distinction between the contiguous parcel rule and the enhancement rule: When adjusting the basis in the property subject to the easement to reflect the easement contribution, enhancement is not taken into account.[143] Because the enhancement occurs to a parcel distinct from the parcel subject to the easement, it does not affect the value of the easement parcel, and, therefore, it does not affect the basis of the easement parcel.

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[142] I.R.C. §§ 267(b), 707(b) (2004) (as amended in 1999).

[143] *See* discussion *infra* Part C.13.a.

h. Financial benefits received must be subtracted from the deduction

The amount of an easement deduction must be reduced by any cash payment or other economic benefit received, or reasonably expected, by the donor or any "related person" as a result of the donation of the easement.[144]

Example 1

Mr. Blue agrees with the ABC Land Trust that he will contribute an easement over his land if ABC will acquire and protect a parcel of land adjoining Mr. Blue's land. ABC agrees to do this. The acquisition by ABC enhances the value of Mr. Blue's land by $150,000. The value of Mr. Blue's easement is $400,000. ABC is required to notify Mr. Blue that, in exchange for his easement contribution to ABC, he has received $150,000 in "goods and services" from ABC, thereby reducing the amount of Mr. Blue's deduction to $250,000 ($400,000 – $150,000).

Example 2

Ms. Brown agrees with the XYZ Land Trust to sell a conservation easement to XYZ on land that she owns adjoining one of XYZ's most important holdings. The agreed price for the easement is $50,000. An appraisal of the easement shows that its value is $150,000. Ms. Brown is allowed a deduction of $100,000 ($150,000 – $50,000) for this qualified "bargain sale." (See IRC § 1011(b) for provisions regarding bargain sales.)

Example 3

Mr. Green contributes a conservation easement to the UVW Land Trust. The Land Trust agrees to pay Mr. Green's costs incurred in the transaction, which include obtaining legal counsel, an appraisal, a survey, and preparation of the natural resources inventory. The costs amount to $5,000. The Land Trust is required to notify Mr. Green that, in exchange for his easement contribution, he has received $5,000 in "goods and services." Mr. Green must reduce his deduction by the $5,000 amount. However, Mr. Green may be able to deduct most of the $5,000 he paid in order to make the gift and substantiate his deduction.

[144] Treas. Reg. §1.170A-14(h)(3)(i) (as amended in 1999).

10. "DONATIVE INTENT" IS REQUIRED

In order for the grant of a conservation easement to be deductible as a charitable contribution the grantor of the easement must *intend* the grant to be a charitable contribution.[145] The intent to make a charitable contribution is known as "donative intent."

The requirement for donative intent should not be confused with the requirement that any financial or economic benefit received in exchange for a conservation easement be subtracted from the value of the easement deduction.[146] In the cases to which this economic benefit rule applies, the grantor of the easement *intends* that the excess of the value of the easement over the benefit received be a charitable contribution. However, where the grant of the easement is required by some regulatory or contractual arrangement, the fact that the conveyance of the easement was *required* generally negates the possibility of donative intent.

The requirement for donative intent precludes deductions for the conveyance of conservation easements in a number of circumstances, e.g., "*quid pro quo*"[147] situations where the donor obtains a governmental permit in exchange for the contribution of an easement, or where an easement is contributed to discharge a contractual obligation. A few of the more common circumstances precluding donative intent are outlined below.

a. Cluster development projects

A growing number of localities allow a landowner increased residential density, or simply the right to cluster permitted residential density, in exchange for the grant of a conservation easement on that portion of the property from which the clustered density has been derived. Because the grant of the easement is a requirement of local regulation there is no donative intent.[148]

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[145] United States v. American Bar Endowment, 477 U.S. 105 (1986); Rev. Rul. 67-246, 1967-2 C.B. 104.

[146] *See* discussion *infra* Part C.10.

[147] Meaning "something for something."

[148] *See* I.R.S. Tech. Adv. Mem. 92-39-002 (June 17, 1992). Technical Advice Memoranda are not supposed to be used or cited as precedent. I.R.C. § 6110(j)(3) (2004).

Example

Elmer Fuddie owns 50 acres in Cracker County. Cracker County allows Elmer up to one house for every five acres that he owns, in his case ten houses and ten lots. However, if Elmer clusters all of his development on ten acres he will be allowed to double his density to twenty houses. In exchange for the increased density, Elmer is required to put a conservation easement on forty acres insuring that it can never be developed.

Elmer hires an appraiser who determines that the value of the fifty acres before he agreed to the cluster and the easement was $1,000,000, and that after the agreement and easement the property was worth only $750,000. Elmer claims a tax deduction of $250,000 for the easement.

The IRS agrees that the easement is worth $250,000. However, the IRS disallows the deduction on the grounds that the easement was not the result of any charitable intent; it was given pursuant to Cracker County regulations requiring the easement in order to obtain the increased density. This is a "*quid pro quo*" transaction.

Note that it doesn't matter that Elmer gave more than he got in this exchange. The fact that the easement was mandated by governmental regulations precludes any "donative intent."

An Alternative: Had Elmer put the easement in place prior to seeking cluster approval from Cracker County, the deduction might have held up because the easement would have been contributed independently from any county approval. There are several additional issues raised by this alternative. First, was the easement written to allow the acreage subject to the easement to be used for purposes of density calculation for development outside of the easement? If so, the appraisal would be required to reflect this retained value. Second, would Cracker County allow the "transfer" of density from the easement land to unrestricted land? Generally, because conservation easements held by private organizations are entirely private contracts, localities do not have the authority to enforce them (which is, in effect, what the county would be doing if it denied Elmer the right to transfer density from the easement property).

b. Reciprocal easements

Where one landowner agrees to grant a conservation easement over his land if his neighbor does the same, and if the agreement is legally enforceable, the contractual obligation to grant the easement precludes donative intent. Performance

of a contractual obligation owed to a private individual does not constitute a charitable gift.

Example 1

The Blacks and the Whites own adjoining farms. For years each of them has considered contributing a conservation easement. The only thing keeping them from going forward with the contribution is the fear that once the easement is in place the other family will develop its land to take advantage of their neighbor's land protection. Finally, Black and White agree with each other that if one donates an easement the other will follow suit. They sign an agreement to that effect and contribute their respective easements.

Because the easements were granted pursuant to the agreement between them, no deduction is allowed. This is because Black and White were discharging a legal obligation by conveying their easements, not making a charitable contribution.

Example 2

There is another way to accomplish what Black and White want that probably (there are no rulings on this plan) preserves their deductions. Where a land trust seeks to obtain conservation easements from several landowners within a region to advance a conservation goal that could not be met with the piecemeal contribution of easements, the land trust may agree to escrow easements until it has received enough easements to accomplish its goal. Such an arrangement does not preclude donative intent. Note that, until the easements are put to record, no deductible gift has been made. Note also that it will be important for the land trust in such a case to have a legitimate conservation justification for the plan.

For example, it turns out that the Black and White farms comprise an historic Civil War battlefield. Events of considerable national significance happened on both farms. The local land trust has been approached by the Black family to protect its farm. However, being purists, the land trust's board members say that they really aren't interested in protecting just a portion of the battlefield; they want both farms.

For fear that the Blacks will change their mind while the land trust is working on the Whites, the land trust asks the Blacks to put their easement in escrow (essentially in trust) with an independent third party (the "escrow agent"); typically the escrow agent would be an attorney or title company. The easement would be held by the escrow agent according to a contract that provides that the easement will be held in escrow until the land trust

has obtained an easement from the White family. When the White easement has been obtained, the escrow agent releases the Black's easement to the land trust, which then puts both easements to record.

However, the escrow agreement further provides that in the event that the land trust is unsuccessful in obtaining a satisfactory easement from the Whites within one year of deposit of the Black's easement into the escrow, the escrow will terminate and the Black's easement will be returned to the Blacks.

Within six months of deposit of the Black's easement in escrow, the land trust has a satisfactory easement from the Whites in hand. It records both easements and both Black and White get a tax deduction. Because the escrow agreement ran to the benefit of the land trust, which is a tax-exempt organization, conveying the easement pursuant to the terms of that contract should not affect the deductibility of the easement contribution.

This is because, as a general proposition, complying with an enforceable pledge to make a charitable contribution, where the pledge is made directly to a charity, does not preclude "donative intent." The pledge and the performance of the pledge, having been made out of charitable motives and without any expectation of receiving, or right to receive, any economic benefit in exchange, are acts done with donative intent.

c. "Conservation Buyer" transactions

Occasionally, a landowner decides to offer his land for sale but only to a buyer who will place a conservation easement on the property after closing. Where the sales contract imposes an obligation on the buyer to convey the easement after closing, the grant of the easement constitutes the performance of a contractual obligation to a private individual, not a charitable contribution. This is true even though the buyer receives no compensation for the easement grant.

A variation of the foregoing is where the seller grants an option to a land trust to acquire a conservation easement on his land, and the land is sold subject to the option. In such a situation, the option is a feature of the title to the property and is a binding part of the private contract between the buyer and the seller. Furthermore, the buyer, who is obligated to honor the option, did not grant the option, and any charitable intention that may have been part of the option grant cannot be attributed to the buyer. For this reason, conveyance of the easement pursuant to the option is the discharge of a private contractual obligation, not a charitable contribution.

Until recently it was believed that there would be a different outcome if the prospective buyer himself granted an option to a land trust, exercisable by the land trust *if* the buyer completed the purchase. Similarly, it was believed that a binding pledge to a land trust by the prospective buyer prior to closing, to contribute an easement after closing, would not preclude a deduction for the easement donation. In both cases it was believed that the option, or the pledge, being made directly to a public charity by the person who would make the contribution and claim the deduction, would not preclude a deduction for the easement donation pursuant to the option or pledge.

However, as discussed immediately below, IRS Notice 2004-41 raises questions about *any easement granted in connection with the purchase of real property*.[149]

Form 8283 now requires a statement from the easement donor as to whether the donor has contributed the easement to obtain a governmental approval, or as part of a contractual arrangement.[150]

d. IRS Notice 2004-41 and "Conservation Buyer" transactions

In July, 2004, the IRS published Notice 2004-41, which is highly critical of certain types of conservation buyer transactions.[151] The notice states in part: "Some taxpayers are claiming inappropriate charitable contribution deductions under § 170 for cash payments *or easement transfers to charitable organizations in connection with the taxpayers' purchases of real property*."[152]

The notice specifically criticized transactions in which a land trust as the seller of property obtains a combination of (1) payment for the property (which is sold subject to a retained conservation easement), based upon the value of the property as restricted by the easement, and (2) a cash contribution from the buyer.[153] The buyer then claims an income tax deduction for the cash contribution. The intent behind the requirement for the cash contribution is to allow the land trust to recover, between the sales price and the contribution, what it originally paid for the property. The notice said that, in such cases, it would treat both payments

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[149] I.R.S. Notice 2004-41, 2004-1 C.B. 31. The notice states, "Some taxpayers are claiming *inappropriate* charitable contribution deductions under § 170 for cash payments *or easement transfers to charitable organizations in connection with the taxpayers' purchases of real property*." *Id.* (emphasis added). The problem is created by the general criticism of all such transactions (as underscored) as "inappropriate" with no further clarification of exactly what types of "*easement transfers to charitable organizations in connection with the taxpayers' purchases of real property" are "inappropriate.*" *Id.* (emphasis added).

[150] *See* discussion *supra* Part C.9.e.

[151] I.R.S. Notice 2004-41, 2004-1 C.B. 31.

[152] *Id.*

[153] *Id.*

(i.e., the payment of the purchase price *and* the cash contribution) as payment for the property and deny the purchaser any charitable deduction for the cash contribution.[154]

Example 1

The Blue Land Trust buys Blue Acre Farm for $2 million. It later sells Blue Acre Farm, retaining a conservation easement. The value of Blue Acre Farm as restricted by the retained easement, according to a qualified appraisal, is $1 million. The buyer pays $1 million for Blue Acre Farm, and makes a cash contribution to the Blue Land Trust of $1 million. The Blue Land Trust has now recovered the entire $2 million that it paid for Blue Acre Farm. However, IRS Notice 2004-41 says that the buyer *may not* claim a charitable contribution deduction for the $1 million cash contribution. The IRS will, instead, treat the entire $2 million paid as payment for the property.

Example 2

Assume that the buyer in Example 1, instead of making a separate cash contribution of $1 million to the Blue Land Trust, simply pays the Land Trust $2 million for the property, the value of which has already been established to be $1 million by a qualified appraisal. The Land Trust formally acknowledges to the buyer that the buyer has "overpaid" for the property by $1 million, which both the buyer and Land Trust acknowledge was intended as a charitable contribution. The buyer successfully claims a $1 million deduction for the charitable contribution to the Blue Land Trust represented by his overpayment for the land.

According (unofficially) to an IRS representative, the buyer in Example 2 is entitled to a charitable deduction for the $1 million overpayment. The crucial difference, according to the IRS representative, is that in Example 2 the structure of the transaction provides the IRS with information that allows it to evaluate whether the overpayment is based upon a valid easement and easement valuation.[155] In Example 1, the IRS has no way of knowing that the cash contribution is connected with the acquisition of property or a conservation easement and has no way of knowing whether the buyer is claiming more of a deduction than is appropriate (e.g. the buyer could pay the land trust $500,000 for the restricted property that is really worth $1 million, and make a cash contribution of

[154] *Id.*

[155] *See* discussion *supra* Part C.11.

$1.5 million for which the buyer claims a deduction, thereby converting $500,000 of what should have been a non-deductible payment into a claimed charitable deduction).[156]

Few land trusts have the resources to acquire land and resell it as a conservation tool. More frequently land trusts try to match conservation-worthy land with conservation-minded buyers willing to commit to protect the land if they acquire it. Unfortunately, the notice's rather vague and generalized condemnation of all easement conveyances made in connection with the acquisition of real property has cast doubt on such transactions as well. As a result, enforceable commitments made by prospective buyers to protect land once the land is acquired may result in the denial of any deduction for an easement contribution made pursuant to the commitment.

The new Form 990, required to be filed by tax exempt organizations, now requires land trusts to disclose whether they have had any transactions "described in" Notice 2004-41.[157]

11. THE CONTRIBUTION OF A CONSERVATION EASEMENT REDUCES THE DONOR'S BASIS IN THE EASEMENT PROPERTY

The donor of a conservation easement is required to reduce his or her basis in the property subject to the easement (basis is, essentially, what was paid for the property)[158] to reflect the value of the contributed easement. This reduction in value must reflect the proportion of the unrestricted fair market value of the land on the date of the donation, represented by the value of the easement.[159]

Example

Mr. Brown contributes an easement on his land. Before the easement was imposed, the land was valued at $1,000,000. After the easement the land was valued at $700,000. Therefore, the value of the easement is $300,000 ($1,000,000 – $700,000). Mr. Brown's basis in his land was $100,000 before the contribution. The easement represents 30% of the unrestricted value of the land when the contribution was made. Therefore, Mr. Brown's adjusted basis after the easement contribution will be $70,000 ($100,000 – (30% x $100,000)).

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[156] *See* discussion *supra* Part C.11.

[157] Form 990, Schedule A, Part III, line 3c.

[158] *See* discussion *supra* Part C.5.

[159] Treas. Reg. § 1.170A-14(h)(3)(iii) (as amended in 1999).

As noted previously,[160] the basis adjustment does not reflect "enhancement" of adjoining unrestricted land.[161]

12. TREATMENT OF EASEMENT CONTRIBUTIONS BY REAL ESTATE DEVELOPERS

Tax deductions for easement contributions by real estate developers may be limited to the developer's basis in the property subject to the easement donation. This is because a deduction for contributions of "ordinary income property" (e.g. lots held for sale by a developer) must be reduced by the amount of gain that would not have been considered long-term gain had the property been sold on the day of the contribution.[162] Because the sale of ordinary income property generates ordinary income rather than capital gain ("long-term gain") this rule essentially limits the deduction to the developer's basis in the easement.[163]

"Ordinary income property" includes property "held by the donor primarily for sale to customers in the 'ordinary course of his trade or business.'"[164] It is possible for a dealer in real estate to hold property primarily as investment property (a capital asset) and not for sale to customers ("inventory"). The contribution of a conservation easement on investment property will not be limited to basis.

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[160] *See* discussion *supra* Part C.13.

[161] *See* discussion *supra* Part C.13; *see also* Treas. Reg. § 1.170A-14(h)(4) (as amended in 1999).

[162] Treas. Reg. § 1.170A-4(a)(1) (as amended in 1994).

[163] *See* discussion *supra* Part C.5.

[164] Treas. Reg. § 1.170A-4(b)(1) (as amended in 1994).

Example

Jack Hoyle is a real estate developer. He has developed 50 lots for sale, but has identified 100 acres of the development property for "open space" protection and it has never been offered for sale. On his books Jack carries the 50 lots as "inventory" and the 100 acres as a capital asset.

Five years later after having sold 40 lots, Jack decides to start a new project and wrap this one up. He agrees with a local land trust to donate a conservation easement on the remaining 10 lots plus the 100 acres. His basis *in the easement* on the 10 lots is $100,000 and his deduction cannot exceed that amount for this part of his contribution, even though the easement on the 10 lots is appraised at $2,000,000. The easement on the 100 acres is appraised at $5,000,000.

Jack will be allowed to deduct $100,000 for the donation of the easement on the lots. This is because his deduction relates to the contribution of ordinary income property. He will be allowed to deduct the full $5,000,000 on the 100 acres because this property was clearly not held for "sale to customers in the ordinary course of his trade or business" and is treated as a capital asset held for investment.

13. CORPORATIONS, PARTNERSHIPS, LIMITED LIABILITY COMPANIES, AND TRUSTS

The amount that may be deducted for the contribution of a conservation easement by an artificial entity may be different from the amount that an individual may deduct for the same contribution. The following is a very limited description of the rules governing limitations on deductions associated with corporations, partnerships, limited liability companies, and trusts. This is a very complex area of tax law and no one should proceed in this area without the assistance of tax counsel having a comprehensive understanding of these rules, which extend considerably beyond what is described in this article.

a. Corporations

There are two types of corporations for purposes of taxation: C-corporations ("C-corps") and S-corporations ("S-corps"). A C-corp is a corporation the income of which is taxed at the corporate level, not the shareholder level. As noted above,[165] a C-corp's deduction for the contribution of a conservation easement is limited to no more than 10% of its "taxable income." The Pension Protection Act

[165] *See* discussion *supra* Part C.3.

created an exception from the 10% limit for a C-corp more than 50% of whose income is from the "business of farming."[166]

The income of an S-corp is taxed at the shareholder level, not the corporate level. Income and deductions of an S-corp are passed through to the shareholders in proportion to their ownership interest in the corporation. In addition, the amount of the corporation's deductions that an individual shareholder is allowed to claim is limited by the shareholder's basis in his or her stock in the corporation. The shareholder's basis is a function of what the shareholder paid for the stock, and subsequent adjustments to reflect items of income and loss (including deductions) allocated to the shareholder. In general, a shareholder may not deduct more than his or her basis in the stock of the S-corp, plus the amount of any debt owed by the S-corp to the shareholder.[167]

Example

The Blinkers Corporation, an S-corp, makes a contribution of a conservation easement on land that it has owned for more than one year. The value of the easement is $1,000,000. The corporation's basis in the property subject to the easement is $500,000. Jerry Doaks owns 75% of the stock of Blinkers Corporation, for which he paid $375,000. Over the years he has taken losses, and other deductions, amounting to $250,000, the result of which is a downward adjustment in his basis in the stock of the corporation to $125,000. Under the law prior to the Pension Protection Act of 2006, Jerry could only deduct $125,000 in connection with the corporation's gift of the easement. This is because Jerry's basis in the Blinkers Corporation stock was only $125,000.

However, the Pension Protection Act (supposedly) changed the law to allow S-corp shareholders to deduct their pro rata share of the value of a contribution of property (including conservation easements) made by the corporation without regard to their stock basis. In other words, under the new law, Jerry may (possibly, depending upon one's reading of the *new law*) deduct $750,000 in connection with the corporation's easement contribution. Of course, Jerry's basis in his stock would be reduced to zero as a result.

A careful reading of the 2006 Pension Protection Act provisions regarding charitable contributions by an S-corp suggests that the only change made by the act was to change the amount by which S-corp shareholders are required to

[166] *See* discussion *supra* Part C.2.

[167] I.R.C. § 1366(d)(1); Treas. Reg. § 1.1366-2(a)(1) (as amended in 1999).

adjust their stock basis to reflect a charitable contribution by the corporation of property.[168] The old rule required a shareholder to reduce his or her stock basis by the shareholder's pro-rata share of the value of the gift. The new rule limits the basis adjustment to the shareholder's pro rata share of the corporation's adjusted basis in the property that was contributed.[169] This rule reduces the amount that the shareholder must recognize as gain in the event of a future sale of stock in the corporation.

However, the examples provided by the Joint Committee on Taxation accompanying its explanation of the new law suggest that the law eliminates the limitation to the stock basis rule, as reflected in the preceding example.[170] Nevertheless, on close reading, the new law seems at odds with the example.[171]

This new tax benefit expires December 31, 2007, unless extended by Congress prior to that date.[172]

b. Limited liability companies and partnerships

Limited liability companies ("LLCs") are entities with some attributes of a corporation (e.g. protection from corporate liabilities for members), but they are taxed like a partnership.[173] Partnerships do not provide any protection from partnership liabilities for partners, although limited partnerships may provide some protection where partnership liability may be limited to a "general partner."

Both LLCs and partnerships pass deductions through to their members/partners in proportion to the members'/partners' ownership interest.[174] Partnerships and LLCs allow the members/partners to allocate interests in the entity in a manner other than equal shares, provided that the interests have "economic substance." For example, one member may have contributed more money to an LLC, or accepted liability for an LLC debt, and may be entitled to a larger ownership interest to reflect such additional investment in the LLC. IRC § 704 and Regulation § 1.704-1 cover the determination of a partner's "distributive share" of a partnership.

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[168] Pension Protection Act, 29 U.S.C. § 1203 (2006); I.R.C. § 1367 (2004).

[169] I.R.C. § 1367(a)(2) (2004).

[170] STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 109TH CONGRESS Title XII.A.3 (Comm. Print 2007).

[171] As of the date of this writing (March 2007), the IRS had agreed to provide clarification of this provision of the Pension Protection Act of 2006, but has not indicated when it will do so.

[172] I.R.C. § 1367(a)(2) (2004).

[173] *See* IRS Pub. 1066, revised July 2003, pp. 1-16.

[174] *See* I.R.C. § 702(a)(4) (2004); *see also* Treas. Reg. § 1.702-1(a)(4) (as amended in 2005); Treas. Reg. § 1.703-1(a)(2)(iv) (as amended in 1995).

Example 1

The Blue Lake Limited Liability Company owns a 500-acre farm that includes a 100-acre lake. There are ten members of the LLC. John Jay, the original owner of the property, set up the LLC and originally was the sole member. Over the years he has given membership interests in the LLC to his five children and their four spouses. Each "family" member has received a membership interest in the LLC amounting to a 5% interest. Thus John owns 55% of the membership of the LLC and each of his children and their spouses own 5%.

The Blue Lake LLC donates a conservation easement on the farm. The easement is valued at $2 million. Therefore, John is entitled to a deduction of $1.1 million ($2,000,000 x 55%), and each of the other members in the LLC are entitled to deduct $100,000 ($2,000,000 x 5%). The same results would occur if the farm had been owned by a family partnership.

Example 2

The Scam LLC owns a 5,000-acre ranch in northern Montana. Scam's sole member is Jim Scam. Scam LLC paid $500,000 for the ranch in 1985. Jim does not want to sell the ranch, but he does want to get some money for a portion of his interest in the LLC. Therefore, Jim offers to sell a 49% interest in the LLC for $1 million to Jonas Schuyler, who had a bang-up year on the stock market and, accordingly, has ordinary income of $10 million for the year. Jim convinces Jonas that for $1 million, Jonas can obtain a $5 million tax deduction that will save him $2.2 million in federal and California income taxes (combined top rates of 44%). This is because Scam LLC plans to contribute a conservation easement to a local land trust and the estimated value of the easement is $10.2 million (of which, as a 49% owner, Jonas will be entitled to $5 million). Jim also requires that Jonas grant an option to Jim to reacquire the 49% interest within two years for $90,000. Taking into account the net loss in membership value resulting from the restrictions imposed by the easement, if the option is exercised Jonas will still net $1,290,000 ($2,200,000 – $990,000).

The only problem with this scenario is whether or not Jonas' 49% interest, for which he paid $1 million in an LLC worth at least $10 million, has any economic substance. Even given the discount for a minority interest, and the obligation to resell the stock, it is likely that 49% is far too big a percentage for the $1 million payment. It is also likely Jonas would have a great deal of difficulty explaining a rationale for such a deal other than tax avoidance.

c. Trusts (other than charitable remainder trusts)

Other than "charitable remainder trusts" qualified under IRC § 664, which are not governed by the rules described below, there are three types of trusts, and each type is treated differently for taxation purposes.[175] "Grantor trusts"[176] are trusts in which the person creating the trust (the "grantor") retains certain rights or interests in the trust. Most typically, the grantor of a grantor trust retains the right to amend or terminate the trust at will. People often create grantor trusts to avoid probate. Grantor trusts are ignored for all purposes of taxation, including federal income and estate taxes.[177]

Therefore, if a grantor trust makes a charitable contribution of a conservation easement on land owned by the trust, the tax deduction passes through the trust directly to the persons who are deemed to be the owners of the trust as though they themselves had made the contribution.

The income and deductions generated by a grantor trust are taxed entirely to the owner of the trust. The owner of the trust is the person who has a power, exercisable solely by himself or herself, to appropriate the income or principal of the trust to his or her personal use.[178] It is possible for more than two persons to be treated as owners of a grantor trust.[179]

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[175] "Simple trusts" are required to distribute all income currently, the taxation of which is governed by I.R.C. § 651. "Complex trusts" may accumulate income, the taxation of which is governed by I.R.C. § 661. "Grantor trusts" are ignored for purposes of taxation. I.R.C. §§ 267(b), 707(b) (2004) (as amended in 1999).

[176] *See generally* I.R.C. § 2702 (2004); Treas. Reg. § 25.2702-5 (as amended in 1997).

> Grantor trusts include personal residence trusts, and qualified personal residence trusts ("QPRTs"). Most conservation easements will not pertain to residence trusts because the tax law strictly limits the amount of land that may be included in such trusts. However, it does not appear that the conveyance of a conservation easement by such a trust would violate the requirements of the tax code.

Treas. Reg. § 25.2702-5 (as amended in 1997). *See also* I.R.S. Priv. Ltr. Rul. 1999-16-030 (Jan. 22,1999). There are several private letter rulings that confirm that the fact that a residence is subject to a conservation easement will not preclude placement of that property into a residence trust. *Id.*

[177] *See* I.R.C. § 671 (2004); Treas. Reg. § 1.671-1 (as amended in 1980); Treas. Reg. § 1.671-3(a)(1) (as amended in 1969).

[178] *See* I.R.C. § 677 (2004); Treas. Reg. § 1.677(a)-(1) (as amended in 1996).

[179] I.R.C. § 678; Treas. Reg. § 1.678(a)-1 (1960).

Example

Jon creates a trust and conveys his farm to the trust. In the trust instrument Jon retains the full right to revoke the trust, or amend the trust. The trust is, therefore, a grantor trust. Jon is the sole trustee and sole beneficiary of the trust until his death. As sole trustee, Jon makes a charitable contribution of a conservation easement to the JY Land Trust. The value of the easement is $500,000. Jon, as the 100% owner of the trust, is entitled to a deduction for $500,000, as though the trust did not exist.

Note that even if Jon were not the trustee and sole beneficiary, but held the right to amend or revoke the trust, he would still be deemed the owner of the trust.

Trusts other than grantor trusts are classified by federal tax law either as "simple trusts"or "complex trusts." Simple trusts (1) are required to distribute all of their income annually, (2) can make no charitable contributions, and (3) do not distribute any of the trust principal during the tax year.[180] A trust that is not a simple trust is a complex trust.[181] Complex trusts are allowed to accumulate income.

Neither simple nor complex trusts pass deductions through to the beneficiaries of the trust. Income and deductions are determined and taxed at the trust level. However, "distributable net income" paid to beneficiaries is taxable to the beneficiaries and is deductible to the trust. Complex trusts are allowed a deduction against trust income for payments out of the income of the trust directed by the trust instrument to be paid for charitable purposes.[182]

However, if the trust instrument does not expressly authorize payment of trust income for charitable purposes, no deduction under IRC § 642(c) is allowed.[183] *More importantly for contributions of conservation easements*, no deduction is allowed for the contribution of a conservation easement regardless of whether the trust instrument authorizes such a contribution. This is because federal tax law allows no deduction for a payment out of the "corpus" of a trust, as deductions are limited to amounts paid from income only and conservation easements are con-

[180] Treas. Reg. § 1.651(a)-(1).

[181] I.R.C. § 661 (2004).

[182] I.R.C. § 642(c) (2004).

[183] *See* Rev. Rul. 2004-5, 2004-1 C.B. (Jan. 20, 2004).

sidered part of corpus, not income. [184] Thus, *other than grantor trusts, trusts are not allowed a deduction for the charitable contribution of a conservation easement.*[185]

Example

Under the terms of the Poodle Trust, the trustee is permitted to accumulate income and is authorized to make charitable contributions of cash and property to public charities recognized under IRC § 501(c)(3). The trustee of the trust makes a $200,000 contribution to the local Episcopal Church for a new building and contributes a conservation easement over a farm owned by the trust. The conservation easement is valued at $1 million. The Poodle Trust has income of $400,000 during the year of these contributions. The trustee also makes a distribution to the beneficiaries of the trust in the amount of $200,000.

The Poodle Trust is permitted a deduction against the trust's $400,000 of income in the amount of $200,000 for the contribution to the church. The trust is also allowed a deduction of $200,000 for the distribution to the beneficiaries. Thus, the trust has no income tax liability for the year. The beneficiaries have collective taxable income from the trust of $200,000. However, no deduction is allowed for the contribution of the conservation easement to the trust, because the contribution was made out of the principal, not the income, of the trust. Furthermore, no charitable contribution for the value of the easement passes through to the beneficiaries of the trust. Thus, the value of the deduction for the easement contribution is lost.

14. Federal tax treatment of state tax credits for easement contributions

A number of states provide credits against state income tax for easement contributions. As noted earlier, tax credits are much more powerful incentives for easement contributions than income tax deductions because they directly offset tax liability, whereas deductions only indirectly offset tax liability by reducing the income against which tax is imposed. The following discussion is not intended to describe the various state credit programs, but to summarize how tax credits are treated under federal tax law. It must be emphasized that there are a number of unknowns in this area and neither Congress nor the IRS has provided answers to all of the outstanding questions.

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[184] *See* Goldsby v. C.I.R., 92 T.C.M. (CCH) 529 (2006); Rev. Rul. 2003-123, 2003-2 C.B. 1200.

[185] In some cases, distribution of land from a trust and conveyance of a conservation easement thereafter may be a solution. In others, (particularly where distribution is not practical, or where there may be unborn beneficiaries) sale of land out of the trust, i.e., replacement of the value of the land, will be necessary.

Some states allow tax credits to be transferred from the original easement donor to other taxpayers. The tax treatment of credits in the hands of the original recipient of the credit and in the hands of the transferee of the credit is different. Therefore, the following discussion is divided into tax treatment for the original recipient and tax treatment for the credit transferee.

a. Treatment of the original credit recipient

1. The credit is not taxable if used against the original recipient's tax liability.

The IRS recently stated that, to the extent that a conservation easement tax credit is used to offset the original recipient's state tax liability, it is not taxable.[186] However, the recipient's federal itemized deduction allowed under IRC § 164 for the payment of state taxes will be reduced to the extent that state income tax liability is offset by use of the credit.[187]

Example

Jordan contributes a conservation easement on land in Virginia. Jordan is a Virginia taxpayer and his easement contribution makes him eligible for a Virginia income tax credit equal to 40% of the value of the easement. The value of the easement was $250,000; therefore Jordan is entitled to a credit against his Virginia income tax of $100,000 ($250,000 x 40%). Jordan's Virginia income tax liability for 2006 is $200,000 (Virginia's top rate is 5.75% and Jordan's 2006 income was approximately $3,500,000). Jordan files his Virginia income tax return in 2007 and uses the tax credit to "pay" $100,000 of his $200,000 liability. He sends along a check for $100,000 to cover the balance. When Jordan files his federal return for 2007 and itemizes his deductions, he can only claim a deduction of $100,000 for his 2006 Virginia income tax payment because he "paid" $100,000 of his $200,000 tax liability with the credit.

2. Proceeds from the sale of a tax credit are taxable.

The IRS has stated that the proceeds from the sale of a tax credit, by the original recipient to another taxpayer, are taxable under IRC § 1001.[188] The IRS

[186] I.R.S. AM 2007-002 (Jan. 11, 2007).

[187] *Id.*

[188] *Id.*

has also ruled that *a state tax credit is not a capital asset* within the meaning of IRC § 1221, and therefore the sale of a credit results in ordinary income, regardless of how long the seller has held the credit.[189]

Example

Assume that Jordan, in the preceding example, sold his credit rather than using it against his Virginia income tax liability. He received $75,000 in 2007 for the credit (a 25% discount, which is not uncommon). Jordan had held the credit for two years prior to the sale. Jordan is required to report the $75,000 as income on his 2007 return, and pay tax at the ordinary rate (assume 35% in Jordan's case) resulting in a tax on the credit sale of $26,250 ($75,000 x 35%).

3. Does the receipt of a tax credit affect the federal deduction for the contribution of the easement?

The answer to this question is not yet known. The IRS has been considering whether receipt of a tax credit constitutes a "*quid pro quo*" that precludes the required "donative intent."[190] To date the IRS has issued no advice on this point. There are three obvious alternative answers to this question (and possibly more that are less obvious): (1) the credit is a payment for the easement that precludes donative intent and no deduction is permitted, (2) the conveyance of an easement resulting in receipt of a tax credit is treated as a "bargain sale" and the amount of the credit must be subtracted from the value of the easement to determine the amount of the deduction, or (3) the credit has no effect on the amount of the easement deduction.

It would seem *unlikely and illogical* that the IRS would rule that the receipt of a credit precludes any deduction for the easement at all if the value of the easement exceeds the amount of the credit. Whether, or when, the IRS will issue any additional comments on the question of donative intent and state income tax credits is unknown at this time.

b. Treatment of transferees of credits

1. Credit transferees may deduct state taxes paid with credits.

Use of a tax credit to pay state income tax by someone who acquired the credit from the original recipient of the credit results in a deduction under IRC § 164(a)

[189] I.R.S. CCA 200211042 (Mar. 15, 2002).

[190] *See* discussion *supra* Part C.10; I.R.S. CCA 200238041 (Sept. 20, 2002) (providing a discussion of donative intent.).

for payment of state income tax.[191] Note that this is different than treatment of use of a credit by the original recipient, which use reduces the deduction allowed under IRC § 164(a).[192]

2. Taxable gain (or loss) may result from use of a credit by a transferee.

The IRS has ruled that the transferee of a state income tax credit has acquired property with a basis equal to the purchase price of the credit.[193] This ruling also states that use of the credit may result in gain or loss under IRC § 1001.[194] However, the IRS has not said whether gain on the sale or use of a credit by a transferee would be taxed as ordinary income or capital gain.

Example

Susie Q purchased Jordan's $100,000 Virginia income tax credit. She paid Jordan $75,000 for the credit. She used the credit to offset her 2006 Virginia income tax liability of $100,000. Her basis in the credit, which is treated as property, is $75,000. When Susie uses the $100,000 credit she will be considered to have paid her state taxes with property in which she has a basis of $75,000. She will be entitled to deduct the state taxes paid in this fashion under IRC § 164(a), but will have to report as income the $25,000 by which the value of the credit exceeds what she paid for it.

15. TAX TREATMENT OF EXPENSES INCURRED IN CONTRIBUTING A CONSERVATION EASEMENT

A frequent question is what expenses of making an easement contribution are deductible. Typical expenses include the following: legal fees, appraisal fees, surveyor's fees, recording fees, costs incurred for preparation of the natural resources inventory, and payments to land trusts to cover future stewardship expenses.

Arguably, an individual may deduct expenses incurred "in connection with the determination, collection, or refund of any tax."[195] This deduction includes most expenses likely to be incurred such as legal fees (insofar as these fees are incurred to insure that the easement is in compliance with federal or state tax requirements); appraisal fees (because the appraisal is a tax code requirement);

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[191] I.R.S. AM 2007-002 (Jan. 11, 2007); I.R.S. CCA 200445046 (Nov. 5, 2004); I.R.S. CCA 200126005 (Jun. 29, 2001).

[192] *See* discussion *supra* Part C.14.b.

[193] I.R.S. AM 2007-002 (Jan. 11, 2007).

[194] *Id.*

[195] I.R.C. § 212(3) (2004).

surveyor's fees (because a survey may be necessary to insure that the easement is enforceable, which is a tax code requirement); recording fees (tax law requires that easements be recorded to be deductible); and costs incurred in preparation of a natural resources inventory (the inventory is a requirement of tax law).[196] In other words, these expenses are all expenses incurred "in connection with the determination . . . of . . . tax."[197]

However, while *voluntary* contributions made to a land trust to assist the land trust in monitoring and enforcing its easements are deductible under IRC § 170, if the payment is *required* it no longer qualifies as a charitable contribution because there is no "donative intent."[198] Furthermore, because a payment made to provide for the monitoring or enforcement of conservation easements is not a payment made "in connection with the determination . . . of . . . tax," and because such a payment does not qualify under any other tax code provision as deductible, it is unlikely that such payments are deductible.

D. ESTATE AND GIFT TAX BENEFITS

A decedent's estate that receives land from a decedent that is subject to a conservation easement from the decedent may qualify for two specific estate tax benefits. In addition to these tax benefits, a conservation easement controls the future use of property in the hands of a decedent's heirs, or other successors in title, more effectively than any other technique available. For these reasons, conservation easements compliment and increase the power of many estate planning techniques. More importantly, the substantial estate tax benefits associated with conservation easements are important tools for estate planning.

1. A NOTE ON THE FUTURE OF THE FEDERAL ESTATE TAX

In 2001, Congress repealed the federal estate tax effective in 2010.[199] Between 2001 and 2010 the estate tax is phased out in stages. In 2011, the entire estate tax, as constituted in 2001, is automatically reinstated. What will, in fact, happen to the estate tax in 2011 is hard to predict. It is unlikely that Congress will allow full reinstatement, but it is also unlikely that Congress will make the repeal permanent. The Republican-controlled Congress tried and failed in 2006 to make the repeal of the estate tax permanent.[200] It appears even less likely that permanent repeal will occur with the Democrat-controlled Congress elected in November of 2006.

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[196] Treas. Reg. § 1.170A-14(g)(5)(i) (as amended in 1999).

[197] I.R.C. § 212(3) (2004).

[198] *See* discussion *supra* Part C.10.

[199] Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No.107-16 (2001).

[200] Permanent Estate Tax Relief Act of 2006, H.R. 5638, 109th Cong. (2006) (passed the U.S. House of Representatives 269 to 156, died in the U.S. Senate.)

The two principal components of the estate tax are the value of estate assets that are exempt from the tax (the "exemption amount" for purposes of this discussion, to distinguish it from the § 2031(c) 40% "exclusion") and the top rate of the tax. These components will be changing over the next five years as follows:

- In 2007 and 2008, the exemption amount is $2 million; the tax on assets over $2 million is 45%.

- In 2009, the exemption amount increases to $3.5 million; the tax on assets over $3.5 million remains 45%.

- In 2010, the estate tax is fully repealed.

- In 2011, the estate tax is reinstated and the exemption amount drops to $1 million; the top rate of tax is increased to 55%.

All of the examples that follow are based upon the 2007 and 2008 exemption amount and tax rates.

2. THE REDUCTION IN ESTATE VALUE AND THE ESTATE AND GIFT TAX DEDUCTIONS

a. The restrictions of a conservation easement reduce the value of the taxable estate

A conservation easement on real property included in a decedent's estate reduces the value of that property for estate tax purposes. This "reduction" in value is applicable regardless of whether the easement was sold or contributed. The value of real property subject to a conservation easement will be determined at the same time as other estate assets: the decedent's death, or on the alternate valuation date (the date six months after the death of the decedent) if the executor elects the alternate date.[201]

[201] I.R.C. § 2032(a) (2004).

Example 1

Mrs. Smith owns, at her death, land worth $4,000,000 *without* considering the effect of a conservation easement that Mrs. Smith contributed prior to her death. On the date of Mrs. Smith's death, the land had a value, taking into account the restrictions imposed by the easement, of $2,000,000. Thus, the easement reduced the size of Mrs. Smith's taxable estate by $2,000,000. Because the other assets in Mrs. Smith's estate were substantial enough that the entire $2,000,000 in land value removed by the easement would have been taxed at the top estate tax rate of 45%, the estate tax savings due to the easement are $900,000 (45% x $2,000,000).

Example 2

Mr. Blue sold a conservation easement in 2000 for $550,000. The easement reduced the value of the land subject to the easement by $1,000,000. Mr. Blue is entitled to a "bargain sale" deduction for the difference between what he received for the easement and what it was worth: $450,000 ($1,000,000 – $550,000).

Mr. Blue dies in 2007. At his death the value of his land is $2,500,000, taking into account the restrictions of the easement. If the land were unrestricted the value in 2007 would have been $5 million. Therefore, the easement has reduced Mr. Blue's taxable estate by $2,500,000, generating estate tax savings of $1,125,000 (45% x $2,500,000). However, Mr. Blue invested the $467,500 (net of taxes) he was paid for the easement in stocks that had a value at the date of his death of $1,000,000. The estate tax on this value will be $450,000 (45% x $1,000,000).

Taking into account the tax savings due to the restrictions imposed by the conservation easement, and the tax on the stocks purchased with the proceeds of sale of the conservation easement, the net estate tax savings for Mr. Blue's estate is $675,000 ($1,125,000 – $450,000).

b. The effect of restrictions other than qualified conservation easements

Generally, restrictions on real property (e.g. options, restrictions on use, the right to acquire or use property for less than fair market value) *cannot* be taken into account by an estate in valuing the property for estate tax purposes.[202]

[202] Treas. Reg. § 25.2703-1 (1992).

However, "qualified easements" pursuant to IRC § 170(h) made during a decedent's lifetime are exempt from this provision[203] and are also deductible for gift tax purposes.[204] In addition, easements qualified under IRC § 170(h) conveyed by the terms of a decedent's will are qualified for estate tax deductions[205] (but without regard to the conservation purposes requirements of IRC § 170(h)(4)(A)).[206]

It is also possible for restrictions that do not comply with the requirements of IRC § 170(h) to be recognized for estate valuation purposes, provided that all of the following requirements are met:

> a) the restrictions are the result of a "bona fide business arrangement;"
>
> b) the restrictions are not a device to transfer the property to family members for less than adequate consideration; and
>
> c) the terms of the restriction are comparable to similar arrangements entered into by persons in an arm's length transaction.[207]

Example

Mr. Brinkman sells a "scenic easement" over Greenacre to his neighbor, the owner of Brownacre. The easement is not perpetual, and expires after 50 years. The easement is, in effect, a restrictive covenant benefiting Mr. Brinkman's neighbor and any future owners of Brownacre during that period. The scenic easement prohibits construction over an area of some 200 acres within view of Brownacre. It also reduces the value of Greenacre by 25%.

Although this scenic easement does not qualify as a "qualified conservation contribution" within the meaning of IRC § 170(h), it does meet the three requirements of IRC § 2703 described above. Therefore, when Mr. Brinkman dies, his executor is allowed to take into account the effect of the scenic easement on the value of Greenacre.

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[203] Treas. Reg. § 25.2703-1(b)(4) (1992).

[204] I.R.C. § 2522(d) (2004).

[205] I.R.C. § 2055(f) (2004).

[206] *See* discussion *infra* Part D.3.

[207] Treas. Reg. §§ 25.2703-1(b)(1), (2) (1992).

c. Estate and gift tax deductions for conservation easements

Generally, gifts made during a person's lifetime are subject to the federal gift tax. However, IRC § 2522(d) allows a deduction for contributions of conservation easements that meet the requirements of IRC § 170(h), with one exception discussed below.

Contributions of conservation easements made by a decedent's will are deductible from the decedent's estate. The amount of the deduction is equal to the value of the easement, as determined in the same manner as for an income tax deduction.[208]

Both the gift tax deduction and estate tax deduction for conservation easements allow the deductions *regardless* of whether the easement meets the "conservation purposes" requirement imposed by IRC § 170(h)(4)(A) for federal income tax deductions.[209] Presumably, if a conservation easement is not required to meet the conservation purposes test, it is not subject to the prohibition on the retention of rights that are inconsistent with conservation purposes, although this is only logical speculation.[210]

According to the official 1986 explanation of the gift and estate tax easement deductions, the reason for exempting gifts and bequests of conservation easements from the conservation purposes test was to avoid a situation in which a decedent makes an irrevocable bequest of a valuable property interest but, because the easement failed to meet a technical standard of the tax code, that property interest is still taxed in the decedent's estate at full value even though it is permanently restricted.[211]

It is also possible that a conservation easement that fails to meet the conservation purposes test might constitute a restriction on the use of real property that a decedent's executor could take into account in valuing such property for estate tax purposes.[212]

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[208] *See* discussion *supra* Part C.5.

[209] *See* discussion *supra* Part B.4.

[210] *See* discussion *supra* Part B.8.

[211] See Tax Protection Act of 1986, Pub. L. No. 99-514, 1986. (Regulations have not been promulgated nor cases decided under this provision to give further guidance).

[212] See I.R.C. § 2703 (2004); *See* discussion *infra* Part D.3

Example

Mr. Brown, a farmer, has a very large estate because of the value of his farm land, but he has only a small income. An income tax deduction is not going to do him much good. However, his children love the farm and don't want it to be sold out of the family, nor does Mr. Brown. Because of the uncertainty of his financial situation Mr. Brown does not want to restrict his ability to sell the farm for top dollar while he is living. (Mrs. Brown left many years earlier, thoroughly disgusted with farming.) Therefore, Mr. Brown provides in his will for the contribution of a conservation easement on the farm (including with the will a complete draft of the instrument so that his executor doesn't have to guess what should go into the easement).

The executor values the farm land on the date of Mr. Brown's death at $4,000,000 before the easement, and at $2,000,000 after the easement. The executor is able to deduct the $2,000,000 value of the easement under IRC § 2055(f). This saves Mr. Brown's children $900,000 in estate taxes because the entire $2,000,000 would have been subject to the 45% marginal rate (the top rate in 2007). Due to the $2,000,000 estate tax exemption in 2007, and the exclusion available under IRC § 2031(c) (discussed below), the easement entirely eliminates the estate tax on Mr. Brown's estate.

Note: Under the terms of § 2031(c)(9), even if Mr. Brown had not made a provision in his will for the easement, his heirs could have directed the executor to donate a "post-mortem" easement that would have given the estate the same tax benefits as the testamentary easement.

3. THE 40% EXCLUSION

In addition to recognizing the reduction in the value of real property resulting from the restrictions of a conservation easement, federal tax law allows 40% of the *easement-restricted* value of land (but not improvements) subject to a "qualified conservation easement" to be excluded from a decedent's estate.[213] To date no regulations or cases concerning the 40% exclusion are available to provide guidance.

The exclusion does not apply to all "*qualified conservation contributions*" as do the deductions under IRC §§ 170(h) and 2055(f), but only to "*qualified conservation easements*."[214] The differences between qualified conservation contributions and qualified conservation easements are that the term "qualified

[213] I.R.C. § 2031(c)(1)(A) (2004).

[214] I.R.C. § 2031(c)(1)(A) (2004); I.R.C. §2031(c)(8)(B) (2004)

conservation easement" does not include certain types of contributions that are included within the meaning of "qualified conservation contribution."[215] Also, a qualified conservation easement must meet requirements that a qualified conservation contribution does not: (1) the easement must apply to land held by the decedent or member of the decedent's family for at least a three-year period immediately preceding the decedent's death; (2) the easement contribution must have been made by the decedent or a member of the decedent's family (as defined in the law); (3) the conservation purposes of the easement cannot be limited to historic preservation; and (4) the easement can allow no more than a "*de minimis* commercial recreational use."[216] These requirements are discussed in more detail below.

Note that the phrase "qualified conservation easement" when used hereafter refers to qualified conservation easements as defined in the preceding paragraph. Note also that the § 2031(c) "exclusion" should not be confused with the "exemption amount." The § 2031(c) exclusion is allowed *in addition* to the exemption amount.

a. Extent of the exclusion

IRC § 2031(c) provides that a decedent's executor *may elect* to exclude 40% of the value of land subject to a qualified conservation easement.[217] In other words, the exclusion applies to the value of the land *taking into account* the restrictions of the easement. Values are determined as of the date of the decedent's death, or six months thereafter if the executor elects the "alternate valuation date."[218]

Example

Before he died, Mr. Brown contributed a conservation easement on his farm reducing the value of the farm from $3,000,000 to $1,000,000. The value of the farm on the date of Mr. Brown's death remained at $1,000,000, taking into account the restrictions of the easement. Mr. Brown's executor elects to exclude 40% of the restricted value of the farm (the $1,000,000) from his estate under IRC § 2031(c). Therefore, $400,000 (40% x $1,000,000) may be excluded. Thus, the easement has reduced the taxable value of the land in Mr. Jones' estate by $2,400,000: $2,000,000 from the initial reduction in value and $400,000 due to the exclusion.

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[215] *See* discussion *supra* Part B.1.

[216] I.R.C. § 2031(c)(8)(B) (2004).

[217] I.R.C. §§ 2031(c)(1), (6) (2004).

[218] I.R.C. §§ 2031(c)(1), (2) (2004).

b. The easement must meet the requirements of IRC § 170(h) to qualify for the exclusion

The easement must meet the requirements of IRC § 170(h),[219] *including* the conservation purposes test.[220] Therefore, while it is possible for a conservation easement that does not meet the conservation purposes test of IRC § 170(h)(4)(A) to be deductible for estate and gift tax purposes, and for permanent restrictions on the use of property to reduce the value of that property for estate tax purposes under IRC § 2703, such restrictions or easements *will not* qualify for the § 2031(c) exclusion because they do not comply with IRC § 170(h).[221]

c. The exclusion applies to land only

The exclusion applies only to the value of land, not to improvements on the land.[222] This limitation does not apply to tax benefits under other provisions of the tax code.

Example

Mrs. White died owning a 200-acre farm subject to a qualified conservation easement. The easement allows only agricultural use of the land and imposes architectural standards on the house, a certified historic structure. Without the easement the land would be worth $1 million and the house and outbuildings $350,000. Taking the easement into account, the land is valued at $750,000 and the house and outbuildings at $300,000 for estate tax purposes. Mrs. White's executor elects the § 2031(c) exclusion. As a result the executor can exclude $300,000 of the restricted value of the land (40% x $750,000). The exclusion does not apply to the house and outbuildings. Thus, for estate tax purposes, the conservation easement results in a total reduction in the value of Mrs. White's farm of $600,000. This is due to a reduction of $250,000 in the value of the farm land; a reduction of $50,000 in the value of the structures; and the exclusion of $300,000 in the value of the farm land as restricted by the easement. These reductions save Mrs. White's heirs $270,000 in federal estate tax ($600,000 x 45%), assuming that all of the value removed by the easement would have been subject to tax.

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[219] *See* discussion *supra* Part B.1.

[220] I.R.C. § 2031(c)(8)(B) (2004).

[221] I.R.C. § 2031(c)(8)(B) (2004) (defining a "qualified conservation easement" as a "qualified conservation contribution as defined in section 170(h)(1)").

[222] I.R.C. § 2031(c)(1)(A) (2004).

d. The exclusion does not apply to the gift tax

Federal law taxes gifts made during an individual's lifetime as well as transfers at death. The gift tax closely tracks the federal estate tax. The § 2031(c) exclusion does not apply to the gift tax imposed on lifetime gifts of conservation easement property.[223] For this reason estate-planning strategies based upon lifetime transfers of property should carefully evaluate the effect of making a lifetime gift of easement-protected land that is subject to a conservation easement. A lifetime gift of land that is subject to a conservation easement, and that otherwise qualifies for the § 2031(c) exclusion, will waste the exclusion. However, there may be other overriding reasons to make lifetime transfers of such land.

Example

Mr. Smith donates a conservation easement on 100 acres. The value of the land as restricted by the easement is $200,000. Before he dies, Mr. Smith gives the land to his son. This gift is subject to the full federal gift tax on a $200,000 gift (which could be as much as $90,000) *and none* of the value of the land can be excluded under § 2031(c).

If Mr. Smith had transferred the land to his son by will, only $120,000 of the value of the land would have been subject to tax. This is because the exclusion would reduce the taxable value by $80,000 (40% x $200,000). Assuming that both the lifetime gift and the bequest would have been taxed at 45% (the maximum estate *and* gift tax rate in 2007), transferring the land by a lifetime gift rather than by will would cost Mr. Smith $36,000 (45% x $80,000) in gift tax over and above what the estate tax would have been had the transfer been made at death.

e. The exclusion does not apply to easements whose sole conservation purpose is historic preservation

The § 2031(c) exclusion does not apply if the *sole* conservation purpose of the easement is the preservation of the historic character of the land (historic structures, being improvements rather than land, are not eligible for the exclusion either).[224] However, the fact that land is historic does not disqualify an easement over it for the exclusion if there is also a bona fide conservation purpose for the easement other than historic preservation.

[223] There is no gift tax provision corresponding to I.R.C. § 2031(c) (2004).

[224] I.R.C. § 2031(c)(8)(B) (2004).

Example

Sally owns an historic 18th Century New England farm. The land is identified in the local comprehensive plan and zoning ordinance as prime agricultural land and is accorded a special reduced real estate tax assessment because of its agricultural value. Sally donates a conservation easement protecting the historic *and* agricultural characteristics of the farm. When she dies, her executor may elect to exclude 40% of the value of the land making up the farm after taking the value of the easement into account. Even though the easement has an historic purpose, it also has the purpose of the preservation of open space pursuant to "a clearly delineated governmental conservation policy" (i.e. farmland preservation).

If the sole purpose of the easement and the only significant characteristic of the farm were its historical significance the exclusion would not be available, although the other easement tax benefits would still be available. However, assuming that the easement complies with IRC § 170(h), the easement would qualify for an income tax deduction. In addition, such an easement would reduce the value of Sally's property for estate tax purposes.

f. The exclusion is available for the estates of decedents dying after 12/31/97

Example

Mary donated a conservation easement in 1980 that meets all of the requirements of § 2031(c). She died December 1, 2000. Because she died after December 31, 1997, Mary's estate is eligible to elect use of the exclusion.

g. Three-year holding period required

The decedent, or a member of the decedent's family, must have owned the land that is subject to the easement for at least three years immediately preceding the decedent's death in order to be eligible for the exclusion.[225] For purposes of this provision the term "member of the decedent's family" is defined as follows:

a) an ancestor of the decedent;

b) the spouse of the decedent;

[225] I.R.C. § 2031(c)(8)(A)(ii) (2004).

c) a lineal descendent of the decedent, or of the decedent's spouse, or of a parent of the decedent; and

d) the spouse of any such lineal descendent.[226]

Example

Joel's father gave him 200 acres. His father owned the land for two years before he made the gift to Joel. Joel promptly donated a conservation easement on the land. He died two years after donating the easement. This land will qualify for the exclusion because the total period of time that Joel and a member of his family owned the land immediately preceding Joel's death was four years.

h. The exclusion is limited to $500,000 per estate

Example

James owns land subject to a qualified conservation easement. The value of the land, as restricted by the easement, is $2,000,000. James dies in 2004. Forty percent of the value of the restricted land is $800,000 (40% x $2,000,000). However, the maximum amount that may be excluded by James' estate under § 2031(c) is $500,000, thus James' executor may only exclude $500,000.

The exclusion is limited to $500,000 *per estate*.[227] The limitation was phased in beginning in 1998, in $100,000 increments. The $500,000 limit applies to the estates of decedent's dying after December 31, 2001.[228]

i. The benefits of the exclusion may be multiplied

Because the $500,000 limitation on the exclusion applies *per estate*, not per easement,[229] one conservation easement can generate multiple exclusions.

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[226] I.R.C. § 2032A(e)(2) (2004).

[227] I.R.C. § 2031(c)(1) (2004).

[228] I.R.C. § 2031(c)(3) (2004).

[229] I.R.C. § 2031(c)(1) (2004).

Example 1

Mr. Green and his wife own land as "tenants in common" with each entitled to a 50% share in the land. In a tenancy in common, the interest of the first decedent does not automatically pass to the surviving tenant, as is the case with joint tenancies and tenancies by the entirety. The will of each of the Greens provides that each share of land goes directly to their children rather than to the surviving spouse. The Greens put extensive easements on the land reducing the value of the land overall from $6,500,000 to $2,500,000. Accordingly, the 50% share of the land owned by each of the Greens, as restricted by the easement, is worth $1,250,000. The exclusion available to each of the Greens' estates would be $500,000 (40% x $1,250,000 = $500,000). Therefore, by dividing the ownership of the land and keeping it separate, the Greens have been able to reduce the aggregate value of their two estates by $1,000,000 by qualifying each estate to use the exclusion up to the $500,000 limit.

A commonly used alternative to passing land directly to the children would be for the Greens to have bequeathed their share of the land to a "by-pass trust" that allows the surviving spouse to use the land but not to control it. Upon the death of the surviving spouse, the by-pass trust distributes the land directly to the Greens' children or to other beneficiaries.

Example 2

Four brothers own a ranch inherited from their parents as equal tenants in common. They donate a qualified conservation easement on the ranch. The value of the ranch before the easement was $20,000,000; after the easement the ranch was worth $10,000,000. The brothers all die in a blizzard in 2007. Their executors each elect to take advantage of the 40% exclusion. Each estate receives the decedent brother's 25% interest in the ranch, worth $2,500,000 (25% x $10,000,000), taking into account the restrictions of the easement. The value of the exclusion available to each estate prior to the $500,000 limitation is $1,000,000 (40% x $2,500,000). Each estate may elect to exclude up to $500,000 of its share of the ranch. Therefore, the total value of the ranch that may be excluded is $2,000,000 (4 x $500,000). In this manner one conservation easement qualified for *four* separate exclusions of $500,000 each.

The net effect of the conservation easement in this example was to reduce the taxable value of the ranch by $12,000,000. This is the combination of the initial reduction in value due to the restrictions of the conservation easement ($20,000,000 – $10,000,000 = $10,000,000) and the exclusion of $500,000 available to each brother's estate (4 x $500,000 = $2,000,000). Assuming that this value would have been taxed at the 45% federal estate tax rate, total estate tax savings between the four estates would amount to $5,400,000 (45% x $12,000,000 = $5,400,000). Due to the $2 million exemption from estate tax available in 2007, none of the brothers' estates would be taxable.

Note: If the brothers had held their interests in the ranch as partners in a partnership, as members in a limited liability company, or as stockholders in a corporation, the result would not have been the same. Because each brother would have owned less than 30% of the partnership, limited liability company, or corporation, their estates would not have been eligible for the exclusion. IRC § 2031(c)(10) allows the exclusion for partnership, corporation, and trust interests held by a decedent, *but only* if the decedent owned at least 30% of such entity.

j. The exclusion may be used in conjunction with other tax benefits for easements

The exclusion, the reduction in value of a decedent's estate due to the existence of a conservation easement, and the income tax deduction attributable to the original contribution of the easement, may all be used in connection with the same easement contribution.

Example

Mr. Jones' land is valued at $1,000,000 and his easement reduces that value to $700,000. Mr. Jones is entitled to a $300,000 income tax deduction. His estate can report the value of the easement restricted land as $700,000, rather than $1,000,000, and the executor can elect to exclude $280,000 of the remaining value under § 2031(c) (40% x $700,000). In this manner, the easement removes $580,000 ($300,000 + $280,000) from the taxable value of the estate, in addition to generating state and federal income tax deductions.

Assume that Mr. Jones' income is taxed at the top 2007 federal rate of 35%, a state rate of 6%, and that the assets in his estate are taxed at the rate of 45%. Given these assumptions, donation of an easement valued at $300,000 would save Mr. Jones and his estate a total of $384,000 in state and federal taxes. These savings are made up of income tax savings of $123,000 ((35% + 6%) x $300,000); estate tax savings of $135,000 due to the reduction in the value of the estate resulting from the conservation easement (45% x $300,000); and additional estate tax savings of $126,000 due to the § 2031(c) exclusion (40% x $700,000 x 45%).

In addition, the exclusion may be layered on top of the unified estate and gift tax credit (the "exemption amount" and the tax benefits available under the special valuation rules of IRC § 2032A for qualified family farms).[230]

k. The exclusion may be passed from one generation to the next

The benefit of the exclusion is available to each succeeding generation of landowners so long as the land remains in the family of the donor.[231] Once the land passes outside of the family, the exclusion is no longer available unless the new owner donates another easement on the land that independently qualifies under IRC § 2031(c).[232] If such a contribution can be made, the exclusion will be revived for the estate of the new donor and his heirs, so long as the land remains in his family.

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[230] I.R.C. §2032A (2004). Care needs to be taken using conservation easements in connection with I.R.C. §2032A so that the easement does not reduce the value of the farm below the 50% of estate assets threshold. *Id.*

[231] I.R.C. § 2031(c)(8)(C) (2004).

[232] I.R.C. § 2031(c)(8)(A)(ii) (2004).

Example 1

Mr. Jones donates a conservation easement on his land that qualifies under § 2031(c). When Mr. Jones dies, the property passes to his son John. John marries and passes his land to his wife Sarah at his death. Sarah has a daughter by a subsequent marriage (John died young), Julie. Julie inherits the land at Sarah's death, marries, and has children who ultimately become beneficiaries of the land. Mr. Jones' estate is eligible for the exclusion, as are the estates of John, Sarah, Julie, and Julie's children, if the land is included in their estates at their deaths.

In addition, the reduction in value due to the restrictions imposed by the easement will be available to future generations in the family of the donor. However, unlike the exclusion, the reduction in value attributable to the restrictions of the easement remains available to owners outside of the family of the original donor in the event that the land is transferred outside of the family.

Example 2

Mr. Green donates an easement on his land that qualifies under § 2031(c). The easement reduces the development potential on Mr. Green's land from 100 houses to 10 and generates a significant public conservation benefit. When Mr. Green dies, the land passes to his son Alfred. Alfred sells the land to his neighbor Mrs. Brown. Mrs. Brown dies leaving the land to her daughter Melissa. Melissa donates a second conservation easement that eliminates all remaining 10 house sites so that the land cannot be developed at all. The easement donated by Melissa is a qualified conservation easement. Melissa passes the land on to her daughter Joan, and it is included in Joan's estate at her death.

Mr. Green's estate is eligible for the exclusion. Alfred's estate does not contain the property so no exclusion is available, and the proceeds of sale that remain in his estate at his death will be fully taxable. Mrs. Brown's estate is not eligible for the exclusion because neither she nor any members of her family donated the easement. However, due to the new easement donated by Melissa, Melissa's estate is eligible for the exclusion, as is Joan's estate.

l. The exclusion must be "elected"

In order to take advantage of the exclusion, a decedent's executor or trustee must make an *affirmative* election to use the exclusion before the date on which

the estate tax return for the decedent is due, including extensions.[233] The election is made on Schedule U ("Qualified Conservation Easement Exclusion") of Form 706, which is the federal estate tax return. Federal law requires estate tax returns to be filed within nine months of a decedent's death.[234]

Extensions of up to six months are available; however, they are not automatic.[235] Under the current law, failure to elect the exclusion does not preclude subsequent generations from electing the exclusion. Schedule U provides that an executor is deemed to have made this election by filing Schedule U and excluding the value of land subject to a conservation easement from the estate.

Note that an executor would probably not choose to elect the exclusion if the estate is not otherwise subject to estate tax (e.g., because the total value of the estate is less than the $2 million exemption amount). This is because, to the extent of the exclusion, land passing through a decedent's estate is denied a "stepped-up" basis.[236]

m. The easement must reduce land value by at least 30% to qualify for the full exclusion

The 40% exclusion is reduced if the conservation easement fails to reduce the value of the land that is subject to it by at least 30%. The statute provides that the 40% exclusion is to be reduced by two percentage points for each one percentage point that the easement fails to reduce the value of the restricted land by 30%.[237] The purpose of this provision is to prevent landowners from donating minimal easements in order to take advantage of the exclusion.

The values for determining compliance with the 30% requirement are the values of the land and easement *at the time of the original contribution* of the easement.[238] To determine compliance with this standard the executor must obtain information about the value of the easement, and the value of the land as restricted by the easement, at the time of the original contribution. However, if the estate qualifies for the exclusion, the exclusion is applied to the restricted value of land under the easement *as of the date of the decedent's death* (or the alternate valuation date, if selected).

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[233] I.R.C. §§ 2031(c)(1), (6) (2004).

[234] I.R.C. § 6075(a) (2004).

[235] I.R.C. § 6081(a) (2004).

[236] *See* discussion *infra* Part D.16.

[237] I.R.C. § 2031(c)(2) (2004).

[238] *Id.*

Example

Mrs. Johnson's land was valued at $1,250,000 before she contributed her easement and $1,000,000 after she contributed her easement. The value of the easement was $250,000 ($1,250,000 – $1,000,000). Therefore the easement reduced the value of the unrestricted land by 20% ($250,000/$1,250,000). Twenty percent is ten percentage points less than the 30% reduction in value required by § 2031(c). To determine the amount by which the 40% exclusion must be reduced, Mrs. Johnson's executor must subtract two percentage points from the 40% exclusion for every one percentage point by which the easement falls short of the 30% requirement, in this case 20% (2 x 10%). Therefore, the executor may only exclude 20% of the restricted value of the land.

However, by the time of Mrs. Johnson's death, the value of the land as restricted by the easement has appreciated to $2,500,000. Twenty percent of this value is $500,000 (20% x $2,500,000). $500,000 is the maximum amount that can be excluded under § 2031(c) in any event. Therefore, due to the appreciation in the value of the restricted land, the 30% threshold requirement does not penalize the estate at all. Had the value of the land subject to the easement not appreciated between the date of the easement donation and the date of Mrs. Johnson's death, the amount that could have been excluded would have been limited to $200,000 (20% x $1,000,000).

n. Retained development rights are not eligible for the exclusion

Any "development rights" retained in the conservation easement are not eligible for the exclusion.[239] However, if those people with an interest in the decedent's land after the decedent's death agree before the due date for the estate tax return (including any extension), to terminate some or all such retained rights the exclusion will apply as though the terminated rights never existed. Those with an interest in the land have two years after the decedent's death to put their agreement into effect (presumably by recording an amendment to the original easement or recording a supplemental easement).[240]

Development rights for purposes of this provision are defined in the law as any right to use the land for a commercial purpose "not subordinate to and directly supportive of the use of such land as a farm for farming purposes."[241]

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[239] I.R.C. §§ 2031(c)(2), (c)(5)(D) (2004).

[240] I.R.C. §§ 2031(c)(5)(A), (B) (2004).

[241] I.R.C. § 2032A(e)(5) (2004) (The definition of "farm for farming purposes" is provided in I.R.C. § 2032A(e)(5)); *see* discussion *supra* Part C.3.

Rights to maintain a residence for the owner's use, as well as normal farming, ranching, and forestry practices should not be considered retained development rights.[242] Retained rights to sell land for development, or to establish houses for sale or rent, probably would be considered retained development rights.[243]

Many conservation easements retain the right for the grantor to use an existing residence, or to construct a residence for use by the grantor. While there are no regulations, cases, or rulings to the knowledge of the author on this point, it would seem that such a retained right is not a "retained development right" because a right reserved by the grantor to personally use a residence does not constitute a "commercial purpose."

Example

An easement otherwise meeting the requirements of IRC § 2031(c) reserves the right to develop and sell five home sites, each worth $50,000. The land is valued at $2,000,000 before the easement and $1,000,000 after the easement (including the value of the retained home sites). Before calculating the exclusion, the executor must subtract the value of the retained development rights from the restricted value of the land ($1,000,000 – (5 x $50,000) = $750,000). The exclusion is then applied to the adjusted value of $750,000. The value that can be excluded from the decedent's estate is therefore $300,000 (40% x $750,000).

If all of the people with an interest in the decedent's land agree to terminate these retained development rights, the exclusion will increase to $400,000 (40% x $1,000,000). If the value excluded were subject to the 2007 45% federal estate tax rate, terminating these rights would save the heirs an additional $45,000 (45% x $100,000) in estate taxes.

It is also possible for people having a legal interest in the decedent's land to take advantage of the "post-mortem" easement provisions of IRC § 2031(c)(9)[244] and eliminate the retained development rights by donating a new easement before the estate tax return is due.[245] This would qualify the termination of the retained

[242] I.R.C. § 2031(c)(5)(D) (2004). This is because the definition of "development right" in IRC § 2031(c)(5)(D) excludes uses that are subordinate to, and directly supportive of, the use of the land as a farm for farming purposes. A farm house for the farmer and housing for farm employees, as well as barns, sheds, etc. used in the farming operation, are a necessary element of a farm or ranch. *Id.*

[243] *Id.*

[244] *See* discussion *supra* Part D.20.

[245] I.R.C. § 2031(c)(9) (2004) (allowing post-mortem easement contributions to qualify for the § 2031(c) exclusion and the I.R.C. § 2055(f) deduction, provided that the easement is a "qualified conservation easement" as defined in I.R.C. § 2031(c)(8)(B)).

rights for both an expanded exclusion as well as an estate tax deduction under IRC § 2055(f).[246] These benefits would be in addition to the reduction in value already attributable to the restrictions of the easement donated by the decedent during his lifetime.

o. Commercial recreational uses must be prohibited

Any easement in which the right is retained to use the land subject to the easement for more than "*de minimis*" commercial recreational purposes is not a qualified conservation easement and is disqualified for the § 2031(c) exclusion.[247]

The official explanation of this provision given by the Joint Committee on Taxation includes a statement that rights retained in an easement to grant hunting or fishing licenses on land subject to the easement is within the exemption for *de minimis* uses and does not disqualify the easement for the exclusion.[248]

No other official clarification of this provision has been given. From a drafting standpoint, until more information about the meaning of this provision is made available, easement donors intending to qualify for the § 2031(c) exclusion should include language in their easements expressly prohibiting "any commercial recreational use, except those uses considered *de minimis* according to the provisions of § 2031(c)(8)(B) of the Internal Revenue Code." An equally effective alternative is a blanket prohibition in the easement against any "commercial recreational" activity or any "commercial activity."

Existing conservation easements that do not include such prohibitions should be re-examined and possibly amended. The staff of the Joint Committee on Taxation has verbally taken the position that a prohibition against all but *de minimis* commercial recreational uses may be supplied by a decedent's executor or trustee in a "post-mortem" amendment to an existing easement. [249] If the easement donor is unable to amend the easement, such a post-mortem correction may be the only alternative. However, because of the cumbersome process involved in granting a post-mortem easement, including the uncertainty of state law and of obtaining consent from all beneficiaries in a timely fashion, amendment of the easement by the original grantor is a far more reliable approach to compliance with this requirement of § 2031(c).

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[246] I.R.C. § 2031(c)(9) (2004).

[247] I.R.C. § 2031(c)(8)(B) (2004).

[248] *See* STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 109TH CONGRESS Title XII.A.3 (Comm. Print 2007).

[249] *See* discussion *supra* Part D.3.t.

p. The exclusion imposes a carryover basis

To the extent of the § 2031(c) exclusion, land received from a decedent has a "carryover basis" in the hands of heirs rather than a "stepped-up basis."[250] Basis is, essentially, what the owner paid for the land, plus amounts paid for improvements. The significance of basis is that when property is sold the seller pays tax on the difference between the property's basis and the sale value of the property.

Example

Mr. Smith's estate includes land subject to a conservation easement. The restricted value of the land, as valued by the executor, is $750,000. Mr. Smith's basis in the land is $5,000. The exclusion allowed is $300,000 ($750,000 x 40%). The carryover basis rule requires that 40% of Mr. Smith's $5,000 basis be carried over to the heirs, along with the stepped-up basis on that portion of the value of the land not subject to the exclusion. Thus, $2,000 ($5,000 x 40%) must be carried over to the heirs. That portion of the value of the land that was not subject to the exclusion ($750,000 – $300,000 = $450,000) will receive a stepped-up basis. The total adjusted basis for the land is therefore $452,000 ($2,000 + $450,000).

The effect of the carryover basis rule, given 2007 income and estate tax rates, is that while Mr. Smith's estate saves $135,000 in estate taxes (45% x $300,000), the heirs are exposed to increased income tax liability on the sale of Mr. Smith's easement property of $44,700 (($750,000 – $452,000) x 15%).

Carryover basis refers to passing on a decedent's basis in his property to his heirs. Normally, land passing from a decedent to his heirs receives a stepped-up basis.[251] This means that the decedent's basis in the property is replaced with a new basis reflecting the fair market value of the property when the decedent died. The stepped-up basis substantially reduces or eliminates income tax on sales of property received from a decedent's estate by heirs.

Improvements are not eligible for the exclusion. Therefore, improvements will continue to receive a stepped-up basis, regardless of whether or not the exclusion is elected.

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[250] I.R.C. § 1014(a)(4) (2004).

[251] I.R.C. § 1014(a)(1) (2004).

q. Geographic limitations on the exclusion

When originally enacted, the provisions of § 2031(c) applied only to land in or within a twenty-five mile radius of a Metropolitan Statistical Area (MSA), national park and/or national wilderness area.[252] This requirement has been eliminated.[253] The current provision only requires that land, to be eligible under § 2031(c), be located within the United States or any U.S. possession.[254]

r. Debt-financed property

If a landowner incurred debt to purchase land with respect to which the § 2031(c) exclusion is elected, any amount of that debt that remains unpaid when the landowner dies must be subtracted from the value of the land before calculating the exclusion.[255] However, the debt is deductible under another provision of the federal estate tax code.[256]

Example

If land subsequent to easement has a restricted value of $700,000, and it is subject to a $300,000 mortgage when the decedent dies, the exclusion can only be applied to $400,000 ($700,000 – $300,000). The exclusion amount in this case would be $160,000 (40% x $400,000).

s. Property owned by partnerships, corporations, and trusts

If the decedent's interest in land eligible for the exclusion is held indirectly through a partnership, corporation, or trust, his or her estate may still enjoy the benefit of the exclusion to the extent of the decedent's ownership interest in such an entity. However, the decedent must own at least a 30% interest in the entity in order for his estate to be able to take advantage of the exclusion.[257]

Although the statute does not speak of limited liability companies, it is likely that such entities will qualify for similar treatment because they have both the attributes of a corporation and a partnership, both of which are eligible for the exclusion.

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[252] I.R.C. § 2031(c)(8)(i) (2004).

[253] The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No.107-16 (2001).

[254] I.R.C. § 2031(c)(8)(i) (2004).

[255] I.R.C. § 2031(c)(4) (2004).

[256] I.R.C. § 2053(a)(4) (2004).

[257] I.R.C. § 2031(c)(10) (2004).

Example

Mrs. Sanders, a widow, placed the family farm into a family corporation in order to facilitate the transfer of interests in the farm to her four children. She donated a conservation easement on the farm before transferring it to the corporation. At the date of her death the farm's land was worth $4,000,000, taking into consideration the restrictions imposed by the conservation easement. The other assets in the corporation were worth $1,000,000 (farm improvements and equipment). Mrs. Sanders owned 35% of the stock of the corporation when she died.

Mrs. Sanders' executor may elect to exclude 40% of the value of her stock attributable to the farm's land from her estate because she owned over 30% of the stock in the corporation at her death. If we assume that the portion of the stock value attributable to the land value is $1,400,000 (35% x $4,000,000—remember that the exclusion applies to the value of land only, not improvements), then the executor may exclude $500,000 of that value from the estate. Note that 40% of Mrs. Sanders' share of the land is $560,000; however, because of the limitation on the amount of the exclusion her estate can only exclude $500,000.

If Mrs. Sanders' interest in the corporation had been 29% or less, her estate would not have been eligible for any of the § 2031(c) exclusion. Note that we are assuming that the corporation will qualify for the exclusion, even though neither it, nor any member of its "family," contributed the easement or owned the easement for the requisite 3-year period immediately preceding the contribution. This may not be a safe assumption. To be completely safe, it might be prudent to defer contribution of the easement until after conveyance of the land to the corporation and until the corporation has held the land for at least three years.

t. Easements donated after the decedent's death ("post-mortem" easements)

The 40% exclusion is available for easements donated by a decedent's executor or trustee *after* the decedent's death—even though the decedent failed to donate an easement before his death.[258] The grant of a post-mortem conservation easement must be completed prior to the due date for the estate tax return (nine months after the date of the decedent's death), plus any extension granted for filing the return.[259]

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[258] I.R.C. § 2031(c)(8)(A)(iii) (2004); I.R.C. § 2031(c)(8)(C) (2004); I.R.C. §2031(c)(9) (2004).

[259] I.R.C. § 2031(c)(9) (2004).

A post-mortem easement will qualify for both the exclusion *and* an estate tax deduction under IRC § 2055(f), *provided* that no income tax deduction is taken in connection with the conveyance of the easement.[260] This provision makes available an important "retroactive" estate planning technique.[261]

Example

Sam and Susie had tried for years to get their aging father to put a conservation easement on his farm. The old man never seemed to get around to it and died without having donated the easement. At the time of his death, the farm's land was valued at $1,000,000. Sam and Susie, being the only persons with any legal claim to the land, directed their father's executor to donate an easement on the farm, and the donation was completed within 9 months of their father's death. The easement reduced the value of the land by $400,000, thereby generating a $400,000 estate tax deduction under IRC § 2055(f). The value of the farm's land, taking the restrictions of the easement into account, was $600,000. Therefore, the 40% exclusion removed an additional $240,000 (40% x $600,000) from the estate. Given the value of other assets in the estate, the entire value of the land subject to the easement would have been taxed at 45%. Thus, the post-mortem election saved Sam and Susie $288,000 (45% x ($400,000 + $240,000)) in estate tax.

Note: § 2031(c) merely controls the tax consequences of a post-mortem easement contribution; it does not authorize the contribution. *State law governs the powers of executors and trustees to make a post-mortem easement contribution, not federal tax law*. Unless state law specifically allows executors and trustees to donate a conservation easement, a decedent must specifically authorize his executor or trustee to contribute the easement in the will. If there is no provision in the decedent's will and no authority granted by state law, a court order may be required. However, at least three states (Colorado, Maryland and Virginia) have amended their laws to allow post-mortem easements to be donated by an executor or trustee in order to take advantage of the post-mortem election.

[260] I.R.C. § 2031(c)(9) (2004).

[261] *See* I.R.S. Priv. Ltr. Rul. 2004-18-005 (Apr. 30, 2004) (confirming use of the post-mortem election by a trust).

CASE NOTE

PUBLIC LANDS—The Road Less Traveled: The 10th Circuit Adjudicates R.S. 2477 Claims Using a Piecemeal State-Law Approach Instead of a Uniform Federal Policy; *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005).

*Joseph Azbell**

Introduction

In the fall of 1996 road crews employed by San Juan, Garfield, and Kane counties (hereinafter the "Counties") began construction on sixteen "roads" that ran through Bureau of Land Management (BLM) controlled lands in southern Utah.[1] Armed with graders and other earth-moving equipment, the Counties began to improve the existing primitive trails into graded roadways without permission or notification to the BLM.[2] With a few exceptions, the claimed rights-of-way were never previously graded by the Counties, although a few appeared to show signs of previous construction.[3] The Counties asserted ownership of several routes pursuant to Revised Statute 2477 (R.S. 2477), a Civil War-era law which granted rights-of-way for the "construction" of "highways" over public lands.[4] R.S. 2477 was repealed by the Federal Land Policy and Management Act of 1976 (FLPMA).[5] FLPMA, however, contained a savings clause which permitted R.S. 2477 claims perfected as of 1976 to continue to be valid.[6]

Nine of the asserted rights-of-way are located in the Grand Staircase-Escalante National Monument; six are situated in wilderness study areas; and six others lie on a mesa overlooking the Needles District of Canyonlands National Park.[7] Given the location of the claimed routes, it did not take long for conservation groups such as the Southern Utah Wilderness Alliance (SUWA) to take notice.[8] On October 2, 1996, SUWA filed suit against the BLM to force the agency

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[1] Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735, 742 (10th Cir. 2005) [hereinafter *SUWA II*].

[2] *Id.*

[3] *Id.*

[4] *Id.* The meaning of the terms "construction" and "highway" are disputed in the principal case. *See*, *e.g*,. *infra* notes 92-93 and accompanying text for discussion of "highways" and note 99 and accompanying text for a discussion of "construction."

[5] Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (2000).

[6] Pub. L. No. 94-579, § 701(a), 90 Stat. 2743 (1976).

[7] *SUWA II*, 425 F.3d at 742.

[8] *Id.* at 742.

to protect the "stunning red-rock canyon formations" and "pristine wilderness areas."[9] This lawsuit kicked off a nine-year court battle which culminated in the principal United States Court of Appeals for the Tenth Circuit case, *Southern Utah Wilderness Alliance* v. *Bureau of Land Management*.

The procedural path leading to the current case was lengthy and convoluted.[10] In the initial 1996 suit brought by SUWA against the BLM and the Counties, the BLM filed cross-claims against the Counties, alleging trespass and degradation of federal property.[11] The BLM sought injunctive and declaratory relief, as well as damages to restore the areas.[12] Despite objections from the Counties, the district court stayed the proceedings to allow the BLM to determine whether the routes in question were valid rights-of-way pursuant to R.S. 2477.[13] Lacking title records or any formal recording process, the BLM sought old maps, photographs, maintenance records, and public testimony to determine whether the Counties had established R.S. 2477 rights-of-way prior to 1976.[14] To aid in its determinations concerning validity of the rights-of-way, the BLM applied its own interpretations of the statutory language of R.S. 2477 instead of referring to Utah state law as suggested by the Counties.[15] The district court held that the BLM had primary jurisdiction over the claims and thus reviewed the BLM's voluminous findings concerning the history of the alleged rights-of-way under an arbitrary and capricious standard.[16] Having found that the BLM acted neither arbitrarily nor capriciously, the district court held that the Counties lacked valid rights-of-way on fifteen of the sixteen roads, and that Kane County had exceeded the scope on the sixteenth road.[17] The court did, however, find in favor of the Counties on the trespass issues.[18] The Counties appealed the decision to the Tenth Circuit Court of Appeals, claiming that the district court erred in granting the BLM primary jurisdiction and that the BLM should not have relied on its own interpretation of the statute but instead should follow state law.[19]

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[9] *Id.*

[10] Only the salient procedural history will be given here. For a more complete summary, *see SUWA II*, 425 F.3d 735, 742-44 (10th Cir. 2005).

[11] *SUWA II*, 425 F.3d at 742-43.

[12] *Id.*

[13] *Id.* at 743.

[14] *Id.* As will be discussed *infra*, the public acceptance of an R.S. 2477 grant required no formal action on the part of local governments, and the grantee was not required to record title. *See also SUWA II*, 425 F.3d at 741.

[15] *Id.* at 759.

[16] Southern Utah Wilderness Alliance v. Bureau of Land Management, 147 F. Supp. 2d 1130, 1134 (D. Utah 2001) [hereinafter *SUWA I*].

[17] *Id.* at 1137.

[18] *SUWA II*, 425 F.3d at 744.

[19] *Id.* at 758.

This case note will concern itself with only one of the Tenth Circuit's most controversial holdings, that concerning primary jurisdiction.[20] The court held that Congress did not grant the BLM authority to make binding determinations regarding the existence of valid R.S. 2477 claims.[21] Therefore, the court concluded "that the BLM lacks primary jurisdiction and that the district court abused its discretion by deferring to the BLM."[22] Consequently, "a remand [was] required to permit the district court to conduct a plenary review and resolution of the R.S. 2477 claims."[23] On remand the Tenth Circuit directed the district court to apply Utah state law to determine the validity of the R.S. 2477 claims.[24]

Ultimately, the Tenth Circuit made no specific findings concerning the sixteen roads.[25] However, the holdings it reached and precedents it set are certain to have far-reaching effects for those living in the West.[26] This case note will explore the controversial history of R.S. 2477 and identify the actors that make this seemingly simple law so contentious. Next, it will analyze the principal case and argue that the court incorrectly decided the issue of primary jurisdiction. Finally, this note will discuss the future of R.S. 2477, and argue that Congress should act to create a unified process in which to resolve these disputes.

BACKGROUND

In the 1860s, filled with the spirit of "manifest destiny," eastern settlers rapidly began homesteading on the newly acquired territories in the American West.[27]

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[20] *Id.* at 757. Black's Law Dictionary defines primary jurisdiction as "[a] judicial doctrine whereby a court tends to favor allowing an agency an initial opportunity to decide an issue in a case in which the court and the agency have concurrent jurisdiction." BLACK'S LAW DICTIONARY 1208 (Deluxe 7th ed. 1999).

[21] *SUWA II*, 425 F.3d at 757.

[22] *Id.* The court summed up its argument by stating "nothing in the terms of R.S. 2477 gives the BLM authority to make binding determinations on the validity of the rights of way granted thereunder, and we decline to infer such authority from silence when the statute creates no executive role for the BLM." *Id.* at 758.

[23] *SUWA II*, 425 F.3d at 758.

[24] *Id.* at 768.

[25] *Id.* at 758.

[26] The BLM manages roughly 258 million acres of land, most of which is located in twelve western states. BLM, *BLM Facts*, http://www.blm.gov/nhp/facts/index.htm (last visited March 8, 2007). It should be noted that while BLM-managed lands are in question in this case, the Tenth Circuit's decision has implications for all federally managed lands as well as private lands acquired from the federal government. *See generally* Brief of Amici Curiae Property Owners for Sensible Roads Policy et al. in Support of Affirmance of the District Court's Orders and in Support of Appellees Southern Utah Wilderness Alliance, Sierra Club, & the BLM, SUWA v. BLM, 425 F.3d 735 (10th Cir. 2005) (Nos. 04-4071, 04-4073).

[27] John Warfield Simpson, VISIONS OF PARADISE: GLIMPSES OF OUR LANDSCAPE'S LEGACY 98 (University of California Press 1999).

To encourage future growth and validate existing settlements, Congress enacted a series of laws, including the Mining Law of 1866.[28] Now codified in part as R.S. 2477, this statute contains few words and is seemingly straightforward. R.S. 2477 reads, in its entirety: "the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[29]

More than a hundred years later, amidst the cultural transformations of the 1970s, Congress passed FLMPA.[30] FLPMA marked a change in the relationship of the American people vis-à-vis the land.[31] Instead of promoting the disposal of public lands and private settlement, the goals of FLPMA were conservation, preservation, multiple use, and retention of federal lands.[32] Consistent with this policy, FLPMA expressly repealed R.S. 2477.[33] However, in an innocuous sounding savings clause, FLPMA permitted those R.S. 2477 rights-of-way perfected prior to October 1, 1976, to remain in existence.[34] Thousands of R.S. 2477 claims are still in existence, and their validity remains uncertain.[35]

Despite the relatively uncontroversial history of R.S. 2477 prior to 1976, the death of the statute has, ironically, sparked considerable controversy for a variety of reasons.[36] Chief among these reasons are the uncertainty surrounding the statute's interpretation and implementation, inconsistent state and federal court opinions, and increased litigation.[37]

Statutory Uncertainty

Revised Statute 2477 has lead to much uncertainty for a variety of reasons.[38] First, the sparse language of the statute and legislative history give little guid-

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[28] *See* Brett Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 HASTINGS L.J. 523, 526 (2005).

[29] 43 U.S.C. § 932 (repealed in 1976 by FLPMA). R.S. 2477 is part of the original 1866 Mining Law. *See SUWA II*, 425 F.3d 735, 740 (10th Cir. 2005).

[30] 43 U.S.C. § 1701 (2000).

[31] *SUWA II*, 425 F.3d at 740.

[32] *See* 43 U.S.C. § 1701 (2000).

[33] *Id.*

[34] 43 U.S.C. § 1701 (2000).

[35] As of 1993, the Department of the Interior stated there were approximately 5,600 pending R.S. 2477 claims. U.S. Dep't of Interior, Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Claims on Federal and Other Lands 29 (June 1993) (microfiche available at University of Wyoming, Coe Library) [hereinafter DOI Rep. to Congress].

[36] Michael J Wolter, *Revised Statute 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past?*, 5 DICK. J. ENVTL. L. & POL'Y 315, 317-18 (1996).

[37] *See infra* notes 38-109 and accompanying text.

[38] Wolter, *supra* note 36, at 319.

ance on how the public establishes a valid R.S. 2477 right-of-way.[39] Second, "the establishment of R.S. 2477 rights-of-way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested."[40] Therefore, it is often difficult to determine whether a valid right-of-way was established prior to the statute's repeal.[41]

State Law

Contributing to the uncertainty is the inconsistency of state case law.[42] The BLM has allowed states to interpret R.S. 2477 with the aid of state law.[43] Disputes that arose in state courts prior to 1976 usually involved adjudicating "claims by private landowners asserting access rights across neighbor's [sic] property."[44] These cases usually did not involve any federal interests and, thus, the federal government rarely made an appearance.[45] In the absence of federal participation, states construed R.S. 2477 liberally and applied various standards taken from state law.[46] According to a 1993 Report to Congress from the Department of the Interior:

> Some state statutes contain language that is very broad, while others specifically lay out definitions and formal procedures. In other states, only formal petitions through public officials are sufficient to establish a highway. Some statutes declare that public use of a road over time can establish a highway. Other statutes set forth definitions of highways that are open to interpretation. Many states have enacted multiple statutes providing for several factors that may operate to establish a highway. Some state statutes refer to undocumented roads.[47]

There are, however, some principles that seem to be fairly established by state law.[48] Courts have generally held that the federal government, by enacting R.S. 2477, was making an offer to the public for the establishment of highways.[49] As

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[39] *Id.*

[40] *SUWA II*, 425 F.3d 735, 741 (10th Cir. 2005).

[41] *Id.*

[42] *Id.*

[43] For example, the terms "construction" and "highway" were interpreted by reference to state law. *See*, *e.g.*, *SUWA II*, 425 F.3d at 762.

[44] Birdsong, *supra* note 28, at 527.

[45] *Id.*

[46] *Id.* at 527. Moreover, the state law that does exist generally does not deal with R.S. 2477 directly but focused on the issue of public highways. DOI Rep. to Congress, *supra* note 35, at 15.

[47] DOI Rep. to Congress, *supra* note 35, at 15.

[48] Wolter, *supra* note 36, at 328.

[49] *See* Wolter, *supra* note 36, at 327 (citing 59 Fed. Reg. 39,218 (Aug. 1, 1994)).

Wolter stated, "[s]tate law governs the terms of acceptance and scope of the right-of-way, insofar as those terms consist with those of the offer."[50] There are limits imposed by the language of R.S. 2477 on how a state can make its acceptance.[51] For example, many states attempted to accept the offer of R.S. 2477 highways by enacting legislation that would create a road on every map section line.[52] Interior Secretary Bliss, in 1898, rejected one such attempt by Douglas County, Washington, and stated that the idea "embodies the manifestation of a marked and novel liberality on the part of the county authorities dealing with the public land."[53]

A 2003 Wyoming Supreme Court opinion illustrates how the application of state law governs R.S. 2477 claims.[54] In this case, a rancher brought suit to enjoin recreationists from using a trail across his property to access a national forest.[55] The recreationists claimed that an R.S. 2477 right-of-way had been established.[56] The court found that a 1919 Wyoming statute was controlling on the issue regarding the establishment of a valid R.S. 2477 right-of-way.[57] The statute "effectively vacated the public status of any road, including those established pursuant to R.S. 2477, which [sic] were not recorded and established by the pertinent board of county commissioners."[58] Thus the claimed R.S. 2477 right-of-way was invalid because the road was not registered with the state as required by Wyoming law.[59]

In addition to state case law, federal case law has fleshed out some important principles concerning R.S. 2477. As will be discussed below, however, federal courts have generally reached inconsistent results.

Federal Cases

Despite R.S. 2477's 100-plus-year existence, there is relatively little federal case law concerning this statute.[60] Most of the cases that do exist were decided

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[50] Wolter, *supra* note 36, at 328. *See also* Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) (discussing the application of state law to establish scope of an R.S. 2477 right-of-way).

[51] Wolter, *supra* note 36, at 328.

[52] DOI Rep. to Congress, *supra* note 35, at 15. The establishment of these "highways" would have checkered the country at one mile intervals. *See* Douglas County, Washington, 26 Pub. Lands Dec. 446 (U.S. Dept. of Int. 1898).

[53] Douglas County, Washington, 26 Pub. Lands Dec. 446 (U.S. Dept. of Int. 1898).

[54] Yeager v. Forbes, 78 P.3d 241 (Wyo. 2003).

[55] *Id.* at 245.

[56] *Id.* at 255.

[57] *Id.* The 1919 statute was amended in a 1920 statute which was codified as Wyo. Stat. Ann. § 24-1-101. *See Yeager*, 78 P.3d at 251.

[58] *Yeager*, 78 P.3d at 255.

[59] *Id.*

[60] Birdsong, *supra* note 28, at 528.

after 1976.[61] One reason for the paucity of cases is that the federal government's primary goal prior to 1976 was the quick disposal of land, therefore, there was little need for federal litigation over these property rights.[62] Additionally, the grant of the right-of-way was self-executing and required no formal process of recognition by the federal government.[63] According to a 1993 Department of Interior Report to Congress, the federal cases had "established no clear judicial precedents."[64]

There are, however, some federal precedents that have wide approval. In general, courts have held that R.S. 2477 applied both retrospectively and prospectively.[65] One of the first Supreme Court cases to discuss R.S. 2477 was *Central Pacific Railway Co. v. Alameda County*.[66] In *Central Pacific,* the Court held that a road established prior to the enactment of the statute was afforded protection under R.S. 2477, and that the statute applied retrospectively and amounted to congressional recognition of pre-existing rights.[67] Most federal courts have also held that R.S. 2477 rights apply equally to roads used for mining and homesteading purposes as to other purposes.[68] Furthermore, an R.S. 2477 right-of-way is

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[61] *Id.*

[62] *Id.*

[63] 43 C.F.R. § 244.58 (1939) ("No application should be filed under R.S. 2477, as no action on the part of the Government is necessary.").

[64] *See* DOI Rep. to Congress, *supra* note 35, at 16.

[65] DOI Rep. to Congress, *supra* note 35, at 16. *Contra* United States v. Dunn, 478 F.2d 443 (9th Cir. 1973) (holding that R.S. 2477 applied only to rights which existed prior to 1866—the statute's enactment—and did not establish any new rights after 1866).

[66] Cent. Pac. R.R. Co. v. Alameda County, 284 U.S. 463 (1932). The Supreme Court also addressed R.S. 2477 in Colorado v. Toll, 268 U.S. 228 (1925). In that case the State of Colorado passed a bill that forbade the superintendent of Rocky Mountain National Park from establishing a monopoly over R.S. 2477 rights-of-way across the park in a scheme for profit. *Id.* at 229. The Court stated that the statute creating the park did not affect the preexisting rights of private landholders or the state, particularly the right to use the road. *Id.* at 231. The statute also did not, absent an act of cession from the state and acceptance from the national government, curtail the jurisdiction of the state. *Id.* Thus the Court ordered an injunction to prevent the superintendent from continuing actions in which he lacked authority. *Id.*

[67] *Cent. Pac. R.R. Co.*, 284 U.S. at 471. In *Central Pacific*, the railroad company sued Alameda County in an action to quiet title on a right-of-way used as a railroad track. *Id.* at 465. Prior to the railroad track, there had been a public highway through the same steep canyon. *Id.* at 455-66. Flood waters forced the highway to be moved from one side of the canyon to the other, putting the railroad right-of-way in conflict with the proposed road. *Id.* at 466. The original road was established by the county, in accordance with state law, "by the passage of wagons, etc., over the natural soil." *Id.* at 467. Central Pacific claimed that Alameda County had no right to the highway because it was established in 1859, twenty-seven years prior to R.S. 2477. *Id.* at 467. The Court disagreed and stated that Congress acquiesced to the public's use and establishment of highways, and therefore R.S. 2477 was a voluntary recognition of preexisting rights. *Id.* at 471.

[68] DOI Rep. to Congress, *supra* note 35, at 16. The DOI report noted:

> The vast majority of cases have found that highway rights-of-way are not limited to the mining and homesteading context. The common logic is that

property which must be compensated by the government if taken by eminent domain.[69] Finally, most courts agree that an R.S. 2477 right-of-way must be accepted by state action, although public use is generally sufficient.[70]

The Tenth Circuit has been involved in greater litigation over the subject than most circuits, with cases from Utah being common.[71] One of the most important cases from that state is *Sierra Club* v. *Hodel*.[72] *Hodel* arose in the early 1990s after Garfield County sought to significantly improve the existing Burr Trail in southern Utah.[73] Conservation groups brought suit in district court to force the BLM to stop the county's construction.[74] They argued that an R.S. 2477 right-of-way had not been created; that even if it had, Garfield County had exceeded the scope of the right-of-way; and that an environmental impact statement was required because the BLM's participation in the project amounted to "major federal action."[75] The district court stated that, according to Tenth Circuit precedent:

> [I]nitial determination of whether activity falls within an established right-of-way is to be made by the BLM and not by the court. The court should pay considerable deference to the BLM's experience in examining the stakes, determining traffic patterns

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> section 8 of the 1866 act has been reenacted, in a distinct and independent statute, Revised Statute 2477, separate from the other provisions of the 1866 Mining Act.

Id.

[69] United States v. 9,947.71 Acres of Land, 220 F.Supp. 328, 337 (D. Nev. 1963) (holding that an R.S. 2477 right-of-way is property that is subject to compensation if taken by the government).

[70] *See*, *e.g.*, Wilderness Soc'y v. Morton, 479 F.2d 842 (D.D.C. 1973) (holding that the State's contract to build a road to assist in pipeline construction was sufficient to accept the R.S. 2477 right-of-way).

[71] Still Standing Stable, LLC v. Allen, 122 P.3d 556 (Utah 2005); Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735 (10th Cir. 2005); San Juan County, Utah v. United States, 420 F.3d 1197 (10th Cir. 2005); Sierra Club v. Lujan, 949 F.2d 362 (10th Cir. 1991); Wilderness Society v. Kane County, Utah, 2006 WL 2471518 (D. Utah 2006); Southern Utah Wilderness Alliance v. National Park Service, 387 F.Supp. 2d 1178 (D. Utah 2005); Southern Utah Wilderness Alliance v. Babbitt, 2000 WL 33914094 *1 (D. Utah 2000); United States v. Garfield County, 122 F. Supp. 2d 1201 (D. Utah 2000); Washington County v. United States, 1996 WL 590911 *1 (D. Utah 1996).

[72] Sierra Club v. Hodel, 675 F. Supp. 594 (D. Utah 1987), *aff'd in part, rev'd in part*, 848 F.2d 1068 (10th Cir. 1988).

[73] *Sierra Club*, 675 F. Supp. at 596.

[74] *Id.* at 594.

[75] *Id.* at 599. The National Environmental Policy Act (NEPA) mandates that an EIS is required for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C) (2000).

> and evaluating the impact of the project on the surrounding environment.[76]

On appeal to the Tenth Circuit, the Sierra Club conceded the existence of the right-of-way but renewed its argument that the scope of the right-of-way had been exceeded.[77] The appeals court concurred with the district court that the BLM was permitted to make initial determinations, noting that the "district court based its findings of fact largely on the testimony and exhibits of several BLM experts."[78] However, contrary to the Sierra Club's contention, the Tenth Circuit held that state law, not federal law, governed the scope of an R.S. 2477 right-of-way.[79] The court did not reach the issue concerning whether state or federal law governs the establishment of a valid R.S. 2477 right-of-way.[80]

These federal cases leave many unresolved questions concerning R.S. 2477.[81] What is the relationship between state and federal law? How does R.S. 2477 interact with FLPMA's goals? Is actual construction required or can "mere use" be sufficient? To what does the term "highway" refer?

Agency Policies

The BLM and its parent agency, the Department of Interior (DOI), have been inconsistent in how they have interpreted and applied R.S. 2477 through the years.[82]

Prior to 1976, consistent with the policy of federal land disposal, there was little DOI guidance on R.S. 2477.[83] In fact, from 1866 to 1898 the DOI provided no regulations.[84] In 1898, the Secretary of the Interior declared unlawful an attempt by Douglas County, Washington, to dedicate sections lines as R.S. 2477 rights-of-way.[85] In 1938, the DOI stated, for the first time, that an R.S. 2477

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[76] *Id.* at 606 (citing City and County of Denver v. Bergland, 695 F.2d 465, 481 (10th Cir. 1982)).

[77] Sierra Club v. Hodel, 848 F.2d. 1068, 1079 (10th Cir. 1988).

[78] *Id.* at 1085 (citing *Bergland*, 695 F.2d at 481).

[79] *Id.* at 1080. In reaching this conclusion the court found the following relevant: BLM regulations supporting the application of state law, congressional acquiescence in the use of state law, and state court precedents applying state law to determine perfection of an R.S. 2477 right of way. *Id.* at 1082. Applying Utah state law, the court held that the county retains all rights to the roads as they existed in 1976. *Id.* at 1083.

[80] *Id.* at 1079.

[81] DOI Rep. to Congress, *supra* note 35, at 12.

[82] Wolter, *supra* note 36, at 317-18.

[83] DOI Rep. to Congress, *supra* note 35, at 15; Birdsong, *supra* note 28, at 527.

[84] DOI Rep. to Congress, *supra* note 35, at 20.

[85] *See* Douglas County Wash., 26 Pub. Lands Dec. 446 (U.S. Dept. of Int. 1898).

grant becomes effective "upon the construction or establishment of highways, in accordance with state laws, over public lands not reserved for public uses. No application should be filed under the act, as no action on the part of the federal government is necessary."[86] This policy was reestablished several times prior to 1976.[87] A 1955 "decision by the DOI shows that R.S. 2477 was considered an authority by which highways could be established across public lands."[88]

After the repeal of R.S. 2477 in 1976, the DOI and the BLM became more active in their management of federal lands and rights-of-way therein.[89] In 1979, the BLM, after realizing the need to manage valid, existing rights-of-way, initially proposed regulations which would have required claimants to file rights-of-way claims within three years.[90] When the final regulations were proposed, the filing requirement became optional; later, the three-year filing window was dropped altogether.[91] In 1994, following a DOI Report detailing the history and management problems associated with R.S. 2477, the BLM again proposed a rule "to clarify the meaning of the statute and provide a workable administrative process and standards for recognizing valid claims."[92] To this end, the proposed regulation would have defined "construction" to require actual, physical construction, and "highway" to require an open public road connecting "places between which people or goods traveled."[93] The proposed rule was never adopted because, in 1996, before publishing of the final regulations, Congress passed an omnibus bill that prohibited all rulemaking regarding R.S. 2477.[94]

Aside from the agency rulemaking, the 1980s and 1990s witnessed many informal policies adopted by DOI solicitors. In 1980, the Interior Solicitor, concerned about the inconsistent court precedents and management of R.S. 2477 under FLPMA, sent a letter to the Assistant Attorney General of the Department

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[86] 43 C.F.R. § 244.55 (1938).

[87] *See* DOI Rep. to Congress, *supra* note 35, at 20.

[88] DOI Rep. to Congress, *supra* note 35, at 20; *see* 43 C.F.R. § 2822.2-2 (1970).

[89] For example, FLMPA, passed in 1976, required federal land managers to actively manage federal lands and develop extensive land use plans. 43 U.S.C. § 1712 (2000).

[90] 43 C.F.R. § 2802.3-6 (1979). The proposed regulations would have required a project description, an environmental protection plan, and a detailed map. *Id.* Additionally, the proposed regulation provided a process for granting or denying the application. 43 C.F.R. § 2802.4 (1979). The application could be denied if the proposed right-of-way was not in the public interest or if the applicant did not demonstrate the financial or technical capability to complete the construction. *Id.* The requirements necessary to establish the existence of the road, however, were noticeably absent from the proposed rule. *See Id.*

[91] 43 C.F.R. § 2802.3-6 (1980); 43 C.F.R. § 2802.3 (1982).

[92] 59 Fed. Reg. 39216 (Aug. 1, 1994).

[93] *Id.*

[94] 110 Stat. 3009-200 (1996).

of Justice, Land and Natural Resources Division.[95] The solicitor, interpreting R.S. 2477, stated that the federal grant of an R.S. 2477 right-of-way applied prospectively; the validity of any claim was a matter of federal law; the phrase "land not reserved for public use" applied to Indian reservations, wildlife refuges, and national parks; and R.S. 2477 required actual construction, not mere use of a route over time.[96]

In 1988, DOI Secretary Hodel, in response to what was perceived to be Alaska's unique problem of having an underdeveloped transportation system, adopted the so-called Hodel Policy, which defined the criteria for the perfection of an R.S. 2477 right-of-way.[97] The term "construction" was interpreted broadly to allow establishment by mere foot or animal travel, "highways" could be established by the expenditure of government monies, and the federal government was said to have neither the duty nor the authority to adjudicate claims.[98]

In 1997, DOI Secretary Babbitt instituted the "Babbitt Policy" in response to Congress' prohibition on final rulemaking regarding the resolution of R.S. 2477 claims.[99] The Babbitt Policy expressly revoked the Hodel Policy, and allowed agency determinations concerning the validity of R.S. 2477 rights-of-way only in situations where there was a pressing need to do so.[100] According to the Babbitt Policy, R.S. 2477 claims were to be decided by the application of state law which existed at the time of R.S. 2477's repeal, but only "to the extent that it is consistent with federal law."[101]

In sum, this review of relevant state, federal, and DOI precedent demonstrates that the historical interpretations of R.S. 2477 have provided few clear guidelines.[102] There are four reasons for the confusion. First, the statutory lan-

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[95] Letter from Deputy Solicitor Frederick Ferguson, to Hon. James W. Moorman, *Standards to be Applied in Determining Whether Highways Have Been Established under the Repealed Statute R.S. 2477 (43 U.S.C. 932)*, 2 (Apr. 28, 1980) (copy available in DOI Rep. to Congress, *supra* note 35, at appendix).

[96] *Id.* at 2-5.

[97] DOI Rep. to Congress, *supra* note 35, at 21-22. The goal of the Hodel Policy was to establish criteria in which federal land managers and interested parties could recognize the existence of R.S. 2477 claims and apply these criteria to all lands under DOI jurisdiction. *Id.* at 23.

[98] *Id.* at 23-24. *See also* Memorandum from Secretary of the Interior, Gale Norton, to Assistant Secretaries of Land and Minerals Management, Fish, Wildlife, and Parks, Indian Affairs, and Water and Science Departmental Implementation of SUWA v. BLM 2 (Mar. 22, 2006) [hereinafter "Norton Memo"] (copy located in DOI Rep. to Congress, *supra* note 35, at appendix).

[99] *See* Norton Memo, *supra* note 98, at attachment 1, 2.

[100] *See id.* While the Hodel Policy permitted broad determinations of the validity of R.S. 2477 claims, the Babbitt Policy restricted agency determinations to rare situations in which a "claimant demonstrated an immediate and compelling need for a determination." *Id.*

[101] *Id.*

[102] Birdsong, *supra* note 28, at 531.

guage and legislative history of R.S. 2477 are shrouded in mystery.[103] Second, the granting of the right-of-way required no formal action of recognition on the part of the government. Thus, often few records exist to determine the validity of a claimed right-of-way.[104] Third, the paucity of federal case law concerning R.S. 2477, coupled with often inconsistent state cases, has created much confusion in interpreting the statute.[105] Finally, there has been a lack of uniformity in determining rights-of-way by the BLM and DOI throughout the statute's lifetime.[106]

By 1996, all of the various threads had coalesced to knot up the courts with confusion and uncertainty.[107] Against this backdrop the Southern Utah Wilderness Alliance filed its case in Utah federal district court. The Tenth Circuit's resolution of the case in 2005 now forms the guidepost for DOI/BLM policy nationwide.[108] Thus, in a sense, it is a step toward clarity. However, it has also opened a Pandora's box.[109]

PRINCIPAL CASE

In October of 1996, SUWA brought suit in federal court against the BLM and the Counties, claiming the Counties were engaging in unlawful road building activities and the BLM was unlawfully acquiescing to the Counties.[110] The BLM cross-claimed against the Counties, alleging trespass in violation of FLPMA.[111] The district court stayed the proceedings to allow the BLM to make an initial determination of the validity of the Counties' claims.[112] After the BLM concluded that fifteen of the sixteen rights-of-way were invalid and that the scope of one of the rights-of-way was exceeded, SUWA sought summary judgment in the district court to enforce the BLM's findings.[113] The district court, interpreting the motion for summary judgment as an agency appeal, discussed the validity of the BLM's findings in accordance with the Administrative Procedure Act's (APA) arbitrary and capricious standard.[114]

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[103] *Id.* at 526.

[104] *SUWA II*, 425 F.3d 735, 741 (10th Cir. 2005).

[105] Norton Memo, *supra* note 98, at attachment 1, 6.

[106] *SUWA II*, 425 F.3d at 760.

[107] Wolter, *supra* note 36, at 319; Birdsong, *supra* note 28, at 527-33.

[108] Norton Memo, *supra* note 98, at 1.

[109] *See infra* notes 166-77 and accompanying text.

[110] SUWA v. BLM, No. 96-836, slip op. at 2-3 (D. Utah May 11, 1998). Specifically, SUWA claimed the Counties violated FLPMA, the Antiquities Act, and the National Environmental Policy Act. *SUWA II*, 425 F.3d at 742.

[111] *SUWA II*, 425 F.3d at 742-43.

[112] *Id.* at 743.

[113] *Id.*

[114] *SUWA I*, 147 F. Supp.2d at 1136. The APA requires a court to review a final action to determine whether the action is arbitrary or capricious. Administrative Procedures Act, 5 U.S.C. § 706(2)(A) (2000).

District Court (SUWA I)

The court began its analysis by discussing the proper scope of review for informal agency adjudications under the APA.[115] The court asserted that the proper standard of review for the agency's factual conclusions was an arbitrary or capricious standard.[116] An arbitrary or capricious standard, which the Tenth Circuit interprets as requiring "an administrative agency determination . . . [to] be supported by 'substantial evidence' found in the administrative record as a whole."[117] On the other hand, review of an agency's statutory interpretation, if made in an "informal policy statements and opinion letters, rather than a formal rule or regulation," is given *Skidmore* deference.[118] Under *Skidmore*, an agency's interpretation is given deference only if it has the "power to persuade."[119]

With these standards in place, the court moved to the substantive issues of the case. It began by reviewing the factual record and determined that the Counties failed to carry their burden of proving the BLM acted arbitrarily and capriciously.[120] Specifically, the court found the BLM's conclusions—that all of the rights-of-way claimed by the Counties were invalid, save one—were supported by the "substantial evidence" required, and, therefore, it upheld the BLM's determinations.[121]

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[115] *SUWA I*, 147 F. Supp. 2d 1130, 1133 (D. Utah 2001).

[116] *Id. See also* 5 U.S.C. § 706(2)(A). The definition of this standard comes from a United States Supreme Court decision, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983), which states that an agency decision is arbitrary and capricious if:

> the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not ascribed to a difference in view or the product of agency expertise.

Motor Vehicle, 463 U.S. at 43.

[117] *SUWA I*, 147 F. Supp. 2d at 1136-37 (citing Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994)). According to *Olenhouse*:

> Where questions of due process and sufficiency of the evidence are raised on appeal from an agency's final decision, the district court must review the agency's decisionmaking process and conduct a plenary review of the facts underlying the challenged action. *It must find and identify substantial evidence to support the agency's action and may affirm agency action, if at all, only on the grounds articulated by the agency itself.*

42 F.3d at 1566 (emphasis added).

[118] *SUWA I,* 147 F. Supp. 2d at 1135 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

[119] *Id.* at 1135 (quoting *Skidmore,* 323 U.S. at 140).

[120] *Id.*

[121] *Id.* at 1137-38. The court did not discuss how the record supported each and every invalidation of the Counties' claims, but summarily stated that "[t]he amount and nature of the evidence presented in support of each of the BLM's determinations is certainly more than a mere scintilla, is sufficient to support the agency's conclusions, and is not outweighed by contrary evidence." *SUWA I*, 147 F. Supp. 2d at 1137.

Two years after the district court ruled on *SUWA I* the Tenth Circuit Court of Appeals decided the case on appeal.[122]

Tenth Circuit Court of Appeals (SUWA II)

In *SUWA II,* the court addressed the issue of primary jurisdiction over R.S. 2477 rights-of-way and ultimately found that the doctrine did not apply.[123] First, the court noted that "[t]he circuits are split over the standard of review of decisions whether to recognize the primary jurisdiction of an administrative agency."[124] The Tenth, Fourth, and District of Columbia Circuits apply an abuse of discretion standard; the First, Second, Eighth, and Ninth Circuits apply a *de novo* standard to the decision over whether to recognize primary jurisdiction.[125] The court ultimately chose to follow Tenth Circuit precedent and apply the former standard.[126] Under the abuse of discretion standard, courts can disturb the BLM's factual findings only if they are arbitrary or capricious.[127] The court set forth the following framework for determining whether primary jurisdiction applied. First, a court must determine whether Congress has "given authority over the issue to an administrative agency."[128] Second, the court must consider whether the reasons and purposes for primary jurisdiction are present.[129] The reasons for primary jurisdiction are twofold.[130] First, the doctrine is used to promote uniformity.[131] Second, it allows those with special expertise to adjudicate issues that are not normally fully understood by judges.[132] If all of these elements are present, a court will apply the doctrine of primary jurisdiction.[133]

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[122] *SUWA II*, 425 F.3d 735 (10th Cir. 2005). Initially, the appeals court rejected the Counties' request for repeal for lack of jurisdiction, reasoning that it could not rule on the case until the district made a final order as required under 28 U.S.C. § 1291. SUWA v. BLM, 69 Fed. Appx. 927 (10th Cir. 2003). Shortly thereafter, the Southern Utah Wilderness Alliance went to the district court, seeking injunctive relief and damages. *SUWA II*, 425 F.3d at 744. The district granted these requests, and the Counties, now with a final order to appeal, brought the case to the Tenth Circuit Court of Appeals where review was granted. *Id.*

[123] *SUWA II*, 425 F.3d at 757.

[124] *Id.* at 750.

[125] *Id.*

[126] *Id.*

[127] *SUWA II*, 425 F.3d at 750.

[128] *Id.* at 751.

[129] *Id.*

[130] *Id.*

[131] *SUWA II*, 425 F.3d at 751.

[132] *Id.*

[133] *Id.*

The *SUWA II* court then applied these elements to the facts.[134] The first issue addressed by the court was whether Congress had given the BLM the authority necessary for primary jurisdiction.[135] The court, relying on the absence of explicit authority in R.S. 2477, past agency positions, and recent congressional prohibitions on R.S. 2477 rulemaking, concluded that the BLM did not have primary jurisdiction of R.S. 2477 right-of-way disputes.[136]

The first rationale the court gave for denying the BLM primary jurisdiction to make binding determinations of the validity of R.S. 2477 claims was the absence of explicit congressional authority.[137] The statutory language of R.S. 2477 does not state whether courts or an agency should resolve R.S. 2477 disputes.[138] The BLM contended that, in the absence of explicit statutory authority, general statutes giving BLM the authority to administer the public lands provided a sufficient basis for primary jurisdiction.[139] Specifically, the agency claimed that 43 U.S.C. § 2 (2000) and 43 U.S.C. § 1201 (2000) both give the Secretary of the Interior broad authority to administer the public lands, including the authority to make binding administrative determinations concerning the validity of R.S. 2477 claims.[140] The BLM also relied on the Supreme Court's decision in *Cameron v. United States* to support its claim of primary jurisdiction.[141] In *Cameron* the Court held that the Land Department (precursor to the BLM) was permitted to make a binding determination concerning the validity of an unpatented mining claim despite the absence of explicit statutory authority.[142] The *Cameron* Court stated that in the absence of some direction to the contrary, general statutory provisions gave the Land Department the authority to adjudicate the validity of unpatented mining claims.[143] Similarly, the BLM argued in *SUWA II*, in the absence of congressional direction to the contrary, the general statutory authority vested in the Secretary of the Interior provides the authority necessary for primary jurisdiction over R.S. 2477 disputes.[144]

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[134] *Id.*

[135] *Id.*

[136] *Id.* at 751-58.

[137] *SUWA II*, 425 F.3d at 757.

[138] *Id.* at 751.

[139] *Id.* at 752.

[140] *Id.* 43 U.S.C. § 2 (2000) states: "The Secretary of the Interior or such office . . . shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States . . . and the issuing of patents for all grants of land under the authority of the Government." 43 U.S.C. § 1201 states: "The Secretary of the Interior . . . is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of Title 32 of the Revised Statutes not otherwise specifically provided for."

[141] *SUWA II*, 425 F.3d at 753 (citing Cameron v. United States, 252 U.S. 450 (1920)).

[142] *Id.*

[143] *Id.* (citing *Cameron*, 252 U.S. at 461).

[144] *Id.*

The *SUWA II* court took issue with the comparison drawn between the unpatented mining claim in *Cameron* and R.S. 2477 rights-of-way.[145] The court noted that, with respect to unpatented mining claims, Congress provided a specific system—the issuance of a patent—for the agency to pass legal title to a claimant who satisfies certain statutory prerequisites.[146] Prior to issuance of a patent, the BLM has the authority to make binding determinations concerning the validity of the unpatented mining claim; after issuance of a patent, disputes concerning the mining claim are resolved in court.[147] In R.S. 2477 Congress established a different system.[148] R.S. 2477 provides no patent process and legal title may pass independent of any formal agency action.[149] Unlike the formal requirements needed for issuance of a patent for a mining claim, R.S. 2477 requires only "acts on the part of the grantee sufficient to manifest an intent to accept the congressional offer."[150] And unlike the patent process for mining claims, "R.S. 2477 creates no executive role for the BLM to play."[151] *Cameron*, the court concluded, does not stand for the proposition that general statutory provisions provide the congressional authority necessary for the agency to adjudicate the validity of R.S. 2477 rights-of-way.[152]

In addition to the absence of explicit congressional authority to adjudicate R.S. 2477 claims, the *SUWA II* court found that longstanding BLM practice confirmed that the BLM did not historically believe it had primary jurisdiction over R.S. 2477 disputes.[153] The court observed that "until very recently, the BLM staunchly maintained that it lacked authority to make binding decisions on R.S. 2477 rights-of-way."[154] In support of this contention, the court referred to several Interior Board of Land Appeal (IBLA) decisions in which the agency generally asserted, "'courts [are] . . . the proper forum for determining whether there is a public highway under [R.S. 2477].'"[155] Additionally, the court noted that "[t]he BLM also has been reluctant, until very recently, to issue regulations governing R.S. 2477 rights-of-way."[156] For example, from 1939 to 1974 the agency refused

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[145] *Id.*

[146] *Id.*

[147] *SUWA II,* 425 F.3d at 753-54 (citing Steel v. St. Louis Smelting & Refining Co., 106 U.S. 447, 451 (1882); *see* United States v. Schurz, 102 U.S. 378, 396 (1880)).

[148] *SUWA II*, 425 F.3d. at 754.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *SUWA II,* 425 F.3d. at 754.

[154] *Id.*

[155] *Id.* at 755 (quoting Leo Titus, Sr., 89 IBLA 323, 337 (1985)).

[156] *Id.*

to involve itself in R.S. 2477 disputes.[157] Moreover, the court noted that Congress barred the agency from recent attempts to promulgate rules relating to R.S. 2477 by a 1997 omnibus bill.[158] Although the court acknowledged this congressional prohibition referred only to rulemaking, "its mere existence undercuts the BLM's primary jurisdiction argument. For primary jurisdiction is appropriate only if R.S. 2477 is an 'issue[] which, under a regulatory scheme, ha[s] been placed within the special competence of an administrative body.'"[159]

The court concluded that, in the absence of an explicit grant of congressional authority, the BLM did not have primary jurisdiction over R.S. 2477 rights-of-way disputes.[160] The court, however, explicitly stated that the agency may make non-binding adjudications for land use planning purposes.[161] These non-binding administrative determinations are not given formal legal deference, but may be used as evidence in litigation.[162] An example of this non-binding administrative determination procedure, the court stated, was *Sierra Club v. Hodel*.[163] According to the *SUWA II* court, *Sierra Club v. Hodel* was not, as argued by the BLM, a primary jurisdiction referral, but an opportunity for the agency to "determine its own position in the litigation."[164]

Because the *SUWA II* court concluded that the district court abused its discretion when it found the doctrine of primary jurisdiction applied to R.S. 2477 disputes, the case was remanded "to permit the district court to conduct a plenary review and resolution of the R.S. 2477 claims."[165]

ANALYSIS

The *SUWA II* court's holding, that the DOI does not have primary jurisdiction over R.S. 2477 rights-of-way, instigated a reversal in DOI policy.[166] The Secretary of the Interior stated that *SUWA II* "effectively requires the Department

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[157] *Id.* at 755-56. *See, e.g.*, 43 C.F.R. § 244.55 (1939); 43 C.F.R. § 244.58(a) (1963); 43 C.F.R. § 2822.1-1 (1974).

[158] *SUWA II*, 425 F.3d at 756 (citing Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208 (1996)).

[159] *SUWA II*, 425 F.3d at 756-57 (quoting United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956)).

[160] *Id.* at 757 ("[N]othing in the terms of R.S. 2477 gives the BLM authority to make binding determinations on the validity of the rights of way granted thereunder . . . [w]e conclude that the BLM lacks primary jurisdiction . . . .").

[161] *SUWA II*, 425 F.3d at 757.

[162] *Id.* at 758.

[163] *Id.* at 757 (citing Sierra Club v. Hodel, 848 F.2d. 1068 (10th Cir. 1988)).

[164] *SUWA II*, 425 F.3d at 758.

[165] *Id.*

[166] Norton Memo, *supra* note 98, at 1.

to alter its current administration of R.S. 2477" nationwide.[167] Thus, the Hodel and Babbitt policies were terminated.[168] The DOI will now apply state law, to the extent it does not conflict with federal law, to make non-binding determinations concerning the validity of an R.S. 2477 right-of-way, therefore, the possibility of adopting a nationwide interpretation of R.S. 2477 has been foreclosed.[169] Given the potential problems of making non-binding R.S. 2477 validity determinations on a state-by-state basis, the agency urges resolution of R.S. 2477 disputes through other means, such as "Title V of FLPMA or other right-of-way authorities, recordable disclaimers, and the Quiet Title Act."[170] Because the DOI is prohibited from making binding determinations on R.S. 2477 claims in the Tenth Circuit, the DOI has formulated a six-step process for making non-binding validity determinations (NBD).[171] These NBDs have no force of law, bind neither party, and are simply a tool for the BLM to plan and manage the land.[172] As will be discussed below, this nationwide change in DOI policy could have been avoided if the *SUWA II* court would have correctly decided the issue of primary jurisdiction.

Primary jurisdiction, as the *SUWA II* court explained, is a prudential doctrine that allocates responsibility between agencies and courts.[173] The application of the doctrine is used to promote uniformity and to allow agency experts to resolve complex issues not generally within the normal competence of the judiciary.[174] The framework for analyzing primary jurisdiction proffered by the *SUWA II* court is

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[167] *Id.* at Attachment 1, 4.

[168] *Id.*

[169] *Id.* ("Thus, while the Department may make non-binding, administrative determinations for its own land-use planning and management purposes, it cannot create a single national standard governing the validity of all R.S. 2477 claims, but instead must look to the particular laws of each State in which a claimed right of way is situated.").

[170] Norton Memo, *supra* note 98, at Attachment 1, 4. Title V of FLPMA permits the granting of rights-of-way, irrespective of potential R.S. 2477 rights, through recordable disclaimers. *See* 43 U.S.C. § 1745. However, many groups prefer the use of R.S. 2477 because it requires no administrative process and is subject to fewer restrictions. Recordable disclaimers are discussed in 43 C.F.R. § 1864, and derive statutory authority from FLPMA § 315. As asserted by the Memo, these disclaimers "have the same effect as a quitclaim deed, estopping the United States from asserting a claim to the interest that is disclaimed." Norton Memo, *supra* note 98, at Attachment 1, 6. Because *SUWA II* determined that claims to property interest are judicial functions, claimants seeking "binding determinations of . . . R.S. 2477 rights . . . must file a claim under the Quiet Title Act, 28 U.S.C. § 2409(a)." *Id.* For an example of a proposed solution to the problems associated with R.S. 2477 *see supra* notes 95-96 and accompanying text.

[171] Norton Memo, *supra* note 98, at Attachment 1, 4.

[172] *Id.*

[173] *SUWA II*, 425 F.3d 735, 750 (10th Cir. 2005).

[174] *Id.*; United States v. W. Pac. R.R. Co, 352 U.S. 59 (1956).

accurate.[175] However, the court reached the wrong conclusion by misapplying the elements and ignoring important precedent.[176] As acknowledged by the *SUWA II* court, analysis of primary jurisdiction involves a three-step process.[177] First, the court must determine whether Congress has given authority to the agency to deal with the issue.[178] If authority has been given, the driving question becomes whether the purpose of the doctrine—uniformity and agency expertise—are present.[179] The second step is to determine if application of the doctrine would promote uniformity.[180] In the third step, the court inquires as to whether the issue is one within the normal competency of judges, or whether the issue is better handled by an agency, given its special expertise.[181]

Did Congress give the Bureau of Land Management authority to adjudicate the validity of R.S. 2477 claims?

The *SUWA II* court answered this question in the negative, holding that the BLM may make non-binding, internal determinations of the validity of R.S. 2477 claims for planning purposes, but may not formally adjudicate claims.[182] As will be shown, this conclusion is not only unsupported by precedent, but it has negative public policy consequences.

In *Sierra Club v. Hodel,* the Tenth Circuit held that the BLM has primary jurisdiction over R.S. 2477 rights-of-way when it stated that the "initial determination of whether activity falls within an established right-of-way is to be made by the BLM and not by the court."[183] The *SUWA II* court rejected reliance on this case, holding that the *Hodel* court was merely allowing the BLM to make non-binding determinations of the scope of an R.S. 2477 right-of-way.[184] This non-binding determination, the *SUWA II* court stated, was not entitled to any formal deference in court.[185] However, in *Hodel,* the district court stated that

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[175] *See W. Pac.*, 352 U.S. 59; Great N. Ry. Co. v. Merchants' Elevator Co., 259 U.S. 285 (1922); Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907); Williams Pipe Line Co. v. Empire Gas Corp., 76 F.3d 1491 (10th Cir. 1996); Volkman v. United Transp. Union, 73 F.3d 1047 (10th Cir. 1996).

[176] *See infra* notes 212-45 and accompanying text.

[177] *SUWA II*, 425 F.3d at 751.

[178] *Id.*; *W. Pac.*, 352 U.S. at 64.

[179] *SUWA II*, 425 F.3d at 751. *See Tex. & Pac. Ry.* Co., 204 U.S. at 440-41 (promotion of uniformity); *Great N. Ry. Co.*, 259 U.S. 285 (agency expertise).

[180] *SUWA II*, 425 F.3d at 751.

[181] *Id.*

[182] *Id.* at 758.

[183] Sierra Club v. Hodel, 848 F.2d 1068, 1084-85 (10th Cir. 1988) (citing City & County of Denver v. Bergland, 695 F.2d 465 (10th Cir. 1982)).

[184] *SUWA II*, 425 F.3d at 758.

[185] *Id.*

it "should pay considerable deference to the BLM's experience" in determining the scope of the R.S. 2477 right-of-way in question. The considerable deference given to the BLM's findings is not the *de novo* standard the *SUWA II* court stated should apply to non-binding determinations.[186] Moreover, in order to determine the scope of an R.S. 2477 right-of-way, the issue in question in *Hodel* on appeal, the BLM must first determine whether the right-of-way is valid in the first place. Therefore, *Hodel* requires the application of primary jurisdiction to R.S. 2477 disputes.

Assuming arguendo that the issue of primary jurisdiction had not been previously addressed, an analogy may be drawn to other mineral laws. The Mining Act of 1872 provides a useful comparison because of its similarities with R.S. 2477.[187] Aside from sharing common language originating from the same 1866 statute, the property interest in an unpatented mining claim and an R.S. 2477 right-of-way require the establishment of certain statutory prerequisites before any interest is conveyed. To establish a valid R.S. 2477 right-of-way the claimant must "construct" a "highway" on "land not reserved for public use"; to establish a valid unpatented mining claim the claimant must discover a valuable mineral on public land.[188] Further, the unpatented mining claim, like an R.S. 2477 right-of-way, requires no governmental action in order for the courts to recognize its validity and give the owner proper protection.[189] Finally, the unpatented mining claim, similar to a perfected R.S. 2477 claim, does not give the owner unfettered rights, but both claims are subject to the rules and regulations of the owner of the

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[186] *See id.* at 750.

[187] *See generally* Birdsong, *supra* note 28, at 557-64. The language found in R.S. 2477, section one, is almost identical to that found in the Mining Act of 1877. Section one of R.S. 2477 states the following:

> [T]he mineral lands of the public domain, both surveyed and unsurveyed, are herby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulation as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

30 U.S.C. §§ 22-23 (2000). The Mining Act of 1872, codified as 30 U.S.C. § 22, states:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C. § 22 (2000).

[188] *See* 43 U.S.C. § 932 (repealed in 1976 by FLPMA) (discussing requirements for R.S. 2477); United States v. Coleman, 390 U.S. 599 (1968) (discussing requirements for mining claim).

[189] *See* Birdsong, *supra* note 28, at 560.

dominant estate, the United States government.[190] Given the similarities between the unpatented mining claim and the R.S. 2477 right-of-way, it is informative to examine how the courts have dealt with the Mining Act in relation to primary jurisdiction. As will be shown below, the same authorities allowing primary jurisdiction in the unpatented mining claim context should permit primary jurisdiction in the R.S. 2477 context.

In 1920, the Supreme Court established that the Land Department had authority to adjudicate the validity of unpatented mining claims in *Cameron v. United States*.[191] Cameron claimed to have perfected a valid mining claim on the rim of the Grand Canyon.[192] The Secretary of the Interior, in the context of a patent hearing, denied his application for a patent because the claim did not fulfill statutory prerequisites.[193] Cameron appealed, claiming that, "although the Secretary had ample authority to determine whether Cameron was entitled to a patent, he was without authority to determine the character of the land or the question of discovery, or to pronounce the claim invalid."[194] The Supreme Court acknowledged that the Mining Act did not explicitly confer authority on the agency to determine the validity of an unpatented mining claim but nonetheless rejected Cameron's claim, holding that "in the absence of some direction to the contrary, the general statutory provisions before mentioned vest [authority] in the Land Department."[195]

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[190] *See* United States v. Locke, 471 U.S. 84, 104 (1985). *See also SUWA II*, 425 F.3d at 747-48 (holding that R.S. 2477 rights-of-way are not tantamount to fee-simple ownership, and those seeking new construction must consult with the BLM); Birdsong, *supra* note 28, at 560.

[191] Cameron v. United States, 252 U.S. 450 (1920).

[192] *Id.* at 457.

[193] *Id.*

[194] *Id.* at 459.

[195] *Id.* at 461 (citing Nesqally v. Gibbon, 158 U.S. 155 (1895)). *See also Cameron*, 252 U.S. at 463 (stating that to hold otherwise "would encourage the use of merely colorable mining locations in the wrongful private appropriation . . ." of public lands). The Land Department is now the Department of the Interior. The general statutory provisions cited by the *Cameron* Court as providing agency authority to adjudicate the validity of unpatented mining claims included Revised Statutes §§ 441, 453, and 2478, which were codified at 43 U.S.C. §§ 1457, 2, and 1201. Section 1457 states: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies: . . . 4. Bureau of Land Management." 43 U.S.C. § 1457 (2000). Section 2 of title 43 of the United States Code states the following:

> The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

43 U.S.C. § 12 (2000). Section 1201 of title 43 of the United States Code states: The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of Title 32 of the Revised Statutes not otherwise specially provided for. 43 U.S.C. § 1201.

Forty-three years later, in *Best v. Humboldt Placer Mining Company,* the Court reestablished the principle that general statutory provisions vest authority in the DOI to determine the validity of unpatented mining claims.[196] In *Best,* the United States sought to build a dam on federal lands.[197] Humboldt claimed to have an unpatented mining claim on the land in question.[198] The United States sued in district court to condemn the property and asked the court to allow the BLM to conduct administrative proceedings to determine the validity of the claim.[199] After the district court granted the United States' request for agency adjudication, Humboldt brought suit to enjoin the proceedings.[200] The district court granted summary judgment to the United States, the appeals court reversed, and the Supreme Court granted certiorari to determine whether the agency was permitted to adjudicate the validity of the claim.[201] The Court first noted that, although underlying legal title to unpatented mining claims is retained by the United States, the "claims are, however, valid against the United States," if the "statutory requirements have been met."[202] The Court concluded that Congress had given the DOI plenary authority to administer the public lands, including the authority to adjudicate the validity of unpatented mining claims.[203] Moreover, not only did the Court permit such proceedings, but it stated "[i]t is difficult to imagine a more appropriate case for invocation of the jurisdiction of an administrative agency."[204]

In sum, as articulated by Professor Bret Birdsong, *Cameron* and *Best* stand for the following principles:

> First, they establish that the Secretary of the Interior's authority to decide the validity of mining claims . . . , despite the lack of specific authorization, is necessarily incident to the congressionally-delegated general authority over the disposition and use of public lands. Second, these cases recognize the specialized expertise of DOI, whose "province is that of determining questions of fact and right under the public land laws, of recognizing or disapproving claims according to their merits, and of granting or refusing patents as the law may give sanction for the one or

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[196] Best v. Humboldt Placer Min. Co., 371 U.S. 334 (1963).

[197] *Id.* at 334-35.

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Best*, 371 U.S. at 335.

[202] *Id.* at 336.

[203] *Id.* at 339. The statutes cited by the Court giving the DOI plenary power include 43 U.S.C. § 1201, quoted at *supra* note 195.

[204] *Best*, 371 U.S. at 338.

> the other."[205] Third, the cases reflect the Court's recognition that the disposition of public lands is a matter of substantial public interest, and that Congress has entrusted the Secretary of the Interior with the protection of that interest, subject to review by courts.[206]

The above principles apply equally to R.S. 2477 rights-of-way.[207] Thus, the same general statutory provisions that apply to the unpatented mining claim—43 U.S.C. sections 2, 12, 1201, and 1457—should also vest authority in the Secretary to adjudicate R.S. 2477 disputes.[208] In these statutes, "Congress has entrusted DOI with administration of the public lands, including land grants."[209] For example, 43 U.S.C. § 1201 provides authority to the Secretary of the Interior to "enforce and carry into execution, by appropriate regulations, every part of the provisions of Title 32 of the Revised Statutes."[210] Title 32 of the Revised Statutes originally encompassed R.S. 2477.[211] Thus, section 1201 expressly provides the Secretary authority over R.S. 2477 rights-of-way. While this authority does not explicitly grant the Secretary of the Interior the power to adjudicate R.S. 2477 disputes, this power "is necessarily incident to the congressionally delegated general authority over the disposition and use of public lands."[212] Therefore, the doctrine of primary jurisdiction applies to R.S. 2477 claims as it does to unpatented mining claims.

The *SUWA II* court, however, expressly rejected *Cameron* and the analogy between the unpatented mining claim and R.S. 2477 rights-of-way, holding that general statutory provisions do not vest authority in the BLM over R.S. 2477 disputes.[213] The *SUWA II* court's rationale for finding *Cameron* inapplicable was based on the fact that R.S. 2477 rights-of-way require no patent for legal title to pass, while mining claims require issuance of a patent prior to conveyance of legal title.[214] Because the patent process is the means by which the agency ensures statutory requirements have been satisfied, the absence of a patent process, the

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[205] Birdsong, *supra* note 28, at 564-65 (citing Boesche v. Udall, 373 U.S. 472, 478 (1963)).

[206] *Id.*

[207] *See id.* at 565.

[208] *See supra* note 195.

[209] Birdsong, *supra* note 28, at 565.

[210] 43 U.S.C. § 1201 (2000).

[211] *Id.*

[212] *See* Birdsong, *supra* note 28, at 563-64.

[213] *SUWA II*, 425 F.3d at 753-57.

[214] *See SUWA II*, 425 F.3d at 753 ("However, this argument ignores a fundamental difference between mining claims and R.S. 2477 rights of way: title to a mining claim passes by means of a patent . . . . Title to an R.S. 2477 right-of-way, by contrast, passes without any procedural formalities and without any agency involvement.").

court concluded, leaves "no executive role for the BLM to play."[215] The alleged passage of legal title, the court believed, forms the line of demarcation between court and agency adjudicative authority: prior to passage of legal title, the DOI may determine the validity of claims against the public lands; after passage of legal title, courts are vested with the sole authority to adjudicate public land disputes.[216] The *SUWA II* court's argument is erroneous because it assumes that after legal title passes the agency is divested of authority to adjudicate the interest conveyed. This contention was expressly rejected in *Boesche v. Udall*.[217] Additionally, the court ignores the fact that a mining patent passes title only to the surface; even without a patent, a valid mining claim gives title to the minerals.[218]

Boesche arose in the context of the Mineral Leasing Act, not the Mining Act.[219] Mineral leases, unpatented mining claims, and R.S. 2477 rights-of-way are different property interests.[220] The principle underlying *Boesche*, however, applies as much to R.S. 2477 rights-of-way as to mineral leases.[221] In *Boesche v. Udall*, the petitioner was awarded an 80-acre, non-competitive mineral lease by Secretary of the Interior Stewart Udall.[222] Udall later realized that the lease awarded to Boesche failed to meet the statutory prerequisites and sought to cancel it.[223] Boesche objected, claiming the Secretary did not hold such power because the Mineral Leasing Act permits cancellation of leases only when the lessee fails to comply with the lease terms.[224] Since Boesche was in compliance with the lease terms the Secretary was powerless to cancel the lease.[225] The Court, citing *Cameron*

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[215] *Id.* at 754. "In fact," the court stated, "because there were no notice or filing requirements of any kind, R.S. 2477 rights of way may have been established—and legal title may have passed—without the BLM ever being aware of it." *Id.*

[216] *Id.* at 754-55 n.6. ("Only after a patent issues is the claim perfected, and from that point onward, issues regarding the nature and extent of the property right are resolved in court." (citing United States v. Schruz, 102 U.S. 378, 396)).

[217] Boesche v. Udall, 373 U.S. 472 (1963).

[218] *See* United States v. Locke, 471 U.S. 84, 86 (1985):

> "Discovery" of a mineral deposit, followed by the minimal procedures required to formally "locate" the deposit, gives an individual the right of exclusive possession of the land for mining purposes, 30 U.S.C. § 26 . . . . For a nominal sum, and after certain statutory conditions are fulfilled, an individual may patent the claim, thereby purchasing from the Federal Government the land and minerals and obtaining ultimate title to them. Patenting, however, is not required, and an unpatented mining claim remains a fully recognized possessory interest.

[219] Mineral Leasing Act, 30 U.S.C. §§ 181-263 (2000).

[220] *See supra* note 187-90 and accompanying text (discussing similarities between unpatented mining claim and R.S. 2477 rights-of-way).

[221] *See* Birdsong, *supra* note 28, at 563-66.

[222] *Boesche*, 373 U.S. at 474.

[223] *Id.*

[224] *Id.* at 475.

[225] *Boesche*, 373 U.S. at 475.

and *Best* for analogous support, rejected the notion that the Mineral Leasing Act was the sole source of statutory power, and held that Congress gave the Secretary broad power to manage public lands, including the power to administratively cancel leases.[226] This authority is assumed present unless Congress had expressly withdrawn it.[227] The Court concluded the Secretary had the power to cancel the lease because Congress had not withdrawn authority.[228] In reaching this conclusion, the Court rejected the distinction between equitable title interests and legal title interests and stated:

> We are not persuaded by petitioner's argument—based on cases holding that land patents once delivered and accepted could be canceled only in judicial proceedings (e.g. Johnson v. Townsley, 13 Wall. 72 [(1871)] . . . Moore v. Robbins, 96 U.S. 530 [(1877)] . . .)—that the administrative cancellation power established by Cameron and the other cases cited is confined to so-called equitable interests, and that a lease, which is said to resemble more closely the legal interest conveyed by patent, is not subject to such power. *We think that no matter how the interest conveyed is denominated the true line of demarcation is whether as a result of the transaction "all authority or control" over the lands has passed from "the Executive Department," . . . or whether the Government continues to possess some measure of control over them.*[229]

Thus, contrary to the *SUWA II* court's opinion, the real test for whether the BLM retains authority over R.S. 2477 rights-of-way is not whether legal title has passed, but whether the BLM "continues to possess some measure of control" over the right-of-way.

One need not look any further than the *SUWA II* court's opinion to determine whether the government continues to possess any measure of control over the rights-of-way.[230] In response to the Counties' argument that notification to the BLM is not necessary to begin new construction on R.S. 2477 rights-of-ways, the court stated: "right of way is not tantamount to fee simple ownership of a defined territory."[231] Numerous other cases also demonstrate that the BLM retains control

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[226] *Id.* at 476.

[227] *Id.*

[228] *Id.* at 485.

[229] *Boesche,* 373 U.S. at 477 (quoting Moore v. Robbins, 96 U.S. 530, 533 (1877)) (emphasis added).

[230] *SUWA II*, 425 F.3d 735, 748 (10th Cir. 2005).

[231] *Id.*

over R.S. 2477 rights-of-way.[232] The interest conveyed in R.S. 2477 right-of-way is not in dispute: "the United States owns a fee interest subject to a right-of-way, in the nature of an easement, for the construction of highways."[233] Therefore, under the *Boesche* standard, the BLM's authority to adjudicate R.S. 2477 claims is not extinguished by the alleged passing of legal title, but continues because of the agency's continuing ownership of underlying land and continued control over the rights-of-way.

The *SUWA II* court's additional rationales for denying the BLM primary jurisdiction over R.S. 2477 disputes are equally unavailing. Relying on past agency actions and a 1997 Omnibus Act which prohibited the agency from making "final rules or regulations," the court contented that Congress did not give the BLM authority to adjudicate R.S. 2477 claims.[234] The 1997 Omnibus Act states, in its entirety:

> No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. [§] 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act [Sept. 30, 1996].[235]

The distinction between agency rulemaking and adjudication is well established.[236] "Agency rulemaking sets a prospective standard of conduct," whereas "agency adjudication by individual order resolves an individual dispute by retrospectively applying law and policy to particular facts."[237] Surely Congress was aware of this distinction when it passed the bill. The fact that agency adjudication was omitted from the statute indicates that Congress did not intend to curtail this authority.[238]

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[232] *See*, *e.g.*,United States v. Vogler, 859 F.2d 638 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989) (holding that the National Park Service had authority to regulate access and mining within Alaska's national parks); United States v. Garfield County, 122 F. Supp. 2d 1201 (D. Utah 2000) (holding that the county must consult with the NPS and get permission prior to widening an existing R.S. 2477 right-of-way).

[233] Birdsong, *supra* note 28, at 565 (citing Vogler v. United States, 859 F.2d 638, 642 (9th Cir. 1988)).

[234] *See SUWA II*, 425 F.3d at 756.

[235] Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208 (1996).

[236] *See* 5 U.S.C. §§ 551(4), 551(7) (2000) (agency rulemaking and agency adjudication, respectively).

[237] *See* Brief of Federal Appellee at 30, SUWA v. BLM, 425 F.3d 735, Nos. 04-4071, 04-4073 (10th Cir. 2004).

[238] *See id.* The *SUWA II* court responded that the prohibition referred only to final rules or regulations because the BLM never had the authority to adjudicate R.S. 2477 disputes. *SUWA II*, 425 F.3d at 756 ("there was . . . no such authority to preserve."). This ignores the fact that the

As additional support for the lack of primary jurisdiction, the court, referring to a series of state court opinions, averred that "[u]ntil very recently, the BLM staunchly maintained that it lacked authority to make binding decisions on R.S. 2477 rights of way."[239] These cases, however, simply do not support the claim the BLM has "staunchly maintained" the lack of authority to adjudicate R.S. 2477 claims, but, instead, demonstrate only that it had declined to do so in the past.[240] Additionally, the *SUWA II* court bolstered its conclusion by reference to the 1993 DOI Report to Congress.[241] In its report, the DOI acknowledged that "[c]ourts must ultimately dertermine [sic] the validity of such [R.S. 2477] claims."[242] The passage, read in context, "states generally that BLM does not make binding R.S. 2477 determinations, but does not state that the BLM lacks the authority to make binding R.S. 2477 determinations if it chooses to do so."[243] Moreover, policy statements found in reports do not legally bind the agency or have the force of law.[244]

After examination of the *SUWA II* court's argument and case precedents, it is clear that Congress, by general statutory provisions, permitted the BLM to adjudicate claims concerning the validity of R.S. 2477. However, for the doctrine of primary jurisdiction to apply, the twin goals of the doctrine must also be present.[245]

Would applying the doctrine of primary jurisdiction to R.S. 2477 claims promote regulatory uniformity?

The *SUWA II* court never had occasion to reach this question specifically because it concluded that Congress never gave the BLM authority to adjudicate

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BLM had been attempting to adjudicate R.S. 2477 disputes in the past. *See supra* notes 89-94 and accompanying text. Surely Congress would have been aware of this fact and taken action accordingly to prohibit R.S. 2477 adjudication.

[239] *SUWA II*, 425 F.3d at 754.

[240] *See* Brief of Federal Appellee, *supra* note 237, at 26. For example, the *SUWA II* court relied on the following to back up its assertion that the BLM had maintained that it lacked authority to adjudicate R.S. 2477 claims: Kirk Brown, 151 IBLA 221, 227 n.6 (1999) ("Normally, the existence of an R.S. 2477 road is a question of state law for adjudication by state courts."); James S. Mitchell, William Dawson, 104 IBLA 377, 381 (1988) ("[T]he Department has taken the consistent position that, as a general proposition, state courts are the proper forum for determining whether, pursuant to [R.S. 2477], a road is properly deemed to be a 'public highway.'").

[241] *SUWA II*, 425 F.3d at 755.

[242] DOI Rep. to Congress, *supra* note 35, at 25.

[243] Brief of Federal Appellee, *supra* note 237, at 26.

[244] *See* Am. Mining Cong. v. Marshall, 671 F.2d 1251, 1263 (10th Cir. 1982).

[245] *SUWA II*, 425 F.3d 735, 751 (10th Cir. 2005). As discussed previously, the twin aims of primary jurisdiction are to promote uniformity and allow agencies with special expertise decide issues generally outside the competence of judges.

R.S. 2477.[246] However, in the court's opinion concerning the application of federal and state law, the court stated that R.S. 2477 has been applied without any unified standard for over 130 years, and concluded that there is no need for a uniform policy.[247] The court reasoned that specific areas, such as Alaska, require unique policies.[248] Applying state law would ensure that policies responded to each state's distinctive geographic environments.[249] In this respect, the court erred.

Allowing the BLM to adjudicate claims using a federal standard "would enable the agency to impose a uniform interpretation of the terms of the grant, something that piecemeal adjudication has failed to provide."[250] Moreover, contrary to the *SUWA II* court's decision, a national uniform policy is necessary to serve agency goals articulated in FLMPA.[251] For example, FLPMA requires the BLM to manage the lands for multiple use and sustained yield and to "take any action necessary to prevent unnecessary or undue degradation."[252] Although the agency may not diminish or reduce a right-of-way established prior to 1976, the agency has a statutory duty to prevent claimants from asserting bogus R.S. 2477 claims if they would unnecessarily degrade the environment.[253] Prior to taking action and developing land use planning documents, the agency must know if a dry creek bed or old foot trail is a valid R.S. 2477 right-of-way. However, as evidenced by the past, courts have interpreted R.S. 2477 differently.[254] Agency adjudication would allow for the development of a uniform statutory standard and, over time, provide a body of agency precedents that would ensure greater predictability.

Private land owners also would benefit from agency adjudication.[255] Federal lands sold to individuals are subject to preexisting R.S. 2477 rights-of-way.[256] Given the informal nature of the grant, these rights-of-way do not generally

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[246] *SUWA II*, 425 F.3d at 749-58.

[247] *Id.* at 766-67.

[248] *Id.* at 767.

[249] *Id.*

[250] Birdsong, *supra* note 28, at 566.

[251] 43 U.S.C. § 1701 (2000). As acknowledged by the *SUWA I* court, "Congress has specifically stated that determination of the validity of R.S. 2477 claims 'should be drawn from the intent of R.S. 2477 and FLPMA.'" *SUWA I*, 147 F. Supp. 2d 1130, 1138 (D. Utah 2001) (citing H.R. Conf. Rep. No. 10-5503 (1992)).

[252] 43 U.S.C. § 1701(7); *see also* 43 U.S.C. § 1732(b).

[253] *Cf.* Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 42 (D D.C. 2003) ("FLPMA, by its plain terms, vests the Secretary of the Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land.").

[254] *See supra* note 64 and accompanying text.

[255] *See generally* Brief of Amici Curiae, Property Owners for Sensible Roads Policy and Jana and Ron Smith, SUWA v. BLM, 425 F.3d 735, Nos. 04-4071, 04-4073 (10th Cir. 2005).

[256] *Id.*

show up in title searches.[257] Often the first sign of an R.S. 2477 right-of-way on private property comes from an individual boldly asserting his or her rights.[258] For example, the Chamberlins, homeowners living in the mountains outside of Boulder, Colorado, purchased a home without notice of any existing rights-of-way.[259] Thereafter, recreational users, asserting an R.S. 2477 right-of-way, tore down no trespassing signs and drove recreational vehicles across the property, day and night.[260] Not only was the Chamberlins' property affected, but the neighbors experienced increased noise, diminished property values, and vandalism due to the recreational users' activities.[261] In protest to the Chamberlins' insistence on blocking access, recreational users smashed a neighbor's car windows and killed one of the neighbor's dogs.[262] The application of a national unified standard would make it easier for private land owners to determine whether their property is subject to R.S. 2477 rights-of-way, and therefore, better understand and enforce their rights.

Would applying the doctrine of primary jurisdiction to R.S. 2477 allow agency experts to resolve complex issues not generally within the normal competence of the judiciary?

As *SUWA I* and *SUWA II* demonstrate, the adjudication of R.S. 2477 disputes is a highly factual determination.[263] Old maps and photographs must be located, testimony concerning prior land uses must be taken, city and county maintenance logs must be dug up, personnel must be deployed to investigate current and past road conditions, and comment and evidence must be submitted by the contesting parties.[264] For example, in the principal case, the BLM evaluated the proposed "Devil's Garden" right-of-way by reference to site inspections, BLM and geological surveys, aerial photographs, land survey systems, wilderness inventories, BLM maintenance records, BLM planning documents, project records for the Federal Highway Administration, and letters and interviews from constituency groups.[265] After this extensive review of the record, the agency concluded that no right-of-way had been established.[266] Certainly, most judges do not have access to

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[257] Property Owners for Sensible Roads Policy, http://www.posrp.org/Testimony%20by%20AJ.htm (last visited March 8, 2007).

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] Brief of Amici Curiae, Property Owners for Sensible Roads Policy and Jana and Ron Smith, supra note 255, at 7.

[263] *SUWA I*, 147 F. Supp. 2d 1130, 1137-38 (D. Utah 2001).

[264] *Id.* at 1137.

[265] *Id.*

[266] *Id.*

this kind of information, and would not have the expertise or time to analyze it if they did. As summarized by Professor Birdsong, "[a]n agency process that allows for the application of agency expertise through extensive field investigations into claims, broad public participation and input would enhance the quality of the factual determinations and their consistency with the purposes of modern federal land management laws."[267] It is clear that the BLM possesses special expertise not generally within the normal competency of judges. Therefore, the third element required for primary jurisdiction, special agency expertise outside the competence of judges, is present.

Given that all three elements of primary jurisdiction are present—Congressional approval, regulatory uniformity, and agency expertise—the *SUWA II* court should have affirmed the district court's decision to allow the BLM to make binding adjudications.

CONCLUSION

Since its repeal in 1976, R.S. 2477 has been plagued with uncertainty. State and federal cases have reached varying results, and DOI and BLM policy has been inconsistent. Given the indeterminable nature of R.S. 2477 claims, increased litigation, and more stringent management mandates under FLPMA, the need for a uniform national policy for the statute has never been greater. *SUWA I*, applying the doctrine of primary jurisdiction, opened the door for the BLM to make binding adjudications of R.S. 2477 claims, subject to judicial review. However, just as the door opened, the *SUWA II* court slammed it shut again. The *SUWA II* court, while clarifying some unresolved questions, foreclosed the possibility of binding BLM adjudication. Not only was this decision reached in error, but, without primary jurisdiction, the uncertainty created by piecemeal court decisions will. It is clear that Congress must now do what the *SUWA II* court forbade: pass legislation allowing agency adjudication of R.S. 2477 rights-of-way.

[267] Birdsong, *supra* note 28, at 566.

CIVIL RIGHTS—No Hitting Back: Schools Have to Play by the Title IX Rules; *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005).

*Elisa M. Butler**

Introduction

The Birmingham Board of Education hired Roderick Jackson in 1993 to teach physical education and to coach a girls basketball team.[1] Six years later, in 1999, Jackson transferred to Ensley High School.[2] Not long after his transfer, Jackson identified disparate treatment between the boys and girls basketball teams in terms of access to equipment and facilities.[3] He also alleged that the girls team was receiving less funding than the boys.[4] In December 2000, Jackson complained to his superior about the unequal treatment, but did not receive a response, and the disparity in treatment continued.[5] Jackson persisted in advocating for the equal treatment of the girls basketball team, but his complaints went unheeded.[6] Subsequently, Jackson received negative work evaluations, and was ultimately dismissed as the girls basketball coach in May 2001.[7] At that time in his career, Jackson had taught and coached for the Birmingham School District for eight years.[8] Although he was dismissed from coaching, Jackson continued to teach physical education for the duration of his case.[9]

After dismissal from his coaching duties, Jackson filed suit in the United States District Court for the Northern District of Alabama claiming a violation of his civil rights based on Title IX of the Education Amendments of 1972.[10] He claimed that the school board violated Title IX by retaliating against him for protesting the unequal treatment of the girls basketball teams.[11] The school board, however, argued that there was no Title IX private cause of action for third-party

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[1] Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Jackson*, 544 U.S. at 171.

[7] *Id.* at 171-72.

[8] *See id.* at 171.

[9] *Id.* at 172.

[10] *Id.*; *see also* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2006).

[11] *Jackson*, 544 U.S. at 172.

retaliation claims.[12] The district court agreed and granted the board's motion to dismiss.[13]

Jackson appealed to the Court of Appeals for the Eleventh Circuit, which also sided with the school board.[14] It reasoned that Congress did not expressly create a private right of action when it enacted the statute, and the court would not imply one.[15] The U.S. Supreme Court granted certiorari to settle the question and, in a 5-4 decision, reversed the Eleventh Circuit's holding.[16]

This note will generally examine private rights of action implied by the courts, and contend that the Supreme Court correctly decided *Jackson v. Birmingham Board of Education* when it held that Title IX implies a private cause of action for third-party retaliation claims. This note will scrutinize the Court's decision in *Jackson*, and after extensive analysis, illustrate that the Court's holding in *Jackson* was ultimately correct. Furthermore, this note will consider some of implications that this decision has on Title IX as well as other statutes.

BACKGROUND

Title IX states, in pertinent part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[17] Congress enacted Title IX pursuant to its Spending Clause power, and "patterned [it] after Title VI of the Civil Rights Act of 1964."[18] Title IX's purpose is to address issues involving discrimination on the basis of sex that are not covered by Title VI or VII of the Civil Rights Act of 1964.[19] Title IX is pervasive in its application "appl[ying] to virtually all public and private educational institutions, and includ[ing] all institutional operations such as academic programs or athletics."[20]

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[12] *Id.*

[13] *Id.*

[14] Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333 (11th Cir. 2002).

[15] *Id.* at 1345.

[16] Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171, 184 (2005).

[17] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006).

[18] Cannon v. Univ. of Chicago, 441 U.S. 677, 694 (1979); *see also* Bradford C. Mank, *Are Anti-Retaliation Regulations in Title VI or Title IX Enforceable in a Private Right of Action: Does* Sandoval *or* Sullivan *Control this Question?*, 35 SETON HALL L. REV. 47, 59 (2004).

[19] *See* Mank, *supra* note 18, at 60.

[20] *Id.* at 60.

Title IX was introduced to Congress for debate in 1972.[21] While this was the first time this bill was introduced, the idea of equality in education dates back to the late 1960s.[22] By the summer of 1970, Congress began focusing on sex bias in education with hearings before a special House subcommittee.[23] Subsequently, Senator Birch Bayh of Indiana introduced Title IX in 1972.[24] Senator Bayh stated that the bill's purpose was to battle "the continuation of corrosive and unjustified discrimination against women in the American educational system."[25] He stressed that inequities in education often lead to inequities in employment opportunities.[26] Although the House and the Senate seemed to agree that there was a need for change, there were difficulties in passing this bill.[27] Many members of Congress feared that passage of the statute would lead to reverse discrimination and quotas.[28] Senator Bayh stressed, however, that "the amendment is not designed to require specific quotas. The thrust of the amendment is to do away with every quota."[29] Congress finally agreed when the House attached a floor amendment to the bill stipulating that quotas would not be required.[30] The newly-clarified legislation was enacted as Title IX of the Education Amendments of 1972.[31]

The result of the debate in Congress over the specifics of Title IX was a broadly worded statute patterned after Title VI of the Civil Rights Act of 1964.[32] Because this statute was worded so broadly, Congress left the task of interpreting the statute and creating regulations to the Department of Health, Education, and Welfare

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[21] U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE IX LEGAL MANUAL 17 (Jan. 11, 2001), *available at* http://www.usdoj.gov/crt/cor/coord/ixlegal.htm [hereinafter TITLE IX LEGAL MANUAL].

[22] *Id.* at 16-17. The emphasis on sex discrimination occurred during the civil rights movement. *Id.* at 16. During this time, people began noticing the disparate treatment and earning gaps occurring between males and females. *Id.* Consequently, the focus shifted toward inequities in education, which had inhibited the progress of women. *Id.* Advocacy groups began speaking out and filed class action lawsuits because of an "industry-wide pattern of sex bias against women who worked in colleges and universities." *Id.*

[23] TITLE IX LEGAL MANUAL, *supra* note 21, at 16; *see also Sex Discrimination Regulations: Hearings Before the Subcomm. on the Postsecondary Educ. of the H. Comm. on Educ. and Labor*, 94th Cong. (1975).

[24] TITLE IX LEGAL MANUAL, *supra* note 21, at 17.

[25] 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh).

[26] TITLE IX LEGAL MANUAL, *supra* note 21, at 17.

[27] *Id.* at 18.

[28] *Id.*

[29] 117 CONG. REC. 30,409 (1971) (statement of Sen. Bayh).

[30] TITLE IX LEGAL MANUAL, *supra* note 21, at 18.

[31] *Id.* at 19.

[32] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858 (Aug. 30, 2000) (to be codified at 28 C.F.R. part 54); *see also* TITLE IX LEGAL MANUAL, *supra* note 21, at 8.

(HEW).[33] The HEW subsequently adopted a multitude of guidelines to create a framework for the application of Title IX to education programs.[34] Following the agency adoption of these regulations, Congress was given the opportunity to review them to determine whether they were consistent with Congress' intent in enacting Title IX.[35] Although there were some disputes in Congress as to whether the regulations should be disapproved in whole or in part, ultimately Congress opted not to disapprove the regulations at all.[36]

In 1980, the HEW split into two distinct departments, the Department of Education and the Department of Health and Human Services.[37] The regulations of the HEW were adopted by both departments.[38] As additional protection, in 1980, President Jimmy Carter enacted Executive Order 12,250 which created power in the Attorney General to provide leadership for the "consistent and effective implementation" of various civil rights statutes, including Title IX.[39] Because the Attorney General is the head of the U.S. Department of Justice, the agency was also charged with enacting rules for the application of Title IX.[40] The Department of Justice did not use this power until 1999 when it published a Notice of Proposed Rulemaking to implement Title IX.[41] The rules eventually adopted by the Department of Justice are virtually identical to both HEW and Department of Education regulations.[42] The only changes made to the old

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[33] TITLE IX LEGAL MANUAL, *supra* note 21, at 23; *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,859.

[34] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 45 C.F.R § 86 (2006); *see also* TITLE IX LEGAL MANUAL, *supra* note 21, at 23; *and* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,859.

[35] David S. Cohen, *Title IX, Beyond Equal Protection*, 28 HARV. J. L. & GENDER 217, 246-47 (2005). The case of *INS v. Chadha* creates questions as to whether this process is constitutional. *See* INS v. Chadha, 462 U.S. 919 (1983). But this process is important, in this case, because it illustrates legislative intent.

[36] *See* Cohen, *supra* note 35, at 247. These regulations, approved by Congress included a regulation against retaliation. *See* 34 C.F.R. § 106.71 (2006) (incorporating Title VI regulation prohibiting retaliation, 34 C.F.R. § 100.7(e) (2006)).

[37] TITLE IX LEGAL MANUAL, *supra* note 21, at 23; *see also* Melanie J. Perez, Note, *Protecting All Victims? The Rise of Retaliation Claims Under Title IX of the Education Amendments of 1972*, 57 RUTGERS L. REV. 1145, 1150-51 (2005).

[38] *See* 34 C.F.R. §§ 106-106.71 (2006) *and* 45 C.F.R. §§ 86-86.71 (2006); *see also* TITLE IX LEGAL MANUAL, *supra* note 21, at 23. Some of the regulations adopted by the HEW include prohibitions of discrimination of the basis of sex in housing, facilities, access to course offerings, counseling, financial assistance, health insurance benefits, athletics, etc. *See* 45 C.F.R. §§ 86.32-86.41 (2006).

[39] Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

[40] *See id.*

[41] *See* TITLE IX LEGAL MANUAL, *supra* note 21, at 23.

[42] *Id.* at 23-24; *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,859 (Aug. 30, 2000).

regulations reflect statutory revisions and "modifications to ensure consistency with Supreme Court precedent."[43]

Title IX's application is quite broad.[44] This breadth is shown by the regulations promulgated by the agencies charged with its interpretation: they "appl[y] to all aspects of education programs or activities operated by recipients of federal financial assistance."[45] Title IX also applies to a broad spectrum of activities occurring within educational programs.[46] It prohibits discrimination on the basis of sex in housing, access to course offerings, access to schools, counseling, financial assistance, health and insurance benefits, and athletics.[47] Title IX also prohibits educational programs from discriminating in employment practices.[48]

Not only is Title IX broadly applied to activities within education programs, but it also broadly defines educational programs receiving federal financial assistance.[49] Title IX applies to educational programs that receive federal financial aid through direct means, such as grants or loans applied directly to the institution.[50] It also applies to educational programs that receive financial assistance indirectly, such as through federal grants and loans given to students who, in turn, use these to pay the institution that they attend.[51] Although the agencies did not explicitly spell out that educational programs would be forced to comply with Title IX if they received federal financial assistance through indirect means, the Supreme Court ruled that this was the case in 1984.[52] In *Grove City College v. Bell*, the

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[43] TITLE IX LEGAL MANUAL, *supra* note 21, at 24; *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,859.

[44] *See*, *e.g.*, TITLE IX LEGAL MANUAL, *supra* note 21, at 25-55.

[45] *Id.* at 7.

[46] *Id.* at 7-8.

[47] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,871-72; *see also* TITLE IX LEGAL MANUAL, *supra* note 21, at 85-93.

[48] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,873-74; *see also* TITLE IX LEGAL MANUAL, *supra* note 21, at 73-75.

[49] *See*, *e.g.*, TITLE IX LEGAL MANUAL, *supra* note 21, at 25.

[50] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. at 52,866; *see also* TITLE IX LEGAL MANUAL, *supra* note 21, at 26.

[51] TITLE IX LEGAL MANUAL, *supra* note 21, at 30.

[52] Grove City Coll. v. Bell, 465 U.S. 555, 564 (1984) (overruled on another point of law by the Civil Rights Restoration Act of 1987). The Court looked at the legislative history of Title IX and determined that Congress intended for the statute to cover those institutions that receive assistance indirectly. *Id.* at 569-70.

Court ruled that it did not matter that the college did not receive federal financial aid directly from the government; it would still be required to comply with Title IX because it received funds indirectly.[53]

In *Grove City College*, the Court determined that Congress intended educational programs that receive federal financial assistance, either directly or indirectly, to be under Title IX's thumb. The Court, however, tempered this ruling by finding that the entire educational institution could not be sanctioned for refusing to follow Title IX—only the part of the institution that was receiving federal financial assistance was required to comply.[54] This ruling seemed to narrow the scope of Title IX and how it could be applied to educational programs.

Congress, however, again widened the scope of Title IX by amending the statute with the Civil Rights Restoration Act of 1987 ("CRRA") after the Court's *Grove City* decision.[55] Congress intended the CRRA to establish the "principle of institution-wide coverage" for Title IX.[56] Therefore, if part of an educational institution receives federal financial assistance either directly or indirectly, it will be required to follow Title IX throughout the entire institution. This statute directly overruled the Court's holding in *Grove City College*.[57] Although this widened the scope of Title IX once again, it is important to note that Title IX only reaches educational programs.[58] Therefore, if part of an institution is educational and part is not, sanctions for violating Title IX could not be applied to the non-educational portion of the institution.[59] While Title IX only applies to educational programs, its reach is broad within this area. As shown, this is exactly what Congress intended.[60] Title IX was deliberately enacted to reach into the farthest corner of education to remedy discrimination on the basis of sex.[61]

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[53] *Id.* at 563-70. The college was receiving federal financial assistance indirectly because students who attended the college were given federal grants which were used to pay tuition, fees, and room and board. *Id.* at 559.

[54] *Id.* at 573.

[55] TITLE IX LEGAL MANUAL, *supra* note 21, at 49; *see also* Civil Rights Restoration Act of 1987, 29 U.S.C. § 794 (2006).

[56] TITLE IX LEGAL MANUAL, *supra* note 21, at 49.

[57] If this case were decided after the CRRA was enacted the Court would be required to find that the entire college would be subject to sanctions because part of the college was receiving federal financial assistance indirectly. *See* Grove City Coll. v. Bell, 465 U.S. 555 (1984); *see also* Civil Rights Restoration Act of 1987, 29 U.S.C. § 794(b) (2006).

[58] TITLE IX LEGAL MANUAL, *supra* note 21, at 49.

[59] *Id.*

[60] *See supra* notes 21-57 and accompanying text.

[61] *See supra* notes 21-57 and accompanying text.

As a result of congressional intent to continually broaden Title IX, courts have consistently interpreted the statute very broadly.[62] In fact, the Supreme Court stated that "[t]here is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'"[63] As part of this broad scope, the Court interpreted Title IX to imply private rights of actions.[64] It also broadly interpreted Title IX to apply to employees as well as students.[65] Finally, the Court allowed monetary awards when intentional discrimination occurs in violation of Title IX.[66] The Court's history illustrates the broad reach extended in this statute.

Because *Jackson v. Birmingham Board of Education* rests on the question of whether a private right of action should be implied for claims of third-party retaliation under Title IX, *Sullivan v. Little Hunting Park, Inc.* is an important case to discuss. *Sullivan* signaled the first time the Court implied a private right of action for retaliation.[67] Sullivan was a white man who leased his home to Freeman, an African-American man.[68] Along with the rental, Sullivan assigned Freeman the right to use the community recreational facilities.[69] The community park board of directors rejected Sullivan's assignment because Freeman was African-American.[70] Subsequently, Sullivan protested the board's refusal.[71] The board then told Sullivan that it was expelling him from the corporation.[72] Sullivan sued the board, claiming that it illegally retaliated against him.[73] The Supreme Court reasoned that if this retaliation were allowed to stand, it would "give impetus to the perpetuation of racial restrictions on property."[74] Sullivan, therefore, had a private right of action

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[62] *See* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); *see also* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992); *and* North Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).

[63] *North Haven*, 456 U.S. at 521 (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

[64] Cannon v. Univ. of Chicago, 441 U.S. 677, 709 (1979) (holding that there is a private right of action for Title IX violations).

[65] *North Haven*, 456 U.S. at 520 (holding that Title IX applies to employees as well as students).

[66] Franklin v. Gwinnett County Public Sch., 503 U.S. 60, 76 (1992) (holding that monetary damages are available for intentional Title IX violations).

[67] Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). This case was not a Title IX case. It is similar to *Jackson*, however, because it was based on a statute protecting a certain class of people. *See id.* at 234-35. Similar to Jackson, Sullivan was a member of the non-protected class advocating for the rights of a person in the protected class, and was subsequently retaliated against. *See id.*

[68] *Id.* at 235.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Sullivan*, 396 U.S. at 235.

[73] *Id.* Sullivan sued the board under 42 U.S.C. § 1982 which provides, "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *Id.*

[74] *Id.* at 237.

because "the white owner is at times 'the only adversary' of the unlawful restrictive covenant."[75] This is an important case because it provides the legal context in which Title IX was passed.[76]

Not only is the legal context in which the statute was passed important to understand, it is also important to explore established Supreme Court tests that deal with similar issues. *Cort v. Ash* provided just such a test. This case established a four-part test to determine whether courts should imply a private right of action when Congress has not explicitly provided for one.[77] A corporate director had misused corporate funds.[78] Ash, a shareholder, sued under a federal statute that "provide[d] only for a criminal penalty."[79] The Court was compelled to determine whether to imply a private cause of action under the statute.[80] The Court pronounced four relevant factors: (1) whether "the plaintiff [is] one of the class for whose especial benefit the statute was enacted;'" (2) whether "there [is] any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;" (3) whether "it [is] consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff;" and (4) whether "the cause of action [is] one traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law."[81] While it articulated these factors, the Court refused to imply a private right of action in *Cort* because that would mean intruding "into an area traditionally committed to state law."[82] Although Ash failed in this case, courts continue to use this test to find that private rights of action exist under other statutes.[83]

While the Court articulated a test concerning private rights of action, it was not until *Cannon v. University of Chicago* that it was applied to Title IX.[84] The

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[75] *Id.* (quoting Barrows v. Jackson, 346 U.S. 249, 259 (1953) (holding a restrictive covenant preventing African-Americans from buying property in a neighborhood valid as long as it was agreed to voluntarily)).

[76] Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); *Jackson*, 544 U.S. at 176-77.

[77] Cort v. Ash, 422 U.S. 66 (1975).

[78] *Id.* at 70-73.

[79] *Id.* at 71; *see also* Hatch Act Reform Amendments of 1993, 18 U.S.C. § 610 (2006).

[80] *Cort*, 422 U.S. at 74.

[81] *Id.* at 77-78 (quoting Tex. & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916)).

[82] *Cort*, 422 U.S. at 85. With this factor, the Court is inquiring as to whether a federalism problem would arise if a private right of action were implied. *See id.*

[83] *See*, *e.g.*, California v. Sierra Club, 451 U.S. 287, 293-95 (1981) (holding that a private right of action should not be implied because the plaintiff failed the first factor of the *Cort* test); *see also* Cannon v. Univ. of Chicago, 441 U.S. 677, 688-709 (1979) (holding that a private right of action exists because the plaintiff met all four factors of the *Cort* test); *and* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 37-41 (1977) (holding that a private right of action should not be implied because the plaintiff failed the first factor of the *Cort* test); *and* Reeves v. Cont'l Equities Corp. of America, 912 F.2d 37, 40 (1990) (holding that a private right of action should not be implied because the plaintiff failed the first two factors of the *Cort* test).

[84] Cannon v. Univ. of Chicago, 441 U.S. 677, 688-709 (1979).

University of Chicago Medical School denied admission to Geraldine Cannon.[85] She maintained the University's rejection was based on her sex and sued, claiming that the school's denial violated her rights under Title IX.[86] In allowing a private action, the Court relied heavily on the four-part test articulated in *Cort v. Ash*.[87] Cannon satisfied the first prong because the statute protects those participating in or attempting to participate in federally-funded education programs, and the University of Chicago Medical School was a federally-funded educational program.[88]

For the second prong, the Court analogized Title IX to Title VI claims, in which it had already implied a private right of action for racial discrimination.[89] Title IX was "patterned after Title VI of the Civil Rights Act of 1964" and, at the time, the federal courts had already developed a private right of action under Title VI.[90] Therefore, Congress would assume Title IX would be "interpreted and applied as Title VI had been during the previous eight years."[91]

Cannon satisfied the third prong, as well.[92] Title IX has two purposes. The first is to "avoid the use of federal resources to support discriminatory practices."[93] The second is to "provide individual citizens effective protection against those practices."[94] The first purpose is satisfied by federal procedures which may terminate funds if institutions discriminate.[95] But this protection does not completely fulfill the second purpose of the statute.[96] Terminating federal funding is often a punishment that is too severe.[97] Therefore, a more appropriate remedy for discrimination on an individual basis would be a private right of action against the institution.[98] According to the Court, "it makes little sense to impose on an

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[85] *Id.* at 680.

[86] *Id.*

[87] Cort v. Ash, 422 U.S. 66 (1975).

[88] *Cannon*, 441 U.S. at 693-94.

[89] *Id.* at 694-95; Title VI is identical to Title IX except instead of "on the basis of sex" in Title IX, Title VI uses the language "on ground of race, color, or national origin." Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006). The second prong of the *Cort* test considers whether there is a legislative intent to create the remedy in question. Cort v. Ash, 422 U.S. 66, 78 (1975).

[90] *Cannon*, 441 U.S. at 694-96; *see also* Bossier Parish Sch. v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967) (implying a private right of action for Title VI claims).

[91] *Cannon*, 441 U.S. at 696.

[92] *Id.* at 704-05. The third prong of the *Cort* test considers whether the remedy in question is consistent with the purpose of the legislative scheme. Cort v. Ash, 422 U.S. 66, 78 (1975).

[93] *Cannon*, 441 U.S. at 704.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 705.

[97] *Id.*

[98] *Cannon*, 441 U.S. at 705.

individual, whose only interest is in obtaining a benefit for herself, . . . the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cut-off of federal funding is appropriate."[99] Requiring individuals to prove this level of discrimination would create an enormous burden on both the individual and the institution.[100]

Cannon also satisfied the final prong.[101] Since the Civil War, the federal government has traditionally been the shield against discrimination.[102] Protecting citizens against discrimination is not a "subject matter [that] involves an area basically of concern to the States."[103] Therefore, a federalism problem did not arise from implying a private right of action in federal anti-discrimination statutes.[104] Since all four elements weighed in favor of implying a private right of action under Title IX, the Court implied a private right of action for Cannon.[105]

By implying a private right of action in *Cannon v. University of Chicago*, the Court gave individuals an opportunity to challenge institutions' discriminatory practices.[106] The Court provided this remedy without burdening victims with the responsibility of proving such pervasive discrimination that it warranted terminating federal funds.[107] This decision also allowed individuals an opportunity to protect themselves from discrimination rather than relying on the federal government to threaten refusal of funding to educational institutions to gain protection.[108]

The Court went further in broadening the scope of Title IX with its decision in *Franklin v. Gwinnett County Public Schools*.[109] This was the first case authorizing monetary damages for private Title IX actions.[110] The Court, however, limited monetary recovery to individuals experiencing intentional Title IX violations.[111]

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[99] *Id.*

[100] *See id.*

[101] *Id.* at 708-09. The fourth prong of the *Cort* test considers whether the cause of action is "traditionally relegated to state law." Cort v. Ash, 422 U.S. 66, 78 (1975).

[102] *Cannon*, 441 U.S. at 708.

[103] *Id.* at 708.

[104] *Id.*

[105] *Id.* at 709

[106] *Id.* at 705.

[107] *Cannon*, 441 U.S. at 705.

[108] *Id.*

[109] Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992). Franklin involved a student's allegation that she had been sexually harassed by a teacher. *Id.* at 63. The student reported the harassment, but no action was taken against the teacher. *Id.* at 63-64.

[110] *Id.* at 76.

[111] *Id.* at 74-75.

First, the *Franklin* Court reiterated the *Cannon* private right of action for Title IX violations.[112] If a private action is available, the Court reasoned, a remedy to cure the injustice must also be available.[113] Without a remedy there would be no reason to bring suit.[114] Although this reasoning alone was sufficient, the Court buttressed its position with numerous cases finding a remedy available when a right of action exists "under the Constitution or laws of the United States."[115]

While the Supreme Court allowed monetary damages, it qualified its holding by allowing recovery only in cases of intentional discrimination.[116] The Court reasoned that when Congress enacts a statute under its spending power, as with Title IX, the statute is "much in the nature of a contract."[117] This means that federal funds are distributed to institutions in consideration for their agreement to the statutory conditions.[118] In the case of Title IX, the federal government agreed to distribute federal funds to educational institutions on the condition that these institutions not discriminate on the basis of sex.[119] Because this arrangement is "much in the nature of a contract," Congress must clearly define the conditions with which an institution must comply.[120] An institution must be aware of the funding conditions, so the Court cannot allow individuals to recover monetary damages for unintentional discrimination.[121] If discrimination is unintentional, the receiving institution is not aware of the discrimination or of the fact that its funding may be in jeopardy.[122] There is no notice problem, however, when the

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[112] *Id.* at 65.

[113] *Id.* at 66.

[114] *See Franklin*, 503 U.S. at 66.

[115] *Id.* at 66-67 (citing Bell v. Hood, 327 U.S. 678, 684 (1946) (finding that when there is a right to sue, "federal courts may use any available remedy to make good the wrong done"); Dooley v. United States, 182 U.S. 222, 229 (1901) (reiterating "the principle that a liability created by statute without a remedy may be enforced by common-law action"); Kendall v. United States, 37 U.S. (12 Pet.) 524, 624 (1838) (stating that it is a "monstrous absurdity in a well organized government, that there should be no remedy although a clear and undeniable right should be shown to exist"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (finding that laws should "furnish [a] remedy for the violation of a vested legal right"); Ashby v. White, 1 Salk. 19, 87 Eng. Rep. 808, 816 (Q.B. 1702) ("If a statute gives a right, the common law will give a remedy to maintain that right . . . .")).

[116] *Franklin*, 503 U.S. at 75-76.

[117] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) *cited in* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74 (1992).

[118] *Franklin*, 503 U.S. at 74-75.

[119] *Id.* at 75; *see also* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999).

[120] *Pennhurst*, 451 U.S. at 17 ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.").

[121] *Franklin*, 503 U.S. at 74; *see also* Alexander v. Sandoval, 532 U.S. 275, 280 (2001); *and* Mank, *supra* note 18, at 68.

[122] *Franklin*, 503 U.S. at 74.

discrimination is intentional because the discriminating entity is aware, and even intends to discriminate.[123] Because entities receiving federal funds know that they are prohibited from discriminating on the basis of sex, and because intentional discrimination occurs when the entity knows that it is discriminating, the entity cannot then say that it was not on notice that it could lose federal funding.[124]

While both *Cannon* and *Franklin* broadened Title IX protection and its remedies, the Court narrowed these protections in the case of *Gebser v. Lago Vista Independent School District*.[125] *Gebser*, like *Franklin*, was based on a high school student's allegations that a teacher had sexually harassed her.[126] Unlike *Franklin*, this student failed to report the harassment, though other students complained that the teacher had acted similarly toward them.[127] As a result, the principal apologized to the complaining students and parents for the teacher's behavior.[128] The principal did not, however, report the incident to the superintendent of the school district.[129]

The Court held that the plaintiff was not entitled to monetary damages under Title IX because the school district did not have actual notice of the plaintiff's harassment, and the district should not be held liable for something it was not aware of.[130] Again, the Court relied on the premise that congressional legislation passed under the Spending Clause is a contract between the federal government and funding recipients.[131] Because this is a contract, Congress must be unambiguous about the conditions placed upon these recipients.[132] The school district, ignorant of the harassment, did not have adequate notice that it would be liable for a Title IX action brought by this student.[133] The Court asserted that because Title IX focused on protection rather than compensation, institutions are not liable when they are not given the opportunity to remedy the situation.[134] In *Gebser*, the school did not have an adequate opportunity to remedy the harassment

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[123] *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 48-49 (2005) for a discussion of intentional discrimination.

[124] *Franklin*, 503 U.S. at 74-75.

[125] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

[126] *Id.* at 277-78.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 278.

[130] *Gebser,* 524 U.S. at 285; *see also* 14 C.J.S. *Civil Rights* § 168 (2006).

[131] *Gebser*, 524 U.S. at 286.

[132] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[133] *Gebser*, 524 U.S. at 287.

[134] *Id.* The Court stated that "Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Id.*

because it did not have notice of the incidents so it could not be held financially responsible.[135]

Although some of the previous cases explain how the Court has interpreted Title IX, it is also important to understand how the Court has interpreted Title VI because these statutes mirror one another.[136] *Alexander v. Sandoval* involved an extensive analysis of Title VI regulations promulgated by the Department of Justice that prohibited disparate-impact discrimination.[137] This case began in Alabama, which had recently declared its official language as English.[138] Because of this, the Department of Public Safety administered driver's license tests only in English.[139] Sandoval, as a representative of the class opposing the regulation, argued that this provision violated Title VI because it had the effect of discriminating against a class of people based on their national origin.[140] The district court agreed with Sandoval and enjoined the state from administering the tests in English only.[141] The Court of Appeals for the Eleventh Circuit upheld the injunction.[142]

The Supreme Court reversed the Eleventh Circuit, reasoning that the Department of Justice regulations forbade conduct that Title VI itself permitted.[143] Since Title VI permitted the conduct, the regulations were irrelevant to determining whether a Title VI private cause of action should be implied in this case.[144] The Court further stated that Congress is responsible for creating private rights of action.[145] Therefore, if Congress does not establish a private right of action when writing a statute, "courts may not create one."[146]

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[135] *Id.*

[136] *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 695 (1979).

[137] Alexander v. Sandoval, 532 U.S 275, 278 (2001). Title VI prohibits institutions receiving federal funding from discriminating against individuals based on race, color, or national origin. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006).

[138] *Sandoval*, 532 U.S. at 278-79.

[139] *Id.*

[140] *Id.* at 279. Sandoval represented a class of people who could not take the driver's license test because they did not speak the English language. *Id.*

[141] *Id.*

[142] *Id.*

[143] *Sandoval*, 532 U.S. at 285. The Court stated that if a statute allows certain conduct, the administrative agency charged with making rules under that statute cannot forbid the same conduct. *Id.* In this case, the regulation forbade disparate treatment that resulted in discrimination on the basis of race. Title VI, however, allowed such conduct. *Id.*

[144] *Id.* at 285.

[145] *Id.* at 286.

[146] *Id.* at 286-87.

The Court further analyzed whether section 602 of Title VI implies a private right of action to enforce regulations promulgated under the agency's authority.[147] The Court maintained that individuals could not sue to enforce regulations promulgated under section 602 because the statute's language did not display a "congressional intent to create new rights."[148] In contrast with allowing individuals to sue, the agency already had an express provision provided in section 602 to terminate funding in discrimination cases.[149] Because Congress had already provided the agency with a method to enforce the statute, this suggested that Congress intended to exclude others.[150] In Justice Scalia's most famous line from this case he stated, "it is almost certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself."[151]

The preceding cases referred to the protections provided under Title IX and similar statutes. Looking solely at these statutes, however, does not provide a complete background. Agency regulations are vital to understanding Title IX and how it applies to third-party retaliation claims. Under Title IX, the responsibility of "effectuat[ing]" the statute falls on the federal agencies providing the financial funds.[152] The agencies charged with providing financial funds carried out this task, adopting a multitude of regulations to effectuate Title IX.[153] These regulations include a prohibition on retaliation.[154] Specifically, the regulation states that "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [Title IX], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part."[155]

Important to the analysis of any agency regulation is the case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* This case established the principle that courts must defer to agency rules when interpreting an ambigu-

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[147] *Id.* at 288; *see also* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (2006).

[148] *Sandoval*, 532 U.S. at 289.

[149] *Id.* at 289-90.

[150] *Id.* at 290-91.

[151] *Id.* at 291.

[152] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682 (2006); *see also* Elizabeth Y. McCuskey, Jackson v. Birmingham Board of Education: *Title IX's Implied Private Right of Action for Retaliation*, 8 U. PA. J. CONST. L. 143, 148 (2006).

[153] *See* 34 C.F.R. §§ 106-106.71 (2006).

[154] *See id.* at § 106.71 (incorporating Title VI regulation against retaliation 34 C.F.R. § 100.7(e)).

[155] 34 C.F.R. § 100.7(e) (2006).

ous statute.[156] It established a two-part analysis to determine whether a court should defer to an agency regulation.[157] The first question that a court must ask is whether Congress has clearly spoken on the issue.[158] If it has, that is "the end of the matter."[159] If Congress has not addressed the issue, or the statute is ambiguous, the court does not "impose its own construction on the statute."[160] Rather, the court must determine whether the agency's solution is "based on a permissible construction of the statute."[161] The Court held that statutes enacted by Congress create agency power, and agencies have the responsibility of filling any gaps—through rules and regulations—that Congress has left.[162] If a gap is explicitly left in a statute for an agency to fill, the agency regulations are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[163] In *Chevron*, the Court deferred to the EPA's interpretation of the Clean Air Act because the statute was ambiguous and the agency's interpretation and subsequent rules were a "permissible construction of the statute."[164]

Title IX is an expansive statute that the Court has, with limited exceptions, continually interpreted broadly.[165] Although these cases assist in determining the outcome in *Jackson v. Birmingham Board of Education*, agency regulations also play a role in determining whether Title IX implies a private right of action for third-party retaliation claims. Understanding Title IX's background is critical in understanding the reasoning of both the majority and the dissent in *Jackson*.

PRINCIPAL CASE

The Supreme Court decided *Jackson v. Birmingham Board of Education* in a 5-4 decision. It held that Title IX implies a private cause of action for third-party retaliation, and allowed Jackson's claim against the school board to proceed.[166] Justice O'Connor wrote the majority opinion, and Justice Thomas wrote the dissent joined by Chief Justice Rehnquist and justices Scalia and Kennedy.[167]

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[156] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). This case was based on Environmental Protection Agency regulations under the Clean Air Act. *Id.* at 839-40.

[157] *Id.* at 842-43.

[158] *Id.* at 842.

[159] *Id.* at 842-43.

[160] *Id.*

[161] *Chevron*, 467 U.S. at 843.

[162] *Id.*

[163] *Id.* at 843-44.

[164] *Id.* at 866.

[165] *See supra* notes 84-135 and accompanying text; *see also supra* notes 62-66 and accompanying text.

[166] Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171, 184 (2005).

[167] *Id.*

The *Jackson* Court articulated three major reasons for its decision. The first was that Title IX's text explicitly prohibits retaliation against those who complain of sex discrimination.[168] It held that retaliation against a person based on complaints of sex discrimination is a form of "intentional sex discrimination."[169] Explaining this theory, the majority expressed that "[r]etaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subjected to differential treatment."[170] Therefore, retaliation is a form of sex discrimination because "it is an intentional response to the nature of the complaint: an allegation of sex discrimination."[171]

The majority next asserted that *Sullivan v. Little Hunting Park, Inc.* provided the legal context for Title IX.[172] The Court decided *Sullivan* shortly before Congress enacted Title IX.[173] Congress was, therefore, aware of the Court's decision to interpret "a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition."[174] Just as the Court explained in *Cannon v. University of Chicago*, the legislature expected the courts to interpret statutes prohibiting racial discrimination in the same way that *Sullivan* was decided.[175] This meant interpreting these statutes to prohibit retaliation based on third-party complaints of discrimination.[176]

The Court based its final contention on policy: Title IX would become unenforceable if it allowed retaliation against those who complain about violations.[177] If retaliation were not prohibited, those who witness discrimination would be less likely to report it.[178] "Reporting incidents of discrimination is integral to Title IX enforcement . . . ."[179] If people in a position to report such abuse are discouraged from doing so, the entire "enforcement scheme" of Title IX would be undermined.[180] The Court pointed out that without embracing prohibitions on retaliation, Congress' intent would be subverted.[181] Congress could not have

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[168] *Id.* at 173-78.

[169] *Id.* at 173.

[170] *Id.*

[171] *Jackson*, 544 U.S. at 174.

[172] Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); *Jackson*, 544 U.S. at 176-77.

[173] *Jackson*, 544 U.S. at 176.

[174] *Id.*

[175] *Id.*; *see also* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).

[176] *Jackson*, 544 U.S. at 176-77.

[177] *Id.* at 180-81.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 181.

[181] *Jackson*, 544 U.S. at 181.

intended to allow retaliation against those trying to protect the integrity of Title IX.[182]

Contrary to the majority, the dissent was adamant that a private right of action should not be implied when Congress has not explicitly provided for one. The dissent's first contention was that Title IX's text does not prohibit claims based solely on retaliation.[183] Title IX claims are permitted only when sex discrimination occurs.[184] Justice Thomas reasoned that Title IX prohibits discrimination "on the basis of the plaintiff's sex, not the sex of some other person."[185] Because Jackson was not discriminated against because of his own sex, the dissent reasoned, he should not be permitted to bring a retaliation action.[186]

Justice Thomas's second contention was that institutions receiving federal funds were not on notice that they may be liable for acts of retaliation against complaining employees.[187] The Board agreed to comply with statutory conditions in exchange for federal funding, but the contract was ambiguous about whether the Board would be subject to liability based on retaliation.[188] Therefore, the district should not be held liable without notice.[189]

Finally, the dissent contended that Title IX does not clearly show Congress' intent to create a private right of action for third-party retaliation claims.[190] By imposing liability on entities for retaliation, the statute would be expanded beyond its scope.[191] It was persuasive, stated Justice Thomas, that Title IX does not explicitly provide for retaliation claims when similar statutes do.[192]

ANALYSIS

Ultimately, the Court accurately concluded that Title IX includes private rights of action for third-party retaliation claims. But the majority could have employed additional persuasive arguments. One of the majority's most convincing lines of reasoning was its comparison of *Jackson v. Birmingham Board of Education*

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[182] *Id.*

[183] *Jackson*, 544 U.S. at 185 (Thomas, J., dissenting).

[184] *Id.* (Thomas, J., dissenting).

[185] *Id.* (Thomas, J., dissenting).

[186] *Id.* at 187 (Thomas, J., dissenting).

[187] *Id.* at 190-92 (Thomas, J., dissenting).

[188] *Jackson*, 544 U.S. at 191 (Thomas, J., dissenting).

[189] *Id.* at 191 (Thomas, J., dissenting).

[190] *Id.* at 193 (Thomas, J., dissenting).

[191] *Id.* at 194-95 (Thomas, J., dissenting).

[192] *Id.* at 194 (Thomas, J., dissenting).

to *Sullivan v. Little Hunting Park, Inc.*[193] The majority's policy reasoning was also persuasive.[194] There were three key arguments that the majority could have used, however, that would have created a more compelling opinion. The first of these was included in the dissent. The dissent compared Title IX to Title VII and ultimately used this as a reason why retaliation should not be included in the Title IX prohibitions.[195] This was an erroneous contention. Second, the majority also refrained from using agency regulations to strengthen its opinion.[196] Third, the Court neglected to use the four-part *Cort* test to determine whether a private right of action should be implied.[197] The Court declined to utilize these three important arguments. Had the majority done so, it would have created a more comprehensive opinion.

The Plain Text of Title IX Does Not Include Prohibitions on Retaliation

The majority began its opinion by asserting that the text of Title IX included prohibitions on retaliation.[198] On this point, however, the dissent had the stronger argument.[199] Justice Thomas pointed out that prohibitions on retaliation are not explicitly stated in the text of Title IX.[200] Title IX prohibits discrimination only on the "basis of sex."[201] The majority attempted to cajole this small phrase to encompass those who complain about discrimination that occurred on the basis of another person's sex.[202] The majority also pointed to *Franklin v. Gwinnett County Public Schools*, which held that Title IX covered forms of "intentional discrimination."[203] Although Jackson was subjected to "intentional discrimination," the Court stretched the language of the Title IX too far when it claimed that

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[193] *See infra* notes 220-229 and accompanying text for an analysis of *Sullivan* and how it compares to *Jackson*.

[194] *See infra* notes 209-219 and accompanying text for a discussion of policy reasons behind this decision.

[195] *See infra* notes 230-243 and accompanying text for a comparison of Title IX and Title VII.

[196] *See infra* notes 244-261 and accompanying text for a discussion of the anti-retaliation regulations adopted by the Department of Education and the Department of Justice.

[197] *See infra* notes 262-273 and accompanying text for a discussion of the four-part *Cort* test and how it applies in this case.

[198] *Jackson*, 544 U.S. at 173-78.

[199] *See id.* at 185-90 (Thomas, J., dissenting); *see also* Charles J. Russo & William E. Thro, *The Meaning of Sex: Jackson v. Birmingham School Board and it Potential Implications*, 198 W. EDUC. L. REP. 777, 792.

[200] *Jackson*, 544 U.S. at 185.

[201] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006).

[202] *Jackson*, 544 U.S. at 173-74.

[203] *Id.* at 173-74; *see also* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74-75 (1992). An intentional act is defined as "[a]n act [that] is foreseen and desired by the doer, and this foresight and desire resulted in the act through the operation of will." BLACK'S LAW DICTIONARY 26 (8th ed. 2004). Retaliatory acts are "foreseen and desired by the doer." *Id.* When an entity such as the school district acts in retaliation of another, it is "foreseen and desired" because this entity is attempting to "repay an injury" that has been paid upon it possibly through complaints of sex discrimination. *Id.*

Jackson was discriminated against "on the basis of sex."[204] The majority based this assertion on the fact that retaliation "is an intentional response to the nature of the complaint: an allegation of sex discrimination."[205] Jackson, however, did not experience discrimination on the basis of his sex.[206] Rather, the Board retaliated against him because he complained of discrimination that occurred because of his basketball players' sex.[207] It was not imperative, and may have been damaging, for the majority to include this reasoning.[208]

The Policy Considerations of Title IX Call for Protection Against Retaliation

The majority also reasoned that if retaliation were not covered under Title IX, the statute would become ineffective.[209] As pointed out, "if retaliation were not prohibited, Title IX's enforcement scheme would unravel."[210] The dissent reasoned that students and parents are also able to report incidents of Title IX violations without the risk of retaliation.[211] But this is not entirely true. Often students subjected to discrimination are reluctant to report abuse because of a fear that retaliation will occur.[212] Contrary to the dissent's argument, students who experience violations of Title IX are not in a position of power when it comes to reporting these violations.[213] In fact, research has shown that "low-power persons are particularly susceptible to retaliation."[214] In the hierarchy of a school, students are at the bottom when it comes to power.[215] This means that students are the

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[204] *Jackson*, 544 U.S. at 173-74; *see also* Russo & Thro, *supra* note 199, at 792; *and* Reply Brief of Petitioner at 6-7, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (No. 02-1672).

[205] *Jackson*, 544 U.S. at 173-74; *see also* Reply Brief of Petitioner, *supra* note 204, at 6-7.

[206] *Jackson*, 544 U.S. at 171.

[207] *Id.*

[208] *See*, *e.g.*, Russo & Thro, *supra* note 199, at 792.

[209] *Jackson*, 544 U.S. at 180-81; *see also* Cassandra M. Hausrath, Note, *Jackson v. Birmingham Board of Education: Expanding the Class of the Protected, or Protecting the Protectors?*, 40 U. RICH. L. REV. 613, 627 (2006) ("[P]rotection against retaliation is potentially critical to protection from discrimination in the first place.").

[210] *Jackson*, 544 U.S. at 180.

[211] *Jackson*, 544 U.S. at 195 (Thomas, J., dissenting).

[212] *See, e.g.,* Brake, *supra* note 123, at 26 ("Research in social psychology has documented a marked reluctance among the targets of discrimination to label and confront their experiences as such.") This is especially true when students are sexually harassed. *See, e.g.,* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 278 (1998) (concluding student did not report sexual harassment by a teacher because "she was uncertain how to react").

[213] *See, e.g., Gebser*, 524 U.S. at 278 (even students who reported sexual harassment were not taken seriously, and steps were never taken to remedy the abuses committed by the teacher); *see also* Brief of the National Education Association et al. as Amicus Curiae in Support of Petitioner at 4, Jackson v. Birmingham Bd. of Educ., No. 02-1672 (Aug. 19, 2004).

[214] *See* Brake, *supra* note 123, at 39-40.

[215] *See*, *e.g.*, Brief of the National Education Association et al., *supra* note 213, at 4.

most likely to be retaliated against when reporting discrimination.[216] Simply reviewing the evidence shows that the dissent's contention that students are powerful enough to report discrimination and avoid retaliation is entirely incorrect.[217] Because students are considered inferior in the school setting, teachers are in the best position to report abuse because they have more power.[218] Therefore, they must be protected from retaliation for taking steps to remedy the violations.[219]

The Legal Context of Title IX Calls for Protection Against Retaliation

Also important to the majority's opinion was the case of *Sullivan v. Little Hunting Park, Inc.* which provided the legal context of Title IX.[220] Because this case provided the legal context of Title IX, it also created a strong precedent for *Jackson*.[221] When stripped to their most elemental, *Jackson* and *Sullivan* are virtually identical.[222] Because these cases' facts are so similar the outcome should be equally similar.[223] In *Sullivan*, a white man was retaliated against for protesting statutory violations made against a black man.[224] Similarly, in *Jackson*, a male basketball coach was retaliated against for protesting illegal discrimination against a girls basketball team.[225] In both cases, the people who were retaliated against complained of violations of anti-discrimination statutes designed to protect a certain class of people.[226] Although these cases are very similar, there are also differences that must be addressed. Most noteworthy is the fact that these are two different statutes that call for prohibitions on two different forms of discrimination.[227] Title

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[216] *See id.*

[217] *See id*. at 4.

[218] *See* McCuskey, *supra* note 152, at 160; *see also* Brief of Women's Sports Foundation as Amici Curiae in Support of Petitioner at 17-18, Jackson v. Birmingham Bd. of Educ., No. 02-1672 (Aug. 19, 2004).

[219] *Jackson*, 544 U.S. at 181.

[220] *Id.* at 176. *Sullivan v. Little Hunting Park, Inc.* was decided under federal statute § 1982. *See* Civil Rights Act of 1866, 42 U.S.C. § 1982 (2000).

[221] Brief of the American Bar Association as Amicus Curiae in Support of Petitioner at 4-5, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (No. 02-1672).

[222] Jackson v. Birmingham Bd. of Educ., 544 U.S.167 (2005); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). Both cases involve a third person not protected by the text of the statute advocating for the rights of persons who are part of the protected class. *See Sullivan*, 396 U.S. at 234-37 *and Jackson* 544 U.S. at 171-73. Both cases also involve the advocate being retaliated against because of his complaints on behalf of a person or people protected by an anti-discrimination statute. *See Sullivan*, 396 U.S. at 234-37 *and Jackson*, 544 U.S. at 171-73.

[223] *Compare Jackson*, 544 U.S. 167 *with Sullivan*, 396 U.S. 229.

[224] *Sullivan*, 396 U.S. at 235.

[225] *Jackson*, 544 U.S. at 171-72.

[226] *Id*. at 173; *Sullivan*, 396 U.S. at 235.

[227] *Compare* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006) (prohibiting discrimination on the basis of sex) *with* Civil Rights Act of 1866, 42 U.S.C. § 1982 (2006) (prohibiting discrimination on the basis of land ownership).

IX calls for a prohibition on sex discrimination committed by federally funded institutions.[228] The statute used in *Sullivan* calls for a prohibition on discrimination based on land ownership.[229] Although these statutes are different, they are both attempting to prohibit the same conduct: discrimination.

The Dissent's Comparison of Title IX and Title VII Was Misplaced

Although some of the majority's reasoning was convincing, there were some key points that could have been utilized to create a more complete opinion. The first of these points is based on one of the dissent's arguments which compared Title VII to Title IX and used this as a reason for denying private rights of action for retaliation claims under Title IX.[230] Justice Thomas was misleading when he reasoned that if Congress wanted a Title IX private right of action for retaliation, it should have explicitly included such a right in the legislation.[231] He compared Title VII to Title IX to support his contention.[232] When Congress enacted Title VII, it explicitly provided for a private right of action for retaliation in the statute, but did not in Title IX.[233] The dissent reasoned that this illustrated Congress' intent, stating that "[i]f a prohibition on 'discrimination' plainly encompasses retaliation, the explicit reference to it in . . . Title VII, would be superfluous—a result we eschew in statutory interpretation. The better explanation is that when Congress intends to include a prohibition against retaliation in a statute, it does so."[234]

The Court should be wary, however, when comparing Title VII to Title IX.[235] These statutes were enacted according to two different Congressional powers. Title VII should be narrowly construed while Title IX should have a broader reach.[236] Congress enacted Title VII using "its general constitutional authority under the Commerce Clause."[237] Conversely, Congress enacted Title IX under the

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[228] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006).

[229] Civil Rights Act of 1866, 42 U.S.C. § 1982 (2006).

[230] *Jackson*, 544 U.S. at 189-90 (Thomas, J., dissenting).

[231] *Id.* at 189 (Thomas, J., dissenting).

[232] *Id.* (Thomas, J., dissenting); *see also* Kenneth L. Thomas & Ramadanah M. Salaam, *The Face of Title IX: Post-Jackson v. Birmingham Board of Education*, 66 ALA. LAW. 429, 434 (2005).

[233] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2006); *Jackson*, 544 U.S. at 189 (Thomas, J., dissenting).

[234] *Jackson*, 544 U.S. at 190 (Thomas, J., dissenting); *see also* Thomas & Salaam, *supra* note 232, at 434.

[235] Mank, *supra* note 18, at 85.

[236] *Id.* at 88.

[237] *Id.* at 87; *see also* U.S. CONST. art. 1, § 8, cl. 3 (stating that Congress has the power "[t]o regulate Commerce with foreign nations, and among the several States, and with Indian Tribes").

Spending Clause.[238] Because Title VII was enacted under the Commerce Clause, it applies to all employers affecting interstate commerce.[239] Title VII is not voluntary.[240] Instead, if an employer is "above a certain size" and "in the private labor market," Title VII applies.[241] Title IX, in contrast, only applies to entities that opt to use federal educational funding.[242] Because Title VII applies to a wider range of entities, there is a good policy reason for construing it more narrowly than Title IX.[243]

Agency Regulations Prohibit Discrimination under Title IX

The Court also neglected to address agency regulations that prohibit retaliatory conduct under Title IX.[244] This reasoning could have lent additional support to the majority opinion. Although the Court previously determined in *Alexander v. Sandoval* that an agency's power in creating a private right of action was limited, this does not mean that agencies do not have substantial room to define those rights created by congressional statute or interpreted by the courts.[245] Indeed, while *Sandoval* "may prevent agencies from creating private rights of action by themselves, they can achieve much the same effect by expansively interpreting the statutory rights of action created by Congress."[246] In *Cannon v. University of Chicago*, the Court determined that private rights of action were available under Title IX for acts of intentional discrimination.[247] The majority failed to consider in *Jackson* that the anti-retaliation regulation could be applied under the "intentional discrimination" ban.[248] Although the HEW promulgated its rule against retaliation

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[238] *See* Mank, *supra* note 18, at 87; *see also* U.S. CONST. art. 1, § 8, cl. 1 (stating that Congress has the power to "collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States").

[239] *See* Mank, *supra* note 18, at 87. "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2006).

[240] *See* Mank, *supra* note 18, at 89.

[241] *Id.* at 88-89.

[242] *Id.* at 89.

[243] *Id.* at 88. Because Title VII applies to a wider range of entities, it is important to narrowly construe the statute to ensure that all entities are aware of the standards to which they will be held. *Id.*

[244] *Jackson*, 544 U.S. at 171-84.

[245] *See* Alexander v. Sandoval, 532 U.S. 275 (2001); *see also* Brianne J. Gorod, Comment, *The Sorcerer's Apprentice:* Sandoval*,* Chevron*, and Agency Power to Define Private Rights of Action*, 113 YALE L. J. 939, 940 (2004).

[246] *See* Gorod, *supra* note 245, at 940.

[247] Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979).

[248] *See* Gorod, *supra* note 245, at 943.

before *Cannon*, when the HEW was dismantled the agencies that inherited the responsibility for effectuating Title IX did not adopt the anti-retaliation regulation until after *Cannon*.[249] This means that the agencies could have implicitly adopted the anti-retaliation regulation by applying Title IX's prohibition on intentional discrimination.[250] If this is the case, then the anti-retaliation regulation did not create a new private right of action, as prohibited by *Sandoval*, rather, the agency was simply interpreting retaliation to be a form of intentional discrimination.[251] The Court in *Sandoval* stated that "[w]e do not doubt that regulations applying [Title IX's] ban on intentional discrimination are covered by the cause of action to enforce [Title IX]. Such regulations, if valid and reasonable, authoritatively construe the statute itself."[252]

Given that the agency could have been applying Title IX's ban on intentional discrimination, the only question left is whether the regulation is valid and reasonable.[253] To determine whether an agency's regulation is "valid and reasonable," the Court must use the *Chevron* analysis.[254] According to the *Chevron* doctrine courts should defer to an executive agency's regulations when Congress's intent is unclear or ambiguous.[255] In using *Chevron*'s two-part test, the Court must first determine whether Congress's intent is clear.[256] As here, when Congress's intent is ambiguous concerning whether retaliation is to be protected under Title IX, *Chevron* requires the Court to determine "whether the agency's answer is based on a permissible construction of the statute."[257] The agencies' regulation states that "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual . . . because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing."[258]

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[249] *See* Perez, *supra* note 37, at 1149. In 1979, the HEW was dismantled. *Id.* at 1150. This led to the creation of the Department of Education, which was given the enforcement authority of Title IX. *Id.*

[250] *See* Gorod, *supra* note 245, at 943.

[251] *Id.* The Court in *Sandoval* prohibited agencies from creating private rights of action under § 602 of Title VI. *Id.* This is the section that empowers the appointed agency to create regulations interpreting Title VI. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (2006). The *Sandoval* decision, however, did not apply to § 601 of Title VI. *See* Gorod, *supra* note 245, at 943. This section prohibits intentional discrimination based on race, color, or national origin. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006).

[252] *Sandoval*, 532 U.S. at 284.

[253] *See id.*

[254] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

[255] *Id.*; *see supra* notes 156-164 and accompanying text.

[256] *Chevron*, 467 U.S. at 842-43.

[257] *Id.*

[258] 34 C.F.R. § 100.7(e) (2006). This regulation has been adopted by all three agencies (Department of Education, Department of Health and Human Services, and the Department of Justice) given the power to effectuate Title IX by incorporating Title VI's regulation against retaliation. *See* 34 C.F.R. § 106.71 (2006).

The interpretation was reasonable when it prohibited retaliation.[259] "[I]t is neither inconsistent with the text of [Title IX] nor an unreasonable construction of that section for an agency to construe it to cover those who are purposefully injured for opposing the intentional discrimination Congress made unlawful via [Title IX]."[260] Given that the agencies' regulation is permissible under the statute, the Court should give this regulation the deference that is called for under *Chevron*.[261] Because the Court neglected to address agency regulations prohibiting retaliatory conduct, an opportunity to expand its opinion was lost.

The Cort *Test Calls for a Private Right of Action*

Another line of reasoning that the Court clearly neglected to consider is the test pronounced in *Cort v. Ash*.[262] The Supreme Court in *Cort v. Ash* established a four-part test to determine when courts should imply a private right of action when it is not explicitly called for by Congress.[263] The Court first utilized this test to determine that a private right of action should be applied to people subjected to discrimination in violation of Title IX.[264] Although *Jackson* comes nearly 30 years after the Court determined that a private right of action exists under Title IX, this case created an opportunity for the Court to revisit this test. Although the *Cort* test is a four-part test, the only factor that would be in dispute in this case is the first. Therefore, this is the only factor addressed here.[265]

The first factor in the *Cort* test is whether the plaintiff is "one of the class for whose especial benefit the statute was enacted."[266] The Court's analysis in *Cannon v. University of Chicago* is telling on this point, however. In a footnote of that case, the Court asserted, "the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action."[267] The Court then cited the case of *Sullivan v. Little Hunting Park* to

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[259] Johnson v. Galen Health Inst., Inc., 267 F. Supp. 2d 679, 698 (2003).

[260] Peters v. Jenney, 327 F.3d 307, 318 (2003).

[261] *Chevron*, 467 U.S. 837.

[262] *See supra* notes 77-83 and accompanying text; *see also* Cort v. Ash, 422 U.S. 66 (1975).

[263] *Cort*, 422 U.S. at 78.

[264] *See* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (holding that a private right of action should be implied for victims of discrimination that violates Title IX).

[265] Congress's review and approval of administrative regulations against retaliation shows its intent to create a remedy for victims, satisfying the second factor. *See supra* notes 34-36 and accompanying text. For the third factor, protecting those trying to remedy discrimination fulfills Title IX's purpose. TITLE IX LEGAL MANUAL, *supra* note 21, at 16; *see also Cannon*, 441 U.S. at 704. The Court previously recognized that the federal government has historically been the primary protector "against invidious discrimination of any sort, including that on the basis of sex," satisfying the fourth factor. *Cannon*, 441 U.S. at 708.

[266] *Cort*, 422 U.S. at 67.

[267] *Cannon*, 441 U.S. at 691 n.13.

support this statement.[268] The facts of *Jackson*, as discussed above, are very similar to the case of *Sullivan v. Little Hunting Park*.[269] That the Court used *Sullivan* to illustrate its point supports the contention that Jackson was a member of the class whose especial benefit the statute was designed to protect.[270]

Even if the reasoning based on *Cannon* is not dispositive to prove the first factor of the *Cort* test, the Court's own reasoning in this case is. As noted earlier, the Court asserted that the retaliation that Jackson experienced was discrimination "on the basis of sex."[271] However disingenuous this reasoning seemed, the Supreme Court is still the highest court in this country. Therefore, relying on its language is not in fact disingenuous. Because the Court interpreted the retaliation experienced by Jackson as discrimination "on the basis of sex," the first factor of the *Cort* test is fulfilled.

In 1975, the Supreme Court announced that this was the test to be used when determining whether a private right of action exists when Congress does not explicitly provide for one.[272] The majority in *Jackson*, however, declined to utilize this test to strengthen its opinion. The reason for this is not clear. Although the first factor would ordinarily be difficult to prove, the majority's opinion that Jackson was discriminated "on the basis of sex" fits perfectly into the argument that Jackson fulfilled the first factor of the *Cort* test.[273] The majority had the opportunity to revisit and reaffirm this test, but ultimately it decided against using a very convincing argument.

Jackson's *Ramifications*

The Court's decision in this case will significantly affect all educational programs. An educational institution receiving federal assistance directly through grants, loans, and even federal property will be subject to private actions if it retaliates against a person reporting Title IX violations.[274] Not only will institutions receiving federal assistance directly be subject to this decision, but also educational institutions receiving federal funds indirectly through their students.[275] This decision reaches almost every educational institution in the country.

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[268] *Id.*

[269] *See supra* notes 220-29 and accompanying text.

[270] *See supra* notes 220-29 and accompanying text.

[271] *See supra* notes 198-208 and accompanying text.

[272] *Cort*, 422 U.S. at 78.

[273] *See supra* notes 198-208 and accompanying text.

[274] *See supra* notes 44-48 and accompanying text.

[275] *See supra* notes 49-53 and accompanying text.

Not only are the majority of institutions subject to this decision, so is every facet of the educational institution.[276] This includes retaliation that occurs for reporting violations of Title IX in housing, access to course offerings, access to schools, counseling, financial assistance, health and insurance benefits and athletics.[277] Even the most mundane act of retaliation could subject the entire educational institution to a lawsuit.

The decision in this case affects the application of Title IX in the future, but it will also affect other statutes. As noted earlier, Title IX was patterned after Title VI of the Civil Rights Act of 1964.[278] Historically, courts have interpreted these statutes interchangeably.[279] Thus, the interpretation of Title IX in the *Jackson* decision is bound to find its way into a Title VI case.

Although Title VI will obviously be affected by this decision, courts have cited *Jackson* favorably when interpreting other statutes as well.[280] The *Jackson* decision is now used as a justification for implying private rights of action in third-party retaliation claims for a number of cases.[281] The astonishing thing about many of these cases is the fact that some of the statutes involved are not even federal.[282] States are now using the *Jackson* decision to bolster their opinions when private rights of action are implied under their own laws. Although there are decisions both citing and approving of the decision in *Jackson*, this is still a relatively new case. There is no way to predict what kind of impact *Jackson* will continue to have in courts throughout the country.

CONCLUSION

Ultimately, the U.S. Supreme Court came to the correct conclusion when it decided in *Jackson v. Birmingham Board of Education* that Title IX provides a private right of action for claims of third-party retaliation. The Court asserted three reasons for its decision. First, it concluded that the plain text of Title IX include claims of retaliation because the term "on the basis of sex" covers those who complain about discrimination on the basis of another person's sex. This line

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[276] *See supra* notes 44-48 and accompanying text.

[277] *See supra* note 47 and accompanying text.

[278] *See supra* note 18 and accompanying text.

[279] *See* Alexander v. Sandoval, 532 U.S. 275, 278 (2001); *and* Gebser v. Lago Vista Independent Sch. Dist., 524 U.S. 274, 286 (1998); *see also* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 514 (1982) *and* Cannon v. Univ. of Chicago, 441 U.S. 677, 694-96 (1979).

[280] *See* Humphries v. CBOCS, No. 05-4047 (U.S. Jan. 10, 2007); *see also* Taylor v. City of Los Angeles, 144 Cal. App. 4th 1216, 1240 (2006) (involving the California Fair Employment and Housing Act) *and* Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1043 (2005) (involving the California Fair Employment and Housing Act).

[281] *Id.*

[282] *See Taylor*, 144 Cal. App. 4th at 1240; *see also Yanowitz*, Cal. 4th at 1043.

of reasoning, however, was not convincing. Second, the majority determined that the policy behind Title IX requires private rights of action for third-party retaliation claims. This was an especially persuasive argument. Title IX's protections could not be realized unless the protectors were shielded from retaliation. Finally, the Court reasoned that the legal context in which Title IX was passed provides proof that Congress intended Title IX to cover private third-party retaliation claims.

While the Court's reasoning was convincing in some respects, there were three major—but never articulated—arguments that could have significantly bolstered the opinion. First, the Court should have rebutted the dissent's contention that, because Title VII specifically calls for protection against retaliation and Title IX does not, this means that retaliation is not covered under Title IX. This argument was erroneous and the majority could have pounced on it. Second, the majority neglected to make any arguments based on Title IX regulations. There is a specific regulation that prohibits retaliation that, if used, would have made for a more complete opinion. Finally, the Court overlooked the four-part *Cort* test that it had previously used to determine when to imply rights of action. Given the major ramifications of this decision, a more thorough and convincing analysis was appropriate.

It is still unclear how *Jackson v. Birmingham Board of Education* will impact future litigation. Some see this decision as a form of judicial legislation.[283] Others see this decision as right and natural given Title IX's long history.[284] Whether one views this decision as right or wrong, it is now clear that institutions receiving federal funding are on notice that they are at risk of losing federal funding if they retaliate against someone who has reported Title IX violations. No longer can federally-funded institutions claim that Congress did not give proper notice that they may be held liable. It would be prudent for practitioners—especially those representing federally funded institutions—to make clear that the courts will not tolerate retaliation.

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[283] *See* Thomas & Salaam, *supra* note 232, at 434; *see also* Russo & Thro, *supra* note 199, at 790.

[284] *See* John A. Gray, *Is Whistleblowing Protection Available Under Title IX?: An Hermeneutical Divide and the Role of the Courts*, 12 WM. & MARY J. WOMEN & L. 671, 695-97 (2006); *see also* Hausrath, *supra* note 209, at 628-30; *and* McCuskey, *supra* note 152, at 163-64; Perez, *supra* note 37, at 1173; Mank, *supra* note 18, at 106-07.

CONSTITUTIONAL LAW—The Confrontation Clause and the New "Primary Purpose Test" in Domestic Violence Cases; *Davis v. Washington*, 126 S. Ct. 2266 (2006).

*Monica Vozakis**

Introduction

On February 1, 2001, Michelle McCottry dialed 911 and then quickly hung up.[1] Since hang-ups often indicate grave danger, the 911 operator immediately returned the call.[2] A hysterical and sobbing McCottry answered and told the operator, "He's here jumpin' on me again."[3] The operator ask McCottry who the attacker was, the relationship she had with the attacker, and if alcohol was involved.[4] McCottry identified her attacker as Adrian Davis and told the operator he had beaten her with his fists and had just left.[5] She also informed the operator she had a protective order against him.[6] When law enforcement officers arrived at the scene, Davis was no longer at the house, and McCottry was frantically gathering belongings so she and her children could leave.[7] McCottry had "fresh injuries on her forearm and her face."[8]

The State arrested Davis and charged him with felony violation of a domestic no-contact order.[9] McCottry originally assisted the prosecutor's office, but at the time of trial, they were unable to locate her.[10] Instead, the two police officers who responded to the scene were the only State witnesses.[11] They testified about McCottry's recent injuries but said they did not know what caused them.[12] While McCottry herself did not testify, the trial court allowed her 911 conversation to be admitted under the excited utterance hearsay exception.[13] Davis objected and

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*University of Wyoming College of Law J.D. Candidate, 2008. I'd like to thank my husband, Marc, and my son, McCoy, for their love and support.

[1] State v. Davis, 111 P.3d 844, 846 (Wash. 2005).

[2] *Id.* at 846, 850.

[3] *Id.* at 846 (quoting Ex. 2 (911 audiotape)).

[4] *Davis*, 111 P.3d at 846.

[5] *Id.*

[6] *Id.* at 846-47.

[7] *Id.* at 847.

[8] *Id.*

[9] *Davis*, 111 P.3d at 847; Wash. Rev. Code § 26.50.110(1), (4) (1984) (McCottry had a no-contact order against Davis in which "[a]ny assault . . . is a violation of an order.").

[10] *Davis*, 111 P.3d at 847.

[11] *Id.*

[12] *Id.*

[13] *Id.* (The court denied a proposed jury instruction on McCottry's absence.); Wash. R. Evid. 803 (a)(2); Fed. R. Evid. 803(2) (The Washington state rule of evidence and the federal rule of

claimed entering the 911 call as evidence violated his Sixth Amendment right to confront the witness against him, but the trial court admitted the 911 tape, and the jury convicted Davis of felony violation of a domestic no-contact order.[14]

Ultimately, the U.S. Supreme Court granted certiorari to consider Davis' Sixth Amendment objection and decide when evidence taken by law enforcement should be admitted at trial without a prior opportunity for cross-examination.[15] The Court previously differentiated between testimonial and non-testimonial statements in applying the Sixth Amendment and determined that the Sixth Amendment does not apply to non-testimonial statements.[16] Furthermore, the Court took the opportunity in this case to clarify what makes a statement testimonial as opposed to non-testimonial.[17] The Court upheld Davis' conviction, ruling the evidence was admissible because the statement was non-testimonial.[18]

The U.S. Supreme Court combined the *Davis* case with *Hammon v. Indiana*, which presented a similar issue, but had distinguishable facts.[19] In *Hammon*, the police responded to a "domestic disturbance" at the home of Hershel and Amy Hammon.[20] When the police arrived, Amy was on the front porch and, although she appeared to be fearful, she told the officers "everything was okay."[21] She let the officers enter the home where they found an overturned heater.[22] The officers spoke to Hershel who said he and Amy had an argument, but it was not physical.[23] One officer talked with Amy in the living room, while the other officer made Hershel stay in the kitchen.[24] The officer talking to Amy did not see any physical injuries, although Amy said she was in some pain.[25] Amy filled out an affidavit stating: "Broke our furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter."[26]

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evidence are the same and state: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.").

[14] *Davis*, 111 P.3d at 847.

[15] Davis v. Washington, 126 S. Ct. 547 (2005); Davis v. Washington, 126 S. Ct. 2266, 2270 (2006).

[16] Crawford v. Washington, 541 U.S. 36, 68 (2004).

[17] *Davis*, 126 S. Ct. at 2273-74.

[18] *Id.* at 2277, 2280.

[19] *Id.* at 2266.

[20] Hammon v. State, 829 N.E.2d 444, 446-47 (Ind. 2005).

[21] *Id.* at 446-47.

[22] *Id.* at 447.

[23] *Id.*

[24] *Id.*; Davis v. Washington, 126 S. Ct. 2266, 2272 (2006).

[25] Hammon v. State, 809 N.E.2d 945, 948 (Ind. Ct. App. 2004).

[26] *Davis*, 126 S. Ct. at 2272.

"The State charged Hershel with domestic battery and with violating his probation."[27] Although Amy did not testify at trial, the court entered her affidavit as evidence under the present sense impression hearsay exception.[28] The responding police officer testified to Amy's oral statements, which the court admitted into evidence under the excited utterance hearsay exception.[29] Hershel objected, arguing that his Sixth Amendment confrontation right had been violated.[30] At a bench trial, the court convicted Hershel on both charges.[31] The Indiana Court of Appeals and the Indiana Supreme Court affirmed the conviction holding that Amy's oral statement to the police officer was an "excited utterance" and, therefore, not testimonial.[32] The Indiana Supreme Court also held Amy's affidavit to be testimonial.[33] Admitting the affidavit as evidence, however, was harmless error because the trial was to the bench.[34]

On certiorari, the U.S. Supreme Court held that Amy's oral statement to the police officer and affidavit were testimonial, and the lower court violated Hershel's right to cross-examine the witness against him.[35] The Court reversed his conviction.[36]

The U.S. Supreme Court resolved both cases, consolidated in *Davis v. Washington*.[37] It used the case to address troubling issues related to the Sixth Amendment's Confrontation Clause that remained after its 2004 decision in

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[27] *Id.*; IND. CODE § 35-42-2-1.3 (2000) ("A person who knowingly or intentionally touches an individual who (1) is or was a spouse of the other person . . . in a rude, insolvent, or angry manner that results in bodily injury . . . .").

[28] *Davis*, 126 S. Ct. at 2272; IND. R. EVID. 803 (1) (1994) ("Present sense impression. A statement describing or explaining a material event, condition or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter.").

[29] *Davis*, 126 S. Ct. at 2272; IND. R. EVID. 803(2) (1994) ("Excited utterances. A statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition.").

[30] *Davis*, 126 S. Ct. at 2272.

[31] *Id.* at 2273.

[32] Hammon v. Indiana, 809 N.E.2d 945, 950, 952 (Ind. Ct. App. 2004); Hammon v. State, 829 N.E.2d 444, 449, 456-58 (Ind. 2005).

[33] *Hammon*, 829 N.E.2d at 458. "The Court of Appeals did not decide whether the affidavit was properly admitted, reasoning that the issue was academic because the affidavit was cumulative of Mooney's testimony and therefore harmless, if error at all." *Id.* at 448; *Hammon*, 809 N.E.2d at 948 n.1.

[34] *Id.* at 459.

[35] Davis v. Washington, 126 S. Ct. 552 (2005), *cert. granted*; Davis v. Washington, 126 S. Ct. 2266, 2278-80 (2006).

[36] *Davis*, 126 S. Ct. at 2280.

[37] Davis v. Washington, 126 S. Ct. 552 (2005), *cert. granted*; Davis v. Washington, 126 S. Ct. 2266, 2270 (2006).

Crawford v. Washington.[38] In *Crawford*, the Court held the Confrontation Clause prohibits the use of "testimonial" statements that are not (or have not been) subject to cross-examination.[39] The Court did not, however, give a precise definition of "testimonial."[40] In *Davis*, the Court took a step in clarifying what sort of statements are testimonial by specifically addressing police interrogations.[41] It found that not all interrogations made by police would qualify as testimonial.[42] Instead, a court must objectively consider the reason and circumstances under which the statement was given to determine whether it is testimonial.[43] If the statement serves to request help in an ongoing emergency, as in McCottry's 911 call, then the statement is non-testimonial.[44] But if the statement is part of an investigation of possible past crimes, it would be considered testimonial regardless of the level of formality used in securing the statement.[45] Thus, after *Davis*, the courts will have to determine the primary purpose of the police interrogation before it can rule on whether the statement will be admissible as evidence under the Confrontation Clause.[46]

This note first discusses the background of the Confrontation Clause and how Confrontation Clause analysis evolved from a close relationship with hearsay rules to a complete separation from hearsay analysis in *Crawford*. The note will next discuss the "primary purpose test" articulated in *Davis* in determining which statements taken by police at the scene will be admissible as evidence and which will not. It will then review some issues with the test that will need further clarification by the Court, and it will also discuss the alternative "formality test" proposed by the dissent. Since both cases involved in *Davis* are rooted in domestic violence, the note will examine the dramatic effect the current doctrine will have on domestic violence cases, including difficulty in prosecuting the cases.[47] Finally, the note will explore how the forfeiture doctrine could remedy some of the problems in domestic violence cases where the victim does not testify as a result of the defendant's threats and intimidation.

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[38] Davis v. Washington, 126 S. Ct. 2266, 2273 (2006); Crawford v. Washington, 541 U.S. 36 (2004).

[39] *Crawford*, 541 U.S. at 68.

[40] *Id.* ("We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.").

[41] *Davis*, 126 S. Ct. at 2270.

[42] *Id.* at 2273-74.

[43] *Id.* at 2273-74, 2277.

[44] *Id.* at 2273-74, 2276-77.

[45] *Id.* at 2276.

[46] *Id.* at 2273-74.

[47] Myrna S. Raeder, *Domestic Violence, Child Abuse, and Trustworthiness Exceptions after* Crawford, 20 CRIM. JUST. 24, 25 (2005). Reports from news agencies shortly after *Crawford* indicated prosecutors were forced to drop nearly fifty percent of domestic violence prosecutions since an estimated eighty percent of victims refused to cooperate. *Id.*

BACKGROUND

The right of the accused to confront the witnesses against him is one that has existed since the Roman era, but has evolved considerably over time.[48] England's early civil law system, for example, allowed judges to examine witnesses before trials in private without the defendant present and later admit the out-of-court examinations into the trial as evidence.[49] This practice later moved to the opposite extreme and prevented out-of-court statements from being admitted at all.[50] The American colonies also had questionable confrontation practices.[51] When the U.S. Constitution was ratified in 1789 without a provision to allow the accused to confront a witness against him, part of the ratification agreement included an understanding that a Bill of Rights would be added.[52] In 1791, the first Congress

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[48] Coy v. Iowa, 487 U.S. 1012, 1015 (1988). The Roman judicial system was adversarial, much like the United States, and the primary means of proving a case was through witness testimony. Frank R. Herrmann, S.J., & Brownlow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481, 484 (1994). Although different social classes were sometimes afforded different treatment, one of the basic rights afforded all defendants was a right to confront a witness against them. *Id.* at 485. According to Roman Governor Festus, "[i]t is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." *Id.* at 482 (quoting *Acts of the Apostles* 25:16).

[49] *Crawford*, 541 U.S. at 43-44.

[50] *Id.* at 44-45. A change in England's civil law court system in the late 1600s generally excluding hearsay was due in part to the 1603 trial of Sir Walter Raleigh, one of England's great explorers and a hero, who was charged with treason for conspiring with Spain to overthrow King James. *Id.* at 44. Raleigh's alleged co-conspirator, Lord Cobham, testified in front of a "Privy Council" and later wrote a letter that implicated Raleigh in an effort for Cobham to try to save himself. *Id.* at 44; Alan Raphael, *When Can a Witness's Statements Be Admitted Into Evidence Without the Witness First Taking the Stand*, 6 PREVIEW 292 (2006). At Raleigh's trial, the court admitted Cobham's prior testimony and letter without Cobham's direct testimony. *Crawford*, 541 U.S. at 44. Raleigh protested that he did not have the opportunity to confront Cobham and that, although Cobham had lied in his prior testimony and letter, he would not lie to Raleigh's face. *Id.* Raleigh was convicted of treason and sentenced to death. *Id.*; Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 388-89 (1959). After this tragedy, English statutes and judicial decisions reformed the laws, granting the "right of confrontation." *Crawford*, 541 U.S. at 44; Pollitt, 8 J. PUB. L. at 388. The English law was changed to require face-to-face testimony. Raphael, 6 PREVIEW at 292. The Court of the King's Bench later went so far as to rule that if a witness was not available for cross-examination, his testimony would not be admitted as evidence, even if the witness were dead. *Crawford*, 541 U.S. at 44 (citing King v. Paine, 5 Mod. 163 (1696)).

[51] *Crawford*, 541 U.S. at 47-48 (relating how in the eighteenth century, the Virginia Council objected to the Governor hearing testimony privately without giving the accused access to the witnesses); Pollitt, *supra* note 50, at 396-97 (noting that before the Revolution, colonial courts heard cases involving violations of the Stamp Act in which the courts questioned and disposed of witnesses in private judicial proceedings); *Crawford*, 541 U.S. at 44 (noting that many states adopted the right of confrontation in their state constitutions, although the federal constitution did not originally have this right); *Id.* (quoting R. Lee, *Letter IV by the Federal Farmer* (Oct. 15, 1787)) (relating criticism by a colonist that the proposed U.S. Constitution did not secure the right to cross-examine witnesses in front of the fact-finders).

[52] *Crawford*, 541 U.S. at 49; Pollitt, *supra* note 50, at 399-400.

kept its promise and passed the Bill of Rights which included the Confrontation Clause in the Sixth Amendment.[53] The Sixth Amendment reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[54]

*Pre-*Roberts *Era*

One of the first cases interpreting the Confrontation Clause, *Mattox v. United States*, was heard in 1895.[55] Two witnesses testified at an earlier trial concerning the same crime but died before the second.[56] In affirming the murder conviction, the Court held that allowing the reporter to read the deceased testimony from the earlier trial was proper.[57] The Court reasoned that the Confrontation Clause prevented evidence from entering a trial when the defendant was not allowed to cross-examine the witness, but since the defendant cross-examined the witnesses in the earlier trial, there was no constitutional violation.[58] The Court also acknowledged that face-to-face confrontation allowed the fact-finders to deter-

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[53] *Crawford*, 541 U.S. at 49, 53-54; Pollitt, *supra* note 50, at 399-400 (stating that the basic purpose of the Sixth Amendment was to ensure the state could not take certain rights from a person faced with criminal charges).

[54] U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 49-50 (2004) (relating that many early courts interpreted the Confrontation Clause to mean the accused should have the opportunity to confront a witness through cross-examination) (citing Johnston v. State, 10 Tenn. 58, 59 (1821)) (holding that prior opportunity to cross-examine and proof of death allows a deceased witness's testimony to be admitted as evidence); State v. Hill, 20 S.C.L. 607, 608-10 (S.C. 1835) (holding that a police administered deposition is not admissible if witness dies after deposition); Commonwealth v. Richards, 35 Mass. 434, 437 (1837) (noting that the exact words of a deceased witness's previous testimony must be used); Bostick v. State, 22 Tenn. 344, 345-46 (1842) (holding that opting not to cross-examine a witness but later introducing the deposition as evidence allows witness's deposition to be entered as rebutting testimony); Kendrick v. State, 29 Tenn. 479, 485-88 (1850) (holding that the defendant's prior opportunity to confront and cross-examine deceased witness allows evidence to be admitted); United States v. Macomb, 26 F. Cas. 1132, 1133 (C.C. Ill. 1851) (No. 15,702) (holding that testimony of a deceased witness allowed because defendant cross-examined the witness at initial hearing); State v. Houser, 26 Mo. 431, 435-36 (1858) (holding that absent defendant's wrongdoing prior depositions cannot be entered into evidence).

[55] Mattox v. United States, 156 U.S. 237 (1895); Laird Kirpatrick, Crawford: *A Look Backward, A Look Forward*, 20 CRIM. JUST. 6, 7 (2005).

> The Court stated that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox*, 156 U.S. at 243. To grant the defendant's claim "would be carrying his constitutional protection to an unwarrantable extent" and "the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."

Mattox, 156 U.S. at 243; Kirkpatrick, 20 CRIM. JUST. at 7.

[56] *Mattox*, 156 U. S. at 240 (in the first trial the defendant was convicted but on appeal the case was reversed and remanded for a new trial).

[57] *Id.* at 242-44.

[58] *Id.* at 244.

mine the witness's credibility.[59] Since *Mattox*, the Court has required a showing that the witness is unavailable to testify before entering a previous statement into evidence.[60]

In 1965, following a period without Confrontation Clause disputes, the U.S. Supreme Court heard two Confrontation Clause cases in which it enforced the accused's fundamental right to have the opportunity to cross-examine a witness.[61] In *Pointer v. Texas*, the Court held the defendant's confrontation right was violated because he was not allowed to cross-examine the witness.[62] The Court held the right to a fair trial, through confrontation and cross-examination, was a fundamental right protected by the Constitution and was applicable to the states through the Fourteenth Amendment.[63] In the second case, *Douglas v. Alabama*, the Court held that Douglas' confrontation right was violated since the prosecutor read a statement from a person Douglas had no opportunity to cross-examine, and the jury could infer that since the witness would not testify, the statement was true.[64]

In 1968, the U.S. Supreme Court heard the cases of *Bruton v. United States* and *Barber v. Page*.[65] In *Bruton*, the Court ruled that Bruton's Sixth Amendment rights were violated since Bruton was not allowed to cross-examine the co-defendant in a joint trial.[66] The Court reasoned the jurors could not follow a jury instruction to disregard the co-defendant's incriminating statement, and the instruction alone was not enough to satisfy Bruton's confrontation right.[67] The Court compared the Sixth Amendment and the traditional hearsay rules.[68] The Confrontation

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[59] *Id.*

[60] Kirpatrick, *supra* note 55, at 7.

[61] Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

[62] *Pointer*, 380 U.S. at 401, 403, 405. The case involved a robbery victim who testified at a preliminary hearing in which the defendant was not represented by counsel. *Id.* at 401. The defendant made no attempt to cross-examine the witness. *Id.* At trial, the court allowed the transcript to be read rather than requiring the witness to testify. *Id.*

[63] *Pointer*, 380 U.S. at 403; U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); Adamson v. California, 332 U.S. 46, 70-72 (1947) (Black, J., dissenting) (majority chose to selectively incorporate the "Bill of Rights" instead of Justice Black's total incorporation approach.).

[64] *Douglas*, 380 U.S. at 416-19. The prosecutor read a police statement previously given by the accomplice because the accomplice had exercised his Fifth Amendment right to avoid self-incrimination during his testimony. *Id.* at 416.

[65] Bruton v. United States, 391 U.S. 123 (1968); Barber v. Page, 390 U.S. 719 (1968).

[66] *Bruton*, 391 U.S. at 137. The co-defendant did not testify in a joint trial but the prosecution read a statement that implicated both Bruton and his co-defendant. *Id.*

[67] *Id.*

[68] *Id.* at 129.

Clause and hearsay rules "stem from the same roots," but the two are not the same.[69] Evidence may meet the rules of hearsay but not meet the Confrontation Clause.[70]

In *Barber*, the Court held that since the defendant did not have an opportunity to confront the witness through cross-examination in front of the jury, the defendant's confrontation right was violated.[71] This case made the requirement of the unavailability of a witness more stringent.[72] If a witness is in jail, he is not unavailable, and the prosecution must make a good-faith effort to produce the witness at trial.[73] If a witness is available for trial, a defendant has a right to confront the witness through cross-examination, which allows the jury to determine the witness's credibility.[74] Also, the right to cross-examine a witness is not waived just because the defendant's counsel does not cross-examine the witness at a preliminary hearing.[75]

The Court further explored the differences between availability of testimony and the importance of the testimony in the 1970 case of *California v. Green*.[76] The Court faced a situation where the defendant had an opportunity to cross-examine a witness, but the witness was evasive and kept changing his story.[77] The Court

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[69] Dutton v. Evans, 400 U.S. 74, 86 (1970).

[70] *Id.*

[71] Barber v. Page, 390 U.S. 719, 720-22, 725-26 (1968). A key witness was incarcerated less than three hundred miles away from the trial, and the State made no effort to have the witness testify. *Id.* at 720. Instead the court admitted evidence from a preliminary hearing in which the defense counsel chose not to cross-examine the witness. *Id.*

> The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial.

Id. at 725.

[72] *Id.* at 723-25.

[73] *Id.*

[74] Barber v. Page, 390 U.S. 719, 725-26 (1968).

[75] *Id.* at 725.

[76] California v. Green, 399 U.S. 149 (1970).

[77] *Green*, 399 U.S. at 151-52. This case involved a minor, named Porter, who was caught selling marijuana. *Id.* at 151. After being arrested for selling marijuana to an undercover police officer, Porter reported that Green had contacted him and asks him if he wanted to sell some "stuff" which Green personally delivered to Porter. *Id.* A week later at the preliminary hearing, Porter stated that Green was the supplier but he had not personally delivered the marijuana to Porter. *Id.* At trial two months later, Porter was uncertain how he had obtained the marijuana because he was on LSD. *Id.* at 152. When the prosecutor examined Porter at trial, he read Porter's preliminary hearing statements. *Id.* Porter evasively answered the prosecutor's questions, as well as the defendant's cross-examination, by claiming that although the preliminary hearing statements refreshed his memory,

found the defendant's right to confront the witness had been met.[78] It explained that, while "hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law."[79] Even though the reading of the minor witness's previous statements may have been questionable under the hearsay rules, it did not mean the Confrontation Clause had been violated.[80] If a witness was available but could not remember what happened, no Confrontation Clause violation exists, even if there had been a hearsay violation.[81]

Also in 1970, the Court heard *Dutton v. Evans* where the Court held the defendant's confrontation right was not violated since he had the opportunity to cross-examine each witness.[82] The Court also found the statement had an "indicia of reliability" because the statement was made spontaneously and against the co-conspirator's own interests.[83] The confrontation right does not bar all hearsay evidence at trial.[84] The Confrontation Clause was added to ensure the accused has the right to show the jury that the witness's statement is not true through confrontation.[85]

Next, the Court decided *Mancusi v. Stubbs* in which a witness had testified and been cross-examined at the first trial and then left the country permanently.[86] The Court combined requirements from previous cases by holding that the testimony from the first trial could be used in the second trial upon a showing of the witness's unavailability, the testimony's reliability, and an opportunity for the defendant to cross-examine.[87] The Court admitted the previous testimony because the jury still had the opportunity to assess the statement's credibility.[88]

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he still was not sure of the details of what had happened since he was taking drugs at the time of the incident. *Id.*

[78] *Green*, 399 U.S. at 155.

[79] *Id.*

[80] *Id.* at 156.

[81] *Id.* at 158. This case shows how the Court viewed hearsay and confrontation rights as two separate doctrines. *Id.* at 155-56.

[82] Dutton v. Evans, 400 U.S. 74, 78 (1970). While in prison, Evans's co-conspirator, Williams, commented to a fellow inmate that Williams would not be in prison if it were not for Evans. *Id.* at 77. The fellow inmate testified at Evans' trial and was cross-examined by Evans' counsel. *Id.*

[83] *Id.* at 88-89. The Court started using the "indicia of reliability" to show trustworthiness of a statement. *Id.*

[84] *Id.* at 80.

[85] *Id.* at 89.

[86] Mancusi v. Stubbs, 408 U.S. 204, 208-09 (1972).

[87] *Id.* at 213, 216.

[88] *Id.* at 216.

In 1975, Congress implemented the Federal Rules of Evidence which codified traditional hearsay rules and exceptions.[89] In doing so, Congress wanted to ensure evidence was used in a way to ascertain the truth.[90] However, even if a statement satisfied the Federal Rules of Evidence, the testimony was still not admissible unless the Confrontation Clause requirements were met.[91] At this point, the Confrontation Clause required that the witness be unavailable and the defendant had an opportunity to cross-examine.[92]

The Roberts *Era*

In 1980, the U.S. Supreme Court decided the landmark case of *Ohio v. Roberts*, which changed previously-held notions about the Sixth Amendment.[93] The Court held, as it had in the past, that entering preliminary hearing testimony at trial did not violate the defendant's Sixth Amendment confrontation rights since the defendant's counsel was allowed to question the witness at the preliminary hearing, and the witness was unavailable for trial.[94]

The Court found the Confrontation Clause restricts admissible hearsay in two ways.[95] The first requirement to allow hearsay was called the "rule of necessity," established in *Mancusi* and *Barber*.[96] That is, if the defendant had a prior opportunity to cross-examine the witness, then the prosecution must show that the witness is unavailable in order to admit the prior testimony as evidence.[97] The second requirement, a major change, came when the Court held that once a witness is shown to be unavailable, the prosecutor must prove the statement is trustworthy or reliable, which will allow the fact-finder to determine the state-

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[89] *See* FED. R. EVID. 102; FED. R. EVID. 801-807. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* at 801(c). H.R. rep. no. 94-355, at 1095 (1975) (This bill "[w]ill put into the Federal Rules of Evidence the prevailing Federal practice. . . . It will simply provide that out-of-court identifications are admissible if they meet constitutional requirements.").

[90] FED. R. EVID. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.").

[91] Dutton v. Evans, 400 U.S. 74, 80 (1970).

[92] Mancusi v. Stubbs, 408 U.S. 204, 208-13 (1972).

[93] Ohio v. Roberts, 448 U.S. 56, 65-66 (1980). *Roberts* involved a witness in a forgery case who had become unavailable after testifying and being cross-examined at a preliminary hearing. *Id.* at 58-59. The witness, Anita, was the victim's daughter. *Id.* at 58. Despite the prosecution's five subpoenas, the state was unable to locate Anita for trial. *Id.* at 59.

[94] *Id.* at 70, 75.

[95] *Id.* at 65.

[96] Mancusi v. Stubbs, 408 U.S. 204, 212-13 (1972); Barber v. Page, 390 U.S. 719, 722 (1968).

[97] *Roberts*, 448 U.S. at 65.

ment's credibility.[98] The prosecutor can prove reliability by showing the evidence falls into "certain hearsay exceptions [that] rest upon such solid foundations that admission of virtually any evidence within them comports the 'substance of the constitutional protection.'"[99] The Court agreed with *Dutton* and *Green* that both the Confrontation Clause and hearsay rules protect the same rights.[100] Since some hearsay rules are so firmly established, meeting the hearsay rule also means the constitutional confrontation standard is met.[101]

After *Roberts*, the Court's decisions continued to weaken the test of unavailability and reliability.[102] For example, in *United States v. Inadi*, the Court held that co-conspirators' recorded statements provided a weaker form of evidence than live testimony.[103] Still, the tape-recorded phone calls could be admitted into evidence.[104] The Court held that the Confrontation Clause did not require proof that the co-conspirator was unavailable for trial as long as the statements met the requirements under the Federal Rules of Evidence regarding hearsay.[105] In effect, this case demonstrated the Court's direction that in order for evidence to be admitted, it only needed to meet the hearsay requirements and not additional Confrontation Clause requirements.[106]

Similarly in *Bourjaily v. United States*, the trial court admitted a co-conspirator's taped telephone statements.[107] Since the requirements under the Confrontation Clause and the Federal Rules of Evidence were identical, the Court held that if the statements met the Federal Rules' requirements, there was no need to determine the reliability requirement under the Confrontation Clause.[108]

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[98] *Id.* at 65-66.

[99] *Id.* at 66 (quoting Mattox v. United States 156 U.S. 237, 244 (1895)).

[100] *Roberts*, 448 U.S. at 66 (quoting California v. Green, 399 U.S. 149, 155 (1970); Dutton v. Evans, 400 U.S. 74, 86 (1970)).

[101] *Roberts*, 448 U.S. at 66 (quoting *Mattox*, 156 U.S. at 244) ("[C]ertain hearsay exceptions rest on such solid foundations that admission of virtually any evidence within them comports with the 'substance of constitutional protection.'"). The dissent pointed out that although the statement may have been shown to be reliable, the state must first meet the "threshold requirement" of the witness's unavailability. *Id.* at 78-79 (Brennan, J., dissenting). The state is required to show that it is impossible for the witness to testify at trial which the dissenters did not agree was met. *Id.* at 79-80 (Brennan, J., dissenting).

[102] Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 757 (2005).

[103] *Id.*; United States v. Inadi, 475 U.S. 387, 394-95 (1986).

[104] *Inadi*, 475 U.S. at 390, 400.

[105] *Id.* at 394-95 (holding the statement must be made in the course and furtherance of the conspiracy as required by the hearsay rule); FED. R. EVID. 801(d)(2)(E).

[106] *Inadi*, 475 U.S. at 394-95.

[107] Bourjaily v. United States, 483 U.S. 171, 174 (1987).

[108] *Id.* at 181-82.

During the *Roberts* era, the Court only disallowed two types of testimony as not within "firmly rooted" hearsay exceptions.[109] The first type of testimony came from accomplices' confessions.[110] The Court found these statements unreliable because they were often made to implicate the other person while trying to save the declarant.[111] The second type of testimony came in child abuse cases.[112] Although prosecutors used different methods to try to allow the defendant the right to confront the witness while still trying to protect the young victim, the Court found that some methods violated the Confrontation Clause.[113] In *Coy v. Iowa*, for example, the Court held the defendant's Sixth Amendment rights were violated because a screen placed between the witness and the defendant prevented him from confronting the witness face-to-face.[114] In *Maryland v. Craig*, the Court departed from previous rulings by holding that although face-to-face confrontation is preferred, it is not an absolute Sixth Amendment right.[115] Due to the trauma caused to the child witness, the Court held that it was permissible under the Sixth Amendment to allow the child to testify by one-way, closed-circuit television upon the showing by the state of the trauma that would be caused to the witness by interaction with the defendant.[116] Then in *Idaho v. Wright*, the Court found the statements made by the two-year-old to a doctor did not have sufficient indicia of reliability and therefore the defendant's Sixth Amendment right to confront the witness was violated.[117] *Wright* helped solidify the "indicia of reliability" requirement and also demonstrated that the Sixth Amendment is only violated if a hearsay exception is not met.[118]

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[109] *See* Lininger, *supra* note 102, at 758.

[110] *Id.*

[111] Lilly v. Virginia, 527 U.S. 116, 130-31 (1999). Three men committed several robberies, then carjacked a car and killed the driver. *Id.* at 120. One man told the police that he had been involved in the robberies but one of the other men had carjacked the car and killed the driver. *Id.* at 120-22. The trial court allowed the statement but the U.S. Supreme Court held the statements were not reliable. *Id.* at 121-22, 130-31.

[112] *See* Lininger, *supra* note 102, at 758.

[113] *See* Coy v. Iowa, 487 U.S. 1012, 1020 (1988); Maryland v. Craig, 497 U.S. 836, 840-42, 855, 860 (1990); Idaho v. Wright, 497 U.S. 805, 826-27 (1990).

[114] Coy v. Iowa, 487 U.S. 1012, 1017-18 (1988). The Court reasoned that the defendant has a right of face-to-face confrontation in addition to the right to cross-examine. *Id.* at 1020-22.

[115] Maryland v. Craig, 497 U.S. 836, 857-58 (1990). The Court remanded the case and held if there was no showing of possible trauma to the victim, it would violate the defendant's Confrontation rights to allow the witness to testify by closed-circuit television. *Id.* at 860.

[116] *Id.* at 840-42.

[117] Idaho v. Wright, 497 U.S. 805, 822, 827 (1990). Two sisters, one 5½ and one 2½, told their father's girlfriend that their mother's boyfriend had sexually assaulted them with the help of their mother. *Id.* at 808-09. After being reported to police, the girls were examined and interviewed by a doctor, but he did not properly record the interview. *Id.* at 809-11. At trial, the judge determined that the then three-year-old could not testify, so the doctor testified about the substance of the interview. *Id.* at 809, 816, 818. Both the mother and the boyfriend were convicted of two counts of lewd conduct with a minor. *Id.* at 812.

[118] *See* Lininger, *supra* note 102, at 758.

The Crawford *Era*

In 2004, the U.S. Supreme Court reinvented the Confrontation Clause when it decided *Crawford v. Washington*.[119] *Crawford* overruled the guidelines set forth in *Ohio v. Roberts* concerning testimonial statements.[120] The Court in *Crawford* found the Confrontation Clause required an opportunity to cross-examine, regardless of the showing of the statement's reliability.[121] The *Crawford* ruling

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[119] Crawford v. Washington, 541 U.S. 36, 61 (2004). In *Crawford*, Kenneth Lee allegedly attempted to rape Sylvia Crawford, so her husband, Michael Crawford, went to Lee's house to confront him. *Id.* at 38. Michael ended up stabbing Lee, and the police eventually arrested Michael for attempted murder. *Id.* While in police custody, the police read both Michael and Sylvia their *Miranda* warnings and then interrogated the couple separately. *Id.*; Miranda v. Arizona, 384 U.S. 436, 479 (1966). Michael and Sylvia's statements were generally consistent, although Sylvia contradicted Michael by saying that Lee did not reach for a weapon. *Crawford*, 541 U.S. at 38-40. As evidence at Michael's trial, the prosecutor entered Sylvia's tape-recorded statement to the police under the State's "hearsay exception against penal interest." *Id.* at 40; WASH. R. EVID. 804(b)(3) (identical to Federal Rule of Evidence 804(b)(3)). Washington State marital privilege law barred Sylvia from testifying, though it allowed a spouse's out-of-court statement to be admitted under a hearsay exception. *Crawford*, 541 U.S. at 40; State v. Burden, 841 P.2d 758, 760 (1992); WASH. REV. CODE § 5.60.060(1) (1994) ("A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage."). Michael refused to waive the privilege to allow his wife to testify and counsel to cross-examine her. *Crawford*, 541 U.S. at 40. The trial court admitted the statement into evidence despite Michael's Confrontation Clause objections, and the jury convicted Michael of assault. *Id.* at 40-41. The Washington Court of Appeals reversed the conviction because, in applying a "nine-factor test," it felt Sylvia's statement was not reliable since it contradicted a prior verbal statement, the statement resulted from specific police questioning, and "she admitted she had shut her eyes during the stabbing." *Id.* at 41; State v. Crawford, 54 P.3d 656, 661 n.3 (2002); State v. Rice, 844 P.2d 416, 425 (1993). The nine factors were:

> (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement.

State v. Crawford, 54 P.3d 656, 661 n.3. The Washington Supreme Court reversed even though it found the statement did not fall under the hearsay exception. Washington v. Crawford, 54 P. 3d 656, 664 (Wash. 2002). Unlike the court of appeals, the Washington Supreme Court held Sylvia's statement was, in fact, reliable. *Id.* The U.S. Supreme Court, however, granted certiorari and reversed the Washington Supreme Court's decision. Crawford v. Washington, 540 U.S. 964 (2003); *Crawford*, 541 U.S. at 69.

[120] *Id.* at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts* . . . .").

[121] *Id.* at 68-69. Before *Crawford*, if a statement qualified under the hearsay exception, it met the confrontation requirement. Idaho v. Wright, 497 U.S. 805, 813-14 (1990).

required separate confrontation and hearsay analyses.[122] Evidence that previously would have been admitted without concern was now inadmissible.[123]

The Court held that playing the recorded statement at trial violated the defendant's Sixth Amendment right to be confronted by the witness against him because the statement was testimonial, and the defendant did not have an opportunity to cross-examine the witness.[124] In order to meet Confrontation Clause requirements, the statement must be testimonial, the witness must be unavailable, and the defendant must have had a prior opportunity to cross-examine the witness.[125]

In the opinion written by Justice Scalia, the Court explained that the history of the Sixth Amendment supported its ruling.[126] The Confrontation Clause was written to prevent the use of "ex parte examinations of evidence against the accused."[127] The Court found the Sixth Amendment protects a defendant against witnesses who "bear testimony."[128] Although the Court did not specifically define the term "testimonial," it did give examples, stating that "[a]ffidavits, depositions, prior testimony, or confessions" are testimonial.[129] The Court also found that "[s]tatements taken by police officers in the course of interrogations are also testimonial, under even a narrow standard."[130]

Crawford illustrated some key changes in Confrontation Clause jurisprudence.[131] The Court held that hearsay and confrontation rights are two distinct issues.[132] Also, by holding that only testimonial statements invoke confrontation issues, it created separate rules for testimonial and non-testimonial statements.[133] For a testimonial statement to be admitted, the witness must be unavailable and the defendant must have had a prior opportunity to cross-examine the witness.[134]

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[122] Lininger, *supra* note 102, at 765.

[123] *Id.* at 768.

[124] *Crawford*, 541 U.S. at 68.

[125] *Id.* at 53-54.

[126] *Id.* at 50.

[127] *Id.*

[128] *Id.* at 51. The Court used an 1828 edition of Webster's *An American Dictionary of the English Language* in defining testimony as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.*

[129] *Crawford*, 541 U.S. at 52 (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring)).

[130] *Crawford*, 541 U.S. at 52.

[131] *Id.* at 53.

[132] *Id.* at 53; Ohio v. Roberts, 448 U.S. 56, 66 (1980) (holding that some hearsay rules were so established that meeting the hearsay requirement also meets the confrontation requirement).

[133] *Crawford*, 541 U.S at 59, 68.

[134] *Id.* at 59.

For a non-testimonial statement, states are allowed some flexibility, as shown in *Roberts*.[135] The key in many cases could be in the definition of the statement as testimonial or non-testimonial.[136] Although the Court gave a few examples of what could be a testimonial statement, it became clear that more clarification was needed.[137]

After *Crawford*, Wyoming courts responded much like other state courts.[138] The Wyoming case against Michael Sarr demonstrates the different approaches used before and after *Crawford*.[139] The State charged Sarr with seven counts of aggravated assault and battery in February of 2001 for alleged attacks against Ann Wing.[140] The charges were supported in part by Wing's two tape-recorded statements to police and the police search of the home for evidence.[141] Wing died shortly after making the statements.[142] After being convicted of five counts of assault and battery, Sarr appealed to the Wyoming Supreme Court, which decided the case in March of 2003.[143] The court found the State secured the convictions based solely on Wing's police interviews.[144] The evidence conformed with the Wyoming Rule of Evidence 804(b)(6), but this rule was not a "firmly rooted" hearsay exception.[145] In considering the totality of the circumstances, the Wyoming Supreme Court decided that the statement was trustworthy, therefore, the trial court properly admitted the statement.[146] Sarr appealed to the U.S.

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[135] *Crawford*, 541 U.S. at 68; *Roberts*, 448 U.S. at 66 (holding that requirements of unavailability and "indicia of reliability" must be shown for a statement to be admitted as evidence).

[136] Richard D. Friedman, *Crawford Surprises: Mostly Unpleasant*, 20 CRIM. JUST. 36, 36-37 (2005).

[137] *Id.* at 36; *see Crawford*, 541 U.S. at 51.

[138] *See* Sarr v. Wyoming, 113 P.3d 1051 (Wyo. 2005) [hereinafter *Sarr II*]; Vigil v. Wyoming, 98 P.3d 172 (Wyo. 2004) (reversing conviction when co-conspirator's previous statement to police admitted into evidence without any opportunity for defendant to cross-examine); Wyoming v. Sarr, 65 P.3d 711 (Wyo. 2003) [hereinafter *Sarr I*]; Jeanine Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of* Crawford v. Washington, 79 S. CAL. L. REV. 213, 216-18 (2005).

[139] *Sarr II*, 113 P.3d at 1051.

[140] *Sarr I*, 65 P.3d at 714-15.

[141] *Id.* at 714. Sarr and Wing's intimate relationship allegedly included abusive acts such as making her stand in the corner, hitting her with a "coup stick," throwing things at her, throwing her to the ground, striking her with a vehicle, repeatedly bashing her head against the dining room table, striking her with a pistol belt full of shells, threatening to kill her with a firearm, and kicking her in the head while wearing heavy winter boots. *Id.* at 714-15.

[142] *Id.* at 715 (noting that Wing drowned in the bathtub and the death was unrelated to the charges against Sarr).

[143] *Id.* at 713, 715.

[144] *Id.* at 715.

[145] *Sarr I*, 65 P.3d at 715-17; WYO. R. EVID. 804(b)(6).

[146] *Id.* at 716, 718. The Wyoming Supreme Court did find one count lacked sufficient evidence of injury. *Id.* at 719.

Supreme Court, which remanded the case to be considered in light of *Crawford*.[147] In June 2005, the Wyoming Supreme Court reconsidered the same facts and reversed two of the convictions it had previously upheld.[148] The court found that Wing's statements were testimonial and Sarr had not been given the opportunity to cross-examine the witness as *Crawford* required.[149]

PRINCIPAL CASE

While *Crawford* held the confrontation requirement applied to testimonial statements, *Davis* addressed the testimonial nature of police interrogation.[150] *Crawford* stated police interrogations were subject to the Confrontation Clause because the statements given to police would be testimonial.[151] The issue presented to the Court allowed it to determine when a statement made to law enforcement personnel would be testimonial and thus "subject to the requirements of the Sixth Amendment's Confrontation Clause."[152] The Court refined this by differentiating between testimonial and non-testimonial statements in police interrogations.[153]

Davis clarified the testimonial nature of the two most common types of police interrogations: 911 calls and questioning at the scene of a crime.[154] The first case involved a 911 call made to police by Michelle McCottry.[155] The second case involved a police interrogation at the scene of a domestic dispute located in Hershel and Amy Hammon's home.[156]

The Court began by reiterating that the Confrontation Clause gives a person a right to confront the witness against him.[157] The basis of the confrontation right depends on the declarant being a witness.[158] Only a person who makes a testimonial statement is a witness.[159]

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[147] Wyoming v. Sarr, 125 S. Ct. 297 (2004).

[148] *Sarr II*, 113 P.3d at 1052.

[149] *Id.* at 1053. The court was not asked to determine the testimonial nature of the statement. *Id.* at 1053.

[150] Crawford v. Washington, 541 U.S. 36, 51 (2004); Davis v. Washington, 126 S. Ct. 2266 (2006).

[151] *Crawford*, 541 U.S. at 52.

[152] *Davis*, 126 S. Ct. at 2270.

[153] *Id.* at 2273-74.

[154] State v. Davis, 111 P.3d 844, 846 (Wash. 2005); Hammon v. State, 829 N.E.2d 444, 446 (Ind. 2005).

[155] *Davis*, 111 P.3d at 846; *See supra* notes 1-18 and accompanying text.

[156] Hammon v. State, 829 N.E.2d 444, 446 (Ind. 2005); *See supra* notes 18-36 and accompanying text.

[157] Davis v. Washington, 126 S. Ct. 2266, 2273 (2006).

[158] *Id.*

[159] *Id.*

The Court held that if a statement is made in an attempt to receive help from the police in an emergency, it is non-testimonial.[160] It stated that a non-testimonial statement is one "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[161] Therefore, the declarant in an emergency encounter with police is not considered a witness within the meaning of the Sixth Amendment Confrontation Clause.[162] The Court unanimously found that McCottry's statement identifying Davis as her attacker was asking for help in an "ongoing emergency," because she described the "events as they were actually happening, rather than 'describ[ing] past events.'"[163]

A statement is testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[164] Since the Confrontation Clause applies only to declarants who bear testimony, the testimonial nature of the statement causes the declarant to become a witness within the meaning of the Confrontation Clause.[165]

The Court was focusing on police interrogations and began by categorizing police interrogations to include interrogations that take place at the scene of an incident as well as 911 calls.[166] In *Crawford*, the Court found that police interrogations were testimonial.[167] But in *Davis*, the Court differentiated the testimonial nature of statements that resulted in different types of situations where police interrogations occur.[168] The initial interrogation during a 911 call is generally to determine what the situation is and what type of police assistance will be needed.[169] The purpose of the 911 operator's interrogation is not to determine past events, therefore, it will generally be non-testimonial.[170]

The Court also found an interrogation may begin as non-testimonial and progress into a testimonial statement once the emergency has ended.[171] The

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[160] *Id.* at 2273, 2277.

[161] *Id.* at 2273.

[162] *Davis*, 126 S. Ct. at 2273.

[163] *Id.*

[164] *Id.* at 2273-74 (quoting Lilly v. Virginia, 527 U.S. 116, 137 (1999)).

[165] *Id.* at 2273.

[166] *Id.* at 2274 n.2.

[167] Crawford v. Washington, 541 U.S. 36, 52 (2004).

[168] *Davis*, 126 S. Ct. at 2273-74.

[169] *Id.* at 2276, 2279.

[170] *Id.* at 2279.

[171] *Id.* at 2277. The Court explained:

> This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme

Court applied this standard by comparing McCottry and Sylvia Crawford's interrogations.[172] Sylvia's interrogation happened in the police station where she gave answers that were recorded by an attending police officer.[173] In contrast, the 911 operator interrogated McCottry while she remained in the place of the attack.[174] She frantically answered questions in a place where she was unsafe, unprotected, and in immediate danger.[175] She described the events as they were occurring instead of having occurred in the past.[176] The Court found she was not testifying as a witness would under direct examination.[177] Instead, McCottry was seeking aid from police.[178] So admitting her statement did not violate Davis's confrontation rights.[179]

In reversing and remanding Hershel's conviction by an eight-to-one vote, the Court reasoned that Amy's affidavit was testimonial, and a prior opportunity to cross-examine must be afforded Hershel in order to satisfy the Confrontation Clause requirements.[180] The testimonial nature of Amy's statement derived from the fact she was describing past events as opposed to an ongoing emergency.[181] The Court, as it did in *Davis*, compared the interrogations of Amy Hammon and Sylvia Crawford and found the interrogations to be similar.[182] The primary purpose of both interrogations was to prove past conduct.[183] Both interrogations took place after the event or emergency had ended, while they were separated from their husbands, and in the presence of police.[184] The Court did acknowledge

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> Court put it, "evolve into testimonial statements," once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*.

Id.

[172] *Id.* at 2276-77.

[173] Davis v. Washington, 126 S. Ct. 2266, 2276 (2006).

[174] *Id.* at 2276.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Davis*, 126 S. Ct. at 2276-77 (2006).

[179] *Id.* at 2277-78.

[180] *Id.* at 2278.

[181] *Id.*

[182] *Id.*

[183] *Davis*, 126 S. Ct. at 2278.

[184] *Id.*

the difference in formality between the two situations.[185] Sylvia's interrogation took place in the police station after she had been read her *Miranda* rights, but Amy's interrogation took place in her living room with no *Miranda* warning.[186] The Court found the level of formality may strengthen the testimonial claim regarding a statement, but the formality is not required.[187]

While concurring with the majority in upholding the *Davis* conviction, Justice Thomas dissented with respect to the reversal of the conviction in the *Hammon* case.[188] He agreed with the majority that the history of the Confrontation Clause supports the definition of a witness and that only a witness can bear testimony.[189] To be considered as a witness, however, a level of formality should be required.[190] In *Crawford*, the police read the *Miranda* warnings and then took Sylvia's statements while she was in police custody.[191] That level of formality alerted the witness to the importance of her statements.[192]

Justice Thomas also claimed the articulated primary purpose test "yields no predictable results to police officers and prosecutors attempting to comply with the law."[193] The primary purpose of law enforcement is not always singular or clear.[194] A law enforcement officer generally has the purposes of responding to the emergency and gathering evidence.[195] Rather than the police in the field, the courts will be charged with determining the officer's actual purpose.[196]

Thus, Justice Thomas advocated that neither the 911 call in *Davis* nor the affidavit in *Hammon* would be testimonial under the correct approach.[197] Thomas reasoned that the lack of formality and the inconsistency with the purpose of the Confrontation Clause furthered the conclusion that did not apply to either interrogation.[198] He argued that the new standards are "neither workable nor a targeted attempt to reach the abuses forbidden by the Clause."[199] The standard is over-

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[185] *Id.*

[186] *Id.* at 2278; Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[187] *Davis*, 126 S. Ct. at 2278.

[188] *Id.* at 2285 (Thomas, J., dissenting).

[189] *Id.* at 2282 (Thomas, J., dissenting).

[190] *Id.* at 2282-83 (Thomas, J., dissenting).

[191] *Id.* at 2282 (Thomas, J., dissenting); Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[192] *Davis*, 126 S. Ct. at 2282-83 (Thomas, J., dissenting).

[193] *Id.* at 2283 (Thomas, J., dissenting).

[194] *Id.* (Thomas, J., dissenting).

[195] *Id.* (Thomas, J., dissenting).

[196] *Id.* at 2284 (Thomas, J., dissenting).

[197] *Davis*, 126 S. Ct. at 2284 (Thomas, J., dissenting).

[198] *Id.* at 2284 (Thomas, J., dissenting).

[199] *Id.* at 2285 (Thomas, J., dissenting).

inclusive since the Confrontation Clause was never meant to cover informal police interrogations whether it occurred on the phone or at the scene.[200] Furthermore, he argued that the majority's apprehension that the right will be evaded if it only applies to formal statements can be remedied by the court controlling the use of evidence that is entered by the prosecution as a way of "circumventing the literal right of confrontation."[201]

The Court rejected the "formality test" proposed by Justice Thomas although he argued it might clarify when testimony is actually taken.[202] Justice Thomas argued the history of the Confrontation Clause and the past cases do not support the majority's ruling.[203] The "formality test" would require a formalized statement "[s]uch as affidavits, depositions, prior testimony, or confessions" in order to qualify for protection under the Confrontation Clause.[204] Statements to police that are not formalized with *Miranda* warnings or in a formal setting would not qualify.[205] Since the statements were not formalized by *Miranda* warnings in either case, the statements would not qualify as testimony or invoke the Confrontation Clause. They simply lack the formal nature required for testimony that lets witnesses know they are giving testimony.[206]

ANALYSIS

In *Davis*, the Court considered two different tests for determining whether a statement made by a declarant during police interrogations was testimonial or non-testimonial: The "primary purpose test," accepted by the majority, and the "formality test," proposed by Justice Thomas in his dissent.[207] Both tests have strengths and weaknesses and will shape domestic violence cases in different ways. Due to the many domestic violence cases, prosecutors, attorneys, and courts need an effective way to handle these cases. Confrontation becomes an important issue in domestic violence cases. If a victim's statement to police requires the victim to later testify, many domestic violence offenses will be difficult to prosecute if the victim refuses to cooperate.

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[200] *Id.* at 2283 (Thomas, J., dissenting).

[201] *Id.* at 2283 (Thomas, J., dissenting).

[202] *Davis*, 126 S. Ct. at 2282-84 (Thomas, J., dissenting).

[203] *Id.* at 2281 (Thomas, J., dissenting).

[204] *Id.* at 2282 (Thomas, J. dissenting); White v. Illinois, 502 U.S. 346, 365 (1992).

[205] *Davis*, 126 S. Ct. at 2282-83 (Thomas, J. dissenting); Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[206] *Davis*, 126 S. Ct. at 2282 (Thomas, J., dissenting).

[207] *Id.* at 2273-74; *see also id.* at 2282-83 (Thomas, J., dissenting).

Comparing the Primary Purpose Test with the Formality Test

The majority of the Court adopted the "primary purpose test" to determine if statements made during police interrogations should be considered testimonial or non-testimonial.[208] This objective test requires a court to determine whether the police interrogator's primary purpose was made to collect evidence of a past criminal act to be used later for prosecution or to aid in an emergency.[209] To determine if a statement is testimonial, a court may consider facts indicating formality in the gathering of the statement, the surrounding circumstances of safety or emergency, and the method of recording the statement.[210]

A strength the "primary purpose test" affords is a definition of what is and is not testimonial.[211] Although *Crawford* previously differentiated between testimonial and non-testimonial statements, it articulated only a broad guideline.[212] The "primary purpose test" provides a more detailed analysis to be applied and allows for an objective determination by the court of the circumstances surrounding the statement.[213] The Court's use of objective tests is favorable because it avoids the problem of courts having to try to figure out individuals' thoughts.[214]

The disadvantage of the "primary purpose test" is that it may lead to further uncertainty in its effective resolution of the confrontation issues.[215] The *Davis* Court adopted a standard defining "testimonial" that may lead to unpredictability.[216] For example, unpredictability may arise in defining when the emergency

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[208] *Id.* at 2273-74; Michael H. Graham, *The* Davis *Narrowing of* Crawford*: Is the Primary Purpose Test of* Davis *Jurisprudentially "Sound," "Workable," and "Predictable?"*, 42 NO. 5 CRIM. L. BULL. 4 (2006).

[209] *Davis*, 126 S. Ct. at 2273-74, 2277.

[210] *See id.* at 2276-77.

[211] *Id.* at 2273-74.

[212] Crawford v. Washington, 541 U.S. 36, 59, 68 (2004).

[213] *Davis*, 126 S. Ct. at 2273-74; Andrew C. Fine, *Refining* Crawford: *The Confrontation Clause After* Davis v. Washington *and* Hammon v. Indiana, 105 MICH. L. REV. FIRST IMPRESSIONS 11, 12 (2006), *at* http://www.michiganlawreview.org/firstimpressions/vol105/fine.pdf (last visited March 1, 2007).

[214] *See* Whren v. United States, 517 U.S. 806, 812-13 (1996). A plainclothes police officer arrested the defendant after stopping the vehicle for a minor traffic violation and then discovering drugs in the car. *Id.* at 808-09. The issue in the case hinged on whether the police officer's subjective thoughts should be considered. *Id.* at 808. The Court found that the lower court was correct in looking at what a reasonable officer in the situation would have done. *Id.* at 813, 819.

[215] *Davis*, 126 S. Ct. at 2284 (Thomas, J., dissenting).

[216] Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach But Not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16, 18 (2006) *at* http://www.michiganlawreview.org/firstimpressions/vol105/giffin.pdf (last visited March 1, 2007); *Davis*, 126 S. Ct. 2283 (Thomas, J., dissenting). The *Crawford* Court criticized *Roberts* for creating precisely the same unpredictability. Lininger, *supra* note 102, at 763-64; Griffin, 105 MICH. L. REV. FIRST IMPRESSIONS at 18.

has ended, given that a statement's timing might affect its primary purpose.[217] An interrogation that starts as a non-testimonial request for assistance can "evolve into [a] testimonial statement" once the emergency assistance is rendered or the emergency has ended.[218] The fine line can mean the difference between key evidence being admitted or not.[219] For example, when McCottry told the 911 operator Davis had left the house, the statement changed from non-testimonial to testimonial because the emergency had ended.[220]

Although McCottry's case seemed obvious, difficulty may arise in deciding when the emergency ended in other situations since part of the interrogation could be testimonial and part could be non-testimonial.[221] If the emergency ends when an alleged abuser leaves the scene, the point when the caller informs the 911 operator that the alleged abuser has left the scene may affect the testimonial nature of the statement.[222] In *Hammon*, the immediate emergency was over when the police arrived, but an argument could be made as to when the emergency really ends in domestic dispute situations.[223] A judge could make a determination about the level of violence and the possibility that, although the initial incident may have ended, there is still an emergency.[224] Leaving such decisions to an individual judge may lead to inconsistencies in applying the standard.[225]

Another source of uncertainty may arise since the new test requires courts to objectively determine, from the circumstances, law enforcement's primary motive for the interrogation.[226] Although the test appears to be logical, it is a legal fiction.[227] An officer usually has many motives including ensuring the safety of the caller, protecting the officer's own safety, gathering evidence, and determining if

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[217] *Davis*, 126 S. Ct. at 2284 (Thomas, J., dissenting).

[218] *Id.* at 2277 (citing *Hammon*, 829 N.E. 2d at 457).

[219] *See Davis*, 126 S. Ct. at 2277.

[220] *Davis*, 126 S. Ct. at 2277.

[221] Joan S. Meier, Davis/Hammon*, Domestic Violence, and The Supreme Court: The Case for Cautious Optimism*, 105 MICH. L. REV. FIRST IMPRESSIONS 22, 26 (2006), *at* http://www.michiganlawreview.org/firstimpressions/vol105/meier.pdf (last visited March 1, 2007); Fine, *supra* note 213, at 12.

[222] *Davis*, 126 S. Ct. at 2277. Because the objective view of the police interrogator is what is important, if the reasonable 911 operator believes there is an emergency then the statement would be non-testimonial. *Id.*; Geetanjli Malhorta, Note, *Resolving the Ambiguity behind the Bright-Line Rule: The Effect of* Crawford v. Washington *on the Admissibility of 911 Calls in Evidence-Based Domestic Violence Prosecutions*, 2006 U. ILL. L. REV. 205, 214 (2006).

[223] Meier, *supra* note 221, at 26.

[224] *Id.*

[225] *Id.*

[226] *Davis*, 126 S. Ct. at 2273-74; Fine, *supra* note 213, at 12.

[227] Fine, *supra* note 213, at 12-13; *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting); Meier, *supra* note 221, at 25.

criminal activity has occurred.[228] Since the police officer may have more than one purpose, the primary one may be difficult to determine, leading to unpredictable rulings by the courts.[229] This unpredictability could cause difficulty for prosecutors in determining charges to bring, and for law enforcement officers in knowing how to respond and record the events through statements.[230]

Further uncertainty may arise from the requirement that the courts consider the police officer's motivations without considering the speaker's motivation or reasonable expectations.[231] Consideration of the police officer's motivation will lead to different results than consideration of the speaker's motivation.[232] A speaker in a domestic violence situation may have the primary purpose of obtaining protection with little thought given to future prosecution.[233] But prosecution may be the police officer's primary motivation.[234] If the purpose of the Confrontation Clause is to prevent governmental abuses, as the majority found, the intent of the person giving the statement should be considered instead of the police officer's intent.[235] In a footnote to the majority opinion, the Court recognized that the intent of the person giving the statement should be considered: it is the "[d]eclarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."[236] But the "primary purpose test" does not consider the declarant's intent in making the statement.[237] This inconsistency caused confusion in a ruling by the West Virginia Supreme Court shortly after *Davis*.[238] The court held that it should "focus more upon the witness' statement, and less upon any interrogator's questions."[239]

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[228] *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting); Fine, *supra* note 213, at 12-13; Meier, *supra* note 221, at 25.

[229] *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting); Griffin, *supra* note 216, at 18.

[230] *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting).

[231] Fine, *supra* note 213, at 12.

[232] *Id.*; *see also* Meier, *supra* note 221, at 25.

[233] Meier, *supra* note 221, at 25.

[234] *Id.*

[235] Griffin, *supra* note 216, at 21 ("The goal of confrontation, according to *Crawford*'s reasoning and *Davis*'s purposive test, is to expose any governmental coercion or manipulation.") The Court did "clarify that the confrontation clause focuses solely upon conduct by governmental officials." Graham, *supra* note 208.

[236] *Davis*, 126 S. Ct. at 2274, n.1.

[237] Fine, *supra* note 213, at 12; Tom Lininger, Davis *and* Hammon: *A Step Forward, or a Step Back?*, 105 MICH. L. REV. FIRST IMPRESSIONS 28, 29 (2006), *at* http://www.michiganlawreview.org/firstimpressions/vol105/lininger.pdf (last visited March 1, 2007).

[238] State v. Mechling, 633 S.E.2d 311, 321-22 (W. Va. 2006).

[239] *Id.* at 321-22.

> We believe that the Court's holdings in *Crawford* and in *Davis* regarding the meaning of "testimonial statements" may therefore be distilled down into the following three points. First, a testimonial statement is, generally, a statement

As a practical matter, *Davis* might encourage police manipulation by officers cautiously reporting the situation.[240] The emergency requirement might also lead to officers questioning the victim while the emergency is ongoing and before they ensure the victim is safe.[241]

The "primary purpose test" is a compromise between the right of the defendant to confront the witness, even regarding informal statements, and the ability to admit statements, without confrontation, that are clearly given in the heat of the emergency.[242] Justice Thomas claimed that by allowing informal statements, the test "shift[s] the ability to control whether a violation occurred from the police and prosecutor to the judge, whose determination as to the 'primary purpose' of a particular interrogation would be unpredictable and not necessarily tethered to the actual purpose for which the police performed the interrogation."[243]

The alternative test the Court considered and rejected was the "formality test." In his dissent, Justice Thomas advocated for a test that would not consider the primary purpose of the interrogation but would instead consider the level of formality under which the statement was obtained.[244] Formality in the police interrogation would alert the declarant to the fact that he or she is giving testimony.[245] This test provides a more definite guideline as to when a statement is testimonial.[246] It requires that formality exists, such as the statement is taken in a formal setting like a police station, and a warning is given that the statement is being considered as evidence of a past crime.[247]

> that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Second, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency. And third, a court assessing whether a witness's out-of-court statement is "testimonial" should focus more upon the witness's statement, and less upon any interrogator's questions.

Id.

[240] Fine, *supra* note 213, at 13.

[241] *Id.*

[242] Griffin, *supra* note 216, at 16-17.

[243] *Davis*, 126 S. Ct. at 2282-83 (Thomas, J., dissenting).

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.*

The major disadvantage of the "formality test" is that the Confrontation Clause could be circumvented by a police officer simply not formalizing a statement.[248] An informal statement would be considered non-testimonial and would not require that the defendant have a right to cross-examine the witness.[249] The majority found that as police procedures for gathering information become more informal, those informal statements should be covered by the Confrontation Clause.[250] The majority of the Court found that some formality is required for making a statement testimonial, but the Court did not describe what levels of formality would be considered appropriate.[251] Although the "formality test" is a bright-line rule, the *Davis* Court clearly adopted the "primary purpose test."[252]

Domestic Violence Cases

Domestic violence cases, as illustrated in *Davis*, present unique issues surrounding the revived Confrontation Clause.[253] Domestic violence victims often request help from law enforcement and initially cooperate with prosecutors only to later withdraw prior statements and try to get the charges dropped.[254] Due to the private nature in which domestic violence occurs, the new rules may prohibit many domestic violence cases from being successfully prosecuted without the victim's statement.[255] The victim's reasons for failing to testify may be persuasion or threats of retaliation from the abuser.[256] Also, the victim could lose financial support provided by the abuser if the abuser is detained or incarcerated as a result of a successful prosecution.[257] The victim may also be fearful of children being taken by the state or hurt by the abuser.[258] Domestic violence centers on a pattern

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[248] *Davis*, 126 S. Ct. at 2276. The Court explained that it "do[es] not think it conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition." *Id.*

[249] *Id.* at 2282-83 (Thomas, J., dissenting).

[250] *Id.* at 2278 n. 5 ("We do not dispute that formality is indeed essential to testimonial utterance. But we no longer have examining Marian magistrates; and we do have, as our 18th century forebears did not, examining police officers . . . .").

[251] Richard D. Friedman, *We Really (For the Most Part) Mean It!*, 105 MICH. L. REV. FIRST IMPRESSIONS 1, 4 (2006), *at* http://www.michiganlawreview.org/firstimpressions/vol105/friedman.pdf (last visited March 1, 2007).

[252] *Davis*, 126 S. Ct. at 2273-74.

[253] Patrice Wade DiPietro, *Domestic Dispute Cases Prompt Closer Look at Confrontation Clause*, 8 NO. 17 LAW. J. 3, 9 (2006); *see* David G. Savage, *Confronting 911 Evidence: High Court Ponders Whether Statements are "Testimonial," Requiring Confrontation*, 92 A.B.A.J. 12 (2006).

[254] Raeder, *supra* note 47, at 24.

[255] *Id.*

[256] Andrew King-Ries, *Forfeiture by Wrongdoing: A Panacea for Victimless Domestic Violence Prosecutions*, 39 CREIGHTON L. REV. 441, 458-59 (2006).

[257] *Id.* at 458.

[258] *Id.* at 443 n.14.

of control that is often used to influence the victim.[259] Unlike other criminal charges, the abuser has access to the victim, even after the court issues a no-contact order.[260] The abuser can use this access to control and persuade the victim not to testify.[261]

The dynamics of domestic violence illustrates practical problems prosecutors will encounter in this post-*Crawford* era.[262] In the past, domestic violence prosecutions often utilized statements of absent victims under the "excited utterances" exception of the Federal Rules of Evidence and identical state rules.[263] Now, the Court's new requirements have added an additional burden over the hearsay requirements of "excited utterances" which will greatly impair domestic violence prosecutions.[264] Reports from news agencies shortly after *Crawford* indicated prosecutors were forced to drop nearly fifty percent of domestic violence prosecutions since an estimated eighty percent of victims refused to cooperate.[265] Prosecutors were forced to decide on a case-by-case basis if charges could be successfully brought on other evidence if the witness did not testify, or how the credibility of a victim might be damaged if the victim testified to something different than was first reported.[266]

The Court's rationale in *Crawford* and *Davis* was a historically based notion that a defendant had the right to confront adverse witnesses.[267] But there are

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[259] *Id.* at 459.

> The battering relationship is not about conflict between two people; rather, it is about one person exercising power and control over the other. Battering is a pattern of verbal and physical abuse, but the batterer's behavior can take many forms. Common manifestations of that behavior include imposing economic or financial restrictions, enforcing physical and emotional isolation, repeatedly invading the victim's privacy, supervising the victim's behavior, terminating support from family or friends, threatening violence toward the victim, threatening suicide, getting the victim addicted to drugs or alcohol, and physically or sexually assaulting the victim. The purpose of the abusive behavior is to subjugate the victim and establish the batterer's superiority.

Id. (quoting Andrew King-Ries, Crawford v. Washington*: The End of Victimless Prosecution*, 28 SEATTLE U. L. REV. 301, 304 (2005)).

[260] Lininger, *supra* note 102, at 769-70.

[261] *Id.*

[262] *Id.*

[263] Raeder, *supra* note 47, at 24; FED. R. EVID. 803(2). Washington court allowed McCottry's statement under the Washington Rules of Evidence. WASH. R. EVID. 803(a)(2). The Indiana court allowed Amy's statement under the Indiana Rules of Evidence. IND. R. EVID. 803(2).

[264] Lininger, *supra* note 102, at 773-82.

[265] Raeder, *supra* note 47, at 25.

[266] *Id.* at 24-25.

[267] Myrna Raeder, Crawford *and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: Remember the Ladies and the Children:* Crawford's *Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 311-12 (2005); Crawford v. Washington, 541 U.S. 36, 43-45 (2004).

problems with adopting policies and practices from 1791 without adapting them to the realities of modern life.[268] The Court retreated to a time when women were not allowed to participate in creating policy and rules.[269] A woman was no longer considered a separate legal person when she married, but rather an extension of her husband.[270] Furthermore, women were not considered equal to men.[271] Also, in 1791, the husband's responsibilities included chastising his wife if he believed she had misbehaved.[272] It is unlikely the founding fathers could have imagined a world that did not tolerate domestic violence.[273] They were unlikely to imagine a world where "911 protocols are routine, as are pro- or mandatory-arrest policies, no-drop prosecutions, criminal contempt convictions for violation of protective orders, expansive hearsay exceptions and in some states reporting requirements for medical personnel."[274]

There have also been many advances since 1791, including the organization of police forces, and medical, forensic, and technological advances (videotape, two-way television, telephone, e-mail, audiotape, typewriters, and computerized recordings).[275] These advances have helped make evidence easily accessible and accepted in the courtroom and should be considered in deciding issues related to Confrontation Clause issues.[276]

Although the "primary purpose test" was a step forward in defining what is testimonial, it raises concern in domestic violence cases.[277] The police officers' motivation in domestic violence situations is often to keep the victim safe, which might not fall neatly into the category of emergency or evidence-building.[278] Keeping a victim of domestic violence safe might involve intervention and assistance long after the initial incident is over.[279] Collecting evidence for prosecution of the abuser might aid in protecting the victim from further harm.[280] *Davis* affects police by requiring a police officer to consider the situation in light of what a court

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[268] Raeder, *supra* note 267, at 311.

[269] *Id.* at 311-12.

[270] Virginia H. Murray, *Part Three: "Traditional" Legal Perspective: A Comparative Survey of the Historic Civil, Common, and American Indian Tribal Law Responses to Domestic Violence*, 23 OKLA. CITY U.L. REV. 433, 440 (1998).

[271] *Id.* at 435-36.

[272] Raeder, *supra* note 267, at 311-12.

[273] *Id.* at 312.

[274] *Id.* at 312, 326-29.

[275] *Id.* at 311-12.

[276] *See id.* at 313.

[277] Meier, *supra* note 221, at 23.

[278] *Id.* at 25.

[279] *Id.* at 26.

[280] *Id.*

will later consider to be the primary motivation for the police officer's actions.[281] The police officer might ask questions that relate to the victim's safety but could also be used to assess criminal activity.[282] The setting, timing, and framing of the question might change the testimonial nature of the statement given by the alleged victim.[283] The police interrogation in *Hammon* occurred after the police arrived at the Hammon home.[284] Amy told police officers she was fine.[285] One police officer questioned Amy in a separate room while the other police officer remained with Hershel in the kitchen to ensure Amy's safety.[286] Yet, the Court found this statement testimonial because it was taken after the emergency had ended.[287] This illustrates that how and when the police officer takes a statement might affect the testimonial nature and admissibility of the statement, since danger can exist even after the initial incident is over.[288] If the police had not separated them and still had to restrain Hershel, a court would have to determine if the emergency had ended.[289]

The good news in domestic violence cases is, although the Supreme Court found the emergency had ended when the police arrived in the *Hammon* case, the lower courts have latitude to determine when the emergency has ended.[290] A court can base its decision on the facts of the particular case.[291] If it finds danger still existed in a domestic violence case, then the emergency had not ended and any statements made would be non-testimonial.[292]

Although *Davis* has made it more difficult to prosecute abusers, domestic violence cases cannot be ignored because there are simply too many cases.[293] Alternative

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[281] *See* Davis v. Washington, 126 S. Ct. 2266, 2273-74 (2006); Linger, *supra* note 102, at 778-81.

[282] Raeder, *supra* note 267, at 312-13; *Davis*, 126 S. Ct. at 2283 (Thomas, J., dissenting); Meier, *supra* note 221, at 26.

[283] Meier, *supra* note 221, at 26.

[284] Hammon v. State, 829 N.E.2d 444, 446-47 (Ind. 2005); Meier, *supra* note 221, at 26.

[285] *Hammon*, 829 N.E.2d at 447; *Davis*, 126 S. Ct. at 2272.

[286] *Hammon*, 829 N.E.2d at 446; Meier, *supra* note 221, at 26.

[287] *Davis*, 126 S. Ct. at 2278.

[288] Meier, *supra* note 221, at 26

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] Raeder, *supra* note 47, at 27. This article supports the volume of cases with the fact that "nearly 590,000 nonfatal acts of domestic violence were estimated to have been committed against women in 2001, and approximately 1,250 women were killed by an intimate partner in 2000." Meier, *supra* note 221, at 23 ("[Domestic violence] cases now constitute up to half of calls to police and form 20 to 50% of criminal dockets, and may well constitute a majority of the case where confrontation rights are at issue.").

ways of handling domestic violence cases have been advocated.[294] Since issues arise with the right to cross-examine a witness, the first solution requires officers to question victims in such a way that their statements are non-testimonial and the person is not a witness.[295] One strategy might be active interrogations before the emergency has ended.[296] Emergency operators are currently trained to ask as many questions as possible about the nature of the emergency.[297] If this is done before the emergency has ended, then the statements are non-testimonial.[298]

The second solution involves legislative reform.[299] The key issue in domestic violence cases centers around the right to cross-examine the witness, but *Crawford* does not require the cross-examination take place at trial.[300] The more time that passes from the assault to trial, the more likely the victim will change or withdraw the accusations.[301] The legislative reforms would require more frequent opportunities to cross-examine the victim.[302] These opportunities might include non-waivable preliminary hearings, special hearings held very shortly after the incident, or depositions.[303] Another strategy is to pass laws that would detain the abuser and provide a quicker trial in order to eliminate witness intimidation.[304]

Forfeiture Doctrine

Unlike other cases where the prosecutor has some control over the witness, in domestic violence cases, the defendant has the control over the victim.[305] The *Davis* Court acknowledged that domestic violence cases are "notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial."[306]

The Court suggested the forfeiture doctrine might be a solution to evidence being excluded in domestic violence cases.[307] In these cases, the defendant often

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[294] Lininger, *supra* note 102, at 783-818.

[295] *Id.* at 776; *Davis*, 126 S. Ct. at 2273-74.

[296] Fine, *supra* note 213, at 12-13.

[297] Lininger, *supra* note 102, at 776.

[298] *Id.*; *Davis*, 126 S. Ct. 2273-74.

[299] Lininger, *supra* note 102, at 783-84.

[300] *Id.* at 784.

[301] *Id.* at 786.

[302] *Id.* at 784-86.

[303] *Id.* at 787-97.

[304] Lininger, *supra* note 102, at 815-16.

[305] *Id.*

[306] Griffin, *supra* note 216, at 19; Davis v. Washington, 126 S. Ct. 2266, 2280 (2006).

[307] *Davis*, 126 S. Ct. at 2279-80. Forfeiture means the defendant waives the Sixth Amendment right if responsible for taking actions that caused the victim's absence or inability to testify. *Id.* at 2279-80.

makes the witness unavailable for trial using threats or intimidation.[308] Therefore, forfeiture could allow a victim's statements to be entered into evidence where they would not otherwise be admissible.[309]

Unfortunately, the Court only briefly mentioned forfeiture.[310] Worse, it did not define Confrontation Clause forfeiture other than to say that if the defendant acts in a way that coerces the victim to silence, confrontational protections will be waived.[311] For support, the Court only cited the 1879 case of *Reynolds v. United States*.[312] In *Reynolds*, the Court held that the State must prove a witness's testimony was unavailable because of the defendant's conduct.[313] The burden then shifts to the defendant to show no involvement.[314] If forfeiture is proven, then the witness's testimony can be admitted into evidence if the evidence is "competent."[315] The *Reynolds* Court did not, however, define "competent."[316] The facts indicated "competent" evidence included prior testimony subject to cross-examination.[317] The Court did not clarify whether it intended modern forfeiture to encompass the same elements as *Reynolds*.[318] These elements would not help domestic violence prosecutions since the prior cross-examination requirement would still need to be met.[319]

In addition to the common-law forfeiture rule for the Confrontation Clause, there is also a hearsay forfeiture doctrine codified into Federal Rule of Evidence ("FRE") 804(b)(6). FRE 804(b)(6) states that forfeiture by wrongdoing provides

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[308] *Id.* at 2280; Meier, *supra* note 221, at 24-25; Raeder, *supra* note 267, at 361-62 (noting that studies indicate a "high percentage of physical and economic threats" were made to victims who cooperated with the police).

[309] Meier, *supra* note 221, at 24. Forfeiture could be particularly significant in Wyoming since it currently ranks second in the U.S. in the number of women being killed by a person she knew. VIOLENCE POLICY CENTER, WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2004 HOMICIDE DATA 21 (2006), *at* http://www.vpc.org/press/0609wmmw.htm (last visited on March 8, 2007) (reporting that 2.39 women per 100,000 were killed in Wyoming in 2004; a total of six women were killed in Wyoming).

[310] *Davis*, 126 S. Ct. at 2280.

[311] *Id.* ("[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.").

[312] *Id.*; Reynolds v. United States, 98 U.S. 145 (1878).

[313] *Reynolds*, 98 U.S. at 158; King-Ries, *supra* note 256, at 451.

[314] *Reynolds*, 98 U.S. at 158; King-Ries, *supra* note 256, at 451.

[315] *Reynolds*, 98 U.S. at 158; King-Ries, *supra* note 256, at 451.

[316] *Reynolds*, 98 U.S. at 160-61; King-Ries, *supra* note 256, at 451.

[317] *Reynolds*, 98 U.S. 145; King-Ries, *supra* note 256, at 451.

[318] Davis v. Washington, 126 S. Ct. 2266, 2280 (2006) ("We take no position on the standards necessary to demonstrate such forfeiture.").

[319] *See* Lininger, *supra* note 102, at 783.

an exception under the hearsay rules.[320] A statement can be admitted into evidence under hearsay rules if the proponent proves the other party secured the witness' unavailability.[321] In drafting the rule, the Rules Committee intended to codify the widely-recognized principle and create a formalized response to actions challenging the criminal justice system.[322] The Court did not decide whether this stringent requirement of witness unavailability applied, although some suggest that FRE 804(b)(6) will affect the forfeiture guidelines.[323]

In addition to what the elements and standard of proof will be, many practical questions remain.[324] If the threat or intimidation occurred before the arrest, the court may or may not consider the threat.[325] A court will have to decide whether to measure threats and intimidation by a subjective or objective test.[326] A court must also decide what conduct by the defendant would invoke the forfeiture doctrine.[327] History of abuse, a particular incident or statement, or an abnormal threat that has been a warning in the past may all influence a court's decision.[328] In addition, a court will be faced with situations where it will have to decide the facts when the victim is unable to testify.[329] Even if the prosecutor proves forfeiture, the court may still have to determine the scope of admissible hearsay.[330]

CONCLUSION

The U.S. Supreme Court in *Davis v. Washington* took the opportunity to clarify what constitutes a "testimonial" statement under *Crawford* by classifying statements gathered in police interrogations as testimonial or non-testimonial. The "primary purpose test" adopted by the Court requires classification of a statement to the police according to the main purpose for which the statement was collected: emergency assistance or an investigation of possible past crimes. Although the test is a step forward in defining what is testimonial, it is a step backward in

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[320] FED. R. EVID. 804(b)(6) ("The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.").

[321] *Id.* The elements are generally thought to include proving the unavailability of the expected witness, intent of the defendant to prevent the testimony, and the defendant's act caused the witness's unavailability. King-Ries, *supra* note 256, at 454-55.

[322] FED. R. EVID. 804(b)(6) advisory committee's note; King-Ries, *supra* note 256, at 452.

[323] King-Ries, *supra* note 256, at 450.

[324] Meier, *supra* note 221, at 24-25.

[325] *Id.* at 24.

[326] *Id.*; Friedman, *supra* note 251, at 5; Lininger, *supra* note 237, at 31.

[327] Meier, *supra* note 221, at 24.

[328] *Id.*

[329] *Id.* at 26.

[330] *Id.* at 24, 26.

domestic violence prosecutions where statements by victims after an emergency has ended would be subject to the full protection of the Confrontation Clause. In domestic violence cases where victims frequently recant or fail to appear at trial, prosecutors will now face the task of trying to prove cases without the benefit of police testimony. Even if the victim continues to cooperate, the prosecutor will have to require the victim to testify against the accused despite concerns for the victim's safety.

Domestic violence is prevalent in our society and without an effective way for courts and prosecutors to deal with the problems, it is likely the violence will continue and may become worse. In fact, domestic violence prosecutions reportedly have been drastically curtailed since *Crawford*.[331] If a perpetrator of domestic violence knows that the charges will be dropped if the victim recants or changes her story, it is likely that more pressure will be put on the victim to do just that. The Court suggests the forfeiture doctrine to be the saving grace in domestic violence cases, but did not lay out clear guidelines. There are likely to be similar evidentiary problems in proving threats and intimidation procured the witness's unavailability without using the witness's statements. Additional guidelines will have to be developed to determine if the forfeiture doctrine could be helpful to a prosecutor who needs the statements of an intimidated or threatened victim to continue the case. Intervention by advocates, the prosecutor, and police may produce evidence other than just the victim's statements to show threats and intimidation of the victim. Although enlightening regarding the term "testimonial," *Davis v. Washington* dims the prospect of successful domestic violence prosecutions.

[331] Raeder, *supra* note 47, at 25.

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