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# LAND & WATER LAW DIVISION

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# ENVIRONMENTAL FLOWS IN THE ROCKY MOUNTAIN WEST: A PROGRESS REPORT

*Lawrence J. MacDonnell**

## INTRODUCTION

Westerners are mostly pragmatic about water. That's especially true for people whose families have lived in this region for a long time. They know that, to live in a land with limited rain, the water in creeks and rivers and aquifers has to be put to work. They know that means dams, diversions, and pumps, using water to grow crops and sustain cities. That's what it means to build a good life in arid country.

Westerners also love the places where they live and play. They love their open spaces, their red rock canyons, their snow-covered mountains. Mostly they live in cities and, increasingly, they expect their cities to be attractive and livable. They also love the special places they can get to on the weekends or for vacations. An increasing number are moving to those places. These are often the places that did not get changed much when the region's economy depended heavily on development of its natural resources. In many cases, these are places where there are rivers and streams, springs and marshes—places with water.

The legal rules governing use of water in this region developed out of the needs of early westerners to put water to direct use and to have certainty that their uses would be protected.[1] These uses required control of some portion of water, typically involving diversion of water out of a river into a ditch for transport to a place of use and storage of water behind a dam. The rules rewarded the person making the effort to capture and use water with a priority right, superior to anyone who came later—no matter what their need. The rules made it clear

* Special acknowledgement is given to Robert Wigington and Bruce Driver for their thorough review and many useful suggestions for an earlier draft of this article.

[1] *See generally* ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS (1983).

that only beneficial uses would be protected. They demanded continuation of the use to maintain the right. A no-nonsense, utilitarian approach suited to the time and place.

There was nothing in the rules, however, about water for the river itself. Nothing about how it worked if someone wanted to be sure there was enough water to maintain a valuable fishery, nothing about protecting flows that maintained cottonwoods and willows in riparian areas, nothing about keeping flows to allow people to swim and to boat, nothing about just making sure that rivers didn't totally dry up. For a long time, nobody paid much attention to these considerations.

Today, rivers serve a broader function in the Rocky Mountain West and elsewhere. They are still essential sources of water for agriculture and for cities, but they are also places people go for recreation, for renewal, for enjoyment. People go there for the astonishing amount of life these places support. The region's economy is now as dependent on healthy rivers as it is on diverted water.

This regional shift in how people view rivers has been slow but sure. In a sense, it is revolutionary. It turns upside down 100 years of effort to put every drop of water to some kind of direct human use, in which water undiverted was water wasted, in which success was measured by how much water was beneficially consumed.

Despite this dramatic shift in human perception about the importance of keeping water in rivers and streams, the changes required of the legal system to accommodate this shift have been relatively modest. All that was really necessary was to recognize that environmental uses of water are beneficial and provide rules by which such uses of water can be protected. This is exactly what prior appropriation is all about: encouraging beneficial uses of water by protecting such uses from being impaired by subsequent uses. State water laws have adjusted in varying degrees to acknowledge demand for protection of environmental flows.[2]

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[2] The literature describing instream flow laws and programs is growing. *E.g.,* LAWRENCE J. MACDONNELL, TERESA A. RICE & STEVEN J. SHUPE, INSTREAM FLOW PROTECTION IN THE WEST (ed. 1989) and (rev. ed. 1993) (providing an initial summary of laws in the western states). This state-by-state summary was followed by a more topical discussion of instream flow policy. DAVID M. GILLILAN & THOMAS C. BROWN, INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE (1997). A series of law review articles followed. *E.g.,* Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 1 U. OF DENVER WATER L. REV. 177 (1998); Jesse A. Boyd, *Hip Deep: A Survey of State Instream Flow Law from the Rocky Mountains to the Pacific Ocean*, 43 NAT. RES. J. 1151 (2003); Charlton H. Bonham, *Perspectives from the Field: A Review of Western Instream Flow Issues and Recommendations for a New Water Future*, 36 ENVTL. L. 1205 (2006); and Adell Louise Amos, *The Use of State Instream Flow Law for Federal Lands: Respecting State Control While Meeting Federal Purposes*, 36 ENVTL. L. 1237 (2006). The Colorado Water Conservation Board supported a comprehensive analysis of instream flow programs in

Yet progress has been uneven. Many in the traditional water community still believe that water in the West is simply too scarce to be permanently committed to environmental or recreational purposes. Such uses, they believe, should be incidental to other, more essential, uses of water—nice if they can be supported but not necessary in the way, say, that water for irrigation is necessary. Yet there are many in these states who believe that places with water are special, that they are an essential part of the state's heritage, to be protected and passed along to future generations. They see healthy rivers as necessary to the economy of the future, just as irrigated agriculture was necessary to the economy of the past. They see environmental flows as a beneficial use of water of equal importance with other, more traditional beneficial uses.

Freshwater ecosystems contain far greater concentrations of life than land or ocean systems.[3] Human alteration of these freshwater-based systems has resulted in a rate of species extinction five times greater than for land-based species.[4] The Federal Endangered Species Act[5] ("ESA") represents a national commitment to reverse this trend, presenting a substantial challenge to find ways to integrate human uses of water systems with the needs of dependent species. Global warming, with its accompanying increases in stream water temperatures, increases in evaporation, and alterations of flows adds another layer of complexity to this challenge.

This article surveys legal and programmatic developments in the eight Rocky Mountain states—Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming—related to commitment of water for environmental purposes (referred to here as "environmental flows"). It is intended to provide an assessment of the manner in which these states have responded to growing public demands for such flows.[6] Part I briefly discusses the two primary tasks

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western states. *See generally* SASHA CHARNEY, COLO. WATER CONSERVATION BD., DECADES DOWN THE ROAD: AN ANALYSIS OF INSTREAM FLOW PROGRAMS IN COLORADO AND THE WESTERN UNITED STATES (July 2005). Trout Unlimited commissioned a report focusing on the transactional aspects of shifting existing water uses to environmental flows. STEVEN MALLOCH, TROUT UNLIMITED, LIQUID ASSETS: PROTECTING AND RESTORING THE WEST'S RIVERS AND WETLANDS THROUGH ENVIRONMENTAL WATER TRANSACTIONS (2005), *available at* http://www.tu.org/atf/cf/%7BED0023C4-EA23-4396-9371-8509DC5B4953%7D/Malloch.LiquidAssets.2005.pdf (last visited Feb. 3, 2009). For a discussion of relevant laws in all states as well as the Canadian provinces, see L. MacDonnell, *Return to the River: Environmental Flow Policy in the United States and Canada*, J. AM. W. MGT. ASS'N (forthcoming 2009).

[3] SANDRA POSTEL & BRIAN RICHTER, RIVERS FOR LIFE: MANAGING WATER FOR PEOPLE AND NATURE 26 (2003).

[4] *Id.*

[5] 16 U.S.C. §§ 1531–1544 (2007).

[6] The research for this paper was commissioned by Western Progress, a nonprofit focused on the Rocky Mountain West that closed up shop at the end of 2008. The paper reflects information gathered from nearly 60 interviews with knowledgeable people in each of the states. These people are acknowledged by state in Part III.

of these laws and programs: protecting some portion of remaining flows and restoring some flows that have been lost. Part II provides a state-by-state look at environmental flow protection and restoration efforts. While there are important developments in all the states, the approaches tend to differ considerably. Part III provides some general observations respecting progress and challenges in these states. Part IV offers some recommendations for next steps on a state-by-state basis. Part V provides some concluding thoughts. The article begins with the basic legal framework.

## PART I—THE ENVIRONMENTAL FLOW PROTECTION FRAMEWORK

The legal and policy framework can be divided into two parts: elements that serve to keep unappropriated water in streams and rivers and elements that facilitate flow restoration in dewatered streams.

### *A. Keeping Water in Rivers*

There are now established means under state law in every Rocky Mountain state except New Mexico and Utah to keep unappropriated water instream for environmental benefits. The states have taken different approaches. Four of the states—Colorado, Idaho, Montana, and Wyoming—have enacted special legislation providing specific rules and procedures by which water may be protected instream (referred to as either instream flows or minimum flows).[7] Court decisions in Arizona and Nevada have determined that environmental flows may be appropriated under existing state water laws.[8] In New Mexico, there is an opinion of the Attorney General that appropriations for environmental flows may be possible with some kind of diversion structure—an option not yet tested.[9] Utah law allows changing existing rights to instream flow but does not authorize appropriations for environmental flows.[10]

Water rights for environmental flows are different from traditional appropriations because there is no need for a point of diversion. Stream flows of a specified rate or rates, described in cubic feet per second, are appropriated or

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[7] COLO. REV. STAT. § 37-92-102 (2008); IDAHO CODE ANN. § 42-1501 (2008); MONT. CODE ANN. § 85-2-316 (2008); WYO. STAT. ANN. § 41-3-1001(a) (2008).

[8] McClellan v. Jantzen, 547 P.2d 494 (Ariz. Ct. App. 1976); State v. Morros, 766 P.2d 263 (Nev. 1988). The Arizona Department of Water Resources has developed detailed guidance for applicants for instream flows. ARIZ. DEP'T OF WATER RES., A GUIDE TO FILING APPLICATIONS FOR INSTREAM FLOW WATER RIGHTS IN ARIZONA (1991), *available at* http://www.adwr.state.az.us/dwr/content/Find_by_Program/Hydrology/Surface_Water_and_Recharge_Section_files/A_Guide_to_Filing_Applications_for_Instream_Flow_Water_Rights_in_Arizona.pdf (last visited Feb. 3, 2009).

[9] 98 Op. Att'y Gen. 01 (1998).

[10] UTAH CODE ANN. § 73-3-3 (11)(g)(i) (2008). Protection of environmental flows has occurred in other contexts in Utah. *See* M. Holden, *Instream Flows in Utah*, *in* INSTREAM FLOW PROTECTION IN THE WEST (1989), *supra* note 2, at 365.

reserved at a described point or between two points along a stream. For ponds and lakes, unclaimed water is appropriated at some specified elevation level. The absence of a point of diversion has been the subject of litigation in several states, with the courts uniformly agreeing that a valid instream flow appropriation under state water law does not require a point of diversion.[11]

Approaches vary among the Rocky Mountain states in a number of respects. Most states limit who may establish an environmental flow right, typically restricting holders to a designated state agency. States vary in the purposes for which environmental flow rights may be established, with maintenance of a fishery the most common. As with any appropriation, the instream applicant is limited to that amount of water reasonably necessary to accomplish the purpose of the appropriation. Each state follows somewhat different procedures for quantifying the claimed flows.[12] In all cases, the claims are necessarily limited to unappropriated water. Typically the applicant must demonstrate the availability of the water it seeks to appropriate for instream flows.

Environmental flow rights hold the priority of the date of appropriation, commonly the date the application is filed with the state, in the same manner as other appropriations. Given the very recent vintage of such rights, they are typically very junior. Nevertheless, they are protected against flow reductions caused by later appropriations and may require such appropriations to cease if the protected environmental flow is being reduced because of the later use. Moreover, as water rights, environmental flows are protected from injury in the case of a change of a water right in the same source of water, just as any other water right. In general, environmental flow appropriations have the same permanency as any other water right.

States with legislated programs generally have focused on protecting stream segments with high sport fishery values. Typically, these are segments near headwaters or otherwise in remote areas with limited competition for the water. In many cases, the segments are on public lands in which additional water development would be subject to federal review and control or otherwise on segments with public access for fishing. The segment is then evaluated using one of the many methodologies available for linking flows to fishery needs so that the quantity sought to be appropriated can be objectively represented.[13] The

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[11] *See, e.g.,* Idaho Dep't of Parks v. Idaho Dep't of Water Admin., 530 P.2d 924 (Idaho 1974); In re Application A-16642, 463 N.W. 2d 591 (Neb. 1990); In re Adjudication of the Mo. River Drainage Area, 55 P.2d 396 (Mont. 2002); Phelps Dodge Corp. v. Ariz. Dep't of Water Res., 118 P.3d 1110 (Ariz. Ct. App. 2005).

[12] *See* Charney, *supra* note 2 (providing a summary of approaches in each western state).

[13] Originally, it was common for flows to be established at a single rate year round—often representing the minimum flow regarded as necessary to simply maintain an existing sport fishery. INSTREAM FLOW COUNCIL, INSTREAM FLOWS FOR RIVERINE RESOURCE STEWARDSHIP 5–6 (rev. ed.

application still must go through the ordinary water permitting decision-making process to provide an opportunity for review by water rights holders and other interested parties. The permit is held in the name of the state. The designated state agency then is charged with monitoring stream conditions to protect the appropriation. A similar process is followed in the states recognizing environmental flow appropriations within their traditional water permitting processes.

### *B. Putting Water Back in Rivers*

As opportunities for setting aside unclaimed water diminish, attention has turned to restoring stream flows and other habitat conditions in heavily appropriated rivers. Much of this effort involves changing the use of existing water rights, either permanently or temporarily, so that water previously diverted for use can stay instream. The positives are clear: improving—not just maintaining—existing stream flows; flows protected with the seniority of the original appropriation; and targeted improvements in the places of greatest need. The challenges are many, however: the limited number of water rights available for acquisition; the cost of acquisition, especially compared to the funds available; and the time and effort necessary to go through the change-of-use process.

In response to growing interest in environmental flow transactions,[14] some states are modifying their laws to facilitate these efforts. Thus, statutes in three of the region's states now explicitly recognize that existing water rights may be changed to environmental flow purposes.[15] In addition, there has been some movement toward allowing parties other than the state to change an existing right to environmental flow purposes.[16]

Temporary arrangements that allow historically diverted water to remain instream are becoming more common.[17] Several states specifically authorize temporary changes of water rights, subject to the same review as required for permanent changes.[18] In addition, several states have established specific programs

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2004). Methodologies for evaluating flow conditions necessary to adequately protect fisheries and other aquatic and riparian resources have evolved greatly in recent years. *Id.* at 98 *et seq.* It remains uncommon to have an appropriation that varies across the year mirroring the natural variability of the hydrologic system.

[14] An excellent overview of environmental water transactions is provided in Malloch, *supra* note 2.

[15] COLO. REV. STAT. § 37-92-102 (3); MONT. CODE ANN. §§ 85-2-320, 402, 408, 420, 436; UTAH CODE ANN. § 73-3-3 (11)(g)(i). As mentioned, Utah only allows instream flow protection based on changing an existing water right, not by appropriation or reservation.

[16] ARIZ. REV. STAT. § 45-172 (A).

[17] Malloch, *supra* note 2, at 20.

[18] IDAHO CODE ANN. § 42-222A; MONT. CODE ANN. § 85-2-108; NEV. REV. STAT. § 533.345; N.M. STAT. ANN. § 72-12-7; UTAH CODE ANN. § 73-3-3.

by which water rights may be leased for environmental flow purposes.[19] Idaho has utilized water banks to facilitate transactions involving temporarily changing existing rights to other uses, including instream flows.[20] Such programs have been attractive to water right holders not interested in permanently giving up their rights. Some temporary arrangements are tailored to reduce diversions during particular periods of the irrigation season when environmental flows are especially important; others operate only during drought years. An advantage of non-divert agreements is they don't need to go through the state change of use review process. Flows can only be protected instream, however, until the next headgate.

The next section takes a more detailed look at the legal framework and its utilization for environmental flows in each of the region's eight states.

## PART II—STATE SUMMARIES

### *A. Arizona*[21]

#### *1. Introduction*

Aside from the Colorado River, there are few perennial streams in Arizona. Generally these are headwaters and tributaries to the larger streams, or they are segments located below storage reservoirs. Arizona has more freshwater species at risk of extinction than any other state.[22] Of the 35 native freshwater species

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[19] COLO. REV. STAT. §§ 37-80.5–104.5; § 37-92-102 (3); § 37-92-305(b); MONT. CODE ANN. §§ 85-2-113, -407. Montana pioneered development of a leasing program, beginning with limited authorization only to its Department of Fish, Wildlife, and Parks and then extending that authority to any party. TROUT UNLIMITED, PRIVATE WATER LEASING: A MONTANA APPROACH (Undated) *available at* http://www.tu.org/atf/cf/%7B0D18ECB7-7347-445B-A38E-65B282BBBD8A%7D/MT_Water Report.pdf (last visited Feb. 3, 2009). Colorado has allowed the Colorado Water Conservation Board to accept donations or make acquisitions of water rights for change to instream flows since 1986. Covell, *supra* note 2, at 185. In 2008, the General Assembly expanded and clarified the CWCB's leasing authority. COLO. REV. STAT. § 37-92-102 (3).

[20] Malloch, *supra* note 2, at 60. Under special legislative authority, the Bureau of Reclamation utilizes the Upper Snake bank to rent water in storage for downstream release to help meet the flow need of salmon. IDAHO CODE ANN. § 42-1763B. The legislature established a special bank in the Lemhi River Basin to facilitate transfers of irrigation water to instream flows to enable salmon to reach upstream spawning habitat in the watershed. IDAHO CODE ANN. §§ 42-1506; 1765A. A state bank, operated by the Idaho Water Resources Department, enables temporary transfers of natural flow water rights to other uses including instream flow. IDAHO CODE ANN. § 42-1762 (2).

[21] Assistance for this section was provided by Jean Calhoun, Arizona Nature Conservancy; Randy Bramer, Office of General Counsel, U.S. Department of Agriculture, Colorado; Dave Weedman, Arizona Game and Fish Department; Tom Colozzo, Arizona Nature Conservancy; Sharon Megdahl, Water Resources Research Center, University of Arizona; Kathy Nelson, Tonto National Forest, Arizona; and Andrew Hautzinger, USFWS, New Mexico.

[22] BRUCE A. STEIN, STATES OF THE UNION: RANKING AMERICA'S BIODIVERSITY, NATURESERVE (2002).

found in Arizona, 21 are federally listed under the Endangered Species Act.[23] Riparian vegetation with its unusually rich biodiversity is also at risk. A recent study has identified state heritage waters, regarded as particularly important for protection.[24]

Arizona does not have a state program directed at protection of environmental flows. Arizona courts have found that water may be appropriated for recreation and wildlife purposes under Arizona law,[25] and the State Department of Water Resources has developed guidance for those interested in filing for instream flow water rights.[26] The Arizona legislature has established financial support for river restoration actions that includes funding that can be used for acquisition of Central Arizona Project water or effluent water.[27] We look first at streamflow protection actions under Arizona law and then at some examples involving stream restoration and protection efforts.

### 2. *Instream Flow Protection under State Law*

In 1979, The Nature Conservancy ("TNC") filed the first application seeking instream flow rights in Arizona. TNC sought rights in Ramsey Creek along which it owned property. The Arizona Department of Water Resources ("ADWR") used this application as a test case out of which it developed substantial guidelines for instream flow applicants.[28] Subsequently, TNC obtained permits for rights associated with properties along Aravaipa Creek, O'Donnell Creek, the Hassayampa River, Bass Canyon, Hot Springs Canyon, and Buehman Creek.

As of the end of 2007, 100 applications for instream flows had been filed with ADWR; 33 permits have been issued.[29] The Bureau of Land Management has filed 31 applications; seven have been permitted. The Forest Service has filed 41 applications; 10 have been permitted.

Litigation, decided in 2005, tested the legality of instream flow permits under Arizona law. Phelps Dodge challenged Forest Service applications for flows in a segment of Cherry Creek, a tributary of the Salt River, as it passes through the

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[23] Dale S. Turner & Michael D. List, *Habitat Mapping and Conservation Analysis to Identify Critical Streams for Arizona's Native Fish*, 17 AQUATIC CONSERVATION: MARINE AND FRESHWATER ECOSYSTEMS 737–48 (2007).

[24] LAWRENCE E. STEVENS & PATRICIA WEST, ARIZONA WATER INSTITUTE, ARIZONA HERITAGE WATERS (2008).

[25] McClellan v. Jantzen, 547 P.2d 494 (Ariz. Ct. App. 1976).

[26] ARIZ. DEP'T OF WATER RES., *supra* note 8.

[27] ARIZ. REV. STAT. ANN. § 45-2113.

[28] *See* ARIZ. DEP'T OF WATER RES., *supra* note 8.

[29] Print-out provided by Ariz. Dep't of Water Res. in response to Public Records Request, received May 21, 2008 (on file with author).

Tonto National Forest. In particular, Phelps Dodge asserted that, under Arizona water law, an appropriation of water required a physical diversion. In *Phelps Dodge Corp. v. Arizona Dep't of Water Resources*,[30] the Arizona Court of Appeals found that a physical diversion was not a requirement and upheld the ADWR permit program.

Arizona statutes provide that water rights may be severed from the land on which they have historically been used and transferred to a new use.[31] It limits such transfers to the state or its political subdivisions if the new use is for recreation or wildlife purposes. Thus non-state owners of water rights cannot change the use to environmental flows. Several transfer applications that would sever water rights and change their use to environmental flows are currently pending while the Arizona Department of Water Resources establishes guidance for their review.[32]

Ground water supplies a large portion of water uses in the state.[33] Long-term pumping from aquifers has mined the water supply, dropping the water table in many places to below its point of contact with rivers and streams. Under Arizona law, ground water is regulated separately from surface water. Only since 2000, in the context of the adjudication of surface water rights in the Gila River Basin, has state law recognized the physical linkage between aquifers and streams.[34] Consequently, groundwater pumping remains one of the greatest challenges to protecting water for environmental benefits in Arizona.

### *3. Examples of Flow Restoration and Protection Efforts*

According to The Nature Conservancy, Arizona rivers have lost 35% of their natural perennial flows.[35] On the big, historically perennial rivers—the Colorado, Gila, Salt, and Verde—91% of the miles with flowing water have been lost. Attention has focused on protecting remaining segments with perennial flows and restoring flows on other segments where possible.

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[30] 118 P.3d 1110 (Ariz. Ct. App. 2005).

[31] ARIZ. REV. STAT. ANN. § 45-172.

[32] The unadjudicated status of these rights means that their validity is still subject to challenge. Cessation of diversion as an instream flow right could be challenged as a forfeiture of the right. Personal Communication with Robert Wigington, Counsel and Manager for the Global Freshwater Team (July 14, 2008).

[33] Arizona does not keep track of the extent of groundwater pumping in the state.

[34] In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source, 9 P.3d 1069 (Ariz. 2000).

[35] Arizona Conservation Science, Projects, *Arizona Rivers and Water*, http://azconservation.org/ (last visited April 3, 2009).

*a. The San Pedro*

The San Pedro flows north out of Mexico into the United States. Remarkably, more than 350 species of birds use the habitat in this watershed.[36] Because of the unique biodiversity in the watershed, TNC has made a sustained effort to support its protection. Rapid growth in the watershed based on ground water threatens the river's limited surface flows. Congress established the San Pedro Riparian National Conservation Area in 1988, managed by the Bureau of Land Management, with the objective of protecting the area's unique desert riparian system.[37] In 1998, the various federal, state, local, and non-governmental organization ("NGO") entities working in the watershed formed the Upper San Pedro Partnership.[38] The initial focus was to retire irrigated agriculture on lands adjacent to the river and end the associated groundwater pumping. In 2003, Congress furthered the federal commitment to find solutions for the multiple water needs in the area.[39] The Partnership has established a goal of sustainable yield of the area's groundwater aquifer, an objective that may require supplementing the area's normally available water resources.

*b. The Upper and Middle Verde*

The Verde River is one of Arizona's few remaining perennial streams and includes Arizona's only Wild and Scenic River.[40] It originates as discharge from groundwater aquifers and flows generally south to its confluence with the Salt River. While there are diversions for irrigated agriculture in the watershed, most of the water is committed to downstream users outside the Verde—primarily for the Salt River Project. Population in and adjacent to the watershed, especially in the headwaters, has grown dramatically since the 1980s. The groundwater pumping associated with supplying this population has begun to measurably affect surface flows in the Verde. In response, a broad range of interests are now working on finding ways to better manage the watershed's water supplies. In 2007, The Nature Conservancy sponsored a workshop and proceedings that helped establish the scientific basis for addressing the hydrologic-ecologic relationships.[41]

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[36] The Nature Conservancy, San Pedro River, Arizona, http://www.nature.org/initiatives/freshwater/work/sanpedroriver.html (last visited April 3, 2009).

[37] Bureau of Land Management, San Pedro Riparian NCA, http://www.blm.gov/az/st/en/prog/blm_special_areas/ncarea/sprnca.html (last visited April 3, 2009).

[38] *See generally* Upper San Pedro Partnership, www.usppartnership.com.

[39] Defense Authorization Act of 2004, Pub. L. No. 108-136, § 321 (2004).

[40] *See* National Wild and Scenic Rivers, Verde River, http://www.rivers.gov/wildriverslist.html (last visited April 3, 2009).

[41] JEANMARIE A. HANEY ET AL., ECOLOGIC IMPLICATIONS OF VERDE RIVER FLOWS (2008), *available at* http://azconservation.org/dl/TNCAZ_VerdeRiver_Ecological_Flows.pdf (last visited April 6, 2009).

In 2005, Congress provided funding to a Verde River Basin Partnership for water planning and scientific studies, including a U.S. Geological study to develop a water budget.[42]

*c. The Bill Williams*

As part of the Sustainable Rivers Project, The Nature Conservancy is working with the U.S. Army Corps of Engineers ("Corps") to help develop operating regimes at several Corps dams around the United States to produce beneficial environmental flows.[43] Alamo Dam on the Bill Williams River in Arizona is one of the projects. The Bill Williams River is located in west-central Arizona in a relatively remote area with little human population. It flows west into the Colorado River at Lake Havasu. The Corps constructed Alamo Dam in 1968 for flood control purposes.[44]

The first step in the process was to define a set of flow requirements for sustaining the long-term ecological health of the Bill Williams River corridor, with the overall goal of maximizing native biodiversity within the flood plain.[45] The major effect of the Alamo Dam on the river has been to substantially reduce peak flows, reduce the variability of average flows, and eliminate the sediment transported from above. The result was an increase in the riparian vegetation in the floodplain and a narrowing and incising of the stream channel. The Corps is now experimenting with flow releases to test the expected biotic responses.

*4. Summary*

Human demands for water in Arizona have greatly altered the hydrologic systems. Interest has grown in protecting the few remaining streams with perennial flows and other special places with water. Access to water from the Colorado River through the Central Arizona Project is enabling some users to reduce their reliance on ground water, and the state is attempting to move toward balancing withdrawals with recharge in five management areas with the most concentrated use. The state has no program for protecting or restoring water for environmental purposes, but its existing laws have been interpreted to allow parties to appropriate

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[42] Northern Arizona Land Exchange & Verde River Basin Partnership Act of 2005, Pub. L. No. 109-110, §§ 201 *et seq*.

[43] The Nature Conservancy, The Sustainable Rivers Project, http://www.nature.org/initiatives/freshwater/partnership/ (last visited April 3, 2009).

[44] The Bill Williams River Corridor Steering Committee, The Physical Setting, http://billwilliamsriver.org/Setting/ (last visited April 3, 2009) ("Alamo Dam was constructed by the Corps of Engineers as a multipurpose project under authorization of the Flood Control Act of December 22, 1944 (Public Law 534, 78th Congress, 2nd Session).").

[45] PATRICK B. SHAFROTH & VANESSA B. BEAUCHAMP, U.S. GEOLOGICAL SURVEY, DEFINING ECOSYSTEM FLOW REQUIREMENTS FOR THE BILL WILLIAMS RIVER, ARIZONA 135 (2006), *available at* http://www.fort.usgs.gov/products/publications/21745/21745.pdf (last visited April 6, 2009).

unappropriated water for these purposes. Permits for such appropriations have been granted, and others are pending. In addition, there are several significant, multi-party processes underway working on protection of important rivers. As further discussed in Part IV below, Arizona could take fuller advantage of the considerable interest in the state in environmental flows by establishing a state program for stream protection and restoration and allowing non-state parties to lease or purchase existing water rights for this purpose.

### *B. Colorado*[46]

#### *1. Introduction*

Colorado sits at the heart of the Rocky Mountain West, with the highest average elevation of any state.[47] It is a headwaters state, the source of major rivers including the Platte, the Arkansas, the Rio Grande, and the Colorado. Statewide, annual average precipitation is 17 inches—semiarid on the eastern plains but much wetter in the mountainous areas.[48] Its growing population, now totaling about 4.8 million people, is heavily concentrated along the Front Range on the east side of the Rockies, but population on the state's western slope is increasing.[49] Average annual runoff is estimated to be about 16 million acre-feet.[50] Water withdrawals for all uses totaled about 12.6 million acre-feet in 2000, 11.4 for irrigated agriculture.[51]

The Colorado General Assembly put in place a state instream flow program in 1973.[52] Increased attention now is focusing on restoring flows in valuable segments historically dewatered by diversions, sometimes motivated in part by the need to protect species listed for protection under the Federal Endangered Species Act. Our discussion begins with a look at the state instream flow program.

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[46] Assistance for this section was provided by Linda Bassi, Colorado Water Conservation Board; Mark Uppendahl, Colorado Division of Wildlife; Melinda Kassen and Drew Peternell, Trout Unlimited, Colorado; Randy Bramer and Lois Witte, Office of General Counsel, U.S. Department of Agriculture, Colorado; and Mike Browning, Colorado Water Trust.

[47] NetState, The Geography of Colorado, http://www.netstate.com/states/geography/co_geography.htm (last visited April 3, 2009).

[48] Precipitation in Colorado, http://waterknowledge.colostate.edu/precip.htm (last visited April 3, 2009).

[49] *See* U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/states/08000.html (last visited April 3, 2009).

[50] Personal Communication with Kelly DiNatale, Principal and Senior Water Resources Engineer, CDM, Inc. (June 11, 2008). The communication was based on STATEWIDE WATER SUPPLY INITIATIVE, COLO. WATER CONSERVATION BD. (2004), *available at* http://cwcb.state.co.us/IWMD/SWSITechnicalResources/SWSIPhaseIReport/ (last visited April 6, 2009).

[51] USGS, Estimated Use of Water in the United States for 2000, Table 2, http://pubs.usgs.gov/circ/2004/circ1268/htdocs/table02.html (last visited April 3, 2009).

[52] COLO. REV. STAT. § 37-92-102 (3).

### 2. *Instream Flow Appropriations*

Colorado law authorizes a state agency, the Colorado Water Conservation Board, to appropriate unappropriated water to "preserve the natural environment to a reasonable degree."[53] Under that program, the State has now appropriated water for the natural environment on nearly 1,500 stream segments covering about 8,500 miles of stream, and has also protected the levels of 476 lakes.[54] Nearly 2,000 decrees for instream flow or lake level protection have been issued through 2006.[55] Instream flow rights are heavily concentrated in the higher elevation headwaters streams and lakes.[56] Protection of cold water fisheries has been the dominant purpose. More recently, flows have been appropriated in some lower elevation streams to protect native warm water fisheries, including endangered species of fish in the Colorado and the Yampa rivers. Appropriations have been made to protect other unique natural values, including glacial ponds for salamanders and habitat for waterfowl.[57]

The Colorado Division of Wildlife ("DOW") plays an important role in identifying places where there are important fisheries that warrant protection.[58] This agency then uses a particular methodology for quantifying that portion of the remaining flows it believes should be protected to maintain the fishery. DOW then provides a report with this information to the Colorado Water Conservation Board ("CWCB"), the agency authorized to file for an instream flow right. CWCB staff evaluates existing stream hydrology to verify that the desired flows are in fact available and weighs the instream use against other potential future uses of the water. The staff may make some modifications to the DOW proposal before submitting the information to the Board, composed primarily of members from around the state appointed by the governor. Upon board approval, the agency then files an application with the water court for the basin in which the appropriation is made. Other holders of water rights may file objections, typically based on concerns about potential adverse effects on their rights. Assuming objections are resolved and the legal requirements met, the court awards a decree for the right.

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[53] *Id.* No other entity or individual is permitted to appropriate water for environmental flows.

[54] Colo. Water Conservation Bd., New Appropriations, http://cwcb.state.co.us/StreamAnd Lake/ NewAppropriations/ (last visited April 3, 2009).

[55] *See* Colo. Water Conservation Bd., Tools & Resources, http://cwcb.state.co.us/Stream AndLake/RelatedInformation/ToolsResources/tools.htm (last visited April 3, 2009).

[56] *See* Streams Included in Colorado's Instream Flow Program, http://cwcb.state.co.us/NR/ rdonlyres/4EFEF72D-8017-42ED-A555-66D1A5B7C8CB/0/StatewideISFMap.jpg (last visited Feb. 2, 2009) (providing a map showing the locations of instream appropriations).

[57] DAN MERRIMAN & ANNE M. JANICKI, COLO. WATER CONSERVATION BD., COLORADO'S INSTREAM FLOW PROGRAM—HOW IT WORKS AND WHY IT'S GOOD FOR COLORADO (n.d.), *available at* http://cwcb.state.co.us/NR/rdonlyres/6333F3FC-E2F8-4E7E-9BD3690FCC4285D1/0/Final RiparianAssocPaper.pdf (last visited April 6, 2009).

[58] *Id.* at 2.

The CWCB has developed an active monitoring program for its rights on many streams and has begun placing "calls" on more junior appropriators when flows drop below appropriated levels.[59] In addition, staff reviews all applications for new or changed rights for potential injury to instream flow rights.[60]

In general, Colorado has taken a cautious approach to appropriating water for instream flows. Its methodology for determining flows is considered by some to be conservative, sufficient to ensure the maintenance of essential fish habitat but not to provide for other ecological values.[61] Originally, the State obtained a single year-round flow but now typically appropriates two or more flow rates to reflect some seasonal variations in stream flows.

Instream flow appropriations limit the ability to make subsequent upstream appropriations of water from the source. Thus, when a year-round instream flow appropriation of 12 cubic feet per second ("cfs") on Snowmass Creek prevented wintertime diversions of water for snowmaking at a nearby ski area, the CWCB reevaluated its decree and determined that protection of the stream's natural environment to a reasonable degree only required three cfs during the winter months. It thus decided not to enforce its rights against proposed new appropriations that would not reduce the flows below three cfs. Aspen Wilderness Workshop brought suit.[62]

The Colorado Supreme Court noted the original decree reflected a determination that the appropriation was the "minimum" necessary to protect the natural environment.[63] While subsequent information may have changed that determination, the CWCB would need to go through a water court process to change the decree. The Court determined that the CWCB holds the right to instream flow appropriations on behalf of the public: "The Conservation Board has a unique statutory fiduciary duty to protect the public in its administration of its water rights decreed to preserve the natural environment."[64] The General Assembly thereafter affirmed the authority of the CWCB to reduce an existing appropriation, but subject to extensive public review and including a water court proceeding.[65]

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[59] Colo. Water Conservation Bd., Physical Protection, http://cwcb.state.co.us/StreamAndLake/Physical/ (last visited April 3, 2009).

[60] Colo. Water Conservation Bd., Legal Protection, http://cwcb.state.co.us/StreamAndLake/Legal/ (last visited April 3, 2009).

[61] Personal Communication with Drew Peternell, Director of the Colo. Water Project, Trout Unlimited (June 23, 2008).

[62] Aspen Wilderness Workshop v. Colo. Water Conservation Bd., 901 P.2d 1251 (Colo. 1995).

[63] *Id.* at 1257.

[64] *Id.* at 1260.

[65] COLO. REV. STAT. § 37-92-102 (4)(b).

The existence of instream flow rights also becomes important if a party seeks to change the place of use of a water right or exchange water from below to above the protected segment. A 2005 Colorado Supreme Court decision provides an example.[66] In this case, the mountain town of Central City sought to shift water from downstream irrigation use to its municipal water system. It also sought the ability to divert water for municipal use out-of-priority by replacing its depletions under a plan for augmentation.[67] On an intervening segment of the stream, the State holds a 1.5 cfs instream flow right with a 1987 priority date. The State filed a statement of opposition to protect its right, arguing that its appropriation would be injured by such out-of-priority diversions. Central City responded that it would be diverting under priorities senior to the instream flow appropriation and thus did not have to limit its diversions. Its replacement water sources were located downstream of the instream flow appropriation.

The Colorado Supreme Court noted the statute governing court reviews of applications for plans for augmentation requires a determination that implementation of the plan will not injure vested rights.[68] A decreed instream flow appropriation is a vested right. In the Court's view, the clear legislative intent of establishing instream appropriations was to ensure that flows determined necessary to preserve the natural environment would not be further depleted, at least not without conditions to protect against injury:

> The legislature . . . clearly envisioned that the instream flow program would obtain, in reasonable measure, its goal of preserving the environment by ensuring that certain stream reaches would not be further depleted without conditions to protect against injury. *See* § 37-92-102 (3), C.R.S. (2005). We conclude the legislature instead envisioned the primary value of an instream flow right to derive from a basic tenet of water law: its ability to preserve the stream conditions existing at the time of its appropriation.[69]

The CWCB has adopted an "injury with mitigation" rule under which the board may decide not to oppose a change if there are no other reasonable alternatives and if other beneficial measures are taken.[70]

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[66] Colo. Water Conservation Bd. v. City of Central, 125 P.3d 424 (Colo. 2005).

[67] COLO. REV. STAT. § 37-92-103 (9). For a discussion of state laws enabling out-of-priority diversions, including Colorado, see Lawrence J. MacDonnell, *Out of Priority Water Use: Adding Flexibility to the Prior Appropriation System*, 83 NEB. L. REV. 485 (2004).

[68] COLO. REV. STAT. § 37-92-305 (3).

[69] *Colo. Water Conservation Bd.*, 125 P.3d at 439.

[70] 2 Colo. Code Regs. § 8(i)(3).

### *3. Restoring Flows in Dewatered Streams*

As the process of appropriation of flows winds down, attention has turned to places in which there is interest in enhancing flows. The CWCB has long had the authority to acquire existing rights for instream flows by donation, purchase, lease, or contract, but its use has been relatively modest. Indeed, until 2001 the statutory language suggested the CWCB could only preserve, not restore or enhance, the existing natural environment. That year, however, the General Assembly specifically broadened the CWCB's role to include improvement of the stream environment.[71] Subsequently, the General Assembly authorized the CWCB to receive temporary loans of agricultural water rights, a provision intended to create a mechanism for responding to droughts or other relatively short-term needs.[72] In 2008, the General Assembly clarified provisions relating to water rights leased, loaned, or contracted to the CWCB to protect against the abandonment of the established consumptive use portion of water during the time the right is used for instream flows and to allow the consumptive use portion to be available for downstream diversion and use.[73] Any change of use, except the temporary loan of agricultural water, must go through the full water court process. In 2008, the General Assembly for the first time authorized funding under which the CWCB may purchase or lease water rights for instream flows.[74] As of the end of 2006, the CWCB had received 16 permanent donations and entered into five leases and one intergovernmental agreement shifting water to instream flow uses.[75] The Colorado Water Trust and Trout Unlimited also are working to obtain water rights that they can donate to the CWCB for instream flows.

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[71] COLO. REV. STAT. § 37-92-102 (3).

[72] COLO. REV. STAT. § 37-83-105 (2). Such loans are not required to go through a water court change-of-use proceeding.

[73] COLO. REV. STAT. § 37-92-102 (3) (revised by H.B. 08-1280, 66th Gen. Assem., 2d Reg. Sess. (Colo. 2008)) ("All Contracts or agreements for water, water rights, or interests in water under this subsection (3) shall provide that, pursuant to the water court decree implementing the contract or agreement, the Board or lessor, lendor, or donor of the water may bring about beneficial use of the historical consumptive use of the leased, loaned, or donated water right downstream of the instream flow reach as fully consumable reusable water."). The revision makes clear the decreed historical consumptive use will not be reduced because of the temporary instream flow use of the right. *See id.*

[74] H.B. 08-1346, 66th Gen. Assem., 2d Reg. Sess. (Colo. 2008) (enacted as COLO. REV. STAT. § 37-60-123.7).

[75] Colo. Water Conservation Bd., Completed Transactions, http://cwcb.state.co.us/StreamAndLake/WaterAcquisitions/CompletedTransactions/ (last visited April 3, 2009).

### 4. *Flows on Federal Lands*

About 35% of Colorado lands are federally managed, including national forests covering most of the state's high elevation areas.[76] Most surface flows originate in these high mountain watersheds. Many of the state's appropriations for instream flows are located on stream segments within national forests and on Bureau of Land Management ("BLM") lands. Through negotiation, Colorado has encouraged federal agencies to use the state's water rights system to achieve federal objectives.[77] Thus, Forest Service claims for water on 303 stream segments within the Rio Grande and Uncompahgre National Forests were resolved by an agreement under which the Forest Service was given state water rights for instream flows to about 85% of the water in return for waiving its special use and right of way permitting authority to regulate other water diversions.[78] In 2004, the State entered into separate memoranda of understanding with the Forest Service and the BLM agreeing to work together to find acceptable approaches to meeting state and federal interests related to water on these federal lands.[79] The Forest Service sponsored an extensive dialogue among interests, called the Pathfinder process, to seek agreement about preferred strategies for streamflow protection in the Grand Mesa, Uncompahgre, and Gunnison National Forests.[80] The State and the Federal government worked out an unusual agreement for establishing a federal right for water for the Great Sand Dunes National Park by which the United States holds what is essentially an instream flow right under state water law.[81]

Colorado has only one congressionally-designated Wild and Scenic River: a segment of the Cache la Poudre River from its headwaters downstream about 70 miles.[82] As part of its land management planning process, the Colorado BLM has

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[76] CAROL HARDY VINCENT ET AL., CRS REPORT FOR CONGRESS, FEDERAL LAND MANAGEMENT AGENCIES: BACKGROUND ON LAND AND RESOURCES MANAGEMENT 3 (2004), *available at* http://www.nationalaglawcenter.org/assets/crs/RL32393.pdf (last visited April 3, 2009) [hereinafter CONGRESSIONAL RESEARCH SERVICE].

[77] By statute, the board is to request recommendations from the U.S. Department of Agriculture and the U.S. Department of the Interior. COLO. REV. STAT. § 37-92-102 (3).

[78] Interview with Randy Bramer, Office of General Counsel, U.S. Department of Agriculture (June 5, 2008).

[79] Memorandum of Understanding between the State of Colo. Dep't of Natural Res. and U.S. Dep't of Agric. Forest Serv. (April 16, 2004); Memorandum of Understanding Between the State of Colo. Dep't of Natural Res. and the Colo. Water Conservation Bd. and U.S. Dep't of the Interior Bureau of Land Mgmt. (September 14, 2005), *both available at* http://cwcb.state.co.us/StreamAndLake/RelatedInformation/HotTopics/AgreementsWithFederalAgencies/agreements.htm (last visited April 3, 2009).

[80] *See generally* Pathfinder Project, http://www.gmugpathfinder.org/ (last visited April 3, 2009) (providing more information about this project).

[81] John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century*, 4 U. DEN. WATER LAW J. 271, 286 (2001).

[82] *See* National Wild and Scenic Rivers, Cache la Poudre River, http://www.rivers.gov/wsr-cache-la-poudre.html (last visited April 3, 2009).

identified several streams suitable for wild and scenic designation.[83] The state has been facilitating stakeholder discussions to seek alternatives to formal designation that would still provide protection for these segments, including their flows.

Federal reserved water rights have also been the basis of flow protection in Colorado. Essentially all the flows in streams located in Rocky Mountain National Park, for example, are controlled by the United States under adjudicated state water rights.[84] Flows of the Gunnison River reserved for the Black Canyon National Monument have just been negotiated and will provide for a year-round base flow of 300 cfs with a 1933 priority date; an annual one-day peak related to inflow (and tied to releases for endangered fish needs); shoulder flows (elevated base flow using a formula in the decree) for 85 days in all but the driest two-year categories; drought-year storage recovery provisions; and subordination to all existing and future in-basin uses up to a total of 60,000 acre-feet.[85]

### 5. *Flows for Endangered Species*

As an outcome of years of lengthy negotiations among an array of interests, including the state, the U.S. Fish and Wildlife Service has developed a recovery plan for four species of endangered fish with critical habitat in the upper Colorado River.[86] One aspect of this plan concerns protection and enhancement of flows in a critical stretch of the river near Grand Junction known as the 15 Mile Reach. While a state instream flow appropriation protects base flows in this reach, additional flow targets are satisfied by managed flow releases from several upstream Bureau of Reclamation storage facilities and from dams managed by

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[83] Bureau of Land Management, Final Wild and Scenic River Eligibility Report for Kremmling and Glenwood Springs Field Offices, Colorado (2007), *available at* http://www.blm.gov/rmp/co/kfo-gsfo/documents/FinalEligibilityReport_Mar2007.pdf (last visited April 6, 2009). *See also* Bureau of Land Management, Grand Junction Field Office, "Wild and Scenic River Eligibility Report," March 24, 2009, *available at* http://www.blm.gov/pgdata/etc/medialib/blm/co/field_offices/grand_junction_field/PDF.Par.3668.File.dat/Final%20Wild%20and%20Scenic%20Eligibility%20Report%20original%20signature%20web.pdf (last visited April 8, 2009).

[84] U.S.-Parks, Rocky Mountain Nat'l Park—Hydrologic Activity, http://www.usparks.com/rocky/hydrologic_activity.html (last visited April 3, 2009).

[85] Interview with Bart Miller, Water Program Manager, Western Resource Advocates; Colo. Trout Unlimited, *Water Court Finalizes Decree to Benefit Black Canyon of the Gunnison National Park*, http://ctunewsblog.wordpress.com/2009/01/08/water-court-finalizes-decree-to-benefit-black-canyon-of-the-gunnison-national-park/ (last visited April 3, 2009).

[86] *See generally* Upper Colo. River Endangered Fish Recovery Program, http://www.fws.gov/coloradoriverrecovery/ (last visited April 3, 2009).

water suppliers.[87] Water users and the State have agreed to downstream delivery points for these releases to ensure their protection.[88]

### 6. *Flows for Recreation*

Between 1999 and 2007, seven decrees were awarded to local governments for flows as high as 1,400 cfs for what are called "recreational in-channel diversions" ("RICD"s).[89] An RICD is simply a structure (or structures) placed in a stream channel to create the kind of hydraulic features ordinarily found only in whitewater segments. The structures transform stream flows into waves, pools, drops, and eddies for use by kayakers, canoeists, rafters, tubers, and others. They are built in urban areas to provide readily accessible water-based recreation. Such appropriations are not regarded under Colorado law as instream flows because they are based on structural control of water to provide the beneficial use.[90] They are now governed by specific statutory provisions of Colorado water law.[91]

### 7. *Summary*

Colorado has actively appropriated water for environmental benefits in streams with important sport fisheries, particularly in high elevation locations. Since 1973, the State has filed instream flow appropriations covering 8,500 stream miles, approximately eight percent of the State's total.[92] The State has generally worked successfully with federal land management agencies to find acceptable ways to use state law to accomplish federal objectives in a number of instances. It has been a generally constructive participant in efforts to provide flows needed to support endangered species. Recently the legislature has expanded the CWCB's

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[87] An effort to adopt a new "upside down" instream flow water right was not successful. Nicole Silk et al., *Turning Instream Flow Water Rights Upside Down*, 7 RIVERS 298 (2000). The state did appropriate a baseflow for protection of the endangered fishes, a rare example of an appropriation for warm-water fish. But the essential higher flows are provided by managed releases from federal and non-federal upstream reservoirs. *Id.*

[88] By designating a place of use just upstream of the 15 Mile Reach, water can be delivered and administered under the Colorado water rights system independent of the state instream flow program.

[89] *See* Colo. Water Conservation Bd., Decreed RICD Applications, http://cwcb.state.co.us/WaterSupply/Recreational/DecreedRICDs/ (last visited April 3, 2009); COLO. REV. STAT. § 37-92-102 (5), (6).

[90] Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist., 109 P.3d 585 (2005); Glenn E. Porzak et al., *Recreation Water Rights: "The Inside Story"*, 10 U. DENV. WATER L. REV. 209 (2007) (providing a discussion of the legal and political wrangling over RICDs).

[91] COLO. REV. STAT. § 37-92-103 (5), (6).

[92] Information on protected stream miles from the Colorado Water Conservation Board. http://cwcb.state.co.us/StreamAndLake/NewAppropriations/. Total Colorado and other western state stream miles from The Montana Watercourse, Water Facts for Mont., http://www.mtwatercourse.org/waterfacts.htm#miles (last visited Feb. 9, 2009).

ability to work on flow restoration, including authorization of funding needed to acquire existing water rights for instream flow purposes. As discussed in Part IV, *infra*, a logical next step would be to allow holders of existing rights to change their rights to environmental flow uses.

### *C. Idaho*[93]

#### *1. Introduction*

Among the Rocky Mountain states Idaho enjoys a relative abundance of water. Its 90,000 miles of rivers and streams carry an average of 86 million acre-feet of water annually.[94] There are 26,000 miles of fishable streams and 3,100 miles of whitewater on 67 rivers and streams.[95] Total surface and ground water withdrawals for all uses were 21.8 million acre-feet in 2000.[96] Irrigation accounted for 19.1 million or about 87% of the total.

Both as a means of protecting its waters from export to other states and of maintaining important fisheries, recreation, and aesthetic values, Idaho has acted statutorily and administratively to legally protect unappropriated water for instream uses and to help restore flows in dewatered streams. The state has appropriated waters to protect minimum flows, designated protected rivers, and authorized the use of water banks for flow augmentation. More recently, the state, as well as groups such as Trout Unlimited and The Nature Conservancy, have been working to restore flows through a variety of arrangements with water right holders. We look first at the state program for appropriation of water for environmental flows.

#### *2. Minimum Flow Appropriations*

The Idaho legislature has itself appropriated waters for protection of environmental values and, in 1978, it established a program by which the Idaho

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[93] Assistance for this section was provided by Peter Anderson, Trout Unlimited, Idaho; Mark Moulton, Sawtooth National Recreation Area, Idaho; Helen Harrington, Idaho Department of Water Resources; Morgan Case, Idaho Department of Water Resources; Cindy Robertson, Idaho Fish and Game; David Barber, Office of the Attorney General, Idaho; Kimberly Goodman, Trout Unlimited, Idaho; Dean Huibregtse, BLM, Idaho; Mike Gheleta, Attorney, Colorado; and Randy Bramer, Office of General Counsel, U.S. Department of Agriculture, Colorado.

[94] IDAHO WATER RES. BD., IDAHO STATE WATER PLAN 26 (1996), *available at* http://www.idwr.idaho.gov/waterboard/Planning/State_Planning/Documents/StatePlans/SWP1996.pdf (last visited April 3, 2009).

[95] *Id.* at 79, 80.

[96] USGS, Estimated Uses of Water in the U.S., 2000, Table 2, *available at* http://pubs.usgs.gov/circ/2004/circ1268/htdocs/table02.html (last visited Feb. 9, 2009) [hereinafter Estimated Uses of Water].

Water Resource Board may file for minimum flow rights.[97] The legislature retains an oversight role and may disapprove permitted rights. Under Idaho law, any person may request the Board to file for a minimum flow right, but only the state may hold such a right.[98] Initially, most requests came from the Idaho Department of Fish and Game and the Department of Parks and Recreation. In addition, as part of its water basin planning process, the Board itself has identified segments for flow protection. There are now 70 licensed minimum flow rights held by the Board covering 554 miles of stream.[99] In addition, 212 rights have been established legislatively. And another 11 rights have been permitted and may ripen into licenses.[100] Idaho established most of its minimum flow rights between 1978 and 1993. The most dramatic addition of minimum flow appropriations by the Board resulted from the 2004 Snake River Water Rights Agreement, resolving the claims of the Nez Perce Tribe and the United States as trustee under the tribe's treaty rights.[101]

The statutory restriction of state ownership of minimum flows serves as the basis for ongoing litigation in which irrigators are suing the Bureau of Reclamation for releases of water from project reservoirs on the Boise River upstream of the state capitol.[102] The irrigators are arguing the releases are minimum stream flows, and that only the state may authorize such releases. The releases provide water to help meet downstream endangered species needs, but they have also provided a base flow in the river as its passes through the City of Boise.

### *3. Protected Rivers*

In 1988 the Idaho legislature authorized the Board to develop comprehensive water plans for individual areas of the state.[103] Included was authority for the Board to designate "protected rivers," where it determines that the "value of preserving a waterway for particular uses outweighs that of developing the waterway for other

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[97] IDAHO CODE ANN. § 42-1501 *et seq.* (2009). More background is provided in J. Beeman & K. Arment, Instream Flows in Idaho, *in* INSTREAM FLOW PROTECTION IN THE WEST (1989), *supra* note 2, at 267.

[98] IDAHO CODE ANN. § 42-1504 (2009).

[99] Minimum Stream Flow Summary, http://www.idwr.idaho.gov/waterboard/Planning/Minimum%20Stream%20Flow/Documents/MSF_for_Web.pdf (last visited May 9, 2008).

[100] A complete listing of minimum stream flow rights is available online at http://www.idwr.idaho.gov/waterboard/Planning/Minimum%20Stream%20Flow/Documents/MSF_for_Web.pdf (last visited Jan. 28, 2009).

[101] The settlement agreement and related documents are online at http://www.idwr.idaho.gov/nezperce/index.htm (last visited Feb. 9, 2009).

[102] Personal Communication from David Barber, Deputy Attorney General, Idaho Office of the Attorney General (Apr. 23, 2008).

[103] IDAHO CODE ANN. § 42-1734A (2009).

beneficial uses . . . ."[104] Protected rivers can either be "natural" or "recreational." No new water development is permitted on natural rivers. To date, the Board has developed 11 such plans that include protected river segments, of which 118 are designated natural.[105]

*4. Water Transactions Program*

Water transactions are focused on changing uses of existing water rights under voluntary agreements to produce enhanced stream flows by reducing diversions in critical stream segments.[106] The State of Idaho is a partner in the Columbia Basin Water Transactions Program through which funding from the Bonneville Power Administration is used to pay for transactions. This program is part of a much larger effort, led by the Northwest Power and Conservation Council, to help restore the threatened anadromous fisheries in the Columbia Basin. The Idaho program is concentrated in the Upper Salmon Basin and is part of the Watershed Project focusing on stream and habitat improvements.[107] The Idaho Water Resources Board also receives matching funds through the Pacific Coast Salmon Recovery Fund for certain transactions in the Salmon Basin.

Transactions in Idaho have taken several different forms. Of the 32 transactions between 2003 and 2007, 18 were leases.[108] Most of the leases were for a single year (or part of a year), but several are for 10-year terms. Increasingly, the preferred form of transaction is an agreement not to divert. In 2007, there were five such agreements ranging in duration from one year to 30 years. One attraction of such agreements is they do not involve a change of use review.

*5. Water Banks*

Water banking has a long history in Idaho, but its use for environmental water emerged in the 1990s as a mechanism by which the Bureau of Reclamation ("Reclamation") could obtain water regarded as necessary to enable its projects in the Snake River Basin to continue to operate without jeopardy to endangered

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[104] *Id.* at (4).

[105] For a map showing the location of these protected rivers see http://www.idwr.idaho.gov/waterboard/Planning/Protected%20Rivers/protected_rivers.htm (last visited Feb. 9, 2009).

[106] The Idaho program is part of the larger Columbia Basin Water Transactions Program. Information available online at http://www.cbwtp.org/jsp/cbwtp/program.jsp (last visited Feb. 9 2009).

[107] For a map of the area and information about the Upper Salmon program see http://www.idwr.idaho.gov/waterboard/Planning/Water%20Transaction%20Program/water_transaction_program.htm (last visited Feb. 9, 2009).

[108] Information provided by Morgan Case, Staff Biologist, Idaho Department of Water Resources, on May 12, 2008.

salmon.[109] Because Idaho law did not allow Reclamation to lease water for such purposes, the Idaho legislature specifically authorized its operation.[110]

Since the mid-1990s, Reclamation has been renting water from the Snake, Boise, and Payette rental pools as available to provide up to 427,000 acre-feet of water at times and places needed by the salmon. Reclamation rents storage water on an annual basis from these pools, following the rules and procedures established by the local operating committees. In addition, as part of the 2004 Snake River Settlement (for the Nez Perce), the legislature authorized Reclamation to lease or acquire natural flow water rights for up to 60,000 acre-feet to supplement flows for salmon.

In addition to the rental pools that enable use of stored water, Idaho established a State Bank in 1979.[111] Direct flow water rights and private storage rights anywhere in the state can be banked and become available for lease by others, including the Water Resources Department, for temporary uses—including to enhance stream flows in locations with a state-established minimum flow. The Board has used the State Bank to lease water under its water transactions program.

### *6. Lemhi and Wood River Water Banks*

In 2001, the Idaho legislature established a special water supply bank for the Lemhi River.[112] This legislation established a minimum flow water right at the lower end of the Lemhi near its confluence with the Salmon River, with the intention that the right be supplied not from unappropriated water but from transactions under the bank involving existing upstream water rights.[113] Provision is made for rental of existing rights through the bank. Transactions are based on an assumed consumptive use of 2.5 acre-feet per acre of irrigated land, and leases may be for partial season, full season, or multi-year periods. No formal change of water right is required for these transactions.

The success of the Lemhi program led the legislature in 2007 to establish a somewhat similar program in the Wood River Basin.[114] Again the legislature

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[109] Water Banks in the West, Washington Department of Ecology (2004), at 61 *et seq.*, *available at* http://www.ecy.wa.gov/pubs/0411011.pdf (last visited Feb. 9, 2009).

[110] IDAHO CODE ANN. § 42-1763B (2009).

[111] A history of water banking in Idaho is available online at http://www.idwr.idaho.gov/waterboard/water%20bank/history_of_bank.htm (last visited Feb. 9, 2009).

[112] IDAHO CODE ANN. § 42-1506 (2009).

[113] In this instance, the designated minimum flow could not be met by existing flows. The legislation nevertheless established the flow rate with the intention it would be met through actions involving existing water diversions. Ordinarily under Idaho law, a minimum flow can only be established if existing hydrology supports it.

[114] IDAHO CODE ANN. §§ 42-1508, 42-1765B (2009).

directed the Board to establish minimum flow rights in a designated reach of the Big Wood and Little Wood rivers, with the desired flows to be met through donations of water rights. The statute does not allow use of the bank for either leasing or purchase of water rights to enhance flows.

*7. Flow Protection on Federal Lands*

Approximately 63% of Idaho is federally owned and managed.[115] As part of the Snake River Basin Adjudication, the federal government filed numerous claims for water associated with its lands in this basin.[116] It prevailed only on its claims under the Wild and Scenic Rivers Act and for the Hells Canyon National Recreation Area. These claims have now been established as water rights under agreement with the State.[117] In 1990 the State entered into a memorandum of understanding with the Forest Service and the Bureau of Land Management to cooperatively investigate the suitability of streams on these federal lands for Wild and Scenic River designation.[118] The Idaho Water Resource Board has established minimum flows on many streams located on federal lands and also has established protected rivers on some of these lands.

There are five federally-designated Wild and Scenic Rivers in Idaho: the middle fork of the Clearwater, including the Lochsa and Selway rivers; the headwaters of the Rapid River within the Nez Perce National Forest; the St. Joe River above its confluence with the North Fork in the Idaho Panhandle National Forest; a portion of the mainstem of the Salmon River within the Salmon-Challis National Forest; and 100 miles of the Middle Fork of the Salmon River to its confluence with the main Salmon River.[119]

*8. Summary*

Idaho is fortunate to have some of the nation's most spectacular rivers. Recreation and fishing are an increasingly important part of the state's economy. Nevertheless, irrigated agriculture remains important—particularly in the Snake River Basin where there are significant conflicts between groundwater and surface

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[115] CONGRESSIONAL RESEARCH SERVICE, *supra* note 76.

[116] Potlatch Corp. v. United States, 12 P.3d 1260 (Idaho 2000).

[117] In re: SRBA, Case No 39576: Consolidated Subcase No. 75-13316, Wild & Scenic Rivers Act Claims, (Encompassing Subcases75-133167, 77-11941, 77-138447, 81-11961, 81-10472,81-10513, and 8 1-10625); Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees (Aug. 20, 2004).

[118] Memorandum of Understanding between the Governor, State of Idaho, and Regional Foresters Northern and Intermountain Regions Forest Service and State Director, Idaho Bureau of Land Management (Feb. 14, 1991).

[119] A list of designated Wild and Scenic Rivers in Idaho can be found at http://www.rivers.gov/wildriverslist.html#id (last visited Feb. 9, 2009).

water users. Early enthusiasm for using the minimum flow program to protect unappropriated water in rivers has tapered off. However, in response to specific demonstrated needs the State has shown a willingness to craft tailored legislative responses to facilitate interests in recovery of endangered fish. Water banks now play an important role in facilitating the use of existing water rights for streamflow enhancement. As discussed in the recommendations section, *infra*, by allowing all parties to make at least temporary use of existing water rights for streamflow enhancement, Idaho could readily advance existing state efforts.

### *D. Montana*[120]

#### *1. Introduction*

Montana is the largest of the Rocky Mountain states, the fourth largest in the country. Its two major river basins, the Upper Missouri and the Upper Columbia, generate or pass through roughly 40 million acre-feet of runoff annually.[121] Its population of about 900,000 people withdrew about 12 million acre-feet of water for all uses in 2000—10.3 million for irrigation.[122]

Topographically, Montana is two states: the great plains of the eastern three fifths of the state and the mountainous west. Most of the precipitation is centered in the mountainous region, with distributions ranging from about 34 inches a year in one part of the northwest to about 6 inches in the south central part of the state.[123] It is a land of big rivers: the Upper Missouri formed by the Jefferson, Madison, and Gallatin rivers and the Yellowstone to the east and the Clark Fork and the Kootenai to the west. There are two congressionally-designated Wild and Scenic Rivers—the three branches of the Flathead River—North Fork, Middle Fork, and that portion of the South Fork above Hungry Horse Reservoir, and a portion of the Missouri as it flows through the Upper Missouri River Breaks National Monument.[124] As noted by the U.S. Geological Survey:

> Instream uses of water for recreation and habitat for fish and wildlife are becoming more important to Montana's rapidly growing tourism industry. Montana's rivers are a popular vacation

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[120] Assistance for this section was provided by Laura Ziemer, Trout Unlimited, Montana; Mike McLane, Montana Department of Fish, Wildlife, and Parks; Andy Drummond, Montana Department of Fish, Wildlife, and Parks; and Brianna Randall, Clark Fork Coalition, Montana.

[121] USGS, Estimated Uses of Water in Montana, 2000.

[122] *Id.* at 8.

[123] Western Regional Climate Center, Climate of Montana, http://www.wrcc.dri.edu/narratives/MONTANA.htm (last visited April 6, 2009).

[124] U.S. Fish and Wildlife Service, Designated Wild & Scenic Rivers, http://www.rivers.gov/wildriverslist.html (last visited Feb. 9, 2009).

> destination for float trips, fishing, and wildlife viewing. Guided river trips are popular on many Montana rivers including the Yellowstone, Smith, Flathead, Bighorn, and Missouri Rivers.[125]

Given the relative abundance of water—at least in the western part of the state—and the importance of instream uses for recreation, Montana has been active in setting aside unappropriated water for protection of environmental flows and in restoring dewatered rivers with valuable fisheries. Discussed here are state appropriations and reservations of water as well as acquisitions and leases of water for instream uses.

### 2. *Appropriations and Reservations*

In 1969 the Montana legislature authorized the State Fish and Game Commission to appropriate the waters in 12 "blue ribbon" trout streams for preservation of fish and wildlife habitat.[126] Then, in 1973, the legislature established a process whereby unappropriated water in Montana streams and rivers could be reserved for existing or future beneficial uses or to "maintain a minimum flow, level, or quality of water . . . ."[127] Instream flow reservations cannot exceed 50% of the average annual flow.[128] The Department of Natural Resources and Conservation ("DNRC") has used this process to establish hundreds of instream flow reservations in the Upper and Lower Missouri and Yellowstone basins.[129] Today, the Montana Department of Fish, Wildlife, and Parks ("DFWP") holds 376 reservations on 331 streams.[130] The Montana Department of Environmental Quality holds reservations for water quality purposes. And the Bureau of Land Management has obtained reservations on 31 streams crossing its lands in the Upper Missouri River Basin.

Reservations are not a perpetual commitment of water. By statute, the Department must review all reservations every ten years.[131] This review examines due diligence in perfection of the state-based water reservation and a

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[125] Estimated Uses of Water in Montana, *supra* note 121, at 8.

[126] M. McKinney, *Instream Flow Policy in Montana: A History and Blueprint for the Future*, *in* INSTREAM FLOW PROTECTION IN THE WEST (rev. ed. 1993), *supra* note 2, at 15-4.

[127] MONT. CODE ANN. § 85-2-316(1) (2009).

[128] "The department shall limit any state water reservations after May 9, 1979, for maintenance of minimum flow, level, or quality of water that it awards at any point on a stream or river to a maximum of 50% of the average annual flow of record on gauged streams. Ungauged streams are not subject to the limit under this subsection." MONT. CODE ANN. § 85-2-316(6) (2009).

[129] Montana went through major basin processes for the Yellowstone and the Upper and Lower Missouri rivers, identifying flows to be protected and resulting in reservation orders in 1979, 1992, and 1994.

[130] Personal Communication from Andy Brummond, Water Resources Specialist, Montana Department of Fish, Wildlife, and Parks (May 7, 2008).

[131] MONT. CODE ANN. § 85-2-316(10) (2009).

determination of use to see if the right is meeting its prescribed objective. Such review provides information upon which the Department may extend, modify, or revoke the reservation. The Department may modify an instream flow reservation every five years. In fact, however, no reservations have yet been modified. Instead, at least those reservations held by DFWP are being managed like water rights. Especially since the drought period around 2000, DFWP has been expanding its monitoring efforts and has been working with junior appropriators to protect instream reserved flows.[132]

### *3. Compact Agreements for Reserved Rights*

In 1979, the Montana legislature established a Reserved Water Rights Compact Commission to negotiate resolution of federal and tribal claims to reserved water rights.[133] Federal lands account for about 30% of Montana.[134] Through the commission process, Montana has entered into compacts—incorporated into statute—with the National Park Service (1995), the Bureau of Land Management (1997), the U.S. Fish and Wildlife Service (1997, 1999, 2007), and the U.S. Forest Service (2007).[135] The primary intent of the compacts is to resolve federal water claims based on the reserved rights doctrine.[136]

The recent compact with the Forest Service illustrates how federal instream water interests are addressed. In addition to recognizing a reserved right for the South Flathead Wild and Scenic River, the compact creates state water rights for instream flows on 77 stream segments located within national forests and an in-place right for one fen.[137] In addition, provision is made for the Forest Service to use the State's reservation process to seek additional instream flow protection.[138] In return, the United States withdrew its claims for federal reserved rights in the state adjudication process.

The State also has established compacts that include water for fish and wildlife and ceremonial purposes with the Blackfeet, Chippewa Cree, Crow, Northern

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[132] Telephone Interview with Andy Brummond and Mike McLane, Water Resources Specialists, Montana Department of Fish, Wildlife, and Parks (Apr. 25, 2008).

[133] Information about the commission is available online at http://dnrc.mt.gov/rwrcc/default.asp (last visited Feb. 10, 2009).

[134] CONGRESSIONAL RESEARCH SERVICE, *supra* note 76.

[135] All compacts are available online at http://dnrc.mt.gov/rwrcc/default.asp (last visited April 6, 2009).

[136] This doctrine provides a right to water necessary to fulfill the primary purposes of federal and tribal lands reserved by Congress or the President from entry under the public land disposal laws. This right, regarded as established at the time the land reservation was made, exists independent of state water law. *See, e.g.,* United States v. New Mexico, 438 U.S. 696 (1978).

[137] MONT. CODE ANN. § 85-20-1401 (2009).

[138] MONT. CODE ANN. § 85-2-320 (2009).

Cheyenne, the Assiniboine and Sioux tribes of the Fort Peck Reservation, and the Gros Vente and Assiniboine tribes of the Fort Belknap Reservation.[139]

### *4. Leasing and Acquisition*

The Montana legislature established a limited leasing program for instream flows in 1989, authorizing the DFWP to enter into leases on four streams.[140] It expanded the program to additional streams in 1991 and again in 1993. In 1995, the legislature authorized a pilot leasing program in the Upper Clark Fork, allowing private groups or individuals to lease water for instream flows. Also, for the first time the legislature authorized the change of use of an existing right to instream flow purposes. At present, Montana continues its state leasing program while also allowing private parties to lease water for instream purposes or to convert their diversionary rights. Existing water rights may be changed temporarily or, in limited instances, permanently. Only the DFWP and the Forest Service are specifically authorized to permanently change the use of owned rights to instream flow purposes.[141] DFWP leases are limited to ten year terms but may be renewed indefinitely (assuming the authorizing statute stays in place); leases for water that comes from a water conservation program may be for up to 30 years. DFWP also may contract for the release of storage water for flow enhancement.

The evolution of instream leasing and change of water right law in Montana is instructive. It reflects an initially cautious view that gradually gave way to substantial support, including opening the process to non-governmental entities. This growing level of political support emerged out of both positive experiences under the initial leasing program and from the development of a diverse coalition of interests, including agriculture, that grew to support this voluntary approach to flow restoration.[142]

In addition to DFWP, Trout Unlimited and the Montana Water Trust have been actively engaged in establishing instream flow leases. The Water Trust has concentrated its efforts on tributaries where modest improvements in stream flows can provide significant fishery benefits.[143] More recently, attention has turned to

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[139] These compacts can be accessed at the Montana Reserved Water Rights Compact Commission web site, http://dnrc.mt.gov/rwrcc/default.asp# (last visited April 6, 2009).

[140] An excellent summary of the history of the leasing program can be found in Trout Unlimited, *Private Water Leasing: A Montana Approach*, *available online at* http://www.tu.org/atf/cf/%7B0D18ECB7-7347-445B-A38E-65B282BBBD8A%7D/MT_WaterReport.pdf (last visited April 6, 2009). *See also* John Ferguson et al., *Keeping Fish Wet in Montana: Private Water Leasing: Working Within the Prior Appropriation System to Restore Streamflows*, 27 PUB. LAND & RESOURCES L. REV. 1 (2006).

[141] MONT. CODE ANN §§ 85-2-320, -436 (2009).

[142] *Private Water Leasing*, *supra* note 140.

[143] Explained at http://www.montanawatertrust.org/our-approach/ourappoach.html (last visited Feb. 10, 2009).

leases of storage water because of the ability to shape releases of water to meet instream flow needs. Trout Unlimited has emphasized flow enhancement in the context of stream habitat restoration.[144]

### 5. *Drought Management Plans*

One of the more notable tools for instream flow protection in Montana is the voluntary drought management plan. An example of outcomes that can sometimes emerge from collaborative watershed processes, drought plans have been developed in several parts of Montana to protect fisheries during water shortages.[145] These efforts emphasize education, monitoring, and primarily voluntary action. For example, a stakeholder group, the Blackfoot Challenge, worked out voluntary agreements among water diverters in the drought years of 2000 and 2001 to maintain enough flow in the Blackfoot River to protect the fish during the low flow period.[146] They are now moving to expand the scope of conservation activities under a long-term plan.

### 6. *Groundwater Development and Instream Flows*

Pumping of ground water from alluvial aquifers, especially from wells close to a stream, can directly reduce flows in that stream. Montana law recognizes the potential hydrologic connection between surface water and ground water.[147] However, the DNRC was allowing new groundwater development in basins designated as closed to new surface water appropriations so long as pumping would not immediately reduce surface flows. Montana Trout Unlimited successfully challenged this administrative interpretation of Montana law,[148] and the legislature responded with changes in the statute requiring new groundwater applications in closed basins to be accompanied by an assessment of potential depletions of surface water.[149]

### 7. *Summary*

Montana appears to have actively embraced the importance of protecting and restoring stream flows, particularly in the well-watered mountainous part of the

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[144] Personal Communication from Laura Ziemer, Montana Director, Western Water Project, Trout Unlimited (May 7, 2008).

[145] Telephone Interview with Mike McLane & Andy Brummond, Water Resources Specialists, Montana Department of Fish, Wildlife, and Parks (Apr. 25, 2008).

[146] For more information see www.blackfootchallenge.org/ (last visited April 6, 2009).

[147] L. Ziemer et al., *Ground Water Management in Montana: On the Road from Beleaguered Law to Science-Based Policy*, 27 PUB. LAND & RESOURCES L. REV. 75 (2006).

[148] Montana Trout Unlimited v. Montana Dep't. of Natural Res. & Conservation, 133 P.3d 224 (Mont. 2006).

[149] MONT. CODE ANN § 85-2-360(1) (2009).

state. In part, this commitment reflects the importance of fishing and recreation to the state's economy. In part, it reflects an availability of water sometimes in excess of out-of-stream demands. The reservation process has been used extensively to protect flows east of the continental divide. The compact process has been used successfully to negotiate water right agreements with federal land management agencies and tribes. Some Montanans have demonstrated an ability to share water in times of drought to benefit fisheries. Willingness to enable non-governmental entities to hold water rights for instream flows has brought more players to the process, with additional resources. A possible next step would be to allow permanent changes of water rights for environmental flow purposes.

### *E. Nevada*[150]

#### *1. Introduction*

Nevada is the driest of our study states, with an average annual precipitation of about nine inches.[151] It is almost totally located between the rain shadow of the Sierra Nevada mountains to the west and the Rockies to the east. The state's complex basin and range topography results in 14 different hydrologic units, only two of which (the Bear and the Colorado) drain outside the state. Perennial streams are few in Nevada. The Truckee, Carson, and Walker rivers originate in the Sierra Nevada mountains of California and flow east into Nevada in the vicinity of Reno. The Humboldt originates and ends within the state. The Colorado, as it flows south to Mexico, forms a portion of the state's eastern border near Las Vegas. The total estimated yield from Nevada's surface sources is about 3.2 million acre-feet annually.[152] The USGS estimates Nevada users withdrew about 3.1 million acre-feet of water for all purposes in 2000, about 2.3 million for irrigation.[153]

Nevada's unique landscapes and hydrology support a diverse array of natural systems. Extensive use of the state's limited water resources inevitably has taken its toll, however. According to the Nevada Water Plan, 11 of the state's native species of fish are extinct or extirpated, and 23 are listed as either threatened or endangered under the Federal Endangered Species Act.[154] More than half of the state's wetlands are gone.

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[150] Assistance for this section was provided by Richard Rimes, USFWS, Nevada; Elmer Bull, Nevada Parks and Wildlife; Carol Grenier, Bureau of Reclamation, Nevada; and Michael Cameron, TNC, Nevada.

[151] The Nevada State Water Plan can be found at http://water.nv.gov/WaterPlanning/wat-plan/pt1-tbfg.cfm (last visited April 6, 2009).

[152] *See id.* at 4-16.

[153] Estimated Uses of Water, *supra* note 96.

[154] *Id.* at 3B-2.

There is no state program for protection of environmental flows in Nevada. Nevada law, however, authorizes appropriation of water for recreational uses, a provision that has been interpreted by the state's Supreme Court to include wildlife, and does not limit who may file for such appropriations.[155] In 2007, the legislature authorized the temporary conversion of irrigation rights to wildlife purposes or to improve the quality or flow of water.[156] Environmental water needs have been met primarily through acquisition of existing rights and their conversion to wildlife purposes. The State has focused its attention on state wildlife areas, including their water-related requirements. Managed releases of water from Reclamation reservoirs also have been important for stream flows on the Truckee River.

### 2. *Environmental Water in the Truckee and Carson Basins*

Concerns about the threatened Lahontan cutthroat trout and the endangered cui-ui in the Truckee River and Pyramid Lake, and the loss of wetlands in the lower Carson basin, instigated a series of actions that led to the Truckee-Carson/Pyramid Lake Water Rights Settlement Act of 1990.[157] One of the nation's first reclamation projects, Newlands diverts water out of the Truckee River to irrigate agricultural lands. Much of the unconsumed water never returned to the Truckee because most of the irrigated lands are in the Carson River watershed. Water levels in Pyramid Lake, the terminus of the Truckee River, had declined to the point that native fish in the lake could not swim up into the river to spawn. One of the programs established under the Settlement Act involved purchasing water rights in the Truckee portion of the Newlands Project and retiring their irrigation use so that the water could remain instream.[158] In addition, the States of California and Nevada, the Pyramid Lake Paiute Tribe, the major water users, and the federal government have now agreed to the Truckee River Operating Agreement,[159] governing storage and release of water in upstream Reclamation reservoirs. Releases are used, in part, to improve stream flows through the Reno area and into Pyramid Lake.

Reduced diversions from the Truckee led to reduced return flows into the Lahontan Valley, the terminus of the Carson River. The Lahontan Valley contains Nevada's most important wetlands. The Settlement Act set up a water rights acquisition program to provide additional water for the wetlands in the Stillwater

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[155] State v. Morros, 766 P.2d 263 (Nev. 1988).

[156] NEV. REV. STAT. § 533.0243 (2009).

[157] Truckee Carson/Pyramid Lake Water Rights Settlement Act, Title II of P.L. 101-618, 1990 Stat. 3084 (1990).

[158] *Id.* § 206(A) (1990).

[159] 73 Fed. Reg. 74,031-01 (Dec. 5, 2008). Information about the agreement is available online at http://www.usbr.gov/mp/troa/ (last visited Feb. 10, 2009).

National Wildlife Refuge and Carson Lake. The U.S. Fish and Wildlife Service determined in 1996 that 75,000 acre-feet of water would be needed.[160] After 12 years, FWS, in partnership with the State of Nevada, The Nature Conservancy, the Nevada Waterfowl Association, the Bureau of Indian Affairs, and the Bureau of Reclamation, have acquired about 37,800 acre-feet of water from the Carson Division of the Newlands Project: 27,100 acre-feet by FWS, 1,800 acre-feet by BIA, and 8,900 acre-feet by the state and NWA. In addition, FWS has purchased 4,300 acre-feet of water from users in another segment of the Carson River and received 2,900 acre-feet from the Navy.[161] In short, they are just halfway to their goal.

In addition to the ordinary challenges involved in acquiring water rights, transactions have been impeded by a series of disputes that have involved extensive litigation, including unresolved questions about the actual quantity of transferable water.[162]

### *3. State Wildlife Management Areas*

The Nevada Department of Wildlife manages nine wildlife management areas around the state, some of which contain wetland acreage and reservoirs for which surface and groundwater rights have been obtained. For example, the Mason Valley WMA is located on formerly irrigated land adjacent to the Walker River purchased by the state together with the associated water rights.[163] Water rights at some WMAs depend on flood flows, irrigation tail water, or subsurface drains. An example is the WMA located in the Humboldt Sink at the terminus of the Humboldt River.

The State also manages the Carson Lake and Pasture, an area of wetlands in the southeast corner of the Lahontan Valley. The Department of Wildlife has been purchasing water rights from upstream irrigators for use in Carson Lake and Pasture, similar to the efforts by the FWS to acquire rights for the Stillwater National Wildlife Refuge. To date, the Department has acquired 8,300 acre-feet of water, based on the duty of water of 3.5 acre-feet per acre established by court decree.[164] However, only 7,000 acre-feet has been transferred pending resolution of the legally transferable quantity of water.

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[160] Personal Communication from Richard Grimes, Supervising Realty Specialist, Stillwater National Wildlife Refuge, U.S. Fish and Wildlife Service (May 21, 2008).

[161] *Id.*

[162] *Id.*

[163] Telephone Interview with Elmer Bull, Wildlife Staff Specialist, Nevada Department of Wildlife (June 12, 2008).

[164] *Id.*

#### *4. Walker Lake*

Walker Lake sits at the terminus of the Walker River and is an enclosed basin. Upstream water uses have severely diminished flows into the lake; the lake's surface elevation has dropped 120 feet from the level that existed 100 years ago, and the volume of water in the lake has declined approximately 80%.[165] Among other effects, the salinity of the water has increased to levels that threaten the ability of native fish, including the listed Lahontan cutthroat trout, to survive.

Under the sponsorship of Senator Harry Reid, Congress has established and funded a Desert Terminal Lakes program that includes funds to acquire water rights from Walker River users and allow that water to remain instream to the lake. The program has established a target of adding 50,000 acre-feet per year to the lake through acquisitions.

#### *5. Summary*

Supplies of water in Nevada are limited, and population—especially in the Las Vegas area—is growing rapidly. Opportunities for protection of water-dependent ecosystems are limited. While the State has taken some actions, especially in association with its wildlife management areas, most of the work to protect water-based environmental values has been accomplished under federal management and funding. Recent legislative action to authorize temporary transfers for environmental benefits provides an important additional tool. In addition, the State may wish to establish a program for environmental flow restoration and protection.

### *F. New Mexico*[166]

#### *1. Introduction*

New Mexico is a semi-arid state, with average annual precipitation of about 14 inches.[167] Relatively few streams are perennial. The major perennial rivers including the Rio Grande and the Pecos are substantially regulated by dams. New Mexico's population of somewhat less than two million people withdrew 3.6

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[165] Personal Communication from Carol Grenier, Desert Terminal Lakes Program Manager, U.S. Bureau of Reclamation (June 12, 2008).

[166] Assistance with this section was provided by Kyle Harwood, Harwood Consulting, Santa Fe, NM; Adrian Oglesby, TNC, NM; Steve Harris, Rio Grande Restoration, NM; Lee Brown, Emeritus Professor, University of New Mexico, NM; Denise Fort, Professor of Law, University of New Mexico; Beth Bardwell, World Wildlife Fund, New Mexico; and Josh Mann, Interstate Stream Commission.

[167] New Mexico Climate Center, Climate of New Mexico, http://weather.nmsu.edu/News/climate-in-NM.htm (last visited April 6, 2009).

million acre-feet of water in 2000, 3.2 million for irrigation.[168] More than 40% of withdrawals came from ground water.

Protection of water for environmental purposes has not historically been a priority for New Mexico. Thus there is no state program for protecting environmental flows, despite several attempts to legislatively establish such a program. Nor has a new water right for environmental flows yet been approved, although the New Mexico Attorney General has determined that an existing right can be changed to instream flow under state water law.[169] There are four congressionally-designated Wild and Scenic River segments in New Mexico: the very northern portion of the Rio Grande as it enters the state, the Rio Chama below El Vado Dam for 24 miles, the East Fork of the Jemez River from the boundary of the Santa Fe National Forest to the confluence with the Rio San Antonio, and the Pecos from its headwaters downstream for 20 miles.[170] Flows on the Rio Chama are managed by the Bureau of Reclamation to provide rafting opportunities.[171] The U.S. attempted unsuccessfully in the 1970s to obtain judicial recognition of instream flow reserved rights for streams in the Gila National Forest.[172]

Our discussion begins with a look at the recently established Strategic Water Reserve and other initiatives suggesting an increasing interest in river restoration. Then we look at several places in the state in which there are active efforts underway involving flow restoration. The needs of endangered species have been a primary driver of water for the environment in New Mexico.

### 2. *Strategic Water Reserve*

Inability to gain legislative support for an environmental flow program prompted development of an alternative strategy, based loosely on the idea of the strategic petroleum reserve. The concept emerged from a Santa Fe nonprofit called Think New Mexico. In the legislative process it was expanded beyond rivers to include ground water, named the Strategic Water Reserve, and became law in 2005.[173] The Interstate Stream Commission is authorized to acquire water or water rights, permanently or temporarily, to assist the state either in meeting its

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[168] Estimated Uses of Water, *supra* note 96.

[169] Opinion of the Attorney General, Opinion No. 98-01 (Mar. 27, 1998).

[170] U.S. Fish and Wildlife Service, Designated Wild & Scenic Rivers, http://www.rivers.gov/wildriverslist.html (last visited April 6, 2009).

[171] U.S. Bureau of Reclamation, Operations Fact Sheet for El Vado Dam and Reservoir, http://www.usbr.gov/uc/albuq/water/SanJuanChama/Reservoirs/fs/sjc_elvado.html (last visited April 6, 2009).

[172] United States v. New Mexico, 438 U.S. 696 (1978).

[173] N.M. STAT. § 72-14-3.3 (2009).

interstate water delivery obligations or to benefit protected species or species at risk. The program received initial funding of $2.8 million; another $2 million was added in 2006. Its first use was in the Pecos River.

In 2007, the governor's office and the legislature established the River Ecosystem Restoration Initiative. The legislature has provided funding for grants to entities engaged in a variety of river restoration activities.[174]

### *3. Flow Improvements in the Pecos River*

The Pecos River originates in the mountains of northern New Mexico and flows south to its junction with the Rio Grande in Texas. Its modest water supply is shared between users in New Mexico and Texas. The major use in New Mexico is for irrigated agriculture, much of that in the Carlsbad Irrigation District served by the Federal Carlsbad Project. New Mexico has worked to better manage irrigation water use, and even to retire some uses, to help meet its compact water delivery obligations to Texas.

The Pecos bluntnose shiner is listed as threatened under the Endangered Species Act.[175] Operations of Reclamation's Carlsbad Project were determined to jeopardize the species' continued existence in 1991.[176] Reclamation has been working to reoperate its facilities, particularly Sumner Dam, to benefit the fish. It has also been acquiring water rights to offset the reduction in deliveries resulting from these additional releases.

The Interstate Stream Commission ("ISC") has used the Strategic Water Reserve to acquire both surface water and groundwater rights in the Pecos to assist in state efforts to meet compact obligations and to enhance flows for the shiner.[177] In addition to retiring irrigation uses, the ISC has acquired groundwater rights that can be pumped to the river if necessary for compact deliveries. The ISC also has acquired groundwater rights and constructed a pipeline to the river to be able to supplement flows just above the shiner's designated critical habitat.

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[174] Information about this initiative is available at http://www.nmenv.state.nm.us/swqb/reri/index.html (last visited April 6, 2009).

[175] U.S. Fish and Wildlife Service, Environmental Conservation Online System, Species Profile for Pecos bluntnose shiner, http://ecos.fws.gov/speciesProfile/SpeciesReport.do?spcode=E04F (last visited April 6, 2009).

[176] *Id.*

[177] Telephone Interview with Josh Mann, Special Assistant Attorney General, Interstate Stream Commission (June 6, 2008).

### *4. Enhancing Flows in the Middle Rio Grande*

The Rio Grande as it moves south out of the mountains towards Elephant Butte Reservoir is a heavily committed river. Much of its water must go to Texas, an obligation that constrains new upstream uses. Historic uses, especially for irrigation, take most of New Mexico's share. With the listing of the Rio Grande silvery minnow as an endangered species in 1994, water managers faced the challenge of factoring in the flow requirements of this fish.

In 2003, following a series of dry years with large stretches of the river going dry, the U.S. Fish and Wildlife Service issued a biological opinion finding that Bureau of Reclamation water operations were jeopardizing the continued existence of the silvery minnow. As a reasonable and prudent alternative, FWS proposed operations over the following ten-year period that would ensure a sufficient spring spike flow necessary to induce the minnow to spawn and flows through the year that would avoid drying up the river in the minnow's designated critical habitat. Reclamation determined, however, it did not have the ability within its legal discretion to make these operational changes. In subsequent litigation, Federal District Court Judge Parker decided that Reclamation was obligated by the Endangered Species Act to modify its operations as necessary to prevent further endangering the minnow's existence.[178] Using a rider to an appropriation bill, however, Senator Domenici legislatively declared that Reclamation operations complied with the ESA, thus mooting Judge Parker's decision.[179]

There is strong interest in using the Strategic Water Reserve as the mechanism for acquiring water rights to improve flows in the Middle Rio Grande.[180] Federal and state funds are available for such acquisitions, and the Interstate Stream Commission has instituted a process for putting an acquisition program in place.

### *5. Summary*

New Mexico is moving cautiously toward protecting a portion of its water for environmental purposes. In this fully appropriated state, environmental water will have to come primarily by retiring existing consumptive uses. The Strategic Water Reserve now provides a much needed mechanism for this process, though its use is limited to addressing needs of endangered species. Assuming experience

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[178] Rio Grande Silvery Minnow v. Keys, 469 F. Supp. 2d 1003 (D.N.M. 2005).

[179] Press Release, WildEarth Guardians, Environmental Groups Oppose Domenici Rider; Offer to Permanently Put San Juan-Chama Water Off Limits; Vow Not To Seek San Juan-Chama Water This Year (July 16, 2003), *available at* http://www.wildearthguardians.org/library/paper.asp?nMode=1&nLibraryID=181 (last visited April 6, 2009).

[180] Telephone Interview with Kyle Harwood, Principal, Harwood Consulting, Santa Fe, NM (June 6, 2008).

with the Strategic Water Reserve is positive, New Mexico may want to consider authorizing its use beyond endangered species and enabling parties to participate in its use in addition to the Interstate Stream Commission.

## *G. Utah*[181]

### *1. Introduction*

Utah is an arid state; its average annual precipitation of about 13 inches is the second lowest in the country (after Nevada).[182] The average annual usable water supply is about seven million acre-feet.[183] Yields are greatest in the Bear, Jordan, Weber, and Sevier River basins. Evaporation from the Great Salt Lake accounts for depletions of about three million acre-feet annually. The Utah Water Plan estimates that remaining developable water is about 790,000 acre-feet. According to the USGS, total withdrawals in 2000 were about 5.5 million acre-feet, about 4.3 million for irrigation.[184]

Utah does not have a program for appropriating water for environmental flows, but its statutes do make some provision for enabling existing rights to be changed to instream flow purposes. Utah has cooperated with the U.S. Fish and Wildlife Service and others in implementation of recovery efforts for endangered native fishes in the Green River. Perhaps the major flow protection efforts in the state are occurring in connection with the Federal Central Utah Project. We begin with a discussion of the state's instream flow program.

### *2. State Instream Flow Program*

In 1986, the Utah legislature enabled protection of instream flows by authorizing either the Utah Division of Water Resources or the Division of Parks and Recreation to file for temporary or permanent changes of rights owned by either Division for instream flow purposes.[185] New appropriations are not authorized. Instream purposes are the propagation of fish, public recreation, or the reasonable preservation or enhancement of the natural stream environment. The divisions may change a donated right to instream use, but may only purchase

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[181] Assistance with this section was provided by Kirk Dahle, Trout Unlimited, Utah; Tim Hawkes, formerly with Trout Unlimited, Utah; Paul Abate, USFWS, Utah; Dale Hepworth, consultant to Trout Unlimited, Utah; Rick Larsen, Utah Fish and Game, Utah; and Mark Holden, Utah Reclamation Mitigation and Conservation Commission, Utah.

[182] Utah Water Plan, *available at* http://www.water.utah.gov/waterplan/uwrpff/Chp-02b.htm#20 (last visited April 6, 2009).

[183] *Id.* at Table 3.

[184] Estimated Uses of Water, *supra* note 96.

[185] Now codified at UTAH CODE ANN. § 73-3-30 (2009).

rights with funding specifically appropriated for that purpose. As of 2005, only four rights had been changed in use under this provision.[186]

The Utah legislature in 2008 authorized "fishing groups" to file a change of use to instream flows for an existing right for up to 10 years to protect or restore habitat for native trout.[187] This legislation resulted from several years of discussions among a variety of interests, spearheaded by Trout Unlimited.[188] The legislation reflects necessary compromises, including its limitation to places where there is a process for protection of native cutthroat trout, its restriction to temporary changes, and its sunset in 10 years. Importantly, however, it enables groups such as Trout Unlimited to lease or purchase water rights and temporarily change their use to instream flows.

### *3. Upper Colorado River Recovery Program*

The flows of the Green River below Flaming Gorge Reservoir are now managed by the Bureau of Reclamation, in part, under a detailed plan designed by the U.S. Fish and Wildlife Service to maintain habitat conditions believed necessary to recover populations of endangered fishes.[189] Flaming Gorge serves primarily to help the Upper Basin meet its delivery obligations to the Lower Basin under the Colorado River Compact. Historically, the dam was operated to maximize hydropower revenues. Releases now are managed as feasible to meet the spawning and reproduction needs of these fish and are varied according to water availability in a given year.

### *4. Mitigation for the Central Utah Project*

As part of the 1992 Central Utah Completion Act, Congress established the Utah Reclamation Mitigation and Conservation Commission and tasked it with, among other things, using appropriated funds to acquire water rights necessary to improve stream flows in the Strawberry River and Provo River basins.[190] The mitigation plan describes the Commission's efforts to purchase water rights in the Lower Provo River for conversion to instream flows. The objective is to be able

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[186] Charney, *supra* note 2, at 124 Appendix B.

[187] H.B. 117, codified at UTAH CODE ANN. § 73-3-30(3) (2009).

[188] Telephone Interview with Tim Hawkes, formerly Director of Utah Water Project, Trout Unlimited, Utah (May 5, 2008).

[189] U.S. Bureau of Reclamation, Flaming Gorge Dam Environmental Impact Statement, Background, http://www.usbr.gov/uc/provo/rm/fgeis/fgeis_background.html (last visited Feb. 10, 2009).

[190] Information about the Commission and its work can be found at http://www.mitigationcommission.gov/aboutus/aboutus.html (last visited April 6, 2009).

to maintain a minimum flow of 75 cubic feet per second into Utah Lake. Out of the total federal funding of over $100 million for these mitigation projects, approximately $15 million is committed to purchase water rights in the Lower Provo.

#### 5. *Federal Reserved Rights for the Virgin River*

The Virgin River flows south from its headwaters into Zion National Park on its way to the Colorado River. The United States and the State of Utah negotiated a settlement of federal reserved rights claims for the park in 1996.[191] Under the agreement, the U.S. subordinated its rights to all existing upstream water rights in return for a cap on future depletions. The expectation is that this cap will ensure the continuance of stream flows into the park.

#### 6. *Summary*

Utah has shown little enthusiasm for setting water aside for environmental flow purposes. State agencies have made limited use of the instream flow program, apparently because the legislature has not made funds available to acquire existing water rights. Most examples of instream flow protection to date in the state are the result of federal action. The new opportunity for fishing groups to lease water for native trout opens the door for nonprofits to play a role in streamflow protection. Perhaps if this program proves successful, Utah will consider its expansion.

### H. *Wyoming*[192]

#### 1. *Introduction*

Wyoming is a large state with few people. Precipitation is limited, except in the mountainous areas.[193] Most of the state is within the Missouri River Basin, including such significant rivers as the Yellowstone, Wind/Big Horn, and the North Platte. The Green River is a major tributary to the Colorado. The Snake River originates in Wyoming and flows west to the Columbia. The Bear River begins in Wyoming and flows into the Great Basin and Great Salt Lake. Average annual runoff is about 17 million acre-feet.[194] The USGS estimated total water withdrawals in Wyoming in 2000 to be about 5.8 million acre-feet, with

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[191] Zion National Park Water Rights Settlement Agreement, Dec. 4, 1996, *available at* http://wcwcd.state.ut.us/Agreements/Zion%20National%20Park.pdf (last visited April 6, 2009).

[192] Assistance with this section was provided by Tom Annear, Wyoming Game & Fish Department; Scott Yates, Trout Unlimited, Wyoming; Jeff Fassett, former state engineer, Wyoming; Anne MacKinnon, Wyoming; and Gary Collins, Governor's Office, Wyoming.

[193] Wyoming Water Plan, http://waterplan.wrds.uwyo.edu/fwp/ (last visited March 29, 2009).

[194] *Id.*

irrigation accounting for about 5 million acre-feet.[195] There are about 21,000 miles of fishable streams in the state, about half on private lands, supporting a considerable recreational economy.[196]

Wyoming has taken a measured approach to protection of environmental flows. State law limits such dedications of water to use for fisheries. State policy is to "focus on the most popular stream fisheries, streams located on public lands, and streams with existing flow agreements under other authorities (such as special use permits)."[197] In addition, instream flows have received protection under federal law (e.g., Wild and Scenic Rivers) and through water management operations involving Bureau of Reclamation facilities. We begin with consideration of the state instream flow program.

### 2. *The State Instream Flow Program*

The Wyoming legislature established a program for protection of instream flows in 1986.[198] Wyoming's Department of Game and Fish identifies the location and quantifies the desired flows and then passes this information to the Wyoming Water Development Commission, which determines whether to file an application with the State Engineer and the Board of Control.[199] The statutorily-defined purpose of the appropriation is to maintain or improve an existing fishery.[200] The appropriated flow is to be the minimum necessary for that purpose. In addition, the State may acquire an existing water right for the purpose of providing instream flows. It has not yet used this authority.[201]

As of January 2008, 101 applications had been filed with the State Engineer.[202] Seventy-four permits have been issued, covering more than 300 stream miles. Most of the rights are clustered in a few areas of the state. These segments primarily

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[195] Estimated Uses of Water, *supra* note 96.

[196] Trout Unlimited, The Economic Value of Healthy Fisheries in Wyoming, January 2005, *available at* http://www.tu.org/atf/cf/%7B0D18ECB7-7347-445B-A38E-65B282BBBD8A%7D/Ecomonics_Fisheries_WY.pdf (last visited April 6, 2009).

[197] Wyoming Game & Fish Department, *Water Management Unit Five-Year Plan; 2006 to 2010*, 2006.

[198] WYO. STAT. ANN. § 41-3-1001 *et seq.* More background is provided in Gordon W. Fassett, Wyoming's Instream Flow Law, INSTREAM FLOW PROTECTION IN THE WEST (1989), *supra* note 2, at 401.

[199] *See* http://wwdc.state.wy.us/instream_flows/instream_flows.html (last visited Jan. 28, 2009).

[200] WYO. STAT. ANN. § 41-3-1001(c).

[201] Telephone interview with Tom Annear, Instream Flow Supervisor, Wyoming Department of Game & Fish (April 29, 2008).

[202] Information provided by the Wyoming State Engineer's Office (May 5, 2008) (on file with author).

include popular trout fisheries with public access and streams with populations of Bonneville cutthroat trout, Colorado River cutthroat trout, and Yellowstone cutthroat trout.

Game and Fish recently succeeded in gaining State Board of Control approval for changing a water right historically used to support a fish hatchery to instream flow.[203] The Department had decided to sell the hatchery. To maintain the hydrology associated with this non-consumptive right the Department wanted to convert the right to instream flow purposes. This is the first conversion of an existing water right to instream flow in Wyoming.

### *3. Flow Protection on Federal Lands*

As mentioned, almost all instream flow appropriations under the state program occur on federal public lands. In addition, the State has established a water right in the name of the United States for the Clarks Fork of the Yellowstone River Wild and Scenic River designated by Congress in 1990.[204] The State established instream flow water rights in the Shoshone and Big Horn national forests as part of a settlement agreement with the United States in the Big Horn Adjudication.[205]

### *4. Restoring Stream Health*

While most attention to this point has focused on protecting unappropriated flows, there have also been efforts to improve and restore stream habitat and flows to enhance fisheries and other aquatic values and to improve their use for recreation and tourism. Thus the Bureau of Reclamation has operated several of its projects to provide flows beneficial to downstream fisheries. For example, Reclamation releases water from Kortes Dam on the North Platte in a manner

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[203] Telephone interview with Tom Annear, Instream Flow Supervisor, Wyoming Department of Game & Fish (April 29, 2008).

[204] Clarks Fork Wild & Scenic River Designation Act of 1990, P.L. 101-547. As explained by the then State Engineer:

> Negotiated language in this federal law authorized the Secretary of Agriculture to apply, through the procedural requirements of State law, quantify and secure a water right for the protection of the wild and scenic value of this particular river. Congress specified these values as beneficial uses for the purpose of allowing Wyoming's procedural laws for instream flow to be used for the appropriation and adjudication of the river flows needed to meet the purposes of the federal designation.

Fassett, Wyoming's Instream Flow Law, INSTREAM FLOW PROTECTION IN THE WEST (rev'd ed. 1993), *supra* note 2, at 21-3.

[205] Personal communication, Jeff Fassett, National Director of Water Resources, HDR Engineering, Inc. (June 16, 2008).

that supports a high quality tailwater trout fishery.[206] Similarly, releases from Fontanelle Dam support a cold-water fishery on the Green River.

Trout Unlimited ("TU") has begun promoting partnerships with private and public entities in places like the Gros Vente River near Jackson, on the Little Laramie River, and in the Smiths Fork and Thomas Fork of the Bear River in Wyoming, Utah, and Idaho.[207] TU has been working with the Wyoming legislature to develop a bill that would enable leasing of water rights for instream flow purposes by entities other than the State.

*5. Summary*

By law, Wyoming's approach to instream flow protection focuses solely on fisheries; by policy, it is largely concerned with popular game fish but, more recently, has also emphasized native cutthroat trout. The state has concentrated on streams on public lands, especially in the higher elevation national forests. There is growing interest in restoration of streams, a process that is likely to bring increased interest in acquiring water or water rights to help restore flows. State funding for such acquisitions would substantially facilitate such efforts as would enabling holders of water rights to change their use to environmental flows.

## PART III—SOME OBSERVATIONS

*1. The legitimacy of environmental flow protection has gained increased policy and legal recognition in the Rocky Mountain states since the 1970s, but there remains a reluctance to regard this use of water as equivalent in importance to consumptive water uses.*

Interest in environmental uses of water has led to affirmative legislative action in most Rocky Mountain states and judicial or administrative action in others. We have moved beyond questions such as whether environmental uses can be regarded as a beneficial use of water and whether an instream flow appropriation requires a physical structure to control and divert water. Thus it is now possible to protect water for environmental uses under state law in some manner in all of the states. The extent to which water has in fact been committed to environmental uses varies widely among the states, however, reflecting in part the relative abundance of water and in part the degree of political support.

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[206] Lawrence J. MacDonnell, *Managing Reclamation Facilities for Ecosystem Benefits*, 67 U. COLO. L. REV. 197, 220 (1996).

[207] Personal communication, Scott Yates, Wyoming Water Project Director, Trout Unlimited (April 18, 2008).

That reservations among state legislators about environmental flow protection remain is evident from the many statutory limitations that still apply to establishing environmental flow rights and changing existing rights to environmental flows. For example, flows dedicated to environmental purposes in Idaho, Colorado, and Wyoming are expressly limited to the minimum amount.[208] Idaho requires legislative review of instream appropriations made by the Water Resources Board.[209] Montana law requires periodic reevaluation of instream flow reservations.[210] Wyoming law only authorizes instream flows for fish.[211] Colorado law subjects instream flow appropriations to existing but undecreed water uses.[212] It authorizes a reduction in decreed flows at the determination of the Colorado Water Conservation Board.[213] By regulation, it allows inundation of a protected stream segment and, under certain conditions, accepts injury to the right caused by other water right changes.[214] Utah does not allow appropriations of new water rights for instream flow purposes.[215] Several states allow only a governmental entity to appropriate water for instream flow; similarly, several restrict the ability to transfer an existing right to instream flow to the state. The list of limitations goes on.

It seems likely that this somewhat second-class status will diminish over time. There has been a clear trend toward recognizing the importance of maintaining water for environmental purposes. There is long-standing support for protection of stream segments with trout fisheries. There is growing interest in enjoying rivers for other recreational benefits as well. Such uses are non-consumptive. They protect important values without diminishing the amount of water potentially

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[208] Current policy in these states is to treat this statutory term as justification for limiting appropriations to flow levels below that necessary to fully support fishery and other ecologic values. Idaho law, for example, states: "Approval of any such application must be based upon a finding that such appropriation of minimum stream flow: . . . (d) is the minimum flow or lake level and not the ideal or most desirable flow or lake level; . . . ." IDAHO CODE ANN. § 42-1503. A strong argument can be made, however, that the word "minimum" is simply another way of stating the fundamental principle of prior appropriation law that beneficial use always is limited to only that amount of water reasonably necessary to accomplish the purpose of the appropriation and no more. The quantity of water needed for an environmental flow water right depends on the purpose for which the right is established. See, for example the discussion by the Nebraska Supreme Court in *In re Application A-16642*, 463 N.W.2d 591, 610–11 (Neb. 1990).

[209] IDAHO CODE ANN. § 42-1503.

[210] MONT. CODE ANN. § 85-2-316 (10).

[211] *See* Reed Benson, *"Adequate Progress," or Rivers Left Behind? Developments in Colorado & Wyoming Instream Flow Laws Since 2000*, 36 ENVT'L L. 1283 (2006).

[212] COLO. REV. STAT. § 37-92-102 (3)(b).

[213] *Id.* (4)(b).

[214] 2 Colo. Code Reg. §§ 7, 8(i)(3).

[215] UTAH CODE ANN. § 73-3-30.

available for meeting other human needs.[216] A few states have affirmatively embraced the importance of environmental water, have established active state programs to identify high value places for protection, have committed at least some of the funding needed to provide the desired protections, and have worked positively with others who share this interest. These states recognize the need to protect and maintain the state's water-dependent heritage and the growing desire of many of their citizens to be able to enjoy the recreational and environmental benefits of healthy streams.

2. *Appropriations of water for environmental flow are heavily concentrated in high elevation, more remote streams that support a sport fishery.*

In part, the concentration of appropriations in relatively remote locations with viable fisheries simply reflects the reality that these are the only places with remaining unappropriated water in most states. Most people live in the lower elevation areas with lands suitable for development, including for agriculture. The streams in these areas have long since been fully appropriated to meet direct human uses. Urban water suppliers and some irrigation water suppliers have established storage facilities that divert water from high elevation streams, but the more remote these streams the less likely they are to have been regulated for human water uses. The focus on sports fisheries reflects both the importance of these fisheries to anglers and the role given to state wildlife agencies to identify places for protection of stream flows. To some degree, the Endangered Species Act has forced states to deal with flow requirements for other aquatic species.[217] As attention turns to protection of important environmental values in lower elevation water sources, it becomes necessary to work with existing water users. States are beginning to develop more tools to work within these settings.

3. *Scientific understanding of environmental flows has burgeoned in recent years, providing information needed to understand the essential role played by flows in maintaining healthy streams and helping to inform ways in which human uses of water can better be managed to enable maintenance of environmental values and functions.*

An early goal of environmental flow protection was simply to prevent rivers and streams from becoming so dewatered as to lose their ability to support a

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[216] An ongoing concern is that such rights limit upstream development of water. Of course, all water rights do this because they establish a legally protected claim as available in priority to the flows of water upon which the purpose of the appropriation are based. The difference with environmental flow appropriations is that they are non-consumptive.

[217] *See* Michael R. Moore et al., *Water Allocation in the American West: Endangered Fish Versus Irrigated Agriculture*, 36 NAT. RES. J. 319 (1996); Reed D. Benson, *So Much Conflict, Yet so Much in Common: Considering the Similarities Between Western Water Law and the Endangered Species Act*, 44 NAT. RES. J. 29 (2004).

fishery. This goal was achieved so long as some flow remained in the stream. Now our better understanding of the role that stream flows play in supporting stream function calls for seeking to manage water so that flows more closely mimic the natural (pre-development) stream hydrograph.[218] High flows are essential for maintaining channel form and for moving sediment. Peak flows that inundate floodplains recharge ground water, create important fish habitat, and support riparian vegetation communities. Base flows are essential to fish and much aquatic life. If flows become too low, water temperatures and concentrations of pollutants may increase beyond the tolerance level of aquatic species.

The Nature Conservancy has developed a framework for what is termed "ecologically sustainable water management."[219] TNC describes this concept as follows:

> Ecologically sustainable water management protects the ecological integrity of affected ecosystems while meeting intergenerational human needs for water and sustaining the full array of other products and services provided by natural freshwater ecosystems. Ecological integrity is protected when the compositional and structural diversity and natural functioning of affected ecosystems is maintained.[220]

The process provides participants with the information needed to make informed decisions about the tradeoffs between different levels and types of human water uses and the health of the river. A group of river scientists is developing a methodology they call the "ecological limits of hydrologic alteration."[221] This approach relies on use of flow-ecology relationships developed by analysis of numerous rivers within a region. With a better understanding of possible outcomes, actions can be taken to establish the desired flow regime.

The Instream Flow Council has identified five riverine components it regards as essential for effective management of flows: hydrology, geomorphology, water

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[218] A good starting point for reviewing the scientific literature emerging in this area is L. Poff et al., *The Natural Flow Regime: A Paradigm for River Conservation and Restoration*, 47 BIOSCIENCE 769 (1997). Also recommended are B. Richter et al., *Ecologically Sustainable Water Management: Managing River Flows for Ecological Integrity*, 13 ECOLOGICAL APPLICATIONS 206 (2003) and T. Annear et al., INSTREAM FLOWS FOR RIVERINE RESOURCE STEWARDSHIP (rev. ed. 2004).

[219] Richter, *supra* note 218, at 207.

[220] *Id.*

[221] A. Arthington et al., *The Challenge of Providing Environmental Flow Rules to Sustain River Ecosystems*, 16 ECOLOGICAL APPLICATIONS 1311 (2006).

quality, biology, and connectivity.[222] Methodologies for evaluation of these components are now being employed in river management across the U.S. and Canada, as well as in other countries.[223] Much progress is being made in integrating improved scientific understanding of river function with other interests in river management and use.

Given the essential role played by flows, extractions of water for human uses could be timed in a manner that corresponds more closely to the hydrograph as well. That is, extractions could be distributed over the year to maintain the shape of the hydrograph, but at a lower level. Protecting the flow regime in this manner has been called an "upside down" instream flow water right because it reverses the traditional baseflow protection approach.[224]

4. *Stream restoration activities, sometimes motivated by legal requirements, are being supported through changes in state water law allowing changes of rights to instream flows, including temporary changes through leases or rentals.*

Streamflow restoration requires working with existing water uses. The challenges here are much greater than in making appropriations of unclaimed water.[225] Water marketing to shift water from irrigation to urban uses has helped identify many of the challenges involved in making changes of water rights, and some states have modified their laws to better facilitate this process. In general, changing consumptive use rights to environmental flow purposes must go through the same procedures as water rights shifted to urban uses.[226] These processes require affirmative demonstration of no injury to other water rights and may include review on other grounds, including public interest assertions.

Most changes of existing water rights to environmental flow simply involve the cessation of diversion of water and the elimination of the associated consumptive use. The primary potential injury issue is whether the new use results in an

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[222] Annear, *supra* note 218, at 98.

[223] See, for example the case studies in A. Locke et al., INTEGRATED APPROACHES TO RIVERINE RESOURCE STEWARDSHIP: CASE STUDIES, SCIENCE, LAW, PEOPLE, AND POLICY (2008).

[224] N. Silk et al., *Turning Instream Flow Water Rights Upside Down*, 7 RIVERS 298 (2000). South Africa has changed its laws to place the fundamental needs of the river first, with human uses then obligated to adjust to become compatible with these needs. *See* Postel & Richter, *supra* note 3, at 84–86.

[225] A useful discussion is provided in Malloch, *supra* note 2, at 30. Also see D. Garrick et al., Environmental Water Transactions: Lessons Learned & Future Prospects, Proceedings of a workshop held September 2, 2007 in Brisbane, Australia as part of the *10th International Riversymposium* and *Environmental Flows Conference,* March 2008, available online at http://cbwtp.org/jsp/cbwtp/library/documents/Env%20Water%20Transactions%20Proceedings.pdf (last visited Feb. 11, 2009).

[226] Malloch, *supra* note 2, at 26–27.

injurious change in the timing of return flows so that stream conditions upon which downstream appropriators have depended are unacceptably altered.[227] Moreover, the matter of historical consumptive use—usually the most contentious matter in a change of water right proceeding—is irrelevant unless the applicant intends to legally protect that amount of water downstream beyond the historical point of return flows.[228]

In short, in many instances, it may be sufficient to demonstrate merely the historical pattern of diversions to establish the extent of the changed instream flow right. If the party making the change intends to protect the quantity of water historically consumed further downstream, then it will be necessary to determine the quantity and timing of this amount of water. It will also be necessary to develop a means of monitoring and protecting that water as it passes by downstream headgates.

Where an option, water rights holders have shown considerably more interest in leasing or loaning their rights or part of their rights for environmental flows than in selling them.[229] In addition to specifically providing for leasing of water rights for environmental flows, several states have developed mechanisms to facilitate such transactions, including Idaho's water banks and New Mexico's Strategic Water Reserve. In this way, water right holders can avoid the use it or lose it rule that forces them to divert water even though they may not want to.[230] They retain the option to revive their use if they choose. In the meantime, the water stays instream for the benefits it can provide in that use.

The continuing reluctance in most states to allow owners of water rights to change the use of the right to environmental flows is puzzling. Western states uniformly regard water rights as property rights. The water right holder has complied with state law and placed some amount of water to beneficial use. The right to continue the use of water, in priority, is protected. Water right holders are able to transfer ownership of the right and make changes to any other uses,

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[227] Another possible injury, at least in Colorado, is the loss of groundwater recharge upon which well pumpers have relied. City of Thornton v. Bijou Irrigation Co., 926 P.2d 1, 78–82 (Colo. 1996).

[228] Sale of the consumptive use portion to a downstream user can potentially provide a mechanism to help finance the original acquisition. In this case, quantification of historic consumptive use makes sense. Colorado law now specifically allows for this. COLO. REV. STAT. § 37-92-102 (3).

[229] Malloch, *supra* note 2, at 20.

[230] Authorizing legislation should stipulate that such temporary instream uses do not raise questions of abandonment or forfeiture. Thus, for example, Idaho provides specifically that water rights placed in the water supply bank are not subject to the state's five-year forfeiture statute. IDAHO CODE ANN. § 42-1764 (2). Moreover, water right owners will be more inclined to temporarily cease use if the process provides that the measure of the right's historic consumptive use will not be affected in the manner Colorado has done. *See supra* note 73.

subject to the no injury rule, except for streamflow enhancement. A change to environmental flows actually increases water in the stream, benefiting not only the in-channel environment but also the supply of water potentially available for other downstream appropriators. There is no clear explanation why holders of water rights should not be free to change the use to environmental purposes or why such changes should be limited to a state agency.[231]

5. *There are illustrations of improved cooperation between states and federal agencies as well as tribes so that mutual interests respecting environmental flows can be met, but more can and should be done.*

An historic area of contention between the United States and the states concerns the availability of water for uses on federal and tribal lands. In general, states determine uses of water within their boundaries. The primary exception is when a reservation of public lands for such things as national parks or Indian reservation is determined to have reserved an amount of appurtenant water necessary to fulfill the purposes of the reservation.[232] Such rights are regarded as existing independent of the normal state procedures for water appropriation. Beyond such reserved rights, federal land agencies and tribes must obtain rights to use water under state law.

In general, implied reserved rights that include instream flows have been found to exist for Indian reservations established under treaties that recognize fishing as an important purpose for which the reservation was established,[233] for national parks because of their explicit preservation purposes,[234] and for a few other such reservations. By statute, congressionally-designated Wild and Scenic Rivers are regarded as having reserved water rights.[235] Implied reserved rights for instream flows have not been recognized for national forests.[236] By terms of the National Wildlife Refuge System Improvement Act of 1997, the U.S. Fish and Wildlife Service does not seek reserved water rights for national wildlife refuges.[237] In general, Bureau of Land Management lands are not reserved. Because the McCarran Amendment[238] makes federal reserved rights subject to state general

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[231] Most states have long been unwilling to allow users other than state agencies to appropriate water for environmental flows. The rationale has been that those with environmental interests would simply appropriate all unappropriated water. This view fails to consider that the appropriation has to go through a permitting or adjudication process.

[232] *Supra* note 136.

[233] *See, e.g.,* Colville Confederated Tribes v. Walton, 647 P.2d 42 (9th Cir. 1981).

[234] *See* Colo. River. Water Conservation Dist. v. United States, 424 U.S. 800, 805 (1976).

[235] 16 U.S.C. § 1284 (c); Potlatch Corp. v. United States, 12 P.3d 1256 (Idaho 2000).

[236] United States v. New Mexico, 438 U.S. 696 (1978).

[237] 16 U.S.C. § 668dd(a)(4)(G).

[238] 43 U.S.C. § 666.

stream adjudications, quantification of such rights generally occurs in state proceedings.[239]

States generally seek to encourage resolution of federal interests in streamflow protection through use of state law. Montana has successfully used a special compact process to resolve federal reserved water rights claims.[240] Several states invite federal agencies to submit their instream flow protection interests to the state agency process established under state law.[241] Arizona and Nevada allow federal land agencies to directly appropriate water for environmental flow purposes.[242] Several states have worked out agreements with the United States under which special legislation has been crafted to enable federal interests to be met under state law.[243] Some states have put in place memoranda of understanding with federal land agencies calling for cooperative approaches to water matters.[244]

Nevertheless, state law governing protection of water for environmental purposes typically has a number of limitations that may not be consistent with federal and tribal land management objectives.[245] In some instances, standard state law has been adapted to specially address federal concerns. Where these limitations cannot be bridged, federal agencies may feel unable to follow state procedures and will choose instead to rely on other means to achieve their objectives. An option that has been proposed is to authorize joint ownership of instream flow water rights between federal and state agencies.[246]

### 6. *There is an increasing number of participants working to protect and improve stream flows in the Rocky Mountain states.*

States jealously guard uses of water to benefit their interests. Once understood in the West to mean uses that generated income or supplied direct human needs,

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[239] *Colo. River Water Conservation Dist,* 424 U.S. at 800. *But see* Reed D. Benson, *Deflating the Deference Myth: National Interests Versus State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241 (2006).

[240] *Supra* notes 133–39 and accompanying text.

[241] *See, e.g., supra* note 77.

[242] Nevada has not acted on federal applications for instream flows for many years, however, Arizona stopped approving such applications during the Phelps–Dodge litigation, a process that now has moved into its second phase involving acceptable methods for quantifying instream flow claims. Personal communication from Randy Bramer, Office of General Counsel, U.S. Department of Agriculture (May 8, 2008).

[243] *See, e.g., supra* note 81.

[244] *See, e.g., supra* notes 79–82 and accompanying text.

[245] Adele L. Amos, *The Use of State Instream Flow Law for Federal Lands: Respecting State Control While Meeting Federal Purposes*, 36 ENVTL. L. 1237 (2006).

[246] Lois Witte, Still No Water for the Woods, ALI-ABA Federal Lands Conference, October 19, 2001, *available at* http://www.stream.fs.fed.us/news/streamnt/apr02/apr_02_01.html (last visited Apr. 9, 2009).

today state interests include helping to find ways to make water available for nonconsumptive, environmental purposes. Unlike with other beneficial uses of water, however, most states restrict the decision to appropriate water for environmental uses to exclusive state control.

Leaving aside the necessity for such restrictions, it is nevertheless true that those most interested in using water for environmental benefits are often involved in the processes under which this is possible. Thus fish biologists working for state wildlife agencies have been central to state efforts to protect stream flows.[247] Occasionally, state parks and recreation departments encourage protection of flows for recreation if that is an allowable instream flow use. Even water quality agencies may weigh in because of the importance of flow for maintenance of water quality, again if protection of water quality is an allowable instream flow use. In addition, federal land management agencies have been actively involved in efforts to protect flows and lake levels within their lands.[248]

Nonprofits with a wildlife or biodiversity interest often are active participants. The Nature Conservancy has for many years been a leader in water-based biodiversity protection as a complement to its traditional land-based programs.[249] Trout Unlimited's Western Water Project, with offices in many of the Rocky Mountain states, actively promotes flow protection and restoration for fish and other aquatic benefits.[250] Modeled somewhat along the lines of land trusts, water trusts have been established in several western states with the objective of acquiring water or water rights for instream flow purposes.[251] Individual watershed groups have developed in many Rocky Mountain states, some with an interest in streamflow protection and restoration.[252] Cities also are increasingly interested in protecting and enhancing flows on streams that pass through their boundaries.[253] In addition, there are riparian landowners—sometimes ranchers—

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[247] The Instream Flow Council is a non-profit organization with membership from virtually all state wildlife agencies as well as their counterparts from the Canadian provinces. *See* www.instreamflowcouncil.org (last visited April 6, 2009).

[248] A good overview of federal agency efforts through the mid 1990s is provided in Gillilan & Brown, *supra* note 2, at 177–223.

[249] For an overview of TNC's program, see http://www.nature.org/initiatives/freshwater/ (last visited April 6, 2009).

[250] For an introduction to this program, see http://www.tu.org/site/c.kkLRJ7MSKtH/b.3022975/ (last visited April 6, 2009).

[251] There are water trusts in Montana (http://www.montanawatertrust.org/ (last visited April 6, 2009)) and Colorado (http://www.coloradowatertrust.org/ (last visited April 6, 2009)).

[252] For a listing of watershed groups by state see http://www.epa.gov/adopt/network.html (last visited Feb. 11, 2009).

[253] Reed D. Benson, *Rivers to Live By: Can Western Water Law Help Communities Embrace Their Streams?,* 27 J. LAND RES. & ENVTL L. 1 (2007).

with an interest in maintaining flows in streams that run through their property for fishery and aesthetic benefits. Moreover, rafting and kayaking enthusiasts are strong proponents of free-flowing rivers.

These entities and individuals bring people, expertise, and funding to the task of streamflow protection, much needed resources to supplement what is available through state and federal agencies. Obviously their participation is affected by the degree to which state law and processes enable them to accomplish their objectives. Precluding entities other than a state agency from acquiring and holding a water right for environmental flow purposes reduces their interest in putting in the time and expending the funds needed to make such acquisitions and go through the change of right process. Putting restrictions on the purposes for which environmental flows may be protected has the effect of keeping out those whose interests cannot be met. Limiting the tools available for entities to work with, such as by not authorizing leasing of water for environmental flows, limits their options and reduces their effectiveness.

That there are so many parties interested in streamflow protection underlines the growing importance placed on this use of water. Some states such as Montana have opened up their systems to enable participation in streamflow protection by all interested parties, in association with state efforts.[254] Others such as Colorado have been welcoming in some respects and unwelcoming in others (such as restricting ownership of instream flow rights to a single state agency).[255] The trend is clearly in the direction of inviting more participation, most importantly by allowing any party to either temporarily or permanently acquire existing water rights or water and changing their use to environmental flow.

*7. The environmental flow restoration toolbox is growing.*

Little has changed over the years in the manner in which states choose to set aside unused water for environmental purposes. Most states simply appropriate water for that purpose in the same manner as water users do for other water rights. States may also use their approval authority to condition approval of new appropriations on maintaining some minimum bypass flow to protect a stream reach.

There has been considerable development, however, in the legal tools by which existing water uses may be changed to provide enhanced stream flows.[256] Some states have explicitly recognized that existing rights may be changed to

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[254] *See supra* notes 141–45 and accompanying text.

[255] *Supra* note 54.

[256] Malloch, *supra* note 2.

environmental flow purposes.[257] As mentioned, such changes must undergo state review to ensure no injury to other rights. Several states now have established procedures by which water rights may be leased for instream flow purposes.[258] There may be limitations on who is authorized to hold these leases and on the number of years for which a right may be leased. There may also be limits on the purposes for which these leases may be made or even the watershed in which the transactions are allowed. But the door has been opened, and the results to date indicate considerable success with restoring stream flows using such approaches.

Purchasers and water right owners have shown considerable creativity in structuring transactions in ways that work for both interests.[259] Some transfers, for example, are triggered only in drought years. Some transfers call for only a limited-term cessation of diversions, for example, at the time during the irrigation season when flows are regarded as most critical for such things as fish passage or to moderate water temperatures. There have been agreements that produced a desired reduction in diversions by paying for water use efficiency improvements. Other agreements have enabled a direct flow diverter to switch to groundwater pumping or even to shift to another, more abundant source of water.

8. *Funding provided under the Columbia Basin Water Transactions Program has spurred innovative, voluntary efforts to restore stream flows needed by endangered fish in critical tributaries. Comparable programs should be established in other basins and states.*

While flow restoration on larger rivers can often be achieved through reoperation of storage facilities managed by the Corps of Engineers or the Bureau of Reclamation, flow restoration in the smaller tributaries typically requires reducing existing diversions under individual water rights. Such work is difficult and time consuming and is only possible if there is a reliable source of funding. In just a few years, the Columbia Basin Water Transactions Program has spurred more than 150 transactions to produce critically needed flows for the benefit of endangered fish.[260] The availability of this funding, generally tied to larger habitat restoration efforts, has enabled states in the Pacific Northwest and nonprofits to develop relationships with water right holders in key areas, to develop arrangements with some of these water right holders under which they are voluntarily willing to

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[257] *See, e.g., supra* note 185.

[258] *See, e.g., supra* notes 141–45 and accompanying text.

[259] Stories of results from transactions involving environmental flows are available on the Columbia River Basin Water Transactions web site available at http://www.cbwtp.org/jsp/cbwtp/stories/stories.jsp (last visited Feb. 11, 2009).

[260] Information about this program is available at http://www.cbwtp.org/jsp/cbwtp/index.jsp (last visited Feb. 11, 2009).

forego or reduce their diversions, and has encouraged states to develop legislative and administrative rules supporting these efforts.

New Mexico's Strategic Water Reserve represents a state-level commitment to providing funding and staff to acquire water and water rights to benefit federally listed species and, potentially, to help keep species from becoming listed.[261] In this way, the state is helping their water users meet their legal responsibilities under the Endangered Species Act through voluntary rather than regulatory means. In 2008, the Colorado General Assembly authorized the Colorado Water Conservation Board to use funds from the state's species conservation trust fund to acquire water rights for instream flow purposes to benefit listed or candidate species or species of concern.[262] Arizona has provided funding for stream restoration that includes the ability to acquire certain sources of water.[263] These are important commitments of state funds to help support the task of streamflow restoration to meet the needs of species in jeopardy of extinction.

Acquisition of water rights is expensive. Any serious effort at flow restoration requires the financial resources necessary to obtain either ownership of existing rights or the ability to use some or all of these rights to enhance stream flows. It seems likely that some dedicated source of funding will be necessary. One option for consideration would be a fee on applications for changes of water rights, similar to a real estate transfer fee.[264] Another possibility would be to establish a charge on all urban water uses, to be collected by the water supplier. It seems likely that states will find it difficult to appropriate general fund monies for this purpose. Thus, a dedicated source of funding will be necessary if progress is to be made.

*9. Collaborative processes focused on restoring specific streams and stream segments are helping to build support for the importance of adequate stream flows to enhance and maintain desired healthy streams and fisheries.*

An important trend in water management over the past 20 years has been the emergence of collaborative, multi-party processes by which acceptable changes in traditional water use patterns have been established, often to produce some desired environmental benefit.[265] Sometimes these processes are driven by the need to

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[261] *Supra* note 173.

[262] S.B. 09-168, COLO. REV. STAT. § 24-33-11 (2)(II).

[263] *Supra* note 27.

[264] An overview of real estate transfer fees, prepared by Trust for Public Lands, is available at http://www.tpl.org/tier3_cdl.cfm?content_item_id=1060&folder_id=825 (last visited April 6, 2009).

[265] *See, e.g.,* ACROSS THE GREAT DIVIDE: EXPLORATIONS IN COLLABORATIVE CONSERVATION & THE AMERICAN WEST, Philip Brick et al., eds. (2001).

comply with federal law respecting endangered species protection, water quality, or hydropower licensing. The Upper Colorado River Fish Recovery Program is a prominent example.[266] In other cases they emerge out of local interests in making watershed improvement (e.g., restoring flows in the Blackfoot River) or in responding to a perceived threat to the existing condition of the watershed (such as in Arizona's Verde River). Restoration of aspects of stream functionality, such as restoring sinuosity to a channelized stream segment or improving in-channel fish habitat, is often an integral objective. Still another means is a state-directed water basin planning process such as exists in Idaho.[267] In many cases these processes provide a better understanding of the manner in which the traditional flow regime has been altered and the effects this alteration has had on aquatic and riparian values. Sometimes this understanding leads to a shared interest in taking steps to restore a flow regime that provides increased ecological benefits. Voluntary diversion reductions during drought in the Blackfoot River of Montana illustrate this point.[268]

There have been some striking outcomes. One is the surprising degree of flexibility that is often available within historical patterns of water use. Water uses develop incrementally over many years, based on patterns of growth and associated needs for water. Under a priority system these patterns tend to stay firmly in place unless there is some important reason for their reconsideration. Yet the base need is simply to assure that valuable water uses continue, not that they necessarily continue in the same manner as they always have. Once that premise is accepted, often many things become possible. Some uses may no longer be important or necessary. Thus New Mexico is retiring some irrigation water uses in the Pecos to improve stream flows.[269] Water stored in Reclamation reservoirs in Idaho can be rented for release to meet downstream flow needs.[270] Other uses may be able to be supplied or managed in different ways. A well can replace a surface water diversion to maintain stream flows. Dams can be operated in ways that are more river-friendly while still meeting their traditional purposes.[271] The Alamo on the Bill Williams River in Arizona is an example.[272] Perhaps most importantly, these changes have been accomplished voluntarily.

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[266] Information about this program is available at http://www.fws.gov/coloradoriverrecovery/ (last visited Feb. 11, 2009).

[267] *Supra* note 103.

[268] Blackfoot Challenge, Better Communities Through Cooperation, http://www.blackfoot challenge.org/ (last visited Feb. 11, 2009).

[269] *See supra* note 177 and accompanying text.

[270] *See supra* note 110 and accompanying text.

[271] For examples of how this is occurring see MacDonnell, *supra* note 206.

[272] *See supra* notes 43–45 and accompanying text.

*10. Committing water to environmental purposes will be challenged by growing demands for consumptive uses of water associated with growing populations and by changes in water availability associated with climate change.*

Dedicating water to environmental uses will not get easier in the years ahead. The Rocky Mountain West contains some of the nation's fastest growing states.[273] Urban water demands are expanding as a result. Moreover, water demands associated with development of the region's important energy resources are growing as well.[274] Set against this pattern of growing water demands is a growing body of research indicating that the region's hydrologic patterns as recorded over the past century and more are changing.[275] The consensus is that for some critical sources of water supply such as the Colorado River basin the supply is likely to diminish. In other places, continued global warming is going to affect the region's dominant source of supply: runoff from the mountain snow pack. Increases in stream temperatures will place greater stress on fish and other temperature-sensitive aquatic life.

In this context the importance of protecting water for environmental purposes is likely to once again be debated. The discussion, however, is likely to be different from the one held 30 years ago. We are less likely to debate whether environmental water should be protected and more likely to focus on how and where water should be maintained for such purposes. Few today would suggest that protecting water for the environment is not important or has no value. Indeed, its value for these purposes is increasing as such water becomes increasingly scarce. We have learned a great deal about how water for the environment can be protected in a manner that is compatible with other interests. Environmental flows are non-consumptive. Their protection increases beneficial use of water without precluding other uses. We have made substantial progress over the past three decades in environmental flow protection, progress that has occurred while simultaneously meeting new water demands and without forcing an end to existing water uses. We can use the lessons we have gained from these efforts and apply them to the challenges of the future.

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[273] Western Governors Association, *Water Needs and Strategies for a Sustainable Future*, June 2006.

[274] *Id.* at 7. *See also* Western Resource Advocates, *Water on the Rocks: Oil Shale Water Rights in Colorado* (2009).

[275] *See, e.g.,* National Research Council, Colorado River Basin Water Management: Evaluating and Adjusting to Hydroclimatic Variability (2007).

## PART IV—
## RECOMMENDATIONS FOR NEXT STEPS IN THE ROCKY MOUNTAIN STATES

While all the Rocky Mountain states now have in place at least some mechanism by which water may be committed to environmental uses, they have followed different approaches and have achieved different results. Offered here are suggestions for possible next steps for each of the states to consider.

### *A. Arizona*

Arizona law accommodates protection of environmental water, but the state has no program of its own for this purpose. Understandably, water providers in the state are concerned primarily with how the state's limited supplies can be used to meet human demands. Yet it is evident there are many Arizona residents who value those special places in which stream flows and springs still support a rich natural environment. Such places have become even more valuable because of their scarcity. An important legislative action was to establish the Arizona Water Protection Fund in 1994.[276] It is time for the state to consider next steps. One easy change would be to authorize use of this fund for acquisition of existing water rights in addition to CAP water and effluent. Simultaneously it would be useful for the legislature to clarify the rules applying to changes of water rights to environmental purposes. Any owner of an existing right should be permitted to make such a change, at least temporarily. Any interested party should be able to lease rights for environmental flow uses. Indeed, the legislature may want to direct one or more of the state's agencies to play an active role in identifying high-value water-dependent places for protection or restoration. While the work of nonprofits and others respecting environmental water in Arizona has been quite remarkable, the needs and opportunities suggest a potentially important role for the state. In addition, now that questions about the legality of the state instream flow process are resolved the Department of Water Resources should move ahead with the many pending applications. Finally, with limited acknowledgement now in place under Arizona law that groundwater pumping can harm surface water rights, the State should provide a means by which any new groundwater pumping must offset its depletions to surface flows.

### *B. Colorado*

Colorado has one of the region's most active instream flow protection programs. In recent years the state legislature has taken important steps to

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[276] ARIZ. REV. STAT. §§ 45-2101 *et seq.* Funds under the program can be used to acquire water from the Central Arizona Project or effluent for environmental restoration purposes. For an overview of restoration projects in the state, many using funding from this source, see S. Megdal et al., *Projects to Enhance Arizona's Environment: An Examination of their Functions, Water Requirements and Public Benefits*, Arizona Water Resources Research Center, May 2006.

enhance the program, such as by clarifying the ability of the Colorado Water Conservation Board to lease existing water rights, change their use to instream flows, and sell the right to use the consumption use portion to a downstream user, as well as by providing funding for such acquisitions. To this point, the State has been unwilling to allow entities other than the CWCB to hold rights acquired for instream flow. While some parties have been willing to donate or sell rights to the CWCB, it is likely that allowing any owner of a water right to either temporarily or permanently change use of the right to instream flows would encourage more to do so. The legislature should remove this unnecessary limitation. In addition, the state should consider using the Basin Roundtable process to identify and evaluate remaining opportunities for streamflow protection and restoration.[277]

### *C. Idaho*

Idaho has taken significant actions to protect flows for environmental benefits over the years. Except under its comprehensive water basin planning program, however, it has tended to be more reactive than proactive in recent years. The legislature keeps an unusually tight leash over environmental flow decisions and, as in Colorado and Wyoming, only a single state agency is authorized to hold water rights for minimum flows. Temporary transfers of existing rights are permitted only to provide flows to a segment with an established minimum flow right. The legislative creation of a special water bank for the Lemhi River with simplified procedures was a creative action to help restore flows in that particular watershed. The Lemhi model should be expanded to other watersheds in which there is an interest in restoring flows. The State has opposed participation by non-state partners in the Columbia Basin Water Transactions Program in Idaho.[278] Given the challenges of successfully negotiating environmental flow water transactions, it would seem that other qualified partners would bring valuable and needed assistance to these efforts. Idaho may wish to continue its practice of only allowing appropriations for state-determined minimum flow segments, but it should consider enabling any party to change the use of an existing water right to environmental flow uses, either temporarily or permanently. There is no good reason to preclude an appropriator from voluntarily choosing to restore stream flows rather than continuing to divert that water. Finally, Idaho should place renewed attention on its water basin planning process including determination of river segments deserving of protected status.

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[277] Information about the roundtables is available at http://ibcc.state.co.us/ (last visited Feb. 12, 2009).

[278] Telephone interview, Kimberly Goodman, Idaho State Director, Trout Unlimited (April 18, 2008).

### *D. Montana*

Montana appears to have embraced the value of environmental flows more than any other state in the region. It has reserved significant amounts of water for instream flows, worked cooperatively with federal land agencies and tribes to resolve reserved rights matters, and encouraged all interested parties to participate in streamflow restoration through purchase or lease of existing water rights. The State is working to address problems created by increasing groundwater pumping in areas closed to new surface water appropriations. While funding for environmental flow water transactions is available in the western part of the State through the Columbia Basin Water Transactions Program, there are no funds available for transactions in the Missouri Basin. The State may wish to consider creating such a fund. In addition, the State should consider allowing any water right holder to permanently change the right to environmental flows.

### *E. Nevada*

Nevada's efforts to protect environmental water have focused primarily on its wildlife management areas. Otherwise, the State itself has not played a very active role. Like Arizona, its laws potentially accommodate environmental flow protection and allow changes of water rights to environmental flows. In practice, however, the State Engineer has been reluctant to issue water rights for environmental flow purposes. Recent adoption of a law authorizing temporary conversion of agricultural rights to instream flows represents an important affirmative expression of support for such action. But there is no state program focused on identifying places of special value outside the wildlife management areas that require protection or restoration of water. There is no state funding that would facilitate efforts to make such changes. These are actions that the State might wish to consider to ensure the long-term protection of its unique water-dependent environments.

### *F. New Mexico*

New Mexico took an important step toward protection of environmental flows with creation of its Strategic Water Reserve. Successful use of the Reserve in the Pecos demonstrates its utility. This mechanism is limited, however, to use for addressing the needs of endangered species. And it is only usable by the Interstate Stream Commission. Yet there are other places in the State where there is interest in restoring stream flows, places not involving endangered species but with other important values. An expansion of the use of the Strategic Water Reserve to such places would be a logical next step. Additionally, New Mexico should consider explicitly allowing owners of water rights to change the use of the right, either temporarily or permanently, to environmental flows. One way to accomplish this objective without legislative action would be for the State Engineer to develop rules providing for such changes, using New Mexico's change of water right

statute and the Opinion of the Attorney General as authority.[279] Such clarifying rules might be helpful to entities such as the City of Santa Fe who want to acquire water rights for environmental flows but are uncertain about applicable rules and procedures.[280] The State's new River Ecosystem Restoration Initiative, under which funds are available under a competitive grant program, could potentially provide money for acquisition of rights if it is continued and if the rules about such acquisitions and transfers are made clearer.

### *G. Utah*

Despite legislative recognition of instream flows in 1986, the State has done little since then to pursue acquisition of water rights for this purpose. The legislature's recent decision to enable fishing groups to temporarily change water rights to enhance flows for native trout is a step in the direction of encouraging participation by others in this work.[281] Assuming this new authority is successful in enabling such groups to find water for fish, the State might want to consider broadening this program by removing some of the restrictions and allowing it to operate statewide. The State should also consider providing funding to its state agencies to enable them to acquire water and water rights as appropriate for enhancement of flows.

### *H. Wyoming*

Wyoming has worked systematically to identify stream segments with high value fisheries and to protect flows in these segments. Very little appears to have been done, however, to acquire existing water rights for flow enhancement. State law authorizes the State to acquire rights for this purpose, but apparently no funding has been authorized for this purpose. Moreover, the ability to acquire rights for instream flows is limited to the State. The Town of Pinedale sought to use its water rights in a storage reservoir to enhance flows in Pine Creek, but the State Engineer determined that only the State could hold and use a water right for this purpose.[282] The State should consider authorizing at least temporary use of an existing water right for instream flows by parties other than the State. Moreover, it should consider providing funding to state agencies to enable the purchase or lease of existing water rights for instream flow purposes, perhaps in connection with a state program for river restoration.

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[279] Personal communication, Beth Bardwell, Acting Senior Program Officer, World Wildlife Fund, Las Cruces, NM, June 17, 2008.

[280] Personal communication, Kyle Harwood, Harwood Consulting, Santa Fe, NM, June 6, 2008.

[281] *Supra* note 187.

[282] C. Urbigkit, *Town Seeks Exemption to State Water Law*, SUBLETTE EXAMINER, October 26, 2006.

## PART V—CONCLUDING THOUGHTS

Dedication of water to environmental purposes is now well established as a potential use in all the Rocky Mountain states. The extent to which water has in fact been committed to such purposes varies widely among the states, however, dependent in good part on the availability of unappropriated water in the state. Thus the more arid states of Arizona, New Mexico, Nevada, and Utah have committed the least water to these uses. In all states, with the possible exception of Montana, there remains a strong belief that protection of water for environmental purposes constrains future development options that are regarded as more valuable. The result is that decisions about protecting environmental flows are based more on politics than science, or traditional views allowing individuals to determine beneficial uses of water.

The desire for strong state control of decisions allocating water to environmental flows suggests that state-run processes are more likely to succeed at working out the trade-offs that are clearly part of these decisions. Additionally, state programs have the obvious advantage of having staff specifically focused on this task. Thus this survey suggests protection of environmental flows is more likely to be successful when such a program exists—especially if the program is given the staff and resources necessary to its implementation. These programs should serve as the conduit through which those most directly interested in streamflow protection can work to achieve their objectives. As an inducement to engaging federal and tribal land management agencies in these processes, states should allow joint ownership of environmental flow rights on federal and tribal lands.

The challenge of restoring depleted stream flows is more complex. Again the existence of a state program that includes this mission seems beneficial, primarily because of the need for multiple sources of effort that can bring resources from different places.[283] In this area, however, the work involves existing water rights rather than unappropriated water. Here the holders of water rights themselves should be allowed to change these rights to environmental flows while still retaining ownership of the right, including enabling a flexible mix of temporary arrangements. Any interested party should be allowed to lease water rights for environmental flows. Several states are moving in this direction, but tentatively, and with continuing unnecessary restrictions. Provision should be made for allowing short-term (less than one year) commitments to environmental flows

[283] In fact, none of the states has made flow restoration a clear state objective. By authorizing state agencies to enter into leases for this purpose, as in Colorado and Montana, the state is implicitly acknowledging the value of flow restoration efforts. New Mexico's Strategic Water Reserve also acknowledges the need for the state to engage in flow restoration, at least for purposes of compliance with the Endangered Species Act. It would be preferable for states to make stream restoration (including flow restoration) an explicit part of a state agency's mission.

with expedited procedures for consideration of injury, similar to the Colorado loan program.[284] Non-permanent commitments to environmental flows should be protected to toll considerations of abandonment or forfeiture and to maintain the historical consumptive use associated with the right. Allowing downstream use of this portion of water both enables administration of the right and makes possible sale of the water to help finance acquisition of the right.

The traditional reservations about allocating unappropriated water to environmental uses seem less persuasive in the restoration context. Here we are considering uses of water that has already been applied to beneficial use, vesting the holder with a property right to continue that use. Determination of future use of that water has been given to the right holder, subject to the traditional no injury limitation, except for the purpose of environmental flows. Moreover, the quantities of water are typically modest—defined according to the already permitted diversion of water. This water has already been tied to the point of diversion of the original right so the change would have no upstream effects. The result of the change is to diminish or eliminate the historic beneficial consumptive use so that this amount of water would now be able to flow downstream. The only real concern to downstream water rights would be any changes in the timing of flows because of elimination of diversions and historical return flows. The physical amount of water in the stream would actually increase. Any such adverse effects on downstream water users would be addressed in the change-of-use proceeding.

Funding for stream restoration, including acquisition of water rights, remains a formidable obstacle to progress. The Columbia River Water Transactions Program demonstrates the importance and value of having such a reliable source of funding.[285] While several Rocky Mountain states have established sources of funding for such work, the need far exceeds existing resources. Two potential sources of such funding are a fee on changes of water rights or a charge assessed on urban and industrial water uses.

Direct human needs for the Rocky Mountain West's limited water resources remain the primary concern of policy makers. Yet public demands for healthy streams have become increasingly important in water decision-making. These are not irreconcilable objectives. Growing interest in environmental flows represents an evolving sense of how we should manage our rivers, streams, and aquifers. Maintenance of a more naturalized flow regime represents a considerable change in the traditional way we have approached water management. In many places there simply is not the flexibility in the system to allow us to achieve this objective. Yet, as our actions over the last 30 years reflect, we can do far more than we had

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[284] *Supra* note 72.

[285] *Supra* note 106.

been doing. We can do this without impairing our ability to satisfy our other direct human requirements for water. We have made significant and measurable progress, but there are many opportunities to do more.

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# CONSERVATION EASEMENTS, COMMON SENSE AND THE CHARITABLE TRUST DOCTRINE

*C. Timothy Lindstrom**

Being on the receiving end of Nancy McLaughlin's and William Weeks's "response"[1] reminds me of a story attributed to Abraham Lincoln about a man being ridden out of town on a rail who, according to Lincoln's story, said "If it weren't for the honor of the thing, I'd rather walk." Having just re-read *Hicks v. Dowd: The End of Perpetuity* (hereinafter "*Perpetuity*"), I believe that it stands up satisfactorily under the criticism lodged against it by *In Defense of Conservation Easements: A Response to The End of Perpetuity* (hereinafter "*Defense*"), and I hope that those who read *Defense* will read, or re-read, *Perpetuity*. However, *Defense* calls for a brief *surrebuttal*; not only to correct the record, but also because it is likely that the unfortunate termination of a conservation easement by Johnson

* Tim Lindstrom holds degrees in law and planning from the University of Virginia. He is the author of numerous articles regarding conservation easements and related tax law, including *A Tax Guide to Conservation Easements* (Island Press, 2008), and *Hicks v. Dowd: The End of Perpetuity*, appearing in this publication in 2008. He is a frequent provider of continuing education seminars for lawyers and realtors regarding conservation easement law. Lindstrom is in private law practice in Jackson, Wyoming, representing landowners and land trusts throughout the United States (including, in Wyoming, the Jackson Hole Land Trust and the Green River Valley Land Trust) with respect to conservation easements. He was adjunct professor of planning law at the University of Virginia School of Architecture in Charlottesville for a number of years and, while in Virginia, served as an elected member of the Albemarle County Board of Supervisors for 12 years. He helped author 26 U.S.C. §2031(c) expanding tax benefits for easement donors and he was instrumental in initiating the Land Preservation Tax Credit in Virginia (VA. CODE ANN. §§ 58.1-510 to 513) providing state income tax credits for qualified easement contributions. In 2005, at the invitation of the late Senator Craig Thomas, he testified before the United States Senate Committee on Finance regarding proposed changes to the charitable deduction for conservation easements. He and his family have contributed conservation easements on family farms in Virginia and Michigan.

[1] *In Defense of Conservation Easements: A Response to The End of Perpetuity*, 9 WYO. L. REV. 1, 4 (2009) [hereinafter *Defense*] written in response to *Hicks v. Dowd: The End of Perpetuity,* 8 WYO. L. REV. 25 (2008) [hereinafter *Perpetuity*].

County, Wyoming that triggered the writing of *Perpetuity* may come before the Wyoming Supreme Court once again.[2] The *Defense* and *Perpetuity* articles shed important light on some of the issues raised by the *Hicks* case that are likely to resurface should that occur. It would be unfortunate if, should the Wyoming Supreme Court pay any attention to these articles, the record were devoid of any response to *Defense*.

The application of the charitable trust doctrine[3] to conservation easements is a proposition that has been ably and vigorously advocated in a number of articles authored by Professor McLaughlin.[4] Without taking anything away from that work, the charitable trust doctrine and its implications for conservation easements are not well understood in the land trust community, nor is application of the doctrine to conservation easements broadly accepted. The application of the doctrine to conservation easements has been hotly debated in certain circles, but that debate has not been particularly visible—at least thus far.

Furthermore, while the application of the doctrine has appeal for a number of reasons, the implications of such an application for the administration of conservation easements on a day-to-day basis, and for the future of easement contributions, raise a number of issues.[5] These issues should be thoroughly considered before this doctrine, grounded in the law of trusts, is injected into what has traditionally been considered a part of real property law, *i.e.*, the law of easements.[6]

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[2] As noted in *Defense*, *supra* note 1, at n.3, the Wyoming Attorney General has filed a complaint in the Johnson County District Court styled *Salzburg v. Dowd*, seeking to reverse termination of the Meadowood easement examined in the *Hicks* case. It is interesting to read in *Defense* that one of the co-authors is "counsel to The Nature Conservancy as prospective amicus curiae in the *Salzburg* case." *Id.* at 1. The Nature Conservancy currently submits certain proposed easement amendments to attorneys general in the states in which it operates for review. *See Amending Conservation Easements, Evolving Practices & Legal Principals*, Research Report of the Land Trust Alliance, Washington, D.C., August, 2007 [hereinafter *Amending Conservation Easements*]. The Nature Conservancy has a chapter in Wyoming and has done a great deal for land conservation. However, comparing The Nature Conservancy to most land trusts is like comparing General Motors (or the *former* General Motors) to entrants in the Soapbox Derby. With hundreds of millions in resources, thousands of staff including a significant team of lawyers, and worldwide operations, The Nature Conservancy is in a position to handle amendments in ways that are simply not practical for the normal land trust. Therefore, what is good for The Nature Conservancy may or may not be good for the land trust community in general.

[3] Throughout *Perpetuity* this doctrine is referred to as the doctrine of *cy pres*.

[4] *See Defense*, *supra* note 1 (listing numerous citations to the works of Nancy A. McLaughlin).

[5] *Perpetuity*, *supra* note 1, at 69.

[6] *Id.* at 59.

*Setting the Record Straight*

*Defense* repeatedly, and *incorrectly* represents the central thesis of *Perpetuity* to be that ". . . land trusts have the *right* to modify and terminate the perpetual conservation easements they hold 'on their own' and as they 'see fit,' subject *only* to the agreement of the owner of the encumbered land and the general constraints imposed by federal tax law on the operations of charitable organizations."[7] In fact, the statement in *Perpetuity* from which this characterization was drawn was this:

> In addition to changing the *authority* of the holder of a conservation easement to modify or terminate the easement as it sees fit (*taking into account the constraints on such decisions imposed by common law and statutory law* described *supra* beginning at note 70); and vesting standing to challenge easement modifications or terminations in a potentially broad range of new persons; application of the *cy pres* doctrine to conservation easements would also alter the criteria for the modification or termination of a conservation easement.[8]

There is a difference between the word "right" (which *Defense* used and *Perpetuity* did not), which implies a moral imperative, and "authority" (*Perpetuity's* word) which, in this case described (and describes) the current state of the law in the United States, including Wyoming.[9]

Compounding *Defense's* incorrect characterization of this statement taken from *Perpetuity* is the dismissive manner in which *Defense* deals with the constraints on land trusts imposed by existing law.[10] These constraints, as explained in *Perpetuity*,[11] are significant and pertinent to easement administration and call into question the necessity for the imposition of new constraints, such as the charitable trust doctrine. To minimize the impact of the existing law governing conservation easements and easement holders is akin to saying that people have the right to operate slaughterhouses, subject *only* to legal prohibitions. *Defense*

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[7] *Defense*, *supra* note 1, at 4 (emphasis added).

[8] *Perpetuity*, *supra* note 1, at 67 (emphasis added).

[9] *Perpetuity*, *supra* note 1, at 35–62.

[10] *Defense,* in its repeated use of the "sees fit" reference only once includes *Perpetuity's* extensively described *caveat* that easement administration is subject to significant existing legal constraints, says that the right of land trusts to modify or terminate easements is "subject *only*" to the "*general* constraints imposed by federal tax law." *Defense*, *supra* note 1, at 4 (emphasis added). In the remainder of its repeated assertions that *Perpetuity's* position is that "land trusts have the *right* to modify and terminate the perpetual conservation easements they hold 'on their own' and as they 'see fit,'" fails to include this rather important condition. *Id.* at 9, 14, 16, 18, 28, 86, 96. (emphasis added).

[11] *Perpetuity*, *supra* note 1, at 45–56.

ignores the point that the legal constraints are significant and compelling—which was a central point of *Perpetuity*.

*Defense* later states: ". . . the aggressive approach to the amendment and termination of conservation easements *advocated* in *The End of Perpetuity* is inconsistent not only with the law governing restricted charitable gifts, but also with the land trust community's longstanding position with regard to amendments and terminations."[12] There is a major difference between "advocacy" and "reporting." *Perpetuity*, as anyone reading it can determine, does not advocate an "aggressive approach" to the administration of conservation easements. *Perpetuity* reports the state of practice and law relating to conservation easements *as it now exists*. Furthermore, to assert that *Perpetuity* advocates an aggressive approach to amendment and termination of conservation easements utterly ignores the emphasis that *Perpetuity* places on the significant constraints imposed on such practices by existing law[13]—and ignores *Perpetuity's* advocacy of *an expansion* of those constraints.[14]

### *The State of the Law*

*Perpetuity* extensively addresses the fact that conservation easements are based in property law and that the doctrine of charitable trusts is not a part of that law.[15] *Defense* relies exclusively on various comments to uniform laws, restatements, letters from offices of attorneys general, and treatises to support its assertion that the charitable trust doctrine applies to conservation easements.[16] *Defense* also relies upon the mention made in a study by the Land Trust Alliance ("LTA") regarding conservation easement amendments that includes consideration of the charitable trust doctrine.[17] However, neither that study, nor the LTA itself, *advocate* application of the doctrine to conservation easements.[18] Notwithstanding the

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[12] *Defense*, *supra* note 1, at 18 (emphasis added).

[13] *Perpetuity*, *supra* note 11.

[14] *Id.* at 82–83.

[15] *Perpetuity*, *supra* note 1, at 35–39.

[16] *Defense*, *supra* note 1, at 7–8.

[17] *Id.* at 15.

[18] LTA's amendment report states:

> Legal constraints may also include the charitable trust doctrine (which includes the doctrine of *cy pres*), the public trust doctrine and the doctrine of changed circumstances, all of which may be known by different names in different states. *These doctrines have existed for many years applicable to charitable gifts outside the realm of land trusts and conservation easements, such as gifts of real property, cash and personal property. Their application to conservation easements is the subject of widely differing views in the land trust legal community.*

*Amending Conservation Easements*, *supra* note 2, at 13 (emphasis added).

academic resources relied upon by *Defense*, the fact remains that the doctrine has not been applied to conservation easements by a single reported case anywhere in the United States, a fact confirmed by the LTA study.[19]

In the over one hundred years of land trust history,[20] with nearly 1,700 private land trusts now in business,[21] and with over six million acres subject to thousands of *privately held* conservation easements,[22] there is *only one recorded case of an improper conservation easement termination*: that of Wyoming's own *Hicks v. Dowd*.[23] Furthermore, the circumstances of the *Hicks* case are novel[24] and not representative of conservation easement administration in either Wyoming or in the other 49 states.[25]

Although a recently revised comment to the Uniform Conservation Easement Act[26] ("UCEA") advocates application of the doctrine to conservation easements, it does not change the UCEA itself, which continues to provide that conservation easements may be terminated or modified *the same as any other easement.*[27]

The revised comment itself acknowledges that the charitable trust doctrine does not apply to easements currently: "the Act is intended to be placed in the real property law of adopting states *and states generally would not permit charitable trust law to be addressed in the real property provisions of their state codes*."[28] The UCEA comment proceeds, as *Defense* points out (and as was pointed out in *Perpetuity*), to state that the charitable trust doctrine "should" be applied to conservation easements. However, there is a good deal of territory between "should" and "is."

The bottom line is that there is nothing in Wyoming law,[29] or established by precedent elsewhere, that requires application of the charitable trust doctrine

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[19] *Id.* at 20. ("Whether the charitable trust doctrine applies to conservation easements and their amendment has not been definitively decided in any state.").

[20] *See Perpetuity*, *supra* note 1, at n.53.

[21] Land Trust Alliance website, http://www.landtrustalliance.org/about-us/land-trust-census/data-tables, (reflecting 2005 data) (last visited Apr. 12, 2009).

[22] *Id.* (reflecting 2005 acreage subject to easements held by private land trusts (as opposed to government agencies)).

[23] Hicks v. Dowd, 157 P.3d 914, (Wyo. 2007).

[24] *Perpetuity*, *supra* note 1 discusses *Hicks* extensively beginning at 27.

[25] There are cases that came close. *Defense* cites two, the *Myrtle Grove* case (*Defense*, *supra* note 1, at 37) and the *Wal-Mart* case (*Id.* at 61); but both of these cases were resolved without the judicial application of the charitable trust doctrine.

[26] Uniform Conservation Easement Act ("UCEA"), comment to § 3.

[27] *Id.* § 2(a).

[28] *Id.* comment to § 3 (emphasis added).

[29] The only case to apply the charitable trust doctrine in Wyoming was Town of Cody v. Buffalo Bill Mem'l Ass'n, 196 P.2d 369 (1948). That case involved the transfer by a charitable

to conservation easements. Instead of creating a "special judicial exemption"[30] as *Defense* would have us believe is the thrust of *Perpetuity*, *Perpetuity's* point is that the doctrine has never been applied to conservation easements and is generally unsuitable to easements as property law constructs.[31]

*Defense*, understandably, seeks to make it appear that the charitable trust doctrine already applies to conservation easements and that those objecting to this proposition are trying to re-write the law, when it is *Defense* that seeks to re-write the law. While the *appropriateness* of such a re-write may be subject to debate, the fact that a re-write would be *required* in order to extend the doctrine to conservation easements should not.

### *A. Question of Intent*

Both *Perpetuity* and *Defense* agree that application of the charitable trust doctrine to conservation easements requires finding that the grantor of the easement intended to create such a trust in the first place.[32] *Defense* argues that such intent may be legally implied in the conveyance of the conservation easement, even though there is no express provision for the creation of a trust in the conveyance itself.[33] The Uniform Trust Code, adopted in Wyoming, provides that "A trust is created only if the settlor indicates an intention to create a trust."[34]

Wyoming law permits inference of intent to create a trust, but the ". . . inference is not to come easily . . ." and ". . . clear, explicit, definite, unequivocal and unambiguous language or conduct establishing the intent to create a trust is required . . . ."[35]

Conservation easements in Wyoming, and elsewhere, typically do not state that the rights to enforce the restrictions on the use of lands that comprise the easement are conveyed "in trust."[36] However, *Defense* states that conservation easements, because they are donated to governmental entities or public charities for a specific purpose, ". . . *should* create a charitable trust . . . ."[37]

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corporation of assets which, according to the articles of incorporation governing the corporation, could only be transferred with the consent of the state legislature, which had not been obtained prior to the transfer. *Id.* at 373, 483.

[30] *See Defense*, *supra* note 1, at 19.

[31] *See Perpetuity*, *supra* note 1, at 59.

[32] *See Defense*, *supra* note 1, at 20; *Perpetuity*, *supra* note 1, at 59.

[33] *Defense*, *supra* note 1, at 20–28.

[34] WYO. STAT. ANN. § 4-10-403.

[35] Meima v. Broemmel, 117 P.3d 429, 445 (Wyo. 2005).

[36] *Amending Conservation Easements*, *supra* note 2, at 18. ("Few, if any, conservation easements are formally written as charitable trusts.").

[37] *Defense*, *supra* note 1, at 6 (emphasis added).

While it is correct that conservation easements are granted to governmental agencies and public charities and that such grants include specific purposes, whether they "should" create a charitable trust is an open question.[38] Whether a conservation easement conveyance is intended by the grantor to create a charitable trust, ". . . even though the deeds of conveyance typically do not contain the words 'trust' or 'trustee;' even though many easement donors may not know that the intended relationship is called a trust . . .";[39] and even though creation of a charitable trust may add a dimension to the relationship between the landowner and easement holder that neither contemplated and that may substantially complicate that relationship; is not something to be lightly inferred.

Landowners who contribute conservation easements intended to be deductible necessarily convey those easements to "qualified organizations" (*i.e.*, public agencies or public charities) "in perpetuity" for "conservation purposes."[40] Federal tax law subsidizes such conveyances on the grounds that they generate significant public benefits, just as it subsidizes other qualified charitable contributions. However, a conservation easement is a "split interest gift"[41] making it one of only four types of such gifts[42] with respect to which the tax law allows a deduction. As such, a conservation easement contribution is one in which the donor retains significant, on-going rights to use that which is the subject of the contribution—the land. This fact, which fundamentally distinguishes conservation easements from most all other contributions, complicates the *inference* of an intention to create a trust, even though such an inference may be appropriate to other types of gifts.

The conveyance of a conservation easement creates a permanent partnership between the landowner and the holder of the easement on that land. The course of action between landowners and easement holders[43] belies any intent by either party to the easement that the easement conveyance was intended to create a charitable trust under which modification or termination was not a matter, *within the context of existing legal constraints*, solely within the purview of the landowner and the easement holder.

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[38] *Amending Conservation Easements*, *supra* note 2, at 13.

[39] *Id.*

[40] These are the requirements imposed by 26 U.S.C. § 170(h) for "qualified conservation contributions."

[41] C. Timothy Lindstrom, *At Tax Guide to Conservation Easements*, Island Press 2008, 15–16.

[42] The other types of gifts are contributions of remainder interests in personal residences and farms; certain contributions in trust; and the contribution of all of a donor's undivided partial interest in property. *See id.*

[43] While easement amendments are certainly not the rule, they are not a minor occurrence. The author has drafted many amendments in the course of his practice. The LTA certainly would not have gone to the trouble of convening the panel of experts that drafted *Amending Conservation Easements* which runs to nearly 80 pages of text providing guidance to land trusts regarding amendments, if easement amendment was a rare practice.

When a landowner conveys a conservation easement, and the holder accepts the easement, they do so subject to the existing law of the state of the conveyance. As a matter of law, those who enter into an agreement are charged with knowledge of and make their agreements subject to, existing law:

> Parties to an agreement are presumed to know the law and to have contracted with reference to existing principles of law. These existing principles of law enter into and become a part of a contract as though referenced and incorporated into the terms of the agreement.[44]

In Wyoming, prior to enactment of the Wyoming Uniform Conservation Easement Act[45] ("WYUCEA"), there was no statute providing for conservation easements and such easements were controlled by the common law pertaining to appurtenant easements.[46] Subsequent to the enactment of the WYUCEA the modification or termination of conservation easements became governed by the following provision: "Except as otherwise provided in this article, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected *in the same manner as other easements*."[47] *Defense* adds as a *caveat* to this provision, the following from another section of the WYUCEA: "This article shall not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity."[48] However, WYUCEA's provision that it does not affect pre-existing judicial authority to modify or terminate conservation easements in accordance with the principles of law and equity cannot be assumed to incorporate into Wyoming conservation easements an entire body of law that directly contradicts the WYUCEA's explicit provision that conservation easements can be modified or terminated in the *same manner as other easements*, and contradicts Wyoming's common law governing the creation, modification, and termination of easements.

In other words, easement grantors can reasonably assume that the easements they convey may be modified or terminated *in the same manner as other easements*, *i.e.*, if both parties to the easement agree.[49] Such a reasonable assumption by easement grantors must be considered part of their intention in granting a conservation easement.

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[44] Kirkwood v. CUNA Mut. Ins. Soc'y, 937 P.2d 206, 211 (Wyo. 1997); *see also* 11 WILLISTON ON CONTRACTS § 30:19 (4th ed.) (citations omitted).

[45] WYO. STAT. ANN. §§ 34-1-201 to -207 (2007).

[46] *Perpetuity*, *supra* note 1, at 44.

[47] WYO. STAT. ANN. § 34-1-202(a) (emphasis added).

[48] WYO. STAT. ANN. § 34-1-203(b).

[49] Perhaps it is necessary to again state that the parties' intent that they can modify or terminate easements is subject to the understanding that one party, the easement holder, is constrained by law in how it does so.

How do we reconcile the grantor's intent that modification or termination of a conservation easement can be done *in the same manner as other easements* with the statements found in most conservation easements that they are granted in perpetuity; are intended to bind future owners; and are granted for the purpose of protecting publicly significant conservation values? The answer is that the landowner, in granting the easement, relinquishes in perpetuity, for himself and for all future owners, any *unilateral* right to change the restrictions of the easement. That is the essence of the contribution. What particularly distinguishes the grant of a conservation easement from other contracts and grants is that one of the parties, the holder of the easement, is substantially constrained by law from using the easement in a manner that does not serve the public interest. This is why the contribution of a conservation easement is subsidized by federal tax law.

In summary, in the absence of an express provision to the contrary in individual easement documents, there is no basis in the common law of appurtenant easements as it existed in Wyoming prior to the enactment of the WYUCEA, or in the WYUCEA itself, for imputing to easement grantors the intent to create a charitable trust. Because the common law of appurtenant easements, and the WYUCEA, both allow the parties to a conservation easement to modify or terminate such easements *in the same manner as other easements* it must be presumed that such is the intent of the parties to conservation easements.

A word here about *Hicks v. Dowd*: As noted in *Perpetuity*[50] neither party to this case challenged application of the charitable trust doctrine to the *Hicks* conservation easement, and the issue presented to the Supreme Court of Wyoming on appeal was not whether the doctrine applied. The Court felt constrained to agree that a charitable trust was involved because the trial court's finding on that point was never challenged by the parties.[51]

Since *Hicks* was decided by the Court, the Wyoming Attorney General filed a complaint in Johnson County District Court (as he was invited to do by the Court) asserting the charitable trust doctrine.[52] That case may end up in the Wyoming Supreme Court as well. If the application of the doctrine to the *Hicks* conservation easement does come before the Court, the previous decision of the Court in *Hicks* would not appear to dictate that the Court adopt, or reject, application of the doctrine.

From the foregoing discussion it can be seen that conservation easements have not been made subject to the charitable trust doctrine, notwithstanding

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[50] *Perpetuity*, *supra* note 1, at 33.

[51] *Hicks*, 157 P.3d at 919 ("Given the district court's unchallenged finding, we must agree that the Scenic Preserve Trust is a charitable trust.").

[52] Salzburg v. Dowd, Complaint for Declaratory Judgment filed in the District Court for Johnson County, Wyoming, July 8, 2008.

arguments that the doctrine *should* apply. Furthermore, it can be seen that the essential element of intent to create a trust that is a pre-requisite to extending the doctrine to conservation easements cannot be automatically inferred from the conveyance of a conservation easement. Lack of such intent remains a major stumbling block to the application of the doctrine to conservation easements. This takes us to the proper question of whether or not the charitable trust doctrine *should* apply to conservation easements.[53]

*Creating Uncertainty*

*Perpetuity* discusses at some length the potential problems associated with a strict application of the charitable trust doctrine to conservation easements.[54] At the very least, application of the doctrine to conservation easements will inject considerable uncertainty into the administration of conservation easements in the future.

In considering application of the charitable trust doctrine it is important to keep in mind that conservation easements are very different from the types of gifts to which the doctrine has been applied in the past. With the exception of the four types of partial interest gifts, when a donor makes a gift the donor is completely divested of the object of the gift.

For example, when a donor makes a gift of land for the express purpose of providing a site for a church there is no remaining private ingredient involved. The land is in the hands of the charity and the donor is out of the picture. Application of the charitable trust doctrine to ensure that the land is used as a church site makes sense. However, when a person makes a gift of a right to control the future private use of land in the form of a conservation easement, a significant private ingredient remains that is intrinsic to the gift: The easement holder must necessarily take into account the continued private use of the land, and the donor has assumed a continuing relationship with the holder of the easement restrictions with which restrictions the donor will be confronted every day of ownership of that land. This essential partnership in the future use and management of the land, which is characteristic of conservation easement gifts, fundamentally distinguishes such gifts from other forms of gifts.

*Defense* argues that *Perpetuity's* concern regarding the application of the charitable trust doctrine is misplaced ("incorrect").[55] Yet the concern expressed in

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[53] Addressing this question was done extensively in both *Perpetuity* and *Defense* whose extensive discussions will not be recapitulated here. However, addressing the question of *should* the doctrine extend to conservation easements assumes that the required intent to create a trust has been established because no one is arguing that a trust can exist in the absence of such intent, express or implied.

[54] *Perpetuity*, *supra* note 1, at 62–69.

[55] *Id.* at 41.

*Perpetuity* is based directly upon precedent in the application of the doctrine and upon commentaries by those who advocate the application of the doctrine—all cited in *Perpetuity*.[56] The following commentary on the results of applying the charitable trust doctrine to conservation easements illustrates the basis of the concern expressed in *Perpetuity*:

> Except to the extent granted the power in the deed of conveyance, the holder of a donated easement should not be permitted to agree with the owner of the encumbered land to modify or terminate the easement unless and until: (i) compliance with one or more of the administrative terms of the easement threatens to defeat or substantially impair the conservation purposes of the easement, and a court applies the doctrine of administrative deviation to authorize the modification or deletion of such term or terms, or (ii) the charitable purpose of the easement has become impossible or impracticable due to changed conditions, and a court applies the doctrine of *cy pres* to authorize either a change in the conservation purpose for which the encumbered land is protected, or the extinguishment of the easement, the sale of the land, and the use of the proceeds attributable to the easement to accomplish the donor's specified conservation purpose or purposes in some other manner or location.[57]

This position is reiterated in *Defense*.[58] In its essence, it comes down to this: (1) no amendments should be agreed upon between landowner and a holder of an easement without court approval under any circumstances and (2) even with court approval, no amendments should be approved unless compliance with easement terms would "defeat or substantially impair" the purpose of the easement, or unless the charitable purpose of the easement becomes "impossible or impracticable." Imposing such constraints on the day-to-day administration of conservation easements is the heart of the concern about application of the charitable trust doctrine to conservation easements expressed in *Perpetuity*.[59]

*Defense* argues that express and implied powers to amend conservation easements essentially overcome these constraints, at least for amendments.[60] However, with respect to express powers, many conservation easements do not contain provisions allowing amendment for the very reason that the law under

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[56] *Perpetuity*, *supra* note 1, at 62–69.

[57] Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 435–436 (2005).

[58] *Defense*, *supra* note 1, at 42.

[59] *Perpetuity*, *supra* note 1, at 69.

[60] *Defense*, *supra* note 1, at 41.

which they were created expressly allows for amendment.[61] Furthermore, it is a fundamental principal of all agreements that they are amendable if the parties thereto agree to amend them, even if the agreements in question expressly prohibit amendment (because even a prohibition against amendment can be amended away by the parties to the agreement).

Only in the event of application of the charitable trust doctrine (or similar doctrines) to easement agreements are the parties precluded from jointly agreeing to amendments. Because the charitable trust doctrine has never been applied to conservation easements, parties to conservation easements have had no reason to assume that they could not jointly agree to amendments. It would be unjust to deny the opportunity to amend to those parties to easements who failed to expressly provide for amendments because they believed that, as a matter of law, they could amend their easements whether or not such a provision was included.

*Defense* acknowledges that implied powers to amend conservation easements, under the charitable trust doctrine, are unpredictable, saying that easement holders "*could* be deemed to have implied power to agree to amendments"[62] and that "the boundaries of a holder's implied power to agree to amendments" are "uncertain" given that "courts have traditionally been reluctant to find that a trustee has powers not expressly granted in the trust instrument."[63]

Rather than alleviating concerns over the impact of application of the charitable trust doctrine on conservation easement modification, *Defense* reinforces that concern. Requiring the parties to conservation easements to rely on infrequently included express powers, and entirely uncertain implied powers, will create precisely the sort of uncertainty and expense in easement administration, and disincentive to easement contributions, discussed in *Perpetuity.*

More uncertainty arises when one attempts to answer the question: If the charitable trust doctrine is applied to conservation easements, how will it be enforced? Standing to intervene in the modification or termination of a conservation easement under the charitable trust doctrine has been explored thoroughly in both *Defense* and *Perpetuity*. While these articles do not agree on the extent of the expansion of standing under the doctrine,[64] they agree that standing will be expanded under the charitable trust doctrine.

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[61] UCEA § 2(a); WYO. STAT. ANN. § 34-1-202(a).

[62] *Defense*, *supra* note 1, at 48 (emphasis added).

[63] *Id*.

[64] *Defense* argues that the "trust" with respect to which standing is ascertained is the "restricted grant of the easement rather than the entity holding the easement." *Supra* note 1, at 67. However, the Wyoming Supreme Court in deciding *Hicks* itself accepted without discussion the District Court's ruling that the Scenic Preserve Trust itself was the charitable trust with reference to which standing was to be determined. *Hicks*, 157 P.3d at 919.

It is clear under any variation of the doctrine that states' attorneys general would have standing.[65] That being the case, exactly how does the attorney general learn of a conservation easement modification or termination in order to be able to apply the doctrine? In the *Hicks* case the Attorney General learned of the easement termination because suit was brought challenging that interpretation, although the plaintiff was ultimately found to be without standing.[66] It is unlikely that private suit will be effective in providing notice of easement modifications or terminations.

Will every easement holder be required to report all amendments or terminations to the Attorney General? If so, must the Attorney General approve or disapprove each proposed change and, if so, how long will that take; what staff will it require; what kind of budgetary considerations are involved? Or, will review of proposed easement actions be delayed due to a shortage of funds and manpower to undertake the review? If, as is implied by *Defense*, amendments or terminations for which there is express or implied authority are exempt from the charitable trust doctrine, do we rely on the easement holders to make these determinations? In the relatively murky world of implied authority, what guidance will an easement holder have in making the determination that it has, or does not have, implied authority for a proposed modification or termination? How these questions will be answered in the context of the day-to-day administration of conservation easements will have a tremendous influence on the future effectiveness of what has been an extremely successful, privately administered, voluntary land conservation movement in the United States.

One other point from *Perpetuity* needs repetition: opening up private easement administration to intervention by political officials in the form of the states' attorneys general may be counterproductive.[67] According to Wyoming's former Attorney General, that is possible. As he said, some attorneys general may be conservation-minded and support conservation easements; others may be development-minded and undercut them.[68] In this same conversation, a senior Wyoming state legislator expressed a concern that Wyoming could be "locked up" with conservation easements; he saw the charitable trust doctrine as a mechanism to modify or terminate conservation easements should they threaten to lock up the state and the public interest require modification or termination to prevent

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[65] 88 AM. JUR. 3D *Proof of Facts* 469 § 8 (2007); Uniform Trust Code § 110(d); WYO. STAT. ANN. § 4-10-110(d) (2007); *Hicks*, 157 P.3d at 919.

[66] *Id.*

[67] *Perpetuity*, *supra* note 1, at 80.

[68] Phone conference with former Wyoming Attorney General Patrick Crank, June 4, 2007.

such an outcome.[69] This is precisely the view that could change the charitable trust doctrine from a shield to defend conservation easements to a sword to pierce them.[70]

The problem remains: how and when the charitable trust doctrine might be applied to conservation easements, once the principal is established that it should be applied, is unpredictable and potentially damaging to the kind of relationship that is necessary between a landowner and the holder of a conservation easement. As *Perpetuity* notes,[71] the unpredictable and potentially intrusive effect of application of the doctrine to conservation easements is highly likely, once word gets around, to discourage many landowners from contributing them in the future.

*Defense* says that the "primary issue addressed in this article is whether . . . [conservation] easements constitute restricted or unrestricted charitable gifts for state law purposes."[72] *Defense* misses the point that the *primary issue* is that the essence of a conservation easement fundamentally distinguishes it from the types of gifts to which the charitable trust doctrine has been applied in the past. In missing this all important point, *Defense* makes of the charitable trust doctrine a procrustean bed to which those parts of conservation easement conveyances that fail to fit (most essentially the partnership between landowner and easement holder) will simply be lopped off.

## Hicks v. Dowd

Inevitably, at least in Wyoming, the debate over application of the charitable trust doctrine must address the *Hicks* case. As noted, *Hicks* is not only the sole reported case of an outright easement termination to come before the judicial system; it is an example of the very worst kind of easement administration imaginable. Here was an outright easement termination without *any* offsetting conservation benefit or even any effort to achieve such a benefit. The termination conferred a direct, significant, and unmitigated economic benefit on the landowner.

Had the easement holder been a private land trust rather than a public agency, such an action would be grounds for the imposition of severe sanctions under the tax code and possible loss of charitable status, or loss of eligibility for holding deductible easements in the future. However, Johnson County, which took these actions (with nearly complete disregard for the quasi-independent status of the

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[69] *Id.*; *Perpetuity*, *supra* note 1, at 82.

[70] *Perpetuity*, *supra* note 1, at 79.

[71] The Wyoming Supreme Court in deciding the *Hicks* case determined that "in Wyoming, a charitable trust may be enforced by a settlor, the attorney general, or a qualified beneficiary of the trust." *Hicks*, 157 P.3d at 921.

[72] *Defense*, *supra* note 1, at 3.

Scenic Preserve Trust) as a governmental entity, is not subject to these sanctions nor, for the same reason, are the landowners.[73]

On the other hand, the fact that the easement holder in *Hicks* is a governmental agency does provide what would appear to be a simple and direct solution for the County's easement termination under Wyoming law. Essentially what Johnson County has done is to confer a unique, private economic benefit upon the landowners in violation of Article 16, § 6 of the Wyoming Constitution which provides: "Neither the state nor any county, city, township, town, school district, or any other political subdivision, shall loan or give its credit or make donations to or in aid of any individual, association or corporation . . . ." As such, the easement termination is voidable.[74] Furthermore, the Attorney General of Wyoming has the standing and authority to challenge the validity of such action as unconstitutional[75] as he has done in his complaint filed in *Salzburg v. Dowd*.[76] Because of this there is no need to expand the charitable trust doctrine to conservation easements in Wyoming to set aside the termination of the Meadowood conservation easement. A similar remedy is likely available in most states where the action is taken by a governmental agency similar to the action taken by Johnson County.

Even if the charitable trust doctrine is applied to cure the problem created by Johnson County, unless its application goes far beyond the facts of *Hicks* in some form of *dictum*, the precedent created will necessarily apply only to an outright, unmitigated easement termination. Were it possible to contain application of the charitable trust doctrine to such cases, the implications of the doctrine for conservation easement administration might be of less concern.

However, *Defense* advocates application of the doctrine not only to the extreme and straightforward case of an unmitigated easement termination, but for easement modifications as well. It is in the application of the doctrine to modifications that negative implications for efficient and reasonable easement administration arise. Of course, the problem is that one can effectively terminate an easement by amendment nearly as effectively as by outright termination.

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[73] Penalties are not imposed on the recipients of improper benefits from governmental agency action of this nature, as they are if the benefits accrue from the action of a public charity.

[74] There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution, can be valid. State v. Campbell County Sch. Dist., 32 P.3d 325, 331 (Wyo. 2001).

[75] WYO. STAT. ANN. § 9-1-603 (2007).

[76] *Defense*, *supra* note 1, at n.3.

*Conclusion*

The vigorous assertion by *Defense* that the charitable trust doctrine should be applied to conservation easements reflects a concern that most of us working with conservation easements share: How well will these unusual legal constructs stand the test of time? As an easement donor myself, the last thing I want to see is reversal of the conservation of two family farms to which I made an economic and emotional commitment, particularly as the ownership of these farms is no longer mine.

On the other hand, voluntary land conservation through conservation easements has been tremendously effective in the United States, in large part because much of it is privately administered. The effect of imposing the kind of uncertainty and potential bureaucratic burden on the daily administration of conservation easements that could arise from a broad application of the charitable trust doctrine is sure to discourage many landowners from the use of conservation easements. The potential for injecting political considerations into the administration and enforcement of existing conservation easements in the form of attorney general oversight is a matter of genuine concern for a number of conservation easement practitioners.

As noted, the law on the books now, law that is applicable not only to deductible conservation easements, but to all conservation easements held by public charities, is ample to prevent abuse of the administration of conservation easements. Increased reporting (again expanded for tax years beginning in 2008 with the new Form 990) by land trusts of easement modifications or terminations, as well as reporting of efforts to monitor and enforce easements required by federal tax law; increased scrutiny of land trusts and easements by the IRS; intensified training and guidance from the Land Trust Alliance, and the Alliance's recent accreditation program; all are likely to result in a better understanding by easement holders of their duties and vastly improved easement administration. However, in the entire history of conservation easements prior to these recent efforts, all that can be found of record in the form of clear abuse of easement administration is the *Hicks* case, and the attempted, but voluntarily corrected, problems described in the *Myrtle Grove* and *Wal-Mart* cases.

Conservation easements, as documented in *Perpetuity* and elsewhere, are a peculiar mixture of legal concepts. Their nature does not lend them to a doctrine designed for entirely different kinds of charitable gifts. However, that is not to say that some remedy for improper easement administration cannot be created which is suited to their nature. Creation of such a remedy is a job that needs to involve the entire land trust community, not just academicians, but practitioners, land trusts, and landowners. It needs to be done openly, deliberately, and collegially rather than by default. There is time. After all, one bad case in the history of conservation easements hardly creates an emergency requiring precipitate action.

WYOMING LAW REVIEW

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# SURFACE DAMAGES, SITE-REMEDIATION AND WELL BONDING IN WYOMING—RESULTS AND ANALYSIS OF RECENT REGULATIONS

*Dr. Christopher S. Kulander**

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* Associate Attorney, Energy and Power Section, Haynes & Boone, LLP, Houston, Texas. Licensed in New Mexico and Texas. B.S. (Geology) 1993, Wright State University; M.S. (Geophysics) 1995, Wright State University; Ph.D. (Geophysics—Petroleum Seismology) 1999, Texas A&M; J.D. 2005, University of Oklahoma.

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## I. INTRODUCTION

A great oil and gas boom is afoot in America and Canada and onshore production is advancing at an extraordinary pace. For some states, this production is without historical precedent. Consequently, they are now facing the environmental and surface-use issues related to hydrocarbon development that states with established production have wrestled with for a long time. Whatever regulatory path these states with newer production decide to take, the laws and regulations they have enacted or are considering will play a significant role in how gas, oil, and coalbed methane is ultimately developed in western America and how that development will affect rural landowners and towns. Wyoming is in the eye of this storm. Hitherto, Wyoming has been a minor producer compared to some other states, but now that prices are hitting new records and technologies and markets have developed for coalbed methane development, the eyes of the energy industry are fixed on Wyoming. It is currently undergoing a remarkable boom cycle, particularly with the advent of coalbed methane development. Wyoming has a sparse population, but must now begin to consider the results of surface damage, water contamination of both aquifers and surface supplies, and the tension between the surface and mineral owner that this rampant development is bringing. Until recently, it had relatively few laws—some of which were antiquated—on the books covering site remediation, water disposal from production, and well bonding.

This paper examines three issues. The first is recent legislation covering surface damages and entry requirements for producers. Wyoming has recently joined other states[1] in passing a Surface Damage Act ("SDA"), designed to facilitate communication between landowners and producers and lessen the domination of the mineral estate over the surface owner in situations where the ownership of the two estates are separate.[2] How the new Wyoming laws compare with other states'

[1] Illinois, Indiana, Kentucky, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Tennessee, West Virginia.

[2] WYO. STAT. ANN. §§ 30-5-401 to -410 (2005).

SDAs, related case law and experiences of producers in other states with SDAs is discussed.

The second issue examined concerns regulations crafted to help prevent groundwater contamination caused by coalbed methane development and surface remediation and bonding. Currently, courts across the nation are seeing an exceptional amount of litigation related to surface damages and remediation. Experiences of the major producing states that have had longer experience with legislated/regulated surface remediation are examined, as well as states whose natural resources include those of aesthetic value.

The third topic of this paper concerns bond requirements for producers. The experiences of the states and provinces have also proven that bonding requirements are necessary to curtail the problems of orphaned wells—unproductive wells that are abandoned without being properly plugged, and therefore, raise the specter of groundwater contamination. To avoid this problem, Wyoming has enacted bonding requirements for operators. Whether these are correctly structured to prevent the problems encountered with bonding schemes in other states is open to debate.

In all three areas, Wyoming's current legal climate will be considered and further suggestions will be made for a "best practices" approach to developing or modifying regulatory oversights. This approach is designed to balance competing concerns, thereby providing efficient, responsible developments of oil, gas, and mineral resources (including natural gas from coal) without damage to the surface or subsurface aquifers. Observations and recommendations regarding Wyoming's process for facilitating communications between surface and mineral owners, resolving valuation differences in an expedited, cost efficient manner, and ensuring timely and successful reclamation will also be discussed.

## II. SURFACE DAMAGE ACTS AND ENTRY REQUIREMENTS

### *A. Introduction*

The United States and Canada are two of the small number of countries where a private surface owner can also own the oil and gas rights below, contrasting most other countries where the national government owns the oil and gas.[3] Typically, if the surface owner also owns the mineral estate, he is happy to see the minerals developed as this means income to him in the form of lease bonus, delay rentals, and royalty. The surface and mineral estates can be separated however, and the two owners (or oil and gas leaseholder) may be completely unknown to one another.

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[3] *See* EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 2.1, at 59 (1987) (noting that the concept of private ownership of oil and gas rights is not the case in civil law countries).

If the mineral estate has been separated from the surface, the surface owner may have no financial incentive to see minerals developed, and may be opposed if the development will cause him nuisance or harm the value of his surface properties. In addition, current high prices have empowered surface mineral owners to make more demands from operators.

Historically, the mineral owner dominated the surface owner when the two owners collided over issues relating to land use and mineral development. In its most unvarnished form, this dominance meant the mineral owner had "the right to use so much of the surface as may be reasonably necessary to enjoy the mineral estate."[4] Later, the dominance of the mineral owner was attenuated somewhat by the accommodation doctrine, which introduced the circumstance that a disruption of the surface owner's use of the land by subsequent mineral development might require or force the mineral owner to use another "reasonable" method to develop the mineral estate. The accommodation doctrine kept intact, however, the overall doctrine of the dominance of the mineral estate—if no other reasonable method existed for mineral development, then the mineral owner could go ahead with the disruptive development without the surface owner's consent and without being liable for damages for the disruption. Oklahoma even adopted statutes to give the mineral owner a private right of eminent domain over the surface for access to the minerals.

Uncertainty exists over whether the accommodation doctrine exists in Wyoming and, if so, to what extent. One landmark case, *Mingo Oil Producers v. Kamp Cattle Company*, examined the terms of the original lease between the parties, focusing on a liquidated damages clause the operator drafted covering damage caused by access to the development site.[5] Holding that the mineral estate was dominant, the court found that the surface owner could not require the execution of an agreement before access was permitted and that the lessee's right of access was "primary and fundamental." The court therefore refused to extend a liquidated damages provision beyond its specified term of one year.[6] The lessee already had the right, being the dominant estate, to possession as provided by the oil and gas lease.[7]

In Texas, and other accommodation doctrine states, it is quite common for informal, non-mandated meetings to be held between the developer and the surface owner. In these meetings, the producer typically outlines his plan for development, a timetable, and the parameters of the impending development. However, such informal "handshake" agreements could not prevent some litigation and in response to ranchers' and farmers' complaints. In an effort to

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[4] Harris v. Currie, 176 S.W.2d 302, 305 (Tex. 1943).

[5] 776 P.2d 736 (Wyo. 1989).

[6] *Id.* at 740.

[7] *Id.*

be viewed as pro-environment, politicians have stepped in to sand down with legislation the perceived hard edges of the dominance of the mineral estate. These efforts have led an increasing number of states to adopt SDAs.

### *B. Surface Damage Acts in General*

Along with Wyoming, ten states have enacted surface damage statutes to help alleviate surface owners/users' displeasure with the perceived imbalance of power that mineral owners have over surface owners/users. They are designed to compensate for damage caused by the mineral owner. Across the states that have passed SDAs, the laws vary surprisingly little with regard to the major components. Most contain entry notification and negotiation requirements to facilitate contact between operators and surface owners/users. Most also contain bonding requirements and protocols on determining surface damage costs. Case law related to such acts is, as yet, sparse.

Another common requirement in SDAs is the need for entry negotiations. In these, the surface owner and the producer must begin negotiations before entry to determine what the surface damages will be before the drilling begins. Oklahoma requires negotiations begin within five days after providing notice to the surface owner. Kentucky and Illinois mandate talks begin at least five days before drilling. The other six states require that negotiations over surface damages begin after drilling operations have begun.

Not surprisingly, these talks can lead to disagreement. If the landowner and the producer cannot agree, then typically the landowner can bring suit or require arbitration. To address this problem, some SDAs then delineate assessment procedures in order to decide the amount of damages that are due (or are due in the future if damage is done) to the landowner. Perhaps the most important departure from the accommodation doctrine is that SDAs, while paying at least lip service to the dominance of the mineral estate, now require payment for damages to the surface estate—even if the actions of the mineral owner were reasonably necessary for development and no other method was open to him.

### *C. Wyoming's Surface Damage Act*

Wyoming's 58th Legislature passed—and Governor Freudenthal signed—an SDA entitled "Entry to Conduct Oil and Gas Operations" in 2005 (the "Act").[8] The Act was made effective on July 1, 2005 after several years of study by

[8] WYO. STAT. ANN. §§ 30-5-401 to -410 (2005).

industry[9] and agitation by landowners.[10] The purpose of the Act was to provide notice to surface owners of coming mineral development and, hopefully, cultivate agreement between the surface owner and the developer.

The Act first establishes the general dominance of the mineral estate, stating: "Any oil and gas operator having the right to any oil and gas underlying the surface of land may locate and enter the land for all purposes reasonable and necessary to conduct oil and gas operations to remove the oil or gas underlying the surface of that land."[11] After this broad declaration, however, the Act nods to the accommodation doctrine by saying the developer must "reasonably accommodate existing surface uses" and goes on to narrow the operator's rights by imposing certain pre-development requirements. Operators are allowed to enter to conduct "non-surface disturbing activities" within which are included inspections, staking, surveys, measurements, and general evaluation of proposed rights and sites for oil and gas operations.[12] These first pass operations require at least five days notice to the surface owner, with further notice required when new non-surface disturbing activities are undertaken.[13]

Subsequent entry upon the land for "oil and gas operations" require more elaborate notifications and it has been suggested that any activity that is not considered a nonsurface disturbing activity counts as an "oil and gas operation."[14] The notice of entry for oil and gas operations must come not more than 180 days and not less than thirty days before actual entrance to the land is proposed,[15] and must include the proposed dates of operation; the foreseen location of surface facilities and all other appurtenants necessary for operations; contact information of the operator; an offer to "discuss and negotiate" any proposed changes to the plan of operations; and a copy of the Surface Damage Act of Wyoming.[16]

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[9] For example, in 2004, Apache Corporation, a large presence in Wyoming with holdings such as the U-Cross Ranch, took the lead by presenting astute recommendations to state officials and industry regarding its vision for responsible development after collaboration with several environmental studies and extensive legal research on other state SDAs.

[10] For example, groups like the Powder River Basin Resource Council ("PRBRC") scheduled meetings with Governor Freudenthal of Wyoming, his energy advisor Steve Waddington, and the Department of Environmental Quality ("DEQ") to express support for a "Surface Owner's Protection Bill". Powder River Basin Resource Council, http://www.powderriverbasin.org (last visited Apr. 9, 2009). Their handbill for the June 13, 2004 meeting with Mr. Waddington and the DEQ representatives exhorted surface owners to show up to avoid letting "streamlining of permitting [to] take away your right to protect your property." *Id.*

[11] WYO. STAT. ANN. § 30-5-402(a) (2005).

[12] *Id.* § 30-5-402(b).

[13] *Id.*

[14] Estee A. Sanchez, Esq., *New Wyoming Surface Use Statutes*, THE ROCKY MOUNTAIN LANDMAN (Denver Assoc. of Petroleum Landman), Summer, Vol. 23, Issue 9, p. 3.

[15] WYO. STAT. ANN. § 30-5-402(d).

[16] *Id.* § 30-5-402(e).

The developer must attempt good faith negotiations in order to reach a surface use agreement.[17] The surface use agreement should describe what methods will be used to protect surface resources, describe the compensation to the surface owner for any damages to the lands and improvements thereon, and provide details of a timely completion of reclamation activities.[18] In order for the surface use agreement to be valid for the purpose of satisfying the surface-use-agreement option for allowing entry (as described later in this section), it must provide that the developer will compensate the surface owner for losses of land and improvement value and losses from lessened production and income from the land. Importantly, the damages provided for are only to be applied to the lands directly affected by production and the surface owner cannot separate from the surface estate the right to receive surface damages.

During the negotiations, either party can seek arbitration or mediation or invoke Wyoming Statute §§ 11-41-101 to -110, providing informal procedures for resolving disputes through the Wyoming Agriculture and Natural Resource Mediation Board. Finally, if a surface use agreement is made, the oil and gas operator is directed by the Surface Damage Act to avoid "substantially and materially different" operations from those listed in the Development Plan.[19]

After notice and negotiations, the developer must satisfy one of the following conditions: (i) acquire a waiver by all the surface owners that will allow the oil and gas producer to begin operations; (ii) obtain a surface use agreement as described above which provides for improvements pursuant to Wyoming Statute § 30-5-405 (2005); (iii) secure a waiver as described in Wyoming Statute § 30-5-408 (2005); or (iv) should the producer not desire to seek an executed Surface Use Agreement, simple consent or waiver, he can choose to execute a surety bond or other guaranty to the Wyoming Oil and Gas Conservation Commission (the "Commission") for the use of the surface owner to obtain payment for any surface damages caused by operations.[20] This surety bond must follow the form set by the Commission, must be at least $2000 per well, and may be a blanket bond that covers a number of wells.[21] The Commission then notifies the surface owner of the bond, which starts a thirty day period wherein the surface owner

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[17] *Id.* § 30-5-402(f).

[18] *Id.* § 30-5-405(c)(i) and (ii). These payments are described in Wyoming Statute § 30-5-405 and include payments to the surface owner which include damages sustained by the surface owner for loss of production, income, land value and value of improvements caused by oil and gas operations.

[19] *Id.* § 30-5-402(g).

[20] *Id.* § 30-5-404(b)(iv). A process of approval described in Wyoming Statute § 30-5-404 determines the amount of the bond.

[21] WYO. STAT. ANN. § 30-5-404 (2005).

can object to the amount. Should an objection occur, the Commission will step in and determine the bond amount depending on the specific circumstances.[22]

In order to help ensure operator compliance with the Act, § 30-5-403 (2005) of the Wyoming code states that an application for a drilling permit will not be approved by the Commission until the oil and gas operator files with the Commission the following:

> (1) The surface owner's name and contact information;
>
> (2) A statement that notice was given to the surface owner of proposed oil and gas operations;
>
> (3 A statement that the surface owner and oil and gas operator attempted good faith negotiations to reach a surface use agreement; and
>
> (4) A statement that the oil and gas operator has either secured the written consent, waiver, or surface use agreement or has filed with the State a surface damages bond.

A surface owner has two years after the discovery of damage to the surface estate to make a claim for damages under the Act if a developer has started operations without any agreement in place regarding compensation for damage to the surface as described above.[23] The surface owner must give notice of this damage to both the developer and the Commission.[24] After such notification, the operator must make a written offer to settle within sixty days and, unless a written agreement between the parties provides for another remedy, the surface owner can accept or reject the offer of the developer.[25] Should the Commission reject the claim of the surface owner, the surface owner can seek redress in the state district court.[26] Surface damages can be recovered for loss of production and income from the surface, and loss of market value and value of improvements—should the operators not pay within sixty days of the due date, the amount owed can double.[27] Note that no allowance is made, when measuring damages for "reasonable use," to defer any portion of the loss of marketable value—any adverse affect on the price appears to be compensable.

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[22] *Id.*

[23] *Id.* § 30-5-406.

[24] *Id.*

[25] *Id.*

[26] WYO. STAT. ANN. § 30-5-406.

[27] *Id.* § 30-5-405.

A statute of limitations is included in the Act that precludes actions not brought within two years of the discovery—or the time whereat the damages should have been discovered—to recover damages to the surface estate.[28] This provision is tolled for four months if a written notice of damages is provided by the surface owner.[29]

### *D. Comparisons with Neighboring States—North Dakota and Montana*

Western states, because of their extensive production and the advent of coalbed methane ("CBM") development, have some of the most commented-upon and extensive SDAs. Oklahoma, because of the extensive production in the state, the fact that its SDA was first in the west, and because the state has produced most of the case law, is often seen as having the "flagship" SDA[30] and is a popular yardstick for other states to measure themselves against. Oklahoma's assessment scheme for a surface damage settlement changes the "reasonable use" doctrine found in Texas and other states without SDAs. Instead of the requirement that landowners show that the producer had done something unreasonable and that other alternatives existed to avoid harming the landowner's preexisting use—a fairly high bar to meet—Oklahoma's SDA defines a compensable damage merely as something with "adverse affect on the price" of the land. This arguably has the effect of making the mineral owner's use comparable to a pipeline easement, invoking condemnation law. Pipelines, however, are an easement whereas the owners of a mineral estate are not trespassers—quite the contrary in that they are the owners of the dominant estate. Additionally, surface owners often benefit from mineral development through bonuses and/or royalties, whereas pipelines do not provide any benefits to the surface owner. More specifics of the various SDAs in the Western States are detailed in Appendix A.

North Dakota and Montana had surface damage acts on the books before Wyoming. North Dakota currently requires that the mineral developer provide written notice of the development plan to the surface owner within twenty days of the start of operations.[31] This notice must detail the development plan and provide notification of the rights afforded the surface owner by the Act.[32] Along with the notice, the producer must make an offer of settlement to compensate the surface owner for damages.[33] If the surface owner rejects the settlement offer, he may bring suit in the appropriate district court. Should the award granted by the court exceed the initial settlement offer, the developer must pay court

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[28] *Id.* § 30-5-409.

[29] *Id.*

[30] OKLA STAT. tit. 52, §§ 318.2 to 318.9 (Supp. 2000).

[31] N.D. CENT. CODE § 38-11.1-05 (2001).

[32] *Id.*

[33] *Id.* § 38-11.1-08.

costs and interest.[34] Unlike Oklahoma, North Dakota's SDA expressly lists what a surface owner can recover for in the state's SDA.[35] North Dakota's SDA expressly delineates actions affording damages—reimbursement is required for the lost value of surface improvements, lost use and access to the surface, loss of market value, and the loss of agricultural production and income.[36] North Dakota does not require a bond for surface development.

Montana's SDA is quite similar. Written notification is again required of the producer to the surface owner not more than ninety days or less than ten days prior to entry and must relate the proposed operations.[37] Montana does not require a surface bond and mirrors North Dakota in requiring damages for loss of value to surface improvements, loss of land value, and loss of production and income from agriculture.[38] After entry, the surface owner has two years to notify the mineral developer of damages. Upon such notification, the developer has sixty days to make an offer of restitution. The surface owner can accept or file suit in the appropriate state district court.[39] Whatever the route to calculating damages, payment must be made within sixty days of the agreement or award, or the surface owner is entitled to twice the amount of the owed damages.[40]

The major difference between the North Dakota and Montana is timing of payment of surface damages. North Dakota requires the parties to speculate on the damages and agree—or seek a judicial determination if no agreement is reached—on a settlement beforehand. Montana's statute considers damages in retrospect, with the surface owner essentially keeping tabs and presenting a bill after the alleged damage is done.

### *E. Analysis and Comment*

#### *1. General Intent*

Resolving the tension between the surface owner/user and the mineral developer is a matter of balancing incentives to produce minerals with concern for accommodating the surface owner and/or tenant regarding specific and narrowly-defined matters. It should not be simply a way for surface owners to shake down producers for no other reason than their presence. Generally, Wyoming's surface damage act has achieved this.

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[34] *Id.* § 38-11.1-09.

[35] *Id.* § 38-11.1-04.

[36] N.D. CENT. CODE § 38-11.1-04.

[37] MONT. CODE. ANN. §§ 82-10-503 and 82-111-122 (2004).

[38] *Id.* § 82-10-504.

[39] *Id.* §§ 82-10-506 to 508.

[40] *Id.* § 82-10-504.

The broadly worded declaration beginning the SDA stating the mineral estate remains dominant over the surface estate is a good, if vague, declaration of intent. If "push comes to shove" and the mineral owner is dead-set on production and the surface owner is equally adamant against production, the mineral estate owner should prevail.

The judicially created accommodation doctrine still championed in Texas, and a host of the other states, still has two major advantages over Wyoming's efforts to address the split estate issue. First, if the development is reasonable and there is no other economic way to accomplish it, then no damages are forthcoming. Production must be encouraged because development of mineral resources is not only a matter of positive economic benefit; it is a function of national security in the face of a turbulent world energy market. It is not just historical dogma that keeps the mineral estate dominant, but political, military, and economic realities that recognize the absolute necessity of promoting domestic production. Second, and related to the first point, the surface owner is not *automatically* entitled to damages if production is reasonable and damages happen to occur, or—as is the unfortunate case now in several states—even if no real damages occur except that the land is entered. Past some nominal payments, damages should be curtailed to those that occur if a surface land use or improvement that pre-dates the mineral development is damaged by a specific act of mineral development that could have been reasonably achieved another way, or one that damages surface use and enjoyment in a specific and narrowly-defined circumstance.

Compensable damages, however, as defined in the Wyoming statute, are worrisome. Compensable damages are defined by the statute as "[a] sum of money or other compensation equal to the amount of damages sustained by the surface owner for loss of production and income, *loss of land value* and loss of value of improvements caused by oil and gas operations."[41] This definition, standing alone, could open the door to the problem in Oklahoma, namely that compensable damages are not tethered by the accommodation doctrine's theory of reasonable use, instead including *any damages* caused by the reasonable development of the minerals—even if the damages were caused by reasonable use. The attempts to curtail these compensable damages in the subsequent section by adding the following clause, "[t]he payments contemplated by this subsection shall only cover land directly affected by oil and gas operations. Payments under this subsection are intended to compensate the surface owner for damage and disruption"[42] fail to rein in damages that would be associated with reasonable development of the land. Unlike North Dakota, where only certain express actions and damages are compensable, in Wyoming, any diminution in value is compensable. Again, this sounds like a pipeline condemnation action. Mineral developers, however, are not trespassers.

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[41] WYO. STAT. ANN. § 30-5-405(a)(i) (2005) (emphasis added).

[42] *Id.* § 30-5-405(a)(iii).

Wyoming's SDA stipulates that if the surface owner files a claim for damages with the Commission against a developer who has not made a Development Plan or other acceptable arrangement with the surface owner, then the developer must offer a settlement within sixty days. This protocol appears to be an incentive for producers to have a Development Plan in place. While encouraging Development Plans is a laudable goal, the Commission should not require a producer to offer a settlement if there was no other reasonable alternative method for mineral development than the one the developer chose. In addition, a surface damage act should not encourage surface owners/users to feel they are automatically entitled to "damages" without some sort of actual damages. Although the surface owner should be compensated for adverse impact of mineral development, adverse impact on the price should have some threshold relative to the mineral owner's reasonable use right. Furthermore, even if damages recoverable through SDAs are to be extended past surface damage caused by use unreasonable for mineral development, all SDAs should at least echo the wisdom of Oklahoma's recent case limiting SDA recovery to the lessee's exercise of his right to enter and use the land for development.[43]

Producers in Wyoming should have the opportunity to litigate all tortious claims in an Article III court. SDAs are not substitutes for standard civil actions brought on by tortious activities such as negligent surface damage or pollution. Recently, the Oklahoma Civil Appellate Court ruled that a lessor must bring a separate cause of action in the event of nuisance or the negligent infliction of pollution.[44] The court agreed with the producer-defendant who argued that the Oklahoma SDA only allows damages to be granted based on the operator's entrance and use of the leased premises.[45] This is good news for producers who might otherwise not have a fair opportunity to defend tort claims but rather have to pay some administrative penalty based on the claims of assessors, without due process.

Another source of tension not yet addressed by the new Wyoming laws is how they interact with areas where the surface is owned by private Wyomingites and the minerals are owned by the federal government. Wyoming, a relative latecomer into the Union, was a federal territory before admission, and in large portions of the state, the federal government retained the mineral rights to the land while divesting the surface to private citizens and the state.

Onshore Oil and Gas Order Number 1, (the "Order") as amended in 2006, provides the requirements necessary for the approval of all proposed oil and gas exploratory, development, or service wells on all Federal and Indian onshore oil

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[43] Vastar Resources, Inc. v. Howard, 38 P.3d 236 (Okla. Civ. App. 2001).

[44] *Id.*

[45] *Id.* at 240–41.

and gas leases, including leases where the surface is managed by the U.S. Forest Service. The Order also covers approvals necessary for subsequent well operations, including abandonment. The changes would include new requirements for development on split estates; a new approval process for multiple wells based on a single environmental review and a Master Development Plan; and additional bonding requirements.[46]

The federal Order provides for lower minimum bond amounts than the new Wyoming law and a less complex system for calculating and providing compensation to affected surface owners for a narrower range of types of surface property damage. Neither law makes it clear which applies when the mineral owner is the federal government. Naturally, given the difference in the bonds and the process for determining surface damages, producers and landowners will likely have a set of laws they would like to apply differently from their counterpart. Both the Wyoming Attorney General and publicists for Governor Freudenthal have been quoted by press sources expressing their beliefs that the Wyoming law applies.[47] In response, the Director of the Bureau of Land Management ("BLM") issued a letter to Don J. Likwartz, Wyoming Oil and Gas Supervisor, on June 13, 2005, expressing the BLM's view that the federal law prevails.

### 2. *Pre-production Requirements*

A surface damage act should address all stages of development. Before production begins, the mineral owner should be required to notify at least one surface owner and the surface owner's tenant, if applicable, a number of days before land entry and the notification should contain information necessary to allow the land owner to assess what effect the development might have on his surface estate. The parties should be required in some way to get together and discuss the plans for mineral development and address any concerns that the surface owner has over the proposed development. These differences should be documented—making damage assessment by appraisers easier or, at worst, leaving a paper trail for subsequent litigation. In many cases, practically speaking, differences that cannot be worked around could lead to a check being written and a settlement made on the spot between landowner and company landman.

Wyoming's SDA does not entirely accomplish these pre-production goals. As noted above, operators are allowed to enter to conduct "non-surface disturbing activities" if they give at least five days of notice to the landowner. Even though

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[46] Onshore Oil and Gas, Order No. 1, 48 Fed. Reg. 48916 (Oct. 21, 1983), as amended at 48 Fed. Reg. 56226 (1983) and 72 Fed. Reg. 10328 (2007). Dated December 1, 2006, not codified in the Code of Federal Regulations.

[47] Richard W. Goeken, *Conflict Looms over Federal and State Regulation of Access to Federal Oil & Gas Leases on Split-Estate Lands*, http://www.saltmanandstevens.com/pdf/split_estate_article_draft_5.pdf (last visited Apr. 6, 2009).

the surface owner has thirty days to protest after the surface bond is posted, a common complaint raised by landowners is that once the bond is posted, immediate access is granted to the producer for these first look activities. Once the Commission gets the protest, they have seven days to respond. This has led to scenarios where the developer posts bond and conducts geophysical surveys and other pre-development activities quickly without having to wait for the outcome of the Commission's examination of the complaint.[48] One solution for this problem would be to delay entry for the developer until after the Commission has had an opportunity to respond to the landowner's complaint.

As expected, the concerns of landowners in Wyoming over the ability of developers to "bond-on" and avoid negotiations altogether mirror concerns in other states. "Bonding-on" happens when producers ask the Commission for permission to conduct operations without the surface owner's approval. Although the Act encourages producers to contact and negotiate with landowners, it ultimately acknowledges that mineral owners, and by proxy their leased developers, should be able to develop without subjecting their entry and development plan to approval by the landowner. This has led to contested bond amounts before the Commission, with the landowner claiming the bonds are not high enough to cover reclamation if the producer defaults on its obligations and the producer pointing towards the numerical limits in the statute of $2000 per well.[49]

### *3. Requirements During Production*

During production, the surface owner should not be able to halt entry and development once the pre-production phase is complete, save for gross negligence and/or willful misconduct. The bar for collectable damages should not be an "adverse affect on the price" as in Oklahoma. This makes the entrance and development much like a pipeline easement—which it is not. Mineral development is not an easement because the mineral producer has the right to develop his asset and is not a trespasser.[50] In addition, often times the surface owner stands to gain from the production, whereas a pipeline provides no benefit to the surface owner.[51] The bar in Wyoming should be the one used in Texas: damage caused by unreasonable use of the land, plus any specific items that the legislature deems worthy of protecting, such as the actual farmstead or other particular classes of fixtures. A nexus needs to exist between the three-part *Getty* analysis, as used in Texas and other accommodation doctrine states, and the modern

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[48] Interview with Llysia Sechrist, Legal Assistant, Wyoming Oil and Gas Conservation Commission in Cheyenne, Wyo., (Nov. 28, 2007).

[49] WYO. STAT. ANN. § 30-5-404 (2005).

[50] Personal communication, Professor Owen Anderson—Eugene Kuntz Chair of Oil and Gas, University of Oklahoma College of Law, 2004.

[51] *Id.*

SDA.[52] If the mineral production upsets a use that predates development and that development could have been accomplished another way (such as directional drilling), with a cost comparable to the cost actually used to develop, the surface owner should be able to go through the assessment process for the collection of damages. This analysis, combined with simple distance limitations preventing development within a certain distance from houses and other structures along with the inclusion of pollution, debris left at the drill site, and improperly plugged and abandoned holes in the damage assessment, would seem to provide the correct balance between the mineral and surface estate. In addition, injunctions should be discouraged. If the correct procedure is followed and the entrance by the mineral developer passes whatever *Getty*-like analysis is required by the SDA, no injunction should be forthcoming to halt production except those necessary to allow time to go to the conservation commission and show the procedures were not followed.

#### *4. Post-development*

Post-development estate relationships center on damages done during production. Here, it is important to see that actual, demonstrated, or evidenced damages yield compensation, but also that the SDA does not come to be seen as an automatic payday when mineral developers appear at the gate. The goal must be accurate assessment.

One benefit of the Wyoming SDA is that it avoids the wrangling over the appointment of three assessors to tally surface damages. In Oklahoma, the developer and the landowner each appoint an assessor who, in turn, jointly appoint a third. The traditional three-member panel of assessors has been a popular way to assess damages, with each side appointing an assessor and the third being appointed by the first two—or a local court when the first two cannot agree. The problems arise when the third member is partial to one side. Oklahoma, faced with the problem of the third member often being favorable to one side or another despite the merits of the case, has attempted to solve the problem by making certification of the assessors by the state mandatory.[53] Although this would help eliminate assessors without any experience and knowledge and, perhaps, obvious "sweetheart" appointments—such as a rancher picking a neighbor—it may be better if the state has a cadre of professional assessors from which the first two assessors, the court, or the appropriate state agency could choose. "Professional" status would mean being licensed after testing and accreditation by the state.

It is also important for the values reached to have some relevance to the real world. In other words, the value of the land should be limited to tangible loss of value, and not sentimental value or the dubious values associated with loss of

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[52] Getty Oil v. Jones, 470 S.W.2d 618, 621–622 (Tex. 1971).

[53] For a further description of the Oklahoma SDA, please see Appendix A.

a remotely-possible future use. Wyoming's SDA should more expressly disallow valuation of damages based upon sentimental value or loss of alleged future use. Another possibility may be to allow "reasonable use" so that mere entry is not an event meriting damages. The current Wyoming SDA makes no allowance for "reasonable use" when considering the amount of damages. This may result in alleged damages of questionable merit cited simply to "nickel and dime" the damage assessment. Furthermore, a requirement that the money paid is actually used to remediate and improve the land should be considered, while allowing for reasonable attorney's fees on a non-contingent basis. Finally, the county tax assessor should be privy to the assessments made by the assessing tribunal. This will help prevent results that are inconsistent with assessments by other state and local agencies.[54]

## III. PRODUCED WATER/GROUNDWATER AND SITE REMEDIATION

### A. *Introduction*

Oil and gas development has long been recognized as a source of concern for groundwater and surface water contamination elsewhere in the country.[55] Being relatively arid, Wyoming—with its low population and historically less-prolific hydrocarbon development—is initiating widespread protective measures for groundwater. Coalbed methane production ("CBM") is especially challenging because the process produces considerable water.[56] The variability of produced water quality, however, makes regional classification difficult and potentially inaccurate. Economic waste could result by having the same regulations that require expensive remediation efforts for low quality water to also govern high quality produced water.

Nationally, litigation for environmental damage is on the upswing, and it seems logical that where water contamination occurs, litigation will closely follow. Litigation has already erupted concerning permitting of CBM development on federal and state land.[57] This first wave of lawsuits will soon give way to actions on

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[54] Gene Gallegos, a seasoned oil and gas lawyer in Santa Fe, New Mexico, strongly disagreed with this suggestion, commenting that trying to intertwine land values as they relate to remediation costs to property tax assessment values was unworkable because the tax assessment values are made for fairly and equitably raising property tax dollars and are *not* made with an eye toward remediation assessment.

[55] VITO NUCCIO, COALBED METHANE—POTENTIAL AND CONCERNS, U. S. Geological Survey Fact Sheet FS-123-00 at 2 (2000), http://pubs.usgs.gov/fs/fs123-00/fs123-00.pdf (last visited March 31, 2009).

[56] RUCKELSHAUS INSTITUTE OF ENVIRONMENT AND NATURAL RESOURCES, WATER PRODUCTION FROM COALBED METHANE DEVELOPMENT IN WYOMING: A SUMMARY OF QUANTITY AND MANAGEMENT OPTIONS 10 (2005) [hereinafter RUCKELSHAUS REPORT].

[57] Appendix B of this report details some current cases moving through the administrative and judicial process in Wyoming and Montana related to CBM development.

private land. Recently, courts and juries in other states have handed out startling damage awards, including astronomical punitive awards. Hopefully, this can be prevented in Wyoming to some degree if site remediation and groundwater concerns are adequately addressed. Regulations should be rigorous yet flexible allowing responsible operators to produce without the specter of outrageous judgments. Concurrently, Wyoming should put the state in the best position to quickly identify and curtail production by "fly-by-nighters" and by so doing, soothe the worries of surface owners concerned about rampant CBM development causing environmental damage.

### *B. Current Wyoming Regulations*

#### *1. Coalbed Methane Produced Water*

In the last four years, Wyoming—led by a governor's office seemingly well advised by academic and industry groups—has enacted several measures dealing with groundwater protection related to hydrocarbon production. The Wyoming Department of Environmental Quality (the "WDEQ")[58] and the Commission have responded to groundwater concerns raised by CBM development.

Before production of CBM, the gas is trapped within the coal and only becomes mobile once the reservoir pressure is decreased by pumping water out of the coal seams.[59] Produced water can be reinjected, hauled away in disposal trucks, or treated and piped for beneficial uses such as irrigation, stock ponds, or even drinking water.[60] Most often this water is stored in wastewater impoundments.[61] Water taken from deeper depths is much more likely to be briny than water found in shallow aquifers and contain higher levels of dissolved solids.[62] The water, if not removed or drained down a channel, either evaporates or infiltrates back into the ground. If this water is contaminated with brine, or if a large volume of produced water leaches out constituents in the soil and introduces these elements into a shallow aquifer, water production becomes problematic because the impoundments can then introduce the briny water from the deeper reservoir into the (generally) freshwater shallow reservoirs. The quality of the produced water can

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[58] Wyoming Department of Environmental Quality, http://deq.state.wy.us/ (last visited March 31, 2009).

[59] NUCCIO, *supra* note 55.

[60] *Id.*

[61] *Id.* at 2.

[62] C.A. RICE, M.S. ELLIE & J.H. BULLOCK, JR., WATER CO-PRODUCED WITH COALBED METHANE IN THE POWDER RIVER BASIN, WYOMING: PRELIMINARY COMPOSITIONAL DATA, U. S. Geological Survey Open File Report 00-372 at 4 (2000), http://pubs.usgs.gov/of/2000/ofr-00-372/OF00-372.pdf (last visited March 31, 2009).

be better than the local surface water and shallow aquifers.[63] For example, in the Powder River Basin, where nearly all of Wyoming's CBM is currently produced, the quality of CBM-produced water generally increases when moving from Belle Fourche, Powder River and Little Powder River drainages southeastward toward the Cheyenne River drainage.[64] In these areas with cleaner CBM-produced water—particularly in drought conditions—the local surface owners and users welcome the produced water and want to use it to irrigate crops and water cattle.

The steep increase in CBM development and the large volume of water produced by CBM development and production has resulted in large numbers of impoundments to hold the produced water. Impoundments are small man-made ponds that hold the plentiful water that springs from CBM development. These impoundments are either created by damming an existing natural channel or stream ("on-channel") or by excavating a pit or pond elsewhere ("off-channel").

Reclamation of impoundments is one of the few instances in Wyoming where remediation is required outside of contractually-based obligations.[65] Bonding and subsequent reclamation of on-channel reservoirs is made obligatory by the WDEQ through regulations promulgated in August 2005, and revised in June 2007 (described below). Off-channel impoundments are the domain of the Commission and the Office of State Lands and Investments ("OSLI"). On federal lands, the BLM requires bonding and reclamation on federal oil and gas leases. Which agency's rules apply depends on not only whether the impoundment is off-channel or on-channel, but also on whether the surface and mineral estates are privately owned, owned by the state, or federally owned.[66]

Reclamation of impoundments after CBM production ceases is seen as necessary lest un-reclaimed pits fragment and isolate drainages. Reclamation also prevents exposure of selenium and dry impoundment bottoms yielding dust,

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[63] *See* Thomas F. Darin, *Waste or Wasted? Rethinking the Regulation of Coalbed Methane Byproduct Water in the Rocky Mountains: A Comparative Analysis of Approaches to Coalbed Methane Produced Water Quality Legal Issues in Utah, New Mexico, Colorado, Montana & Wyoming*, 17 J. ENVTL. L. & LITIG. 281 (2002).

[64] RUCKELSHAUS REPORT, *supra* note 56, at 17.

[65] On-channel regulations are described in the "Implementation Guidance for Reclamation and Bonding of On-Channel Reservoirs that Store Coalbed Natural Gas Produced Water" promulgated to implement the requirements of § 35-11-102 of the Wyoming Environmental Quality Act as they cover reclamation of on-channel impoundments. Wyoming Department of Environmental Quality, Water Quality Division, *Implementation Guidance for Reclamation and Bonding of On-Channel Reservoirs that Store Coalbed Natural Gas Produced Water*, August 2005, *available at* http://deq.state.wy.us/wqd/WYPDES_Permitting/WYPDES_cbm/downloads/BONDING_GUIDANCE-CBM.pdf (last visited Apr. 1, 2009) [hereinafter Implementation Guidance].

[66] Fortunately, the WDEQ maintains a chart on their website that distills the question of whose remediation and bonding regulations apply to an elementary process. *See* Wyoming Department of Environmental Quality, *Reservoir Bonding and Reclamation Guidance*, *available at* http://deq.state.wy.us/wqd/WYPDES_Permitting/WYPDES_cbm/cbm.asp (last visited Apr. 1, 2009).

invasive weeds and other undesirable flora.[67] The bonding is intended to pay for reclamation of the impoundment after production has ceased if the operator does not conduct such operations himself.

The non-federal off-channel regulations of impoundments are the province of the Commission and the OSLI. Section 1(r) of Chapter 4 of the regulation effective February 11, 2008 and promulgated by the Commission requires completion of "Form 14A" for construction and maintenance of produced water pits. Additional information may be required by the Commission if the land affected by the impoundment meets the Commission definition of a "critical area" as defined in Chapter 4.

With respect to "off-channel" impoundments, the WDEQ first enacted rules in 2002 and 2004 that attempted to address the issue of contamination caused by use of surface impoundments.[68] These rules were superseded in September 2006.[69] Because of contamination concerns, the WDEQ announced steps necessary for issuance of new CBM water discharge permits whereby the operator using the discharge impoundment demonstrates, through groundwater monitoring and geochemical sampling of the surrounding soils, that the produced water will not degrade shallow aquifers to a lower classification. Monitoring is to continue through all phases of production. This mandated sampling will eventually delineate statewide areas with clean water that require less control and areas with polluted discharge that may require the prohibition of the use of impoundments. The WDEQ has divided the Powder River Basin into smaller drainage areas, making the policy flexible enough to deal with areas of differing levels of contaminates.[70]

Bonding where BLM rules apply is based upon a professional engineer's estimate of reclamation costs for the impoundment. The Commission requires a bond based upon the written estimate of a professional engineer. WDEQ bonding requirements are as follows:

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[67] Implementation Guidance, *supra* note 66.

[68] Wyoming Department of Environmental Quality, Water Quality Division, *Compliance Monitoring for Groundwater Protection Beneath Unlined Coalbed Methane Produced Water Impoundments*, November 2008 (Revised), http://deq.state.wy.us/wqd/groundwater/downloads/CBM/8-1043-Compliance%20Monitoring%20and%20Siting%20Requirements_Impoundments_Oct%2008revision%20_2_%20with%20doc%20num%20and%20Attachments.pdf (last visited Apr. 1, 2009) [hereinafter Compliance Monitoring]; *Off channel Unlined CBM Produced Water Pit Siting Guidelines for the Powder River Basin, Wyoming*, Guidance Document, Wyoming Department of Environmental Quality, August 6, 2002.

[69] Compliance Monitoring, *supra* note 68.

[70] *See Watershed-based WYPDES Permitting Schedule for the Power River Basin, Wyoming*, a map maintained on the website of the WDEQ.

(1) $7,500 for on-channel impoundments less than 5,000 cubic yards of earthwork;

(2) $12,500 for on-channel impoundments less than 5,000 cubic yards of earthwork;

(3) For on-channel impoundments greater than 10,000 cubic yards of earthwork, the security amount must be based upon a certified professional engineer's estimate of reclamation including costs to remove all ancillary equipment.[71]

These bonding requirements include a 3.0% inflationary escalation scale.

Remediation requirements across the agencies all have similar aspects. For example, the WDEQ requires that topsoil be set aside and replaced if the impoundment is to be reclaimed and not left for the landowner. Harmful evaporates like halite must be removed after production ceases and the impoundment filled. The soil must meet WDEQ Land Quality Division specifications. Once the original grade is reconfigured and the topsoil replaced, the producer is required to "seed and mulch the area with a native grass and shrub seed mixture, unless the landowner specifies some other seed mixture consistent with the use."[72]

Secondary development of CBM can be achieved by enhanced stimulation techniques such as hydraulic fracturing. This technique involves high-pressure injection of fluid (generally water), and in some places sand, into a CBM-bearing formation. The high-pressure fluid fractures the reservoir and the sand enters the cracks, propping them open. The fluid is then drawn out, but the sand remains, keeping the cracks open to enhance production. Complaints have occurred when diesel fuel used as a surfactant in the injection fluid caused bacteria blooms in nearby water wells. However, once use of diesel fuel was voluntarily curtailed as an injection fluid additive, the Environmental Protection Agency found that injection or "frac'ing" fluid presented no danger to groundwater in a study that looked at wells in eleven coal basins and compared the results of over 200 peer-reviewed studies.[73]

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[71] *Id.* § 5(f).

[72] *Id.* § 5(c).

[73] ENVIRONMENTAL PROTECTION AGENCY, EVALUATION OF IMPACTS TO UNDERGROUND SOURCES OF DRINKING WATER BY HYDRAULIC FRACTURING OF COALBED METHANE RESERVOIRS, EXECUTIVE SUMMARY, June 2004, http://www.epa.gov/safewater/uic/pdfs/cbmstudy_attach_uic_exec_summ.pdf (last visited Apr. 1, 2009) (providing the results of the study).

### 2. *Site Remediation*

Generally, impoundments must be remediated within one year of the date of last use.[74] Because of their possible use to surface owners, and because CBM-produced water can often be put to beneficial surface use, produced water impoundments may be left undemolished with the approval of the WDEQ if not subject to other regulations. If the impoundment is to be left in place, however, a written agreement executed and notarized by the surface owner expressing a willingness to accept future responsibility for the impoundment and its potential contents describing the location, size, and including a cost estimate for pit demolition prepared by a professional engineer with expertise in pit remediation, must be approved by the WDEQ.[75]

The level of remediation required is not expressed clearly in the regulations. Unlike plugging operations, the potential cost of site remediation is more variable and often depends on state mandates governing the level of remediation and the climate of the area, whether arid or humid. For example, restoring a pad site to the exact same look it had before development takes longer and requires more work in arid regions where the foliage can take decades to return. Wyoming is an arid state—foliage cannot be expected to grow back at the same rate as in a humid state like Louisiana. The close well spacing necessary for optimal development of CBM (without directional drilling) requires a thick network of roads to access each ten acre site, crosshatching former wilderness with potentially unsightly and dusty roads and dotting it with impoundments. Conversely, some ranchers like the roads because it gives them better access to their land and impoundments filled with high quality water may be welcome.

## C. *The "Implied Covenant to Restore" & Troubling Damage Awards—the Louisiana Experience*

The above exposition on regulations governing the surface footprint of CBM development represents mandated surface use limitations and remediation rules rooted in concern related to surface and groundwater quality. These regulations appear to not require surface remediation or use limitations based on any other presuppositions.

A common worry of producers and operators is liability for environmental damage. Awards for damage to the surface—making companies liable for unreasonable damage to the surface estate—has made the operators more conscientious about working with surface owners and acting with a lighter touch. The informal and non-mandated meetings between developers and land owners

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[74] WOGCC Reg. Chap. 4, § 1(qq).

[75] *Id.*

to discuss future mineral development common in the production industry evidence this awareness.

While some states, by statute or regulation, require that developers remediate certain disruptions to the surface estate, as for example the aforementioned mandated remediation of impoundments in Wyoming, no state legislature or court has instituted an implied covenant to restore the surface. Recently, however, Louisiana courts and juries delivered a Faustian jambalaya of disturbing portents for operators in that state. First, in *Corbello v. Iowa Production*,[76] the Supreme Court of Louisiana affirmed a $33 million award for breach of an express covenant in a surface lease requiring restoration of the surface, holding that for breach of contract, the costs of restoration are not limited by the fair market value of the property restored. The court opined,

> [W]e decline to set forth a rule of law . . . that in cases of breach of a contractual obligation of restoration in a lease, the damage award to [the surface owning] plaintiffs must be tethered to the market value of the property. To do so would give license to oil companies to perform their operations in any manner with indifference to the aftermath of its operations because of the assurance that it would not be responsible for the full cost of restoration.[77]

No promising lights shine down this road. In addition to the mistake of "tortifying" contract law, the potential for astronomical damages, where the amount rewarded is no longer "tethered" to any realistic measure of the land, is immense. The potential for economic waste is also heightened: most prospective acreage is leased many times as generations of explorationists use new technology to wring more from fields. Even if the money collected in damages is actually put into remediation such that the land is returned to its (alleged) original shape, much remediated land is simply leased again, with the same damage done—and the same improvements, such as canals and roads, being re-dug and re-slashed.

Next, consider the "implied covenant to restore" the leased acreage. In *Terrebonne Parish School Board* ("TPSB") *v. Castex Energy, Inc.*,[78] a Louisiana Court of Appeals majority ruled that under the Louisiana Mineral Code

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[76] 850 So. 2d 686, 694–95 (La. 2003).

[77] *Id.* at 695.

[78] 878 So. 2d 522, 528 (La. App. 1 Cir. 2004) (petition for cert. accepted as No. 04-C-968 in La. S. Ct.).

§ 31.122,[79] "there is an obligation to restore the surface of the land subject to an oil and gas lease despite the lack of an express provision so requiring." This implied obligation is "to restore the surface of the lease premises as near as is practical to its original condition." The judgment was amended to provide that defendants "are solitarily obligated to TPSB for the restoration to TPSB's property to a condition as near as practicable to its pre-lease condition." Prior to the decision, Louisiana jurisprudence did not require lessees to restore the land used for gas and oil production unless either an express agreement was reached in writing with the lessor, or the lessor gave proof that the operator had been negligent and caused unreasonable damage to the surface or engaged in excessive use.[80] The majority did not balance restoration costs against the fair market value of the acreage, nor the fact that the surface owner intended to re-lease the property again for mineral development. Instead, the majority focused on, *inter alia*, the "intrinsic value" of Louisiana's swamps to society,[81] the "global-wide benefits restoration of this state's wetlands provide",[82] and what the lower court perceived to be "the rich reward of the oil industry."[83] Any implied duty invoked by Louisiana Mineral Code § 31.122 must be tied to the prudent operator standard, yet in *Terrebonne* no evidence existed that a reasonably prudent operator would have backfilled the canals in question or that construction of the canals was an unreasonable use of the land and not in accordance with common industry practice.

Fortunately, the Louisiana Supreme Court reversed this decision in a split decision in January 2005.[84] The high court of Louisiana opined:

> Although the temptation may be to thrust a great part of the solution to the problem of coastal restoration upon the oil and gas companies and other private parties, rather than the state and federal governments currently faced with underwriting the expense of restoration, we decline to do so out of respect for the terms of the mineral lease to which the parties agreed.[85]

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[79] LA. REV. STAT. ANN. § 31:122 (2009).

> A mineral lessee is not under a fiduciary obligation to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor. Parties may stipulate what shall constitute reasonably prudent conduct on the part of the lessee.

*Id.*

[80] Rohner v. Austral Oil Exploration Co., 104 So. 2d 253, 255–56 (La. App. 1 Cir. 1958).

[81] *Terrebonne*, 878 So. 2d at 19.

[82] *Id.* at 20.

[83] *Id.* at 19.

[84] Terrebonne Parish Sch. Bd. v. Castex Energy Inc., 893 So. 2d 789, 801 (La. 2005).

[85] *Id.* at 792.

The decision of the Louisiana court of appeals—and the subsequent reversal by the Louisiana Supreme Court—represent points on a continuum that the courts and legislature of Wyoming need to consider and choose wherein they will lie. The effect of *Corbello* and the decision of the court of appeals in *Terrebonne*, if applied in tandem, would certainly make producers think twice about land use, perhaps making them back off altogether from exploration. Taken together, even if a lease lacks any express requirement for remediation of the leasehold back to "original" condition, an implied covenant has been found to exist requiring this remediation—and the damages for breach of this implied covenant will not be limited by the market value of the leasehold.

### *D. Analysis and Recommendations*

Natural gas is a clean-burning fuel, the production of which should be facilitated responsibly. CBM development allows economic benefits to flow into the state and enhances national security by decreasing dependence on foreign liquefied natural gas ("LNG"). Development of CBM should not be discouraged by the threat of completely unreasonable surface remediation damage awards and outrageous punitive damages.

Happily, with the rules enacted by the WDEQ in 2004 controlling water quality standards for, and monitoring of, impoundments, Wyoming has taken a big step towards responsible CBM development. Of course, the state must vigorously follow up on the data garnered by the reporting mechanisms in these regulations to see if the problems caused by contaminated water disposal are being alleviated. If this proves not to be the case, the state may need to consider financial mechanisms to ensure responsible drilling and water disposal, keeping in mind that the real test for whether any bonding-supported remediation system works is when the exploitation ceases because of lower prices. Blanket bonds and lowered bond requirements for long-time producers should never be allowed and each impoundment should always have a specific bond covering it.

Should bonding beyond that necessary to insure reclamation of impoundments be required for remediation of possible surface damage in Wyoming? No other state requires bonding for surface remediation by developers, although several states have some peripheral ways of raising money for surface remediation. For example, Texas sets aside a portion of the oil spill cleanup fund for site remediation. The Oklahoma Energy Resource Board[86] (the "OERB") performs some surface remediation along with its primary mission of plugging orphaned wells. The OERB is funded through a voluntary one-tenth of one percent assessment on the sale of oil and natural gas in Oklahoma. Any producer or royalty owner who does not wish to participate in the program can apply for a refund, but historically, 95%

[86] Oklahoma Energy Resource Board, http://www.oerb.com (last visited Apr. 1, 2009).

of all contributions remain in the OERB's coffers. In no state, however, is surface remediation afforded anywhere near the priority of orphaned well plugging.

Each well site is different and many variables control the type of surface damage that might occur; thus predicting the amount necessary to require for such a bond is likely to be fraught with a great deal of speculation. Bonding for surface remediation should probably be considered only if other surface remediation remedies do not assist with the problem, and if adopted, should only be required in the amount necessary to remove obvious signs of development, such as removal of leftover equipment, the plowing-up of service roads, the leveling of unwanted water impoundments, and development leftovers of that nature.

Also, when considering mandatory site remediation bonding and the measure of potential damages being considered for the establishment of bond values, the diminution of land value if remediation is not made should typically be the value used to set the bond, not the cost to remediate the land back into the exact same condition that existed before development. This paradigm recognizes a couple things. Foliage grows more slowly in the West and while an area may require replanting, the replaced fauna should not have to mimic immediately the original fauna. Also, land is often re-leased, and Lessee A should not necessarily have to remediate land back to pristine conditions just before the land is re-leased to Lessee B, who then develops the lease in much the same way Lessee A had done. In other words, what is the sense in remediation of a roadway or canal one lessee built just so that the next lessee can rebuild it?

Classification of the produced water must recognize that various levels and types of pollutants exist in different areas. Furthermore, the WDEQ might want to address whether localized small scale degradation really matters. If no one will use the water in or near that location, expensive measures to maintain water quality may not be necessary or practical. Flexibility is the key—water produced varies in quality statewide, a fact recognized by the WDEQ in its recent regulations.

If responsible companies follow state-established procedures, their liability should be reduced, particularly when considering punitive damages. It makes sense to limit awards to the value of the land or the price it takes to remediate it, whatever is less. Finally, awards for surface damages ought to go toward remediation—not into the pockets of plaintiff's attorneys and landowners who then turn around and re-lease the land to another developer. The state has no interest in seeing surface damage claims turn into a lottery for plaintiffs and a payday for mercenary plaintiff attorneys while the problems of surface damages remain unsolved. Finally, hydraulic fracturing fluids do not pose a threat to groundwater and so do not logically factor into any bonding scheme or any surface damage calculations.

Surface owners should not be able to recover for surface damage occurring before purchase of the property when such damage was discovered before purchase in the absence of the assignment of such a claim. Suits of this sort typically are difficult to win. For example, a Texas appellate court recently ruled that a cause of action for injury to real property accrues to the person who owns the property at the time of the injury and, absent an express assignment of the cause of action to a subsequent owner, the current owner lacks standing.[87] Additionally, allowing landowners to recoup the full cost of remediation for pollution caused by contamination from orphaned wells—instead of just the diminution in value—is seen as a litigation-based stimulant because it would open the door to increased liability for contamination. Agencies and courts are struggling with damage awards for common surface damages such as those caused by the presence of leftover production equipment and surface pollution. The case law, as described below with regards to recent developments in Louisiana, can yield frighteningly huge judgments when total remediation is required. Like full remediation of surface damages, requiring full remediation of an aquifer contaminated by orphaned wells—particularly an aquifer away from any productive use—may result in astronomical judgments. Limiting recovery to the diminution of value, unless reckless conduct or willful conduct is involved, takes economic factors into consideration, promotes mineral development, and prevents economic waste.

One pleasant side effect of the new regulations concerning CBM development and its impact on groundwater is that by addressing—if only in some aspects—the topic of groundwater, surface water, and site remediation, Wyoming courts will have some legislative landmarks in which to ground their opinions in the inevitable cases that will arise as the CBM boom continues in Wyoming. Jurisprudence will hopefully develop such that Wyoming will follow the more conservative models for surface restoration. Heeding the cautionary tale of Louisiana, no implied covenant to remediate a leasehold back to its original condition—particularly in arid Wyoming—should exist, and surface damage awards should at least be tied to the fair market value of the land.

## IV. BONDING AND ORPHANED WELLS

### *A. Introduction*

The recent increase in gas prices combined with the relatively shallow depths required for a successful CBM well has led to a dramatic increase in the number of wells drilled in Wyoming and neighboring states and the decrease of the average spacing between wells. A vehicle to properly plug and abandon wells left

[87] Exxon Corp. v. Pluff, 94 S.W.3d 22, 27 (Tex. Comm'n App. 2002). In addition, the court ruled no express or implied duty existed for the oil company to remove oilfield materials from the property.

as orphaned wells was needed. This led many states to require operators put up a bond before drilling so that if an insolvent operator does not properly plug and abandon a non-productive well, the state can pay to have the well plugged. Orphan wells present the problem of contamination when water migrates to shallow aquifers through leaks in casing or cement behind casing. A properly plugged well has a cement barrier preventing the flow of saline-rich waters in contaminated aquifers into fresh water aquifers closer to the surface. Improperly plugged or completely unplugged wells do not have the cement barrier and present a contamination threat. The cost of plugging wells varies widely, averaging about $12,500–$15,000 for traditional oil and gas wells, but occasionally costing much more. No technology presently exists to restore a regionally contaminated aquifer.

### *B. Current Wyoming Regulations*

Wyoming requires a compliance bond to drill in the state, which is collected by the Commission.[88] The size of the bond for drilling is dependent on the depth of the well. Bonds for wells less than 2,000 feet are $10,000 for an individual bond or $75,000 for a blanket bond. A blanket bond is a single bond that covers all the wells in a certain area, typically a state. Wells deeper than 2,000 feet require a $20,000 individual bond or, as before, a $75,000 blanket bond. Wyoming's requirements for bonding necessitate an additional bonding up to $3 per foot for idle wells in excess of 8,300 feet or 25,000 feet, depending on the bond in place. Currently, five options exist for companies to choose from:

(1) Owner's surety bond ($10,000 or $20,000 as applicable)

(2) Owner's blanket bond ($75,000)

(3) Letter of Credit

(4) Certificate of Deposit

(5) Cash (cashier's check)

On state lands, the bond of the producer is paid to the Wyoming Commissioner of Public Lands in the amount of $10,000 for an individual well or $100,000 for a blanket bond.

### *C. Orphaned Well Problems—the Texas Experience*

The best way to consider Wyoming's possible future regarding bonding is to consider Texas' past. The biggest change, and the cause of the greatest howl among the regulated in Texas, is the Texas Railroad Commission's (the "RRC")

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[88] Wyoming Oil and Gas Conversation Commission, *Chapter 3: Operational Rules, Drilling Rules,* http://soswy.state.wy.us/RULES/rules/6913.pdf (last visited Apr. 1, 2009).

move towards substantial and universal bonding. Universal bonding, without opportunity for additional deposits, "good guy" grandfathering, or other alternatives to bonding, is the ultimate destination of producer security regulation in Texas.

Texas has perhaps the greatest problem with orphaned wells, and it is one of the missions of the RRC[89] to prevent the orphaning of wells and to oversee the proper plugging and abandonment of orphaned wells. In order to produce in Texas, at least in theory, a prospective operator must prove to the state that it is financially capable of properly plugging and abandoning its wells. In 2004, Texas had about 355,000 wells, 112,013 shut-in (nonproductive) wells and 242,932 productive wells. By the end of January 2004, higher risk, unbonded companies operated 7,313 wells. The RRC rules require operators to plug/abandon or shut-in wells, but industry insiders suggest this is not rigorously enforced. For example, loopholes can be used to circumvent this requirement. An operator is allowed to treat an entire lease as a single entity. So, for example, if there are ten wells on a lease and only one is a producer, then the other nine holes need not be plugged until the one well stops producing. By the time that happens, the operating company may be bankrupt. The likelihood of bankruptcy increases as the production decreases over time because wells with dwindling production typically get sold down the company "food chain" so that wells circling the drain of economic viability are common in the portfolio of financially unstable corporations. These companies often go out of business, orphaning a large group of wells in one fell swoop. In a few cases, unbonded operators intentionally accumulated inactive wells and striped the wells of salvage. Then they went out of business, orphaning many wells at once.[90]

The current public plugging mechanism for orphaned wells in Texas, the Oilfield Cleanup Fund, does not cover the cost of plugging orphaned wells, a problem made worse by the fact that many operators cannot be made to pay because of subsequent bankruptcy. Until recently, unbonded operators in Texas managed to perpetually avoid plugging wells by paying a $100-per well licensing fee annually. This fee could be paid in lieu of plugging the well properly.

Legal and equitable remedies can be a challenge to landowners. If saltwater from an unplugged oil well contaminates freshwater wells on an adjoining piece of land, that landowner can bring a "trespass suit for damage to land." This has a two-year statute of limitations, tolling from "first injury"—*not* from detection of

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[89] The Texas Railroad Commission regulates oil and gas operators within Texas. Railroad Commission of Texas, http://www.rrc.state.tx.us (last visited Apr. 1,2009).

[90] Personal communication, Professor Owen Anderson—Eugene Kuntz Chair of Oil and Gas, University of Oklahoma College of Law, 2004.

the injury. Two recent cases, *Walton v. Phillips Petroleum Co.*[91] and *Exxon v. Pluff*,[92] have limited a landowner's recovery for damages to diminution of the land's value, not cost of remediation. Furthermore, "trespass suit for damage to land" does not include attorney's fees. Those fees are deducted from any award—a deduction that could discourage plaintiff's attorneys.

After the implementation of new bonding rules, producers in Texas had the following two options to satisfy the necessity of fiscal assurance that they will properly plug and abandon wells:[93]

(1) A bond or letter of credit based on the total footage of the wells operated; or

(2) A bond or letter of credit based on the number of wells operated.

Prior to making the financial requirements more strictly controlled, concern existed that these changes would make it difficult for small operators to stay in business. This fear has apparently not materialized. Although the number of operators did indeed drop annually from 2001–2003, this seems merely a continuation of the drop in the number of active operators that has steadily declined since before 1990; subsequently, the number of operators is increasing considerably. The cost to maintain an inactive company has increased from $100 to $1000 in March 2002, thus increasing the incentive for owners to finally shut down long-lingering inactive companies. In addition, company registration costs with the state went from the $300–$1000 range to $300–$1125 over the same period. The bottom line appears to be that operators that are not financially solvent enough to post an adequate bond are far more likely to not properly plug and abandon a well.

The RRC's other tactics for solving the orphan well problem have been threefold. First, a limit to the transfer of inactive wells has been suggested, keeping unproductive wells attached to the companies who originally owned—and are liable—for them. Further, it is suggested that the number of plugging extensions, via dodges like the $100/year fee, has been curtailed. Increased funding of the RRC's plugging program through increased fees, a more robust bonding and letter of credit plan, and more vigorous state action in going after offenders with substantial fines are all beginning to better address the orphan well problem.

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[91] Walton v. Phillips Petroleum Co., 65 S.W.3d 262, 272 n.3 (Tex. Comm'n App. 2001).

[92] 94 S.W.3d at 22.

[93] *Bonding Requirements for Oil & Gas Exporters: Hearing Before the H. Energy Resources Comm.,* (Tx. 2004) (testimony of Michael Williams, Commisioner of The Railroad Commission of Texas) http://www.rrc.state.tx.us/commissioners/williams/newscenter/House_Energy_Testimony_3-24.pdf (last visited April 5, 2009).

### *D. Alberta*

On the other end of the spectrum is Alberta, Canada, whose regulatory experiences with orphaned wells are much less problematic. The well plugging authority in Alberta is the Orphan Well Association (the "OWA") that operates with fiscal independence under authority of the Alberta Energy and Utilities Board (the "AEUB"). Of course, Alberta has fewer wells to worry about (and less people to complain about them) than Texas and also has been aided by a more proactive approach toward remediation and plugging. First, reasonable attempts are made by the agencies to recover money from responsible parties before wells are determined to be orphaned. After a well is deemed orphan, the OWA can conduct the orphan abandonment plan. The AEUB receives funding from two sources. The first source is the Orphan Fund levy, where funds are collected from the "upstream" oil and gas industry with each company being levied based on its proportionate share of "deemed liabilities" compared to total industry deemed liability. In the past, the agency has based the annual levy for the orphan fund on the number of inactive wells each company held at the end of the previous year.[94] The second source of funds is a first time licensee fee. Recently, revenues were increased because of an increase in applications for a *first time* licensee fee for each operator. This fee is $10,000 and is charged to each new company wishing to hold well licenses.

### *E. Analysis and Comment*

Preventing orphaned wells is a two-step process. The first is to prevent a rush of financially unstable producers from beginning development. The second is to assure that state conservation efforts to manage production of oil, gas, and CBM through pooling and unitization do not encourage economic waste and needless wells that could be orphaned, as happened in Texas.

In order to ensure that funds are available for the proper plugging of orphaned wells, Wyoming should assume *every* well will be orphaned and plugging costs will ultimately be borne by the state. The necessity of this assumption was lain bare by the unfortunate scenario that unfolded in Texas when the RRC's orphaned well prevention and remediation program—a scheme that included blanket bonds[95] and non-bonding schemes such as licensing fees and "good guy" reductions—did not provide enough money to properly plug and abandon holes. Wyoming's goal should be to set up bonding requirements so that each company's bond can cover

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[94] Interestingly, in 2001 and 2000, the annual levy was set at zero per inactive well to *reduce* the growing Orphan Fund balance and to match the decreased activity level of orphan abandonment and reclamations in 2000. The levy was set at zero based on the reasoning to only take money from the upstream oil and gas industry when it was required. Orphan Well Association of Alberta 2002–2003 Annual Report.

[95] A blanket bond is one bond that covers more that one well. Thus, one bond could cover many or all wells in a single company's portfolio.

that company's orphaned well responsibility. Furthermore, the money collected should be tied to a particular well so that, if well ownership changes hands, the state would continue to hold the funds necessary for covering the cost of plugging and abandoning the well. This is particularly important within the realm of CBM development. CBM wells are typically quite shallow, particularly when compared to oil wells. Typical depths are 500 to 1,500 feet for these wells. Wells of this depth can be quickly, easily, and cheaply drilled. This business thus attracts all manner of developers, and the state must keep a tight rein on development in order to prevent the financially challenged, capital constrained, or irresponsible operators from converging on Wyoming and then departing suddenly when the prices fall again, leaving their responsibilities for remediation, well plugging, and surface damage costs unmet.

Recent changes in Texas law may provide Wyoming a good starting point of view, particularly if focused through the lens of CBM production. Texas' problems with orphaned wells are rooted in the fact that the bonding procedures were not responsive to maneuvers by producers short on cash but savvy to various 'outs' that could be used to avoid responsibility for properly plugging and abandoning wells. In addition, before reforming their well-bonding measures, Texas allowed the following three options for producers as alternatives to well bonding:[96]

(1) A $100 annual fee if the operator had 48 consecutive months of acceptable operation under remediation statutes and regulations.

(2) A fee equaling 3% of the otherwise applicable bond amount described in the first two options.

(3) A lien on tangible personal property in an amount equal to the otherwise applicable bond amounts in the first two options.

Wyoming's regulatory position would be much stronger if a requirement existed mandating the collection of money via a bond to plug a well if the producer proves unable to do so. Each well could have money specifically earmarked for that particular well, rather than a pool of money provided by a blanket bond. In other words, Wyoming should act as if *every* well will be orphaned and the state will have to pay to plug it. The shallow depth common to CBM wells, combined with the size of Wyoming and the state's allowance of one CBM gas well per forty or eighty acres, means that active producers of CBM will hold a large number of wells in their portfolio. If the producer pays the blanket bond, then the money

[96] After September 1, 2004, these three options were no longer available in Texas. All operators are now required to have a bond, letter of credit, or to make a cash deposit.

available for plugging potentially abandoned holes is lessened for each. As Texas has done, all options—save a well-specific bond or letter-of-credit—should be forever eliminated. These options have proven ineffective in providing money to plug orphaned wells in Texas, often placing the burden on companies who do fulfill responsibilities, landowners, and taxpayers.

Furthermore, a change in control of a well need not reduce the amount of money available to plug the well. If a portfolio of wells is passed from one operator to another, the state-held funds to plug each well via a bond can remain at the pre-sale level. Here again, limitation of the blanket bond is apparent. For example, a producer could acquire a multitude of marginal wells and then go out of business, leaving only a blanket bond to cover plugging all the orphaned wells in the company's portfolio. Eliminating the blanket bond and going to a per-well bond requirement will require companies to devise methods, such as establishing escrow accounts or performance bonds, or using the direct approach of having the new company augment money held in the state with its own cash. As an added feature, regulations could have a built-in mechanism for increasing the bond amounts should costs and inflation escalate.

Other solutions to the problem of orphaned wells exist. Lease forms are often off-the-shelf and used with little foresight. If the model lease forms drafted and endorsed by the American Association of Professional Landmen ("AAPL")[97] were made more remediation-friendly, the number of orphan wells abandoned in the future could be attenuated.[98] Another suggestion is requiring every oil company in Texas to annually plug a certain percentage of the shut-in wells on its inventory. For example, the company could be required to plug 5–10% of shut-in wells in their portfolio annually.[99] Additionally, a prescription limiting the amount of time a company has to plug such wells could be imposed. "Whole lease" provisions—loopholes that allow an operator to wait on plugging an unproductive well until drilling and production on the whole lease ceases—ought to be eliminated. Combining regulatory responsibility for groundwater and surface

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[97] American Association of Professional Landmen, http://www.landman.org/ (last visited Apr. 1, 2009).

[98] Loire Woodward Cantu, *On a Collision Course*, CATTLEMEN, May 2004, *available at* http://www.texascattleraisers.org/issues/2004/0504/collision.asp (last visited Apr. 1, 2009). This article mentions several problems and suggestions regarding orphan wells in addition to bonding, such as changing the model lease forms, requiring the proper plugging and abandonment of a certain percentage annually of each operator's portfolio of orphaned wells, and elimination of "whole lease" loopholes. *Id.*

[99] This provision could potentially eliminate wells that might return to production under better economic conditions. If such a provision were ever adopted, care would have to be taken to require plugging of wells clearly below any threshold of realistic future economically-sound productivity, while also allowing the shut-in of wells that could realistically be reworked and made profitable with higher oil prices.

water into one agency, as opposed to dividing it between the Texas Commission on Environmental Quality[100] and the RRC, respectively, is touted by some as a solution to inconsistent regulatory enforcement.[101]

One of the greatest causes of orphaned wells and ensuing pollution, surface disruption and damage, and economic waste are unnecessary wells kept afloat by conservation schemes incentivizing "small parcel" wells by marginal producers. In Texas, state coddling of small producers and the refusal to mandate orderly field development through unitization and spacing has resulted in a plethora of unnecessary wells produced by unstable operators.[102] This phenomenon is particularly ominous for Wyoming. Boom conditions, combined with the shallow depth common to CBM wells with small proration units, means that producers of CBM will end up with a lot of wells in their portfolio. If the producer pays a fixed blanket bond, then the money available for plugging a potentially abandoned hole is lessened for each producer as the producer's portfolio increases. For the same reasons, all options, save a well-specific bond or letter-of-credit, should be eliminated. Furthermore, the change in control of a well should not in any way affect the money available to plug the well. If a portfolio of wells is passed from one operator to another, the money that the state holds to plug each well via a bond should remain at the level it was before the sale. This will prevent financially unstable operators from orphaning a multitude of wells with one bankruptcy.

Finally, if a well produces water fresh enough to be an asset to the surface owner, an option could exist for a producer to assign a well to a rancher. The rancher might want the water from the CBM well for irrigation or livestock. This complicates the orphan well issue, but the water well could be a resource for surface owners or the state.

## APPENDIX A:
## A SURVEY OF SURFACE DAMAGE ACTS—EAST & WEST

What follows is a glimpse at the various SDAs currently enacted, with analysis split into SDAs in the western and eastern United States.

### *SDAs in the Western United States*

North Dakota and Montana have been previously discussed.

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[100] Texas Commission of Environmental Quality, http://www.tceq.state.tx.us/ (last visited Apr. 1, 2009).

[101] *See* Cantu, *supra* note 7, at 7–8.

[102] Jacqueline Lang Weaver, *The Federal Government as a Useful Enemy: Perspectives on the Bush Energy/Environmental Agenda from the Texas Oilfields*, 19 PACE ENVTL. L. REV. 1, 15 (2001).

Oklahoma does not require that surface damages be paid as a matter of course, but the behavior of the mineral owners suggests they believe the SDA of Oklahoma creates an obligation to pay for any and all damages suffered by the surface owner.[103] Arbitration of damages is conducted by three assessors—one appointed by the landowner, one appointed by the producer, and the third appointed by the other two.[104] If the appraisers, by majority vote, decide no compensation is owed, none is due, but the landowner can appeal. Upon appeal to a court, if the court's judgment is less than that of the appraisal of damages, the landowner will not receive attorney fees as part of the damages. Often what occurs is that the landowner will "lowball" or "sandbag"—slang used by lawyers for purposely quoting an unreasonably low damage estimate—on the appraisal because he knows he is going to go to court anyway. Then, in court, the landowner will be sure to get a judgment far over what was agreed upon, thus assuring attorney fees.[105]

In South Dakota, the SDA[106] requires the mineral developer to give written notice to the surface owner at least thirty days prior to the beginning of operations. The notice is to go to the address of the surface owner as ascertained by the county records for the land to be subject to development. The notice shall be explicit enough to allow the surface owner to approximate the disruption and damage that the mineral development will cause.

The amount of surface damages may be determined using any method both sides agree upon. Damages can be paid in annual installments, but the surface owner can only be compensated for harm caused by exploration with one single lump sum payment. In addition, the payment is to be to the titleholder of the land and assignment or reservation of such compensation is prohibited unless

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[103] Ronald W. Polston, *Surface Rights of Mineral Owners—What Happens When Judges Make Law and Nobody Listens?*, 63 N.D. L. REV. 41, 55–56 (1987). In a survey conducted by the author, producers of forty-six of forty-seven wells drilled accepted responsibility for some measure of surface damages. One operator, when asked why he paid, simply responded with a copy of Oklahoma's SDA. Owen Anderson, a professor of oil and gas law at the University of Oklahoma, has said that surface owners and tenants generally know the "going rate" of surface damage settlements in the area around their land and seem to expect something akin to that value whatever the particular scenario involved. He said that surface owners routinely expect some measure of payment. (From a special talk given in conjunction to Owen Anderson's 2003 Oil and Gas Law class at the University of Oklahoma College of Law.)

[104] Bruce Stallsworth, in his article *Legislation Hits Mid-Point; Oil and Gas Bills Progress—Surface Damage Reforms* in the April 2004 edition of *WellHead* April 2004, noted that two bills currently in committee Oklahoma (HB 2541 and SB 1296) contain language that will require that all three appraisers used in a surface damage settlement be state-certified. These bills have met resistance from landowners. Bruce Stallsworth, *Legislation Hits Mid-Point; Oil and Gas Bills Progress—Surface Damage Reforms*, WELLHEAD, April 2004.

[105] Producers in Oklahoma jocularly refer to this as "getting Munsoned."

[106] *See* S.D. CODIFIED LAWS §§ 45-5A-1 to -11 (1997).

made to a surface lessee. The mineral developer is to pay damages to the surface owner equal to the amount of damages sustained for:

(1) Loss of agricultural production;

(2) Lost land value; and

(3) Lost value of improvements caused by mineral development.

The surface owner, in order to receive compensation, must give the mineral developer notice in writing of damages sustained within two years that the damage became apparent or should have been apparent.

Unless controlled by another written agreement, the mineral developer, within sixty days of receipt of damages sustained by the surface owner, must make an "offer of settlement." This must be accepted or rejected within sixty days of receipt of the offer of settlement. If rejected, the surface owner can seek redress in court of proper jurisdiction. In a clause not mentioned in any other SDA, this SDA expressly does not apply to vehicles traveling on state highways.

*SDAs in the Eastern United States*

Speaking generally, SDAs east of the Mississippi are more prone to expressly provide specific items for which surface owners can expect recovery and more tightly stipulate notice, negotiations with the surface owner, and periods during which the mineral owner can proceed with development. What follows is a list of the high points and quirks of each of the SDAs in eastern states.

West Virginia's SDA[107] does not require that the mineral developer give the landowner notice of entry.[108] Items that require compensation are enumerated in the law as are the surface damages that may be recovered for them if an offer of

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[107] *See* W. VA. CODE §§ 22-7-1 to -8 (1998).

[108] W. VA. CODE § 22-7-7 (2009). The oil and gas developer must pay damages to cover compensation to the surface owner for any of the following:

(1) Lost income or expenses incurred by mineral developers occupation.

(2) Market value of crops destroyed.

(3) Damage to water supplies.

(4) Cost of repair (up to replacement value) of personal property.

(5) Diminution of value of the surface after completion of the mineral development.

All other common law claims remain intact. The surface owner, in order to receive compensation, must give the mineral developer notice in writing of damages sustained within two years of the time that the damage became apparent or should have been apparent. Unless otherwise provided by written agreement, the mineral developer must, within sixty days of giving of notice of damages, either make an offer of settlement or reject the claim. *Id.*

settlement fails. The alternative to court action is an arbitration method carefully delineated in the statute.[109]

Tennessee's SDA[110] is very similar. A list of items requiring compensation after notice is listed in the statute.[111] The developer must then respond, offering either a settlement or rejecting the claim. Upon either rejection of the demand for damages or the offer of an unacceptable settlement, the surface owner can choose to seek compensation in court or through arbitration.[112]

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[109] W. VA. CODE § 22-7-7 (2009). Within sixty days of notice of rejection of the surface damage claim by the mineral developer, the surface owner can either (1) bring an action for compensation in the court of proper jurisdiction; or (2) decide to have his compensation finally determined by binding arbitration. The arbitration committee consists of three arbitrators—one picked by the surface owner, one picked by the mineral developer, and the third selected by the first two. If the first two arbitrators cannot agree on a third arbitrator, the matter will be turned over to the circuit court of the county wherein the surface estate lies. *Id.*

[110] *See* TENN. CODE ANN. §§ 60-1-601 to -608 (1989).

[111] TENN. CODE ANN. § 60-1-604 (2009). The oil and gas developer must pay the surface owner for:

> (1) Lost income or expenses incurred as a result of being unable to use land actually occupied by the driller's operation or to which access is prevented by such drilling operation for the purposes it was used prior to commencement of the activity for which a permit was obtained, measured from the date the operator enters upon the land;
>
> (2) The market value of crops destroyed or damaged;
>
> (3) Any damage to a water supply in use prior to the commencement of the permitted activity;
>
> (4) The cost of repair of personal property up to the value of replacement by personal property of like age, wear and quality; and
>
> (5) The diminution in value, if any, of the surface lands and other property after completion of the surface disturbance done pursuant to the activity for which the permit was issued, determined according to the actual use made thereof by the surface owner immediately prior to the commencement of the permitted activity.

Any surface owners who want to receive compensation must notify the oil and gas developer by certified mail, return receipt requested, of the damages sustained by the person within three years after the injury occurs. *Id.*

[112] TENN. CODE ANN. § 60-1-607 (2009). If the surface owner wanting compensation receives a written rejection, rejects any counter-offer of the oil and gas developer, or receives no reply, he may bring an action for compensation in a court of proper jurisdiction. If the amount of compensation awarded by arbitration or the court is greater than that which had been offered by the oil and gas developer, the person seeking compensation shall also be awarded reasonable attorney fees, costs of expert witnesses, any other costs which may be legally assessed, and interest on the amount of the final compensation awarded from the day drilling was commenced. This scheme avoids the lowballing seen in Oklahoma, as the surface owner cannot give an artificially low damage value because the producer can take him up on it, whereas in Oklahoma, the surface owner can give a low value, then refuse anything the arbitrators come up with and go to court assured the judgment will be larger than his previous bogus damage value.

Illinois' SDA[113] contains two clever stipulations. First, the developer is required to give notice and offer to negotiate with the surface owner.[114] Second, the producer must obtain a certificate from the state assessor's office providing state clearance to drill.[115] The surface owner is encouraged by the statute to meet with the producer—failure of the surface owner to contact the operator at least five days prior to the proposed commencement of drilling operations is conclusively deemed a waiver of the right to meet by the surface owner. The surface owner is entitled to reasonable compensation from the mineral producer for damages caused by the drilling operations.[116]

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The surface owner, instead of bringing an action in court, can request the mineral developer to deliver in writing by certified mail, return receipt requested, that compensation be determined by binding arbitration. If the oil and gas developer agrees to binding arbitration, the mineral developer shall notify the surface owner of consent to arbitration in writing within fifteen days of receiving the request. In the event of binding arbitration, compensation to be awarded the surface owner shall be determined by a disinterested arbitrator chosen by the surface owner and the oil and gas developer from a list of arbitrators approved by the American Arbitration Association—although the statute does not say how they choose. *Id.*

[113] *See* 765 ILL. COMP. STAT. 530/1–530/6 (2001).

[114] 765 ILL. COMP. STAT. 530/4 (2009). The operator must give written notice prior to the commencement of drilling.

This notice includes:

(1) The location and date of entry;

(2) Photocopy of the drilling application submitted to the Department of Natural Resources;

(3) Name, address and phone number of the applicant; and

(4) Offer to "discuss" with the surface owner the following:

(a) Placement of roads

(b) Points of entry

(c) Construction and placement of pits

(d) Restoration of fences to be cut

(e) Use of water

(f) Removal of trees

(g) Surface water drainage changes caused by drilling operations.

*Id.*

[115] 765 ILL. COMP. STAT. 530/4 (2009). This certificate identifies the surface owner(s) and, once approved, acts as conclusive evidence as to the identities of surface owners—somewhat akin to a division order—*and* acts as proof of producer's compliance with the SDA.

[116] 765 ILL. COMP. STAT. 530/6(A) (2009). In Illinois, compensation must be paid in a manner "mutually agreeable" to both the surface owner and the mineral developer. *Id.* at (B). However, the failure to agree upon the amount *will not* prevent the mineral operator from beginning operations, although compensation will be made within ninety days of completing the well. If compensation is not made, or not made to the level requested, the surface owner's remedy is a lawsuit. In addition, the mineral developer can only use that portion of the surface reasonably necessary for mineral development. *Id.*

Kentucky also has an SDA[117] that is very similar to that found in Illinois. A certificate of ownership is required, as is notice to the surface owner, the requirements of which are expressly listed in the statute.[118] The surface owner can recover for damages to crops, structures, etc. The payment shall be made in accordance with whatever is agreeable to the parties, *but a failure to agree shall not prevent a mineral developer from entering the land*. The operator must pay the surface owner within ninety days of completion of the well. If the payment is not made, or if no agreement is reached in the amount of the surface damages, then the surface owners can seek a judgment. Finally, as in the Illinois statute, surface restoration is also required.[119]

## APPENDIX B:
## CASE LAW REGARDING COALBED METHANE DEVELOPMENT IN WYOMING AND MONTANA

In December 2005, the Ruckelshaus Institute of Environment and Natural Resources, in conjunction with the University of Wyoming, delivered to the office of the governor of Wyoming the "Water Production from Coalbed Methane Development in Wyoming: a Summary of Quantity and Management Options." The "Ruckelshaus Report" contained summaries of the amount of CBM development in various parts of Wyoming, the specifics of CBM development, scientific reports on contamination of surface and groundwater by CBM produced water, and suggestions as to what steps should be taken to govern the process of permitting produced water impoundments as well as other facets of CBM development. This report created controversy, particularly with the pro-CBM production contingent within the Wyoming legislature, some of whom apparently used the report as a reason to vote against certain funding initiatives for the Institute and the University because of what they saw as anti-CBM sentiment within the report.[120] The Ruckelshaus Report mentioned six cases then currently

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[117] *See* KY. REV. STAT. ANN. § 353.595(5) (2000).

[118] KY. REV. STAT. ANN. § 353.595 (2009). Within ninety days prior to the giving of notice to the surface owner, the mineral developer must get from the Property Valuation Office a certification which identifies the correct surface owner for the land on which development is intended. *Id.* § 353.595 (3)(b). This will act as conclusive evidence of surface ownership. The mineral producer must also provide notice of impending operations, including information such as drilling location and contact information. *Id.*

[119] KY. REV. STAT. ANN. § 353.595(7) (2009).

> In conjunction with the plugging and abandonment of any well or the reworking of any well, the operator shall restore the surface and any improvements thereon to a condition as near as practicable to their condition prior to commencement of the work. The surface owner and operator may waive this requirement in writing, subject to the approval of the department that the waiver is in accordance with its administrative regulations.

[120] *Freudenthal Says University of Wyoming Needs to Be a Place of Free Expression*, LOCAL NEWS 8 ONLINE, Jan. 26, 2008.

in litigation concerning actions, mostly by environmentalist groups, against state and federal government agencies in Wyoming and Montana for issuing permits allowing CBM developments. These types of actions have typically been the first wave of litigation to meet natural resource development on state or federal lands in other states for other uses. Later, private disputes with less-idealistic bents became more common. Since the CBM boom in Wyoming is still fairly novel, the second wave of private litigation has not yet developed. Below are detailed the five cases mentioned or cited within the Ruckelshaus Report on pp. 38–39.

*Pennaco Energy, Inc. v. U.S. Dept. of Interior*[121]

In *Pennaco*, a dispute arose involving three leases that were auctioned off by the BLM in the Powder River Basin. Environmental groups sued the BLM claiming that the agency failed to follow proper procedure according to the National Environmental Policy Act ("NEPA") prior to leasing BLM land for CBM production. The BLM depended on two environmental reports to demonstrate its compliance with NEPA. The first report was called the Buffalo Resource Management Plan Environmental Impact Statement ("Buffalo RMP EIS"). This report was published in October 1985 and did not address environmental issues specific to CBM production. The second report, the Wyodak Coal Bed Methane Project Draft Environmental Impact Statement ("Wyodak DEIS") was published in 1999 and addressed post-lease environmental issues relating to CBM production.

The court ruled the BLM failed to meet NEPA's pre-lease environmental reporting requirements. Neither the Buffalo RMP EIS nor the Wyodak DEIS were found to be sufficient to satisfy NEPA's requirements. The Buffalo report was written prior to the explosion of CBM production in the area, and was written to address the environmental impact of regular oil and gas operations which differ substantially from the environmental impact of CBM production. The Wyodak DEIS addressed *post-lease* CBM-specific environmental impact from CBM production, and therefore, was not sufficient for NEPA's pre-production reporting requirements. Several subsequent opinions have cited this case.

*Northern Plains Resource Council v. United States Bureau of Land Management*[122]

This case was brought by another environmental group seeking to curtail development, but with a twist—*before* this case was filed, the Federal District Court of Montana had found that the BLM's initial Environmental Impact Statement ("EIS") was inadequate. This dispute arose to determine the extent to which

[121] Pennaco Energy, Inc. v. U.S. Dept. of Interior, 377 F.3d 1147 (10th Cir. 2004).

[122] N. Plains Res. Council v. U.S. Bureau of Land Mgmt., No. CV 03-69-BLG-RWA (D. Mont. Apr. 5, 2005).

CBM production and development could continue pending the completion of the BLM's final EIS. This time around, the issue involved the scope of the court's order. One side wanted CBM production to be limited to production already in place until the BLM's final EIS report was completed. The other party wanted to follow the BLM-proposed plan to limit growth in production to a defined geographical area with heightened environmental impact requirements, and a cap of 500 new wells per year. An amicus party argued for a larger geographical area, less stringent environmental controls, and more wells per year until the BLM completed an acceptable EIS.

The court ordered that CBM production should follow the course set out by the BLM (limited geographical area, stringent environmental controls, and a cap of 500 new wells per year) but that the BLM must refuse all permits to drill unless the applicant demonstrated compliance with the environmental restrictions.

*Wyoming Outdoor Council v. U.S. Army Corps of Engineers*[123]

The Army Corps of Engineers (the "Corps") issued a certain 'General Permit 98-08' as a way to address the growing need for permits to discharge dredge and fill materials associated with CBM development in the Powder River Basin. Accompanying General Permit 98-08 was a Combined Decisions Document ("CDD") to satisfy the reporting demands of NEPA. The Wyoming Outdoor Council, the Powder River Basin Resource Council, and others challenged the issuance of General Permit 98-08 and the efficacy of the CDD.

The issue the Wyoming District faced in this case was whether General Permit 98-08 and the CDD were arbitrarily and capriciously issued without regard to the standards set by the Clean Water Act ("CWA") and NEPA. The court remanded the case to the Corps to address the problems with General Permit 98-08 and the CDD, and held that the Corps' reports were arbitrary and capricious in:

(1) failing to consider impacts to private ranchlands;

(2) failing to consider cumulative impacts to non-wetland resources;

(3) relying on mitigation measures wholly unsupported by the record; and

(4) inding that cumulative effects on the aquatic environment were minimal without assessing lands other than wetlands.[124]

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[123] Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, No. 02-CV-155-D, slip op. (D. Wyo. Jan. 7, 2005).

[124] Williams Prod. RMT Co. v. Maycock, Decision Letter, Campbell County Civ. Action No. 26099, slip op. (Wyo. 8th Dist. Oct. 11, 2005).

On March 16, 2006, Judge Keith Kautz of the Eighth Judicial District Court of Wyoming resolved a dispute between Williams and Maycock concerning whether there was a state waterway easement to use creek beds on Maycock's land for discharge of water from Williams' CBM development. Because of the infrequency of the water flow within the banks of the creeks in question, the court decided that the creeks were not waterways; therefore, there was no state easement that Williams could use to dispose of the CBM water.

In addition to the preceding five cases, the Institute's report mentioned one dismissed case from Montana which dealt with air quality concerns under the Clean Air Act. This case was dismissed prior to trial according to the Clerk of the Court in the Federal District Court of Montana.[125] Several briefs and motions, however, were still filed in the court as of July 3, 2008.

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[125] Envtl. Def. v. Norton, No. CV-04-64-BLG-RWA (D. Mt.).

COMMENT

# Trading Water for Gas: Application of the Public Interest Review to Coalbed Methane Produced Water Discharge in Wyoming

*C. Stephen Herlihy**

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## I. INTRODUCTION

Coalbed methane has become a productive part of Wyoming's energy industry.[1] The pace of development is frenzied in areas such as the Powder River Basin, where coalbed methane ("CBM") is plentiful and accessible.[2] To be sure, methane gas is a valuable resource; however, the recovery of CBM gas

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* Candidate for J.D., University of Wyoming, 2009.

[1] *See* The Ruckelshaus Institute of Environment and Natural Resources, *Water Production from Coalbed Methane Development in Wyoming: A Summary of Quantity, Quality and Management Options*, University of Wyoming, December 2005, at 5–10 [hereinafter Ruckelshaus Report].

[2] Anne MacKinnon & Kate Fox, *Demanding Beneficial Use: Opportunities and Obligations for Wyoming Regulators in Coalbed Methane,* 6 WYO. L. REV. 369, 370 (2006).

causes a myriad of concerns.[3] This comment addresses a troublesome aspect of CBM development, which is produced water.[4] Specifically, in a race for CBM development, one valuable resource is being traded for another: water for gas.[5] Both resources are important and valuable, yet industry treats the water resource largely as a troublesome bi-product of gas production.[6] Management of produced water in the Powder River Basin of Wyoming and Montana raises some unique issues because of the higher quality and greater quantity of water than is produced in other CBM plays.[7]

A paradigm shift should occur in how the water produced in association with CBM development is viewed and managed within Wyoming.[8] Water in the west is a scarce and valuable resource. Humans depend on water for their very survival. A large amount of readily available groundwater is a valuable and reliable resource that should not be treated as waste bi-product of industry.[9] Long after the gas is gone, people living in the Powder River Basin, and in other CBM hotspots allowing the discharge of produced water, will rely on water for domestic and other uses. As a result, wise management of the associated water should temper the pace of CBM production.[10]

Challenging issues associated with CBM production abound, though the overarching and most contentious theme surrounds the management of discharged CBM water.[11] First, the *quantity* of water brought to the surface in the pursuit of coalbed methane gas has challenged many parties involved in, and those affected

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[3] *See generally* Ruckelshaus Report, *supra* note 1; Sharon Buccino & Steve Jones, *Controlling Water Pollution from Coalbed Methane Drilling: An Analysis of Discharge Permit Requirements*, 4 WYO. L. REV. 559 (2004) (discussing the environmental concerns associated with CBM water).

[4] Ruckelshaus Report, *supra* note 1, at v. "Produced water" is any byproduct water discharged in oil and gas exploration. *Id.* This comment addresses water discharged in the production of coalbed methane.

[5] *See generally* MacKinnon & Fox, *supra* note 2; Thomas F. Darrin, *Waste or Wasted?—Rethinking the Regulation of Coalbed Methane Byproduct Water in the Rocky Mountains: A Comparative Analysis of Approaches to Coalbed Methane Produced Water Quantity Legal Issues in Utah, New Mexico, Colorado, Montana and Wyoming*, 17 J. ENVTL. L. & LITIG. 281 (2002).

[6] *See* Darrin, *supra* note 5, at 283.

[7] *See* Mike Hightower, Managing Coal Bed Methane Produced Water for Beneficial Uses, Initially Using the San Juan and Raton Basins as a Model, Sandia National Laboratories, Power Point, http://wrri.nmsu.edu/conf/forum/CBM.pdf, at slide 1 (this slide shows that water in the Powder River Basin has lower amounts of total dissolved solids, which equates to better quality water).

[8] *See infra* notes 187–238 and accompanying text.

[9] Ruckelshaus Report, *supra* note 1, at vii.

[10] *See* MacKinnon & Fox, *supra* note 2, at 372.

[11] *See* Gary C. Bryner, *Coalbed Methane Development: The Costs and Benefits of an Emerging Energy Resource*, 43 NAT. RESOURCES J. 519, 535–541 (2003).

by, the industry.[12] Second, the water brought to the surface varies in degree of *quality*, posing a set of challenges in its own right.[13] A third emerging issue is the interconnectedness of groundwater.[14] This includes the management of CBM producers within the existing scheme of water law relating to groundwater when the withdrawal of groundwater to capture natural gas affects other groundwater users' water rights.[15] These issues impact a large swath of Wyoming's population, and any current conflicts, as well as those on the horizon, will be exacerbated as CBM production continues to play a major role in Wyoming's energy industry.[16]

Though the problems with water quality are numerous and important, this comment focuses on the quantity of groundwater discharged in CBM production.[17] Much has been written about how to minimize the impacts of the vast amount of water produced by CBM production, yet it is also important to recognize that the water itself is being largely sacrificed for the production of gas.[18] The primary problems associated with the loss of trillions of gallons of groundwater are not fully understood but include aquifer draw-down, which will affect surrounding wells, and the loss of a valuable resource that will likely not be replenished in our lifetime.[19]

This comment argues that the water associated with CBM should not be treated as a waste product of gas production; limits should be imposed on the energy industry to ensure wise use of both resources.[20] The background section introduces coalbed methane development, associated impacts, and the agency management scheme for CBM water.[21] An introduction to the public interest is given, followed by an analysis of the State Engineer Office's ("SEO's") duty pursuant to the public interest review.[22] The State Engineer is the steward of Wyoming's water and can impose limits on the energy industry's production of CBM water through application of the public interest review.[23] Specifically, this

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[12] *Id.*

[13] *See generally* Buccino & Jones, *supra* note 3 (discussing at length issues relating to the quality of CBM water including environmental impacts and management concerns).

[14] *See* MacKinnon & Fox, *supra* note 2 at 380–383.

[15] *Id.*

[16] *See generally* Ruckelshaus Report, *supra* note 1 (discussing conflict areas relating to the CBM industry).

[17] *See infra* notes 45–56 and accompanying text.

[18] *See* Joshua Skov & Nancy Myers, *Easy Money, Hidden Costs: Applying Precautionary Analysis to Coalbed Methane in the Powder River Basin*, A Report of the Science and Environmental Health Network at i (June 2004), http://www.sehn.org/pdf/cbm.pdf.

[19] *See generally* Ruckelshaus Report, *supra* note 1.

[20] *See infra* notes 187–250 and accompanying text.

[21] *See infra* notes 31–98 and accompanying text.

[22] *See infra* notes 99–168 and accompanying text.

[23] *See infra* notes 196–204 and accompanying text.

comment argues the SEO should conduct an identifiable cost-benefit analysis, pursuant to the public interest review, considering the full costs associated with the discharge of produced water.[24]

## II. BACKGROUND

The background section begins with an overview of coalbed methane and produced water.[25] A discussion of the current state of CBM development follows, with particular focus on the Powder River Basin in Wyoming.[26] This section includes a brief introduction to water quality considerations.[27] An overview of the current CBM management scheme sets the stage for an in-depth look at the public interest review.[28] Specifically, this section explores the sources from which the public interest review is derived in Wyoming, which other states require a public interest review, and finally, what some states' public interest reviews actually require of the state engineer.[29] The background section ends with a look at a current Wyoming case involving the public interest review and some of the current actions being taken by Wyoming agencies that address the discharge of CBM produced water.[30]

### *A. Introduction to Coalbed Methane and Produced Water*

Coalbed methane is natural gas located in coal deposits.[31] The gas that producers seek in CBM production is found virtually wherever coal seams exist.[32] This translates into a prevalent resource throughout Wyoming and the United States because coal deposits are widespread.[33] Coalbed methane can be distinguished from traditional natural gas in a number of ways. These differences have led the energy industry to sometimes refer to CBM as coalbed natural gas so as to avoid confusion with traditional natural gas.[34] First, traditional natural gas is found in different geologic structures than CBM, which are often sandstone formations deep within the ground.[35] Second, traditional natural gas does not

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[24] *See infra* notes 205–238 and accompanying text.

[25] *See infra* notes 31–44 and accompanying text.

[26] *See infra* notes 45–56 and accompanying text.

[27] *See infra* notes 57–69 and accompanying text.

[28] *See infra* notes 70–98 and accompanying text.

[29] *See infra* notes 99–147 and accompanying text.

[30] *See infra* notes 148–168 and accompanying text.

[31] Wyoming State Geological Survey: Coalbed Methane Information, http://www.wsgs.uwyo.edu/Coal/CBM_Info.aspx (last visited Mar. 22, 2009).

[32] Darrin, *supra* note 5, at 293.

[33] *Id.*

[34] Ruckelshaus Report, *supra* note 1, at 1.

[35] *Id.* Examples of traditional natural gas fields are the Jonah and Pinedale Anticline Fields, which are located in southwest Wyoming. *Id.*

produce the vast amount of water that CBM production does.[36] Because of the way coal forms, coal seams, where CBM is located, are also aquifers.[37] The valuable methane gas is trapped in the coal seam by the hydrostatic pressure of the water contained in the aquifer.[38] In order to release the gas, water must be discharged to lessen the pressure that keeps the gas in the ground.[39] Because coalbed methane gas is found in aquifers and the aquifer must be dewatered in order to obtain the methane gas, CBM production poses significantly different challenges than traditional natural gas production.[40]

People have known about CBM for centuries, yet only recently has CBM generated interest as a serious and economically viable addition to the United States energy portfolio.[41] In fact, development did not begin until 1987 in the Powder River Basin, and development has yet to reach anything close to nearing maximum capacity.[42] As of 2004, approximately 95% of CBM in the Powder River Basin had yet to be recovered.[43] Because of the relative newness of CBM production combined with the massive amounts of water discharged in the process of obtaining coalbed methane, it is no surprise that management practices are struggling to keep pace with CBM production and associated discharge of produced water.[44]

As of 2007, roughly 26,000 CBM wells have been drilled in the Powder River Basin.[45] About 17,400 of these wells currently produce and another 6,800

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[36] *Id.*

[37] Darrin, *supra* note 5, at 283.

[38] *Id.*

[39] *Id.*

[40] Kristin Keith, Jim Bauder & John Wheaton, *Coalbed Methane Frequently Asked Questions*, Water Quality and Irrigation Mgmt., The Dep't of Land Res. and Envt'l Sciences, Montana State University–Bozeman (2003), http://waterquality.montana.edu/docs/methane/cbmfaq.shtml (last visited Mar. 22, 2009).

[41] Ruckelshaus Report, *supra* note 1, at 1.

[42] *See generally id.*

[43] *Id.* at 1.

[44] *See generally* MacKinnon & Fox, *supra* note 2; Darrin, *supra* note 5; Gary Bryner, *Coalbed Methane Development in the Intermountain West: Producing Energy and Protecting Water*, 4 WYO L. REV. 541 (2004); Buccino & Jones, *supra* note 3; Allan Ingelson, *Sustainable Development and the Regulation of Coal Bed Methane Industry in the United States*, 20 J. NAT. RESOURCES & ENVTL. L. 51 (2005-2006); Wyo. Outdoor Council v. Army Corps of Engineers, 351 F.Supp.2d 1232 (D.Wyo., 2005); Swartz v. Beach, 229 F.Supp.2d 1239 (D.Wyo., 2002).

[45] Jimmy Goolsby & Andy Finley, Coalbed Natural Gas in the Powder River Basin Wyoming and Geology, Goolsby, Finley and Associates, LLC, Power Point (June 30, 2007), http://www.goolsbyfinley.com/presents/prbcbm063007.ppt, at slide 12 (last visited Apr. 17, 2009).

wells have been drilled but do not currently produce because they have yet to be permitted or for some other reason.[46] Roughly 2,000 wells have been plugged and abandoned.[47]

Groundwater extraction, which allows for the release of coalbed methane gas, is at the core of the majority of concerns and disputes regarding CBM development.[48] CBM wells discharge a significant amount of water in the Powder River Basin due to methane gas extraction.[49] By one estimation, as much as 11 trillion gallons of water could be lost during the fifteen to twenty year projected life of CBM production in the Powder River Basin.[50] That is enough water to fulfill the domestic needs of every person who lives in Wyoming and Montana for the next 150 years.[51] Furthermore, up to 5,000 private groundwater wells could be dewatered due to declining aquifers as a result of pumping water to produce gas.[52] By one estimate, this water could be worth as much as $10 billion dollars.[53] A report produced by the University of Wyoming estimated total water production at about 7,150,354 acre-feet of water.[54] There are 325,851 gallons of water in an acre-foot.[55] Total water production by this estimate in gallons is about 2.3 trillion gallons of water. Total gas production is projected to be 31,700 billion cubic feet.[56]

### *1. Water Quality Considerations*

Although this comment focuses primarily on the amount of groundwater discharged in CBM production, the *quality* of the water produced because of CBM development is inextricably tied to the management structure that has been developed.[57] CBM produced water, especially in the Powder River Basin, is notably different than produced water from other oil and gas production.[58] There are two main differences. First, *much* more water is produced in CBM development.[59]

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[46] *Id.*

[47] *Id.*

[48] *See, e.g.*, MacKinnon & Fox, *supra* note 2, at 370.

[49] *See generally* Skov & Myers, *supra* note 18.

[50] *Id.* at 1.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] Ruckelshaus Report, *supra* note 1, at 10. An acre-foot is the amount of water it takes to cover one acre of land one foot deep in water. *Id.* at iv.

[55] *Id.*

[56] *Id.*

[57] *See generally* Buccino & Jones, *supra* note 3.

[58] Darrin, *supra* note 5, at 296–300.

[59] *Id.* at 288.

Second, the *quality* of CBM produced water, especially in the Powder River Basin, is of significantly higher quality than water produced in other forms of oil and gas production.[60]

The quality of CBM water varies, in some cases drastically, from one coal seam to another.[61] The Powder River Basin is the focus of this comment because the quality of the produced water in general is higher than virtually any other coal seams in Wyoming and the west.[62] These quality discrepancies complicate management practices because varying tactics are often employed depending on the quality of produced water.[63] The quality of the water is affected by the amount of total dissolved solids, sodium absorption ratio, and electrical conductivity.[64]

While the quality of CBM produced water varies widely, it is generally better than traditional produced water from oil and gas operations.[65] One significant challenge is that CBM water is both valuable and hazardous.[66] It is valuable and hazardous precisely because there is so much water and the water varies from drinkable to so saline it is unusable and hazardous when discharged.[67] It is true that not all CBM produced water is of high value because of its low quality, yet much of the water can be treated to drinkable standards, though with poorer water quality, more expense is needed to treat it to reach useable levels.[68] As water becomes scarcer, treatment of lower quality water for domestic and stock uses may become a more economically attractive option.[69]

### *B. Current Management Practices for Produced Water in Wyoming*

The current management scheme of CBM produced water is three-fold.[70] The Wyoming Department of Environmental Quality ("WDEQ"), the State Engineer's Office ("SEO"), and the Wyoming Oil and Gas Conservation Commission ("WOGCC") each play a role.[71] The WDEQ oversees the *quality*

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[60] *Id.*

[61] Ruckelshaus Report, *supra* note 1, at 17.

[62] *Id.* The trend in the Powder River Basin is that the water is of higher quality in the shallow coal seams located in the southeast section of the field and decreases in quality as one heads towards the northwest. *Id.*

[63] *See generally* Buccino & Jones, *supra* note 3; Ruckelshaus Report, *supra* note 1.

[64] For a detailed discussion of water quality issues see Ruckelshaus Report, *supra* note 1; Buccino & Jones, *supra* note 3.

[65] *See, e.g.*, Hightower, *supra* note 7 and accompanying text.

[66] *See generally* MacKinnon & Fox, *supra* note 2, at 371–74.

[67] *Id.*

[68] *See* Ruckelshaus Report, *supra* note 1, at 20–30.

[69] *See generally* Buccino & Jones, *supra* note 3, at 581–82.

[70] Ruckelshaus Report, *supra* note 1, at 33.

[71] *Id.*

of water discharged in connection with CBM production through the issuance of Wyoming Pollution Discharge Elimination System ("WYPDES") permits, which is under the umbrella of the National Pollution Discharge Elimination System.[72] The State issues WYPDES permits pursuant to authority from the Clean Water Act.[73]

Responsibility lies with the SEO for managing the *quantity* of produced water.[74] The WOGCC is the permitting body for well construction.[75] Beyond permitting, the WOGCC also manages, reclamation, well spacing and density of well sites.[76] Finally, the WOGCC manages the permitting of "off-channel reservoir containment pits when the only use of the water will be 'water produced in the production of coalbed methane gas.'"[77]

The current management scheme has sparked heated debate and spawned lawsuits by private citizens and interest groups who are unsatisfied with the manner in which CBM produced water is currently managed.[78] As in all conflicts there are two sides.[79] One side asserts that agencies handle water quality and quantity issues satisfactorily within the existing framework.[80] Others argue CBM produced water causes a myriad of serious problems that the current management scheme cannot and has not effectively handled.[81]

The serious problems caused by CBM water are changing Wyoming's landscape right now.[82] These include effects of water quality and quantity to those downstream and the surrounding ecosystem.[83] The ecosystem, in many instances, is not meant to hold the continuous heavy flows produced by CBM

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[72] Wyoming Department of Environmental Quality, WYPDES Coalbed Methane Permits, http://deq.state.wy.us/wqd/WYPDES_Permitting/WYPDES_cbm/cbm.asp (last visited Mar. 22, 2009).

[73] Clean Water Act, 33 U.S.C. § 1342 (2008).

[74] State Engineer's Office, http://seo.state.wy.us/ (last visited Mar. 22, 2009). The SEO requires an application to appropriate groundwater for each CBM well. *Id.*

[75] Ruckelshaus Report, *supra* note 1, at 34.

[76] *Id.*

[77] Wyoming Oil and Gas Conservation Commission, http://wogcc.state.wy.us/ (last visited Mar. 22, 2009).

[78] One such interest group is the Powder River Basin Resource Council, http://www.powderriverbasin.org. Another is the Wyoming Outdoor Council, http://www.wyomingoutdoorcouncil.org. *See also Wyo. Outdoor Council*, 351 F.Supp.2d at 1232.

[79] Ruckelshaus Report, *supra* note 1, at 1–2.

[80] *Id.*

[81] *Id.; see also* Darrin, *supra* note 5, at 288–290; Buccino & Jones, *supra* note 3, at 561–563.

[82] *See generally* Ruckelshaus Report, *supra* note 1; Buccino & Jones, *supra* note 3.

[83] Ruckelshaus Report, *supra* note 1, at 22.

wells.[84] Higher than normal flows cause stream bank erosion and disrupt existing ecosystems.[85] High flows combined with varying degrees of water quality often have negative impacts on the environment.[86] These negative impacts include damage to downstream crops and soils because of relatively high levels of saline in produced water, as well as salt deposition.[87]

### *C. Wyoming State Engineer's Office Management of Produced Water*

Applications by producers to drill wells for the production of CBM are permitted as groundwater wells by the Wyoming State Engineer's Office.[88] The State Engineer is required to grant such a permit application "as a matter of course" if the use is considered a "beneficial use."[89]

Pursuant to the Wyoming Constitution and State statutes, the State Engineer has a duty to take into consideration the public interest prior to approving an application for a well.[90] This comment surveys Wyoming's history regarding the public interest review in the issuance of water permits, as well as how surrounding states have historically applied this doctrine. After a period of relative calm, litigation involving the "public interest review" is heating up.[91]

#### *1. Separation of Water from Coalbed Methane as a Beneficial Use*

Wyoming, a leader in western water law, has always applied the prior appropriation doctrine to administer water rights.[92] The prior appropriation doctrine was developed to make the best use of a scarce resource in the arid western states, and the concept of "beneficial use" is fundamental to the prior appropriation system.[93] The concept of public interest review must be viewed in the context of western water law. A Wyoming statute states, "[b]eneficial use is the

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[84] *Id.* at 20.

[85] *Id.*

[86] *Id.* at vi.

[87] *Id.* at 20.

[88] State Engineer's Office, Guidance: CBM/Ground Water Permits, http://seo.state.wy.us/ (last visited Mar. 22, 2009).

[89] *Id.*

[90] WYO. CONST. art. VIII, § 3; WYO. STAT. ANN. § 41-4-503 (2007); WYO. STAT. ANN. § 41-3-931 (2007); *see also infra* notes 99–113 and accompanying text.

[91] West v. Tyrrell, In The District Court, First Judicial District, County of Laramie, Docket No. 170-063 (Filed May 30, 2008). This recent lawsuit was filed in Wyoming based on the public interest review. *Id.*

[92] Mark Squillace, *A Critical Look at Wyoming Water Law*, 24 LAND & WATER L. REV. 308, 308 (1989).

[93] *Id.* at 323.

basis, the measure and the limit of the right to use water. . . ."[94] This requirement dictates that appropriated water be put to a use that has been deemed "beneficial." Notably, CBM production was not considered a beneficial use of water until recently.[95] The evolution of how the SEO came to have authority to permit CBM wells is significant because no other state takes this view.[96]

The State Engineer has classified water produced in CBM production as a beneficial use of water:

> The State Engineer's Office considers CBM production different than traditional natural gas production. It is similar in that the water is not the object of production; the methane reserve is the target. CBM production is different than conventional gas production due to the necessity for production of water for the production of the gas resource, thus the production of water is a requirement of the production cycle.
>
> The intentional production, or appropriation, of ground water for the CBM production led to the designation of CBM as a *beneficial use* of water and subsequently, to a requirement for a permit to appropriate ground water.
>
> Coal seams in many areas of Wyoming have been and continue to be important sources of ground water to appropriators for uses including, but not limited to, stock and domestic. Wyoming water law requires that water rights be administered on the basis of *prior appropriation*, giving rise to the necessity of permitting all beneficial uses from the water source in question.[97]

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[94] WYO. STAT. ANN. § 41-3-101 (2007).

[95] State Engineer's Office, Guidance: CBM/Ground Water Permits, http://seo.state.wy.us/PDF/GW_CBM%20Guidance.pdf (last visited Mar. 22, 2009).

[96] Darrin, *supra* note 5, at 323-324. Darrin notes:

> Wyoming, unlike any other western state, places CBM water quantity jurisdiction with the state engineer. This model [prior appropriation] does not fit CBM production because . . . only a small percentage of CBM byproduct water in Wyoming can be beneficially used itself. As a result, the rest is wasted. Wyoming did not need to follow this path. It too has the byproduct provision in its oil and gas statute, which vests jurisdiction with the state oil and gas commission to oversee the '[d]isposal of salt water . . . which [is] uniquely associated with exploration and production operations.' However, given that the early wells produced so much water, without any gas, for long periods of time, the State Engineer assumed jurisdiction over the initial diversion from the ground.

*Id.*

[97] State Engineer's Office, Guidance: CBM/Ground Water Permits, http://seo.state.wy.us/PDF/GW_CBM%20Guidance.pdf (last visited Mar. 22, 2009).

The definition of CBM production as a beneficial use of water is important to the discussion because it provides the SEO with authority to control produced water. Because the SEO has authority to regulate CBM produced water, the SEO also has a duty to conduct a public interest review in the course of the CBM permitting process.[98]

### *D. Public Interest Review*

As if to affirm the importance of water in Wyoming, the State's founders imbedded some foundational principles of water law in the Wyoming Constitution.[99] One of these fundamental principles, considered so vital at the birth of Wyoming, is the concept of the "public interest review."[100] The public interest review has become somewhat of a legal flashpoint recently after a long period of relative dormancy.[101] This section explores the concept of the public interest review generally.[102] A discussion of what this review may require of the State Engineer follows in the analysis section.[103]

Water in Wyoming belongs to the state and is retained as property of the state.[104] The State Engineer is charged with the great responsibility of overseeing the appropriation, distribution, and diversion of the state's water.[105] Beginning from this premise—that waters within the state belong to the state—it seems natural that there is a public interest review requirement interposed in the administration of the state's water. While individuals are given a legal right to use water, ultimately the water belongs to the people collectively, and as such, the people's interests should be considered.[106]

This comment asserts that the Wyoming State Engineer has an *affirmative duty* to consider the public interest when reviewing an application for appropriation.

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[98] *See infra* notes 107–113 and accompanying text.

[99] WYO. CONST. art. VIII, § 1; WYO. CONST. art. VIII, § 2; WYO. CONST. art. VIII, § 3.

[100] WYO. CONST. art. VIII, § 1; WYO. CONST. art. VIII, § 2; WYO. CONST. art. VIII, § 3.

[101] Douglas L. Grant, *Two Models of Public Interest Review of Water Allocation in the West*, 9 U. DENV. WATER L. REV. 485, 516 (2006); *see also* West v. Tyrrell, In The District Court, First Judicial District, County of Laramie, Docket No. 170-063 (Filed May 30, 2008).

[102] *See infra* notes 104–130 and accompanying text.

[103] *See infra* notes 196–214 and accompanying text.

[104] WYO. CONST. art. VIII, § 1 ("The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.").

[105] WYO. CONST. art. VIII, § 2.

[106] *See* Ronald R. Robie, *The Public Interest in Water Rights Administration*, 23 ROCKY MTN. MIN. L. INST. 917, 921–923 (1977).

This duty comes from both the Wyoming Constitution and statutes.[107] Both the constitutional and statutory provisions give the SEO the authority to deny an otherwise acceptable application to appropriate water. The constitutional provision states that the SEO shall not deny an appropriation unless "such denial is demanded by the public interest."[108] The language of the two statutory provisions pertaining to appropriations differ.[109] The first appears to be discretionary and the second appears to create an affirmative duty for the SEO to deny an otherwise valid appropriation that is detrimental to the public interest.[110] The language of the first statute reads, "[i]f the state engineer finds that to grant the application as a matter of course, would not be in public's water interest, then he *may* deny the application subject to review at the next meeting of the state board of control"; as opposed to the second statute, which reads "where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, it *shall be the duty* of the state engineer to reject such application and refuse to issue the permit asked for."[111]

Whether the SEO's responsibility to deny a permit that does not comport with the public interest is affirmative or discretionary, the SEO must conduct some

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[107] WYO. STAT. ANN. § 41-3-931 (2007).

> An application for a permit for a well in any areas not designated as a critical area shall be granted as a matter of course, if the proposed use is beneficial and, if the state engineer finds that the proposed means of diversion and construction are adequate. If the state engineer finds that to grant the application as a matter of course, would not be in public's water interest, then he may deny the application subject to review at the next meeting of the state board of control. If the state engineer shall find that the proposed means of diversion or construction are inadequate, or if the application is otherwise defective, he may return the application for correction. If such correction is not made within ninety (90) days, the state engineer may cancel the application.

WYO. STAT. ANN. § 41-4-503 (2007).

> All applications which shall comply with the provisions of this chapter, and with the regulations of the engineer's office, shall be recorded in a suitable book kept for that purpose; and it shall be the duty of the state engineer to approve all applications made in proper form, which contemplate the application of the water to a beneficial use and where the proposed use does not tend to impair the value of existing rights, or be otherwise detrimental to the public welfare. But where there is no unappropriated water in the proposed source of supply, or where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest, it shall be the duty of the state engineer to reject such application and refuse to issue the permit asked for.

WYO. CONST. art. VIII, § 3 ("Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interest.").

[108] WYO. CONST. art. VII, § 3.

[109] *See supra* note 107 and accompanying text.

[110] *Id.*

[111] WYO. STAT. ANN. § 41-3-931 (2007) (emphasis added); WYO. STAT. ANN. § 41-4-503 (2007) (emphasis added).

form of public interest review to determine whether such an appropriation is, or is not, in the public interest.[112] Without conducting such a review, the SEO has no basis for determining whether the application is, or is not, in the public's interest, and subsequently, whether to approve or deny the appropriation. Therefore, the SEO has an affirmative duty to conduct a public interest review when evaluating pending appropriations. The SEO is not currently conducting an identifiable public interest review and should begin viewing CBM well applications through the lens of what is in the public interest.[113]

Black's Law Dictionary defines the public interest as, "(1) [t]he general welfare of the public that warrants recognition and protection. (2) Something in which the public as a whole has a stake; esp., an interest that justifies governmental regulation."[114] Dan A. Tarlock gives the following definition of the public interest review:

> Water is both a private and public resource. Private rights may be acquired by putting water to beneficial use, but states have always reserved the power to limit private use. This power extends to the protection of other users and to the advancement of state or community interest in water allocation.[115]

Generally, a review of the public interest allows the state administrative agency to deny an application for a water right when unappropriated water is available, or to a senior appropriation in favor of a junior user.[116] Initially, this review came down to a cost-benefit analysis, in which the state administrator compared the competing uses and chose the use that he deemed to maximize benefits to the state.[117] As the view of beneficial uses of water expanded to include societies' changing environmental values, the public interest review changed as well. Tarlock notes, "[t]he public interest limitation has taken on added significance as states have incorporated environmental values into water resources allocation and have begun to formulate state water plans that are more than laundry lists of desired projects."[118]

Douglas L. Grant succinctly categorizes historic application of the public interest review using two models: the maximum-benefits model and the other-laws model of review.[119] He defines the maximum-benefits model:

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[112] *See* WYO. STAT. ANN. § 41-4-503 (2007); WYO. STAT. ANN. § 41-3-931 (2007).

[113] Darrin, *supra* note 5, at 335.

[114] BLACK'S LAW DICTIONARY, 1244 (7th ed. 1999).

[115] A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES, § 5:51 (2008).

[116] *Id.* § 5:52.

[117] *Id.*

[118] *Id.*

[119] Grant, *supra* note 101, at 488.

> [t]he core idea behind the maximum-benefits model is that the legislature intended the permitting agency to use public interest review of applications as a tool to maximize the benefits to the community from the water resource. For the agency to do that, it must ascertain a project's benefits and costs, not only to the applicant but also to others in the community.[120]

This contrasts with application of the other-laws model in which the legislature only intended the state engineer to apply the state's water laws, without conducting a cost-benefit analysis.[121] Maximization of benefits to the community is not considered in this model.[122] Rather, applications are granted if they meet the requirements of state law.[123]

A survey of how western states apply the public interest review invites some speculation because the concept is rarely defined and, even then, it is defined with open-ended factors.[124] The ubiquity of the public interest review among western states leads to the conclusion that the writers of each state's water laws saw the public interest review as a vital tool.[125] Oregon, Idaho and Alaska, among others, have defined the public interest review, though Oregon led the way by providing a definition almost 40 years prior to any other state.[126] This early definition called for:

> [c]onserving the highest use of the water for all purposes, including . . . public recreation, protection of commercial and game fishing and wildlife . . . or any other beneficial use to which the water may be applied for which it may have a special value to the public.[127]

Alaska followed suit in 1966 by providing a definition of the public interest that was drafted by the former dean of the Wyoming College of Law and Wyoming

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[120] *Id.*

[121] *Id.* at 489.

[122] *Id.*

[123] *Id.*

[124] *See* Grant, *supra* note 101, at 486; Squillace, *supra* note 92, at 322.

[125] ALASKA STAT. § 46.15.080 (2008); CAL. WATER CODE § 1253 (West 2009); HAW. CONST. art. XI, §§ 1, 7; IDAHO CODE ANN. § 42-222 (2009); MONT. CODE ANN. § 85-2-311 (2008); N.D. CENT. CODE § 61-04-06 (2008); NEB. REV. STAT. § 46-2,116 (2008); N.M. STAT. 1978 § 72-5-7 (2009); OR. REV. STAT. § 537.230 (2009); TEX. WATER CODE ANN. § 11.122(b) (2007); UTAH CODE ANN. § 73-3-8 (2008); REV. CODE WASH. ANN. § 90.03.290 (2009).

[126] Act of Feb. 28, 1929, ch. 245, § 1, 1929 Or. Laws 252-53 (codified as amended at OR. REV. STAT. § 537.170(8)(a) (2005)).

[127] *Id.*

water law archetype, Frank J. Trelease.[128] The Alaska statute lists eight factors to be considered by the state engineer in deciding whether to permit an application for a water right. These factors are:

> (1) the benefit to the applicant resulting from the proposed appropriation;
>
> (2) the effect of the economic activity resulting from the proposed appropriation;
>
> (3) the effect on fish and game resources and on public recreational opportunities;
>
> (4) the effect on public health;
>
> (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation;
>
> (6) harm to other persons resulting from the proposed appropriation;
>
> (7) the intent and ability of the applicant to complete the appropriation; and
>
> (8) the effect upon access to navigable or public water.[129]

Even with the guidance of the factors listed above, application of the public interest review remains nebulous.[130] Few courts have addressed the application of the public interest review, but the following decisions give valuable insight.

### *E. Public Interest Review Case Law*

An early case examining the public interest review is *Young & Norton v. Hinderlider*.[131] In this 1910 case from New Mexico, the territorial engineer, confronted with conflicting applications for the same water, chose Young's later appropriation, over Henderlider's, based on public interest considerations.[132] The territorial engineer stated, "it would not be to the best interests of the public to approve the application of M.C. Hinderlider, thereby forcing the protestants to

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[128] See Frank J. Trelease, *Alaska's New Water Use Act*, 2 LAND & WATER L. REV. 1, 26 (1967).

[129] ALASKA STAT. § 46.15.080 (2008).

[130] *See generally* Grant, *supra* note 101.

[131] Young & Norton v. Hinderlider, 110 P. 1045 (N.M. 1910).

[132] *Id.* at 1047.

pay double price for their water rights."[133] Hinderlider appealed the decision to the board of water commissioners, who reversed the territorial engineer, and used a narrower construction of public interest review stating, "[t]he board is of the opinion that the statute contemplated that the territorial engineer may reject an application if he finds that the project would be contrary to the public interests, in that it would be a menace to the public health or safety."[134]

*Hinderlider* exemplifies how public interest review can be narrowly or broadly interpreted.[135] The territorial engineer appeared to be applying a model of public interest review in which he intended to maximize the benefit of the water to the public, which here, was in the form of lower priced water.[136] The board, on the other hand, seemed to rely strictly on the prior appropriation system basing their decision on the fact that Hinderlider's project was feasible, first, and that there was unappropriated water.[137] The board narrowly construed public interest statute, finding it should only be applied to protect the public health and safety.[138] The New Mexico Supreme Court remanded the case with instructions to the district court to conduct a seemingly detailed cost-benefit analysis of the projects based on the parties' arguments.[139] It is this type of cost-benefit analysis that is argued for here.

A seminal, and much more recent, case regarding public interest review is the Idaho case *Shokal v. Dunn*.[140] Though Idaho did not require the application of a public interest review until 1978, it did not take long before a public interest case made it to the courts.[141] In *Shokal*, the dispute involved the granting of a permit for the withdrawal of 100 cubic feet per second from a creek.[142] The Idaho Supreme Court explored how the public interest review requirement should be interpreted.[143] The court began by surveying the public interest requirements of other western states and adopted Alaska's public interest criteria as a starting point for the consideration.[144] The court remanded the case to the Department of Water Resources to review the permit through a cost-benefit analysis, which

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[133] *Id.*

[134] *Id.* at 1048.

[135] *See generally id.*

[136] *Hinderlider*, 110 P. at 1048.

[137] *Id.*

[138] *See id.*

[139] *Id.* at 1050–51.

[140] Shokal v. Dunn, 707 P.2d 441 (Idaho 1985).

[141] Grant, *supra* note 101, at 501.

[142] *Shokal*, 107 P.2d at 337.

[143] *Id.* at 337–341.

[144] *Id.* at 337–339.

was to include, but not be limited to, factors outlined by the court, which were essentially the Alaska factors.[145] In adopting the Alaska factors and remanding the case so that a cost-benefit analysis could be conducted, the court in *Shokal* adopted a maximum-benefits model of review.[146] In lieu of specific statutory language or case law on the subject regarding how the state engineer is to apply the public interest review in Wyoming, the SEO, legislature, and courts may look to the case law of surrounding states.[147]

### *F. Recent Wyoming Public Interest Review Case Law*

In June 2007, four residents of the Powder River Basin filed a case against the Wyoming State Engineer and Board of Control.[148] The suit alleged the SEO and Board of Control's actions violated the Wyoming Constitution and laws.[149] In their complaint, plaintiffs, the Turners and Wests, collectively alleged that the discharge of CBM water damaged vegetation, soil, and their ability to irrigate their ranches.[150] Plaintiffs further alleged that CBM "water drilling has depleted their ground water wells."[151]

Specifically, "[p]laintiffs claim[ed] the SEO's current practice of permitting and regulating the production and storage of water associated with coalbed methane (CBM) fail[ed] to consider the various public interests affected by CBM production."[152] The Wests and Turners sought a declaratory judgment holding that the State Engineer's permitting practices for CBM wells, which fail to consider the public interest, were in violation of the Wyoming Constitution, Wyoming Statutes, plaintiff's due process rights, and the Wyoming Administrative Procedure Act.[153]

In response to the plaintiffs' complaint, the State Engineer and Board of Control filed a motion to dismiss.[154] The state raised two primary arguments asserting, "[p]laintiffs have not presented a justiciable case, and any action by this court would invade the provinces of the Legislative and Executive branches

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[145] *Id.* at 441.

[146] *See generally* Grant, *supra* note 101.

[147] Another case addressing the public interest with a powerful dissent is *Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 918 P.2d 697 (Nev. 1996).

[148] West v. Tyrrell, In The District Court, First Judicial District, County of Laramie, Docket No. 170-063 (filed May 30, 2008).

[149] *Id.* at 1.

[150] *Id.* at 7.

[151] *Id.*

[152] *Id.*

[153] *West v. Tyrrell*, at 1.

[154] *Id.*

of the Wyoming Government."[155] In the alternative, the SEO argued, "the court should exercise prudential restraint and dismiss the current action."[156] The court interpreted these assertions as two arguments and addressed both in turn.

On the first issue the state appeared to be arguing that the legislature is aware of problems associated with CBM development and it holds the sole authority to act, not the court.[157] Plaintiffs countered this argument by asserting the separation of powers doctrine of checks and balances.[158] Plaintiffs argued that they simply sought the court to rule on "the validity and construction of agency regulations."[159] Ultimately, the court agreed with the Plaintiffs noting:

> Plaintiffs are not seeking to have the Court create new regulations on its own. Instead, plaintiffs seek a declaratory judgment on whether the current permitting process is in accordance with the Wyoming Constitution and laws. Such a determination is within the power of the Court if the Plaintiffs have standing to bring the current action.[160]

The court then addressed the issue of whether the plaintiffs had standing to bring the action against the State Engineer and Board of Control.[161] The court first laid out a test for standing from a United States Supreme Court case, *Lujan v. Defenders of Wildlife*.[162] However, the court did not apply the *Lujan* test, but instead applied a test set forth under the Wyoming Uniform Declaratory Judgments Act. This is a four-element test and the court took each in turn. The elements are:

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[155] *Id.* at 1–2.

[156] *Id.* at 2.

[157] *Id.*

[158] *West v. Tyrrell*, at 4.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–561 (1992). The elements of standing under the *Lujan* test are:

> First, the plaintiff must have suffered 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . traceable to the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

*Id.*

> (1) The parties must have existing and genuine, as distinguished from theoretical, rights or interests.
>
> (2) The controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument evoking a purely political, administrative, philosophical or academic conclusion.
>
> (3) It must be a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in interest, or, wanting these qualities to be of such great and overriding public moment as to constitute the legal equivalent of all of them.
>
> (4) The proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender a thorough research and analysis of the major issues.[163]

The court found that the plaintiffs had satisfied elements one, three, and four, but ultimately found element two unsatisfied.[164] The court stated that for the purposes of the motion to dismiss the defendants had admitted their actions had caused injury to the plaintiffs, so the first element was met.[165] Further, the third element was met because finding a solution to issues associated with CBM water was a constitutional question of great public importance, and that the fourth element was met because the proceedings were genuinely adversarial.[166] As to the second element, the court decided that a decision would not resolve the controversy.[167] The court concluded that a decision would not only not resolve the instant case but that, ". . . any decision by this court most certainly will evoke political, administrative, philosophical, and/or academic debate or argument."[168]

Because the Turners' and Wests' case was dismissed for lack of standing, the court did not reach the merits of the case and so the underlying issues remain unresolved. The Wests and Turners have appealed their case to the Wyoming Supreme Court.

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[163] *West v. Tyrell*, at 7 (citing Pedro/Aspen, Ltd. v. Bd. of County Comm'rs for Natrona County, 94 P.3d 412, 415 (Wyo. 2004)).

[164] *Id.* at 8.

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *West v. Tyrell*, at 8.

### *G. Current Actions Addressing the Discharge of Produced Water in Wyoming*

The issues associated with CBM produced water have not escaped the State Engineer, nor the legislature.[169] The SEO has taken steps to tackle these issues by addressing CBM producers whose wells produce large quantities of water for long periods with no significant gas production.[170] The legislature has acknowledged the issues through the creation of the Wyoming Coal Bed Natural Gas Water Management Task Force ("Task Force"). The Governor also commissioned a report entitled, "Water Production from Coalbed Methane Development in Wyoming: A Summary of Quantity, Quality and Management Options."[171]

The Task Force was created in May of 2006 to address issues associated with CBM produced water.[172] The Task Force was charged with a two-part mission: (1) to review both statutes and regulations relating to CBM produced water, and (2) to evaluate "produced water management and alternatives and options currently available to or used by the coalbed natural gas industry."[173] The Task Force was composed of major players in the management structure of produced water, members of the Legislature, interest groups, and the public.[174] The Task Force proposed some interesting solutions and new laws to better address the management of produced water.[175]

The Task Force made a number of recommendations for the management of CBM produced water, including proposing a pipeline be constructed to facilitate the use or retention of produced water.[176] The task force also recommended that the SEO establish a "threshold water-to-gas ratio necessary for establishing or continuing beneficial use after a period of time."[177]

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[169] *See* Wyoming CBM Water management Task Force, Final Recommendations, Power Point, http://governor.wy.gov/Media.aspx?MediaId=214 (last visited Mar. 22, 2009); Letter by the State Engineer, Review of Existing Coalbed Methane (CBM) Permits to Verify Beneficial Use of Water, (Dec. 11, 2007), http://seo.state.wy.us/Press/2007/121807.aspx (last visited Mar. 22, 2009).

[170] *See infra* notes 169–186 and accompanying text.

[171] Ruckelshaus Report, *supra* note 1.

[172] Wyoming Coal Bed Natural Gas Water Management Task Force, Interim Report, (December 14, 2006), http://209.85.173.104/search?q=cache:zopfXiyKvykJ:cbm.moose.wy.gov/documents/FinalInterimReport.pdf+Wyoming+CBM+Task+Force&hl=en&ct=clnk&cd=5&gl=us&client=firefox-a (last visited Mar. 22, 2009).

[173] *Id.*

[174] *Id.* The Task Force consisted of 15 members: the director of the Wyoming Department of Environmental Quality, Supervisor of the Wyoming Oil and Gas Conservation Commission, Chairman of the Wyoming Pipeline Authority, Wyoming State Engineer, three members representing the coal bed natural gas industry, four members from the Legislature, and one member from the public at large. *Id.*

[175] Wyoming CBM Water management Task Force, Final Recommendations, Power Point, http://governor.wy.gov/Media.aspx?MediaId=214 (last visited Mar. 22, 2009).

[176] *Id.*

[177] *Id.*

The State Engineer has acknowledged the fact that CBM wells can discharge water for years with very little to no gas production to show for the discharged water.[178] In December 2007, the State Engineer sent a letter to ten CBM companies requiring those companies to explain by February 1, 2008, how water being discharged from certain wells was being put to a beneficial use when no gas had been produced over the life of the well.[179] This review of CBM groundwater permits was sparked because, "[a]pproval of a permit to appropriate ground water for CBM production carries with it an expectation that production of gas will proceed in a timely fashion and in such a way as to minimize the impact to the ground water resource."[180] In this letter, the State Engineer reserved the right to cancel permits where CBM operators could not show that the water from their wells was being put to the beneficial use of obtaining gas.[181]

This "show cause" letter was sent to appropriators regarding 296 wells.[182] As a result of this letter numerous actions were taken by the SEO.[183] The SEO issued a second round of show cause letters in August 2008.[184] These letters were sent to forty-three companies regarding a total of 992 wells.[185] This action indicates that the SEO acknowledges some level of water to gas ratio should be enforced, so that CBM wells do not produce water and no, or very little, gas for long periods.[186]

## III. ANALYSIS

The State Engineer and Board of Control should act to reduce the virtually unlimited discharge of produced water.[187] This comment argues the SEO should apply a maximum-benefits model of public interest review as a limit to the virtually

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[178] Letter by the State Engineer, Review of Existing Coalbed Methane (CBM) Permits to Verify Beneficial Use of Water, December 11, 2007, http://seo.state.wy.us/Press/2007/121807.aspx (last visited Mar. 22, 2009).

[179] *Id*.

[180] *Id*.

[181] *Id.*

[182] Telephone Interview with Harry C. LaBonde, Deputy State Engineer, Wyoming State Engineers Office (Mar. 3, 2009).

[183] *Id*. Of the 296 wells at issue in the letters, 197 have had their permits cancelled or are in the process of canceling the permit. *Id.* The permits of 86 wells have been suspended. *Id.* There was a data mistake on 9 permits and 4 permits are still under review. *Id.*

[184] *Id.*

[185] *Id*. The SEO cancelled 192 of these permits and suspended 255 more. *Id.* There was a data error regarding 215 wells that should not have been on the list, while 39 of the wells rarely pumped and were also suspended. *Id.* Finally, 212 of the permits remain active and 79 are still under review. *Id*.

[186] *See supra* notes 178–185 and accompanying text.

[187] *See infra* notes 205–238 and accompanying text.

unlimited discharge of CBM produced water in Wyoming because this discharge does not comport with the public interest.[188] The state legislature should revisit and clarify the SEO's duties pursuant to the public interest review and if the legislature fails in this regard, the SEO should promulgate a set of factors that can be applied.[189] Finally, Wyoming courts should enforce the SEO's duty to conduct a public interest review and should clarify what the review requires, if the SEO and legislature continue to fail to act.[190]

The analysis section begins by examining how the classification of CBM production as a beneficial use of water provides the SEO with the authority to regulate CBM wells.[191] This comment asserts that the SEO has an affirmative duty to consider the public interest when evaluating an application for an appropriation.[192] Since the SEO has taken management responsibility of CBM wells, the SEO has a duty to conduct a public interest review regarding CBM well permitting.[193] A discussion follows of what this review could entail.[194] This comment suggests that the SEO apply a model of public interest review that takes into consideration the full costs and benefits of CBM production.[195]

### *A. Application of the Beneficial Use Principle*

Though the concept of "beneficial use" is not at the core of this comment it is vital to the discussion because defining CBM production as a beneficial use of water provides the SEO with the authority to regulate the quantity of water discharged.[196] Because the State Engineer has classified CBM production as a "beneficial use," each CBM well is required to be permitted by the SEO.[197] The SEO should have control over CBM water because CBM water is Wyoming's groundwater and the State Engineer is the steward of Wyoming's water.[198]

Though the SEO has identified the production of CBM as a beneficial use, he has also introduced the concept of a "further beneficial use."[199] The idea behind a

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[188] *See infra* notes 215–238 and accompanying text.

[189] Squillace, *supra* note 92, at 322.

[190] *See infra* notes 239–241 and accompanying text.

[191] *See infra* notes 196–204 and accompanying text.

[192] *See supra* notes 107–111 and accompanying text.

[193] *See supra* notes 88–98 and accompanying text.

[194] *See infra* notes 205–238 and accompanying text.

[195] *Id.*

[196] *See infra* notes 197–204 and accompanying text.

[197] State Engineer's Office, *Guidance: CBM/Ground Water Permits*, http://seo.state.wy.us/PDF/GW_CBM%20Guidance.pdf (last visited Mar. 22, 2009).

[198] *See* MacKinnon & Fox, *supra* note 2, at 378.

[199] *Id.*; State Engineer's Office, *Guidance: CBM/Ground Water Permits*, http://seo.state.wy.us/PDF/GW_CBM%20Guidance.pdf (last visited Mar. 22, 2009).

"further beneficial use" is that water discharged in the production of CBM, thus meeting the beneficial use requirement, can be put to a "further beneficial use" by a subsequent appropriator who has obtained a water use permit.[200] Despite the challenges in classifying the production of CBM as a beneficial use of water, this is a reasonable determination by the state's administrative agency charged with the management of water.[201] This classification provides the SEO with the authority to regulate the *quantity* of produced water discharged.[202] Though reasonable, the SEO should enforce a strict amount limitation for the withdrawal of water to obtain CBM.[203] The SEO can use authority under the public interest review to establish this limitation.[204]

### *B. Application of the Public Interest Review in Wyoming to Produced Water*

Application of the public interest review in Wyoming has changed over time. Originally, the Wyoming SEO applied a version of the maximum-benefits model, where the SEO conducted a cost-benefit analysis.[205] The current SEO appears to be following the other-laws model, in which the SEO approves permits for unappropriated water that meet the definition of a beneficial use.[206] The maximum-benefits approach should be applied by the SEO because a significant amount of Wyoming's groundwater is being discharged so that gas may be obtained.[207] Further, of the water that is discharged in the Powder River Basin, only a fraction is being put to a "further beneficial use," and aquifers that could serve as valuable sources of water for the people of Wyoming are being dewatered for the sole purpose of obtaining CBM.[208]

What is in the public interest does not remain static.[209] As noted earlier, one definition of the public interest is "the general welfare of the public that

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[200] *See* MacKinnon & Fox, *supra* note 2, at 379.

[201] *Id.*

[202] *Id.*

[203] *See* Darrin, *supra* note 5, at 330–31. The classification of CBM production as a beneficial use of water is perhaps suspect because much of the water is not put to a further beneficial use and arguably wasted. *Id.*

[204] *See supra* note 106–112 and accompanying text.

[205] *See* Big Horn Power Co. v. State, 148 P. 1110, 1110–11 (Wyo. 1915); TARLOCK, *supra* note 115, § 5:52.

[206] *See generally* Grant, *supra* note 101; Darrin, *supra* note 5; Wyoming State Engineer's Office, *Guidance: CBM/Ground Water Permits*, http://seo.state.wy.us/PDF/GW_CBM%20Guidance.pdf (last visited Mar. 22, 2009).

[207] *See supra* notes 45–56 and accompanying text.

[208] *See generally* Darrin, *supra* note 5.

[209] Bruce Babbitt, *Essay: The Public Interest in Western Water Law*, 23 ENVTL. L. 933, 937–941 (1993).

warrants recognition and protection."[210] Dan A. Tarlock notes that "[t]he public interest limitation has taken on added significance as states have incorporated environmental values into water resources allocation and have begun to formulate state water plans that are more than laundry lists of desired projects."[211]

If the SEO chooses, he may conduct a cost-benefit analysis, consistent with the maximum-benefits model of public interest review, when reviewing appropriations for CBM wells.[212] The SEO should apply a set of identifiable factors when conducting this review, so that the people of Wyoming know that their interests, both present and future, have been considered and what that consideration entailed.[213] In the Powder River Basin, a vast amount of water is being discharged to obtain CBM and the SEO appears to be, through his actions of approving CBM well appropriation, condoning that discharge of Wyoming's water wholesale.[214]

### 1. *Unlimited Discharge of Produced Water is not in the Public's Interest*

Because so much of Wyoming's groundwater is being discharged in the pursuit of CBM, the SEO should set forth a list of factors and conduct a formal public interest review to analyze the full costs and benefits of this use of Wyoming's water.[215]

The State Engineer, legislature, or Wyoming courts may consider adopting some or all of the elements contained in other states' water codes so that an identifiable public interest review can be conducted.[216] The elements set forth in the Alaska water code might be a useful starting point.[217] Other water scholars and

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[210] BLACK'S LAW DICTIONARY, 1244 (7th ed. 1999).

[211] TARLOCK, LAW OF WATER RIGHTS AND RESOURCES, *supra* note 115, § 5:52.

[212] *See generally* Grant, *supra* note 101.

[213] *See generally* MacKinnon & Fox, *supra* note 2; Darrin, *supra* note 5; Squillace, *supra* note 92.

[214] *See generally* Wyoming State Engineer's Office, *Guidance: CBM/Ground Water Permits*, http://seo.state.wy.us/PDF/GW_CBM%20Guidance.pdf (last visited 3/22/09); MacKinnon & Fox, *supra* note 2; Darrin, *supra* note 5.

[215] *See, e.g.*, MacKinnon & Fox, *supra* note 2, at 382; Squillace, *supra* note 92, at 322–324; Darrin, *supra* note 5, at 335–338.

[216] *Id.*

[217] *See* ALASKA STAT. § 46.15.080 (2008). These factors are:

> (1) The benefit to the applicant resulting from the proposed appropriation; (2) the effect of the economic activity resulting from the proposed appropriation; (3) the effect on fish and game resources and on public recreational opportunities; (4) the effect on public health; (5) the effect of loss of alternate uses of water that might be made within a reasonable time if not precluded or hindered by the proposed appropriation; (6) harm to other persons resulting from the proposed appropriation; (7) the intent and ability of the applicant to complete the appropriation; and (8) the effect upon access to navigable or public water.

states have suggested their own sets of factors.[218] Whatever set of factors is applied, it should probably be a nonexclusive list, because of the changing nature of the public interest. Further, not every factor is applicable to each factual situation; therefore it may be appropriate to weigh some factors more heavily than others or not at all if they simply do not apply.

In an analysis of the factors set forth in the Alaska statute in the context of CBM production in Wyoming, benefit to the applicant resulting from the appropriation is great. The value of Wyoming CBM production in 2003 was roughly $1.5 billion.[219] In total, the Wyoming CBM resource has been valued at $140 billion.[220] Substantial benefits also lie in the economic value accrued to the state because of royalties paid by energy companies.[221] Expected royalties to be accrued by the State of Wyoming are $12.8 billion over the life of the industry.[222] Another factor that must be considered in this analysis, not present in the Alaska factors, is the boon to the regional and national economies.[223] It is expected that $8.2 billion will go to the county governments and another $2.5 billion to the federal government.[224] The economic activity from the appropriations is undeniably beneficial to the state economy as well by generating jobs and infusing cash into local businesses.

Loss of alternative uses of water that otherwise would be available for future appropriations must be weighed on the opposite side of the scale. In obtaining the gas resource the state is sacrificing a reliable water resource that will not be available for the current and future use Wyoming's inhabitants.[225] Estimates of the amount of water that may be discharged vary greatly, but range from 2.3 trillion to 11 trillion gallons.[226] The population of Wyoming is currently only about a half a million people.[227] CBM hotspots like the Powder River Basin have relatively

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[218] Squillace, *supra* note 96, at 322. The factors suggested by Professor Squillace are:

> (1) The value to both the individual and the community of the use proposed for the water; (2) the extent to which the use represents efficient use of water resources; (3) the extent and value of other uses which may be precluded by the proposed use; (4) the impact of the appropriation on fish and wildlife; (5) the impact of the appropriation on water quality; and (6) the extent to which the appropriation interferes with compliance with local, state, and federal laws.

[219] Ruckelshaus Report, *supra* note 1, at v.

[220] *Id.*

[221] Skov & Myers, *supra* note 18, at 5.

[222] Ruckelshaus Report, *supra* note 1, at v.

[223] *See* ALASKA STAT. § 46.15.080 (2008).

[224] Ruckelshaus Report, *supra* note 1, at v.

[225] *Id.*

[226] *See* Ruckelshaus Report, *supra* note 1, at vi; Skov & Myers, *supra* note 18, at 5.

[227] United States Department of Agriculture, Economic Research Service, http://www.ers.usda.gov/Statefacts/WY.htm (last visited Apr. 17, 2009).

small populations, but as Wyoming's population in these areas grows people will need water for domestic and other uses.

One study applied the principle of "precautionary economics" to exploitation of the CBM resource in the Powder River Basin.[228] The goal of precautionary economic analysis is to "assign[] full value to human health and the environment, taking uncertainty into account and describing full costs and harms."[229] Economic analysis in general strives to construct a cost-benefit analysis in an attempt to determine the value of an action and how those costs and benefits are distributed amongst the public.[230] Ultimately, this study found that the benefits of CBM production in the Powder River Basin heavily favor the energy companies and will occur primarily in the short term, while the costs of production will occur over the longer term and "accrue to the public."[231]

The methodology applied in this study is instructive and described as such:

> Instead of assigning monetary values to all possible costs, we concentrated on trade-offs: a short-term source of natural gas to help meet high short-term demand versus long-term security of water supplies, quality of life, health of surrounding ecosystems, and the viability of existing rural economic activity. We describe who reaps the benefits and who bears the costs, over what time frame. The differences are qualitative, not quantitative. They involve distributions of benefits and costs, lifestyles, and different economic opportunities for the present and future. They call for *choices* based on value and values, monetary and non-monetary. A few numbers with "cost" and "benefit" written next to them cannot tell us how to make those choices.[232]

This study exemplifies the importance of looking at the whole picture, which is what this comment also urges.

The harm to other persons from the proposed use is exemplified in the *West* case, where the Wests and Turners alleged harm from CBM produced water discharge.[233] While some ranchers and others downstream of CBM discharge do

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[228] Skov & Myers, *supra* note 18, at 5.

[229] *Id.* at 2.

[230] *Id.*

[231] *Id.* at 1.

[232] *Id.* at 2 (emphasis added).

[233] *West v. Tyrrell*, at 1.

not always welcome the high flows, especially if the water has not been sufficiently treated, others benefit from added water for irrigation and other purposes.[234]

What is of particular concern to this author is the rate of discharge, which is not necessarily addressed by the Alaska factors because CBM produced water was not a prevalent issue when Dean Trelease generated the list.[235] Wyoming CBM wells discharge water at an average of nine and one-half gallons per minute.[236] Produced water is being discharged at a rate far greater than the rate at which the water can be put to a "further beneficial use."[237] If the rate of discharge were limited to the rate at which the water could be put to a further beneficial use, then it might be possible to wisely use both resources.[238]

### 2. *Wyoming Courts Should Enforce the State Engineer's Duty to Consider the Public Interest in the Permitting of Coalbed Methane Wells*

The recent Wyoming case *West v. Tyrell* may be a harbinger of further litigation seeking to clarify the SEO's duty pursuant to the public interest review requirement. In *West*, the First Judicial District Court did not reach the merits of the argument because the case was dismissed for lack of standing.[239] The Wyoming Supreme Court dismissed the suit for lack of standing as well, holding in part that

> the Plaintiff's claims are simply too general to be justiciable. They do not connect the alleged deficiencies in the State's administration of water to a direct harm they have suffered. Nor do they make a sufficient showing that a ruling by the court will have an actual effect on them.[240]

If the SEO were to consider the public interest, the Wests and Turners interests would be considered along with the needs of the energy industry for the disposal of produced water as demanded by Wyoming law.[241] Alternatively,

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[234] Ruckelshaus Report, *supra* note 1, at vi.

[235] Darrin, *supra* note 5, at 320.

[236] *Id.*

[237] *See id.*

[238] *See generally* Darrin, *supra* note 5; MacKinnon & Fox, *supra* note 2.

[239] *West v. Tyrell*, at 8.

[240] *West v. Tyrrell,* In The Supreme Court, State of Wyoming, 2009 WY 62, S-08-0161, S-08-0162 (Published May, 7 2009), *available at* http://www.courts.state.wy.us/Opinions/2009WY62.pdf.

[241] *See supra* notes 107–113 and accompanying text.

perhaps prospective plaintiffs could find another avenue to bring their case other than the Wyoming Uniform Declaratory Judgments Act. A court that hears such a case will have an opportunity to urge the legislature or SEO to promulgate specific criteria that must be considered in a public interest review and to further conduct a review using these factors.

## IV. CONCLUSION

The CBM boom is in high gear.[242] With energy prices fluctuating wildly and a growing unease over our nation's dependence on foreign sources of energy, domestic energy production has never been more important.[243] It is also important, however, to temper development with the wise use of resources.[244] CBM development should be limited by reasonable use of produced water, which goes hand-in-hand with that development.[245] The State Engineer should apply, and courts should enforce, a model of public interest review that accounts for the full costs of the virtually unlimited discharge of Wyoming's groundwater water.[246]

Long after the CBM is gone, people will remain in the Powder River Basin, as well as other CBM hotspots, and those people will need water. The water that is produced because of CBM development belongs to the people of Wyoming.[247] In other words, it is the people's water. The State Engineer is the steward of Wyoming's water.[248] Because the State Engineer is assigned the weighty task of overseeing the water resource, it is not enough to grant permits simply because a CBM producer has submitted a proper permit for unappropriated water.[249] The State Engineer should not sit on the sideline while trillions of gallons of water are traded for gas; the SEO should conduct a public interest review on the record so that the people of Wyoming know their interests are being formally considered.[250]

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[242] *See generally* Ruckelshaus Report, *supra* note 1.

[243] *See generally* Darrin, *supra* note 5, Mackinnon & Fox, *supra* note 2.

[244] *See generally* Bryner, *supra* note 11.

[245] *See supra* notes 215–238 and accompanying text.

[246] *Id.*

[247] WYO. CONST. art. VIII, § 1 ("The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.").

[248] *See supra* notes 88–98 and accompanying text.

[249] *See supra* notes 215–238 and accompanying text.

[250] *See supra* notes 196–238 and accompanying text.

University of Wyoming
**College of Law**

# Wyoming Law Review

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# GENERAL LAW DIVISION

WYOMING LAW REVIEW

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# AMERICAN PATERNALISM AND THE ONE FUND SOLUTION

*Gordon T. Butler**

The Republicans want an ownership society.
What they mean is that you are on your own. [1]

Barack Obama, 2008

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* Gordon T. Butler (J.D. University of Texas at Austin; LL.M (Taxation) New York University) is a Professor of Law at St. Thomas University School of Law, Miami, Florida.

[1] *See* RAHM EMANUEL & BRUCE REED, THE PLAN: BIG IDEAS FOR AMERICA 43 (2006) ("That was the central promise of Bush's Ownership Society: If Americans agreed to a riskier retirement (or health plan or public school system), went the argument, they'd have the chance to earn a higher return.").

## I. INTRODUCTION

For years Americans have heard dire warning from economists and politicians that Americans save too little and that by saving too little not only will the growth of the American economy be retarded, but individual Americans will face uncertain futures.[2] At the same time Americans are admonished that they must continue their heavy and debt financed spending in order to keep the nation and the world from economic slowdown and recession.[3] The American consumer is the engine of worldwide economic growth and prosperity. Politicians are all too accommodating by providing tax and other incentives to save and to spend.

The result is that America has experienced a party over the last thirty years as the country has low taxes coupled with increased Federal spending financed by the creation of the largest national debt in history and the largest expansion of personal debt ever seen. Americans have also come to the point where a two wage-earner family is the only economic unit able to maintain a respectable household standard of living. At the same time we have been all too willing to overwhelm our children with the burden of starting life with heavy personal educational debt. There is the belief that such burdens can be borne forever since the only question is whether you can pay the accruing interest which is kept at a minimum by an aggressive low-interest monetary policy endorsed by the Federal Reserve. Is there no end to the party? Like other debtors, someday may we be forced to consider liquidating assets? Can we sell Alaska to Russia or Texas to Mexico?

It has been recognized for half a century that children born between 1946 and 1964, called the "baby boomer" generation,[4] will reach the Social Security full retirement age of 66 beginning in 2012. The impact of 78.8 million baby boomers on the social fabric of American culture has been to dominate and change each age group as it passed through that age. It is now poised to cause an enormous strain on the nation's ability to fund the retirement income (Social Security) and health care (Medicare) promises made to them in 1936 and 1966 and enhanced several times along the way.

To meet the needs of the baby boomers and their children the United States Federal Government ("Federal Government") has taken numerous steps by creating incentives under the Federal Income Tax Code (the "Tax Code") for

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[2] RONALD T. WILCOX, WHATEVER HAPPENED TO THRIFT?: WHY AMERICANS DON'T SAVE AND WHAT TO DO ABOUT IT (2008).

[3] How can these two constant refrains be consistent? Perhaps it is simply a matter that we must spend in the short term but save in the long term and no one knows when the short term becomes the long term. Nevertheless, this inconsistency allows politicians to blame every economic problem on the American consumer.

[4] The baby boomers are often broken into the "early boomers," those born between 1946 and 1955, and the "late boomers," those born between 1956 and 1964.

housing, education, health care, retirement, and emergencies (collectively referred to as the "family planning challenges"). All of these areas have been hot topics of conversation in Washington D.C. and are getting hotter as 2012 looms closer. You can see this in recent publications by a former Speaker of the House,[5] the current White House Chief of Staff,[6] a prominent U. S. Senator,[7] a sociologist,[8] an economist,[9] a journalist,[10] a law professor,[11] and a martial artist.[12] All have addressed the issue and proposed solutions. One common thread of these solutions is that they all presume the ability of the Federal government to successfully affect such solutions and to some extent they all predate the current economic crises that may overshadow and undermine the government's ability to carry out any serious reform or even fulfill its promises.

Much of this article will focus on retirement planning because it presents unique challenges in which individuals must be able to understand the long-term impact of investment returns, taxes, and inflation on their planning. In this area economist Teresa Ghilarducci's recent book, *When I'm Sixty-Four*, provides a wealth of information about approaches to funding retirement including a plan to supplement Social Security income and will be discussed extensively in this article.

Part I of this article will consider several problems faced by individuals seeking to save for their future needs and the complexity presented by current incentives facilitated through the Tax Code. Part II will explore various ways families have addressed the family planning challenges and the support for such solutions provided by the Tax Code. Included in Part II will be descriptions of several proposed plans, including the One Fund Solution, to resolve the coming crisis. Part III will discuss criteria for selecting a solution and will advocate the One Fund Solution which recognizes that long-term building of family wealth is the solution that can, over the long term, minimize the role of the Federal Government in individual decisions and allow maximum life choices to a free self-governing people.

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[5] NEWT GINGRICH, REAL CHANGE: FROM THE WORLD THAT FAILS TO THE WORLD THAT WORKS (2008) [hereinafter GINGRICH, REAL CHANGE]; NEWT GINGRICH, WINNING THE FUTURE (2007) [hereinafter GINGRICH, WINNING THE FUTURE].

[6] EMANUEL & REED, *supra* note 1.

[7] SENATOR CHUCK SCHUMER, POSITIVELY AMERICAN: WINNING BACK THE MIDDLE-CLASS MAJORITY ONE FAMILY AT A TIME (2007).

[8] CHARLES MURRAY, IN OUR HANDS (2006).

[9] TERESA GHILARDUCCI, WHEN I'M SIXTY-FOUR: THE PLOT AGAINST PENSIONS AND THE PLAN TO SAVE THEM (2008).

[10] MATTHEW MILLER, THE TWO PERCENT SOLUTION: FIXING AMERICA'S PROBLEMS IN WAYS LIBERALS AND CONSERVATIVES CAN LOVE (2003).

[11] DANIEL SHAVIRO, MAKING SENSE OF SOCIAL SECURITY REFORM (2000).

[12] CHUCK NORRIS, BLACK BELT PATRIOTISM: HOW TO REAWAKEN AMERICA (2008).

The One Fund Solution can be funded by recognition that Federal Paternalism should support a floor or "safety net" for its citizens and insure full, fair, and accurate disclosure of financial information provided within the safety net, but require citizens that desire more than the paternalistic safety net to assume responsibility for building their own wealth and pay current taxes on accumulations. The One Fund Solution is modeled after the traditional whole life insurance policy that has successfully provided a life-time wealth building strategy with minimal investment decisions on the part of the policy holder. The insurance model coupled with the assumption that government has a responsibility to exercise a degree of paternalism to insure people are not left without a "safety-net" can provide the individual with the financial protection needed. At some point the Federal Government must recognize there are limits to the use of tax incentives and if the tax system is stripped of numerous other tax incentives to fund the One Fund Solution there will be sufficient revenue to fund the transition from the current Social Security system over an extended period of time. The key to financial security is that individuals start saving when they are young, coupled with the government providing protection against inflation and taxation. The article concludes that honesty and integrity are the hallmark of free government and that solving a problem that has been building for over 70 years may take 70 years to resolve.

## II. AMERICAN PATERNALISM

In the 1930s the Federal Government undertook to provide a universal retirement income system that would provide a minimal amount of income for each person to live on after reaching age 65. At the time life expectancy was short and funding was minimal. During the 1940s the Federal Government, through its income tax system, promoted employer based health care by providing tax deductions and income exclusions for health care benefits. In 1946 the Federal Government took another step into the economy by undertaking to guarantee full employment for all Americans.[13]

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[13] RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 247 (1954).

> In spite of their failure to end the depression, the policy makers of the thirties did at least present a new philosophy of prosperity. Under this revised concept the source of prosperity was at the bottom of the income scale rather than the top; the restoration of good times depended upon better economic conditions among all groups and all along the economic line. Prosperity was not a class affair, but had to circulate freely throughout the entire population. . . . The core of this philosophy . . . finally emerged in the Employment Act of 1946, which recognized that the Federal government should not stand idly by the wayside when the economy subsided into depression, but rather should assume an affirmative responsibility for the maintenance of employment, production and purchasing power.

*Id.*

In 1966 the Federal Government created the Medicare program to guarantee health care to all Americans reaching age 65. Beginning in the 1970s and continuing to the present time the Federal Government has created tax incentives for American taxpayers to save money through restricted trust accounts to provide for future needs for education, health care, and retirement. Throughout this period, and to the present time, a variety of tax incentives in the Tax Code promoted home ownership. The bottom line is that when considering family planning challenges the Federal Government has become the dominant player and individuals make no decisions without considering the impact of federal authority.

The result of all this federal action is that people have poured money into homes and savings plans on the understanding that they were acting responsibly and playing their part in securing their own future. The effect of all these programs is now being questioned as the value of investments in the stock market plummeted 40–50% in 2008 and the value of homes plummeted 40% or more over two years putting the value of many homes below the amount of mortgages secured by the home.[14]

It was the willingness of Americans to borrow on their homes to obtain a tax deduction for the interest that provided the consumer wealth to fuel the world's economic engine. People now find those dreams evaporating as the financial system borders on collapse and as the Federal Government seems to find unlimited resources to "bailout" every bad decision in the finance and banking communities. The already recognized insurmountable problems of funding entitlements for Social Security and Medicare are now dwarfed as trillions of U.S. dollars are pledged to support the basic structure of the economic system. The banker of last resort is tapping itself to the limit and consequently, there remains no banker of last resort. The artificial prosperity is in danger of evaporation.

Putting citizens on their own in planning for retirement has been facilitated by a finance theory that held that a well balanced portfolio eliminates firm specific risk and the capital asset pricing model permits an investor to minimize risk associated with a given projected return.[15] In other words the investor can

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[14] In a recent editorial, editor-in-chief and billionaire Mortimer B. Zuckerman characterizes the current crises as one of confidence in which the banks and the American people need to begin spending. Zuckerman states, "[n]ot surprisingly, American consumers are hoarding cash, cutting spending to replenish the $10 trillion plus in collective wealth they have lost through declines in their stockholdings and their housing. Individually understandable, collectively disastrous." Mortimer B. Zuckerman, *No Time To Lose*, U.S. NEWS & WORLD REPORT, Mar. 2009, at 80.

[15] An additional principle making investment acumen unnecessary is the efficient capital market hypothesis that posits that in an efficient market all available information is reflected in the current price of the stock. The effect on the market decisions of this principle is as follows:

> If capital markets were perfect, then it would simply not be possible (apart from corruption or a failure to diversify the portfolio across a sufficient number of assets)

take a random walk down Wall Street and select an appropriate fund to meet his general investment objectives and forget about the return because it will be 7–9% over the long term, thereby beating inflation. Recent events call that strategy into question and even if it works as planned the individual investor must be willing to weather the investment roller coaster associated with the volatile movements of stock on Wall Street.[16] It is also important to recognize that saving for retirement is often deferred to the last 10 to 15 years before retirement because the costs of establishing and raising a family capture all available revenue up until age 50.[17]

The uncertainty of the stock market can be seen in a simple example: an individual whose income increases from $40,000 in 1991 to $96,000 in 2009 and invests 20% of his income in a relatively conservative stock mutual fund. If the individual retires on December 31, 2007 the value of the fund is $409,000, but if the retirement is 14 months later the value would have fallen to $237,000 after making the 2008 and 2009 contributions. A bond fund receiving the same contributions over the same period would have produced a value of $356,000.[18]

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> for funds to be badly invested. *Efficient markets ensure that returns are commensurate with risk*, as long as the investment portfolio is sufficiently diversified. Given efficient markets, those that accuse the government of investing poorly therefore must be accusing the government either of corruption, or of choosing a portfolio that does not correspond to the risk preferences of pensioners. With respect to the latter, little evidence is typically presented.

Peter R. Orszag & Joseph E. Stiglitz, *Rethinking Pension Reform: Ten Myths about Social Security Systems, in* THE WORLD BANK, NEW IDEAS ABOUT OLD AGE SECURITY 1, 37 (1999) (emphasis in original).

[16] JEREMY J. SIEGEL, STOCKS FOR THE LONG RUN: THE DEFINITIVE GUIDE TO FINANCIAL MARKET RETURNS AND LONG-TERM INVESTMENT STRATEGIES 140–141 (4th ed. 2008) (questioning the value of the random walk theory, the capital asset pricing model, and the efficient market hypothesis).

[17] It goes without saying that stocks are risky at least over the short-term and for most individuals they will be making their largest investments in the years immediately preceding retirement when other obligations have been discharged. People are generally risk adverse. Orszag & Stiglitz, *supra* note 15, at 17.

[18] The example assumes a 48 year-old individual earning $40,000 in 1991 and getting 5% per annum salary increases. By 2009 he is earning $96,000 per annum. The individual decides to invest 20% of his income in a tax advantaged account over the next 19 years until normal Social Security retirement age of 66. The individual decides to invest in TIAA-CREF mutual funds making deposits into his account at the end of each year. TIAA-CREF is a respected company providing retirement products to the non-profit community for over 90 years. Fund performance data is available back to 1991. *See* TIAA-CREF: Fund Research, http://www.tiaa-cref.org/performance/index.html (last visited March 31, 2009). Over the 19 years the individual would invest $290,000 and the value of that account, if the investment was 100% in the basic "Stock Fund" would be $409,000 on December 31, 2007 but would fall to $237,000 by February 28, 2009. The same investment in the "Bond Fund" would be valued at $356,000 as of February 28, 2009. The example assumes a full year investment in 2009 and that the end of year value equaled the ending value on February 28, 2009. Other investment results for TIAA-CREF funds as of February 28, 2009 under the same assumptions would be: equity index fund—$235,000; social choice fund (a balanced fund)—$287,000; and 3% bank passbook account—$309,000.

Securities lawyers talk about how disclosure can be made user friendly and one wonders whether 200 million Americans want to become investment managers providing adequate monies for their own retirement and medical needs. Indeed one need look no farther than major United States companies such as General Motors to realize that managing wealth for retirees is no easy task. In fact, it is a task many companies are disposing of as quickly as practicable.[19] Even the Federal Government, with its management of revenues to provide for its promised benefits under Social Security and Medicare, has proved incapable of providing a sense of security that people will actually receive the benefits promised.[20]

Americans are admonished by the Federal Government to save. The failure of Americans to save is seen as threatening to the national well being. The savings rate is now less than zero which means that the people are consuming their wealth. On the other hand the American consumer is seen as the world's engine of economic growth. During recent recessions the consumer has been seen as the force in the economy that kept the economy growing. How is it that the American consumer can be both the engine to maintain economic growth and the source of savings to fuel long-term economic growth? Are these contradictory burdens?

Senator Chuck Schumer sees himself as representing the working class American and wants to focus his rhetoric in such a way that they can understand his decision. He has created his average constituent family:

> Joe and Eileen Bailey live in Massapequa, a medium-size suburb in Nassau County, Long Island. They are each 45 years old. Their home is about 30 minutes from the outskirts of New York City, but they don't go into town very often. They have a house, a mortgage, property taxes that never cease to go up, monthly

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[19] In the third of a trilogy of articles addressing minimum funding rules and benefit restrictions on defined benefit plans covered by ERISA and the Internal Revenue Code, the author analyzes the impact of the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006). Kathryn J. Kennedy, *The Demise of Defined Benefit Plans for Private Employers*, 121 TAX NOTES 179 (2008). The author sees the new law as drastically accelerating minimum funding requirements and imposing benefit restrictions on underfunded pensions and as being part of an effort to protect the Pension Benefit Guarantee Corporation against liability for underfunded plans. Pointing out that the stock market decline in the early 2000s along with depressed interest rates produced a "perfect storm" that left many plans underfunded the author concludes that while the purpose of the new rules may be applauded, the effect will be to cripple the approaches employers will have to meeting the new requirements. *Id.* at 180, 181, 201. Finally, the author states: "In response to these new rules, plan sponsors of existing defined benefit plans are drastically freezing accruals under the plans to minimize future plan liabilities, and are moving to defined contribution plans for future accruals." *Id.* at 201.

[20] It is asserted that Social Security is the individual's most secure source of retirement income. GHILARDUCCI, *supra* note 9, at 29. Social Security is not a risk-free investment since it is subject to political as well as long-term funding uncertainties. Shaviro, *supra* note 11, at 40.

> payments for two cars, and three kids in the local public schools. They both work because they want to and because they need to. Joe works for an insurance company and Eileen is a part time administrative assistant at a family physician's practice. They are middle class by New York standards, together earning about $75,000 per year, which translates to about $50,000 in a typical American community.[21]

Schumer goes on to discuss the Bailey's elderly parents, optimistic attitude, worries about the costs of health care and college, the chance of terrorist attacks and a multitude of other concerns that are common discussions around the middle-income kitchen tables in America. For Schumer, the Baileys are always at his side and he speaks to them when he speaks publicly. He wants to make their lives better.

Using the Baileys as our model family let's look at the family's financial plan. Assuming they are fortunate, they can begin their $50,000 income at age 20 when they are married and start life free of debt. They begin only with the American dream. They want a home of their own, college educations for their three children, health care, and a secure retirement. They also should be ready for an emergency. Let's say they need $25,000 in three years as a 10% down payment on a home, $25,000 a year for six years to fund three college educations beginning in 20 years, $25,000 in years 30 and 40 to fund family emergencies, and sufficient funds to retire in 45 years. The Baileys have determined that they can invest 20% of their income toward meeting these family needs. Ignoring inflation and assuming that the Baileys can invest at a 4% rate of return and any internal buildup of investment earnings is not currently taxable, the Baileys will begin retirement with a fund valued at $658,000—enough to allow the Baileys to withdraw $40,000 per year (80% of their pre-retirement income) until they are 91 years old.

This example does not address the Bailey's medical needs. It could be assumed that they are covered by a family health insurance policy provided by the Bailey's employer and in retirement they are covered by Medicare, although the deductibles and the Medicare Part B and D would have to be paid for by the Baileys.

Since the Baileys are saving $10,000 per year they have to decide where they will save so that that the savings can build up in tax favored accounts. Here they have considerable choice since the Tax Code has provided several vehicles. They could invest in a 401(k) or 403(b) plan provided by his employer or one of

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[21] SCHUMER, *supra* note 7, at 23.

several types of individual retirement accounts.[22] Each plan has its own specific characteristics. The contributions may be tax deductible in the year made, or not deductible. If they are not tax deductible they may provide tax free income when the funds are withdrawn later for retirement.[23]

In planning for their children's education they have several investment options including Coverdale accounts that permit limited contributions for each child and allow the monies to grow tax free and be distributed tax free if used for certain educational expenses.[24] The Baileys also have the option of investing in prepaid college funds sponsored by various state agencies that can either provide certain tuition advantages at state colleges or merely provide investment vehicles for college savings.[25] In addition, as the college expenses are incurred, or loans are taken to pay for college expenses, the Baileys will have a number of deductions or tax credits that are available to help mitigate the cost of college by reducing the tax bill the Baileys will pay each year if they pay any tax at all.[26]

As for health care, the cost of the health insurance provided by the Bailey's employer is not considered income to the Baileys, and when claims are filed under the plan the benefits are not taxed to the Baileys.[27] Had they not been covered they may have availed themselves of a Medical Savings Account ("MSA") and purchased a high deductible health insurance policy and invested a certain amount

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[22] I.R.C. §§ 401(k), 403(b), 408 (2008). References to "section" numbers refer to sections in the Internal Revenue Code of 1986 (as amended).

[23] The individual type of investment can have significant impact on a person's savings depending on their marginal tax rate at the time of investment and at the time of distribution. However, assuming constant tax rates the traditional IRA permits tax deductible contributions and the Roth IRA, which permits tax deductible withdrawals, are economically equivalent investments. *Compare* I.R.C. § 408 (governing traditional IRAs) *with* I.R.C. § 408A (2008) (governing Roth IRAs). However, since both IRAs have a $5,000 annual contribution limit, a $5,000 contribution to a Roth IRA represents a larger investment than the same amount in a traditional IRA because the Roth IRA contribution produces a tax free distribution whereas distributions from the traditional IRA are reduced by the taxes paid upon distribution. I.R.C. § 219 (2008). Assuming that both investments have the same rate of return and both taxpayers make equivalent contributions, then the investments are economic equivalents. Further, two contributors to Roth IRAs can have greatly different amounts of tax free income depending on their respective investment choices. MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 765 (6th ed. 2009).

[24] I.R.C. § 530 (2008) permits contributions to a Coverdell education savings account of up to $2,000 per year and permit tax free distributions for qualified educational expenses at the primary, secondary or higher education levels.

[25] I.R.C. § 529 (2008).

[26] I.R.C. § 25A (2008) authorizes tax credits of up to $1,500 for the first two years of post secondary education (Hope Scholarship Credit) and up to $2,000 for education expenses not limited to the first two year of post secondary education (Lifetime Learning Credit).

[27] I.R.C. §§ 105, 106 (2008).

in an MSA to cover out of pocket future costs.[28] If the Baileys were covered by an employer health care policy, then each year the Baileys can set money aside tax free in a "flexible spending" account to provide for medical expenses that are not covered by their health insurance or to cover deductible amounts under the plan.[29]

To avail themselves of all these tax benefits the Baileys need the help of professional planners. With their 2009 gross income of $50,000 per year the Baileys take the standard deduction ($11,400) and with three children they are entitled to five personal exemptions ($3,650 each)—leaving the Baileys with a taxable income of $20,350. This places them in the 15% marginal rate and with tax before credits of $2,217. If their children are not yet 17 they will be entitled to child tax credits of $3,000 which reduces their 2009 federal income tax to zero. For the Baileys this means that the elaborate assortment of tax breaks described in the previous paragraph (other than those provided for employer provided health care) are essentially meaningless. Senator Schumer's New York Baileys making $75,000 per year would have some federal tax breaks but they would be valued at a 10% or 15 % marginal tax rate.

Each year the Joint Committee on Taxation produces the tax expenditure budget estimating the impact of various tax benefits on revenue collections for the current year and for five and ten years in the future. A "tax expenditure" is defined under the Congressional Budget and Impoundment Control Act of 1974 ("the Budget Act") as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability."[30] For the Baileys the above items are all considered tax expenditures. The

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[28] I.R.C. §§ 106, 220 (2008) (providing for Archer Medical Savings Accounts).

[29] I.R.C. § 125 (2008) permits flexible spending plans that reimburse participants for out-of-pocket medical expenses incurred during the plan year provided that an election to defer a specified amount occurs prior to the beginning of a plan year and any funds in the plan not used during the year are forfeited to the employer. *See* BORIS I. BITTKER, MARTIN J. MCMAHON, JR., & LAWRENCE A. ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS 8–40 (3d ed. 2002).

[30] Pub. L. No. 93-344, § 3(3), 88 Stat. 297 (1974). Prior to 2008 the Treasury Department identified tax expenditures as deviations from a "normal" tax base. Since use of a "normal" tax base raised considerable controversy, in 2008 a new approach was followed by classifying tax expenditures as "Tax Subsidies" or "Tax-Induced Structural Distortions." A tax subsidy is "a specific tax provision that is deliberately inconsistent with an identifiable general rule of the present tax law . . . and that collects less revenue than does the general rule." JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2008–2012, JCS-2-08 at 5 (Oct. 31, 2008), *available at* 2008 WL 4874301 [hereinafter JOINT COMM. ON TAXATION]. Tax Subsidies are then divided into Tax Transfers (generally transfers to persons not having a tax liability), *id.* at 11–12; Social Spending, *id.* at 12–18; and Business Synthetic Spending, *id.* at 19–24. Sometimes the categories overlap. For example, the mortgage interest deduction on owner occupied housing could be classified as social spending if it is viewed as consumption or as business synthetic spending if it is viewed as a substitute for income producing investment. *Id.* at 13–14.

lost revenue over the five year period from 2008 to 2012 from tax expenditures affecting the Bailey's tax liability includes the following:

| | **2008–2012 (in billions of dollars)**[31] |
|---|---|
| Employer-provided Health Insurance Premiums | $680.3 |
| Deduction of Mortgage Interest on Owner Occupied Housing | 443.6 |
| Property Tax Deduction (homes) | 112.0 |
| Defined Benefit Pension Plans | 212.9 |
| Defined Contribution Pension Plans | 341.4 |
| Roth and Traditional IRAs | 98.3 |
| Nonrefundable Child Tax Credit | 105.1 |
| Hope and Lifetime Learning Credits (higher education) | 22.6 |
| | **Total $2,016.2** |

These are enormous amounts and the Baileys take advantage of some of them but because of their limited income the Baileys don't get the same benefit as taxpayers with higher incomes in higher marginal tax brackets. Senator Schumer may keep the Baileys in mind but the bulk of the massive tax expenditures pass them by in favor of high income taxpayers.[32]

By injecting itself into these areas of personal living the Federal Government has taken on a major responsibility for housing, health care, education, retirement, and emergency aid. With this massive flow of money into these vital areas one must ask the question about who benefits most and about the impact of such money into the system on prices. Certainly prices for education, health care, and housing have seen incredible increases in recent years. Could it be that government assistance is pushing prices up and out of reach of the Baileys—the very people the programs are designed to assist?

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[31] Tax expenditure values are taken from various charts in JOINT COMM. ON TAXATION, *supra* note 30, at 48–57. Specifically, Employer-provided Health Insurance Premiums, *id.* at 56, Deduction of Mortgage Interest on Owner Occupied Housing, *id.* at 51, Property Tax Deduction (homes), *id.* at 52, Defined Benefit Pension Plans, *id.* at 57, Defined Contribution Pension Plans, *id.*, Roth and Traditional IRAs, *id.*, Nonrefundable Child Tax Credit, *id.* at 55; Hope and Lifetime Learning Credits (higher education), *id.* at 54.

[32] The perverse effect of various tax expenditures was illustrated in 1972 by the originator of the tax expenditure budget who compared two families—one had $200,000 in income and was in the 70% marginal rate and the other earned $10,000 and was in the 19% marginal rate. The first received $70 back from the government for each $100 of mortgage interest on their home while the other only $19. GRAETZ & SCHENK, *supra* note 23, at 58–59. Professor William Andrews, objecting to upside-down subsidies, argued that deductions should be considered as refinements of an ideal personal income tax, the purpose of which is to impose a "uniform graduated burden on aggregate consumption and accumulation." William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 311–313 (1972). Andrews finds many distinctions that are irrelevant to an ideal personal income tax and should be purged from the tax. *Id.* at 316.

We saw how saving 20% of their wages allowed the Baileys to fund a home purchase, education, weather some family emergencies, and have an adequate retirement. We ignored inflation, health care (assuming that was provided by employers and Medicare), taxes, and Social Security. We should now ask the question of the appropriate level of savings. Let's look at the Bailey's wage package (to include the value of major fringe benefits) in a relatively broad way.

| | | |
|---|---|---|
| Basic wage | | $50,000 |
| Family Health Insurance | | 12,000 |
| Employer Social Security contribution | | 3,200 |
| Employer Medicare contribution | | 688 |
| | **Total Wage Package[33]** | **$65,888** |
| Less: | Health Insurance | $(12,000) |
| | Social Security | (6,400) |
| | Medicare | (1,375) |
| | Tithe (the Baileys attend church)[34] | (5,000) |
| | | **Net Income $41,113** |

The Baileys have $41,113 to use for other spending. From that amount they will find that they have to dedicate a portion for medical expenses not covered by their employer health insurance such as physician and drug co-pays, glasses, and other medical supplies that could easily amount to over $1,000 per year. The Baileys must also determine how much they will save. In some respect they are saving $7,775 (11.8%) of their wage package for retirement in the form of Social Security and Medicare.

Since Social Security and Medicare payments are not available for home purchase, education, current health care, or emergencies, the Baileys must save in some other way. Since they have determined to save 20% of their income based on their "base" wage, they conclude that Social Security will provide some retirement income so they will save $3,600 per year in addition to the $6,400 paid to social security. This savings will be used to cover the down payment for the home, education, and emergencies.

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[33] Health insurance, Social Security, and Medicare are included in the Bailey's wage package since if it were not provided by the employer or required by payroll taxes the employer would increase the Bailey's gross wage.

[34] SCHUMER, *supra* note 7, at 24.

> Socially, the Baileys are not anti-authority; in fact, they respect authority. They attend church regularly, though not every week. They accept the structure brought to their lives by religion, work and governmental institutions. They want these structures to be successful and strong, and they are leery of those who seem to always criticize them.

*Id.*

Saving $3,600 per year as set forth above would mean that the Baileys would delay the home purchase because they would need to wait longer to accumulate the down payment, which they would do in year seven. Continuing their saving at this rate and earning the 4% annual return they will be able to pay for some college but, by the time the six years of $25,000 is completed, they will have borrowed approximately $60,000 which they will pay off using their annual savings of $3,600 per year. Then, when the emergencies hit at age 50 and 60 and those expenses are paid, the Baileys will discover they owe $96,000 when they are age 65 and all they will have is the Social Security amount when they retire. That Social Security benefit, using a 2007 estimate, would be $1,607 per month or $19,283 per year. Social Security will replace 39% of the Bailey's pre-retirement income. Reliance on Social Security has left them with $96,000 in debt and only a $19,283 pension for life.

To replace their pre-retirement income at 80% they would need to save and invest $7,000 per year to pay off the housing down payment, college expenses, emergencies and $20,000 per year from age 65 to age 95 to supplement the nearly $20,000 per year Social Security benefit. This example is terribly over simplified—Social Security has benefits in addition to the retirement benefit and do-it-yourself pensions have many pitfalls as Teresa Ghilarducci clearly points out.[35] A particularly glaring oversight is that we have assumed zero inflation, an assumption that can have devastating effects on the Bailey's best planning.[36] But we have pointed out that the Baileys, at least while they have minor children in the family receive few immediate tax benefits, although with proper planning they will have invested in Roth-type tax advantaged investment accounts so that their retirement income will have a minimal tax burden and if they die before exhausting their savings their children will receive some benefit.

Finally, the Baileys began saving at age 20 and their emergencies occurred late in life. Had the emergencies occurred earlier or they began saving at age 30 instead of age 20 their lifetime savings would be considerably less. It is also possible that the Baileys might inherit money unexpectedly from their parents which would add to their family wealth.[37]

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[35] GHILARDUCCI, *supra* note 9, at 116–138 in a chapter entitled "Do-It-Yourself Pensions."

[36] Interestingly, Siegel reports the real rate of return on stocks of 6.8% per year over 204 years from 1802 through 2006. This growth offsets 2.5% inflation. Since World War II, during which the United States experienced all the inflation it experienced in 200 years, the average real rate of return was 6.9% per year which is virtually identical to the prior 125 years during which there was no inflation. SIEGEL, *supra* note 16, at 12–13.

[37] *See* Peter Ferrara, *Short-Circuiting the "Third Rail": Social Security Personal Accounts and the Traditional Family*, FAM. POL'Y REV. 75, 88 (Spring 2003). Ferrara points to the positive benefits of intergenerational wealth transfers:

> More than simply aiding the family financially, these cross-generational financial assets can help to bind the family more closely. Instead of becoming mere dependents or forgotten government beneficiaries, retired parents and

One other significant factor is inflation.[38] It was not considered in the example but a brief comment will demonstrate its devastating effects. If the Bailey's age 20 income were $20,000 and inflation during their lifetime were 4% per year and the Baileys were able to achieve wage increases at 2% above inflation then at age 65 the Bailey's income would be $275,000. Inflation alone would have increased the $20,000 income to $117,000 so the Bailey's real wage has slightly more than doubled. If they determine they would like to retire on 80% of pre-retirement income of $220,000 then by age 80, inflation would require an annual income of almost $400,000 to maintain that level of purchasing power. The point here is that few people can conceive of planning for the combined effects of investment return, inflation rates, levels of savings, and retirement needs without considerable assistance.[39]

Rahm Emanuel and Bruce Reed see the old America with its security and sense of responsibility as having disappeared during 1970s, 1980s, and 1990s as financial strains forced more and more women into the workplace and forced longer hours on most workers.[40] They claim that President Bush aggravated the problem.[41] Nevertheless America has changed:

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> grandparents can continue to play a central, even leading role in helping and guiding the family. The family will collaborate more intimately, working together to preserve and manage its nest egg.

*Id.*

[38] Inflation is considered as a natural part of America's financial landscape and deflation the most feared result. Newt Gingrich favors "a balanced budget, limited government, low taxation, relatively stable inflation (1 to 3%), and low interest rates as the best way to promote prosperity." GINGRICH, WINNING THE FUTURE, *supra* note 5, at 145.

[39] A simple example of the impact of taxes and inflation on savings can be illustrated by a taxpayer that invests $10,000 for one-year at 5%. At the end of the year the account has a value of $10,500 and the individual, assuming a 25% marginal tax rate, owes $125 in Federal Tax. This leaves the taxpayer with $10,375. However, assuming 3% inflation it will take the taxpayer $10,300 to restore the purchasing power of $10,000 the year before. Thus the taxpayer has some gain from his investment but far less than the 5% nominal interest.

[40] EMANUEL & REED, *supra* note 1, at 37.

> When the economic woes of the 1970s brought a sudden halt to the steady rise in living standards they had grown used to in the 1950s and 1960s, families adapted by sending more women off to work. According to the Families and Work Institute, two-earner families now work an average of ninety-one hours a week—ten hours more than a quarter century ago. Like American business, families have downsized, waiting longer to have children and having fewer when they do.

*Id.*

[41] *Id.* at 40.

> Respond to the first widespread rip in the social contract, the disappearance of pensions, by making social Security's troubles worse. And as a final burden to middle-class aspirations, abandon the fiscal responsibility that sparked the longest economic boom in American history, and instead saddle us with enormous foreign debt.

*Id.*

> Yet for all practical purposes, the world we grew up in no longer exists. The generations before us built a land of opportunity and certainty, where a job could last a lifetime, one salary could support a family, a house came with only one mortgage, a pension could guarantee a secure retirement, and one generation's decades of hard work and sacrifice could give the next generation a better life. Those certainties were America's security blankets—and one by one, economic and social changes have taken them away.[42]

The example of the Bailey's lifetime saving plan only shows the power of consistent savings and compounding. Many of the events noted above could interrupt this simple plan. The 20% savings rate for the Baileys is somewhat higher than the current amount paid into Social Security and Medicare. While a 4% rate of return is lower than historically earned in the stock market, the effects of inflation have been ignored.

A serious question in these matters is whether the Baileys will have any choice in determining their future. The Social Security system takes the fund that the Baileys could save for their own future and replaces it with a schedule of benefits determined by Congress to meet the needs of a nation of nearly 300,000,000 people. The individual has lost control over his destiny. Presumably, left to themselves, individuals will not rationally plan for their futures and will spend their entire income leaving inadequate resources to meet the needs of themselves and their family. This theory is taken and incorporated into the Tax Code in numerous ways that prevent the individual from taking control of their lives.

The Tax Code is used as a method of exerting a paternalistic oversight of the population. The Social Security System is a classic example where workers are forced to contribute to a system that will work more or less independent of the workers' decisions to provide disability and death benefits for themselves and their family and a retirement benefit when the worker becomes of age. But, the benefit is expensive and numerous studies indicate the workers would be better off investing themselves.[43] But investing is not as simple as it sounds.

Any of the vital areas of life planning could be explored to demonstrate Congress' irrational control over tax incentives. Home ownership, health care, education, and retirement planning are all heavily controlled through the Tax Code. Within each area and between areas, provisions overlap and provide contradictory

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[42] *Id.* at 32 ("We console ourselves with high-definition, flat-screen color TVs, but all our dreams are still in black-and-white. Ozzie and Harriet don't live here anymore, and their children can't stop squabbling about what to do now that they're gone.").

[43] *See generally* Ferrara, *supra* note 37, at 76.

incentives.[44] Each area raises a complex set of decisions and limitations but all areas raise the question of why the American public is restricted by such a set of paternalistic rules when simple solutions could be affected. Here, we will explore the provisions dealing with health insurance.

The contradictory nature of tax legislation is seen in the history of I.R.C. § 162(l) which allowed self-employed individuals to deduct 60% of the amount paid in 1999 (prior to 1996 it was 25%) for health insurance for medical care for the taxpayer, his spouse, and dependents.[45] At that time the percentage was scheduled to increase gradually to 100%. The percentage and the phase-in period changed four times during the 1990s. When fully phased in, self-employed individuals were finally granted the same tax advantages for their health insurance coverage as employed individuals. An examination of health care provisions will show great disparity in the tax benefits received by differently situated individuals. The erratic nature of the relief reflected the distortion in the tax system by virtue of the efforts at deficit reduction which dominated tax policy during much of the 1990s.

A fundamental tax policy objective is that similarly-situated taxpayers receive the same tax treatment. Therefore, similarly situated taxpayers should receive the same level of tax support for medical costs. In this case, employed, self-employed, and unemployed persons of similar income levels should receive the same support for medical costs. Under I.R.C. § 162 an employer deducts the full cost of employee health insurance plans and under I.R.C. § 106 the employee excludes the value of employer-provided coverage under health plans from gross income. Thus, employed persons get the full benefit of the tax deduction for health insurance. Self-employed persons (e.g., sole proprietors, partners) were historically limited under I.R.C. § 162(l).

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[44] GRAETZ & SCHENK, *supra* note 23, at 756. Graetz and Schenk illustrate the conflicting nature of many tax policies:

> Legislation passed in 2006 permitted additional taxpayers to convert a regular IRA to a Roth IRA by removing the income limitation on conversions in 2010. This was done to move revenue (the tax paid on such conversions) into the five-year budget window so that the legislation would not cost more than allowed by budget reconciliation instructions. Obviously, only taxpayers who think they will save taxes by converting will do so. The additional revenue was used to pay for extensions of the 2003 rate cuts for capital gains and dividends. So Congress seems to have found its own version of the Golden Goose—a way to pay for tax cuts for the wealthy with more tax cuts for the wealthy.

*Id.*

[45] This problem is discussed in Gordon T. Butler, *The Line-Item Veto and the Tax Legislative Process: A Futile Effort at Deficit Reduction, But a Step Toward Tax Integrity*, 49 HASTINGS L.J. 1, 80–90 (1997).

Taxpayers who are not employed, or who are self employed, fare even worse. Without a deduction under I.R.C. § 162(l), taxpayers paying their own health insurance can only deduct the amount under I.R.C. § 213 as a medical expense. However, I.R.C. § 213 only permits a deduction to the extent medical expenses exceed 7.5% of adjusted gross income. This high threshold was intended to eliminate medical deductions except in extreme cases to help defray extraordinary medical costs. It affords little help for health insurance premiums because the premiums seldom exceed the threshold.

Employed persons get the benefit of deducting many routine costs through deductible medical insurance even though there is no serious medical condition or undue financial burden. Such a result is inconsistent with the theory of I.R.C. § 213. Furthermore, employees covered by cafeteria plans under I.R.C. § 125 can establish a healthcare flexible spending account and take most medical and dental expenses on a pre-tax basis. Taxpayers who receive employer-paid health insurance and persons who pay for their own care (including health insurance), whether self-employed or otherwise, are given unequal tax subsidies for their health care. The extent of confusion in health care has been described:

> Although enormously popular, the tax exclusion for employer-provided health insurance has been the "Titanic" of U.S. domestic policy. It is hard to find a domestic program that rivals the incompetence of U.S. health insurance. While spending per capita is more than twice the OECD [Organisation for Economic Cooperation and Development] average ($6401 versus $2759), we manage to leave about 47 million Americans without insurance. All of the systems of other OECD countries provide (near) universal access at aggregate costs—both as a percentage of GDP [gross domestic product] and per capita—below U.S. expenditures.[46]

A similar analysis can be made in other areas. Complexity abounds in the pension area not only in defined benefit plans and profit sharing plans but in the numerous provisions for private pension savings. I.R.C. § 401(k) plans, 403(b) plans, IRAs, Roth IRAs, pretax IRAs, Roth rollover, IRA rollover, Keogh plans, SIMPLEs (savings incentive match plan for employees), and SEPs (simplified employee pensions) all have their individual limitations and conditions. This paper will focus on retirement tax incentives and will naturally implicate social policy as well as tax policy. Hopefully the reader will conclude, as this author has,

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[46] GRAETZ & SCHENK, *supra* note 23, at 105–109 (citing MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCES (1999)). They also point out that the tax expenditure in 2007 for the exclusion of employer sponsored health care was $145.3 billion for income tax purposes and $100.7 for Social Security payroll tax purposes. *Id.*

that greater freedom for the individual is a desirable and important policy goal and that much of the discussion on the topic is flawed.[47]

## II. RETIREMENT PLANNING MODELS

There are numerous vehicles that enable families to save for retirement. This section will summarize a number of those vehicles and point out some of the tax advantages associated with each one. We will begin with the most traditional method, the whole-life insurance policy.

### *A. Insurance Model—After Tax In and No Tax Out*

In general there are two types of life insurance; term insurance and whole-life insurance. Term insurance provides a simple death benefit if you die while the insurance is in force. You pay an annual premium that is based on your age and health over the term of the insurance policy. There are many variations of term insurance but, in general, it is not a vehicle for saving for retirement. Premiums are paid with after-tax dollars but policy proceeds at death are excluded from tax.[48]

Whole-life insurance combines a death benefit with a savings feature, and for this reason the annual premium is considerably higher than the premium for a term insurance policy. The increased premium is used to build a "cash value" over the years. That cash value will pay a dividend each year which can be used to reduce the premium, or purchase additional life insurance, so that the final insurance value greatly exceeds the original face value of the policy. The policy is considered a life-time policy so that if the insured dies at any time the face value of the policy will be paid.

A special feature of the whole-life policy is that the cash value provides a source of money from which the policy holder can borrow to meet current needs. The borrowings can be repaid with interest at a determined rate but if they are

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[47] The World Bank delineated three pillars: a publicly managed, unfunded, defined benefit pillar; a privately managed, funded, defined contribution pillar; and a voluntary private pillar. Orszag & Stiglitz, *supra* note 15, at 4 (citing WORLD BANK, AVERTING THE OLD AGE CRISIS: POLICIES TO PROTECT THE OLD AND PROMOTE GROWTH (1994)). Orszag and Stiglitz address ten myths identified by the World Bank: (1) individual accounts raise national savings; (2) rates of return are higher under individual accounts; (3) declining rates of return on pay-as-you-go systems reflect fundamental problems; (4) investment of public trust funds in equities has no macroeconomic effects; (5) labor market incentives are better under individual accounts; (6) defined benefit plans necessarily provide more of an incentive to retire early; (7) competition ensures low administrative costs under individual accounts; (8) corrupt and inefficient governments provide a rationale for individual accounts; (9) bailout politics are worse under public defined benefit plans; and (10) investment of public trust funds is always squandered and mismanaged. Orszag & Stiglitz, *supra* note 15, at 8–40.

[48] I.R.C. § 101 (2008).

not paid then upon death of the insured the policy proceeds will be used to pay off any policy loans. This borrowing feature allows an elderly policy holder to withdraw an amount each year in the form of an annuity that will be repaid only when the policy matures at death. In this way the policy will provide a pension for the insured. Particularly attractive are the facts that the internal build up of investment earnings are excluded from income tax and that the payment of proceeds at death are tax free to the beneficiary so that when the policy loan is repaid there is no tax impact.[49]

A healthy 20-year-old desiring to purchase a $1 million whole-life policy with a projected 5% per annum internal build up would pay a premium of $5,700 per year. If the insured allowed the policy to build over 45 years, at age 65 the death benefit would be $2,044,851 and the cash value would be $1,054,096—more than enough to guarantee a lifetime $40,000 retirement benefit. This illustration does not account for the need for a down payment for a home, education or emergencies. However, if the Baileys are committed to saving $10,000 per year, the $4,300 remaining after paying the insurance premium would come close to funding those needs, although the Bailey's savings fund would fall to zero and they would have to borrow to fund the education needs and repay the loans with interest after the college period ends. While these projections seem attractive they would undergo considerable adjustment to account for inflation.

Individuals face many decisions related to education, health care, housing, and retirement. Traditionally, the individual provided for these uncertainties through the purchase of life insurance which provided a growing fund that was available to meet the uncertainties of life. These problems were addressed by an individual through discussions and dialogues with a life insurance salesman. The salesman would make projections of policy values using a sophisticated financial analysis and the individual would be instructed on how the buildup of cash values would be available to be borrowed for unexpected expenses, for college or retirement. The numerous tax advantages available for insurance accumulations would come into play to accelerate investment growth thereby making the compounding effects of interest benefit the individual. In this way the ordinary citizen encountered all the sophistication of a Wall Street banker, had financial security assured, and his personal investment decisions kept to a minimum.

Creation of a fund with life insurance characteristics could provide an alternative to the complexity experienced by taxpayers coping with the current system that combines Social Security, private pensions, and private savings. Funded with after-tax dollars, the tax benefits of life insurance policies could easily be extended to the single savings fund concept. Tax free build up and eventual tax free withdrawals could be provided. The tax expenditure for the exclusion of

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[49] I.R.C. §§ 101, 7702 (2008).

investment income on life insurance and annuity contracts totals $154.8 billion over five years (2008–2012). Analyzing these large existing tax expenditures could begin the analysis as to the source of funds to change current systems.

### *B. Social Security Model*

In 1936, the Congress of the United States enacted the Social Security Act providing a vehicle for universal retirement income for nearly all citizens. The system is funded through a payroll tax on all earnings. Initially, the system provided for a 1% tax on an individual's gross earnings matched by 1% paid by employers, and a pension when a worker reached age 65. Since life expectancy for persons over 65 was relatively short the system was well funded and easily paid the benefits. As time passed the number of retirees grew and raising sufficient money to support the retirees became more burdensome.[50] During the 1970s, Congress amended the system so that the individual's initial benefit was indexed to wage increases, but, once the individual started collecting the benefit it was indexed to price increases (cost of living or "COLA").[51] It could be said that each generation would receive the benefit of their generation's productivity and that the purchasing power of the initial benefit would be maintained for life.[52]

Raising the initial benefit based on wage indexing reflects not only price inflation but also productivity increases. This method of calculating initial benefits was instituted in 1975. Because of wage indexing, a person retiring in 2020 will receive benefits 20% higher in real terms than a person retiring in 2003. Those retiring in 2040 will be 60% higher in real terms. Indexing for price inflation only assures each generation the same purchasing power as the previous generation.[53]

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[50] Fertility rates decreased in the 1960s and 1970s until the replacement rate stabilized around 2.1 in the late 1980s. This is called the "baby bust" that followed the baby boom. Other demographics affecting the future of Social Security are the longer life expectancy and a slowing of wage growth in the recent past. Ferrara, *supra* note 37, at 80–81.

[51] Daniel Shaviro sees the Social Security retirement benefit as containing three essential features: (i) forced savings, (ii) limiting portfolio choice, and (iii) a redistribution of income in that some people will receive back more than the value of their tax contributions and other will receive less. He describes the retirement system as a wage tax in which everyone pays during their working years in exchange for a wage subsidy upon retirement such that some participants will receive less than they put in and thus pay a net wage tax. SHAVIRO, *supra* note 11, at 3. Two other features provided by Social Security are survivor benefits and a form of security generally unavailable to most investors—a lifetime annuity with a fixed real payment. *Id.* at 3 n.1.

[52] First, in 1972 benefits were increased by 20% across the board and then, in an effort to block the political bidding wars that occurred biennially, indexed for inflation by making annual cost of living adjustments. In the late 1970s another tweaking of benefits tied the initial benefit to real wages, thereby assuring each new wave of retirees that their benefit would not have been undermined by inflationary pressures. "The 'replacement rate'—a measure of the share of preretirement earnings replaced by Social Security—jumped from 34 percent in 1970 to 54 percent in 1981." MILLER, *supra* note 10, at 200.

[53] *Id.* at 205–206.

A person's initial retirement benefit under Social Security is calculated in a way that results in lower income workers replacing a greater percentage of their pre-retirement income than higher paid workers. Taking a worker's highest 35 years of earnings, an "average indexed monthly earnings" ("AIME") is determined for each worker.[54] A worker's AIME is then divided into three levels with the lowest level multiplied by 90%, the next level by 32%, and the final level by 15%. Applying these percentages to the 2007 levels, a person with a $612 AIME would receive a benefit of $550 while a person with a $3,700 AIME would receive a benefit of $1,560.[55] After the initial benefit is calculated the annual benefit is indexed for price inflation so that so long as wage increases exceed cost of living increases each succeeding generation will have greater buying power from Social Security than the previous generation.[56]

Social Security is a pay-as-you-go ("PAYGO") system meaning current benefits are paid with current taxes.[57] In the 1980s it became increasingly apparent that the system could not be maintained indefinitely with the current payroll tax rates and benefit expectations. The Greenspan Commission was set up with the concurrence of Congress and the President and made recommendations for increased funding as well as a decrease in benefits. Funding was increased by assessing the tax against a higher and higher income base and is currently (2009) being assessed at a rate of 6.4% each for the employee and the employer on the first $106,500. On the benefit side, the age at which full social benefits could be

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[54] Covered earnings before age sixty are indexed for both real and inflationary wage growth until you reach age 60. SHAVIRO, *supra* note 11, at 13. Shaviro facetiously suggests that, if asked, you simply describe the Social Security benefit calculation as, "[t]ake the PIA on your AIME, adjust for your retirement age and spousal benefits, and then just index it." *Id.* The "PIA" is the basic benefit offered at normal retirement age.

[55] *See* GHILARDUCCI, *supra* note 9, at 139–143 for details of this example. Using these percentages gives the lower-paid workers a larger percent of their AIME. In 2007, a person with an AIME of $3,689 would receive an initial benefit equal to 90% of $612 ($550.80) plus 32% of the next $3,070 ($984.64) plus 15% of the next $166 ($24.90) for a total of $1,560.34 or a replacement of 42.3% of their AIME. A person with an AIME of only $612 would receive a monthly benefit of $550.80 which replaces 90% of his AIME. AIME is calculated on the basis of indexing that reflect wage rate increases that include productivity as well as cost of living increase.

[56] *Id.* at 142.

> Every retiree has living standards reflecting the achievements of her or his generation. That the Social Security initial benefit is indexed to wages, and the subsequent benefits are indexed to prices, both reflect a specific philosophical decision about the balance between retirees' standard of living and the standard of living of the workers who support them.

*Id.*

[57] Suggesting that Congress overrode President Roosevelt in structuring Social Security as a pay-as-you-go ("PAYGO") system, Browning states, "[p]erhaps we would make more progress in reforming the system if we acknowledged Charles Ponzi as the true 'father of Social Security.'" Edgar K. Browning, *The Anatomy of Social Security and Medicare*, INDEP. REV., Summer 2008, at 5, 26.

received will gradually increase to age 67 by 2027. The system provides reduced benefits for persons retiring after age 62 but before full retirement age. A surviving spouse who does not qualify for their own benefits will receive a 50% spousal benefit if it is taken when the surviving spouse reaches full retirement age. The spousal benefit illustrates the unusual set of incentives and distributional effects created by taxing individuals while determining benefits based on marital status.[58]

The Greenspan Commission recommendations also recognized that the payroll tax revenues would exceed the benefits paid out each year and that the excess would be placed in a government trust fund and reserved for a future time when the baby boom generation would cause annual revenue short falls.[59] Present projections are that revenue surpluses will continue until 2018 at which time the system will begin consuming the funds in the trust fund, but that the trust fund will be depleted by 2041 after which time revenues at current rates would only support about 78% of the benefits promised.[60] At that time a decision would have to be made whether to decrease benefits or pay for the short fall from general revenues. Over the past few years there has been a continued debate on how to best prepare for the shortfall and for the time when the system will call on the Federal Government to repay loans from the trust funds that have been used to fund government operations and reduce deficits ever since the trust funds were established.[61]

In 2005 President Bush proposed giving workers the option of diverting 4% of their 6.2% FICA payroll tax into a "personal savings account"—a plan

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[58] SHAVIRO, *supra* note 11, at 19; Orszag & Stiglitz, *supra* note 15, at 12. ("As Paul Samuelson showed 40 years ago, the real rate of return in a mature pay-as-you-go system is equal to the sum of the rate of growth in the labor force and the rate of growth in productivity.") (citing Paul Samuelson, *An Exact Consumption-Loan Model of Interest with or without the Social Contrivance of Money*, 66 J. POL. ECON. 467 (1958)).

[59] Not everyone believes that the changes wrought by the Greenspan Commission were necessary. It is argued that the Social Security trust fund was created to provide tax revenues to reduce the soaring budget deficit created by the Reagan tax cuts of 1981 that heavily favored high income taxpayers. Under this argument the Social Security "crisis" was fabricated and used to cover the real purpose of funding the budget deficit. In other words, taxes on low and middle income workers were used to fund tax cuts for high income taxpayers. *See* RAVI BATRA, GREENSPAN'S FRAUD: HOW TWO DECADES OF HIS POLICIES HAVE UNDERMINED THE GLOBAL ECONOMY 11–45, 240–241 (2005).

[60] Browning estimates that revenues begin to fall short of payments as early as 2007 for Medicare and 2017 for Social Security, and the points when trust fund revenue is exhausted as 2019 for Medicare and 2041 for Social Security. Browning also estimates that maintaining these current programs would require reducing benefits by 50% or doubling payroll taxes by 2040. Browning, *supra* note 57, at 18–19.

[61] Browning sees the trust fund discussion as a distraction "that has permitted people to believe mistakenly that the future financing problems of Social Security and Medicare are smaller and further in the future than they actually are." *Id.* at 19.

the Democrats derogatively referred to as "privatization."[62] Funds in the private account could be invested in the stock market to produce an investment return estimated at 3% after inflation in exchange for a reduction in their projected Social Security benefit equal to the presumed value of the benefit replaced by the account.[63] The 3% assumption was seriously questioned.[64] Democrats in Congress refused to support the plan[65] seeing it as an attempt to "bury the New Deal and try life without a safety net."[66] In general, all discussions to save Social Security seek to preserve the system's solvency for the next 75 years—nearly two full work lives of 40 years each.[67]

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[62] Support for privatization efforts often comes from examining successes with that approach in other countries. In Chile workers could opt-out for a private account in lieu of the traditional Social Security system. In addition to paying 10% into a private account they were required to pay an additional 3% to finance life and disability insurance to cover the survivor's disability benefits of the old system. Ferrara, *supra* note 37, at 89–90.

[63] If investment in the stock market is desirable, why doesn't the government make the investment rather than individual account holders? Some traditionalists talk as though stock market profits are free and without risk. SHAVIRO, *supra* note 11, at 114. One issue is the reluctance to have the government deciding which companies to favor but the other is pointed out by Alan Greenspan who argues that swapping public debt for private debt in the trust fund would produce a benefit to the Social Security system only to the extent that it reduced the benefit to other recipients of that income. He states:

> But, if the social security trust funds achieved a higher rate of return investing in equities than in lower yielding U.S. Treasuries, private sector incomes generated by their asset portfolios, including retirement funds, would fall by the same amount, potentially jeopardizing their financial condition. This zero-sum result occurs because of the assumption that no new productive saving and investment has been induced by this portfolio reallocation process. . . . At best, the results of this restricted form of privatization are ambiguous. . . .

Orszag & Stiglitz, *supra* note 15, at 21 (citing Alan Greenspan, Chairman, Fed. Reserve Sys., Remarks at the Abraham Lincoln Award Ceremony of the Union of League of Philadelphia, Philadelphia, Penn., (December 6, 1996)).

[64] GHILARDUCCI, *supra* note 9, at 155.

[65] Ghilarducci refers to President Bush's 2004 retirement savings accounts (RSAs) proposal to consolidate retirement savings under the Tax Code and notes:

> Two things primarily characterized individual retirement accounts; they are based on financial market assets rather than an annuity as found in defined benefit pensions and in Social Security; and the employer has no responsibility for retirement income. Both add up to one result—that the elderly, when retired, will not be able to rely on pension income and will need other sources of reliable income. . . . More reliable is work. . . . Anyone who has to work more to reach the same income suffers a decline in living standards.

*Id.* at 23. She further asserts that "[m]ost preretirees are unaware that Social Security is their most secure source of retirement income." *Id.* at 29.

[66] EMANUEL & REED, *supra* note 1, at 85.

[67] Emanuel and Reed complain that President Bush has made solving the shortfall impossible:

> For the last six years, Washington has spent as if there's no tomorrow. The cost of making the Bush tax cuts permanent will be three times larger than the size of the Social Security shortfall over the next seventy-five years. In fact, just the cost of

### *C. Defined Benefit Plan Model*

Beginning in the 1940s and continuing through the present time employers instituted defined benefit pension plans. Under the defined benefit plans employers would establish a pension plan under which employees would receive a lifetime annuity based on their average earning over a certain period prior to retirement and the number of years of service. Typically, an employee would qualify for a minimum pension payable when the employee turned 65 after a minimum number of years of service with the employer. For example, the maximum pension might be equal to 60% of the employee's final annual average compensation over five years provided the employee had 30 years of service by age 65. If the employee had only 20 years of service then the pension would be 40% of final annual average compensation. Some plans offer lump sum withdrawals that avoid the lifetime annuity. Employees electing the lump sum option often learn the error of their choice after the choice has become irreversible.

Under the Tax Code, contributions to qualified pension plans are deductible by the employer and not included currently in the taxable income of the employee provided that the employer meets the requirements of the Tax Code.[68] One of those requirements is that the employer not discriminate in favor of higher compensated individuals.[69] The bottom line for the IRS is that if the executives want tax advantaged pension plans the lower paid employees have to be included. This arrangement worked well through the 1980s. During that time it became common to refer to retirement planning as a three legged stool. These legs were Social Security, the company pension, and the employee's personal savings.

In 1974 Congress passed the Employee Retirement Income Security Act ("ERISA")[70] to provide Federal Government insurance for defined benefit plans and to force employers to take appropriate action to fund the plans. ERISA established the Pension Benefit Guarantee Corporation ("PBGC"), a quasi-governmental agency that provides insurance coverage for pensions up to certain limits depending on age and plan termination date but only for pensions that

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> the tax cuts for the top 1 percent of households, which equals about 0.6 percent of GDP, is larger than the entire Social Security deficit, according to the CBO. Medicare is by far the bigger fiscal time bomb, and Bush's prescription drug plan made Medicare's looming shortfall far worse. Congress and the president doled out pork, special favors, corporate tax breaks, and other new spending at a pace that would be unsustainable in the short run and catastrophic over the long haul. The best way to strengthen Social Security and Medicare is for Washington to stop spending the family fortune on everything else.

*Id.* at 87–88.

[68] *See generally* I.R.C. §§ 401–404; 410–416 (2008).

[69] I.R.C. § 401(a)(4), (5), (20).

[70] P.L. 93-406, 88 Stat. 829 (1974).

began at normal retirement age.[71] In many cases during economic downturns employers would scale back employment by offering enhanced retirement benefits to employees agreeing to retire before normal retirement age. These enhanced benefits were not insured by PBGC so that when certain employers went bankrupt employees found, to their chagrin, that the "enhanced" portion of the benefit was not protected. Bankruptcies in the steel and airline industries had a particularly hard impact on employees and on the funds held by PBGC to protect other plans.

Beginning in the 1980s, accelerating in the 1990s and continuing to the present time, employers began to discontinue or freeze their defined benefit plans preferring to offer defined contribution plans that shifted the risk of funding pensions from the employer to the employee. There are a number of reasons for the shift including the elimination of employer costs and to some extent a desire on the part of employees to control their own pensions. Employers also found that funding defined benefit pensions was extremely costly and attaining an appropriate investment return uncertain.

Defined benefit plans historically have also been combined with employer provided retiree health insurance. Defined benefit plans still dominate state and federal government employees and funds, such as the California Public Employees Retirement System ("CalPERS") that manages pensions and health care for 1.6 million California employees, retirees, and their families. In recent years CalPERS paid over $10 billion in retirement benefits and $7 billion in health care benefits from a trust fund of approximately $180 billion, as of December 2008.[72] Newt Gingrich notes that state and local unfunded retiree health and pension liabilities amount to $2 trillion and will come due with devastating effect.[73]

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[71] Guarantee limits for 2009 for a 65 year-old retiree are $54,000 for single life annuity $48,600 for a joint and 50% survivor annuity. Pension Benefit Guarantee Corporation, Maximum Monthly Guarantee Tables, http://www.pbgc.gov/workers-retirees/benefits-information/content/page789.html#top (last visited March 11, 2009).

[72] At its peak in October 2007 the assets were approximately $260 billion.

[73] GINGRICH, REAL CHANGE, *supra* note 5, at 31.

> Chris Edwards and Jagadeesh Gokhale, economists at the libertarian Cato Institute, have warned that there is a $2 trillion "fiscal hole" in unfunded retirement benefits and retirement health benefits for state and local workers. They warn that "the prospect of funding $2 trillion of obligations with higher taxes is frightening, especially when you consider that state politicians would be imposing them on the same income base as federal politicians trying to finance massive shortfalls in Social and Medicare."

*Id.* Gingrich also notes that state and local governments pay $3.91 per hour worked for health benefits while private sector pays $1.72; he concludes the only option is for state and local governments to reduce benefits and currently fund pension costs through private savings accounts—an option opposed by a left leaning Democratic Party. *Id.* at 31–32.

An example of a defined benefit plan is that provided to members of Congress. Members elected prior to 1984 were covered by the Civil Service Retirement System ("CSRS"), but, members elected since 1984 are covered by the Federal Employee's Retirement System ("FERS") under which members contribute 1.3% of their salary into the pension fund and 6.2% of their salary in Social Security taxes. Their pension will vest upon attaining five years of credited service with the option to retire at age 50, with 20 years of service, anytime after 25 years of service, or at age 65 with less than 20 years of service. The amount of the pension depends on the years of service and the average of the highest three years of salary. The starting amount of the retirement annuity cannot be more than 80% of the last salary received. As of 2006 the average pensions under the CSRS for 290 former members was $60,972 and under the CSRS and/or FERS for 123 former members was $35,952.[74]

From the standpoint of the tax expenditure budget the cost of defined benefit plans to the income tax is approximately $628 billion over five years. Defined benefit plans have begun to be replaced with defined contribution plans initiated in the late 1970s to supplement defined benefit plans.

### *D. Defined Contribution Model, the Congressional and Military Pension Plans* [75]

Beginning in the late 1970s companies began sharing profits with employees on a broad basis. The company would make contributions to a trust and allocate portions of the trust to individual employees. When the Internal Revenue Service approved the creation of such plans, provided they did not discriminate in favor of higher paid employees, the defined contribution plan movement was born.

Today defined contribution plans come in several forms.[76] Employer sponsored plans under sections 401(k) and 403(b) are broadly popular and are presented as retirement plans. Under these plans employees make voluntary contributions to an employee trust fund that accommodates individual accounts

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[74] *See* About.com, U.S. Gov't Info., http://usgovinfo.about.com/library/weekly/aa031200a.htm (last visited January 22, 2009).

[75] Defined contribution plans are presented as the heart of privatization proposals. Shaviro includes five concepts included in most privatization plans in various combinations. These include a shift to a fully funded plan to increase national savings, a shift from a single benefit plan to one offering portfolio choice; elimination of income transfers except to the extent of privatizing existing benefits; a shift of administrative functions from government to regulated private enterprises; and allocation of income to individual accounts depending on investment choice. SHAVIRO, *supra* note 11, at 128.

[76] Defined contribution plans go under names such as Individual Retirement Accounts ("IRAs" which include standard pre-tax IRAs and post tax Roth IRAs), SIMPLEs (savings incentive match plan for employees), SEPs (simplified employee pensions), and I.R.C. § 401(k), 403(b), and 457 plans.

for each employee. The employer typically matches the employee contribution to some extent. Contributions to the plans are invested either in employer stock or in mutual funds determined by the employer sponsor with each employee allocating the funds in their respective accounts. At times employers contribute their stock to the plan and restrict the sale of such stock by the employee account holder.

Taxwise contributions to the plans are excluded from the employee's income in the current year as is any growth of the invested funds in the plan. Ultimately the funds will be taxed when withdrawn from the fund by the employee when the employee retires. Currently, in the year 2009, employees are permitted to contribute $16,500 to a fund per year and employees age 50 and over are entitled to contribute an additional $5,500 for a total of $22,000 per year.[77] Employers can make contributions and often do so in the form of an employer match. Employers often require the employee to make voluntary contributions in order to qualify for the employer match. However, in that employers are primarily interested in benefiting the higher paid employees, by not making the program mandatory the employer reduces cost when lower paid employees do not participate and claim the employer match.[78]

Withdrawals before the employee turns 59 and one-half are penalized with a 10% penalty on the tax due.[79] Withdrawals must begin in the year following the year in which the employee turns 70 and one-half unless the employee is still employed by the plan sponsor.[80] Withdrawals are permitted for hardships and a limited number of other reasons. When an employee changes employment he can roll the funds in the plan over into a new employer's 401(k) plan or into an Individual Retirement Account ("IRA").

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[77] IRA contribution limits for 2009 are $5,000 for those under age 50 and $6,000 for others. These amounts will be indexed for inflation in 2010. I.R.C. § 219(b).

[78] GHILARDUCCI, *supra* note 9, at 1130–32. The author presents the argument that I.R.C. § 401(k) participants are planners and more productive employees than non-participants and thus the I.R.C. § 401(k) rewards the most productive workers. *Id.* at 132. Enron presented a particularly stark picture of employees unable to sell Enron stock contributed by Enron to the employee's account although the employee could sell Enron stock purchased with employee contributions. When Enron stock plummeted on disclosures of massive fraud employees who held large blocks of Enron stock in their I.R.C. § 401(k) accounts lost most of the value of their accounts and some retirees were forced to return to work.

[79] I.R.C. § 72(t) (2008). This section imposes a penalty for early withdrawal from qualified retirement plans. Exceptions are provided for withdrawals after age 59 and one-half; to a beneficiary after the death of the employee; for disability; following separation from employment after age 55; for life time annuities; and for some distributions from some plans for medical expenses, health insurance premiums, and first home purchases. *Id.*

[80] *Id.* Subject to specified conditions, exceptions from the 10% penalty are provided for education, health insurance, disability, retirement annuities, first time home purchases, and other similar uses. There are also restrictions on borrowing against pension assets. I.R.C. § 72(p).

Individual retirement accounts are another form of a defined contribution plan except that it is not employer sponsored.[81] In an IRA the employee is permitted to make annual contributions up to a certain amount each year. Depending on the person's income and whether the person or their spouse is covered by an employer sponsored plan the contributions may be tax deductible. In either case, whether deductible or not, the contributions once made are invested and grow without current taxation until the funds in the IRA are withdrawn. The same rules governing withdrawals from 401(k) plans cover IRAs. Investment rules under the Tax Code permit the owner of the account to broadly control the investment choices in the IRA. Generally contributions to IRAs cannot exceed earned income in a given year although special rules permit contribution by non-working spouses.[82]

A variation of I.R.C. 401(k)/403(b) and IRAs is the Roth version in which the person contributing the funds does not receive a tax deduction or exclusion for the funds contributed.[83] In effect the funds are taxed to the individual in the year they are earned and contributed to the plan. However because they are deemed to be after tax funds they will not be taxed when they are withdrawn. The rules require that they remain in the plan for at least five years and the owner cannot withdraw them without penalty before reaching the age of 59 and one-half. However, there are no mandatory withdrawals.

Amounts left in the defined contribution plans go to the designated beneficiary upon the death of the owner. Special tax rules apply regarding the withdrawal of the funds by the beneficiary. Depending on the circumstances upon the death of the owner, the beneficiary may be permitted to spread the withdrawal of funds over the beneficiary's lifetime thereby deferring the taxation of funds in the account until withdrawn.

Common criticism of defined contribution plans is that the tax benefits of the plans favor high income taxpayers who receive the greatest tax benefit.[84] It is argued that these accounts do not spur new savings but merely a transfer of existing savings from taxable to tax deferred accounts. It is also claimed that these accounts reduce the amount available to the owner at retirement because the companies managing the funds charge higher fees than are common in defined benefit plans which manage large funds for a single employer. Another criticism is that since the account holder is generally inexperienced in selecting and balancing

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[81] *See generally* I.R.C. §§ 408, 219.

[82] I.R.C. § 219(c).

[83] *See generally* I.R.C. § 408A.

[84] Ghilarducci describes the three "I's" for the defined contribution model as: Inefficiency (the nation is not getting the most retirement income security out of each dollar saved for retirement); Inadequate retirement savings; and Inequality of income and risk-bearing between employers and workers, as well as between upper- and middle-class workers. GHILARDUCCI, *supra* note 9, at 116.

mutual fund investments, the optimum investment returns are not achieved. Further, because participation is voluntary these plans do not have anywhere near the 100% participation of defined benefit plans. Indeed it often occurs that when an employee changes employers and the funds are transferred to the new plan the employee does not roll over 100% of the funds. They use the funds for current needs, thereby undermining their retirement savings plan.[85]

### *E. Education Funds*

The Tax Code has a myriad of exclusions, deductions, and credits providing educational assistance to taxpayers and their dependents.[86] Of particular importance to the Baileys in their investment planning are the Coverdale education savings accounts[87] and the state sponsored qualified tuition programs. Coverdale education savings accounts permit the taxpayer to contribute up to $2,000 per child per year to a trust for use in providing the child qualified educational expenses. Contributions are not tax deductible, must be in cash, and cannot be made after the child reaches his 18th birthday. Funds in the trust are invested and accumulate without current taxation and, if used for qualified educational expenses, will not be taxed upon distribution. Uniquely, funds in a Coverdale education savings account can be used for education below the college level.[88]

State sponsored qualified tuition programs come in two varieties. First are the programs that permit taxpayers to purchase tuition credits on behalf of a designated beneficiary. Tuition credits are purchased at a discount for use at a future date when the beneficiary attends college or university. When used for educational purposes any increase in the value of the tuition credit is not taxed.

The second type of qualified tuition program is the investment type program in which funds are deposited with the State sponsor and invested in pre-designated accounts. In this type of plan there is a prohibition against the person

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[85] Defined contribution plans under I.R.C. §§ 401(k) and 403(b) are currently being studied by Congress to better structure the American retirement system. *See* Sam Young, *Retirement Reforms Examined by House Committees* 122 TAX NOTES 1060 (2009).

[86] *See* I.R.C. § 25A (2008) (Hope Scholarships and Lifetime Learning Credits); I.R.C. § 108(f)(1) (2008) (loan forgiveness); I.R.C. § 117 (2008) (scholarship exclusion); I.R.C. § 127 (2008) (employer provided educational assistance); I.R.C. § 135 (2008) (exclusion of interest on U.S. savings bonds); I.R.C. § 219 (individual retirement accounts); I.R.C. § 221 (2008) (deductions for interest on educational loans); I.R.C. § 222 (2008) (tuition tax deduction); I.R.C. § 529 (qualified state tuition programs); I.R.C. § 530 (Coverdale education savings accounts).

[87] Coverdale education savings accounts were originally modeled after individual retirement accounts and were originally given the title education IRA.

[88] Education groups and in particular the National Education Association have opposed any and all programs, including tax incentive programs, that would provide any assistance below the college level to non-public schools.

or beneficiary providing any investment direction after the funds are deposited.[89] Direction, of course, is made to some extent in the choice of which State program to invest in and often states will provide several investment choices. Furthermore, account holders are permitted to roll the funds in one plan over to a different plan once within a 12-month period.[90] By rolling over the funds to another state the owner has renewed the ability to select among different investment funds. Many states offer funds directed toward entering college in specified years as well as funds directed toward types of investments such as bonds, stocks, aggressive stocks, blend or balanced funds, and other combinations.

Notably, while the Coverdale education savings accounts are limited to annual contributions of $2,000 the qualified tuition programs are limited only by the general standard of the amounts necessary to provide for the qualified higher education expenses of the beneficiary.[91] This amount could be several hundred thousand dollars such that the buildup of earnings will never be taxed provided they are used for "qualified higher educational expenses." Unused funds can be rolled over to successive beneficiaries.[92] Reform of the tax provisions for education is overdue and being called for by politicians.[93]

### *F. Health Care Funds*

Investment accounts for health care are limited to flexible spending accounts and medical savings accounts.[94] Flexible spending accounts allow an employee to contribute an amount to an account to be used by the employee for medical

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[89] I.R.C. § 529(b)(4).

[90] I.R.C. § 529(c)(3)(C)(iii).

[91] I.R.C. § 529(b)(6).

[92] Abuse of the rollover provisions is the subject of regulations proposed by the Treasury and Internal Revenue Service and is described in Wendy C. Gerzaog, *College Savings Plans: Not Just for Education*, 122 TAX NOTES 1267 (2009).

[93] Advocating universal college education, Emanuel and Reed note a 2006 study by the Federal Reserve that found the average net worth of a high school drop out to be $20,000 as compared to the average family headed by a college graduate which was $226,000. EMANUEL & REED, *supra* note 1, at 70. They call for reform of confusing and contradictory education tax incentives:

> The main reason young people don't go to college—or don't finish—is cost. For starters, we need to get rid of the red tape in their way. The tax code is littered with well-intentioned but confusing and often contradictory education provisions, with different rules, definitions, and limits. We should simply the tax code by replacing the five major existing education tax incentives—the Hope Scholarship, the Lifetime Learning Credit, the deduction for higher-education expenses, the exclusion of employer-provided education benefits, and the exclusion for qualified tuition reductions—with a single $3,000-a-year refundable credit for four years of college and two years of graduate school. If we want young people to go to college, they shouldn't have to stop first at H&R Block.

*Id.* at 72.

[94] I.R.C. § 125 (flexible spending accounts); I.R.C. § 220 (Archer Medical Savings Accounts).

expenses during the plan year. Contributions are excluded from the employee's gross income for Federal income tax purposes but not for purposes of payroll taxes. Amounts authorized by the employee to be contributed to the plan must be made available by the employer for use by the employee on day one of the plan year even though the contribution will be collected from the employee's pay over the entire plan year. Amounts not used during the plan year are forfeited to the employer and cannot be carried forward to future years. Employees who over contribute must use the money or lose it.[95]

Archer Medical Savings Accounts ("MSAs") are accounts for use by individuals who are covered by "high deductible health plans." Such individuals are provided a deduction for a percentage (65% in the case of individual policies and 75% in the case of family policies) of the annual deductible amount under the high deductible health plan.[96] MSA trusts are exempt from tax, and distributions from MSAs are excluded from gross income provided the money is used for medical purposes.

Because MSAs offer individuals the potential for self insuring, there is a fear that if they are generally available, the young and most healthy individuals will self select out of traditional health insurance policies leaving traditional policies with high-risk/high-cost participants thereby undermining the actuarial projections for such plans. Therefore the availability of MSAs has been highly restricted.

### *G. Guaranteed Retirement Account Model*

Professor Ghilarducci proposes that the Federal Government adopt guaranteed retirement accounts as a supplement to Social Security in a way that will provide a secure retirement for all Americans. Ghilarducci builds her analysis on several basic beliefs. The first is that the traditional three-legged stool of Social Security, defined benefit plan, and personal savings has provided a secure retirement system. She believes that Social Security is likely secure through 2052, that a secure retirement without the need to work is a symbol of a prosperous and healthy society, that the decline of defined benefit plans has been accelerated

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[95] Addressing the use of pre-tax reimbursement accounts for health costs, Gingrich points out that when the contributions to such accounts were allowed to be carried over from year to year that several companies experimented with providing participants with information and incentives to control the decisions on health care. As a result, costs incurred dropped up to 45% in the face of projected cost increases. The use of Health Savings Accounts (HSA) also produced significant results in cost containment. This is particularly true because four out of five people do not have major health problems before age 65. Gingrich points out that an 18 year-old that maintains his health could have $250,000 in his HAS by age 65. Other savings could be realized in health care by providing electronic availability of health information together with an emphasis on wellness and prevention, including health care. GINGRICH, WINNING THE FUTURE, *supra* note 5, at 121.

[96] I.R.C. § 220(b)(2).

by the introduction of defined contribution plans, and that defined contribution plans are an inadequate substitute for defined benefit plans.

Her objection to defined contribution plans centers first on the fact that participation is voluntary such that only a small percentage of people are covered; the plans have a much higher administrative cost than defined benefit plans; that retirement is undermined because participants withdraw funds during the accumulation period and take lump sum distributions at retirement instead of exercising the annuity option; that these plans favor highly compensated individuals who often only use them as tax shelters for existing savings resulting in an excessive tax expenditure and loss of federal tax revenue; and that employer's contributions to their employees' retirement security has been greatly reduced.[97]

Guaranteed retirement accounts are proposed as a supplement to Social Security and are funded by payroll taxes equal to 5% of payroll, up to the ceiling for Social Security, to be split between employee and employer, but, unlike Social Security, additional voluntary contributions can be made that will increase the ultimate retirement payout.[98] Unlike defined contribution plans contributions are not excluded from gross income but to avoid an undue burden of low-income workers a $600 refundable tax credit is given to every worker regardless of income.[99]

Funds collected in the guaranteed retirement accounts will be invested in the financial markets by public employees overseen by a board appointed by Congress and the President.[100] The government will guarantee an inflation adjusted return of 3% reflecting the historic long term growth of the economy but if the actual investment return is greater the board can, after providing for the ability to back up the minimum guarantee in times of economic downturn, allocate a higher return to the accounts. In this way, the government and the worker will share the investment risk of the accounts.[101]

Upon retirement or thereafter the worker can convert all or part of their account to an inflation adjusted lifetime annuity. The annuity is preferred to assure the retiree will not outlive the available funds. Any amounts remaining in the fund

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[97] GHILARDUCCI, *supra* note 9, at 118–30.

[98] *Id.* at 264.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 265 (indicating that if the economy does better than 3% the Board of Trustees can allocate the increased economic performance among the accounts). These accounts are largely modeled after the approach of the Teachers Insurance Annuity and College Retirement Equities Fund (TIAA-CREF) which represents university professors and offers a guaranteed return of 3% but, if investment yields exceed 3%, will allocate the additional earnings to the accounts. TIAA-CREF is a nonprofit organization. *Id.* at 272.

at death will be used to provide survivor benefits. The objective of guaranteed retirement accounts is to provide a retirement income that does not require a significant drop in the retiree's standard of living. In this regard it is estimated that the combined income from Social Security and a life-time annuity through the guaranteed retirement account would replace 64% of the pre-retirement earnings of a high earner ($61,914); 71% of an average earner ($38,696); and 86% of a low earner ($17,413).[102] To meet these replacement percentages it is necessary to restrict access to the funds so that they are not available for "all sorts of other needs including health care, job changes, buying a home, education, and other expenses unrelated to retirement or disability . . . ."[103] These accounts will shift the numerous risks of retirement savings to the Federal Government:

> An individual must not bear all the risks of losing his or her job and losing all pension benefits; nor the risk of living longer than anticipated; nor the risk of financial market fluctuation; nor the risk that inflation will diminish the buying power of the investments income. Individuals must not bear risks because they cannot control these risks. Employers and the government can bear these risks more effectively and at lower cost.[104]

A significant risk is undertaken by the government when it undertakes to protect accounts against inflation. Even in periods when investment return is undermined by inflation, as in the 1970s, the tax revenues kept pace with inflation. Because the proposed $600 refundable tax credit replaces the benefits for the defined contribution plan the loss to tax expenditures will be dramatically reduced. However, if the dramatic shift away from defined contribution plans is resisted politically, Ghilarducci proposes an alternative plan that would retain a progressive tax response that would use a $400 refundable tax credit and cap defined benefit tax breaks at $5,000.

Ghilarducci sees retirement planning as a form of paternalism in which the government can decide the degree of support and, for her, a secure option to retire or work as the individual may choose is the optimum result. For her:

> Whether an economy can support non-workers depends more on productivity growth and the size of and strength of the tax base rather than on the ratio of workers to beneficiaries. Whether a society chooses to support non-working older people depends on economic power, mostly on the power in the labor market. Pension policy is ultimately labor policy.[105]

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[102] GHILARDUCCI, *supra* note 9, at 266.

[103] *Id.* at 267.

[104] *Id.*

[105] *Id.* at 282–83.

### *H. The Plan*

Sociologist Charles Murray looks at the massive redistribution of income in America and concludes that there is a better way to spend this money.[106] He believes that enormous wealth generated by our society can more efficiently be utilized to alleviate poverty, secure a comfortable retirement, provide adequate health care, and revitalize civil society. Murray's "ideal" solution is to recognize that the trillion dollars in wealth transfers cannot solve the problem and leave the money in the hands of those who originated the wealth to use it as they deem necessary.[107] Recognizing that this "ideal" solution is not acceptable to 90% of the population, Murray has proposed an alternative which I have dubbed the "Guaranteed Income Solution" and which Murray calls simply "The Plan."[108]

Under The Plan each individual citizen age 21 and older would receive an annual grant of $10,000 to be deposited monthly into the citizen's United States bank account.[109] A married couple would receive two annual grants for a total of $20,000 per year. Grants will be adjusted for inflation either by linking it to a wage or inflation index or simply allowing Congress to adjust the amount periodically. The annual grant will be offset, to some extent, by a 20% surtax on incomes between $25,000 and $50,000. For example, someone making $30,000 per year would have a $1,000 surtax (20% of $5,000) and someone making $50,000 per year or more would pay the maximum surtax of $5,000 (20% of $25,000). For a married couple the surtax would apply to each individual's earned income, if any.

The Plan is calculated to replace income transfer programs totaling, in 2002, $1.385 trillion which includes replacement of Social Security, Medicare, Medicaid, unemployment compensation, food stamps, and certain corporate welfare programs as detailed by Murray.[110] Murray estimates the net cost (after the surtax) will be approximately $1,740 trillion. The gap between the cost of the

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[106] MURRAY, *supra* note 8, at 5 ("The argument starts by accepting that the American government will continue to spend a huge amount of money on income transfers. It then contends that we should take all of that money and give it back to the American people in cash grants.").

[107] The large wealth transfers by governments assume that government can allocate wealth effectively. According to Murray this assumption began in small ethnically homogeneous societies like Scandinavia and the Netherlands that had traditions of work, thrift, neighborliness, and social consensus. These traditions broke down as the welfare state removed the penalty for failing to acquire these qualities. At first it was the large societies with diverse populations where an underclass developed that lacked these qualities. Thus, according to Murray the welfare state carries the seeds of its own destruction and the process plays out over decades such that the Western world can see that it is within decades of financial and social bankruptcy. *Id.* at 1–4.

[108] *Id.* at 4.

[109] *Id.* at 24.

[110] *Id.* at 25, app. at 130–39.

program and the savings from program elimination will be eliminated in that the costs of the replaced programs would increase at a faster rate than The Plan. He also claims that his calculations err on the high side.[111]

Retirement and health care deserve special consideration. For retirement, Murray uses the example of a worker who will make $20,000 per year for his lifetime. Under the current system the employee's and the employer's annual contribution would be $2,480 and would provide an annual retirement benefit of $10,992. If the employee made a similar contribution to an investment account paying a real annual rate of return of 4% the employee's retirement account would total $300,153, enough to provide a lifetime annuity of $24,350 which, combined with the annual grant, would provide a total retirement of $34,350.[112]

Health care is a significant element of The Plan.[113] Each person will have to provide their own health care but they will be granted resources with which to make that provision. Murray points out that "routine" medical care costs have been falling while costs for medical care at the front lines of medical science have escalated. He believes that a major problem in the health care system is that individuals do not make the cost-benefit analysis that would ultimately reduce costs. Under his proposal people would have the benefit of choosing the medical insurance they desire and would have the funds available from the grant to support that choice. One of the most expensive, and least cost effective treatments, is end of life care ("EOL"). An individual could purchase a policy with limited EOL at a reduced cost if he so chose. At least the government would not make the choice.

Murray suggests three reforms that will accommodate The Plan. First, health insurance companies would consider the population as a whole as the pool and individuals age 21 and older would be required to purchase a policy that would

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[111] MURRAY, *supra* note 8, at 21. The Plan would allow some restrictions on the use of the money. According to Murray the cost of The Plan beginning in around 2011 would be less than the current cost for the social programs. By 2020 he expects The Plan will save a half trillion dollars over the projected cost of existing programs.

[112] *Id.* at 25–26. Murray points out that the retirement annuity would be less than $25,000 so that the surtax would not be triggered. Apparently, the annuity constitutes "earned" income for purposes of the surtax. As always the devil is in the details. Murray goes to great length to support the "anemic" 4% real rate of return on stocks over 45 years arguing that if the market does not achieve this level the government would be unable to fund existing programs. *Id.* at 35.

[113] For Medicare the problem is more difficult than Social Security as costs are to rise faster than revenues. Costs will rise from 2.5% of GDP to 5% by 2030 and Medicare's share of federal spending will rise from 12% to 24%. To keep the Medicare trust fund solvent would require a doubling of the Medicare portion of the payroll tax from 2.9% to 5.8%. Medical spending increases will outstrip any increases that Social Security will provided seniors. MILLER, *supra* note 10, at 208. But it is argued that insolvency is only one of the four "I's" associated with Medicare's problems: inadequate, inefficient, and inequitable. *Id.* at 209 (referring to points made by Robert Reischauer of the Urban Institute).

cover chronic conditions. Murray estimates that if an individual committed to a lifetime policy a premium of $2,800 for males and $3,500 for females, which would include pharmaceutical coverage, a $2,500 deductible could be obtained. Additional insurance could be purchased if desired. The second reform is to make employer provided health care taxable and the third is to allow legally binding medical malpractice waivers for routine procedures. The second reform facilitates individual choice in policies above the required minimum and the third will allow the creation of an inexpensive network of neighborhood medical centers to handle routine matters.[114]

The Plan will require that $3,000 of the $10,000 be used to purchase health insurance. While it might be unfair to young healthy individuals with a healthy lifestyle and family history of few chronic conditions, it is the only way to keep the costs of insurance under control and at a minimum.[115] In this way the annual grant would be $7,000. Murray also suggests that it may be politically necessary to commit an additional $2,000 of the annual grant (called "Plan B") as a contribution toward retirement which would leave an annual grant of $5,000. Murray recommends against Plan B because he believes that the grant should allow the young to save for other things such as an education or to pursue a dream.

Murray does not believe that The Plan will undermine initiative and it will not promote the lethargy he sees in the European nations as a result of the extensive welfare systems that sees work as a hindrance to self-fulfillment rather than a path toward that goal.[116] The Plan, he asserts, is consistent with three basic elements of human nature: humans as individuals tend to act in ways that advance their own interests, humans tend to have a desire for approbation from other human beings, and humans tend to take on responsibility to the extent that circumstances require them to do so.[117]

### *I. The Two Percent Solution*

Journalist Matthew Miller recognized that the need to solve the Social Security and Medicare (and Medicaid) projected shortfalls would necessitate the solution to social problems that kept large segments of society from becoming productive.

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[114] MURRAY, *supra* note 8, at 43–50.

[115] *Id.* at 50 (suggesting that insurance companies might be permitted to vary premiums for smokers or persons engaged in hang-gliding).

[116] *Id.* at 83–87 (outlining Europe's loss of meaning and purpose and predicting the loss of greatness resulting from the welfare state). Murray dubs the term "European Syndrome" to describe the acceptance that "the purpose of life is to while away the time as pleasantly as possible, and the purpose of government to enable people to so with as little effort as possible." *Id.* at 84.

[117] *Id.* at 91.

Looking at the percentage of the GDP that was being consumed by the Federal Government he focused on the fact that the then current (2002) percentage was 20% whereas the percentage under President Reagan had been as high as 22%. He proposed funding "major" reforms to education, health care, and campaign finance and implementation of a plan to support a living wage all of which could be achieved by adding 2% to the Federal Government's budget to pay for such reforms.

Addressing the Social Security shortfall, Miller claims a simple fix will solve the funding problems. That fix is to change the index under which initial Social Security benefits are determined from the wage index to the price index. This simple change will mean that the purchasing power of each new generation of retirees will be the same whereas under the current system, each generation of retirees is better off because of the productivity improvements generated by that generation.[118]

### *J. Other Plans*

There are other solutions that have been proposed by competent and recognized sources. Ghilarducci references a number of them.[119] Each plan raises the issues discussed above and provides suggested solutions. A plan proposed by the "Hamilton Project" suggests that employers automatically enroll their employees in 401(k) plans and invest all retirement funds in "life cycle" mutual funds that adjust the ratio of stocks to bonds depending on the age of the participant so that the fund investments become more secure as the employee ages.[120]

Emanuel and Reed recognize that major companies are replacing their defined benefit plans with 401(k) plans and believe that, if Social Security remains strong and people contribute to the 401(k) plans, a sound retirement can be assured. They acknowledge only 50% of employees participate; that the average balance for people between the ages of 55 and 60 is $15,000;[121] that an endless array of investments and investment advisors make investment more like a lottery than a plan for the future; and the need to limit the downside for individuals planning their own retirement. They suggest automatic enrollment and the combining of all tax incentives into a single "Universal Pension" to include the option to direct tax refunds to the account at the point of a "savable moment."[122] Finally,

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[118] *See supra* note 52 and accompanying text (commenting on the impact of wage indexing in the description of Social Security).

[119] GHILARDUCCI, *supra* note 9, at 383–87.

[120] *Id.* at 286. Peter Orszag, appointed Director of the Office of Management and Budget by President Obama, along with other economists was involved in the Hamilton Project.

[121] EMANUEL & REED, *supra* note 1, at 89.

[122] *Id.* at 93.

to provide an incentive for low income individuals Emanuel and Reed propose a 50% match on contributions up to $2,000 for individuals making $30,000 or less or $60,000 for couples.[123]

Professor Shaviro provides a "modest" proposal for Social Security reform. His reform would provide mandatory contributions from earnings with a cap on covered earning. The funds would be placed in an individual account that could be invested in a conservative stock or bond fund with limited administrative costs. Contributions by married couples would be split 50–50 between their respective accounts. The unique feature of this proposal is that it provides for a limited "adjustment" of all accounts upon retirement so that accounts above an "average value" would contribute to those with below-average assets. This "progressive redistribution" captures to some extent the redistributive effects of the current Social Security system. Options upon retirement would provide a combination of annuities with the possibility of a guaranteed term and the possibility of passing the balance to a survivor.[124]

These and other interesting and important proposals have been made from time to time. The One Fund Solution described next incorporates many of the proposals already discussed. By building on the whole-life insurance model it offers more flexibility than other proposals.

### *K. The One Fund Solution*

The simplest plan to understand is the whole-life insurance model. The policy owner invests a certain amount every year and the benefits are invested by a competent insurance company that is guided by actuarially sound principles and a long term investment time horizon. The policy owner can understand that the cash buildup can be borrowed and if not repaid will affect the policy values. Life insurance premiums are paid with after-tax funds, but the proceeds of the policy will be paid at death, free of income tax. It is also easily understood that the cash value can be used to fund an annuity to provide a retirement income with any balance being left for the beneficiary of the policy. In all cases the investment decisions and sound financial condition of the insurance company is directed by professionals overseen by experienced regulatory authorities.

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[123] A simple example of Emanuel & Reed's basic principle of saving, "Start early and keep at it" is: "If the employer matches her contribution, a person who starts setting aside 1 percent of her $30,000 salary at twenty-five and keeps doing it until she is sixty-five can expect to have a nest egg of around $200,000." *Id*. at 93. The saving contribution would be $600 per year over 40 years at an expected compounded rate of 9 percent per annum. Congress temporarily enacted a similar program in 2001. *See* GRAETZ & SCHENK, *supra* note 23, at 757.

[124] SHAVIRO, *supra* note 11, at 152–57.

The One Fund Solution captures the freedom and flexibility of whole-life insurance with a governmentally administered fund, required contributions, and restrictions on withdrawals but is large enough to fund the major investment needs of a life time at an adequate level. The One Fund Solution reflects a combination of features present in the plans described above. The One Fund Solution recognizes the long recognized principle that government's involvement in so many areas of individual choice is for the purpose of enabling the least privileged in society to participate in society and have an opportunity to work their way economically into the middle class or higher. However, an equally well recognized principle is that $100s of billions in tax expenditures each year provide the greatest benefit to those taxpayers in the highest marginal brackets. The guaranteed retirement account proposal described above recognized the basic unfairness of current tax expenditures when it proposed a $600 refundable tax credit to replace the tax benefits for defined benefit plans. The One Fund would carry that proposal a step further and recommend the gradual elimination of all such "upside" down tax expenditures in favor of supporting a single whole-life insurance type fund offering flexibility and equality to all participants.

The One Fund recognizes that personal wealth is built up over a lifetime and that savings objectives focus on uses prior to retirement. The One Fund would ultimately supplant tax expenditures for retirement, housing, education, health care, and emergencies, freeing up tax revenues to support the conversion to the One Fund. The objective of the One Fund would be to replace Social Security and Medicare as they exist today. Because of the accumulated interests and expectations of individuals in the existing plans a complex set of rules would be needed to accommodate those changes over a significant period of time.

Because of the ultimate demands on the One Fund, significant funding will be required and that funding should begin when the individual begins gainful employment. The objective is to create a tax-advantaged fund that will support the normal financial needs of an individual or family at the level somewhat above the middle class. If that level is a family with an expected $60,000 pre-retirement income and it is desired to provide a retirement benefit replacing 80% of that amount, the account would need to grow sufficiently to provide a lifetime annuity of $48,000 annually or $4,000 per month. One estimate is that the necessary amount would be $920,000. Contributions of $10,000 per year from age 20 to 65 with an investment return of 3% per year would fund that annuity. If the required contribution were 20%, the annual contribution on $60,000 would be $12,000 per year and the additional funds could be used to provide other needs such as education or health care.

Taxation of the One Fund would mirror the insurance model and Roth IRA model which are funded with after tax income with all withdrawals being tax free. As was seen in the case of the Baileys no income tax was due during the years they were raising their family, so the loss of tax incentives on contributions is

irrelevant to the Baileys. Later when funds are withdrawn they may be in a higher tax bracket so that the tax-free nature of the withdrawals could be a significant benefit. Currently, the employer's Social Security contributions are excluded from the gross income of the employee and benefits are taxed depending on the recipient's overall income tax situation.[125]

The One Fund proposal could be efficiently administered by the Social Security Administration. The guaranteed retirement account proposed an increase of 5% in the payroll tax suggesting that an individual being required to save 20% of their income is not unreasonable. The example of the Baileys and several studies would also support the 20% level. To permit the fund to grow and provide meaningful support for the worker, voluntary contributions by the employee would be permitted. Additional contributions by the employer would be taxed as income to the employee, and could be used to fund various benefits through the fund such as health care or disability insurance.

Because this is a proposal to support a middle class life style and because withdrawals are tax free there would be limitations placed on the amount of the annual contribution as well as the overall size of the fund. Consistent with current savings plans, annual contributions to the plan could be limited to $40,000. Someone earning $100,000 per year would be required to contribute $20,000, but the worker or the employer could contribute an additional $20,000 which could be used for health insurance or other approved uses. Required contributions would be discontinued when fund values reached $1 million but voluntary contributions would be permitted until the fund value reached $2 million. After the fund reaches $2 million no further contributions would be permitted, and any withdrawals above $2 million would be taxed at ordinary income tax rates.[126]

Funds left at the time of the participant's death can be distributed as directed by the participant or transferred to a One Fund for designated beneficiaries up to the $2 million limit on contributions to any individual's One Fund. The value of an individual One Fund account will be exempt from any estate taxes on death.[127]

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[125] I.R.C. § 86 (2008).

[126] To some extent the $2 million figure is a figure that represents current thinking about the level of estate assets that would exempt someone from the federal estate tax. This level divides the "upper middle class" from the "wealthy" and if the One Fund Solution is fully implemented one would expect the accumulation of intergenerational wealth. Under the federal estate tax a credit is given to each taxpayer equal to the tax on an estate of a designated amount. For 2006–2008 the amount of the credit was the tax on a $2 million estate. For 2009 the credit was the tax on an estate of $3.5 million. I.R.C. § 2010(c) (2008). The estate tax is repealed for 2010 but reinstated in 2011 with a credit equal to the tax on a $1 million estate. A married couple has a credit for the husband's and the wife's estate which provides estate planning opportunities.

[127] It would be appropriate to limit other deductions from the estate tax to make transfers through the One Fund the principal method of transferring tax-free wealth.

By transferring the One Fund to a child at death the next generation would begin life with an endowment. Setting limitations on contributions and tax-free distributions insures some degree of equality in the receipt of tax advantages. It is important that Congress resist calls to add benefits that favor high income tax payers.[128]

Investment return is controversial. It is a simple matter to demonstrate the superiority of private accounts by using a high enough projected return on investment. Murray suggests that over the worst 45 year period on record the real rate of return was 4%. Others have suggested higher rates. An important consideration is whether, in dealing with accounts to be administered on a population wide basis, it is necessary that everyone make every investment decision. The guaranteed retirement account proposed allowing the government to invest the funds and allocate the investment profits among participants with the Federal Government guaranteeing a minimum return of 3% above inflation. This proposal is attractive except for the provision allowing the government to control investments in the market.[129]

Investment of money in One Fund accounts should be subject to strict rules. Notwithstanding arguments to the contrary this author believes that individuals prefer to let professionals make the investment decisions.[130] Given the option of a

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[128] In proposing The Plan, Charles Murray suggested that the Constitution be amended to prohibit Congress from creating any wealth redistribution programs. MURRAY, *supra* note 8, at 11.

[129] Shaviro questions the wisdom of allowing the government to make investment decisions with Social Security funds:

> Thus, even if Congress created an independent "Social Security Reserve Board" it might well get in the habit of issuing narrow directives. Perhaps it would start by barring investments in tobacco companies and gun manufacturers. Then, mirroring what has happened in state-run funds and those in other countries, Congress might start mandating, say, investment in low-income housing, local infrastructure, or companies that promise to build manufacturing plants in Rust Belt states that hold key presidential primaries. . . . In a thorough study of investment performance by state and local governments' retirement systems, published well before the current Social Security debate, Roberta Romano concludes that "there are no practical solutions to the problem of political influence on public pension funds" so long as (like Social Security) they are defined-benefit plans. Others are less pessimistic but agree that the problem of political meddling is real.

SHAVIRO, *supra* note 11, at 122 (quoting Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 796 (1993)) (citations omitted).

[130] Shaviro disagrees stating:

> Despite the paternalism and moral hazard arguments for limiting portfolio choice, I personally find the extent and manner in which the system denies it hard to defend. Are Americans unable to make even such limited investment decisions as whether to accept a bit of well-diversified risk in exchange for a higher expected return? Why try to prevent people (in practice, only those who don't save enough on the outside) from trading the Social Security retirement package for something

secure account with a guaranteed return they would select that account over more volatile accounts with uncertain returns. Offering a government bond fund with a guaranteed return of 3% above inflation would be highly attractive and should be the default fund as well as the fund holding a minimum level of investment in every account.[131] The minimum level could be the first $100,000 plus 40% of the balance in any account up to $1 million. Thereafter, the participant can allocate the remaining funds among approved funds. In that the One Fund is the worker's "safety net," investment options approved and monitored by the administrator should be relatively conservative.[132]

The magic of compound interest is performed over a long term.[133] For this reason individuals begin saving when they begin working and continue until the $1 million level is reached. At such time as the value of the fund reaches certain predetermined levels the individual will be permitted to withdraw funds for use in the purchase of a residence, education, special health care needs, or bona fide or designated emergencies. Funds withdrawn for a particular purpose will not be taxed but the $2 million limit will be reduced by the amount of any tax free withdrawals.

Funds in the One Fund are exempt from the claims of creditors except to the extent determined pursuant to a valid domestic relations order for the benefit of dependent children. As proposed, it will be unnecessary for amounts in a One Fund account to be subject to claims of a divorced or surviving spouse since each person would have their own One Fund account.[134] The One Fund

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> of equal actuarial value, perhaps selected from a short list of what are considered prudent options?

*Id.* at 103.

[131] The return on long-term government bonds has not kept up with the impact of inflation since World War II. The real rate of return during the period 1946 to 2006 for stocks was 6.9% but for long-term government bonds was 1.6%. However, Siegel predicts that future real rates of return will be about 2% with inflation at between 2% to 3% for nominal interest rates of 4% and 5%. This is lower than the 3.5% real rate of return on such bonds over the past 205 years. SIEGEL, *supra* note 16, at 16–17.

[132] Commentators desiring the privatization of the Social Security system emphasize the long-term real returns on equities will argue that the longer money is invested the less the risk and greater the return. However, the One Fund Solution with its guaranteed real rate of return with tax exempt distributions provides a risk-free return consistent with the paternalistic approach suggested. Besides, additional funds could be contributed and invested for the long-term.

[133] Albert Einstein is reputed for his comment that compound interest is the eighth wonder of the world meaning that small changes in rate will produce large changes in outcomes when compounded over long periods of time. Browning, *supra* note 57, at 10.

[134] Earnings-sharing proposals have been set forth as a way to reduce benefit costs and inequities by crediting each spouse with one-half of the couples combined earnings. Such proposals may result in costs savings for the Social Security system but would have the effect of facilitating property settlements upon divorce. SHAVIRO, *supra* note 11, at 112–13 (citing C. EUGENE STEUERLE & JON

Solution would provide that fund contributions and earnings made or accrued during marriage would be allocated equally between the accounts of the married persons.[135] This proposal essentially treats the earnings of married couples in a manner similar to how they are treated in a community property state.

Funding health care requires special consideration. Charles Murray found in formulating The Plan that a high deductible health insurance plan could be obtained if the individual committed to a lifetime premium. He estimated the cost at $3,000 per year. If such a plan were provided through the One Fund the government could commit to refundable tax credits for low income participants to assist in the funding of health insurance until asset values in the One Fund could support the individual's insurance. It is not the purpose of the One Fund Solution to replace all wealth transfers, as Murray's The Plan is proposing, but it should be an objective that as individual wealth accumulates the individual will be in a position to fund their own benefits. The One Fund Solution is sufficiently flexible to permit employer contributions for the purpose of providing health and medical insurance.

The One Fund is established to reflect the shared responsibility of the individual to provide for their own welfare and the government's role in paternalism. Governments step in and take over responsibility for individuals when they fail to provide for themselves. It has been the practice of governments once engaged in an area to dominate that area and squeeze out private decisions. So it has become in the prime areas of life planning. Government's problem is that it cannot say "NO" to any perceived need.[136] With the One Fund individuals

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M. BAKIJA, RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY: RIGHT AND WRONG APPROACHES TO REFORM, 214 (1994); HENRY J. AARON & ROBERT D. REISCHAUER, COUNTDOWN TO REFORM: THE GREAT SOCIAL SECURITY DEBATE, 98 (1998)).

[135] *Id.* at 124. Shaviro notes:

> On spousal benefits, some traditionalists have commendably taken the lead in proposing reform without just trying to cut benefits by the back door. Unfortunately, the tendency of the current system to discourage clear thinking about the tax-benefit relationship impedes addressing the forced-saving needs of stay-at-home spouses without making what are perhaps excessive transfers to one-earner couples. Traditional Social Security is in principle flexible enough to do better in its treatment of household issues, but this will require clear thinking about the difficult choices that are involved.

*Id.*

[136] Gingrich confirms this analysis:

> When there is a permanent deficit there is no reason for any politician to say no to any interest group. If government spending is simply an open-ended credit card with no consequences, why not pander to every group and say yes to every request? That is, in fact, how we ended up with the current absurdly bloated, undisciplined federal government. If deficits do not matter and spending is open ended, the most rational strategy for every bureaucracy is to simply ask for more money. If, however, there is a commitment to balancing the budget, then each agency has to

can re-take responsibility for their own life decisions, fund their own priorities, and refuse expenses that are not cost effective. They will be spending their own money.[137] The individual will decide between the extent of end of life care and an inheritance for the next generation. Government's role will be to allow the One Fund Solution to be the exclusive tax-supported solution to government support in these areas. Murray suggested that The Plan might only work if a constitutional amendment prohibited the government from reentering the fields which The Plan supplanted. A constitutional amendment may also be necessary to limit government's role in all family planning challenges except for provisions of the One Fund Solution that treat all citizens equally.

Once fully implemented the One Fund should replace tax expenditures estimated to be over $700 billion over five years. As such funds are gradually freed up, subject to appropriate transition rules, they can be used to offset the immense legacy costs associated with unfunded governmental obligations for Social Security and Medicare.[138] One unintentional benefit of the One Fund is that as funds in the guaranteed government bond fund grow, more and more of the Federal debt will be held by United States citizens. Because the bond interest is inflation adjusted, there may also be an incentive for Congress and the Federal Reserve to restore fiscal discipline to the government. With a guaranteed inflation adjusted rate, seniors will no longer be squeezed by Federal Reserve rate cuts that reduce the income generated by secure FDIC guaranteed investments.

Because of the projected size of the unfunded Social Security and Medicare/Medicaid problem built over the baby boom generation it is unlikely that any solution will be fully in place in the near future. In fact, proposed "fixes" for Social Security solvency commonly focus on a 75 year horizon suggesting that full implementation of the One Fund Solution will be a multigenerational project.

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> find better ways to do things and more innovative ways to get things done. If you want innovation, better outcomes at lower costs, greater productivity, and a spirit of entrepreneurial public management, the balanced budget creates much more pressure for real innovation.

GINGRICH, WINNING THE FUTURE, *supra* note 5, at 144.

[137] People come to rely on such assistance and then fail to provide it for themselves. Since government finds it impossible to say "no" to any request for assistance the cost effectiveness of any solution is ignored. Since there is never "enough" to satisfy the need, programs grow, costs inflate, efficiency is lost, and individual needs are only partially met. The solution to government's cost containment problem is to place a certain amount of decision making and risk of poor decisions on the individual whose fate is determined by those decisions. The whole-life insurance model lets the individual decide which needs have priority.

[138] STAFF OF JOINT COMM. ON TAXATION, 111TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2008–2012, (Comm. Print 2008). Retirement tax expenditures include (in billions) Keogh-type plans $71; defined benefit plans $212.9; defined contribution $341.4; traditional IRAs $78; Roth IRAs 20.3; and credits for certain IRA deferrals $4.1.

## IV. FINDING THE RIGHT SOLUTION

The search for a solution for the social safety net results from the general acknowledgement that the Federal Government will be unable to finance the promised benefits under Social Security and Medicare.[139] The Social Security "trust" fund described above should have insured payment of benefits through 2041, but has become the subject of jokes among Washington politicians. Surveys alleging that young people have greater confidence in the existence of UFOs than in the likelihood that they will receive Social Security[140] were widely quoted by President Bush, but the reliability of such surveys has been seriously questioned.[141] One presidential expression of the problem is the following:

> On April 5, 2005, President Bush posed for a photo beside a file cabinet that holds the $1.7 trillion in Treasury bonds that constitute the Social Security Trust Fund and commented that those securities "were not real assets." Later in a speech he said, "There is no trust fund, just IOUs."[142]

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[139] That Social Security is a poor investment is generally acknowledged. However, what is not known generally is that it does not achieve its primary purpose of eliminating poverty in the over-65 population. It does not according to Murray who points out that nearly one out of every ten people age 65 and older fall below the poverty line. The primary reason is that many people (e.g., divorced women who stayed at home) did not work long enough to qualify for Social Security. This is remedied by The Plan which is universal and not dependent on working. MURRAY, *supra* note 8, at 24.

[140] Miller notes the problem faced by young workers expecting some payout:

> By the early 1980s, owing to the growing payroll tax bite, that average couple had to scrape by on four times what they paid in, but in absolute dollars those retirees (many still collecting) enjoy the biggest windfalls Social Security will ever bestow. How big? On average, on lifetime payroll contributions of $65,000, they receive an astonishing $280,000 in benefits, for a net lifetime "profit" of about $215,000 (in 2003 dollars). People retiring in 2000 will still receive 1.2 to 1.4 times their contributions. But many boomers retiring in 2010, and the bulk of the Generation X'ers who come after, will face lifetime *losses*.

MILLER, *supra* note 10, at 201 (emphasis in original).

[141] GHILARDUCCI, *supra*, note 9, at 151.

[142] *Id.* at 151. Miller provides the following:

> Remember how awful it was when you realized there wasn't a Tooth Fairy or a Santa Claus? Well, brace yourself for another rude awakening: The Social Security trust fund is an accounting fiction. While it's true that about $100 billion more comes in today via Social Security taxes than gets paid out in benefits, that "surplus" is immediately invested in Treasury bonds, in effect loaning the money to Uncle Sam to mask the deep deficits in the rest of the budget. The so-called surpluses building up in the trust fund are thus nothing but IOUs. Making good on them as the boomers retire won't be pretty, since by that time we'll be paying out far more in Social Security than payroll taxes bring in. The tragedy is that today's "surpluses" were designed by congressional reformers in 1983 to add to national savings, in

In contrast to this view of the trust fund is the view that the trust fund is a solemn compact between the politicians and the average American worker. By passing the legislation the lawmakers are saying, "You pay higher taxes now in exchange for guaranteed benefits at the time you retire."[143] Any reservations those who voted for the change had were abandoned when the legislation was approved. This position sees Social Security as the "bedrock" of the American retirement system.[144]

Some commentators seriously contest the 2041 date and suggest that more reasonable estimates of economic growth should keep the system solvent through 2052.[145] It is also considered possible to increase the Social Security payroll tax by 2.5% to assure solvency for 75 years.[146] What is unsettling is that responsible

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> hopes of boosting economic growth before the big bills came due. Instead, they became an easy way to evade hard choices in the rest of the budget. For the record, the head-in-the-sand crowd insists these trust funds (there's one for Medicare, too) are as "real" as any private retirement account holding Treasury bonds. Maybe it's time we switched to a clear label: the "Pass the Huge Tax Hike to the Kids" Funds.

MILLER, *supra* note 10, at 201. Newt Gingrich is particularly irreverent about the Social Security trust fund which will be needed in 2017:

> But the government has no cash in reserve to repay any of those bonds. So guess who will pay for them? That's right: you, the taxpayer.
>
> From 2017 [to] 2042, in order for Social Security to continue to be able to pay all promised benefits, taxpayers will have to cough up an additional $6.5 trillion to pay off all the trust fund bonds. . . .
>
> This additional, enormous taxpayer liability happened because Social Security never saved and invested any of its "surpluses[.]" . . . Instead, the program loaned the surpluses to the federal government, which used the money to pay for everything from "bridges to nowhere" to welfare to foreign aid. In short, the Social Security surpluses went to the general fund to pay for anything and everything the government pays for.

GINGRICH, REAL CHANGE, *supra* note 5 at 148. They are, of course correct, but, why say it that way? In reality the taxpayers are merely repaying the debt incurred years ago so Congress could continue spending without raising taxes. It was Gingrich and the others in Congress who set up the trust fund concept which they now use to taunt the American people. That the government has to repay borrowed money should be no surprise.

[143] BATRA, *supra* note 59, at 22.

[144] *Id.* at 15.

[145] GHILARDUCCI, *supra* note 9, at 148.

[146] Ghilarducci states:

> (Raising the FICA tax rate is not unreasonable since it has not changed in fourteen years. Moreover, during the fourteen-year period before it was last changed in 1990, FICA was increased six times, from 7% in 1977 to 12.4% in 1990.) Presidents Carter, Reagan, and Bush senior oversaw FICA tax rate increases. Since FICA has been raised twenty-two times in the sixty-seven years since Social Security was established, increasing the FICA tax on pay is a routine part of maintaining the system. It can be argued that raising the FICA tax now is politically difficult

government officials as high as the President should think so little of the Federal Government's obligations.[147]

Social Security can be made solvent by either (i) raising the payroll tax; (ii) reducing benefits, for instance by extending the retirement age;[148] or (iii) increasing the rate of return on the trust fund assets or privatizing a portion of the payroll tax.[149] A proposal called "progressive price indexing" uses wage indexing to drastically reduce benefits for average and higher income workers. It would flatten the progressive nature of the system and provide a high replacement for lower income workers.[150] Progressive price indexing would force average and high

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> because there is a surplus of more than $1.5 trillion in the Social Security Trust Fund, and the trust fund is projected to grow in absolute value until 2017, when the size of the trust fund will be overtaken by the liabilities in Social Security.

*Id.* at 152. To support her position that the United States can afford to fund Social Security, Ghilarducci points out that the United States will only spend 7% of its GDP on Social Security in 2050 while Italy is projected to spend 20%, Canada 8.7%, and France and Germany between 14% and 18% while England will spend only 4%. *Id.* at 153.

[147] For Shaviro the importance of the trust fund lies only in the willingness of future politicians to respect it and to allow its existence to restrain their decision making. SHAVIRO, *supra* note 11, at 7.

[148] Ghilarducci recognizes the push to extend retirement age:

> The World Bank's report on pensions in 1994 became a manifesto for more individual responsibility in retirement planning, for changing social norms to reward and make legitimate longer work lives, to penalize "early" retirement, and for private individual pension accounts to replace national Social Security and company plans. In short, one clear expressed global agenda is to retrench—to get the elderly to work more.

GHILARDUCCI, *supra* note 9, at 192. Ferrara points to *Flemming v. Nestor*, 363 U.S. 603, 616 (1960) (holding that individuals have no property rights in Social Security benefits and that Congress can change them at will to meet the needs of flexibility and boldness). Ferrara, *supra* note 37, at 78. Justice Black, dissenting, looked at the program as insurance and therefore subject to contract principles. *Flemming*, 363 U.S. at 624 (Black, J., dissenting).

[149] Ghilarducci recognizes seven issues that are constantly raised when Social Security Reform is being considered: (1) How much should the elderly work; (2) What should the Federal Government do when employer pension plans fail?; (3) Will increased longevity cause insolvency?; (4) Does Social Security squelch initiative to save for one's own retirement?; (5) Can Social Security (and tax-favored retirement systems) mitigate rising income and wealth inequality?; (6) Does a crisis require major reform?; and (7) Are advanced-funded programs or pay-as-you-go programs more affordable? GHILARDUCCI, *supra* note 9, at 172.

[150] *Id.* at 157. The effective rate of the Social Security portion of the payroll tax is complicated by iterations between the employer portion which is deductible by employer and not included in the employee's income while the employee portion is deductible by the employer and taxed to the employee. Shaviro suggests the combined effect is an 11.5% tax up to the ceiling but for the purpose of thinking about the overall impact on your earning it is a combined 14.2% (7.65% multiplied by 2) reflecting a minor adjustment for the exclusion of the employer's share from your earnings. He also points out that the payroll tax does not apply to all fringe benefits and certain forms of compensation. SHAVIRO, *supra* note 11, at 10–11 n.3.

income workers to increase their personal investing to compensate for loss of Social Security.[151] Another commentator has suggested that the Social Security shortfall could be eliminated by simply indexing the determination of the initial benefit to the cost of living rather than to wage increases.[152]

American culture has always respected personal responsibility, self-reliance, and the ability to overcome life's difficulties through perseverance and the pursuit of the good in an honorable way. Self-respect derives from these qualities. Our discussion of American Paternalism and numerous tax motivated solutions to life's problems has demonstrated an incredible complexity which, coupled with government mandated inflation and an incomprehensible tax system, undermines these fundamental American values. Ghilarducci concludes:

> In most, if not all, nations, social spending programs aim to prevent poverty and enable workers to retire, even if a worker is still capable of working. Governmental policymakers and economists recognize that people are unable to make, or hopelessly ineffective at making, decisions affecting their lives over a long time horizon.[153]

What is particularly alarming is that at the beginning of 2009 with a new president being sworn into office the nation looks to the government to solve an overwhelming economic crisis that was generated by that very government's irresponsible economic policies. A new economic stimulus is becoming the cure for problems caused by previous economic stimuli. Solving such crisis with continued borrowing could create intergenerational conflict because the government's ability to fairly balance interests is being seriously questioned.[154] It is therefore necessary

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[151] Shaviro sees every income cohort in the Social Security system as suffering a net loss in the system with lower cohorts losing less than higher cohorts. It is merely a transfer from younger persons to older persons that is distributed progressively based on income. *Id.* at 69.

[152] MILLER, *supra* note 10, at 205–08. *See* GHILARDUCCI, *supra* note 9, at 168 (identifying and describing a number of ways to fine-tune the existing system to extend the solvency of Social Security and estimating the effect of each on such extension).

[153] GHILARDUCCI, *supra* note 9, at 56.

[154] Governmental solutions produce unequal and often inequitable effects. For example, the government has no ability to offset the moral hazard of people working less if their income is assured or for adverse self-selection. Thus any effort by the government must be limited. SHAVIRO, *supra* note 11, at 53–55. Shaviro further explains:

> [The government's ability to successfully alter or reform Social Security and maintain a sense of generational fairness] strongly depends upon the fact that so long as society keeps getting wealthier, the age group (elderly people) with the greatest political power is also generally the poorest on a lifetime basis. The current system might look less appealing if we asked: How would it respond to different contingencies, such as an economic downturn that left young people worse off that the elderly? This could happen, for example, if a recession hit the labor market harder than the stock market.

to limit the governmental role in personal financial responsibility and limit that role to areas in which the government has the ability to act efficiently and effectively.

The focus here is individual financial security and the first question is how much of an individual's income should be saved to meet that goal of financial security. From the earlier discussion of the Baileys it was suggested that 20% seems to be an acceptable goal. Recognizing this goal it seems the height of incredulity to suggest that the 15.3% payroll tax should not be considered individual savings. Ghilarducci agrees with the 20% suggestion:

> Without Social Security and employer-provided pensions, a worker who chooses to be, or must be, a "do-it-yourself pension" planner, needs to save about 20% of every paycheck in an account earning at least 4% after inflation and investment fees for an entire working life. It is a tall order to fill; most people don't fill it and couldn't fill it without being forced to save.[155]

A rule of thumb might be that a person would need approximately $230,000 in a lump sum at retirement to generate a pension of $1,000 per month.[156] Thus, a $1 million retirement nest egg would purchase a $4,347 per month ($53,174 per year) lifetime annuity.[157] However, the retiree must keep in mind that with inflation at 4% per annum the retirees earning power would decrease about 25% by age 75, and 50% by age 85.[158]

The second question is what is meant by financial security and this question seems best answered by focusing on financial independence. That is the ability to make decisions about life without complete dependence on one's ability to earn a living. Since few people begin life with such an ability it is appropriate to ask at what age someone should ideally be in such a financial position. This raises

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> Under such circumstance, transfers from the elderly to the young, or at least reduced transfers in the other direction might be appropriate. But the adoption of such transfers through Social Security would be impeded not only by the power of the AARP, but also by an ideology that holds that benefits currently promised to the elderly can be increased but not reduced.

*Id.* at 71.

[155] GHILARDUCCI, *supra* note 9, at 56. She further observes a rule of thumb by pension experts is that you must save between 7% and 15% of every paycheck during your thirties and forties if you will be able to maintain your pre-retirement standard of living in retirement depending on the assumed rate of return, wage increases, inflation and Social Security benefit. *Id.* at 120.

[156] *Id.* at 121 (reflecting the estimate that a $1,000 per month Social Security benefit is valued at approximately at $240,000).

[157] This number seems low in that corporate bonds generally pay 5% or more long-term and this would generate $50,000 per year without consuming principal.

[158] *Id.* at 121.

the question of the age of retirement although, by retirement, we should not think solely of the ability to while away one's life on the sea shore without any productive activity.[159] Retirement may mean continued work or the start of a new career or vocation. Many Americans believe that the ability to be productive is the essence of life. However, the fact that healthy men and women who are able to continue working may plan to retire at some point is also generally accepted in American society.[160]

Ghilarducci uniquely and poetically ties retirement to human dignity in a way we should all keep in mind: "The financial ability to withdraw voluntarily from the labor force, the ability to rest, and, even to recuperate before dying, is, to workers, a fundamental part of dignified living and a marker for achieving middle class status."[161] Ghilarducci states further: "Retirement with dignity and security after a lifetime of hard work is a cherished feature of a civilized society."[162] For Ghilarducci this promise is being lost in the United States because of the shift away from defined benefit plans in favor of defined contribution plans which, in her mind, have been proven as a failed experiment.[163]

At what age or after how long a period of labor should this ideal be achievable.[164] Many pension plans target age 65 and 30 years of service as the target for "full" retirement. Government and military look to 20 or 30 years of

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[159] Charles Murray calls this the European Syndrome. MURRAY, *supra* note 8, at 84–87 ("The European Syndrome is dismissive of all the ways in which work can become vocation and vocation can become a central source of satisfaction in life.").

[160] GHILARDUCCI, *supra* note 9, at 1 (noting that in 2000 the life expectancy of a man at age 65 was 14 years and a woman was 18 years).

[161] *Id.* at 2. Further she states:

> Retirement is a result of economic prosperity. And the choice to retire should be an achievable goal of everyone's financial life. A fundamental desire of everyone is to be able to make choices about how to spend our time. As we grow older time grow more precious. Making our pensions secure is the only way to secure the capacity to choose what to do with the time remaining to us.

*Id.* at 25.

[162] *Id.* at 260.

[163] This objective is becoming less and less a reality in the United States primarily because of the uncertainty generated by the demise of the defined benefit plan in favor of the defined contribution plan which relies on uncertain market returns. Ghilarducci concludes: "The nation's experience with voluntary, individual, tax-subsidized retirement accounts administered by commercial money managers, has failed." *Id.* at 261.

[164] The proposal is to allow people to choose their age of retirement but such decisions could be threatened from unexpected sources. The aging of the population in Western countries and the desire for early retirement could be threatened by a downward pressure on equity prices as baby boomers seek to sell their investments to fund their retirement. Siegel proposes a "Global Solution" to what he calls the "age wave" with the developing countries providing goods to the developed countries in exchange for "assets" furnished by the developed countries. From his analysis, it is necessary for the developing world to maintain a growth rate of 6% to 8% to allow the baby boomers to maintain their retirement age of 62. SIEGEL, *supra* note 16, at 133–38.

service and age 55 as the targets for retirement.[165] Social Security targets age 66 currently (increasing gradually to age 67 in 2027) for full retirement with early retirement at a decreased benefit at age 62 and delayed retirement with increased benefits at age 70.[166]

Contributions to the One Fund begin at age 18 although many young people attend college and begin their careers later. But, for someone beginning at age 18, by age 68 they would have accumulated 50 years of compounding on their One Fund contributions. That's great for the magic of compounding, but 50 years is a long time to pursue financial security. Ideally, that should occur much earlier—age 60, or even 55, should be considered a real target for an enlightened, progressive, growing society.[167] Sociologists suggest that length of expected retirement across socioeconomic groups is about equal at 13 years so that a system is necessary to allow people to retire at different ages.[168] Newt Gingrich suggests changes that encourage the poor to build wealth by beginning to save early in life and benefit from the principle of compound interest.[169] He would advise the young: "The key

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[165] The twentieth century saw a gradual increase in expected retirement time for both men and women. Nevertheless, beginning in 1999 expected retirement time began to slip back somewhat as people began to use their increased longevity to continue gainful employment. GHILARDUCCI, *supra* note 9, at 11.

[166] *Id.* at 282–83. Ghilarducci states:

> Whether an economy can support nonworkers depends more on productivity growth and the size and strength of the tax base rather than on the ratio of workers to beneficiaries. Whether a society chooses to support nonworking older people depends on economic power, mostly on the power in the labor market. Pension policy is ultimately labor policy. Economists Steven Nyce and Sylvester Schieber argue that older people should work more because a future smaller U.S. workforce will slow GDP growth (assuming everyone else is working) and lower consumption, which is something we all do not want to happen.

*Id.*

[167] If this objective cannot be met in the immediate generation it should become more achievable under the One Fund for succeeding generations that begin life with, or at least expect to receive, some contribution to their One Fund through inheritance.

[168] *Id.* at 13–15.

[169] GINGRICH, REAL CHANGE, *supra* note 5, at 64. Gingrich states:

> The poor especially need the power of compound interest over time to help them grow out of poverty and into prosperity. The earlier you start working and saving, the more likely you are to rise. The earlier you learn how to make a living and how to spend less than you earn, the more likely you are to move out of poverty.

*Id.* He also sees the importance of change in education:

> There is ample evidence of what works in education, but the bureaucracies have systematically ignored all of it. Innovations that work included merit-based pay, increasing teacher-student rations, revamping union rules to reward the best teachers, bonuses and incentives for new teachers, charter schools, and offering parents a coupon giving them the opportunity to send their children to the school that works best for them. I've even suggested rewarding students in the poorest neighborhoods by paying them if they get a B or better in math and science.

*Id.* at 57–58.

characteristics of great success are starting early, working hard, learning every day, and being prepared to bounce back from failure and to enthusiastically work your way through setbacks and frustrations."[170]

Ghilarducci believes a system of combined Social Security and defined benefit pensions as being efficient and affordable and preferable to a defined contribution plan because the former will cover everyone and the latter only those who volunteer.[171] Workers need to be forced to save and insure against the coming possible "superannuation."[172] Social Security and employer pensions spread the risk over large groups in an efficient and workable manner.[173] She sees arguments that the system is seriously threatened by the shift to defined contribution plans and longer life expectancy as false, arguing that the large tax expenditure supporting defined contribution plans unfairly favor higher paid workers and suggesting that increased life expectancies may result from earlier retirement.[174] Finally, she argues that similarly situated retirees with a guaranteed amount of income feel more secure and are generally more content with their situation than retirees with merely an equivalent lump sum at their disposal.[175] Defined benefit plans are preferable in a society in which frequent job changes occurs.[176]

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[170] *Id.* at 64.

[171] GHILARDUCCI, *supra* note 9, at 13–17 (arguing that the combination is both efficient and affordable).

[172] *Id.* at 24 ("'[S]uperannuation' [is] a rarely used word of many syllables that simply and sadly refers to the awkward stage of life when people either cannot work or no one wants them to work.").

[173] An important complicating factor is that a public program can control risk in a way that private programs cannot. A public program can obtain any portfolio profile it desires, whereas a private plan cannot. For example, recent contributions have significantly more risk than contributions years in the past. Orszag & Stiglitz, *supra* note 15, at 13.

[174] The pension system is seen as being threatened by the general beliefs that (i) life expectancy is increasing so that we should work longer, (ii) labor shortages will develop as the population ages, and (iii) pensions are unaffordable. GHILARDUCCI, *supra* note 9, at 17. She presents the example of an upside down tax incentive by comparing a $20,000 a year worker taxed at 15% saving $2,000 (10%) and getting a $300 tax break with a $200,000 a year worker taxed at 35% saving $20,000 (10%) and getting a $7,000 tax break. *Id.* at 21.

[175] This is also borne out by the finding from the survey that having a supplement to Medicare or Medicaid—even for retirees who are healthy—substantially increases their satisfaction. *Id.* at 72.

[176] *Id.* at 74. The author compares two employees and concludes that an "average" employee with the defined contribution would accumulate $59,000—enough to pay an annuity of $6,000—while the same employee accumulating 2% per year of final average pay making the same moves as the 401(k) employee would accumulate a pension of $35,364. The author acknowledges that if the employee was an "ideal" 401(k) participant and had rolled-over his entire accumulation each time he changed jobs he would have accumulated $647,379—enough to buy an annuity worth $51,790 for life. Of course when the 401(k) participant changes jobs the money that is not rolled-over is used for current purposes that may improve the quality of the participant's life. This ideal participant is one that never misses a payment, never borrows from the plan, and never withdraws any amount from the plan. See *id.* at 78, for a chart setting forth the details of the comparison between a "real life" average 401(k) participant and an "ideal" 401(k) participant.

In promoting her guaranteed retirement account, Ghilarducci argues her preference for defined benefit plans over defined contribution plans. Her primary argument is that they cover all employees and are better and more efficiently managed.[177] Defined contribution plans suffer from non-professional management and high costs.[178] Current problems with defined benefit plans stem from under-funding which she attributes to the actions of the PBGC that permitted pension funds to use a double digit return to project future values.[179] Further, the under-funding of the PBGC is the result of unusual bankruptcies in the airline and steel industries.[180] Finally, calling herself an "institutionalist" as opposed to a neoclassical economist, she believes that governments, unions, and firms are better able to make group decisions than individuals in the group.[181]

Defined contribution plans also suffer from certain leakages such as hardship and other special withdrawals so that the average defined contribution plan has a balance of around $50,000—enough to fund a 20 year payout of $300 per month

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[177] Self-annuitizers face inflation risks against which the increasing cost of living will progressively undermine the buying power of the retiree's income. Investment risk includes the risk of a less than optimum portfolio mix of bonds and stocks thereby incurring greater risk for a given return on investment. Investment funds may provide life-cycle funds that eliminate some of the risk but even here all life-cycle funds vary in their investment strategies. Providing educational assistance in the area of personal financial management to participants does not seem to change the investment allocations of participants. GHILARDUCCI, *supra* note 9, at 127, 309 n.15 (citing Steven Venti, *Choice, Behavior, and Retirement Saving*, in OXFORD HANDBOOK OF PENSIONS AND RETIREMENT INCOME, 603–617 (Gordon L. Clark, Alicia H. Munnell, & Michael Orszag, eds., 2005)).

[178] Workers are unsuited and unable to earn the maximum return on their pension savings when individual accounts are the vehicle to do so because of high and hidden investment management fees, the lack of investment experience and the difficulty of saving enough to eliminate the downside risk of not having enough to retire on. GHILARDUCCI, *supra* note 9, at 129.

[179] *Id.* at 97–98, 109–110. That defined benefit pensions are subject to considerable uncertainty is reflected in the impact of the economic downturn in 2008 on pension assets. One study reported that, of 772 of the S&P 1500 companies that have defined benefit plans, plan assets represented only 75% of pension obligations. Further, at a time (Sept. 30, 2008) when the non-finance companies in the S&P 500 companies reported a near record $647.8 billion in cash, escalating demands for that cash included $70–$100 billion need to cover investment losses in pension plans. Norm Alster, *Corporations Face Cash Squeeze from Credit, Profits, Pensions*, INVESTOR'S BUS. DAILY, Jan. 26, 2009 at A1.

[180] GHILARDUCCI, *supra* note 9, at 105.

[181] *Id.* at 85. Ghilarducci states that:

> Institutionalists emphasize human limitations to process information, limitation that make it unrealistic for people to make rational decisions. That perception implies that decisions can be better made, or only made, by a union and a firm, together, to provide employee benefits, such as defined benefit pension and health insurance, both providing for worker's long-term needs. Perhaps this may justify what could be considered derisively as the "paternalistic" view of unions and firms.

*Id.*

at a 4% investment return.[182] Believing that permitting lump sum withdrawals undermines pension security,[183] Ghilarducci proposes that any pension reform should be judged by the following standard:

> Any pension reform should be evaluated according to: whether the reform encourages better and more stable funding; whether the reform is fair to workers, retirees, executives, shareholders, customers, and taxpayers; whether the reform encourages the formation of "real" pensions—where "real" implies an definite stream of lifetime income; and whether the reform helps firms adjust to business cycles and industrial trauma.[184]

The One Fund Solution meets these standards by requiring significant contributions throughout life, offers guaranteed inflation adjusted investment options, and is the sole vehicle for government supported/tax favored savings. All taxpayers are treated equally with taxpayers desiring greater returns or larger portfolio's being required to do so without taxpayer subsidies. But the One Fund goes beyond these standards by offering flexibility to the participants in investment choices and the ability to use the fund for lifetime needs subject to regulations that prevent jeopardizing long-term security. Further, it limits the government's involvement in guaranteeing or underwriting investment risk. Where outside services are provided through the One Fund such as investment options, health care, disability, education needs, and related services, government does what government should do best by insuring adequate disclosure and the ability of approved vendors to provide the service offered in a responsible manner.[185]

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[182] *Id.* at 102, 306 n.46, 107–08.

[183] The PBGC regulations do not restrict the lump sum distributions from defined benefit plans. These distributions are favored mainly by executives but have the effect of draining fund assets which are not generally acquired to fund lump sum distributions. *Id.* at 114. By taking a lump sum rather than a retirement annuity you forego any "subsidy" that you would obtain if you were in an actuarial defined group of similar retirees. A self-annuitizer is also likely to underestimate your longevity. Psychologically it is interesting that people are willing to share risks in auto, house, and medical insurance, but not in pension risk. *Id.* at 124.

[184] *Id.* at 114.

[185] MURRAY, *supra* note 8, at 127. Murray states:

> If constructed with great care, it is possible to have a government that administers a competent army, competent police, and competent courts. Even accomplishing this much is not easy. Every step beyond these simplest, most basic tasks is fraught with increasing difficulty. By the time the government begins trying to administer to complex human needs, it is far out of its depth. Individuals and groups acting privately, with no choice but to behave in ways that elicit voluntary cooperation, do these jobs better. The limited competence of government is inherent. At some point in this century, that too will become a consensus understanding.

*Id.*

Resolving the retirement dilemma should not be independent of solving the health care problem. At one point employers provided pensions and health care as a package and, for seniors the two problems interact every day. Social Security ties into Medicare in that Medicare Part B is deducted monthly from Social Security payments. Murray suggested that high deductible health care insurance could be obtained for a relatively modest cost when coupled with a commitment to continue the policy over one's life.[186] This at least would address the possibility of catastrophic illness.[187] However, it is suggested that achieving real health care reform requires stressing prevention, wellness, early detection, and self-management as well as shifting health care decisions from bureaucratic systems back to the patient.[188]

Education makes demands on life savings that can be accommodated through the One Fund. Tax subsidies provide assistance on a modest level that could be duplicated through the One Fund without seriously undermining long term security. Housing is often acquired through savings when people are in their 20s. During these early earning years the One Fund balance may not be sufficient to

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[186] Gingrich provides a list of citizenship rights which includes basic health rights. You have a right not to die from medical error, be protected from contracting illnesses in the health care facility, to own your own medical record, be part of a low-cost health insurance with vouchers for those who cannot afford the insurance, to know quality and cost before making a medical decision, and to know your treatment options. Every person has the responsibility to have health insurance but he would require the posting of a bond by "libertarians" who do not wish to participate in the plan. He goes further and asserts that everyone is expected to be engaged in maintaining their own health, contribute something toward the cost of medical care, and make reasonable cost-benefit decisions. GINGRICH, WINNING THE FUTURE, *supra* note 5, at 123–26.

[187] The Plan recognizes an important connection between health care and retirement savings. Murray notes the expense of medical care escalates because of three characteristics in the current health care system. Routine health care needs are paid by insurance so that the individual receiving the service is unaware of the cost and not responsible for its payment. Second, many costs are incurred "just-to-be-sure" the condition does not exist. These expensive tests have only a marginal benefit yet are extremely expensive and are paid by insurance. Finally, end of life care is a large part of the medical costs but often only extends life a couple of months. These problems can be overcome by having medical and related cost decisions be made by the person receiving the care. His three reforms are noted in the text.

[188] GINGRICH, REAL CHANGE, *supra* note 5, at 240. Gingrich states:

> The deepest and most destructive impact of the third-party bureaucratic system on health is that it shifts responsibility and authority away from the individual and onto other people. In a third-party bureaucratic system, the buyer (the insurance company) pays for the receiver (the patient) and someone else (the doctor) provides a good or service. The patient is essentially passive, and becomes dependent on the insurance bureaucracy to decide how he can get care. Then he becomes dependent on the doctor to provide the service the bureaucracy has agreed to pay for. He gets into the habit of waiting for someone besides himself to do something to make him healthy. To make this problem even worse, the doctor who is being paid to take care of the patient grows to expect him to be hopelessly passive.

*Id.*

fund a loan for a down payment. While the One Fund is not a "bank" account and withdrawals are strictly regulated to minimize any impact on long term security, some accommodation of first time home buyers may be possible depending on fund balances and age of participants. Education is now built on the willingness of young men and women to borrow large amounts of money. A goal of the One Fund should be to alleviate that need.

The key item of discussion when talking about private accounts is the rate of return on the funds invested.[189] Newt Gingrich in his advocacy strongly asserts the low real rate of return on money invested in Social Security, which he argues is only 1 to 1.5%, and contrasts it with the argued long-term real rate of return on stocks of over 7%, and the real return on bonds of around 3.5%.[190] He would subscribe to a plan proposed by Representative Ryan and Senator Sununu that would allow people to invest 50% of their Social Security contribution in private accounts with a Federal guarantee that the fund would yield no less than would be the case under Social Security.[191] This plan essentially leaves the investment

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[189] Newt Gingrich points out that the basic argument is that Social Security is no longer a good deal for young Americans since the long-term real rate of return on corporate stocks is at least 7.0 to 7.5%. *Id.* at 34 (citing PETER FERRARA & MICHAEL TANNER, A NEW DEAL FOR SOCIAL SECURITY 72–73 (1998)). Arguably, large company stocks have returned a real rate of return on the New York Stock Exchange of 7.5% since 1926. *Id.* at 33 (citing IBBOTSON ASSOCS., STOCKS, BONDS, BILLS AND INFLATION YEARBOOK (2003)). The real rate of return on corporate bonds is 3.5% so that a portfolio of half bonds and half stocks would be 5% and a portfolio of two-thirds stocks and one-third bonds would produce a return of 5.75%. Compare these results to the real rate of return on Social Security of 1 to 1.5%, although some studies suggest that it is less than 1%. *Id.* at 33–34, 223 nn.15–17 (citing WILLIAM W. BEACH & GARETH G. DAVIS, SOCIAL SECURITY'S RATE OF RETURN: A REPORT OF THE HERITAGE CENTER FOR DATA ANALYSIS, No. CDA98-01 (January 15, 1998)).

[190] GINGRICH, REAL CHANGE, *supra* note 5, at 150. Shaviro cites estimates that Social Security offers an average internal rate of return of 2.4% for people born between 1945–1949; less than 1% for those born after 1965; and approximately 0% for those born after 1995. SHAVIRO, *supra* note 11, at 33. Browning provides data emphasizing that the "return" on Social Security taxes paid by individuals has and will decrease as time passes regardless of family and income status in which one finds oneself although the highest return goes to the low wage earner in a one-earner couple (dropping from 6.1% in 1995 and 4.9% in 2008 to 4% in 2068) and the lowest return goes to the high income single male (dropping from 1.5% in 1995 and 0.8% in 2008 to 0.2% in 2068). Browning, *supra* note 57, at 9.

[191] This plan reflects input from the "chief actuary of Social Security" and a principle at State Street Global Advisors. It would create intergenerational wealth and make the Social Security system not only solvent but produce surpluses. In fact, it would force the Federal Government:

> [T]o stop spending the annual Social Security Raid, it would have to be honest about the budget and the larger financial picture, because it would force Congress to no longer hide deficit spending in Social Security IOUs that it cannot finance. That would force Congress to prioritize or cut spending.

GINGRICH, REAL CHANGE, *supra* note 5, at 158.

decisions to the individual but the risk of loss with the government.[192] Such private accounts would resolve the Social Security funding problem[193] and create an ownership interest in society which he exuberantly praises:

> Just think about what sweeping changes our society would experience if workers at all income levels could accumulate several hundred thousand dollars in their own personal accounts by retirement. All workers would be accumulating a substantial, direct ownership stake in America's businesses and industries, and they would all prosper while dramatically increasing the capital available to the American economy. This would be a historic breakthrough in the personal prosperity of working people.[194]

As noted previously, Murray provides support for at least a 4% real rate of return over a 45 year period.[195] But while long-term averages are comforting and reflect some degree of reliance on the integrity of the stock market, individual experience may be somewhat unnerving. For example, the Dow Jones Industrial Average ("DJIA") peaked just over 1,000 in 1966 before falling below that number. Thereafter, it did not return permanently to that level until 1983; seventeen years later. While some dividend income may have cushioned the investment return,

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[192] Gingrich, using a plan proposed by Representative Ryan and Senator Sununu, calculates that if a husband making $40,000 per year and a wife making $30,000 per year were permitted to invest 50% of their current Social Security contributions in private accounts with a 50/50 stock bond ratio earning average returns over their entire careers they would accumulate approximately $668,178—enough to pay twice what social security would pay. Making a 67/33 stock bond ratio accumulates approximately $829,848 and if they were allowed to shift 80% of their contributions they would accumulate $1.2 million. A similar calculation produced even better benefits for a low income individual who would be permitted to invest a greater percent of their contributions to a private account. The Ryan/Sununu plan also contained a Social Security safety net with full Federal guarantee such that if the return on accounts fell below what Social Security would pay then the government would make up the difference. Since few people would fall below the level of protection the guarantee would be of minimal expense to the government.

[193] Estimating the cost of the Ryan/Sununu proposal, the Social Security chief actuary estimated that the reform plan would begin paying surpluses by 2030 and would meet all obligations through 2077 and beyond. GINGRICH, WINNING THE FUTURE, *supra* note 5, at 39; *see also id.* at 223 n.30 (detailing the Ryan/Sununu bill); *id.* at 223 n.31 (citing STEPHEN GOSS, ESTIMATED FINANCIAL EFFECTS OF THE PROGRESSIVE PERSONAL ACCOUNT PLAN (Dec. 1, 2003); STEPHEN GOSS, ADDITIONAL ESTIMATED FINANCIAL EFFECTS OF THE PROGRESSIVE PERSONAL ACCOUNT PLAN (April 6, 2004)).

[194] GINGRICH, REAL CHANGE, *supra* note 5, at 153.

[195] MURRAY, *supra* note 8, at 35. Murray argues that the 4% real growth return on stocks is essential for another reason. If it does not occur over the next 45 years the government would not be able to make good on its promises under Social Security in which case it may not make any difference whether The Plan was in effect except that with The Plan you would have an opportunity to make your own decisions on how to protect your retirement account. *Id.*

inflation would have left you worse off in 1982 than you were in 1966.[196] Likewise for the period 1998 to 2008 where the DJIA closed around 8600 in both years.

The meaning of these swings can be offset to some extent by investment strategies. But for the individual that turned 55 in 1998, planning to work for another ten years and retire in 2008 at age 65, the challenge is daunting. Not only were investment returns uncertain in that the swing of returns was great depending on the particular year being considered but these were the individual's highest years for personal earnings as well as savings. Keep in mind that any investment made at age 55 only accumulates a compounded return for ten years before the owner must decided whether to retire at age 65. An example may help understand recent stock market returns.

TIAA-CREF, one of the oldest organizations providing retirement services, is dedicated to providing financial services to persons in the field of education. They are known for their conservative investment strategies. They offer a number of funds in their retirement portfolio including a stock and bond fund and a guaranteed investment account. Looking at the ten year compounded annual rate of return on these funds reveals the following: stock fund -1.01%;[197] bond fund 5%; guaranteed retirement annuity (restricted withdrawals over ten years but benefiting from professional management) 6.12%. A combination of these funds could have produced a return that exceeded the stock market return although during the period returns varied and the one, three, and five year returns during this period were lower than the ten year return. It should be noted that the Stock Fund was created in 1952 and reports its rate of return since inception through 2008 at 9.38%—well above inflation.

Most workers would not be in a position to manage their investments with the degree of confidence and objective and detached sophistication of professional investors so that restricting investment choices and providing a guaranteed fund remains highly desirable for funds that are accumulating for specific purposes.[198]

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[196] The real return on stocks was an abnormally low -0.4% during the period 1966 to 1981 and an abnormally high 13.6% during the period 1982 to 1999. SIEGEL, *supra* note 16, at 13.

[197] It is interesting to compare the Vanguard Total Stock Market Index fund for the same ten year period. It reported a return of -0.66%. Vanguard's Total Bond Market Index reported a return of 5.37% over the same period.

[198] Murray disagrees and asks the question:

> The broader question is whether ordinary people can be expected to plan for their own retirements and invest their money wisely, to which my short answer is: Why not? The large retirement income that I produced from a working income of $20,000 a year is based on the same amount that people at that income level are currently required by law to save for retirement. Accumulating that sum does not require people to make sophisticated investment choices; it is based on the result if they buy a fund based on a broad market index and leave it alone during a hypothesized worst investment period in American history. For that matter,

Such uncertainty leads others to advocate defined benefit plans and guaranteed funds managed by professionals. The One Fund provides a balance between these positions that leaves some degree of decision making and responsibility with the One Fund participant.

Transition costs from the present retirement system to the One Fund Solution would be significant and time consuming. Murray faced the problem of transition costs when he proposed The Plan. He noted that the switch would affect different people depending on their age and position. He proposed that the present value of the benefits lost by switching to The Plan could be made up by providing affected persons with a lump sum payment equal to the lost benefits.[199] He surmised that the only people that would need to be paid off under The Plan would be couples older than their mid-thirties making more than $50,000 each. These couples would expect two social security payments plus Medicare when they retire at normal retirement age.

Such a solution would be applicable to a transition to the One Fund. A present value calculation could be made either on the basis of individual contributions to the Social Security and Medicare trust funds together with some growth rate to determine the present value.[200] An alternative would be to use a present value analysis of expected benefits less future contributions and taking into account benefits to be assumed under the One Fund such as the guaranteed account and tax free withdrawals. Individual determinations would be made and the amount credited to the individual's One Fund account subject to appropriate limitations. Such calculations are performed regularly by the financial services community and much of the information necessary to make such calculations is generated annually by the Social Security Administration and mailed to every Social Security participant.

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> obtaining a 4 percent return does not require investing exclusively in equities. The CBO [Congressional Budget Office] analysis of the President's Commission to Strengthen Social Security projects an average real return of 5.2 percent from a portfolio consisting of 50 percent equities, 20 percent treasury bonds, and 30 percent corporate bonds.

MURRAY, *supra* note 8, at 31.

[199] *Id.* at 165–167.

[200] The higher the discount rate the lower the present value. It could be argued that the discount rate should be the expected return from Social Security (*e.g.*, 1.5%) or it could be the investment return on the guaranteed fund (*e.g.*, 3% after inflation) or some other rate on special bonds to be place in the individual's One Fund account. The discount rate could also reflect the tax exemption of distributions from the One Fund. The appropriate discount rate may be different for high and low wage workers but, in any event is controversial. *See* SHAVIRO, *supra* note 11, at 34–35.

Paying the "legacy" costs associated with Social Security and Medicare are significant.[201] The shortfalls and the trust fund weakness is a fact of life that must be addressed with hard choices. It has been pointed out:

> The trick in switching mid-stream from today's "pay-as-you-go" system to a pre-funded private retirement system is that one generation has to pay twice: first for the retirement of its parents, and then for its own, since younger folks in a private scheme will start paying for themselves. Usually such plans require at least a trillion dollars in these "transitions" costs. Conservatives either can't do the math or simply won't admit that they can't have Bush's tax cuts and also fund their transition to partial private accounts. Democrats fairly blast Republicans here for continued fiscal recklessness and for peddling the worst kind of accounting hoaxes to mask what they are up to.[202]

Under the One Fund enormous tax expenditures supporting existing programs would be freed up as time passes, vested benefits are paid, and existing plans dissipate and expire. A further important source of revenue will be the reinstitution of the estate tax after 2010 on large estates. It is reasonable to tax these estates because the accumulation of a large estate generally includes assets that have not previously been taxed under the normal income tax rates. Nevertheless there is a cost associated with the transition and that cost will be incurred even if the existing plans are continued. The One Fund would allow the shifting to a sustainable funded plan in which the government's roll would be to administer and provide inflation adjusted 3% bonds but not assume risk of investment losses.

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[201] Miller commenting on the unfunded liability:

> If government accounted for future benefit commitments as businesses must, these programs would show $25 trillion in unfunded liabilities. That means $25 trillion in promised benefits for which no money has been set aside. The pledge to honor them amounts to a promise to raise taxes on our children. If payroll taxes were raised to meet these costs, they would have to roughly double to 32 percent in 2030, an unthinkable and economically devastating burden. This won't happen, of course: Its obvious insanity means that long before then we'll have to rethink how these benefits are designed and financed.

MILLER, *supra* note 10, at 58–59.

[202] *Id.* at 277. Transition costs are a major reason that the system is not reformed but Browning points out that a refusal to pay these costs will ultimately mean that our children and grandchildren will be consigned to a lower standard of living. Browning, *supra* note 57, at 25. Furthermore, Browning identifies as a hidden cost of Social Security taxes a 10% reduction in GDP (0.3% annually) resulting from reduced savings and work incentives from the taxes. *Id.* at 26. Thus estimates of real return on an individual's Social Security contributions are incomplete. *Id.* at 12–16. That a switch from a pay-as-you-go system to private accounts incurs transition costs that must be borne by the current generation is not difficult to understand: "If the economy is dynamically efficient, one cannot improve the welfare of later generations without making intervening generations worse off. Reform of pension systems must thus address equity issued both within and across generations." Orszag & Stiglitz, *supra* note 15, at 13.

Finding the political will to change may also present problems.[203] In 2003, Matthew Miller proposed four areas in need of serious reform if America was to be in a position of addressing the retirement of the baby boomer generation. If implemented, his two-percent solution would mean that everyone working full time would be able to provide for their family, that every citizen should have basic health coverage, that poor children should have good schools, and that every citizen should be able to voice their opinions. Goals that he thought achievable were not met because of political consideration he outlined in his book. Money is a moving force in politics that distorts every effort at reform.[204]

Miller is skeptical of any reform[205] and sees the political future as determined by the government's commitment to be the "seniors-only" ATM machine.[206] If major programs were means-tested the cost would be reduced dramatically. With over $200 billion a year going to Americans with incomes over $50,000, it would

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[203] The political will to institute change is a perennial problem. Resisting the impulse to undo tax reform was seen in Republican efforts to undo the achievements of the tax reform of 1986 which reduced the income tax brackets to two and eliminated the capital gains differential. Both achievements were undermined within ten years by Republican majorities in Congress with the concurrence of a Democratic president. The author herein recognized the tendency of politicians to complicate simple tax proposals and argued against the adopting a value-added tax for the United States and argues herein for a transfer of control of life savings back to individuals. *See* Gordon T. Butler, *The Value-Added Tax: A New $40 Billion Tax for the United States?*, 50 TEX. L. REV. 267, 307 (1972). The Value Added Tax continues to be a hot topic whenever the government is seeking new revenue sources. *See* Alan D. Viard, *Border Tax Adjustments Won't Stimulate Exports*, 122 TAX NOTES 1139 (2009); David D. Stewart, *Specialists Offer Ideas for Design of U.S. VAT*, 122 TAX NOTES 1074 (2009).

[204] Miller suggests that money skews politics: "(1) it puts sensible policy options off-limits; (2) turns politicians' attention to wealthier Americans and business interests; (3) allows politicians to shake down business for campaign cash; and (4) discourages promising candidates from running for office." MILLER, *supra* note 10, at 45.

[205] *Id.* at 47–48. Miller states:

> The upshot of the forces we've discussed—electoral parity, Democratic timidity, Republican indifference, media stenography, and the warping effect of campaign cash—is a debased political culture in which potential answers to our major domestic problems cannot find expression. . . . Since our leaders can't or won't talk about what it would take to make serious progress on health or schools or wages or campaign reform, they pretend they're serious as a way of communicating their good intentions and letting us know which "side" they're on. . . . Public life becomes a complex and mystifying con—not a search for solutions, but the pretense of a search for solutions as a means of jockeying for power.

*Id.*

[206] *Id.* at 57. Miller states:

> The reality dawning as we look over the horizon is that virtually all of government spending has been pre-committed to the seniors-only ATM, leaving future voters effectively disenfranchised. This can't be acceptable. We need to tackle the challenges that accompany the aging of America now to avoid a showdown later.

*Id.*

appear on first look that means-testing would be appropriate. But liberals resist means testing because political support would be lost if wealthier Americans did not benefit.[207] Miller approaches the political question by obtaining acceptance of the proposition that some minimal level of governmental assistance is necessary because of the presence of "luck" in the determination of one's station and success in life.[208]

Newt Gingrich acknowledges the Republican failure at governing, but predicts the Democrats, after winning in 2008, will be unable to bring change because they refuse to acknowledge that government sponsored programs are invariably riddled with incompetence, inefficiency, waste, fraud, and illegality.[209]

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[207] *Id.* at 62. Miller suggests:

> First, we already means-test programs to some extent, both through progressive benefit formulas (like Social Security's) and by treating most benefits as taxable income. Looking ahead, they say, the universal nature of programs like Social Security and Medicare, into which everyone pays and knows they'll get out what they're supposed to, is precisely what assures their political viability. Alter this by explicitly scaling back benefits for well-off Americans and you'll stigmatize these programs as "welfare." Wealthier Americans will decide there's nothing in it for them, and will vote to opt out of the system. Before long, the whole notion of social insurance, and the transfers to needier citizens that take place within it, will erode. "Bribing" better off citizens to maintain their support, the argument goes, is a reasonable price to pay for the social good these programs bring.

*Id.*

[208] *Id.* at 71. Shaviro believes that the underfunding of Social Security is the only reason politicians even speak about Social Security reform. The relationship between taxes and benefits is muddled, inexact, and confusing. The relationship has been described as:

> The original rationale for muddying the relationship between Social Security taxes and benefits was to increase the potential to engage in hidden, but it was thought desirable, progressive redistribution. This was and is typically put in terms of giving the middle class a stake in government transfer programs if they are to be politically feasible; let the redistributive element stand alone and it will be politically vulnerable. To be effective, however, this requires not only combining multiple purposes within a single program, but obscuring the real relationship between these purposes.

SHAVIRO, *supra* note 11, at 20.

[209] Gingrich states:

> It is hard to overestimate the human cost that failed government has on the prosperity and well-being of the American people. Unionized bureaucracies and underperforming government institutions fight hardest to avoid change precisely where change is most needed because they recognize change as a threat to their power. They prefer failure with power to success without power. We have seen the cost of bad government most recently in the aftermath of Hurricane Katrina and more starkly in the state of Michigan and its once great city of Detroit.

GINGRICH, REAL CHANGE, *supra* note 5, at 43.

Nevertheless Gingrich is optimistic and believes that to make real change[210] happen requires a high degree of cheerful[211] perseverance.[212]

We may also find some consolation by comparing the situation in the United States with that of other developed nations. Comparing the United States to the rest of the world with respect to its future pensions and health care liabilities it is projected that in 2050 the United States will use 5.5% of GDP on pensions and health care while Italy will use 18.5%.[213] The United States' projection is lower because of higher birth rates and immigration rates.[214]

## V. CONCLUSION

The theme of 2009 is change. This article has looked at numerous proposals for change. Senator Chuck Schumer set out eleven ambitious goals and specific policies that appeal to the middle class all to be achieved within two years of the Democrats taking control of Congress in 2006, none of which addressed the looming retirement crises.[215] Emanuel and Reed call for a new social contract that

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[210] Gingrich remarks:

> Eisenhower learned one lesson that strikes many people as counterintuitive: "Whenever I run into a problem I can't solve, I always make it bigger," he asserted. "I can never solve it by trying to make it smaller, but if I make it big enough I can begin to see the outlines of a solution."

*Id.* at 84.

[211] Gingrich states, "I learned the value of cheerful persistence in part from studying Eisenhower and Reagan. They both had wonderful smiles and a remarkable ability to work through opposition, frustration, and exhaustion. So did Franklin Delano Roosevelt." *Id.* at 89.

[212] *Id.* at 262–266. Gingrich describes 10 points about change learned through welfare reform in the 1990s. These include: (1) Successful reform always starts with a big idea. (2) Decide whether to repair or replace. (3) Great change never starts with government. (4) Cheerful persistence is necessary to successfully deliver large-scale reform in a free society. (5) Collaboration is critical. (6) Real change always requires winning the argument. (7) Words matter. (8) Real change must be consistent with broad American values. (9) Opponents of reform must be forced to carry the burden of their positions. (10) Real change must be citizen-centered. *Id.*

[213] The problems will be faced not only by the United States but by the entire developed world as people live longer, enjoy better health due to medical innovations, have a high quality of life, and have smaller families that will shrink the population drastically in Western European countries and in Japan. MILLER, *supra* note 10, at 59. The United States is seen as better able to address the problem with its large and innovative population. The problem is solvable but will require raising taxes and cutting benefits, or some combination thereof. *Id.* It will also require promoting economic growth. *Id.*

[214] GHILARDUCCI, *supra* note 9, at 193. The author points out that the United States has more men over 65 working than most other industrialized countries. *Id.*

[215] He calls his solution the "50% solution" reflecting his view that the middle class are not 100% dissatisfied with the present situation but only 50% dissatisfied. His eleven goals include 50% reductions in (i) property taxes that fund education, (ii) illegal immigration, (iii) our dependence on foreign oil, (iv) cancer mortality, (v) childhood obesity, (vi) abortions, (vii) child access to internet

includes a call for patriotism[216] and incentives to build middle-class wealth.[217] Their guiding principle is "You do your part, and your government, your company, and your country will do theirs."[218] They believe they can save $1.8 trillion over the next ten years.[219] Unlike the Bush administration's tax cuts,[220] they provide

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pornography, and (viii) tax evasion together with 50% increases in (ix) reading and math scores, (x) number of college graduates, and (xi) our ability to fight terrorism. Interestingly, retirement security and fiscal responsibility are not among his eleven goals. SCHUMER, *supra* note 7, at vi–ix.

[216] Emmanuel and Reed state: "America faces three great, urgent challenges. We need a new social contract for economic growth that enables Americans to get ahead again. We need a new strategy to make America safe again. And we need a new sense of patriotism and responsibility that unites us in common purpose again." EMANUEL & REED, *supra* note 1, at 49–50.

[217] Emanuel and Reed's plan provides the following: (1) A new social contract—universal citizen service, universal college access, universal retirement savings, and universal children's health care—that makes clear what you can do for your country and what your country can do for you. (2) A return to fiscal responsibility and an end to corporate welfare as we know it. (3) Tax reform to help those who aren't wealthy build wealth. (4) A new strategy to use all America's strengths to win the war on terror. (5) A hybrid economy that cuts America's gasoline consumption in half over the next decade. *Id.* at 52–53.

[218] *Id.* at 51–52.

[219] *Id.* at 118. Referring to a study by Paul Weinstein of the Progressive Institute, their threefold program would "[g]et rid of programs and privileges we don't need anymore; close loopholes that let some distort the market; and put the economy back on a path of sustained, broad-based economic growth." *Id.* They also want to limit corporate welfare and return to annual spending caps and pay-as-you-go rules that produced the surpluses at the end of the Clinton administration. *Id.* at 119. The pay-as-you-go rules require Congress to pay for any tax cuts or spending increases with off-setting tax increases or spending cuts. *Id.* Other suggestions include the use of capital budgeting and elimination of gerrymandering of Congressional districts, drastically curtailing lobbying by former members of Congress for five years after leaving Congress, and limiting the number of federal appointees from 3,000 to 1,500. *Id.* at 128.

[220] The debate in Washington over the last 30 years has been about taxes and the Republican has found tax cuts for the wealthy as the solution for all economic ills. Emanuel and Reed assert that:

> President Bush likewise changed the rationale for his tax cuts, but he never changed the policy. In 2000 when the economy was booming, Bush proposed tax cuts to get rid of the budget surplus and—unfortunately for the nation—succeeded beyond his wildest dreams. A year later, with the economy in recession, he promised the same tax cuts as stimulus. After the 9/11 attacks made clear that for years to come, the U.S. would be spending a fortune to fight the war on terror, Bush proposed more tax cuts as a return to normality. In 2003, as he headed for war in Iraq and a record deficit at home, he proposed still another round of tax cuts to ease the burden of wealth on the wealthy.
>
> When Republicans talk about taxes, any resemblance to the actual economy is coincidental and unintentional. That's because the Republican case for tax cuts is a theological argument, not an economic one. Conservatives have to make taxes a theological debate because the supply-side theory is the economic equivalent of intelligent design: They don't have any evidence to teach it in the classroom. Perhaps the conservative movement's greatest political coup over the last quarter century was to pull off the notion that cutting taxes for the wealthy corresponds to any economic theory at all.

EMANUEL & REED, *supra* note 1, at 131–32.

incentives for the "pillars of middle-class life: raising a family, buying a home, paying for college, and saving for retirement."[221] They contend that the Tax Code does not promote economic growth but simply favors those with influence.[222]

Newt Gingrich sees Social Security reform as a litmus test for voters.[223] But solutions to the crisis in America are not all economic. Actor Chuck Norris identifies eight areas of weakness in the American culture. These are our lack of a national legacy, no control over spending, insufficient border control, loss of a moral compass, failure to value human life, failure to provide our children with a future, loss of family values, and physical and mental laziness.[224] For Norris the renewal is spiritual and Americans need to be willing to sacrifice to pass on a tradition of freedom to the next generation.[225]

Charles Murray believes his proposal, The Plan, will regenerate the spirit of the community to solve its own welfare problems in a manner of volunteerism that was prevalent before the social net was built. Voluntary actions are more efficient and will give individuals the ability to share in the life of others in need. This has been lost in the bureaucratic provision of services.[226] He still believes in "the pursuit of happiness" and distinguishes it from "pleasure" by defining "happiness" as "lasting and justified satisfaction with one's life as a whole."[227] Such a distinction

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[221] *Id.* at 130.

[222] *Id.* at 137.

[223] NEWT GINGRICH, WINNING THE FUTURE, *supra* note 5, at 25 (stating that politicians see Social Security as untouchable but the rewards to the participant are so great that reform should be a litmus test). He sets out the example of an average American couple who invest in personal accounts throughout their careers, each start out earning $20,000 a year or less. By age forty, the husband is earning $40,000 and the wife is earning $30,000 so that by retirement they accumulate $829,800 in their personal investment accounts—enough to pay them double what Social Security promises. *Id.* at 222 n.1. He details the example stating:

> The calculation assumes that the husband is age forty and earning $40,000 and his wife earns $30,000. They both entered the work force at age twenty-three and the husband earned $20,200 and the wife earned $15,150 their first year for work and receive average salary increases throughout their working lives. The calculation also assumes that they had been investing two-thirds of their personal investment accounts in stocks and one third in bonds that earned standard, long-term, market returns over their working years. This study was done by Peter Ferrara of the Institute for Policy Innovation.

*Id.*; *see also* Ferrara, *supra* note 37.

[224] NORRIS, *supra* note 12, at 1–13.

[225] *Id.* at 186–189.

[226] MURRAY, *supra* note 8, at 111–124. One major problem is that "bureaucracies must by their nature be morally indifferent." Volunteers can address moral shortcomings in a way the bureaucrats cannot.

[227] *Id.* at 87.

is important in the terms "lasting and justified" which will require the exercise of one's abilities and the practice of virtue. Murray suggests happiness requires five basic materials. Two of the five are passive (material resources and safety) and three are active (meaningful relationships, vocation, and self-respect).[228]

In this regard, the One Fund Solution, like The Plan, is a way to renew American life by eliminating the deadly bureaucracy that consumed resources and controlled lives.[229] Let the individual have some control over their long-term financial planning and we may be surprised at the degree of responsibility that is exhibited. Choice is a time honored American virtue that is returned to the individual with the One Fund Solution.[230] Removing the government from everyday decisions of life should allow Americans to once again reach the dreams of individual achievement that moves all of us to a higher calling.[231]

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[228] *Id.* at 88–89.

[229] Murray's philosophy behind The Plan has nothing to do with retirement, health care, poverty, or the underclass, but is instead focused on the quality of life in a country of plenty and security. Reflecting on the European welfare state Murray suggests that it represents a particular way of looking at life and one which America should not emulate. He sees having short work weeks and frequent vacations along with impediments to changing jobs or starting a business as preventing work from becoming a vocation with the personal satisfaction that it generates. It reduces the marriage rate by lessening the economic incentives for marriage, objectifies children as a mere expense rather than an expression of the marriage, and presents the family choice as "children or a vacation home." European secularization also diminishes the interest in religion. Churches are empty. As he sees it:

> All of Europe combined has neither the military force nor the political will to defend itself. The only thing Europe has left is economic size, and even that is growing at a slower pace that elsewhere. When life becomes an extended picnic, with nothing of importance to do, ideas of greatness become an irritant.

*Id.* at 86.

[230] *Id.* at 127. Murray states:

> What was clear to the Founders will once again become clear to a future generation: The greatness of the American project was that it set out to let everyone live life as each person saw fit, as long as each accorded the same freedom to everyone else . . . . Sometime in the twenty-first century it will become possible to take up the task again, more expansively than the Founders could have dreamed but seeking the same end: taking our lives back into our own hands—*ours* as individuals, *ours* as families, and *ours* as communities.

*Id.*

[231] Gingrich laments:

> One of the great disappointments of my life has been the hijacking of the great space adventure by the NASA bureaucracy. Space should be an area in which American innovation, creativity, and entrepreneurship are producing constant breakthroughs that increase our economic capability, improve our quality of life, and raise our prestige among the world. Instead space has been hijacked by dull, inefficient, and unimaginative bureaucracies and transformed into an expensive, risk-adverse, and sad undertaking. This outcome is a surprising failure and a great disappointment for those of us who grew up in the early days of the great space adventure.

GINGRICH, REAL CHANGE, *supra* note 5, at 185.

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# LIMITED LIABILITY POLICY AND VEIL PIERCING

*Harvey Gelb**

## I. INTRODUCTION

The evolution of the common law is marvelous to behold, especially when it adheres to its tradition of thoughtful, measured adjudication. Judges should take special care in considering the espousal or adoption of broad principles based on the generalizations of commentators or even other judges, rather than through the more trustworthy development of rulings based on specific factual situations. This is not to depreciate the value of the work of commentators, one of whom is the author of this article. Hopefully scholarly efforts contribute to the resolution of cases presented by concrete factual situations as part of a healthy adversarial process that considers all relevant arguments. But a serious danger to the rational legal process occurs when able commentators too effectively advocate the adoption of persuasive sounding generalizations that, though offered in good faith, ill serve the policies underlying the rulings through which legal principles evolve. Both commentators and judges may cease to reexamine the principles they have embraced, and those principles will prematurely gain the status of settled law.

One such generalization has been creeping into the law of corporate veil piercing. It calls for contract creditors to be treated less kindly than tort creditors. Indeed, some argue that a contract creditor should succeed in piercing the corporate veil in only the most exceptional situation. This article challenges that generalization as contrary to the essential public policies underlying the conferring

* Kepler Chair in Law & Leadership and Professor of Law, University of Wyoming College of Law. B.A. 1957, Harvard College; J.D. 1960, Harvard Law School. The author is grateful for the generous support of his research by Charles and Ursula Kepler and the Paul Stock Foundation. To his excellent student research assistants, Tara Hickerson and Julie Rhoden, the author expresses his deep appreciation. The author is especially happy to thank his son, Attorney James M. Gelb, for his outstanding editing contribution.

of limited liability on business enterprises; reliance on such a generalization will prove unjust in many veil piercing cases. It should be understood from the outset that the veil piercing doctrine discussed throughout this article is confined to privately held businesses.[1]

This article reviews some of the important elements of veil piercing and proposes an alternative approach to the tort versus contract distinction. It also discusses the implications of causation as an element in piercing claims.

## II. THREE LIMITED LIABILITY SCENARIOS

Three scenarios illustrate public policy issues related to limited liability.

*Scenario 1*: Two brothers formed a corporation to go into business together, to work full time, to produce useful items, and to make money. They invested substantially in the business but did not want to risk all of their personal assets. While their goal was to achieve business success, they wanted the veil of limited liability to protect their homes and other assets not committed to their business in the event of failure. They formed and operated their business entity in a financially responsible manner, but their business failed. A rational public policy favoring responsible entrepreneurship could be materially enhanced by allowing such persons the privilege of limited liability.

*Scenario 2*: Two brothers used the corporate form not to achieve business success, but simply to obtain money from creditors and to ultimately ignore their liabilities. They were willing to become rich or at least derive some monetary benefit at the expense of contract and tort creditors while hiding behind the veil of limited liability.

While the first scenario encourages owners to invest money, talent and hard work into something that may benefit the society in which they live, the second scenario simply makes limited liability a vehicle for owners of a business to cheat others. It would be absurd to support a policy in which such persons would be given immunity from liability.

*Scenario 3*: Two brothers form a corporation to go into business together to produce useful items and make money but want to risk little or none of their assets to do it. Their goal is to try to develop a successful business but lose nothing or very little, leaving it to the creditors of the business to sustain any or all of its

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[1] DOUGLAS M. BRANSON ET AL., BUSINESS ENTERPRISES: LEGAL STRUCTURES, GOVERNANCE, AND POLICY 217 (2009). Although it is theoretically conceivable to pierce the corporate veil of publicly-held corporations, the doctrine has only been successfully invoked in the context of privately held corporations whose stock is owned by another business enterprise (which may be a publicly-held corporation) or whose stock is held by individual equity holders. *Id.*

losses. In other words, they undertake a business for a good purpose but with an outrageous degree of financial irresponsibility. This scenario would generally not serve the societal interest in authorizing limited liability. The word "generally" is used because it is conceivable that voluntary and properly informed creditors may choose in some circumstances to deal with such corporations and recognize the limited liability of their owners. In that unusual event, the burden should be on the debtor to make proper disclosure and to secure the consent of the creditor to the allowance of limited liability.

## III. PIERCING THE VEIL: BACKGROUND AND TRENDS

It is a well established rule of law that when a corporation cannot pay its debts, its owners are not liable for them in the absence of special circumstances.[2] The corporation is considered an entity with the characteristic of limited liability. Of course, owners can contract away their immunity from corporate debts or may themselves be personally liable for the commission of certain torts or on the basis of other theories. This article, however, is concerned with the doctrine of piercing the corporate veil, a doctrine that enables creditors to collect from owners of a corporation in situations where the corporate characteristic of limited liability is not respected by the courts.

This article is written against the background of two major trends affecting issues of limited liability. The first is the emergence of two new business forms. It used to be that if owners wanted their business organization to have the limited liability characteristic, they would have been likely to form a corporation or a limited partnership. Those forms of doing business have been well established under state laws that require the filing of forms in particular governmental offices. In the corporate form, the limited liability characteristic is available to shield owners who are active participants in corporate affairs, as well as those who are passive owners. In the limited partnership form, historically a degree of passivity was required for those owners designated as limited partners to enjoy the limited liability shield. The other major business organizational form, the general partnership, was quite commonly used but did not provide its owners limited liability. More recently, state laws have been enacted that enable partners to limit their liability by complying with simple requirements and becoming limited liability partnerships ("LLP"s).[3] Allowing general partners to limit their liability represents a dramatic change in business organization law because previously a

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[2] *E.g.*, Radaszewski v. Telecom Corp., 981 F.2d 305, 306 (8th Cir. 1992); DeWitt Truck Brokers, Inc. v. W. Ray Fleming Fruit Co., 540 F.2d 681, 683 (4th Cir. 1976).

[3] *E.g.*, S.D. CODIFIED LAWS § 48-7A-306 (2008); REV. UNIFORM PARTNERSHIP ACT § 306 (2001 ed.); ALAN R. BROMBERG & LARRY E. RIBSTEIN, LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT 12, 17–18, 31–33, 48–58 (Aspen Law & Business ed. 2009). All United States jurisdictions have adopted LLP provisions. California, Nevada, New York, and Oregon only permit professional firms to be LLPs. *Id*. at 16.

cardinal principle of partnership law held partners personally liable for the debts of the partnership. Now personal liability can be limited in most states, though the wording of each state statute may raise issues about the extent of liability avoidance.[4] In addition, and even more significant at the moment because of its great popularity, is the relatively new business organization with the limited liability characteristic called the limited liability company ("LLC").[5]

A question arises about the extent to which doctrines related to the piercing of the corporate veil may be applied to these new limited liability forms. In other words, how much, if at all, will courts be guided by traditional veil piercing doctrines in cases involving LLCs or LLPs? Case law suggests that corporate law piercing principles will be applied to LLCs[6] and there is no reason to believe that LLPs will be treated differently.

A second major trend in business organizations law permits certain business entities with the limited liability characteristic to operate with a minimum of formality. As will be seen later, failure to observe formalities has often been a factor cited in corporate piercing analysis. Partnerships have been subject to relatively little restrictive state regulation regarding their governance mode, a characteristic unchanged by limited liability partnership statutes. Limited liability companies are also free of significant restrictive state regulation of their modes of governance.[7] Laws governing both of these entities allow for considerable latitude in making arrangements as to governance. While corporations historically were subject to a great deal of state statutory regulation in governance matters, closely held corporations now have the ability under certain conditions to escape from the governance rules previously imposed on public and closely held companies. For example, states that have adopted Revised Model Business Corporation Act ("RMBCA") § 7.32 allow a nonpublic corporation to be governed largely through an agreement signed by all of its shareholders.[8] The statutory reduction

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[4] For example the language of the Wyoming Uniform Partnership Act § 17-21-306 allowing limited liability partnerships is not the same in limiting liability as that of § 306 referred to in the Revised Uniform Partnership Act, *supra* note 3.

[5] *See, e.g.*, WYO. STAT. ANN. §§ 17-15-101 to 17-15-147 (2008) (an LLC statute).

[6] *See, e.g.*, Kaycee Land & Livestock v. Flahive, 46 P.3d 323, 329 (Wyo. 2002).

[7] *See, e.g.*, Fisk Ventures, LLC v. Segal, 2009 WL 73957 at *2 (Del. Ch. 2009); Gottsacker v. Monnier, 697 N.W.2d 436, 438 (Wis. 2005).

[8] REVISED MODEL BUS. CORP. ACT § 7.32 (1984)

> (a) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this Act in that it: (1) eliminates the board of directors or restricts the discretion or powers of the board of directors; (2) governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in section 6.40; (3) establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal; (4) governs, in general

of the necessity for the formalities of corporate structure or governance requires clarification of the meaning and significance of corporate formalities observance in the piercing analysis. Additionally, statutes may follow that provision of the RMBCA § 7.32, which provides:

> The existence or performance of an agreement authorized by this section shall not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.[9]

Furthermore, courts have referred to the issue of reduced significance of formalities observance for LLCs as compared to corporations,[10] although to some extent, as pointed out above, the need for some corporations to observe governance formalities has already been lessened in some corporate statutes.

## IV. LIMITED LIABILITY JUDICIAL APPROACH

How do courts decide to reject limited liability for certain corporate shareholders? Although courts may call a corporation a mere alter ego or instrumentality of its owners in deciding to pierce the corporate veil, the use of such terminology does little to explain the basis of a court's decision. Courts often cite general piercing tests or list factors to be taken into consideration in a piercing decision. Among the tests cited are the following:

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> or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies; (5) establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them; (6) transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders; (7) requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or (8) otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

[9] REVISED MODEL BUS. CORP. ACT § 7.32(f) (1984); *see, e.g.*, WYO. STAT. ANN. § 17-1-132(f) (2008).

[10] *See, e.g.*, *Kaycee Land & Livestock*, 46 P.3d at 328 (Wyo. 2002).

> [F]irst, there must be such unity of interest and ownership that the separate personalities of the corporation and the individual [or other corporation] no longer exist; and second, circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice.[11]

There is also an instrumentality test:

> The instrumentality rule requires, in any case but an express agency, proof of three elements: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of plaintiff's legal rights; and (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.[12]

Additionally, courts sometimes use epithets like "sham" or "dummy" or "shell" to describe corporations unfit for the privilege of limited liability.[13] In a recent case, where the words sham and shell appear, a veil was pierced against an individual who was the sole owner and officer of the defendant corporation in a case involving breach of an asset purchase agreement. The court said:

> The "corporate veil may be pierced under exceptional circumstances, for example, where the corporation is a mere shell." . . . Factors which would support such a finding include: (1) the corporation is undercapitalized, (2) without separate books, (3) its finances are not kept separate from individual finances, individual obligations are paid by the corporation,

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[11] Van Dorn Co. v. Future Chem. & Oil Corp., 753 F.2d 565, 569–70 (7th Cir. 1985). For similar statements of this test, see for example, Semmaterials, L.P. v. Alliance Asphalt, Inc., 2008 WL 161797 at *4 (D. Idaho 2008); Baize v. Eastridge Companies, 47 Cal. Rptr. 3d 763, 770 (Cal. Ct. App. 2 Dist. 2006).

[12] Zaist v. Olson, 227 A.2d 552, 558 (Conn. 1967); *accord* Pae v. Chul Yoon, 838 N.Y.S.2d 172, 173 (N.Y.App. Div. 2 Dept. 2007).

[13] *See, e.g.*, HARVEY GELB, PERSONAL CORPORATE LIABILITY: A GUIDE FOR PLANNERS, LITIGATORS, AND CREDITOR'S COUNSEL § 1.2 (1991); H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 146, at 344–45 n.2 (3d ed. 1983) for a list of such words and phrases.

> (4) the corporation is used to promote fraud or illegality, (5) corporate formalities are not followed or (6) the corporation is merely a sham.[14]

In applying these factors the court said that the corporation involved was never funded with any assets, had no separate books, no established course of business, and was formed for the sole purpose of purchasing the radio station involved in the agreement.[15] In *Ventresca Realty Corp. v. Houlihan*, a New York case, the court supported piercing where the evidence demonstrated a lessee corporation was a mere dummy or shell entity created solely to sign the lease.[16] The court said, "[t]he corporation owned no assets, held no investments, conducted no business, had no employees, did not possess its own telephone line, and had no income other than the funds periodically contributed to it by the individual defendants so that its monthly rent obligation could be met."[17]

The use by courts of pejoratives like sham, dummy, or shell may reflect at times a disgust and rejection of the use of corporate limited liability, not by the good faith entrepreneur, but by financially irresponsible parasites.

A lengthy list of factors in making piercing decisions appeared in a Wyoming case:

> Among the possible factors pertinent to the trial court's determination are: commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; the treatment by an individual of the assets of the corporation as his own; the failure to obtain authority to issue or subscribe to stock; the holding out by an individual that he is personally liable for the debts of the corporation; the failure to maintain minutes or adequate corporate records and the confusion of the records of the separate entities; the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management;

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[14] Burke v. Cont'l. Broad. Inc., 746 N.W.2d 279 (Table), 2008 WL 141565 at *2 (Iowa Ct.App. 2008) (quoting Briggs Transp. Co. v. Starr Sale Co., 262 N.W.2d 805, 810 (Iowa 1978)). In *Burke*, the trial court determined that because Local Continental was a "shell or sham entity" its corporate veil could be pierced. *Id.* The appellate court affirmed the decision. *Id.* at *3.

[15] *Id.* at *2.

[16] Ventresca Realty Corp. v. Houlihan, 41 A.D.3d 707, 709, 2007 N.Y. Slip Op. 05498 (N.Y.App.Div. 2 Dept. 2007).

[17] *Id.*

> the failure to adequately capitalize a corporation; the absence of corporate assets, and undercapitalization; the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest or concealment of personal business activities; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; the use of the corporate entity to procure labor, services or merchandise for another person or entity; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; the contracting with another with intent to avoid performance by use of a corporation as a subterfuge of illegal transactions; and the formation and use of a corporation to transfer to it the existing liability of another person or entity.[18]

Courts may insist that more than one factor exists before the veil may be pierced. Such an approach may be regarded as implicit or explicit in piercing tests with dual and triple prongs, such as those cited earlier. Furthermore, there are numerous cases that resolve the piercing issue by actually applying a multifactor analysis.[19] Difficulties in utilizing and applying multifactor analyses may arise in ascertaining the meaning and weight of particular factors in the mix leading to a particular piercing decision. This is often the case because the piercing decision is so dependent on the court's equitable discretion as applied to varying fact patterns and multiple factors, which may indeed be frustrating to those seeking certitude or predictability.

## V. FINANCIAL RESPONSIBILITY AND VEIL PIERCING

If at times the privilege of limited liability should be denied to certain owners who have run an entity that is not financially responsible, then it is logical to look at the entity from inception for evidence of responsibility or irresponsibility. Among other things, it is appropriate to determine if the owners have undersupplied or misused assets of the entity.

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[18] Miles v. CEC Homes, Inc., 753 P.2d 1021, 1023–24 (Wyo. 1988) (quoting Amfac Mechanical Supply Co. v. Federer, 645 P.2d 73, 77–78 (Wyo. 1982) (quoting Arnold v. Browne, 27 Cal.App.3d 386, 394–95 (Cal.App. 1972))).

[19] *See, e.g.*, *Semmaterials*, 2008 WL 161797 at *4; *DeWitt Truck Brokers*, 540 F.2d at 686-87.

Undercapitalization is mentioned in the long list of piercing factors referred to above.[20] It is a relative concept. Some businesses need a great deal of capital, others very little, and of course there are the in-betweens. Courts may look to whether a corporation was grossly undercapitalized for the purposes of the corporate undertaking; it has been said that "an obvious inadequacy of capital, measured by the nature and magnitude of the corporate undertaking, has frequently been an important factor in cases denying stockholders their defense of limited liability."[21] The importance of relativity is illustrated by the words of a California court that said: "[i]n the instant case the evidence is undisputed that there was no attempt to provide adequate capitalization. [The corporation] never had any substantial assets. . . . Its capital was 'trifling compared with the business to be done and the risks of loss. . . .'"[22] A leading commentator explained the undercapitalization issue as follows:

> If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability. The attempt to do corporate business without providing any sufficient basis of financial responsibility to creditors is an abuse of the separate entity and will be ineffectual to exempt the shareholders from corporate debts. It is coming to be recognized as the policy of the law that shareholders should in good faith put at the risk of the business unencumbered capital reasonably adequate for its prospective liabilities. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege.[23]

Some courts would limit the undercapitalization determination to the situation existing at the outset of the business,[24] but others may look at it as a continuing issue.[25] Because the issue of adequate capitalization is a relative concept, it should not be frozen at the outset of the enterprise, but must be

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[20] *See supra* note 18 and accompanying text.

[21] *DeWitt Truck Brokers*, 540 F.2d at 684 (citing Anderson v. Abbott, 321 U.S. 349, 362 (1944)).

[22] Minton v. Cavaney, 364 P.2d 473 (Cal. 1961) (citing Automotriz Del Golfo De California S. A. De C. V. v. Resnick, 306 P.2d 1, 4 (Cal. 1957)); *see also* GELB, *supra* note 13, § 1.6.

[23] H. BALLANTINE, BALLANTINE ON CORPORATIONS, § 129, 302–03 (rev. ed. 1946).

[24] *See, e.g.*, Keams v. Tempe Technical Inst., Inc., 993 F. Supp. 714, 724 (D. Ariz. 1997); Pierson v. Jones, 625 P.2d 1085, 1087 (Idaho 1981).

[25] *See*, *e.g.*, Coughlin Const. Co. Inc. v. Nu-Tec Indus., Inc., 755 N.W.2d 867 (N.D. 2008); United States v. Golden Acres, Inc., 702 F.Supp. 1097, 1105–1107 (D. Del.1988); Bucyrus-Erie Co. v. Gen. Prods. Corp., 643 F.2d 413, 418 (6th Cir. 1981); *see* GELB, *supra* note 13, § 1.6[3].

looked at as the needs of the business change, as it expands and contracts, as it accumulates profits and prospers, or loses money and declines. In *Atlas Const. Co. v. Slater*[26] the court considered relevant changes in corporate needs and asset levels, in addition to initial capital or assets as well as the insurance carried by the corporation, and explained as follows:

> Undercapitalization is often cited as a factor which will support piercing the corporate veil. . . . The problem of determining adequate capitalization in a particular case, however, may be a complicated one.
>
> Courts cannot focus solely on initial corporate capital or assets, as some are prone to do, in deciding whether inadequacy of assets warrants a decision to pierce because subsequent changes, such as increased hazards or reduced assets, may render a determination as to initial inadequacy irrelevant.
>
> Whatever the courts' requirements in terms of inadequacy of assets, courts must still consider many varying factors relevant to their deliberations. For example, where the inadequacy of capital and other assets is at issue the testimony of expert financial analysts and statisticians as to comparable businesses may be relevant. Perhaps this analysis might include evidence of the adequacy of insurance coverage, and involve testimony concerning the amounts of insurance carried by comparable businesses. Furthermore, in addition to consideration of the amount of capital provided, other factors such as shareholder loans and the amount of earnings retained by the corporation may be analyzed.[27]

Undercapitalization is generally more reasonably considered in a context of financial responsibility along with the other assets that a corporation has available for creditors and in light of the nature and risks of the business at various points in its life.[28] In the *Atlas* case a purchaser of a new home brought action against a construction company, its subsidiary and individual shareholders for negligence and breach of the implied warranty of habitability. In analyzing the issue of piercing the corporate veil, the court indicated that initial corporate capital or assets could not be the sole focus. The court looked at the corporation's capitalization and retained earnings for a period of years subsequent to its initial capitalization. The

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[26] 746 P.2d 352 (Wyo. 1987).

[27] *Id.* at 356 (quoting Harvey Gelb, *Piercing the Corporate Veil—The Undercapitalization Factor*, 59 CHI.-KENT L. REV. 1, 14–15 (1982)).

[28] GELB, *supra* note 13, §§ 1.6, 1.7.

court considered the events that allegedly caused the declining corporate assets, which had grown considerably over the years, pointing to an affidavit indicating that five houses had been sold at considerable loss attributable to a downturn in the market and that a flood caused further losses.[29] The court also said that the record suggested that the corporation purchased insurance to cover the type of liability that arose in this case, but during the litigation and at the time the judgment was entered the company was apparently involved in a dispute with its carrier over the coverage.[30] The result in this particular case was that a summary judgment favoring piercing of the veil was overruled and sent back to the lower court for further inquiry into the facts.[31] Thus, while undercapitalization is recognized as a possible indicator of financial irresponsibility in terms of unfairness to creditors, the piercing issue really depends in a broader sense upon the level of assets available for potential claims. Clearly, when assets to pay claims turn out to be insufficient, reasons for their inadequacy are important in determining whether the corporation was operated in a financially responsible manner.

In certain types of cases, the nature of the debt owed may also be considered by some courts in determining the importance of inadequacy of capital. Indeed the relative importance of the amount of capital a corporation has at its outset or at any given point in time when it incurs an obligation can vary a great deal. To a tort victim, insurance available to cover her claim is often of central significance. In the *Radaszewski* case, a biker injured by a truck was frustrated in the collection of his claim by the failure of an insurance company. [32] In that case insurance was carried in the amount of eleven million dollars, but only one million dollars was actually collectible. The court felt that undercapitalization was relevant because of the question of financial responsibility, and that a trucking company carrying eleven million dollars in liability insurance was financially responsible even though it was assumed that undercapitalization existed.[33] Important to the court was that the company did not appear to be intentionally or recklessly set up to evade responsibility to the tort creditor.[34]

If there is a contract claim or a type of tort claim generally not covered by insurance, the existence of insurance covering other tort claims in the face of gross undercapitalization or lack of adequate assets almost seems irrelevant. Why "almost"? Because appropriate insurance should somehow be taken into account as part of an undercapitalization or adequacy of assets assessment, as it may be relevant to the issue of financial responsibility. It should, therefore, be part of

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[29] *Atlas*, 746 P.2d at 357.

[30] *Id.*

[31] *Id.* at 360.

[32] *Radaszewski*, 981 F.2d at 306.

[33] *Id.* at 310.

[34] *Id.*

a determination of overall financial responsibility, and its availability may leave other corporate assets for potential creditors.

### *A. Financial Responsibility and Misuse of Assets*

A number of factors in the list cited earlier[35] concern the "misuse of assets." The drainage of funds from the corporation to its owners may unfairly leave creditors with a judgment-proof corporate debtor, or the controlling corporate owners may deplete the assets reasonably required for current or potential tort or contract liabilities, destroying the financial responsibility and even viability of the company. There are certain appropriate financial dealings between the corporation and its owners, such as where the corporation is receiving proper consideration for the funds it is disbursing. Transactions between the corporation and owners, such as property transfers, leases, salaries, loans and fringe benefits, may cost the corporation what it would have to pay in arm's length deals, but the danger of favoritism to owners as part of an unbusiness-like reduction of corporate assets calls for a determination as to whether transactions with owners were fair to the corporate entity and just to its existing or prospective tort or contract creditors.[36] Injustice can be an important criterion in veil piercing cases.[37]

### *B. Financial Responsibility and Limited Liability Public Policy*

Shirts, Inc. manufactures and sells shirts to wholesalers and retailers. Its sales employees travel mostly by automobile to show company merchandise to customers and prospective customers. A, B and C are the only shareholders of Shirts, Inc., and all three of them have been active as directors and managerial employees and have been its only shareholders since it was incorporated. At the time of incorporation A, B and C each invested $5,000 in the common stock of Shirts, Inc. and no additional funds have ever been invested by them. E, a sales employee of Shirts, Inc., negligently struck P, a pedestrian, who sustained severe injuries and was awarded $2 million in damages against Shirts, Inc. and E. Both

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[35] *See supra* note 18 and accompanying text.

[36] Stockton v. Nenadic Invs., Ltd., 2006 WL 3775850 at *7 (Wash Ct. App. 2006) (disregarding corporate entity when corporation intentionally removed funds to avoid liability); Windsor v. Huron Mach., Inc., 2006 WL 1752137 at *6 (Mich. Ct. App. 2006) (piercing the veil where a transfer of corporate assets to avoid payment of a judgment). The court also pointed to defendant's use of corporate funds for his own benefit and the benefit of his family without offering adequate business justifications for the expenses at issue. *Id.* at 5. In *Miles*, 753 P.2d at 1021 defendant's procurement of labor and services of the corporation and diversion of corporate assets to other than corporate uses was cited *inter alia* as basis for veil piercing. For further discussion of misuse of assets see GELB, *supra* note 13, § 1.7.

[37] *See, e.g.*, Int'l. Fin. Servs. Corp. v. Chromas Tech. Can., Inc., 2005 WL 2304783 (D.N.D. Ill. 2005).

Shirts, Inc. and E are insolvent and P received only $20,000, which represented the entire available insurance amount carried by Shirts, Inc. P, however, seeks to pierce the veil of Shirts, Inc. and collect from A, B and C, who are very wealthy persons. During the five-year life of Shirts, Inc. it has paid annual salaries of $500,000 each plus certain fringe benefits to A, B and C. It has no retained earnings and its liabilities far exceed its assets.

Assuming that the amount of insurance carried by Shirts, Inc. is considered inadequate, and that it has been otherwise financially irresponsible, allowing the owners of Shirts, Inc. to escape liability to the injured pedestrian is unjust and poor public policy. The corporation that risks inflicting harm on others should reasonably provide for damages that may result to those others. It should also promote safety in its operations. Controlling owners should be encouraged to responsibly face the risks of business by the possibility of personal liability if they fail to do so. Moreover, the ownership of companies that are financially responsible and reasonably use resources to promote safety should not be disadvantaged in their competition with owners who are irresponsible.

In a recent North Dakota case where plaintiff's judgment against a corporation was based in part on a finding of fraud, the court stated:

> In tort cases, particular significance is placed on whether a corporation is undercapitalized, which involves an added public policy consideration of whether individuals may transfer a risk of loss to the public in the name of a corporation that is marginally financed.[38]

The court pointed to the importance of "carefree entrepreneuring" in a piercing case saying that "The essence of the requirement for fairness is that an individual cannot hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell."[39] Of course, it is the contention of this article that as a matter of policy carefree entrepreneuring is unworthy of protection against the veil piercing claims of contract creditors as well as tort creditors.

### *C. Formalities*

As indicated earlier, in deciding whether or not to pierce the veil a court may refer to the observing or disregarding of corporate formalities as a factor. Corporations may be remiss in holding board or shareholder meetings, keeping

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[38] Axtmann v. Chillami, 740 N.W.2d 838, 834–44 (N.D. 2007).

[39] *Id.* (citing Jablonsky v. Klemm, 377 N.W.2d 560, 567 (N.D. 1985) (quoting Labadie Coal Co. v. Black, 672 F.2d 92, 100 (D.C. Cir. 1982))).

minutes and other records, and even issuing stock. However, state law frequently authorizes corporations to proceed in some respects with great informality, such as unanimous written consents instead of board meetings.[40] Indeed, as explained earlier, statutory provisions modeled after § 7.32 of the RMBCA provide great latitude for the operation of nonpublic corporations where agreements are entered into by all shareholders.[41] If despite such statutory authorization shareholders and directors operate informally but outside the scope of technical statutory compliance, say without meetings or written consents or without complying with statutory provisions like § 7.32, how much should a court weigh such behavior in the piercing decision? It is hard to see how creditors or the public are harmed if the only three shareholders who are also the only three directors of a closely held corporation sit in a common office area, talk over their problems and make decisions without formal meetings or passing resolutions. If there is no harm to creditors or to the public stemming from such informal conduct, why should shareholders be punished by such a drastic remedy as veil piercing? Certainly statutory trends shrinking formality requirements indicate little if any public interest in them. Some things, however, which may be thought of or labeled by some courts as formalities, may be worth weighing in piercing decisions. The lack of appropriate corporate records and minutes may in some cases mislead persons who are about to become creditors about the financial health of an enterprise or hinder them in tracing corporate assets available to them for the payment of debts.[42] The commingling of funds and the misuse of assets, which may sometimes also be labeled in the category of lack of respect for formalities,[43] may reflect both corporate financial irresponsibility and chaos that will be confusing to creditors. Indeed the failure to issue stock and the lack of other formalities referred to above may raise a question as to whether the corporation was in fact functioning at all.[44] If judicial opinions are to offer meaningful guidance as precedent, the court should separate and articulate what items are actually considered by it to be of significance in the nonobservance of formalities category.

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[40] *E.g.*, CONN. GEN. STAT. ANN. § 34-140 (2008); MASS. GEN. LAWS ANN. ch. 156D, §§ 7.32, 8.21 (West 1999).

[41] *See supra* notes 8–9 and accompanying text.

[42] *See* Conn. Light & Power Co. v. Westview Carlton Group, L.L.C., 2006 WL 3719484 at *3 (Conn. Super. Ct. 2006). Among the factors considered by the court in finding that the first prong of the instrumentality test had been proved by plaintiff in a case involving an LLC veil are the following: defendant was the sole owner, member, and manager of the company, certain state or federal tax returns were not filed, there was a failure to preserve financial records, and the defendant had total control concerning business practices, finances and policy. For further discussion of formalities issues see GELB, *supra* note 13, § 1.8.

[43] GELB, *supra* note 13, § 1.8.

[44] *Id.*

### *D. Fraud*

Fraud is often cited as a factor in veil piercing cases.[45] If a debtor deceives a creditor by misrepresenting material facts about its financial condition before a creditor has extended a loan or at the collection stage, or if a debtor with a duty to disclose material information to a creditor fails to do so at either stage, piercing may be justified.[46] Fraud in the sense of deception may even be perpetrated by a corporation that could not rightly be called a financially irresponsible entity for piercing purposes, because a creditor should have the opportunity to decide how much interest to charge, or what security is needed to extend a loan to even a financially responsible entity. Fraud in making the borrower look financially better than it really is, may justify veil piercing.

Sometimes courts go beyond disclosure or nondisclosure situations and consider other factors relevant to a fraud determination in a veil piercing context. For example, a Nebraska case includes grossly inadequate capitalization, insolvency of a debtor at the time a debt is incurred, or improperly diverting corporate assets to shareholders.[47] In using these factors, the fraud determination reflects a condition of financial irresponsibility.

### *E. Contract versus Tort*

Tort victims who are involuntary creditors do not have an opportunity to bargain for the personal guarantees of corporate shareholders or other protections as many contract creditors would be able to do. While banks or other big creditors extending loans to closely held corporations are generally in a position to demand personal guarantees from corporate owners, a person about to be hit by a car lacks that luxury. It is not surprising, therefore, that some judges and commentators have articulated the proposition that courts ought to be less willing to pierce the corporate veil in contract cases than in tort cases.[48] It has been argued that contract creditors should protect their own interests by demanding personal guarantees from controlling shareholders, and if they fail to protect themselves the

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[45] *See, e.g.*, *DeWitt Truck Brokers*, 540 F.2d at 686–87; Bergh v. Mills, 763 P.2d 214, 218 (Wyo. 1988); Westmeyer v. Flynn, 889 N.E.2d 671, 677 (Ill. App. Ct. 2008); GELB, *supra* note 13, § 1.9.

[46] GELB, *supra* note 13, § 1.9.

[47] *See, e.g.*, Carpenter Paper Co. of Neb. v. Lakin Meat Processors Inc., 435 N.W.2d 179, 183 (Neb. 1989) (quoting J.L. Brock Bldrs., Inc. v. Dahlbec, 391 N.W.2d 110, 115 (Neb. 1986)); GELB, *supra* note 13, § 1.9.

[48] *See, e.g.*, Secon Serv. Sys., Inc. v. St. Joseph Bank & Trust Co., 855 F.2d 406, 415–416 (7th Cir. 1988); Perpetual Real Estate Servs., Inc. v. Michaelson Prop., Inc., 974 F.2d 545, 550 (4th Cir. 1992); United States v. Jon-T Chem., Inc., 768 F.2d 686, 693 (5th Cir. 1985) STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 155 (Found. Press 2002).

law should not rescue them.[49] One commentator points to "a substantial number of courts [which have] correctly . . . accepted the proposition that they ought not to pierce on behalf of contract creditors in an absence of fraud or other unusual circumstances,"[50] but states that "although the contract/tort distinction makes so much sense as to seem unassailable, it has received a surprisingly mixed reception from the courts."[51] Indeed this commentator admits that in practice courts in fact tend to pierce more often in contract than in tort cases.[52] A contemporary treatise refers to the tort vs. contract controversy stating, "[a]lthough commentators have sometimes argued that it should be more difficult to pierce the corporate veil in contract as opposed to tort cases, courts have not always discussed or applied these distinctions."[53] The position that the perspective of courts in piercing the veil should be more hostile to contract creditors than tort creditors may be fashionable in some quarters and have a deceptively persuasive sound to it, but it is actually inappropriate. This article proposes an entirely different perspective for a number of reasons.

First, in the vast universe of contract piercing cases, there are probably relatively few where it would be practical or sensible for contract creditors to obtain personal guarantees or other contract protections. Those contract creditors who are in a position to do so, like banks, may obtain personal guarantees and/or security from privately held businesses as a matter of course. But the vast majority of contract creditors or potential contract creditors, such as wage earners, consumers, trade creditors and small suppliers, have probably been in no position competitively or economically to insist on guarantees or other protections or to incur the expenses of investigating whether they should be seeking such protections. These contract creditors should not lose the opportunity to pierce corporate veils or be disadvantaged in their efforts to do so simply because they are classified as contract creditors.

Furthermore, the costs and consequences of attempts at protection, such as demanding guarantees from many debtors, may be undesirable. Will the owners of innocent and financially responsible businesses end up with burdens because of the irresponsible? Will defaults by egregiously irresponsible debtor corporations lead to costs being passed on to responsible businesses or to the public? A claim for veil piercing should logically start with the premise that tort creditors and contract creditors are in the same position except to the extent that it can be shown that voluntary contract creditors have decided to accept the risk of dealing

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[49] BAINBRIDGE, *supra* note 48, at 155.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 155–156.

[53] EDWARD BRODSKY & M. PATRICIA ADAMSKI, LAW OF CORPORATE OFFICERS AND DIRECTORS: RIGHTS, DUTIES AND LIABILITIES § 20:6 (Thomson/West 2007).

with a pierce-worthy operation and given up the right to the equitable relief of veil piercing. It is hard to imagine why a court should generally start with a bias against contract creditors in most piercing cases.

Second, courts have been reluctant to pierce entity veils.[54] Usually those in control of the pierced entity have been financially irresponsible or done something seriously wrong before veil piercing is allowed. Protecting contract creditors against egregious behavior by withdrawing the limited liability shield for those responsible for such behavior should be the norm and not the exception.

Third, it is not good public policy to give limited liability to businesses so irresponsible as to ordinarily qualify for veil piercing, and it should not be assumed that any legislature intended to do so just because a contract creditor is the claimant. For example, a business that makes its money from taking advantage of creditors rather than from operating in some way beneficial or potentially beneficial to society does not deserve veil piercing immunity in contract cases except on rare occasions where a creditor has been shown to have thrown all caution to the wind and in effect waived her rights to equitable relief. For special reasons, for example, a landlord may accept a no assets corporation as a tenant. If so, that should preclude or at least weigh heavily against veil piercing in favor of that landlord, not because of a general rule against contract creditors, but because of the particular behavior of this one.

Fourth, there are many cases where courts pierce veils in favor of contract creditors.[55] Although some courts and commentators may have advocated a more hostile position to contract creditors, the existence of many case precedents favorable to contract creditors should not be ignored. Surely the collective wisdom of courts that have had to deal with piercing situations in the front lines of litigation is worth considerable weight.

Fifth, the general proposition that society and both contract and tort creditors should be able to rely on limited liability entities operating in good faith for profit and not simply to profit from taking advantage of creditors is completely reasonable. It is important to clarify that the position expressed in this article is not based on the notion that there is anything wrong with courts being reluctant to strip away the veil of limited liability entities, quite the contrary is true. Rather, the position of this article is that generally most contract creditors are as worthy plaintiffs in veil piercing cases as tort creditors, and the many cases in which contract creditors are allowed veil piercing relief reflect the proper approach.

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[54] Nat'l Ass'n of Sys. Adm'rs., Inc. v. Avionics Solutions, Inc., 2008 WL 140773 at *6 (S.D.Ind. 2008); *DeWitt Truck Brokers*, 540 F.2d at 681.

[55] *Id.*; BRODSKY & ADAMSKI, *supra* note 53, § 20:6.

Veil piercing allows courts to make wrongdoers pay for corporate debts. When done with proper reluctance, it does not subvert limited liability policy. Moreover, the threat of veil piercing encourages knowledgeable attorneys to advise clients to follow proper business practices. When courts adequately explain their reasons for or against veil piercing in particular cases, lawyers are able to better advise clients about financial responsibility, appropriate behavior, and about what may be expected for a corporation to be seen as a legitimate business. Certainly owners who use the corporate form as a tool to transfer creditors' assets to themselves, rather than to profit from running a legitimate business, should not be able to hide behind the corporate limited liability characteristic. At least the piercing of the veil doctrine may prevent some egregiously bad behavior because of good, early, and continuing legal advice and it may rectify situations where such behavior has occurred. To force voluntary creditors to add to their contractual costs of doing business or to pass costs on to the public by letting scoundrels walk away from irresponsible pierce-worthy conduct would be bad public policy.

### *H. Piercing the Veil: Causation and Liability*

Piercing the corporate veil, sometimes called "disregarding the corporate entity," does not mean that the protection of limited liability is necessarily stripped away from all shareholders or in favor of all judgment creditors of the particular corporation. For example, in a case where the corporation is carrying a lot of automobile insurance to protect tort victims from negligent employee drivers, a wage earner or trade creditor alleging undercapitalization and misuse of assets may fare better in a piercing case than a tort victim of a negligent employee driver when the insurance is inadequate because of the unusual severity of the injuries.

The question of who is to be liable when the veil is pierced may also be complicated. One well known case, *Minton v. Cavaney*, speaks of imposing liability on the equitable owners of a corporation who actively participate in the conduct of corporate affairs.[56] The instrumentality rule cited earlier[57] refers to control, not mere majority or complete stock control, but domination, and speaks of the defendant being liable who has used control to commit fraud or wrong or perpetrate other improper actions. It also indicates that the defendant's control and breach of duty must proximately cause the injury or unjust loss complained of. Significantly, the proximate cause requirement of the instrumentality rule is subject to more than one interpretation. For example, on the one hand, fraud by a controlling corporate officer may lead a creditor to enter a contract with the corporation and satisfy the proximate cause requirement of the instrumentality rule. On the other hand, unjust loss in the sense of inability to collect on

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[56] 364 P.2d 473 (Cal. 1961).

[57] *See supra* note 12.

a judgment obtained by the plaintiff because of the improper diversion of corporate assets, may meet the proximate cause requirement.[58] Under either the *Minton* test of active participation, or the instrumentality approach, the passive shareholder would generally be an unlikely candidate for veil piercing liability. Neither approach, however, furnishes a universal bright line rule of exclusion. The instrumentality rule is replete with issues. It cannot or should not mean that the defendant will not be held liable if she is one of three equal stockholders on a board of directors consisting only of herself and the other two stockholders who have voted unanimously for what a court determines to be grossly inadequate capitalization, serious misuse of assets and other inappropriate behavior under veil piercing guidelines because her control exists only in conjunction with the support of the others. The test of active participation in the conduct of corporate affairs should protect the passive shareholder who is a mere investor and not engaged in corporate affairs beyond the traditional shareholder role, nor should the person who happens to own a share of stock and is a janitor for the company but does not really participate in the conduct of corporate affairs be personally liable. Still some may think it equitable in some piercing cases to hold liable an owner who does not vote or participate in corporate affairs, but knowingly benefits from improper activity.

On its face the instrumentality causation rule predicates liability on wrongdoing while the *Minton* rule looks only to activity. Because piercing cases involve multifactor findings, which courts weigh to decide if the piercing line is crossed, some shareholders may participate slightly in wrongful behavior or in a lesser wrongdoing compared to the magnitude of wrongful behavior by other shareholders in the piercing factors mix. For example, the corporation may have grossly inadequate capitalization, be underinsured, have commingled its assets with shareholders' assets and engaged in confusing recordkeeping, but a particular shareholder, either because of when she entered the picture as an owner or because she even opposed some of the wrongdoing, may argue for exculpation by trivializing her role and seeking equitable mercy. Additionally, a significant shareholder may, without any official role, contact active persons to give advice or occasionally speak favorably to outsiders on behalf of the corporation to promote its business or reputation. Could such behavior attain a level of activity under *Minton* or constitute the requisite level of wrongful control under the instrumentality rule to justify personal liability?

In addition to deciding who should be liable by virtue of causation or activity requirements, there is the question of whether an effort should be made by the court to quantify the particular loss caused by the improper conduct of a defendant or defendants, or whether once the veil is pierced there should be liability for the entire judgment that the plaintiff has obtained against the corporation.

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[58] GELB, *supra* note 13, § 1.11.

In analyzing the quantification of damages issue, consider the following hypothetical: Since its inception the same five shareholders have each owned 20% of the shares of X Corporation and four of them, A, B, C and D, have been active participants in the governance of X Corporation and also its paid managerial employees. E, the other shareholder, has lived far away in body and mind from the corporate business and, other than voting for directors and on other shareholder matters, has been inactive and received only a yearly dividend equal to that received by each other 20% shareholder. Plaintiff was negligently hit by an X Corporation vehicle driven by Z, an employee of the corporation, and obtained a one million dollar judgment against X Corporation due to severe injuries.

Utilizing a multifactor test, a court has determined that X Corporation has been grossly undercapitalized and woefully underinsured, and that its shareholders other than E have received, without charge, significant services and property from X Corporation; the court further determined that it would be unjust to not pierce the corporate veil of an insolvent X Corporation so that Plaintiff can collect his judgment.

Out of the group should A, B, C, D and E all be liable, and of those who are liable should liability be for the entire amount of one million dollars? Should the court limit the amount of personal liability to less than one million dollars, based on the theory that all of the wrongdoing (for example, combined undercapitalization, underinsurance and misuse of assets) could be evaluated as depriving the corporation of $500,000 of assets that should have been available for Plaintiff? That approach may be unwise. First, there may be difficulties and expenses in making such calculations. Second, society should not confer on an irresponsibly run corporation the gift of limited liability. Society through its legal system gives a great benefit to business people in bestowing limited liability, so as to encourage persons to try to succeed in business without the risk of losing everything they have. However, when people go so far as to operate financially irresponsible businesses that incur debts that cannot be paid, they should not be seen as the intended beneficiaries of the limited liability privilege. Indeed the granting of limited liability to such irresponsible persons who are often willing to cheat their creditors is opposed to the interests of society, the victims of their wrongdoing and to legitimate businesses with which they compete, because it shifts responsibility to pay for injuries and obligations to the wrong people. Finally, and perhaps of most importance, is that the damages caused to tort or contract creditors cannot simply be measured by adding up the amounts of asset misuse, undercapitalization, lack of insurance or other calculable improprieties. Rather, creditors and the public ought to be able to expect that businesses granted limited liability are being run in a way to achieve success and increase their value through properly combining and using assets and labor, and are not being created or operated to feast parasitically on creditors and avoid financial responsibilities. Thus, the lack of or misuse of assets and underinsurance may cause harm beyond

the dollar measurement of those items since a bona fide business would be seeking to generate greater value than its owners invest in it. Of course, there may be some situations where certain contract creditors agree to assume all risk and accept limited liability no matter what. But such an unusual assumption of risk should be clearly understood and articulated. For courts to simply presume that contract creditors should have obtained guarantees or other protections from corporate shareholders is to endorse corporate limited liability even for the financially irresponsible or those whose goals in entering or operating a business are not in the public interest.

In a recent appellate opinion focusing on the amount of damages to be awarded in a piercing case, the court affirmed a lower court award of damages of over $1 million against a corporate seller of real estate based on an agreement requiring the seller to indemnify the purchaser for remediation costs if hazardous substances were found on the property.[59]

The trial court had also found corporate officers personally liable for part but not all of the judgment against the corporate seller on the basis that piercing can occur only to the extent that the wrongful activities caused harm to the party seeking relief.[60]

On appeal the court stated:

> The corporate entity is disregarded and liability assessed against shareholders in the corporation when the corporation has been intentionally used to violate or evade a duty owed to another. This may occur either because the liability-causing activity did not occur only for the benefit of the corporation, and the corporation and its controllers are thus "alter egos", or because the liable corporation has been "gutted" and left without funds by those controlling it in order to avoid actual or potential liability.[61]

The trial court found that two officers had abused the corporate form in both ways mentioned, i.e., under the "alter ego" and the "gutting principles"; that the "gutting" occurred when an officer transferred $450,000 (all corporate funds) to his son to hide it from the plaintiff; that abuse occurred as the officers routinely failed to separate corporate affairs from their own, representing corporate assets

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[59] *Stockton*, 2006 WL 3775850.

[60] *Id.* at *5 (citing Morgan v. Burks, 611 P.2d 751, 755 (Wash. 1980)).

[61] *Id.* (citing *Morgan*, 611 P.2d at 755).

in financial statements supporting applications for personal loans. The lower court found that shareholders, directors and officers merged their personal and corporate interests and identities after the real estate agreement was signed and the corporation started generating cash income.[62] Although the lower court pierced the veil against corporate officers, it limited their liability to the $450,000 gutting amount on the ground that the alter ego use did not directly harm plaintiff.

The court of appeals affirmed, holding that there is a proximate cause requirement in veil piercing and plaintiff must prove not just abuse of the corporate form but that wrongful conduct actually harmed the party seeking relief. It was the court's position that the harm caused was $450,000 and that there was no proof that additional corporate funds would have been available even if the officers scrupulously maintained the corporate identity separately from their own, though the court admitted that the corporation "was established solely to manage the property in question, and therefore had no assets other than cash received from [plaintiff]."[63]

Thus, the court overlooked or gave no significance to the unavailability of assets and the issue of financial responsibility by simply limiting the recovery based on an ill-applied proximate causation theory.

One would hope and expect that the same court would have more clearly seen the need to give weight to the lack of assets, gutting, and lack of financial responsibility factors if the case involved an involuntary tort plaintiff. A fair reading of this opinion would show that the court really took comfort in its result (though reached through a proximate causation route) by pointing to the sophistication of both contracting parties and suggested that plaintiff could have protected himself by requiring a personal guarantee.[64] This argument requires a policy judgment that some contract creditors are the cause of their own problems if they do not secure personal guarantees or other protection.

As indicated above, the ability of some creditors to obtain protection should not sabotage piercing claims of tort creditors or contract creditors, because the privilege of limited liability should not bar piercing claims against owners of entities who have not operated in good faith. On rare occasions, informed contract creditors may accept debtors that lack an appropriate level of assets, and that is part of the deal. In those cases the intentions of the parties should be respected. As stated earlier, although there are cases unfavorable to contract creditors, there are many that allow piercing by contract creditors. Indeed why should contract creditors be precluded from piercing, a judicial remedy granted only with reluctance where equity requires it, because of notions that such

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[62] *Stockton*, 2006 WL 3775850.

[63] *Id.* at *7.

[64] *Id.*

creditors have the burden to enter into further protective transactions such as securing guarantees. Moreover, the beneficial impact of limited liability may be diluted to the extent that more and more contract creditors conclude that it is best as a matter of course to require personal guarantees from owners of privately held limited liability entities.

Society should be able to expect entities granted limited liability to be operated in a financially responsible manner and that the victims of irresponsible financial behavior should have the right to go behind the veil of limited liability and hold its perpetrators accountable.

## VI. CONCLUSION

The conclusion of this article will come as no surprise. Commentators and courts should reject the argument to disadvantage contract creditors in veil piercing suits against financially irresponsible owners. Blaming contract creditors for not protecting themselves is frequently unrealistic and may save unworthy persons from personal liability.

*Caveat*: While veil piercing is a respectable, well-established remedy against the financially irresponsible, and the threat of it may help prevent some negative debtor behavior, it is reluctantly granted and may be costly to pursue. Creditors need to analyze carefully the best ways to protect themselves from the harm of debtor default. As a practical matter, creditors in some situations may be able to take more self protective steps in considering the extension of credit and its ultimate collection. But limited liability is a privilege, and if its disregard will help a creditor against persons undeserving of that privilege, then veil piercing, a venerable and equitable remedy, is appropriately invoked.

Furthermore, using strict or narrow causation concepts in piercing cases may often ignore the simple reality that it is financial irresponsibility as such that often leads to insolvency and is the real cause of creditor collection problems. The cause of insolvency may be traced to the lack of a good faith or appropriate effort to succeed as a business; those responsible for that lack should not be protected in piercing cases by the privilege of limited liability. Of course, in piercing cases where it is shown that a properly informed creditor has agreed not to hold owners of the limited liability entity liable, that agreement should be respected.

Otherwise owners of privately held businesses who operate limited liability entities in a financially irresponsible way should be deemed outside the scope of protection from personal liability in piercing cases. Case law and statutes relevant to veil piercing should not protect such owners. Our society has enough financial distress without endorsing through law a policy to protect the irresponsible from veil piercing.

## CASE NOTE

# CIVIL PROCEDURE—Effects of the "Effects Test": Problems of Personal Jurisdiction and the Internet; *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008).

*Teresa J. Cassidy**

## Introduction

True to its name, the World Wide Web has created an intricate network of people, places, things, and ideas. No longer a novelty, the "Web" has moved so firmly into the category of global necessity, it is nearly impossible to imagine contemporary culture without it.[1] Around the globe, people connect seamlessly in an online arena that appears to defy all traditional notions of law and territory.[2] Although conducted over an electronic medium, Internet communication exists as an extension of the human sphere, complete with disagreements and infringements. As such, the Internet has created a slew of recent problems in the legal world.[3] Unsure of how to address harms incurred in the borderless sphere of cyberspace, courts and practitioners continue to grapple with the sheer breadth of the Internet's reach.[4] Particularly, issues of personal jurisdiction arise, creating a dilemma for courts attempting to assert power over a defendant whose actions have taken place in the amorphous arena of cyberspace.[5]

Fortunately for legal practitioners, the effects of Internet communication provide a more concrete answer to jurisdiction issues.[6] Initially, the limits of a

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* Candidate for J.D., University of Wyoming, 2010. Many thanks to my family, friends and loved ones for their continual support and encouragement. You are the most important parts of my life.

[1] *See generally* Federal Communications Commission Internet Policy Statement 05-151, September 23, 2005, http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf (last visited February 22, 2009).

[2] Dr. Georgios I. Zekos, *State Cyberspace Jurisdiction and Personal Cyberspace Jurisdiction*, 15 Int'l. J.L. & Info. Tech. 1, 1 (2007).

[3] David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1367 (1996).

[4] *Id.* at 1368.

[5] *See* Zekos, *supra* note 2, at 4.

[6] *See, e.g.,* CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996) (holding that when the defendant knowingly made an effort to market a product over the Internet, it was reasonable to subject the defendant to suit in the state where his Internet service provider was located); Digital Equip. Corp. v. Alta Vista Tech., Inc., 960 F. Supp. 456 (D. Mass. 1997) (holding the totality of the defendant's contacts with the forum state rendered assertion of personal jurisdiction over the defendant appropriate); Park Inns Int'l., Inc. v. Pac. Plaza Hotels, Inc., 5 F. Supp. 2d 762 (D. Ariz. 1998) (holding the defendant's websites, used to transact and solicit business into the forum state, proved sufficient to assert jurisdiction).

court's personal jurisdiction were strictly defined by territorial boundaries, and activities occurring only in cyberspace remained tied to geographically constrained locations.[7] As such, courts must look to balance these Internet and real-world connections when determining jurisdiction.[8] Many theories have emerged as to how to weigh these ties and consequent effects when determining issues of jurisdiction, and courts have used a trial and error method to determine which theories provide fair results.[9]

In October 2005, Karen Dudnikov and Michael Meadors, owners of a small, Internet-based business in Colorado, launched an auction for the sale of fabric on the Internet auction site, eBay.[10] The fabric offered for sale portrayed a cartoon character wearing several gowns, each gown with a different artistic design.[11] One gown depicted distinct designs by the artist and designer, Erte.[12] The designs depicted on the character's gown mimicked Erte's work, with the cartoon character herself replacing the female figure in Erte's designs.[13]

SevenArts, a British corporation, owns the copyright to the original Erte designs.[14] Chalk & Vermilion ("Chalk"), a Delaware corporation with its principal place of business in Connecticut, acts as SevenArts' agent in the United States.[15] To protect the copyrights of Erte's designs, Chalk is a member of eBay's "Verified Rights Owner" ("VeRO") program.[16] Under this program, eBay will terminate an auction when it receives a notice of claimed infringement ("NOCI") from a

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[7] *See* cases cited *supra* note 6.

[8] *Id.*

[9] *Id.*

[10] Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1068 (10th Cir. 2008).

[11] *Id.*

[12] *Id.* A famed artist and fashion designer, Erte, served as the primary design influence for the "Art Deco" movement of the early Twentieth Century. Erte, http://www.chalk-vermilion.com/artist_page/erte_bio_cv.html (last visited Feb. 25, 2009). Born in Russia in 1892, the artist died in 1990, at age 97. *Id.* For a more detailed biography, along with an extensive collection of Erte's works and designs see www.erte.com.

[13] *Dudnikov*, 514 F.3d at 1068.

[14] *Id.*

[15] *Id.*

[16] *Id.* Safe Harbor provisions of the Copyright Act allow copyright holders to impel auction sites to terminate infringing auctions. *See* 17 U.S.C. § 512(c) (2000). If an intellectual property rights owner, in good faith, believes his copyright is being infringed on eBay, he may submit a notice of claimed infringement ("NOCI") as part of the VeRO program. eBay, Reporting Intellectual Property Rights (VeRO), http://pages.ebay.com/help/tp/vero-rights-owner.html (last visited Feb. 25, 2009). The NOCI is a form filled out by the copyright and then faxed to eBay. *Id.* A NOCI filed against an eBay user may result in removal of the infringing items and multiple NOCI infringements may result in suspension of the user, hence Dudnikov's fear of a "black mark" on her eBay sellers' record. *Id.* For more information on eBay copyright protection see http://pages.ebay.com/help/tp/programs-vero-ov.html.

VeRO member.[17] Upon learning of the fabric auction, Chalk filled out an NOCI and faxed it to eBay in California, thereby exercising its rights under the VeRO program on behalf of SevenArts.[18] Per VeRO rules, eBay immediately terminated Dudnikov and Meador's auction and notified them of the NOCI submission.[19] Dudnikov, in Colorado, contacted Chalk, in Delaware, by email, to state that she would voluntarily refrain from relisting the disputed fabric and requested the NOCI be withdrawn for fear of a "black mark" on her eBay record.[20] SevenArts refused to withdraw the NOCI, causing Dudnikov to submit a counter notice to eBay contesting SevenArts' copyright claim.[21] SevenArts then notified Dudnikov via email of its intent to file an action in court.[22]

On December 12, 2005, Dudnikov and Meadors filed a pro se complaint against Chalk and SevenArts in the United States District Court for the District of Colorado.[23] The suit sought both a declaratory judgment to determine the fabric did not infringe SevenArts copyrights, and an injunction to prevent Chalk and SevenArts from interfering with future sales of the fabric.[24] SevenArts and Chalk responded by moving to dismiss for lack of personal jurisdiction and improper venue.[25] The magistrate judge recommended a finding of specific jurisdiction, reasoning that while the court lacked general jurisdiction over the defendants, specific jurisdiction did exist.[26] The defendants objected to the recommendation

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[17] *Dudnikov*, 514 F.3d at 1068.

[18] *Id.* at 1069.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Dudnikov*, 514 F.3d at 1069.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* For more information on recommended dispositions, see 28 U.S.C. § 636(b)(1)(A) (2000). Relevant statutory language states:

> (b)(1) Notwithstanding any provision of law to the contrary—
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> (A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

*Id.* Black's Law Dictionary defines general jurisdiction as: "A court's authority to hear all claims against a defendant, at the place of the defendant's domicile or place of service, without any showing that a connection exists between the claims and the forum state." BLACK'S LAW DICTIONARY 869 (8th

and the district court sustained the objection.[27] Finding neither specific nor general jurisdiction, the district court granted the defendant motion to dismiss on September 15, 2005.[28] Dudnikov and Meadors appealed the dismissal of their action, contesting the district court's finding that the court lacked personal jurisdiction.[29]

In *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, the United States Court of Appeals for the Tenth Circuit Court examined whether the effects of an electronic notice intended to cancel an Internet auction would support a finding of specific personal jurisdiction in the forum of Colorado, where the plaintiffs reside and from which they are providing the online auction site in question.[30] Tenth Circuit judges Gorsuch, McConnell and Ebel unanimously held the notice sent by Chalk & Vermilion to eBay satisfied personal jurisdiction in Colorado because it expressly intended to suspend Dudnikov's Colorado-based Internet auction.[31] In a case of first impression, the court applied the "effects test" as set forth in the landmark United States Supreme Court case, *Calder v. Jones*, to analyze "purposeful availment" via electronic means.[32] Following the sister circuits that applied the *Calder* "express aiming" test to Internet-based cases, the Tenth Circuit determined the intentional nature and consequences of the NOCI filed by Chalk

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ed. 2004). Black's Law Dictionary defines specific jurisdiction as follows: "Jurisdiction that stems from the defendant's having certain minimum contacts with the forum state so that the court may hear a case whose issues arise from those minimum contacts." BLACK'S LAW DICTIONARY 870 (8th ed. 2004).

[27] *Dudnikov,* 514 F.3d at 1069. Defendants also moved to dismiss for improper venue, however, in a copyright action, lack of jurisdiction also renders venue improper. *Id.*

[28] *Id.*

[29] *Id.* at 1063–82.

[30] *Id.*

[31] *Id.*

[32] *Dudnikov*, 514 F.3d at 1070–81 (citing Calder v. Jones, 465 U.S. 783, 788–90 (1984)) (holding "[petitioners'] intentional, and allegedly tortious, actions were expressly aimed at California. . . . [T]hey knew [the article] would have a potentially devastating impact upon respondent . . . in the State in which she lives and works . . . [a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California"). The "Purposeful Availment Test" states that in order for the "minimum contacts test" to be satisfied, the defendant must have "purposefully avail[ed]" itself of the benefits and privileges of the forum. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (quoting Hanson v. Denckla, 357 U.S. 235 (1958)). Black's Law Dictionary defines minimum contacts as follows: "A non-resident defendant's forum-state connections, such as business activity or actions foreseeably leading to business activity, that are substantial enough to bring the defendant within the forum-state court's personal jurisdiction without offending traditional notions of fair play and substantial justice." BLACK'S LAW DICTIONARY 457 (3rd Pocket ed. 2006) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

& Vermilion sufficient to satisfy purposeful availment.[33] Relying on the "effects test," the court deemed the electronic NOCI an adequate contact to support a finding of specific personal jurisdiction in Colorado.[34] In adopting the *Calder* "effects test," the court additionally implied that parties' locations and manner of electronic transmission, as well as the involvement of a third party, proved nearly irrelevant when compared to the aimed, intentional effect of the action.[35]

This case note follows the evolution of jurisdiction and the Internet, beginning with a brief history of the Internet and early Internet jurisdiction problems.[36] Exploring the body of law surrounding Internet jurisdiction, this discussion covers both the landmark cases and current trends reflecting the state of the common law.[37] The note then covers the principal case of *Dudnikov*, explaining the court's analysis and its use of the *Calder* "effects test."[38] Discussion then moves to the dilemmas of applying territorial law in the borderless online arena, and demonstrates courts' ongoing struggle to tailor the established law of jurisdiction to fit rapidly evolving legal issues involving online contacts.[39] Finally, the analysis shifts to future problems and the need to create a unified, activity-based approach to cases involving the Internet to ensure the exercise of jurisdiction harmonizes with constitutional due process demands.[40]

## BACKGROUND

### *History and Development of the Internet*

The amorphous, borderless quality of the Internet is explained by examining its beginnings. Internet building-blocks date back to the early 1960s, when a section of the United States Department of Defense facilitated the development of a communication system which could, hypothetically, withstand a nuclear war

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[33] *See, e.g.,* Bancroft & Masters, Inc. v. Augusta Nat'l. Inc., 223 F.3d 1082, 1089 (9th Cir. 2000); *contra* Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797 (9th Cir. 2004); *Dudnikov*, 514 F.3d at 1076. The *Calder* "express aiming" or "effects test" allows the exercise of personal jurisdiction when the defendant's intentional, tortious actions are expressly aimed at the forum state and cause harm to the plaintiff in the forum state of the type that the defendant knows is likely to be suffered. *Id*. at 1074–75. According to the court, "the . . . [effects] test focuses more on a defendant's intentions-where was the 'focal point' of its purposive efforts." *Id.* at 1075 n.9.

[34] *Dudnikov*, 514 F.3d at 1082.

[35] *Id.* at 1073–77.

[36] *See infra* notes 41–90 and accompanying text.

[37] *See infra* notes 65–90 and accompanying text.

[38] *See infra* notes 91–119 and accompanying text.

[39] *See infra* notes 91–179 and accompanying text.

[40] *See infra* notes 123–79 and accompanying text.

with the Soviet Union.[41] Originally called ARPANET, the communication system utilized early computers and telephone lines.[42] To connect between computers, communications were chopped into tiny packets to be transmitted separately via a network of pathways which would automatically re-route to a final destination if a path became blocked.[43] The individual packets of information gathered at a receiving computer and then reassembled into the original communication, thus explaining the unique and current amorphous quality of Internet connections.[44]

New technology allowed for the interconnection of larger groups of computers and allowed networks to use other databases.[45] Increased demand for network connections eventually necessitated the replacement of ARPANET with high-speed cable technology in the 1980s.[46]

Amplified popularity led to dramatically increased usage of the Internet.[47] Hyper Text Transfer Protocol ("HTTP") and Hypertext Markup Language ("HTML") allowed users to operate computer systems without the use of special computer text commands, creating the "World Wide Web."[48] By January 2001, the number of hosts totaled 110 million and the number of web-sites had reached 30 million.[49] As such, increasingly affordable computers and services increased

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[41] *See* Richard T. Griffith, *History of the Internet,* Universiteit Leiden, http://www.Internethistory.leidenuniv.nl/index.php3?c=3&m=&session= (last viewed Feb. 22, 2008).

[42] JANET ABBATE, INVENTING THE INTERNET, 8–46 (1999). ARPANET stands for Advanced Research Projects Agency Network. *Id.* The Advanced Research Projects Agency (ARPA), created by the Department of Defense in the early 1950s, stood as a state-of-the-art technological think tank designed to advance the state of America's defense systems. *Id.* Headed by MIT scientists for ARPA, ARPANET became a revolutionary computer network which advanced the idea of a "Galatic Network" concept in which computers would be networked together and accessible everywhere. *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Griffith, *supra* note 41, at 1.

[47] ABBATE, *supra* note 42, at 8–46.

[48] Griffith, *supra* note 41, at 1. The Webopedia Computer Dictionary explains HTTP and HTML:

> Short for HyperText Transfer Protocol, the underlying protocol used by the World Wide Web. HTTP defines how messages are formatted and transmitted, and what actions Web servers and browsers should take in response to various commands. For example, when you enter a URL in your browser, this actually sends an HTTP command to the Web server directing it to fetch and transmit the requested Web page.
>
> The other main standard that controls how the World Wide Web works is HTML, which covers how Web pages are formatted and displayed.

Definition is available at http://www.webopedia.com/TERM/H/HTTP.html (last viewed Feb. 22, 2008).

[49] *See* Internet Usage Statistics, Miniwatts Marketing Group, http://www.Internetworldstats.com/stats.htm (last visited Feb. 22, 2008).

computer usage dramatically.[50] In the second quarter of 2008, the estimated global number of Internet users totaled nearly 1.5 billion.[51]

*Traditional Personal Jurisdiction*

As culture changes, the judicial system demands a constantly evolving scheme of jurisdiction. The United States Supreme Court's decision in *International Shoe v. Washington* changed the decades-old rule, set forth by *Pennoyer v. Neff* in 1877, that only service of process on a defendant present in the forum state would support a finding of *in personam* personal jurisdiction.[52] *International Shoe* ushered in a new era for personal jurisdiction, allowing courts to move beyond traditional bases of jurisdiction, such as citizenship or incorporation, to analyze the defendant's contacts with the forum state.[53]

In the absence of a traditional basis for jurisdiction, a court must first determine whether the forum has a long-arm statute extending to the nonresident defendant.[54] If the statute applies, the court must then examine whether the exercise of jurisdiction complies with constitutional due process protections.[55] The due process analysis is based on the defendant's contacts with the forum state to determine fairness of asserting personal jurisdiction over the defendant.[56] Analysis of the defendant's contacts with the forum depends on the type of personal

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[50] *Id.*

[51] *Id.*

[52] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *see also* Pennoyer v. Neff, 95 U.S. 714 (1877).

[53] *See* Hanson v. Denckla, 357 U.S. 235, 250–51 (1958) (stating "technological progress has increased the flow of commerce between the States . . . in response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*"); *see also Int'l Shoe*, 326 U.S. at 316. For an explanation of "minimum contacts," see *supra* note 32 and accompanying text.

[54] Fed. R. Civ. P. 4(k)(1)(A) (2007). Black's Law Dictionary defines long-arm statute as follows: "A statute providing for jurisdiction over a nonresident defendant who has had contacts with the territory where the statute is in effect. Most state long-arm statutes extend this jurisdiction to its constitutional limits." BLACK'S LAW DICTIONARY 961 (8th ed. 2004).

[55] U.S. CONST. amend. XIV, § 1.

> Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

*Id.*

[56] *Int'l Shoe*, 326 U.S. at 316.

jurisdiction at issue: general or specific.[57] For specific jurisdiction to be met, the defendant's contacts with the forum state must show the defendant purposefully availed itself of the benefits of the forum and that assertion of jurisdiction over the defendant "a[rose] out of" the forum-related activities.[58] Finally, the plaintiff must show that an assertion of jurisdiction over the defendant is consistent with "traditional notions of fair play and substantial justice."[59]

*Early Cases Involving Internet Jurisdiction*

While it now seems logical that connections between Internet users may constitute the type of contact necessary to assert personal jurisdiction in a forum, courts have struggled with the global concept of the Internet.[60] Dwelling on the sheer breadth of the Internet's reach, early decisions resulted in the broadest assertions of Internet jurisdiction.[61] Early courts found reason to support a finding of purposeful availment anywhere a website could be viewed, because the Internet existed nearly anywhere.[62] As cases involving the Internet multiplied dramatically in the mid-1990s, courts and legal scholars soon realized the overbreadth of these early decisions led to inequitable results.[63] Assertions of jurisdiction anywhere the

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[57] Arthur von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–49 (1966). The terms "specific" and "general" jurisdiction originated in this article. *Id.* If the plaintiff's claim arises from the defendant's contacts with the forum state, "specific" jurisdiction is said to exist. *Id.* at 1144–49. However, if the claim does not arise out of the defendant's contacts with the forum state, but those contacts are sufficient to justify an assertion of jurisdiction over the defendant, "general" jurisdiction is said to exist. *Id.* at 1136–44.

[58] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); *Int'l Shoe*, 326 U.S. at 316.

[59] *Int'l Shoe*, 326 U.S. at 316.

[60] *See, e.g.,* Reno v. ACLU, 521 U.S. 844, 853 (1997) (acknowledging the Internet's great expanse, the court stated: "The Web is . . . both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services"); Inset Sys., Inc. v. Instruction Set, 937 F. Supp. 161, 163 (D. Conn. 1996) (stating that "[u]nlike television and radio, in which advertisements are broadcast at certain times only, or newspapers in which advertisements are often disposed of quickly, advertisements over the Internet are available to Internet users continually, at the stroke of a few keys of a computer").

[61] *See, e.g., Inset Systems*, 937 F. Supp. at 164 (concluding "that advertising via the Internet is solicitation of a sufficient repetitive nature to satisfy [jurisdiction]"); Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328, 1330 (E.D.Mo. 1996) (finding jurisdiction because the defendant maintained a website that was "continually [sic] accessible to every [I]nternet-connected computer in Missouri and the world").

[62] *See, e.g.*, *Maritz*, 947 F. Supp. at 1330 (holding a website's universal accessibility may subject it to jurisdiction anywhere it can be viewed); *Inset Systems*, 937 F. Supp. at 164–65 (holding website advertising alone established personal jurisdiction over the defendant wherever the website could be viewed); *see also* Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 297 F. Supp. 2d 1154, 1159 (W.D. Wis. 2004) (addressing the problems of universal assertion of personal jurisdiction wherever a website can be viewed, established by *Inset* and its progeny).

[63] *See, e.g.,* Digital Control Inc. v. Boretronics Inc., 161 F. Supp. 2d 1183, 1186 (W.D.Wash. 2001). In *Digital Control*, the court explained:

Internet was accessible meant the potentiality of calling a defendant into court *anywhere* around the world.[64]

The first significant test to evaluate the connection between Internet contact and purposeful availment debuted in the 1997 case, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc*.[65] Addressing the problem of asserting purposeful availment anywhere a website could be viewed, *Zippo* provided the most widely-used analysis of Internet jurisdiction to date.[66] Taking into account due process demands, the United States District Court for the Western District of Pennsylvania proposed a "sliding scale" of purposeful availment to analyze the nature of the defendant's activities in the forum.[67] The court stated:

> [T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is

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> *Inset* is far from compelling: after citing two cases in which national advertising was coupled with inquiries from, correspondence with, and sales to citizens of the forum state, the court jumped to the conclusion that the ready availability of the Internet and its potential to reach thousands of Connecticut residents justified the exercise of jurisdiction over defendant even though there was no indication that the offending web site had actually been seen by a Connecticut resident or that defendant had engaged in any commercial activity within the forum. As recognized by another court [*Zippo*], *Inset* represents the "outer limits" of the personal jurisdiction analysis.

*Id.*; *see also* Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd* 126 F.3d 25 (2d Cir. 1997) (contesting the previous supposition that the ability of a person to access information about a product equates, for purposes of jurisdiction, to promoting, selling or advertising the product); Vinten v. Jeantot Marine Alliances, S.A., 191 F. Supp. 2d 642, 647 n.10 (D.S.C. 2002) (stating that "[s]ome earlier cases did find that the mere presence of a website, without more, was enough to subject a defendant to personal jurisdiction in the forum where the website could be accessed . . . . However, as case law in this area has developed, the majority of courts have rejected this conclusion" (citations omitted)).

[64] *See, e.g., Inset*, 973 F. Supp. at 163; *Maritz*, 947 F. Supp. at 1332 (discussing that "[u]nlike use of the mail, the Internet, with its electronic mail, is a tremendously more efficient, quicker, and vast means of reaching a global audience. By simply setting up, and posting information at, a website in the form of an advertisement or solicitation, one has done everything necessary to reach the global Internet [audience]").

[65] 952 F. Supp. 1119 (W.D. Pa. 1997) (holding that in a domain name dispute with famous lighter-maker, Zippo Manufacturing, Zippo Dot Com forged a substantial connection with Pennsylvania through Internet contacts which included use of Pennsylvania Internet service providers and interaction between the company and 3000 Pennsylvanians who had subscribed to the Zippo Dot Com service).

[66] *Id.* at 1124.

[67] *Id.* at 1124–27.

> proper. . . . At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction.[68]

Although initially applauded by the legal community, the *Zippo* decision proved unsuited to address the many demands of an increasingly interactive online community.[69] While *Zippo* did provide initial guidance, by 1999 courts began shifting away from the *Zippo* "passive v. active" approach in search of a more thorough test.[70] Again, courts diverged on the issue of Internet jurisdiction, applying scattered models and testing the outcomes and often incorporating parts of the "Zippo Test."[71] The most frequently repeated tests strove to apply traditional models of jurisdiction to Internet communication, as derived from the seminal United States Supreme Court cases *Burger King v. Rudzewicz*, *World Wide Volkswagen Corp. v. Woodson*, and *Asahi Metal Industry Co. v. Superior Court of California*.[72]

While the United States Supreme Court has yet to address the specific issue of Internet jurisdiction, current trends focus less on the Internet connection itself and more on the concrete relationship between the parties, the harm suffered, and the location and significance of each contact.[73] The "effects test," as set forth in

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[68] *Id*. (internal citation omitted).

[69] *See* Dennis T. Yokoyama, *You Can't Always Use the Zippo Code: The Fallacy of a Uniform Theory of Internet Personal Jurisdiction*, 54 DEPAUL L. REV. 1147, 1166–77 (2005).

[70] Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1371 (2001); *see, e.g.,* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir.1997) (holding that a passive Internet website alone is sufficient to subject a party to jurisdiction in another state and "something more" must also exist to support a finding of jurisdiction); Panavision Int'l., L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998) (extending *Cybersell*, the court stated: "we agree that simply . . . posting a [passive] web site on the Internet is not sufficient to subject a party . . . to jurisdiction." The court then used the "effects test" to support a finding of jurisdiction); *Compuserve*, 89 F.3d at 1257; Neogen Corp. v. Neo Gen Screening, Inc., 109 F. Supp. 2d 724, 729 (W.D. Mich. 2000).

[71] Yokoyama, *supra* note 69, at 11.

[72] *See, e.g., Compuserve*, 89 F.3d at 1261–66 (using Asahi Metal Indus. Co. Ltd. v. California, 480 U.S. 102 (1987) to determine that defendant's placement of shareware into the stream of commerce was not sufficient to render personal jurisdiction in Ohio); *see also Burger King*, 417 U.S. 462; *World-Wide Volkswagen*, 444 U.S. 286.

[73] *See, e.g.,* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (quoting Shaffer v. Heitner, 433 U.S. 186, 204 (1977)) (speaking about specific jurisdiction, the court stated foundations for personal jurisdiction arise out of the "relationship among the defendant, the forum and the litigation"); *see also* Diamond Healthcare of Ohio, Inc. v. Humility of Mary Health Partners, 229 F.3d 448, 450 (4th Cir. 2000) (holding that in the absence of continuous and systematic contacts, personal jurisdiction may exist where contacts are related to the cause of action and create substantial connections with the forum).

the 1984 landmark cases *Calder v. Jones* and *Keeton v. Hustler Magazine*, provides courts with a more directed approach for the evaluation of Internet contacts.[74]

In *Calder v. Jones*, a California actress sued a Florida magazine publisher for libel.[75] To determine appropriateness of personal jurisdiction, the United States Supreme Court focused on the effects of the allegedly libelous material within California.[76] In creating the "effects test," the Court held personal jurisdiction over an out-of-state defendant is proper when: a) the defendant's intentional and tortious actions; b) expressly aimed at the forum state; c) cause harm to the plaintiff in the forum state; and d) the defendant exhibited awareness that the brunt of the injury would occur in the forum.[77] Perhaps drawn to the systematic analysis the test affords, courts have extended *Calder* to address a broad range of cases involving Internet contacts.[78] Yet, while the "effects test" acts as a deciding factor in many cases, federal circuit courts vary in their implementation and interpretation of the test.[79] Additionally, some circuits have not adopted the *Calder* test to determine Internet jurisdiction, or fail to apply it consistently to questions of Internet jurisdiction.[80]

Inconsistency in the application of personal jurisdiction analysis by the courts creates confusion for citizens and legal scholars alike.[81] With courts facing similar

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[74] *See* Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); *see also Panavision*, 141 F.3d at 1321–22 (applying the *Calder* "effects test" after stating cases of cybersquatting parallel cases of intentional torts); Blakey v. Continental Airlines, Inc., 751 A.2d 538 (N.J. 2000) (using the "effects test," the New Jersey Supreme Court analyzed the effects of defamatory statements in an online defamation case).

[75] *Calder*, 465 U.S. at 784.

[76] *Id.*

[77] *Id.* at 789.

[78] The *Calder* "effects test" has been applied in defamation, intellectual property, business torts, and contract cases. *See, e.g.,* Euromarket Designs Inc., v. Crate & Barrel Ltd., 96 F. Supp. 2d 824 (N.D. Ill. 2000) (using the "effects test" to determine personal jurisdiction in a trademark infringement case); Tech Heads, Inc. v. Desktop Serv. Ctr., Inc., 105 F. Supp. 2d 1142 (D. Or. 2000) (deeming a Virginia company's use of an Internet domain name insufficient to subject it to personal jurisdiction in Oregon under the "effects test").

[79] *See* Yahoo! Inc., v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1208 (9th Cir. 2006) (*en banc*) (the *en banc* panel held acts applied in the "effects test" need not be wrongful acts, overruling the court's earlier decision in Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082 (9th Cir. 2000)).

[80] *See* Digital Equip. Corp. v. AltaVista Tech., Inc., 960 F. Supp. 456 (D. Mass. 1997) (holding a "stream of commerce" model—not the "effects test"—was appropriate to assert jurisdiction in a case involving online commerce); Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002) (using a "passive/interactive" test); ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707 (4th Cir. 2002) (using a "targeting" test to determine if sufficient Internet contacts existed to exercise jurisdiction).

[81] Timothy P. Lester, *Globalized Automatic Choice of Forum: Where Do Internet Consumers Sue?*, 9 NEW ENG. J. INT'L & COMP. L. 431 (2003).

factual situations and reaching different results, the body of law surrounding Internet jurisdiction remains murky.[82]

Given the global nature of the Internet, an international jurisdiction solution may eventually be the answer.[83] Currently, an international system of regulation is under investigation by international bodies, such as the European Union, The Hague Convention, and the Internet Law and Policy Forum.[84] However, progress in the field remains slow.[85] Vast disparities between United States and European procedural law, along with individual considerations concerning jurisdiction, present an uphill battle with no quick resolution.[86]

The history of Internet jurisdiction has evolved in conjunction with the technology itself.[87] Early cases required courts to rapidly comprehend and distinguish Internet activities as they evolved and then apply existing models of jurisdiction.[88] Today, trends focus on the effects and targets of Internet activities within the forum state, but precedent varies among jurisdictions.[89] Eventually, global regulation may provide a consistent means to determine Internet jurisdiction; however, international substantive and procedural differences prevent an easy solution.[90]

## PRINCIPAL CASE

Following the trend set forth by its sister circuits, the United States Court of Appeals for the Tenth Circuit unanimously adopted the *Calder* "effects test" to establish personal jurisdiction over an out-of-state defendant connected to the forum by electronic contacts.[91] Basing its jurisdictional analysis on the "effects test" in *Calder v. Jones*, the *Dudnikov* court found the intentional sending of an electronic NOCI, specifically designed to terminate the plaintiff's auction, as sufficient to support exercise of personal jurisdiction.[92] Explaining the nature of its review, the court held precedent required it to defer to the facts alleged by

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[82] *Id*. at 446–49.

[83] *Id*. at 446–47.

[84] *Id*. at 447–58.

[85] *Id.* at 448–61.

[86] Lester, *supra* note 81, at 448–61.

[87] *See supra* notes 40–73 and accompanying text.

[88] *See supra* notes 64–87 and accompanying text.

[89] *See supra* and *infra* notes 64–163 and accompanying text.

[90] *See infra* notes 164–73 and accompanying text.

[91] Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063 (10th Cir. 2008).

[92] *Id.* For information on NOCI, *see supra* note 16 and accompanying text.

the plaintiffs.[93] Precedent also required the plaintiffs to make only a prima facie showing of personal jurisdiction by a preponderance of the evidence.[94]

The court began its analysis using the traditional, two-prong test for personal jurisdiction.[95] Under the first prong, the court sought to determine if any applicable long-arm statute authorized service of process over the defendants.[96] Under the second prong, the court examined whether the exercise of statutory jurisdiction was in harmony with Fourteenth Amendment due process considerations.[97]

In analyzing the first prong, the court found neither the Copyright Act nor the Declaratory Judgment Act provided for nationwide service of process.[98] Therefore, under Federal Rules of Civil Procedure, the court determined it must apply the laws of Colorado under the Colorado long-arm statute.[99] After determining the Colorado long-arm statute allowed for maximum jurisdiction permissible under the Due Process Clause, the court turned to the second prong of the personal jurisdiction analysis.[100]

In addressing the second prong of analysis, the court utilized the test set forth by the United States Supreme Court in *International Shoe Co. v. Washington*.[101] In order to comport with due process under *International Shoe*, a court should exercise jurisdiction only if defendants had "minimum contacts" with the forum state and a lawsuit in the forum would not "offend traditional notions of fair play and substantial justice."[102] Again turning to the United States Supreme Court

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[93] *Dudnikov*, 514 F.3d at 1070 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

[94] *Id.* at 1070 n.4 (citing Dennis Garberg & Assoc., Inc. v. Pack-Tech Int'l Corp., 115 F.3d 767, 773 (10th Cir. 1997)).

[95] *Id.* (citing Trujillo v. Williams, 465 F.3d 1210, 1217 (10th Cir. 2006)).

[96] *Id.*

[97] *Id.*

[98] *Dudnikov*, 514 F.3d at 1070. The federal Copyright Act enumerates the rights and limitations of copyright holders in the United States. 17 U.S.C. §§ 101–122 (2000). The Federal Declaratory Judgment Act permits parties to bring an action to determine their legal rights "whether or not further relief is or could be sought . . . such declaration shall have the force and effect of a final judgment or decree . . . ." 28 U.S.C. § 2201(a) (2000). The *Dudnikov* court recognized neither act provided for nationwide service of process which would effectively serve the defendants, residents of Delaware and the United Kingdom, respectively. *Dudnikov*, 514 F.3d at 1070.

[99] *Dudnikov*, 514 F.3d at 1070. Federal Rules of Civil Procedure require a district court to apply the law of the state in which it sits. FED. R. CIV. P. 4(k)(1)(A) (2007). Colorado's long-arm statute provides for service of process of an out-of-state defendant and confers maximum jurisdiction permissible under the Due Process Clause. COLO. REV. STAT. ANN. § 13-1-124 (West 2005).

[100] *Dudnikov*, 514 F.3d at 1070.

[101] *Id.* at 1071 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

[102] *Id.* (quoting *Int'l Shoe*, 326 U.S. at 316).

for instruction, the Tenth Circuit pointed to *Burger King Corp. v. Rudzewicz* and applied the familiar "purposeful availment" and "arise out of" standards to determine whether the defendant's activities constituted "minimum contacts."[103]

Next, the court determined whether the defendant's actions could stand under the "minimum contacts" inquiries in *Burger King*.[104] Addressing the "lack of predictability and uncertainty in [personal jurisdiction 'purposeful availment' analysis]," the court focused its inquiry on the *Calder v. Jones* "effects test" to determine purposeful availment in this case.[105]

Under the *Calder* "effects test," the court focused on the intentional action of sending the NOCI to eBay and the alleged "wrongfulness" of that action.[106] Pointing to a recent decision by the United States Court of Appeals for the Ninth Circuit, the court held an action need only be intentional, not "wrongful," in order for the *Calder* test to be used.[107] Applying this rationale, the court determined the effects of the NOCI sufficient to infer that Chalk "tortiously interfered with the plaintiff's business," thus satisfying the requirement of an intentional act.[108]

Finally, the court examined the "express aiming" requirement under *Calder*.[109] Addressing the defendant's assertion that the plaintiffs failed to meet the "express aiming" standard, the court examined the path and intent of the NOCI.[110] Looking beyond the physical travel of the NOCI to eBay in California, the court examined the actual intent behind the NOCI: to halt the plaintiff's

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[103] *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)). The "arise out of" standard relates to the contacts an out-of-state defendant maintains with the forum state. *Burger King*, 471 U.S. at 463. When a court seeks to assert specific jurisdiction over an out-of-state defendant who has not consented to suit there, the notice requirement is satisfied if the defendant has purposefully directed his activities at residence of the forum and the litigation results from injuries that "arise out of" or relate to those activities. *Id.* at 472–83.

[104] *Dudnikov*, 514 F.3d at 1070.

[105] *Id.* at 1071; *see* Calder v. Jones, 465 U.S. 783 (1984). *See also Int'l Shoe*, 326 U.S. at 322–26 (Black, J. concurring) (referring to the majority's approach to jurisdiction as consisting of "elastic standards" and "vague Constitutional criteria").

[106] *Dudnikov*, 514 F.3d at 1072.

[107] *Id.* at 1072–73; *see* Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1208 (9th Cir. 2006) (holding effects need not be wrongful acts to be "judicially relevant" under the "effects test").

[108] *Dudnikov*, 514 F.3d at 1074–76 (stating that "[e]ven if *Calder* can be properly read as requiring some form of 'wrongful' intentional conduct, we agree with plaintiff's that their complaint complies").

[109] *Id.* at 1074–75.

[110] *Id.* at 1075. The "expressly aimed" criteria set forth in *Calder* is satisfied if the allegedly offending party knew its action would have a potentially devastating impact upon respondent, and they knew that the brunt of that injury would be felt by respondent in the State in which he lives and works. *Calder*, 465 U.S. at 783–84.

auction in Colorado.[111] Comparing the actions of the plaintiff to those of a bank shot in basketball, the court held that while the NOCI actually traveled only to California, the means of the NOCI were intended to cancel the plaintiff's auction in Colorado.[112] Establishing that Chalk's sending of the NOCI sufficiently satisfied either both proximate or "but-for" causation, the court found sufficient minimum contacts.[113] Weighing several factors, including the burden on the defendant and applicable policy interests, the court determined whether bringing the action in Colorado would "offend traditional notions of fair play and substantial justice."[114] In analyzing "fair play and substantial justice," the court found only the potential foreign policy interests of SevenArts to be compelling, as the company resides in the United Kingdom.[115] Finally, the court dismissed all other factors, including the foreign policy factor, and ultimately upheld jurisdiction over Chalk and Vermilion.[116]

In *Dudnikov*, the Tenth Circuit examined the issue of whether the effects of a notice intended to cancel an auction, sent to a third-party via Internet, sufficed to support a finding of specific personal jurisdiction in the forum state.[117] The court

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[111] *Dudnikov*, 514 F.3d. at 1075.

[112] *Id.* In summing up its analysis, the *Dudnikov* court explained:

> A player who shoots the ball off the backboard intends to hit the backboard, but he does so in the service of his further intention of putting the ball into the basket. Here, the defendants intended to send the NOCI to eBay in California, but they did so with the ultimate purpose of canceling the plaintiffs' auction in Colorado. Their "express aim" thus can be said to have reached into Colorado in much the same way that a basketball player's express aim in shooting off the backboard is not simply to hit the backboard, but to make a basket.

*Id.*

[113] *Id.* at 1078–79. The court declined to choose between "but-for" and "proximate" causation analysis, stating: "As between the remaining but-for and proximate causation tests, we have no need to pick sides today. On the facts of this case, we are satisfied that either theory adopted by our sister circuits would support a determination that plaintiffs' cause of action arises from defendants' contact with Colorado." *Id.* at 1079.

[114] *Dudnikov*, 514 F.3d. at 1080–81 (citing *Int'l Shoe,* 326 U.S. at 316). The court went on to state:

> In making such [a] [fairness] inquiry courts traditionally consider factors such as these: (1) the burden on the defendant, (2) the forum state's interests in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effectual relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states [or foreign nations] in furthering fundamental social policies.

*Id*. at 1080.

[115] *Id.*

[116] *Id.* at 1080–81.

[117] *Id.* at 1081.

determined the intent and effects of the notice created jurisdiction.[118] Therefore, if a cause of action arises from an Internet communication, the effects of that action must serve to determine if personal jurisdiction is appropriate.[119]

## ANALYSIS

The *Dudnikov* court established the *Calder* "effects test" as the appropriate minimum contacts test for determining specific personal jurisdiction when electronic contacts exist.[120] The Tenth Circuit is now among the several federal circuits currently using a form of the "effects test" to analyze electronic contacts when determining personal jurisdiction.[121] Following the United States Courts of Appeals for the Fourth, Fifth, Seventh and Ninth Circuits, the Tenth Circuit systematically applied the *Calder* "effects test" standard, providing minimal guidance for practitioners with some type of electronic or Internet contact.[122]

### *Projected Impact on the Tenth Circuit*

While the novelty of *Dudnikov* prevents any conclusive discussion of the case's ramifications in the Tenth Circuit, projected impact may be somewhat predictable.[123] Based on the test's application elsewhere, problems are imminent for the Tenth Circuit.[124] Inherent ambiguity, coupled with inconsistency in application by courts, has muddled predictability of the test, except within a few types of cases involving very evident harm.[125] In utilizing the *Calder* approach to determine minimum contacts, the *Dudnikov* decision may create as many problems as it corrects.[126] As seen in other jurisdictions, the addition of another

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[118] *Id.* at 1080.

[119] *Dudnikov,* 514 F.3d at 1080.

[120] *Id.* The "effects test" holds that personal jurisdiction over an out-of-state defendant is proper when the following exist: a) the defendant's intentional and tortious actions, b) expressly aimed at the forum state, c) cause harm to the plaintiff in the forum state, and d) defendant exhibited awareness that the brunt of the injury would occur in the forum. *See Calder*, 465 U.S. at 788–90.

[121] *See* C. Douglas Floyd & Shima Baradaran-Robinson, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L. J. 601, 657–60 (2006). The "effects test" has been used in courts across the United States, including the Fourth, Fifth, Seventh and Ninth Circuit Courts of Appeals. *Id.*

[122] *See* Ehrenfeld v. Mahfouz, 489 F.3d 542 (2nd Cir. 2007); Stroman Realty, Inc. v. Wercinski, 513 F.3d 476 (5th Cir. 2008); *Yahoo!*, 433 F.3d at 1208.

[123] *Dudnikov*, 514 F.3d at 1063. The *Dudnikov* decision was handed down in January 2008.

[124] *See* Geist, *supra* note 70, at 1345 (calling the effects test a "source of considerable uncertainty").

[125] Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 320 (2002). For examples of these types of cases see *infra* notes 146–47 and accompanying text.

[126] *See* Geist, *supra* note 70, at 1384.

test to a court's jurisdictional inquiry does little to solidify the inherent liquid tendencies of jurisdiction.[127] The decision leaves practitioners stranded, with no bright line to follow and too many tests to be effective.[128] As such, practitioners in other jurisdictions have started taking preventative measures outside the courtroom by adding protections, such as choice of forum agreements, to client websites.[129] Ultimately, the "effects test" exists as the legal equivalent of a necessary evil; although better than nothing, the test is simply not the best solution to the complex dilemmas of Internet jurisdiction.[130]

*Forum Prediction Problems*

For the most part, what *Dudnikov* adds in rhetoric through the addition of a new test, it equally detracts in clarity.[131] As courts continue to stretch the taut boundaries of jurisdiction even further, practitioners around the globe flounder to predict a forum for disputes.[132] Inherent ambiguity in jurisdictional analysis, coupled with the broadness of the Internet and courts' inconsistent, and often strained, application of jurisdictional principles creates confusion for practitioners, especially on a global scale.[133]

The *Calder* test, like any jurisdictional test, remains subject to the ambiguity inherent in the language of the test itself.[134] Broad phrases like "purposefully directed" and "arise out of" do little to provide a bright line.[135] Accordingly, a test for "minimum contacts" has been elusive, sparking debate from practitioners and

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[127] *See* Berman, *supra* note 125, at 320 (asserting that "our current territorially based rules for jurisdiction (and conflict of laws) were developed in an era when physical geography was more meaningful than it is today" and as such we must reevaluate the theoretical foundation for personal jurisdiction).

[128] *See* GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET, § 303(D)–(E) (2d ed. Supp. 2007).

[129] *See infra* notes 142–48 and accompanying text.

[130] *See* Geist, *supra* note 70, at 1380–1406. For proposed solutions, see *infra* notes 170–78 and accompanying text.

[131] *See generally* Floyd & Baradaran-Robinson, *supra* note 121, at 602–03.

[132] *See* Lester, *supra* note 81, at 431–72 (addressing problems of Internet jurisdiction globally). For more on preventative measures, see *infra* notes 161–69 and accompanying text.

[133] *See* Lester, *supra* note 81, at 431–32.

[134] *Dudnikov*, 514 F.3d at 1071 (calling the rules of jurisdictional law "more aspirational than self-defining" and explaining the general tendency of courts to analogize Supreme Court jurisdiction cases to explain jurisdiction law).

[135] *See, e.g.*, Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L. J. 189, 189 (1998) (asserting "[a]mbiguity and incoherence have plagued the minimum contacts test for the more than five decades during which it was served as a cornerstone of the Supreme Court's personal jurisdiction doctrine").

scholars.[136] The *Dudnikov* court goes even so far as to devote nearly half a page to the inherent ambiguities of jurisdictional analysis.[137]

Adding to the problem, the test becomes only marginally effective due to differing factual interpretations from the bench.[138] Because facts come from initial pleadings, courts are forced to draw inferences from parties' assertions of fact.[139] Accordingly, although facts are similar, conclusions based on those facts may differ from judge to judge.[140]

Additionally, courts have inconsistently applied the test in cases involving Internet contacts.[141] Most notably, not all courts rigorously require intentional targeting of the forum state.[142] To some courts, "targeting" of the forum only indicates an effort to reach an individual in the forum.[143] To others, it may require a finding of intent to target the forum state itself.[144] To still others, "targeting" may only require foreseeability of effects within the forum, as based on other non-Internet connections.[145] For example, in *Cybersell v. Cybersell*, the United States Court of Appeals for the Ninth Circuit used the test to find no jurisdiction in a trademark infringement case because the defendant's website lacked intentional

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[136] *See id.*; *Dudnikov*, 514 F.3d at 1072 (articulating that "[a] venerated principal to be sure, [the "minimum contacts" test] is also one that has long eluded a definitive legal test and proven fertile ground for debate by law students, lawyers and judges alike").

[137] *Dudnikov*, 514 F.3d at 1072.

[138] *Compare* Bancroft & Masters, Inc. v. Augusta Nat'l. Inc., 223 F.3d 1082, 1087 (9th Cir. 2000) (holding the "expressly aimed" portion of the "effects test" supports jurisdiction simply when the defendant targets a forum resident), *with Dudnikov*, 514 F.3d at 1075 (holding the "expressly aimed" portion of the test must target the forum resident *and* be the "focal point of the tort" (emphasis added)).

[139] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–556 (in determining personal jurisdiction de novo, the court must take all well-pled facts as true and construe them in the plaintiff's favor).

[140] Floyd & Baradaran-Robinson, *supra* note 121, at 602–03 (explaining "[i]n the specific context of Internet activities, the courts sometimes have relied on new interpretations of one or the other of these established approaches to questions of personal jurisdiction, and sometimes have fashioned new tests not dependent upon either of them").

[141] *Compare Bancroft*, 223 F.3d at 1087 (holding the "expressly aimed" portion of the "effects test" supports jurisdiction simply when the defendant targets a forum resident), *with Dudnikov*, 514 F.3d at 1075 (holding the "expressly aimed" portion of the test must target the forum resident *and* be the "focal point of the tort" (emphasis added)), *with Yahoo!*, 433 F.3d at 1208 (holding effects need not be caused by wrongful acts to be "jurisdictionally relevant" under the "effects test").

[142] *See, e.g.*, cases cited *supra* note 141; *Calder*, 465 U.S. at 783–84 (requiring that the "[plaintiff] knew that the brunt of that injury would be felt by respondent in the [forum] State").

[143] *See, e.g., Bancroft,* 223 F.3d at 1082–87.

[144] *See, e.g.,* Euromarket Designs Inc. v. Crate & Barrel Ltd., 96 F. Supp. 2d 824, 824 (N.D. Ill. 2000).

[145] *See, e.g.*, Barrett v. Catacombs Press, 44 F. Supp. 2d 717 (E.D. Pa. 1999) (asserting even if Internet contacts alone are insufficient to warrant a finding of jurisdiction, traditional contacts may also apply to show jurisdiction in Internet cases).

purpose to cause harm in the forum state.[146] Later, in *Panavision International, L.P. v. Toeppen*, the same court expanded its analysis of the test to include harms which were aimed at *or* had an effect in the forum state.[147] Courts within the Seventh Circuit have applied an even looser, and often inconsistent, version of the test in cases similar to *Cybersell* and *Panavision*.[148] While some courts within the Seventh Circuit have used the test to focus broadly on the harm itself, others used it to create complex "targeting" inquiries to examine harm and intent.[149]

*Effective Use*

Given its shortfalls, the "effects test" is firmly adhered to in only a few types of cases, such as defamation suits and certain intellectual property cases.[150] In many courts, the test has proven effective in cases where the plaintiff's cause of action is obviously harmful.[151] Since *Calder* addressed defamation, it follows logically that cases of active Internet defamation experience the most consistent application of the "effects test."[152] Additionally, courts have more consistently applied the "effects test" in cases involving obvious intellectual property infringement.[153] Even so, application in these types of cases is far from steady and varies greatly depending on the facts of each case.[154] Analogies to facts involving less tangible "harmful" effects, such as the posting of a single copyrighted photo on a webpage or online

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[146] 130 F.3d 414, 417–20 (9th Cir. 1997) (holding "something more" than registering a website and domain name must occur for the court to exercise jurisdiction in the forum, but failing to define "something more").

[147] 141 F.3d 1316, 1322 (9th Cir. 1998). *Compare id.* ("As we said in *Cybersell*, there must be 'something more' to demonstrate that the defendant directed his activity toward the forum state. Here, that has been shown. Toeppen engaged in a scheme to register Panavision's trademarks as his domain names for the purpose of extorting money from Panavision." (internal citations omitted)), *with Cybersell*, 130 F.3d at 417–20 (finding no jurisdiction because defendant's allegedly infringing use of plaintiff's trademark lacked direct purpose to cause harm because "a corporation 'does not suffer harm in a particular geographic location in the same sense that an individual does.'" (quoting Core-Vent Corp. v. Nobel Ind., 11 F.3d 1482, 1486 (9th Cir. 1993)).

[148] *See, e.g.,* Bunn-O-Matic Corp. v. Bunn Coffee Serv., Inc., 88 F. Supp. 2d 914, 919–20 (C.D. Ill. 2000); Ford Motor Co. v. Great Domains, Inc., 141 F. Supp. 2d 763, 771–77 (E.D. Mich., S. Div. 2001).

[149] *Bunn-O-Matic*, 88 F. Supp. 2d at 919–20; *Ford Motor Co.,* 141 F. Supp. 2d at 771–77.

[150] *See* Floyd & Baradaran-Robinson, *supra* note 121, at 618–20 (explaining that the test best applies to cases where harm is most evident).

[151] *See* Zekos, *supra* note 2, at 34–36.

[152] *See, e.g., Blakey*, 751 A.2d 538; Bailey v. Turbine Design, Inc., 86 F. Supp. 2d 790 (W.D. Tenn., E. Div. 2000); Young v. New Haven Advocate, 315 F. 3d 256, 263–64 (4th Cir. 2003).

[153] *See, e.g.,* Sports Authority Mich., Inc. v. Justballs, Inc., 97 F. Supp. 2d 806 (E.D. Mich. 2000); ALS Scan, Inc. v. Digital Serv. Consultants, Inc. 293 F.3d 707, 714–16 (4th Cir. 2002).

[154] *See supra* note 144 and accompanying text.

gambling, present problems of predictability.[155] For example, a practitioner may successfully use the *Calder* test to determine the outcome in a case where an unauthorized party actively used a trademarked company logo to solicit business; however, existing law lacks clarity to determine a case where its effects are arguably harmful, such as posting a copyrighted photo on a passive blog website.[156] In these types of cases, the court's rationale lies in circumstantial details, thus eliminating the possibility of an easy bright line.[157]

Due to problems of ambiguity, interpretation, and application, the body of law surrounding Internet personal jurisdiction remains unquestionably vague.[158] By adding to the already overwhelming tower of tests and factors used to determine jurisdiction, the *Dudnikov* decision seems to do little to rectify the long-term issues of Internet jurisdiction.[159] However, the test has been applied with some consistency in cases involving defamation and active intellectual property infringement.[160]

### *Impact Outside the Courts*

The ambiguity of Internet jurisdiction also resonates outside the courtroom.[161] Recognizing the problems concerning personal jurisdiction and the Internet, websites have increasingly utilized choice of law and forum provisions to provide jurisdictional direction.[162] Often contained in a website's terms of use page,

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[155] *See* Zekos, *supra* note 2, at 36 (articulating "[t]here is a need to consider a cyberspace jurisdiction for cyberspace actions having not feasible effects on real world and the creation, execution and effects are felt only in cyberspace").

[156] *Id.* at 34–35; *see also ALS Scan*, 293 F.3d at 712–16 (finding no jurisdiction over an Internet Service Provider [ISP] where the ISP allowed operation of a website which had posted allegedly infringing photographs).

[157] *See supra* notes 149–55 and accompanying text.

[158] *See supra* notes 64–88 and accompanying text.

[159] *See* Floyd & Baradaran-Robinson, *supra* note 121, at 638.

[160] *See supra* notes 40–173 and accompanying text.

[161] Lester, *supra* note 81, at 431–72.

[162] Lisa D. Rosenthal et al., *Consumer Protection in the Electronic Marketplace: Looking Ahead*, at 1 (Sept. 2000), *available at* http://www.ftc.gov/bcp/icpw/lookingahead/global.shtm (urging online businesses to reveal forum and choice of law provisions on their websites). *See also* Jonathan D. Frieden, *Common Issues Facing E-Commerce Businesses* (May 9, 2006), *available at* http://ecommercelaw.typepad.com/ecommerce_law/2006/05/common_issues_f_1.html (last visited Feb. 23, 2008).

> Choice of Forum provisions permit the parties to a contract to select, with certain limitations, the jurisdiction in which any disputes pertaining to their relationship are resolved. In many instances, a website's Terms of Use purports to require any legal action pertaining to the website to be brought in the jurisdiction in which the publisher is located, which may be quite inconvenient for a distant user of the site. Choice of Law provisions permit the parties to a contract to select, with certain limitations, which jurisdiction's laws will be applicable to their relationship.

choice of law and choice of forum provisions permit the parties to choose which jurisdiction's laws will apply to their relationship.[163] A company's choice of law and forum provision may use law of: (1) the jurisdiction whose laws are most favorable to the publisher; (2) the jurisdiction in which the publisher is physically located; or (3) the jurisdiction whose laws are most familiar to the attorney who drafted the contract.[164]

These provisions may create problems for unsophisticated Internet users who generally access the Web without thinking about the legal implications of their usage.[165] Often, complex terms are included in a "clickwrap agreement" and hastily agreed to by a website user.[166] Should a dispute arise, sophisticated businesses may assert control of jurisdiction with the use of these provisions.[167] While the court in *Dudnikov* seemed concerned about the status of the plaintiffs as small time, "Mom & Pop" operators, this policy consideration remains threatened by continued use of choice of law and forum provisions.[168] The use of these provisions on websites leaves Internet users with little choice: either learn the complex law of jurisdiction as it relates to the Internet, or become subject to the one-sided control of sophisticated businesses.[169]

Since the problem extends around the globe, legal scholars act as perplexed as the courts in their projected solutions.[170] Some advocate unique cyberspace forums, promoting international conventions and treaties.[171] Advocates of

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> Generally, a website's Terms of Use will apply the law of: (1) the jurisdiction whose laws are most favorable to the publisher; (2) the jurisdiction in which the publisher is physically located; or (3) the jurisdiction whose laws are most familiar to the attorney who drafted the contract.

*Id.*

[163] Geist, *supra* note 70, at 1386–93.

[164] *See* Frieden, *supra* note 162, at 34.

[165] *See* Lester, *supra* note 81, at 460–72.

[166] Geist, *supra* note 70, at 1386–91 (stating that "[t]hese agreements typically involve clicking on an 'I agree' icon to indicate assent in the agreement").

[167] *See* Lester, *supra* note 81, at 467–69. Courts in the United States and Canada have been generally supportive of Internet forum selection clauses and clickwrap agreements. *See, e.g.*, Kilgallen v. Network Solutions, 99 F. Supp. 2d 125 (D. Mass. 2000); Rudder v. Microsoft Corp. [1999] 2 C.P.R. (4th) 474 (Ont.).

[168] *See Dudnikov*, 514 F.3d at 1063. From the language of the opinion, the court appears to support and protect small businesses, referring to the petitioners as: "A husband-wife team, operat[ing] a small and unincorporated Internet-based business from their home in Colorado . . . a majority of their income is derived from selling [craft-type] products on eBay."

[169] *See* Rosenthal, *supra* note 162, at 25.

[170] *See* Zeckos, *supra* note 2, at 35–37; *see also* Lester, *supra* note 81, at 468–72.

[171] *See* Zeckos, *supra* note 2, at 36–37.

> Cyber courts and cyber arbitral tribunals should have jurisdiction to solve all actions taking place on the net and the enforcement of their awards and decisions will be

cyberspace forums recognize the issue of Internet boundaries and urge an exclusive Internet jurisdiction with its own laws.[172] However, creating harmony within the vast realm of international law and policy presents significant problems.[173] Others look to a solution using an evolved combination of existing tests.[174] As seen in *Dudnikov*, the addition of more tests could create confusion for courts and practitioners.[175] Additionally, more tests do not create a global solution to Internet jurisdiction problems.[176] Still others advocate a "targeting test" which would focus on the place of intended harm or action.[177] However, success of the "targeting test" remains subject to problems of international acceptance and issues of consistency in application.[178] Given the problems of each, no perfect solution exists.[179]

## CONCLUSION

In *Dudnikov*, the United States Court of Appeals for the Tenth Circuit Court examined whether the effects of a notice intended to cancel an Internet auction, sent to a third-party via electronic transmission, would support a finding of specific personal jurisdiction in the forum of Colorado.[180] Using the "effects test" set forth in *Calder v. Jones*, the United States Supreme Court determined the intent and effects of the notice created jurisdiction, not the manner in which it was sent.[181] Therefore, if a cause of action arises from an Internet or electronic communication, the effects of that action must serve to determine if personal

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> made according to international conventions on recognition and enforcement of foreign awards and e-awards. Of course, courts and arbitral tribunals have to be regarded as equal and independent forms of dispute resolutions.

*Id. See also* Lester, *supra* note 81, at 23.

[172] Geist, *supra* note 70, at 1393–97.

[173] Lester, *supra* note 81, at 458 (discussing that "[e]ven if the United States ratifies the proposed [Hague] Convention, it is not certain that the United States courts would be compelled to follow its rules").

[174] *See* Floyd & Baradaran-Robinson, *supra* note 121, at 601–66.

[175] *See supra* notes 119–44 and accompanying text; *see also* Yokoyama, *supra* note 69, at 1195 (articulating that "[j]urisdictional issues involving Internet activity, like issues involving more traditional activity, should be resolved according to the defendant's overall contacts with the forum state and in relation to the substantive and factual underpinnings of the lawsuit").

[176] *See Yahoo!,* 433 F.3d at 1208.

[177] *See* Geist, *supra* note 70, at 1392–1406.

[178] *See id*. at 1384 (stating "[w]ithout universally applicable standards for assessment of target in the online environment, a targeting test is likely to leave further uncertainty in its wake").

[179] *Id.* (acknowledging the shortfalls of each proposed solution, including shortfalls of the "targeting test" which the author advocates).

[180] *See supra* notes 89–115 and accompanying text.

[181] *Id.*

jurisdiction appropriately exists.[182] While the outcome of the "effects test" in future cases in the Tenth Circuit is presently undeterminable, the test will unlikely serve as a concrete determinant of personal jurisdiction cases involving the Internet.[183]

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[182] *Id.*

[183] *See supra* notes 1–182 and accompanying text.

## CASE NOTE

# CRIMINAL LAW—Giving Gun Rights Back to the Wrong People: The United States Court of Appeals for the Tenth Circuit Takes a Bite Out of The Federal Firearm Prohibition in Wyoming; *United States v. Hays*, 526 F.3d 674 (10th Cir. 2008).

*David Shields**

## Introduction

Due to the use of outdated thinking, individuals who commit crimes of domestic violence rarely face felony prosecution.[1] Seldom do domestic offenders incur prosecution at all; those who do will, at most, face misdemeanor charges.[2] This unfortunate result often stems from a plea agreement.[3] Ironically, one-third of these crimes would qualify as felonies if committed by a stranger.[4] In comparison to similar forms of criminal behavior, domestic violence rarely receives equivalent prosecutionary treatment.[5]

On March 27, 2003, the Fremont County Sheriffs' Department issued Steven Hays a misdemeanor citation for violating Wyoming's simple assault and battery statute.[6] Neither the citation issued to Hays, nor the subsequent judgment entered in the case, described the factual circumstances leading to his conviction.[7] On September 22, 2006, a federal grand jury indicted Hays for possessing a firearm in violation of a federal statute prohibiting individuals convicted of a misdemeanor

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* Candidate for J.D., University of Wyoming, 2010. I would like to thank my family and friends for their support during this project. Special thanks to Professor Lisa Rich for her assistance with this note. Additionally, I would like to express my immeasurable gratitude to John Barksdale. Without you, this project would not have been possible; your assistance and words of encouragement will be missed.

[1] United States v. Hays, 526 F.3d 674 (10th Cir. 2008); *see* Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 207846, Family Violence Statistics Including Statistics on Strangers and Acquaintances 51 (2005), *available at* http://www.ojp.usdoj.gov/bjs/abstract/fvs.htm (last visited Mar. 19, 2009).

[2] *Hays*, 526 F.3d at 680.

[3] *Id.*; Adam W. Kersey, *Misdemeanants, Firearms, and Discretion: The Practical Impact of The Debate over "Physical Force" and 18 U.S.C. § 922(G)(9)*, 49 Wm. Mary L. Rev. 1901, 1902 (2008).

[4] *Hays*, 526 F.3d at 680.

[5] *Id.*

[6] *Id.* at 675; Wyo. Stat. Ann. § 6-2-501(b) (2008) ("A person is guilty of battery if he unlawfully touches another in a rude, insolent or angry manner or intentionally, knowingly or recklessly causes bodily injury to another.").

[7] *Hays*, 526 F.3d at 675.

crime of domestic violence from possessing or transporting firearms.[8] The grand jury also indicted Hays under 18 U.S.C. § 924(a)(2), which provides a sentencing court with statutory guidance for potential fines and imprisonment of individuals found in violation of 18 U.S.C. § 922(g)(9).[9]

Hays' prior conviction under Wyoming Statute § 6-2-501(b) served as the predicate offense in the federal matter.[10] Hays subsequently filed a Motion to Dismiss the indictment on January 22, 2007, contending his misdemeanor conviction did not meet the requirements of a crime of domestic violence under federal law.[11] Hays argued his prior Wyoming conviction did not contain an element of "the use or attempted use of physical force, or the threatened use of a deadly weapon."[12]

In considering Hays' motion, Judge Clarence Brimmer of the United States District Court for the District of Wyoming concluded a person could not make contact in a "rude, insolent or angry manner" without some level of physical force; thus, the language of the Wyoming battery statute satisfied the requirement for an element of physical force under 18 U.S.C. § 921(a)(33)(A)(ii).[13] Accordingly, Judge Brimmer denied the motion and Hays pled guilty, reserving his right to appeal.[14] Judge Brimmer sentenced Hays to eighteen months in prison and three years of supervised release.[15]

On appeal, Hays again argued that his prior conviction under Wyoming Statute § 6-2-501(b) did not satisfy the use of physical force element required by 18 U.S.C. § 921(a)(33)(A)(ii)'s definition of a misdemeanor crime of domestic

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[8] *Id.*; 18 U.S.C. § 922(g)(9) (West 2005).

> It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9).

[9] *Hays*, 526 F.3d at 675; 18 U.S.C. § 924(a)(2) ("Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than ten years, or both.").

[10] *Hays*, 526 F.3d at 675.

[11] *Id.*; 18 U.S.C. § 921(a)(33)(A)(ii) (West 2006) (defining a misdemeanor crime of domestic violence as an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon").

[12] *Hays*, 526 F.3d at 675.

[13] *Id.* at 676.

[14] *Id.* at 675–76.

[15] *Id.* at 675 (Hays appealed this decision on May 2, 2008).

violence.[16] In essence, Hays claimed the federal statute required more than the *de minimis* contact criminalized by Wyoming's simple assault and battery statute.[17]

The United States Attorney's office, argued to the contrary, following the reasoning of the First, Eighth, and Eleventh Circuits.[18] It contended Hays' domestic violence conviction under Wyoming Statute § 6-2-501(b) satisfied 18 U.S.C. § 921(a)(33)(A)(ii)'s requirement for the use of "physical force" against the victim.[19] The United States Attorney asserted the improbability of physically touching someone in a "rude, insolent, or angry manner" without also exerting some degree of physical force against that person.[20] The United States Attorney concluded Wyoming's statute met the definitional requirements of 18 U.S.C. § 921(a)(33)(A)(ii) and therefore, a conviction under this statute constituted a misdemeanor crime of domestic violence.[21] Such a conviction forbids offenders from possessing firearms.[22]

The United States Court of Appeals for the Tenth Circuit agreed with Hays and held that Wyoming Statute § 6-2-501(b) does not satisfy the "use or attempted use of physical force" element of 18 U.S.C. § 921(a)(33)(A)(ii).[23] In reaching this conclusion, the court rejected the reasoning of the First, Eighth and Eleventh Circuits.[24] The Tenth Circuit reasoned those courts may be correct from a scientific perspective, but such a holding merges violent and non-violent offenses into one category.[25] The Tenth Circuit held Wyoming's simple assault and battery statute does not satisfy the requirement for an element of physical force.[26]

This case note addresses the varying approaches federal courts utilize in determining whether statutes similar to Wyoming Statute § 6-2-501 satisfy the federal definition of a misdemeanor crime of domestic violence.[27] This note also

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[16] Brief of Petitioner-Appellant at 6, United States v. Hays, 526 F.3d 674, No. 07-8039 (10th Cir. Jul. 20, 2007).

[17] *Id.*

[18] *See infra* notes 44–55 and accompanying text (discussing if the statutory language is clear and unambiguous courts are bound to follow it as long as the results are neither unreasonable, nor absurd).

[19] Brief of Petitioner-Appellee at 28, United States v. Hays, 526 F.3d 674, No. 07-8039 (10th Cir. Aug. 20, 2007).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Hays*, 526 F.3d at 680–81.

[24] *Id*. at 681.

[25] *Id.*

[26] *Id*.

[27] *See infra* notes 39–87 and accompanying text.

examines the United States Court of Appeals for the Tenth Circuit's opinion in *United States v. Hays*.[28] Finally, this case note illustrates the need for the United States Supreme Court to resolve the split of authority and provide a uniform interpretation of the behavior criminalized under 18 U.S.C. § 922(g)(9).[29]

## BACKGROUND

Given the *Hays* court's focus regarding whether Wyoming's battery statute satisfied the federal definition of a crime of domestic violence, this section first discusses why Congress amended the Gun Control Act of 1968 by enacting 18 U.S.C § 922(g)(9).[30] This section also explains the federal circuits' varying interpretations of whether the federal definition of a crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)(ii) criminalizes *de minimis* touches.[31]

### *The Lautenberg Amendment*

In 1996, Congress codified a firearm restriction for qualified domestic offenders, which prohibits criminals convicted of a misdemeanor crime of domestic violence from possessing a firearm.[32] By enacting 18 U.S.C. § 922(g)(9), Congress aimed to close a "dangerous loophole" allowing violent offenders to possess firearms.[33] The amendment, known as the "Lautenberg Amendment," relies on the prosecution of criminals under state substantive law.[34] This state conviction dependence gives states a significant role in the facilitation of federal criminal "policy and goals."[35] Some commentators claim the use of state criminal proceedings as predicate offenses to federal firearm convictions not only has the potential to lead to an arbitrary application of the law, but also relinquishes federal lawmaking authority to the states.[36] These commentators contend federal

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[28] *See infra* notes 88–124 and accompanying text.

[29] *See infra* notes 125–200 and accompanying text.

[30] *See infra* notes 32–38 and accompanying text.

[31] *See infra* notes 39–87 and accompanying text.

[32] Matthew A. Radefeld, *Commentary: Ever Heard of the Lautenberg Amendment? Don't Worry You're Not Alone*, MISSOURI LAWYERS WEEKLY, Oct. 31, 2005.

[33] United States v. Hayes, 129 S. Ct. 1079, 1087 (2009); *Hays*, 526 F.3d at 679.

> During the debate of the bill, that later became 18 U.S.C. § 922(g)(9), one of the sponsoring senators referred repeatedly to "wife beaters" and "child abusers" and also to "people who engage in serious spousal or child abuse" and "people who show they cannot control themselves and are prone to fits of violent rage," suggesting that the concern was with the violent individuals rather than those who have merely touched their spouse or child in a rude manner.

*Hays*, 526 F.3d at 679.

[34] *See* Kersey, *supra* note 3, at 1902; Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 67 (2006).

[35] Logan, *supra* note 34, at 70, 90–96.

[36] *Id.* at 90–96.

courts interpreting federal statutes having a foundation in state substantive law must be cognizant of these two concerns because of the far-reaching effects of the Amendment.[37] Since no exemptions to the Lautenberg Amendment exist, convicted individuals who use firearms in their line of work must procure different forms of employment because they may no longer possess a firearm.[38]

*Interpretation of the Lautenberg Amendment within the Federal Courts*

Currently, a split of authority exists among the circuit courts of appeals regarding the issue presented in *United States v. Hays*.[39] The United States Courts of Appeals for the First, Eighth, and Eleventh Circuits held the plain language of the statute should control.[40] Under this view, the federal definition of domestic violence makes it clear that a person cannot make physical contact with another without rising to some level of physical force.[41] Meanwhile, the Seventh and Ninth Circuits have adopted a standard requiring the violent use of physical force.[42]

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[37] *Id.*

[38] Radefeld, *supra* note 32.

> Under the Lautenberg Amendment, if a law enforcement officer or a member of the military is convicted of a misdemeanor crime of domestic violence, they cannot possess a firearm ever again. Such a conviction may result in loss of employment or permanent reassignment to a position that does not involve carrying or possessing a firearm.

*Id.*

[39] *Hays,* 526 F.3d at 684 n.4 (Ebel, J., dissenting), *see generally* John M. Skakun III, *Violence and Contact: Interpreting "Physical Force" in the Lautenberg Amendment*, 75 U. CHI. L. REV. 1833 (2008) (discussing the split amongst the federal circuits which recognize *de minimis* touching and courts which require a violent act to satisfy § 921(a)(33)(A)(ii)).

[40] *See* United States v. Griffith, 455 F.3d 1339, 1342 (11th Cir. 2006) (holding under the plain meaning rule, the "physical contact of an insulting or provoking nature" made illegal by Georgia Statute satisfied the "physical force" requirement of § 921(a)(33)(A)(ii)); United States v. Nason, 269 F.3d 10, 22 (1st Cir. 2001) (holding all convictions under the Maine statute necessarily involve, as an element, the use of "physical force"); United States v. Smith, 171 F.3d 617, 621 n.2 (8th Cir. 1999) (finding insulting or offensive contact, by necessity, requires physical force to complete).

[41] *Hays*, 526 F.3d at 684 (Ebel, J., dissenting).

[42] *See* United States v. Belless, 338 F.3d 1063 (9th Cir. 2003). Belless pled guilty to battery in violation of Wyoming Statute § 6-2-501(b) and years later faced prosecution for violating 18 U.S.C. § 922(g). *Id.* at 1065. The United States Court of Appeals for the Ninth Circuit found that Wyoming's battery statute encompassed less violent behavior than definitional requirements of 18 U.S.C. § 921(a)(33)(A)(ii) and was too broad to qualify as a misdemeanor crime of domestic violence. *Id.* at 1069. The court therefore reversed the judgment and remanded the case. *Id.* at 1070. *See also* Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003). Flores pled guilty in Indiana to battery, a misdemeanor under Indiana Code § 35-42-2-1, which criminalizes "rude, insolent, or angry" touching, as does Wyoming Statute § 6-2-501(b). *Id.* at 669. The Board of Immigration Appeals determined this offense qualified as a crime of domestic violent under 18 U.S.C.S. § 16 and ordered Flores' removal from the country. *Id.* at 671. Upon review, the United States Court of Appeals for the Seventh Circuit found the issue was whether the offense created under the Indiana Code

Despite the varying interpretations of § 921(a)(33)(A)(ii), the United States Supreme Court declined to grant certiorari when presented with this issue.[43]

*The Plain Language of the Statute Should Control: The First, Eighth, and Eleventh Circuits*

The First, Eighth, and Eleventh Circuit Courts of Appeals applied the principles of statutory construction in their interpretation.[44] When faced with determining whether statutes similar to Wyoming Statute § 6-2-501(b) satisfied the "use of physical force" element, as required in § 921(a)(33)(A)(ii)'s definition of a crime of domestic violence, the First, Eighth and Eleventh Circuits concluded the language of § 921(a)(33)(A)(ii) is clear and unambiguous.[45] Courts must follow the language of the statute as long as the plain meaning is neither unreasonable nor absurd.[46] The First, Eighth and Eleventh Circuit Courts of Appeals have concluded the application of the plain meaning of the term "physical force" in § 921(a)(33)(A)(ii) produced neither unreasonable nor absurd results.[47] All three circuits acknowledge the impossibility for an offender to touch an individual in an offensive manner without exerting some level of physical force, thus holding that *de minimis* touches satisfy the physical force requirement.[48]

The First, Eighth and Eleventh Circuits referenced 18 U.S.C. § 922(g)(8) to further support the position.[49] Subsection 922(g)(8) contains a qualifying clause, which limits its reach to a specific subset of physical force: the type reasonably expected to cause physical injury.[50] In *United States v. Nason* and *United States v.*

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qualified as a removable offense. *Id.* at 669. Despite a police report showing that Flores attacked and beat his wife, the court found the elements of Flores' battery conviction could not properly be viewed as a crime of violence under 18 U.S.C.S. § 16. *Id.* at 672. Therefore, the court vacated the order for Flores' removal from the country. *Id.*

[43] *See* Gillespie v. City of Indianapolis, 528 U.S. 1116 (2000); Brady v. United States, 513 U.S. 894 (1994).

[44] *Nason*, 269 F.3d at 16 ("Where statutory interpretation is in prospect, the jumping off point always is the text of the statute itself."); *Griffith*, 455 F.3d at 1342 ("In interpreting a statute we look first to the plain meaning of its words.") (quoting United States v. Maung, 267 F.3d 113, 1121 (11th Cir. 2001)).

[45] *Nason*, 269 F.3d at 16 ("This venerable reference work defines physical force as force consisting in a physical act. The word force means power, violence, or pressure directed against a person or thing." (internal quotations omitted)); BLACK'S LAW DICTIONARY 537 (7th ed. 1999).

[46] *Nason*, 269 F.3d at 16.

[47] *Id.*; *Griffith*, 455 F.3d at 1342; *Smith*, 171 F.3d at 621.

[48] *Nason*, 269 F.3d at 16; *Griffith*, 455 F.3d at 1344–45; *Smith*, 171 F.3d at 621.

[49] *Nason*, 269 F.3d at 16; *Belless*, 338 F.3d at 1063–64.

[50] 18 U.S.C. § 922(g)(8) (2008) provides:

> It shall be unlawful for any person, who is subject to a court order that was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate; restrains such person from harassing,

*Griffith*, the United States Courts of Appeals for the First and Eleventh Circuits respectively, found Congress revealed its intent by restricting the scope of § 922(g)(8) with a modifying clause, but declined to do so in § 922(g)(9).[51]

Additionally, in *United States v. Nason*, the United States Court of Appeals for the First Circuit found the legislative history suggested Congress did not intend to include an injury requirement.[52] While on the Senate floor, Senator Frank Lautenberg observed under the final amendment that the ban applies to crimes that have, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon.[53] The United States Court of Appeals for the First Circuit found Senator Lautenberg's comments helpful when construing the federal statute.[54] The court concluded Senator Lautenberg's comments demonstrated the principal purpose of substituting "crimes involving the use or attempted use of physical force" for "crimes of violence" in § 922(g)(9) was to enlarge the scope of predicate offenses covered by the statute.[55]

### *The Element of Physical Force Must Be Violent: The Seventh and Ninth Circuits*

The United States Courts of Appeals for the Seventh and Ninth Circuits have interpreted "the use or attempted use of physical force" element in § 921(a)(33)(A)(ii) differently.[56] When examining broad state assault and battery statutes, the Seventh and Ninth Circuits have asserted *de minimis* touches cannot be categorized as violent based on the definition of a misdemeanor crime of domestic

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> stalking or threatening an intimate partner . . . in reasonable fear of bodily injury to the partner or child; and includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that *would reasonably be expected to cause bodily injury*.

*Id.* (emphasis added).

[51] *Nason*, 269 F.3d at 16–17 ("After all, when Congress inserts limiting language in one section of a statute but abjures that language in another, closely related section, the usual presumption is that Congress acted deliberately and purposefully in the disparate omission."); *see* Duncan v. Walker, 533 U.S. 167, 173 (2001) ("It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Griffith*, 455 F.3d at 1342 ("If Congress had wanted to limit the physical force requirement in § 922(g)(9), it could have done so, as it did in the last clause of the preceding paragraph of the same subsection . . . but that is not what Congress did. That it did not speaks loudly and clearly.").

[52] *Nason*, 269 F.3d at 17–18.

[53] 142 CONG. REC. S11,877 (1996).

[54] *Nason*, 269 F.3d at 17.

[55] *Id.*

[56] *See generally Flores*, 350 F.3d at 668–69; United States v. Norbinga, 474 F.3d 561, 563–64 (9th Cir. 2006).

violence.[57] These courts reasoned that a strict interpretation in cases involving *de minimis* touching leads to harsh results.[58] The Seventh and Ninth Circuit Courts of Appeals assert that in order to avoid collapsing the distinction between violent and non-violent offenses, the word "force" requires a different legal meaning in contrast to its general scientific meaning.[59]

In order to preserve the distinction between violent and non-violent offenses, the Seventh Circuit Court of Appeals, in *United States v. Flores*, established a standard requiring force of a violent nature.[60] This standard criminalizes force meant to cause, or likely to cause, bodily injury.[61] The court conceded establishing such a benchmark for the use of "physical force" set a qualitative, rather than quantitative, line.[62] However, the court elaborated that without creating a minimum boundary for the use of force, the distinction between the use of "physical force against" and "physical contact" would be indistinguishable, despite having different legal meanings.[63]

Establishing a standard requiring the use, or attempted use, of violent physical force is significant when examining a broad battery statute like Wyoming Statute

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[57] *See infra* notes 58–74 and accompanying text (discussing the exclusion of *de minimis* touches when considering the "physical force" requirement in § 921(a)(33)(A)(ii)).

[58] *Flores*, 350 F.3d at 671–72.

> Every battery entails a touch, and it is impossible to touch someone without applying some force, if only a smidgeon. . . . Every battery involves "force" in the sense of physics or engineering, where "force" means the acceleration of mass. A dyne is the amount of force needed to accelerate one gram of mass by one centimeter per second per second. . . . Perhaps one could read the word "force" in § 16(a) to mean one dyne or more, but that would make hash of the effort to distinguish ordinary crimes from violent ones.

*Id.*

[59] *Id.* at 672 ("[W]e must treat the word force as having a meaning in the legal community that differs from its meaning in the physics community."); *Belless*, 338 F.3d at 1068 (stating the use of deadly weapon as discussed in the federal definition is a gravely serious threat in comparison with the ungentlemanly conduct criminalized by the Wyoming statute).

[60] *Flores*, 350 F.3d at 672; *see* Solorzano-Patlan v. INS, 207 F.3d 869, 875 n.10 (7th Cir. 2000); Xiong v. INS, 173 F.3d 601, 604–05 (7th Cir. 1999).

[61] *Flores*, 350 F.3d at 672.

> Otherwise, "physical force against" and "physical contact with" would end up meaning the same thing, even though these senses are distinct in law. This is not a quantitative line ("how many newtons makes a touching violent?") but a qualitative one. An offensive touching is on the "contact" side of this line, a punch on the "force" side; and even though we know that Flores's acts were on the "force" side of this legal line, the elements of his offense are on the "contact" side.

*Id.*

[62] *Id.*

[63] *Id.*

§ 6-2-501(b) because of the criminalization of *de minimis* touching.[64] In *Flores*, the United States Court of Appeals for the Seventh Circuit analyzed a broad Indiana battery statute incorporating "rude, insolent, or angry" language similar to the Wyoming statute.[65] The court found the elements of petitioner's battery conviction could not properly be viewed as a "crime of violence" given the broad range of conduct criminalized by the Indiana statute.[66]

*United States v. Belless*

The Ninth Circuit Court of Appeals decision in *United States v. Belless* is significant because the court interprets the same Wyoming statute at issue in *Hays*.[67] In *Belless*, the United States Court of Appeals for the Ninth Circuit addressed whether Wyoming's battery statute satisfies the "use of physical force" element required by the § 921(a)(33)(A)(ii) definition of a misdemeanor crime of domestic violence.[68] The *Belless* court, using the doctrine of *noscitur a sociis,* concluded Wyoming's battery statute does not embrace conduct rising to the level of the federal definition's requirement for "physical force."[69] Specifically, the court held the prong of the statute criminalizing rude, insolent, or angry touches failed to meet the element of "physical force" required by § 921(a)(33)(A)(ii).[70] The court found § 921(a)(33)(A)(ii) required the violent use of force against the body.[71] The court reasoned that Wyoming's legislature drafted the more inclusive battery statute to criminalize behavior that often leads to serious violence.[72] The court presumed it may be the state's objective to allow police to arrest individuals for *de minimis* touches and therefore ensure such acts would not escalate into violence.[73] In light of this standard, the *Belless* court held Wyoming Statute § 6-2-501(b) does not satisfy the § 921(a)(33)(A)(ii) definition of a crime of domestic violence.[74]

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[64] *See id.* at 666.

[65] *Id.* at 668; IND. CODE § 35-42-2-1(a) (2008) ("A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor.").

[66] *Flores*, 350 F.3d at 672 (pleading guilty in the United States District Court for the District of Montana to illegally possessing a firearm in violation of § 922(g)(9)).

[67] *Belless*, 338 F.3d at 1065. While Belless' prosecution took place in the Ninth Circuit, the predicate offense in this matter was a violation of Wyoming Statute § 6-2-501(b). *Id.*

[68] *Id.*

[69] *Id.* at 1067–68. The doctrine of *noscitur a sociis* provides that "the meaning of doubtful words may be determined by reference to associated words and phrases." *Id.* at 1068.

[70] *Id.*

[71] *Id.*

[72] *Belless*, 338 F.3d at 1068 (enabling police to arrest and intervene in such confrontations in order and avoid the risk that rude touchings will escalate into further violence).

[73] *Id.*

[74] *Id.* at 1069.

*Split of Authority within the United States District Courts of Wyoming*

Prior to *Hays*, a split of authority existed within the United States District Courts for the District of Wyoming as to whether 18 U.S.C. § 921(a)(33)(A)(ii) includes *de minimis* touching.[75] The Chief Judge for the District of Wyoming, William F. Downes, examined the issue in *United States v. Gonzales*.[76] As in *Hays*, Gonzales allegedly violated Wyoming Statute § 6-2-501(b) and was subsequently indicted under 18 U.S.C. § 922(g)(9).[77] Judge Downes agreed with the United States Court of Appeals for the Ninth Circuit's analysis of Wyoming Statute § 6-2-501(b) in *Belless*.[78] Accordingly, the court held Wyoming's battery statute, which criminalizes nonviolent conduct, does not satisfy the element of physical force in § 921(a)(33)(A)(ii) and dismissed the charge against Mr. Gonzales.[79]

However, Judge Clarence Brimmer and Judge Alan Johnson, Wyoming's other two United States District Court Judges, sided with the reasoning of the First, Eighth and Eleventh Circuit Courts of Appeals on the issue presented in *Hays*.[80] In *United States v. McCue*, Judge Brimmer held the language of Wyoming Statute § 6-2-501(b) was not overinclusive and criminalized conduct sufficient to meet the element of "physical force" in § 921(a)(33)(A)(ii).[81] Similarly, in *United States v. Rael*, Judge Johnson found the position of the First, Eighth, and Eleventh Circuit Courts of Appeals better aligned with the principles of statutory interpretation and legislative intent.[82] By favorably citing *Griffith* and *Nason*, Judge Johnson held Wyoming Statute § 6-2-501(b) met the physical force requirement of § 922(a)(33)(A)(ii).[83] In essence, the court effectively rejected *Belless*' interpretation

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[75] *See infra* notes 76–87 and accompanying text.

[76] *United States v. Gonzales*, 05-CR0276-D, Order Granting Mot. Dismiss Count Three (Mar. 29, 2006).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *See infra* notes 81–87 and accompanying text.

[81] *United States v. McCue*, No. 05-CR-222, Order Denying Def.'s Mot. Dismiss Count Two of the Indictment (Nov. 17, 2006) ("Therefore, under the plain meaning rule, 'the unlawful touching of another in a rude, insolent or angry manner' made illegal by the Wyoming battery statute satisfies the 'physical force' requirement of § 921(a)(33)(A)(ii).").

[82] *United States v. Rael*, No. 06-CR-183 Order Denying Def.'s Mot. to Dismiss Count One and Two of the Indictment (Nov. 27, 2006).

[83] *Id.* at 6.

> This Court's decision that Wyoming's battery statute is sufficient to qualify as a misdemeanor crime of domestic violence under § 922(a)(33)(A) is supported by the plain meaning of the statute. This court takes particular note of the fact that § 921(a)(33)(A) does not specify any particular degree of physical force required before an act may be considered a "misdemeanor crime of domestic violence." Instead, the statute plainly refers only to the use or attempted use of physical force.

*Id.*

of Wyoming Statute § 6-2-501(b).[84] The court, just as in *Nason* and *Griffith*, declined to read § 921(a)(33)(A)(ii) as requiring physical force be violent, when Congress itself declined to include modifying language.[85]

The district courts for the District of Wyoming, like the Federal Circuit Courts of Appeals, were split as to whether the definitional requirements of § 921(a)(33)(A)(ii) for the use or attempted use of physical force are met by *de minimis* touches.[86] However, in *Hays*, the Tenth Circuit interpreted § 921(a)(33)(A)(ii)'s physical force requirement differently than any other court to previously rule on the issue.[87]

## PRINCIPAL CASE

A panel of the United States Court of Appeals for the Tenth Circuit narrowly decided *Hays* by a two-to-one vote with Circuit Judge Seymour authoring the opinion for the majority.[88] The court adhered to precedent in cases where a defendant contests whether a prior conviction is a crime of violence and applied the categorical approach.[89] The categorical approach does not involve a factual inquiry, but rather an examination of the statute under which a defendant was charged, and an examination of that prong on its face.[90] The categorical approach permits a court to look beyond the statute to the facts of the prior conviction only in certain circumstances.[91]

### *Majority Opinion*

The court began its analysis by examining the text of 18 U.S.C. § 922(g)(9) and 18 U.S.C. § 921(a)(33)(A)(ii).[92] Because Hays' appeal turned on the

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[84] *Id.* at 7.

[85] *Id.*

[86] *See supra* notes 44–87 and accompanying text.

[87] *See infra* notes 93–107 and accompanying text.

[88] *See generally Hays*, 526 F.3d at 674.

[89] *Id.* at 676; *see also* Taylor v. United States, 495 U.S. 575, 600 (1990) (finding persuasive authority in the holdings of the Courts of Appeals which mandate a formal categorical approach looking only to the statutory definitions of the prior offenses, not to the particular facts of those underlying convictions).

[90] *Hays*, 526 F.3d at 676 ("Such review does not involve a subjective inquiry into the facts of the case, but rather its purpose is to determine 'which part of the statute was charged against the defendant and, thus, which portion of the statute to examine on its face.'").

[91] *Id.* ("When the underlying statute reaches a broad range of conduct, some of which merits an enhancement and some of which does not, courts resolve the resulting ambiguity by consulting reliable judicial records, such as the charging document, plea agreement, or plea colloquy.").

[92] *Id.* at 676; *see also* Leocal v. Ashcroft, 543 U.S. 1, 8 (2004); United States v. Sanchez-Garcia, 501 F.3d 1208, 1212 (10th Cir. 2007); McGraw v. Barnhart, 450 F.3d 493, 498 (10th Cir. 2006).

interpretation of the term "physical force," and the fact that neither 18 U.S.C. § 922(g)(9) nor § 921(a)(33)(A)(ii) provided a definition for the term, the court turned to Black's Law Dictionary for guidance.[93] The court found the definitions implied the term "physical force" requires something more than mere contact.[94] The court contended its interpretation—that physical force entailed something more than *de minimis* touches—conformed to what the United States Supreme Court and the Seventh and Ninth Circuits had suggested.[95] With this notion of "physical force" in mind, the court noted the United States Supreme Court's interpretation of "crime of violence" in *Leocal v. Ashcroft*, as well as the Seventh Circuit's interpretation in *Flores v. Ashcroft*, to support its holding that "physical force" requires violence.[96] Additionally, the court examined the Ninth Circuit Court of Appeals' interpretation of "physical force" in *United States v. Belless*, as well as its own interpretation in *United States v. Sanchez-Garcia.*[97]

The court observed the record did not indicate whether Hays had violated the "unlawfully touching" prong or the "recklessly causes bodily injury prong" of Wyoming Statute § 6-2-501(b).[98] According to the court, without any information regarding Hays' underlying conviction, both prongs of the Wyoming battery statute must satisfy the federal definition of a crime of domestic violence.[99] Under the modified categorical approach, the court concluded each prong must satisfy 18 U.S.C. § 922(a)(33)(A)(ii)'s definition, or Hays' prior conviction under the Wyoming Statute could not support the charge in his federal indictment.[100]

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[93] BLACK'S LAW DICTIONARY 537 (8th Abridged ed. 2005) (defining "force" as "power, violence, or pressure directed against a person or thing," and the term "physical force" as "force consisting in a physical act, esp. a violent act directed against a robbery victim").

[94] *Hays*, 526 F.3d at 677.

[95] *Id*. ("Consistent with these definitions, the Supreme Court and both this circuit and others have suggested that physical force means more than mere physical contact; that some degree of power or violence must be present in that contact to constitute physical force." (internal quotations omitted)).

[96] *Id*; *Leocal*, 543 U.S. at 11 ("The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent active crimes that cannot be said naturally to include DUI offenses."); *Flores*, 350 F.3d at 672 ("Perhaps one could read the word 'force' in § 16(a) to mean one dyne or more, but that would make hash of the effort to distinguish ordinary crimes from violent ones.").

[97] *Hays*, 526 F.3d at 678 ("'[F]orce' refers to 'destructive or violent force.'" (quoting United States v. Venegas-Ornelas, 348 F.3d 1273, 1275 (10th Cir. 2003))).

[98] *Id*. Due to the restrictions of the modified categorical approach, the only document in the record containing any information about the circumstances of Hays' underlying conviction was the pre-sentence report; a document the court could not examine to resolve ambiguity. *Id.*

[99] *Id.*

[100] *Id.*

In analyzing the first prong of Wyoming Statute § 6-2-501(b) forbidding "rude, insolent, or angry" touching, the court discerned the Wyoming statute incorporates the common law rule and any touching, however slight, constitutes battery.[101] However, the court reasoned the common law rule has become antiquated, as many states have moved away from the broad definition due to the Model Penal Code's influence on state substantive law.[102] Accordingly, the court found the first prong of Wyoming's assault and battery statute criminalized conduct which did not satisfy the definition of a misdemeanor crime of domestic violence set forth in 18 U.S.C. § 921(a)(33)(A)(ii).[103]

The court next examined the Congressional Record and the legislative history of 18 U.S.C. § 922(g)(9).[104] The court found that during the debate of what later became 18 U.S.C. § 922(g)(9), Senator Lautenburg repeatedly referred to individuals such as "wife beaters" and "child abusers," suggesting Congress' concern was violent offenders, rather than those who have merely touched another in a rude manner.[105] The court determined Congress broadened the scope of the firearm prohibition to include individuals employing violent force in non-felony crimes.[106]

*Dissenting Opinion*

Judge Ebel wrote a dissenting opinion arguing the court's holding was not supported by the principles of statutory construction or wise public policy.[107] Judge Ebel, unlike the majority, agreed with the reasoning of the United States

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[101] WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW §16.2 (2d ed. 2007).

[102] *Hays*, 526 F.3d at 679 n.2; *see, e.g.*, UTAH CODE ANN. § 76-5-102(1)(c) (West 1953) (criminalizing behavior which intends or actually causes bodily injury); COLO. REV. STAT. ANN. §§ 18-3-202 to -204 (West. 2004) (criminalizing behavior in which the offender must intend to injure or actually cause bodily harm to the body of another, or act with an extreme indifference to the value of human life).

[103] *Hays*, 526 F.3d at 679 ("Indeed, one can think of any number of 'touchings' that might be considered 'rude' or 'insolent' in a domestic setting but would not rise to the level of physical force discussed [in § 921(a)(33)(A)(ii)].").

[104] *Id.*

[105] *Id.*

[106] *Id.* at 680.

> These comments make clear that Congress broadened the scope of § 922(g) to encompass misdemeanor crimes of domestic violence not out of a hope to keep guns out of the hands of individuals who may have inflicted *de minimis* touches on their spouses or children, but to keep guns out of the hands of domestic abusers who previously fell outside the bounds of the statute because they were convicted of misdemeanors rather than felonies due to "outdated thinking" or plea-bargains.

*Id.*

[107] *Id.* at 682 (Ebel, J., dissenting).

Courts of Appeals for the First, Eighth and Eleventh Circuits, and found the language of the statute clear and unambiguous, therefore, the plain meaning should control.[108] Judge Ebel concluded Wyoming Statute § 6-2-501(b) does not criminalize incidental contact, but rather deliberate touches.[109] From his perspective, these types of intentional touches constitute the kind of aggression Congress meant to include in the enactment of § 921(a)(33)(A)(ii).[110]

Judge Ebel criticized the majority's heavy reliance on *United States v. Leocal*.[111] In his opinion, *Leocal* was not on point because the Florida statute did not include a *mens rea* requirement, while Wyoming Statute § 6-2-501(b) clearly incorporates a *mens rea* requirement.[112]

In addition, Judge Ebel argued the court's reasoning was misguided based on the language of the statutory scheme.[113] In Judge Ebel's opinion, the statutory language of § 921(a)(33)(A)(ii) is clear and unambiguous, therefore, the court did not need to judicially graft qualifying language onto § 922(g)(9).[114] Judge Ebel asserted an examination of § 922(g)(8)(C) demonstrated Congress had the capacity to add modifying language to § 922(g)(9).[115] Such a finding made it clear that Congress purposely left the qualifying language broad enough to incorporate all types of force, including *de minimis* touches.[116]

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[108] *Hays*, 526 F.3d at 682 (Ebel, J., dissenting).

[109] *Id.* (Ebel, J., dissenting).

[110] *Id.* (Ebel, J., dissenting).

[111] *Id.* (Ebel, J., dissenting); *see Leocal*, 543 U.S. at 7. From a scientific perspective, every touch does include some level of physical force, but something more is required from a legal standpoint. *Id.*

[112] *Hays,* 526 F.3d at 682–83 (Ebel, J., dissenting); *see* Streitmatter v. State, 981 P.2d 921, 924 (Wyo. 1994).

> [I]t is clear that Wyo. Stat. Ann. §§ 6-2-501 and 6-5-502, . . . simple assault and battery and aggravated assault and battery, are the statutory equivalents of a crime at common law. As such, the court had no hesitancy in concluding that Wyo. Stat. Ann. § 6-2-502(a)(ii) is a general intent crime and would no doubt reach the same conclusion in relation to § 6-2-501. Importantly, general intent crimes require the intentional doing of the prohibited act. Thus, an individual may not violate Wyo. Stat. Ann. § 6-2-501 by engaging in the type of negligent or merely accidental conduct.

*Id.* (internal citation omitted).

[113] *Hays*, 526 F.3d at 684 (Ebel, J., dissenting).

[114] *Id.* (Ebel, J., dissenting); *see Duncan*, 533 U.S. at 173 (2001).

[115] *Hays*, 526 F.3d at 684 (Ebel, J., dissenting).

[116] *Id.* (Ebel, J., dissenting).

Furthermore, the actual language of the standard troubled Judge Ebel.[117] Judge Ebel argued the majority's reliance on *United States v. Leocal* and *United States v. Flores* led it to require that "physical force result in some sort of harm or injury."[118] According to Judge Ebel, imposing a standard requiring the use of physical force result in either harm or injury provides little clarity as to what qualifies under the federal definition of a crime of domestic violence.[119] Judge Ebel asserted, "[o]nce we start down the slippery slope left open by the majority opinion of qualifying what constitutes 'physical force,' our work will never be done."[120]

In Judge Ebel's opinion, the court's adoption of the physical force standard was neither necessary nor helpful.[121] Judge Ebel proffered the court's opinion was not supported by the plain language of the statute, the overall statutory scheme in which § 922(g)(9) is included, or by wise public policy.[122] Judge Ebel concluded Congress adopted the more applicable standard based on its' own appreciation for the difficulties of defining qualifying conduct.[123] Like the First, Eighth, and Eleventh Circuit Courts of Appeals, Judge Ebel would have held the plain language of the statute should control.[124]

## ANALYSIS

The reasoning of the United States Circuit Court of Appeals for the Tenth Circuit in *Hays* is problematic for several reasons.[125] First, the court erred by concluding the 18 U.S.C. § 921(a)(33)(A)(ii) physical force requirement entails something more than *de minimis* touching.[126] Second, the court ignored its own previous interpretation of the term "physical force."[127] Third, the court incorrectly imposed a legal standard requiring the use of physical force result in physical harm or injury.[128] Fourth, rather than seizing the opportunity to clarify whether

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[117] *Id.* (Ebel, J., dissenting) ("It imposes an amorphous legal standard to determine whether conduct involving 'physical force' rises to the level of a predicate offense for purposes of section 922(g)(9).").

[118] *Id.* (Ebel, J., dissenting).

[119] *Id.* (Ebel, J., dissenting).

[120] *Hays*, 526 F.3d at 684 (Ebel, J., dissenting) (acknowledging the problematic effect of a standard requiring the use or attempted use of physical force result in either harm or injury because there is no bright line rule for quantifying "physical force").

[121] *Id.* at 685 (Ebel, J., dissenting).

[122] *Id.* at 682 (Ebel, J., dissenting).

[123] *Id.* at 685 (Ebel, J., dissenting).

[124] *Id.* (Ebel, J., dissenting).

[125] *See infra* notes 131–97 and accompanying text.

[126] *See infra* notes 131–62 and accompanying text.

[127] *See infra* notes 163–74 and accompanying text.

[128] *See infra* notes 175–86 and accompanying text.

Wyoming's battery statute satisfies the use of physical force requirement of § 921(a)(33)(A)(ii), the court further complicated the law.[129] Additionally, this section discusses the *Hays* decision's practical implications on the firearm rights of individuals convicted under broad state assault and battery statutes within the Tenth Circuit.[130]

*The Plain Language of § 921(a)(33)(A)(ii) is Clear and Unambiguous*

The holdings of the First, Eighth and Eleventh Circuits are more consistent with the principles of statutory interpretation and legislative intent compared to the other circuits.[131] The first step in any statutory exercise is to examine the language of the statute itself.[132] If the statutory language has a plain meaning, the courts are bound to follow that language.[133] The term "physical force" is an elementary concept, readily understood within the legal community.[134] Given the clarity of "physical force," the plain meaning of the language must control.[135] Furthermore, Congress is entitled to define the terms governing crimes freely.[136] For a court to find ambiguity from a straightforward phrase such as "physical force" on the basis that it disagrees with Congress' effort is improper.[137] Supposing Congress' definition of a qualifying misdemeanor does not encompass all types of force when the language clearly supports the proposition is unfounded.[138]

The faulty reasoning of the Seventh and Ninth Circuit Courts of Appeals, on which the Tenth Circuit relied, frustrates the congressional intent behind § 922(g)(9).[139] The *Hays* court's reliance on *Leocal, Flores,* and *Belless* leads to a misguided interpretation of "physical force."[140] As Judge Ebel points out in the dissent, the

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[129] *See infra* notes 187–91 and accompanying text.

[130] *See infra* notes 192–97 and accompanying text.

[131] *United States v. Rael*, No. 06-CR0183, Order Denying Def. Mot. to Dismiss Count One and Two of the Indictment (Nov. 27, 2006) (finding the statutory language of Wyoming Statute § 6-2-501(b) has a plain meaning and without ambiguity, a court must follow that language).

[132] *Hays*, 526 F.3d at 677; *Griffith*, 455 F.3d at 1342; *Nason*, 269 F.3d at 15–16.

[133] *See* Salinas v. United States, 522 U.S. 52, 57–58, (1997); United States v. Charles George Trucking Co., 823 F.2d 685, 688 (1st Cir. 1987); *McGraw*, 450 F.3d at 498.

[134] *Nason*, 269 F.3d at 16; *Griffith*, 455 F.3d at 1345 ("Unlike the Seventh Circuit, we do not feel compelled to reach a result at war with common sense, particularly when doing so would require us to alter the plain language of what Congress has written.").

[135] *Nason*, 269 F.3d at 16.

[136] *Id.* at 17.

[137] *Id.*

[138] *Id.*

[139] *Hays*, 526 F.3d at 685 (Ebel, J., dissenting); *see Hayes*, 129 S. Ct. at 1081 (construing § 922(g)(9) to exclude the domestic abuser convicted under a generic use-of-force statute would frustrate Congress' purpose).

[140] *Hays*, at 682–84 (Ebel, J., dissenting).

court's reliance on *Leocal* is misplaced.[141] The court shows a broad deference to the United States Supreme Court's statement in *Leocal* that it could not "forget that it was ultimately . . . determining the meaning of the phrase 'crime of violence.'"[142] However, rather than determining the meaning of the phrase "crime of violence," the *Hays* court was asked to decipher the meaning of the term "misdemeanor crime of domestic violence."[143] As Judge Ebel noted, the court gave no weight to the misdemeanor qualifier.[144] By its very nature, a misdemeanor crime will involve less violence than a felony.[145]

Likewise, the court's dependence on *Flores* is mistaken.[146] In *Flores*, the Seventh Circuit considered 18 U.S.C. § 16, a statute similar to § 921(a)(33)(A)(ii).[147] The court seems to adopt *Flores'* scientific discussion of "force" as a clear indication that Congress did not intend to include *de minimis* touches in the definition of § 921(a)(33)(A)(ii).[148] The *Hays* court's approval of this discussion is problematic because it deviates from the plain language of § 921(a)(33)(A)(ii).[149] The physics discussion in *Flores* addresses matters wholly unrelated to the practical application of the law.[150] *Flores'* examination considers hypothetical situations such as snowballs, spitballs and paper airplanes.[151] These situations are the type where minimal amounts of "dynes" or "newtons" of force are used against others.[152] Rarely would an individual be prosecuted for offenses involving spitballs

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[141] *Id.* at 682–83 (Ebel, J., dissenting); *Leocal*, 547 U.S. at 7. In *Leocal*, the United States Supreme Court was asked to consider the meaning of the term "crime of violence." *Id.* However, the *Hays* court was being asked to weigh the meaning of the term "misdemeanor crime of domestic violence." *Hays*, 526 F.3d at 683.

[142] *Hays*, 526 F.3d at 683 (Ebel, J., dissenting) ("In this regard, the majority asserts that it is significant for our purposes that the *Leocal* Court went on to assert, 'the ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person . . . suggests a category of violent active crimes that cannot be said naturally to include DUI offenses.").

[143] *Id.* (Ebel, J., dissenting).

[144] *Id.* (Ebel, J., dissenting).

[145] *Id.* (Ebel, J., dissenting).

[146] *Id.* (Ebel, J., dissenting); *see infra* notes 148–56 and accompanying text.

[147] *See Flores*, 350 F.3d at 668. The Immigration and Nationality Act defined a "crime of domestic violence" in terms of 18 U.S.C. § 16 as a crime that has, an element, the use, attempted use, or threatened use of physical force against the person or property of another. *Flores*, 350 F.3d at 668; Petitioner Brief-Appellee, *supra* note 19, at 9.

[148] *Hays*, 526 F.3d at 678; *see supra* notes 60–66 and accompanying text for discussion of "force" in *Flores*.

[149] *Griffith*, 455 F.3d at 1345.

[150] Petitioner Brief-Appellee, *supra* note 19, at 20; *Flores*, 350 F.3d at 673 (Evans, J., concurring) ("We recently observed that critics of our system of law often see it as 'not tethered very closely to common sense.'").

[151] *See supra* note 58 and accompanying text.

[152] Petitioner Brief-Appellee, *supra* note 19, at 20; *Griffith*, 455 F.3d at 1345.

and paper airplanes.[153] In the real world, a person is prosecuted for actual battery against the body of another.[154] A consideration of time and resources in relation to the circumstances surrounding battery prosecutions within the American legal system leads to the rational conclusion that individuals rarely face prosecution for little more than a minimal exertion of "dynes" or "newtons."[155]

The *Belless* court's reasoning presents the same analytical problems as *Flores.*[156] Following *Belless'* misguided discussion of Newtonian mechanics, the court stated its goal in this exercise is to allocate criminal responsibility, not take part in a discussion of physics.[157] This statement is clearly erroneous as the function of assigning criminal responsibility belongs to Congress.[158] A reading of a statute contradicting the plain meaning ultimately frustrates Congress' intent for the broad application of these sections.[159] The *Hays* court found the reasoning of the Ninth Circuit in *Belless* persuasive and consequently added its own qualifying language to 18 U.S.C. § 921(a)(33)(A)(ii).[160] As in *Hays*, imposing a standard requiring violent physical force when Congress itself did not include such a requirement is inappropriate.[161] If Congress had intended the term "physical

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[153] Petitioner Brief-Appellee, *supra* note 19, at 20; *Flores*, 350 at 672 (Evans, J., concurring) ("For one thing, people don't get charged criminally for expending a newton of force against victims.").

[154] Petitioner Brief-Appellee, *supra* note 19, at 20; *Griffith*, 455 F.3d at 1345 (inferring that prosecutions based on a minimal exertion of force are divorced from common sense and have little or no basis in the real world).

[155] Petitioner Brief-Appellee, *supra* note 19 at 20; *Flores*, 350 at 672 (Evans, J., concurring); Skakun, *supra* note 39, at 1852 ("And as a practical matter, it is likely that actual violence, not mere touching, is the basis of almost all assault and battery convictions for making physical contact with a domestic intimate.").

[156] *United States v. Rael*, No. 06-CR-183, Order Denying Def's Mot. to Dismiss Count One and Two of the Indictment (Nov. 27, 2006) (rejecting the Ninth Circuit's analysis of "physical force" based on Newtonian mechanics and the associated language requiring "threatened use of a deadly weapon").

[157] *Id.*; *Griffith*, 455 F.3d at 1344; *see* U.S. CONST. art. I, §8, cl.2 (granting Congress the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution).

[158] *United States v. Gonzales*, No. 05-CR-276-D Order Granting Mot. Dismiss Count Three (Mar. 29, 2006); *see also* Pioneer Inv. Serv. v. Brunswick Assocs., 507 U.S. 380, 388 (1993) ("Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'").

[159] *United States v. McCue*, No. 05-CR-222-B, Order Denying Defendant's Motions to Dismiss Count One and Two of the Indictment (Nov. 27, 2006) at 7.

[160] *See Hays*, 526 F.3d at 681 (holding Wyoming Statute § 6-2-501(b) does not satisfy the "use of physical force" element in § 921(a)(33)(A)(ii) because from a legal standpoint, "physical force" entails more than mere touching).

[161] *United States v. McCue*, No. 05-CR-222-B, Order Denying Defendant's Motions to Dismiss Count One and Two of the Indictment (Nov. 27, 2006) at 7; *see supra* note 51 and accompanying text (discussing the impropriety of adding language which Congress itself did not include).

force" to actually mean violent physical force, it could have expressly included the distinction in the statute's text.[162]

### Hays' *Interpretation Strays From Precedent*

Another problematic aspect of the *Hays* decision is the court's disregard for its own previous interpretation of the term "physical force."[163] It is important to note that until *Hays*, the Tenth Circuit had not ruled on the precise issue presented in *Hays*.[164] However, it previously interpreted analogous statutory language in *United States v. Treto-Martinez*.[165] In *Treto-Martinez*, the Tenth Circuit Court of Appeals considered whether a prior felony conviction under Kansas' aggravated battery statute constituted a "crime of violence" for the purposes of U.S.S.G. § 2L1.2(b)(1)(A).[166] The U.S.S.G. § 2L1.2(b)(1)(A) definitional requirements are similar to those of 18 U.S.C. § 921(a)(33)(A)(ii) as both include as an element the "use or attempted use of physical force."[167] The Kansas aggravated battery statute, like the Wyoming statute, prohibits "intentionally causing physical contact with another person when done in a rude, insulting, or angry manner with a deadly weapon."[168] In *Treto-Martinez*, the Tenth Circuit Court of Appeals held the intentional touching of another with a deadly weapon in a "rude, insolent, or angry manner" did involve the use of physical force.[169]

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[162] *See Hays*, 526 F.3d at 684 (Ebel, J., dissenting); *Nason*, 269 F.3d at 16–18; *Griffith*, 455 F.3d at 1342.

[163] *See supra* notes 163–69 and accompanying text.

[164] Petitioner Brief-Appellee, *supra* note 19, at 9.

[165] *Id.; see* United States v. Treto-Martinez, 421 F.3d 1156, 1157–58 (10th Cir. 2005); United States v. Miller, 98 Fed. Appx. 801, 802–03 (10th Cir. 2004); United States v. Quijada, 146 Fed. Appx. 958, 960–62 (10th Cir. 2005).

[166] *Treto-Martinez*, 421 F.3d at 1157. Treto-Martinez pled guilty in the United States District Court for the District of Colorado to unlawful reentry by a deported alien who had been removed from the country subsequent to commission of an aggravated felony. *Id.* The Sentencing Guidelines advised a court to increase punishment by sixteen levels if a defendant remains in the country after a felony conviction that is a crime of violence. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (1991). Treto-Martinez appealed the sentence imposed. *Treto-Martinez*, 421 F.3d at 1157. The court concluded the defendant's prior conviction for aggravated battery constituted a crime of violence. *Id.* Causing physical contact with a deadly weapon in a rude, insulting or angry manner was sufficient to constitute actual use of force under the sentencing guidelines and would always include as an element the threatened use of physical force. *Id.*

[167] *Treto-Martinez*, 421 F.3d at 1159; U.S.S.G. § 2L1.2(b)(1)(A) provides that:

> (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels . . . .

*Id.*

[168] *Treto-Martinez*, 421 F.3d at 1159.

[169] *Id.* at 1162.

Despite interpreting "physical force" in other contexts, *Hays* was not a case of first impression for the United States Court of Appeals for the Tenth Circuit, as it has spoken on domestic abuse issues dealing with the interpretation of "physical force."[170] Therefore, *Hays'* interpretation of "physical force" undermines the principles of stare decisis.[171] The court's interpretation of "physical force" in the instant case offends the integrity of the judicial system because it did not treat analogous situations alike in accordance with the doctrine of stare decisis.[172]

### Hays *Imposes an Amorphous Legal Standard*

As indicated by Judge Ebel in the dissent, the court imposes an amorphous standard to determine whether conduct involving physical force rises to the level of a predicate offense.[173] The *Hays* court's addition of modifying language to § 921(a)(33)(A)(ii) is improper given the overall statutory scheme.[174] Additionally, implementing a standard requiring physical force result in either harm or injury stifles the promotion of judicial efficiency.[175] In the dissent, Judge Ebel pointedly asked what constitutes harm or injury in relation to an element of physical force.[176] Judge Ebel asserted that imposing a standard requiring the use of physical force result in either harm or injury has the potential to flood the courts with litigation.[177]

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[170] Petitioner Brief-Appellee, *supra* note 19, at 10; *see Treto-Martinez*, 421 F.3d at 1158–59; *Miller*, 98 Fed. Appx. at 804; *Quijada*, 146 Fed. Appx. at 964–70.

[171] Jordan W. Connors, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 681, (2008).

> The Supreme Court considers stare decisis—the obligation to adhere to past opinions—to be "indispensable" to the "rule of law." In describing the doctrine, the Court has explained that "when an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." This constraint helps legitimize the judicial system by requiring the Court to treat like cases alike.

*Id.*

[172] Connors, *supra* note 171, at 681; 20 AM. JUR. 2D *Courts* § 129 (2008).

> Under the doctrine of stare decisis, when a court has laid down a principle of law as applying to a certain set of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. The doctrine is the means by which courts ensure that the law will not merely change erratically but will develop in a principled and intelligible fashion.

*Id.*

[173] *Hays*, 526 F.3d at 684 (Ebel, J., dissenting).

[174] *Griffith*, 455 F.3d at 1343.

[175] *Hays*, 526 F.3d at 684 (Ebel, J., dissenting); Drew C. Ensign, *The Impact of Liberty on Stare Decisis: The Rehnquist Court From* Casey *to* Lawrence, 81 N.Y.U. L. REV. 1137, 1141 (2006) ("Stare decisis serves many important interests, including: (1) promoting judicial economy by avoiding relitigation of issues.").

[176] *Hays*, 526 F.3d at 684 (Ebel, J., dissenting).

[177] *Id.*

The *Hays* court's imposition of its standard shows no regard for the rule laid out by the United States Supreme Court in *Duncan v. Walker*.[178] When construing the meaning of a statute a court should, if possible, prevent any clause, sentence, or word from being superfluous, void, or insignificant.[179] As stated by the Courts of Appeals in the First, Eighth and Eleventh Circuits, Congress clearly intended to leave the language of § 922(g)(9) broad because it chose to place qualifying language in the previous section.[180] Furthermore, the legal standard adopted in *Hays* frustrates the concept of judicial economy.[181] Such a standard will inundate the Tenth Circuit with questions relating to the quantitative aspects of both harm and injury.[182] This standard, like the standard adopted by the Seventh and Ninth Circuits, serves as a qualitative measure.[183] Therefore, by adopting this standard, the panel of the Tenth Circuit provides no guidance to lower courts facing the issue in the future.[184]

### Hays *Provides No Clarity in Relation to § 921(a)(33)(A)(ii)*

Given the split of authority within the federal courts, the *Hays* court had the opportunity to provide clarity as to whether Wyoming's battery statute satisfies the federal definition of a misdemeanor crime of domestic violence.[185] However, unlike the United States Courts of Appeals for the Seventh and Ninth Circuits, the Tenth Circuit imposed a standard requiring physical force result in either harm or injury to the victim.[186] Prior to *Hays*, the only court to consider whether the language of Wyoming's assault and battery statute satisfies the physical force requirement was the Ninth Circuit in *Belless*.[187] Rather than finding the *Belless* court's reasoning persuasive, the panel of the Tenth Circuit Court of Appeals adopted a different legal standard, rendering the Tenth Circuit a "lone ranger" in

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[178] *Duncan*, 533 U.S. at 175; *see supra* note 51 and accompanying text (discussing the impropriety of finding Congress' omission of a word in one section, but not in another, intentional and purposeful).

[179] *Duncan*, 533 U.S. at 175.

[180] *Hays*, 526 F.3d at 684 (Ebel, J., dissenting).

[181] *Id.* at 684–85 (Ebel, J., dissenting).

[182] *Id.* at 685 (Ebel, J., dissenting) (asserting the standard will necessitate the courts to hear a substantial number of cases to define what types of injuries will merit an interpretation of the application of physical force).

[183] *Id.* (Ebel, J., dissenting).

[184] *Id.* (Ebel, J., dissenting).

[185] *See Hays*, 526 F.3d at 684–85 (Ebel, J., dissenting) (discussing the various interpretations of the federal courts on the issue).

[186] *Id.* at 677–78 (insisting force be violent in nature, the sort that is intended to cause bodily injury, or a minimum likely to do so).

[187] *Id.* at 680; *see generally Belless*, 338 F.3d 1063.

relation to this question.[188] At the time of the *Hays* decision, none of the federal circuits to rule on the issue supported the imposition of language requiring the use, or attempted use, of physical force to result in either harm or injury.[189]

### *Implications of* Hays

The United States Court of Appeals for the Tenth Circuit's holding in *Hays* serves as a considerable victory for individuals convicted under state assault and battery statutes criminalizing *de minimis* touches.[190] Given the circumstances of how state court systems process misdemeanor cases, potential now exists for widespread restoration of firearm rights, especially in states with all encompassing assault and battery statutes.[191] As in *Hays*, misdemeanor cases often pass through the courts without the inclusion of facts in the charging document, plea agreement, or plea colloquy.[192] When combining these circumstances with the restraints of the categorical approach, state assault and battery statutes like Wyoming's are rendered useless when serving as the predicate offense for federal prosecutions under the Lautenberg Amendment.[193] The *Hays* court's holding provides individuals convicted in the Tenth Circuit under broadly authored state assault and battery statutes an avenue for restoring their right to possess firearms.[194] Despite Congress' intention to prohibit "wife beaters" and "child abusers" from possessing firearms, *Hays* in effect restores firearm rights under the categorical approach.[195]

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[188] *See Hays*, 526 F.3d at 684 (Ebel, J., dissenting) (asserting the standard adopted leaves the Tenth Circuit standing alone in requiring "physical force" to result in either harm or injury).

[189] *Id.* at 674; *see supra* notes 39–86 and accompanying text (asserting that a person cannot make contact with the body of another without exerting some level of physical force, particularly of an insulting or rude nature); *see supra* notes 60–74 and accompanying text (asserting the term "physical force" in relation to the definitional requirements of 18 U.S.C. § 921(a)(33)(A)(ii) require the violent use of force against the body of another).

[190] *Fun With Crimes of Violence*, Kansas Federal Defender, http://kansasfederaldefender.blogspot.com/2008/05/fun-with-crimes-of-violence.html, May 21, 2008 (last visited Jan. 8, 2009).

[191] *Id.*

[192] Stanley Z. Fisher, *Just the Facts, Ma'am: Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 17 (1993) (discussing the omission of factual information which is important in criminal proceedings); *Hays*, 526 F.3d at 676.

> Even the categorical approach, however, permits courts to look beyond the statute of conviction under certain circumstances. When the underlying statute reaches a broad range of conduct, some of which merits an enhancement and some of which does not, courts resolve the resulting ambiguity by consulting reliable judicial records, such as the charging document, plea agreement, or plea colloquy.

*Hays*, 526 F.3d at 676.

[193] *See Hays*, 526 F.3d at 681. The categorical approach limits a sentencing court to examining the statutory elements of the predicate offense. *Id.* at 676.

[194] *Id.* at 681.

[195] *Id.*

## CONCLUSION

The United States Court of Appeals for the Tenth Circuit's decision in *Hays* blurs the law regarding whether the federal definition of a crime of domestic violence under 18 U.S.C. § 921(a)(33)(A)(ii) criminalizes *de minimis* touches.[196] The Tenth Circuit must reconsider the legal standard requiring "physical force" to either result in harm or injury in order to satisfy 18 U.S.C. § 921(a)(33)(A)(ii).[197] The disarray surrounding 18 U.S.C. § 921(a)(33)(A)(ii)'s definitional requirement for an element of "physical force" must compel the United States Supreme Court to hear a case on this precise issue and therefore provide clarity and uniformity to the lower courts in the near future.[198]

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[196] *See supra* notes 39–86 and accompanying text.

[197] *See supra* notes 39–197 and accompanying text.

[198] *See supra* notes 126–97 and accompanying text.

University of Wyoming
**College of Law**

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## CASE NOTE

# CRIMINAL LAW—The Wyoming Supreme Court's Confusion on Voluntary Act: Automatic Jury Instruction on the Voluntary Act Requirement?; *Seymore v. State*, 152 P.3d 401 (Wyo. 2007).

*Birthe S. Christensen**

## Introduction

During a hearing for a felony conviction, the judge placed the defendant-appellant, Brian Seymore, in detention with Frontier Corrections System ("FCS").[1] Under FCS rules, a failure to return to FCS at the required time constitutes escape.[2] On July 2, 2004, Seymore left the facility at 5:00 p.m., but failed to return as required by 10:00 p.m.[3] Aware of his violation, Seymore attempted to turn himself in the following morning; however, the jail refused to take him without an arrest warrant.[4] About a month-and-a-half later, authorities arrested Seymore and charged him with escape.[5] Following trial, a jury found Seymore guilty of escape.[6]

The escape statute, which Seymore allegedly violated, makes no reference to a *mens rea* requirement and simply describes the offense of escape.[7] Consequently,

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* Candidate for J.D., University of Wyoming, 2010.

[1] Seymore v. State, 152 P.3d 401, 403, 405 (Wyo. 2007). The Frontier Corrections facility detaining Seymore is an "adult community corrections facility." *Id.* at 405. Such a facility

> provides housing and case management services for probationers, parolees, inmates, and Intensive Supervision Program violators who are administratively sanctioned by Field Services to participate in the ACC program as an alternative to probation or parole revocation. The facilities provide the courts, Parole Board, and the WDOC an alternative to incarceration or traditional probation/parole supervision and they provide a transition option for inmates who are preparing to reenter Wyoming communities.

Department of Corrections, *available at* http://corrections.wy.gov/services/adult.html (last visited Feb. 1, 2009).

[2] *Seymore*, 152 P.3d at 403.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Seymore*, 152 P.3d at 404. The Wyoming escape statute provides that:

> (a) An offender, parolee or an inmate is deemed guilty of escape from official detention and shall be punished as provided by W.S. 6-5-206(a)(i) if, without proper authorization, he: (i) Fails to remain within the extended limits of his confinement or to return within the time prescribed to an adult community correctional facility to which he was assigned or transferred; or (ii) Being a participant in a program

the trial judge did not instruct the jury as to the *mens rea* requirement and the jury found Seymore guilty of escape without considering intent.[8] On appeal, Seymore argued reversible error occurred when the trial judge did not instruct the jury on the *mens rea* element of the crime of escape and specifically argued the trial judge failed to instruct the jury on the "specific intent element of escape."[9]

First, the Wyoming Supreme Court reviewed this case under the plain error standard because Seymore did not object to the jury instructions at trial.[10] Second, the court disagreed with Seymore's argument regarding the trial court's exclusion of a specific intent element in the jury instructions, because escape is a general intent crime, and not a specific intent crime.[11] Nevertheless, the court found the jury instructions inadequate because even for a general intent crime the state must prove the voluntariness of the actor's criminal conduct.[12] The court held the state was required to prove whether Seymore had voluntarily failed to return to FCS.[13]

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> established under the provisions of this act he leaves his place of employment or fails or neglects to return to the adult community correctional facility within the time prescribed or when specifically ordered to do so.

WYO. STAT. ANN. § 7-18-112 (West 2008). The Wyoming Supreme Court further articulated that "[*m*]*ens rea* is the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness." *Seymore*, 152 P.3d at 405 (quoting BLACK'S LAW DICTIONARY 1006 (8th ed. 2004)).

[8] *Seymore*, 152 P.3d at 405.

[9] *Id*. at 405–06.

[10] *Id.* at 404. The court applies the plain error standard when an appellant fails to object to the jury instructions at trial, or when an appellant requests for "a certain instruction [to] be included." *Id.* In order to prevail under the plain error standard the Wyoming Supreme Court considers three elements:

> First, the record must clearly present the incident alleged to be error. Second, appellant must demonstrate that a clear and unequivocal rule of law was violated in a clear and obvious, not merely arguable, way. Last, appellant must prove that he was denied a substantial right resulting in material prejudice against him.

*Id.*

[11] *Id.* at 406. The Wyoming Supreme Court explained general and specific intent crimes as follows:

> When the statute sets out the offense with only a description of the particular unlawful act, without reference to intent to do a further act or achieve a future consequence, the trial judge asks the jury whether the defendant intended to do the outlawed act. Such intention is general intent. When the statutory definition of the crime refers to an intent to do some further act or attain some additional consequence, the offense is considered to be a specific intent crime and then that question must be asked of the jury.

*Id.*

[12] *Id.* (quoting Rowe v. State, 974 P.2d 937, 939 (Wyo. 1999)) (stating "even a general intent crime requires a showing that the prohibited conduct was undertaken voluntarily").

[13] *Seymore*, 152 P.3d at 406. Specifically, the court stated

> The law of intent, as applied to the facts of this case, required the State to prove that the appellant *voluntarily* failed to return to FCS at the required time.

The Wyoming Supreme Court came to this conclusion because the court equated voluntariness with *mens rea* and noted that every crime generally contains two essential elements: *actus reus* and *mens rea*.[14] Failure to instruct the jury on an essential element of the crime constitutes a "fundamental error" and requires reversal.[15] Accordingly, the state must prove, and the trial judge must instruct on, the essential element of voluntariness; otherwise, the court will overturn the conviction.[16] Consequently, *Seymore* implicitly stands for the requirement of an automatic jury instruction on voluntariness in each and every case.[17] The Wyoming Supreme Court reversed and remanded to the trial court for a new trial because reversible error concerning the jury instructions occurred.[18]

The *Seymore* court erred in holding a judge must automatically instruct a jury on the requirement of a voluntary act.[19] This note will first explain a voluntary act and will thereafter examine the settled law prior to the *Seymore* decision.[20] Next, this note will look at the principal case and the court's rationale in overruling the trial court.[21] Finally, this note will analyze and critique the court's holding that a

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> Unfortunately, the jury was not instructed that it had to find the failure to return to have been voluntary. Without voluntary conduct, there is no mens rea.

*Id.* (emphasis in original).

[14] *Id.* at 405.

[15] *Id.* at 406–07. *But see infra* note 18 and accompanying text (discussing failure to instruct on an essential element is no longer an "error per se" and, in order to get case reversed on appeal, the defendant must show that he was prejudiced by the non-instruction on the essential element).

[16] *See supra* notes 12–15 and accompanying text.

[17] *See supra* notes 12–16 and accompanying text.

[18] *Seymore*, 152 P.2d at 411. The court held error occurred because the jury did not receive adequate instruction "as to the mens rea element of the crime charged." *Id.* After *Seymore*, the Wyoming Supreme Court decided Granzer v. State, 193 P.3d 266 (Wyo. 2008). That case turned on "[w]hether the trial court committed reversible error by omitting statutory language from the instruction on the elements of child endangerment" thereby requiring reversal based on the second prong of the plain error test. *Id.* at 268; *see also supra* note 10 and accompanying text (discussing the plain error test). The court discussed how its precedent suggested automatic reversal once a fundamental error occurs, such as when the trial court fails to instruct on an essential element, and "once an error is established, reversal is warranted without regard to whether the error prejudiced the defendant." *Granzer*, 193 P.3d at 270. But the court went on to hold that a fundamental error is no longer an "error per se" and "the defendant must show prejudice in order to warrant a reversal of his conviction." *Id.* at 271–72. Furthermore, "failure to instruct properly on an element of a crime does not constitute plain error where that element is not contested at trial, or where the evidence of the defendant's guilt is overwhelming." *Id.* at 270–71. However, the ruling in *Granzer* does not abrogate the overall holding of *Seymore*. *Id.* at 268–72. Indeed, a failure to instruct on voluntariness is still a violation of "a clear and unequivocal rule of law," because the Wyoming Supreme Court holds voluntariness to be an essential element. *Seymore*, 152 P.3d at 404–06. *Granzer* simply states that, on appeal, the defendant must now show the added requirement of prejudice in order to reverse his conviction. *Granzer*, 193 P.3d at 272.

[19] *See infra* notes 24–168 and accompanying text.

[20] *See infra* notes 24–96 and accompanying text.

[21] *See infra* notes 97–121 and accompanying text.

trial judge must automatically instruct on voluntary act.[22] Specifically, this note will argue that the court came to the wrong conclusion and articulate why, as a general rule, trial judges do not automatically instruct jurors on a voluntary act.[23]

## BACKGROUND

### *Explanation of a Voluntary Act*

Regardless of how commentators define voluntariness, the Wyoming Supreme Court, as well as other courts, agree the law does not punish individuals for involuntary bodily movements.[24] Without a doubt, Wyoming, as well as other courts, recognizes a voluntary act as an indispensible prerequisite to criminal liability.[25] The notion of a voluntary act begins when the actor commits a crime, because, in order to do so, the actor must do an act, or fail to do an act.[26] Furthermore, the act or omission must be voluntary; otherwise, the defendant may avoid liability.[27] Voluntariness arises from "volition" which simply means "a willed bodily movement."[28] Therefore, voluntariness exists as a minimum

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[22] *See infra* notes 122–68 and accompanying text.

[23] *Id.*

[24] *See, e.g.*, Fulcher v. State, 633 P.2d 142, 145 (Wyo. 1981) (holding a person who acts involuntarily "does so without intent, exercise or free will, or knowledge of the acts"); Nelson v. State, 927 P.2d 331, 333 n.3 (Alaska Ct. App. 1996) (stating "[e]very criminal offense must be premised on some voluntary act or omission of the defendant"); Mooney v. State, 105 P.3d 149, 154 (Alaska Ct. App. 2005) (holding "a person cannot be held criminally liable unless that person has performed a voluntary act").

[25] *See supra* note 24 and accompanying text.

[26] Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 380 (2008) (stating that by "doing something" the "actor increase[s] the risk of harm to others" and the "crime occurs when [the act] results in the [harm]"); *see also* JOSHUA DRESSLER ET AL., CASES AND MATERIALS ON CRIMINAL LAW 126 (4th ed. 2007) (articulating that *"actus* express[es] the voluntary physical movement in the sense of conduct and *reus* express[es] the fact that this conduct results in a certain proscribed harm, i.e., that it 'causes' an injury to the legal interest protected in that crime") (quoting Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345, 386 (1965)).

[27] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-201 (West 2008) (articulating "[t]he minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or omission to perform a duty by law which the person is physically capable of performing"); ALA. CODE § 13A-2-3 (2008) (stating "[t]he minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing"); HAW. REV. STAT. ANN. § 702-200(1) (West 2008) (allowing a defense for any involuntary conduct or any involuntary omission); COLO. REV. STAT. ANN. § 18-1-502 (West 2008) (stating "[t]he minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing").

[28] *See, e.g.*, Alexander & Ferzan, *supra* note 26, at 381 (articulating that "volition [means] the defendant wills the movement of her body"); BLACK'S LAW DICTIONARY 1309 (8th ed. 2005) (stating that volition simply means "the ability to make a choice or determine something"); Takacs v. Engle,

threshold for the imposition of criminal liability, and a willed bodily movement satisfies the requirement of voluntariness.[29]

For example, if A practices target shooting at a shooting range and pulls the trigger of his gun, and at the same time B walks in front of the gun and A's bullet strikes and kills B, A has committed the voluntary act of pulling the trigger, regardless of whether he intended to kill B.[30] By simply pulling the trigger, A wills his bodily movement and thereby engages in a voluntary act.[31] But a voluntary act also encompasses a level of awareness and not only the physical act.[32] Actually, the law *assumes* a level of awareness on behalf of the actor and a capability on behalf of the actor to will and control his actions, or refrain from acting.[33] Thus, when A pulls the trigger, an assumption exists that A chose to pull the trigger because of A's capability to control his action.[34]

Difficulties in defining voluntariness have led some authorities to define voluntariness negatively, by stating what actions do not constitute a voluntary act.[35] For example, if the defendant causes harm due to reflexes, convulsions, or while sleeping, a voluntary act has not been committed because these actions are not a "product" of the defendant's mind.[36] To illustrate, in *Martin v. State*, the prosecutor charged Martin with appearing intoxicated in public; however, the arresting police officers "forcibly" carried the intoxicated Martin to a public area.[37] Consequently, the Alabama Court of Criminal Appeals reversed Martin's case because the manifestation of his drunkenness in public resulted from the

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768 F.2d 122, 126 (Ohio 1985) (discussing that "[r]eflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's *volition*, are involuntary acts" (emphasis added)).

[29] HAW. REV. STAT. ANN. § 702-200, cmt. (West 2008) (stating the "minimum basis for the imposition of penal liability . . . includes a voluntary act or voluntary omission"); *see also supra* note 27 and accompanying text.

[30] DRESSLER ET AL., *supra* note 26, at 133 n.5.

[31] *See id.*; *see also supra* notes 26–30 and accompanying text.

[32] Nita A. Farahany & James E. Coleman, Jr., *Genetics and Responsibility: To Know the Criminal from the Crime*, 69 LAW & CONTEMP. PROBS. 115, 142 (2006).

[33] *Id.* (emphasis added).

[34] *See supra* notes 28–33; *see also* ARIZ. REV. STAT. ANN. § 13-105(41) (defining a voluntary act as "a bodily movement performed consciously and as a result of effort and determination"); KY. REV. STAT. ANN. § 501.010 (Banks-Baldwin 2008) (stating "voluntary act means a bodily movement performed consciously as a result of effort or determination").

[35] *See infra* notes 36–39 and accompanying text.

[36] *See, e.g.*, MODEL PENAL CODE § 2.01(2) (West 2008) (defining what are not voluntary bodily movements: "(a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual").

[37] 17 So. 2d 427, 427 (Ala. Ct. App. 1944).

police officers carrying him there and not from Martin's voluntary determination to appear in public.[38] As a result, if the accused does not act voluntarily, he acts due to "compulsion" and not from individual choice or control.[39]

*Jury Instructions on Voluntary Act*

According to existing practice in Wyoming, courts generally do not instruct juries on a voluntary act.[40] To illustrate this point, one need only look at the Wyoming Criminal Pattern Jury Instructions.[41] It becomes evident that almost none of the pattern instructions require proof of a voluntary act.[42] No requirement exists for trial courts to use the Wyoming Criminal Pattern Jury Instructions.[43] However, the pattern instructions and court precedent "advise" the courts and practitioners in how to carefully draft jury instructions, and thereby correctly instruct the jury.[44]

The pattern instructions show existing practice in Wyoming.[45] For instance, the Wyoming Supreme Court established aggravated homicide by vehicle as a general intent crime.[46] In reviewing the Wyoming Criminal Pattern Jury Instruction on aggravated homicide by vehicle, the pattern instructions make no mention of a voluntary act.[47] Similarly, the court recognized aggravated assault and battery with a deadly weapon as a general intent crime.[48] The pattern instructions do not mention voluntary act as an essential element.[49] In other words, for most general intent crimes, such as escape, the jury instructions do not mention voluntary act as an essential element on which the trial judge must instruct.[50]

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[38] *Id.*

[39] Farahany & Coleman, *supra* note 32, at 143 (citing United States v. Moore, 486 F.2d 1139, 1179 (D.C. Cir. 1973)).

[40] WYOMING PATTERN JURY INSTRUCTIONS (CRIMINAL) (2004).

[41] *Id.*

[42] *Id.*

[43] Reilly v. State, 55 P.3d 1259, 1267 n.7 (Wyo. 2002).

[44] Tanner v. State, 57 P.3d 1242, 1248 (Wyo. 2002).

[45] *See infra* note 46–50 and accompanying text.

[46] Fleske v. State, 706 P.2d 257, 260 (Wyo. 1985).

[47] WYOMING PATTERN JURY INSTRUCTIONS (CRIMINAL) § 21.06B3 (2004).

[48] Streitmatter v. State, 981 P.2d 921, 924 (Wyo. 1999).

[49] WYOMING PATTERN JURY INSTRUCTIONS (CRIMINAL) § 25.02B (2004).

[50] WYOMING PATTERN JURY INSTRUCTIONS (CRIMINAL) § 52.06A (2004); *see also supra* notes 41–49.

*Why Courts Do Not Instruct on Voluntariness*

Generally, courts do not instruct on voluntariness, *sua sponte*, because the issue is simply not disputed.[51] In essence, the issue of voluntariness is not litigated unless the defendant "injects" it into the case.[52] The Wyoming Supreme Court recognized this concept in *Brooks v. State*, in which the court acknowledged insanity as an affirmative defense requiring the defendant to inject the issue of voluntariness into the case.[53] The best explanation for why courts generally do not instruct, *sua sponte*, on a voluntary act is the existence of a *presumption of voluntariness*.[54] This presumption rests on the proposition that human beings have a certain level of "control over their behavior" and causing an action arises from exercising this control.[55] As the Wyoming Supreme Court acknowledged in *Polston v. State*, every man is presumed normal and in possession of "ordinary faculties" unless the defendant proves otherwise.[56] Therefore, on the basis of the prosecution's proof of the prohibited act, the jury presumes the defendant decided to engage in this act because of the defendant's inherent ability to control his behavior and act voluntarily.[57]

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[51] *Mooney*, 105 P.3d at 155. *Sua sponte* means "[w]ithout prompting or suggestion; on its own motion." BLACK'S LAW DICTIONARY 1192 (8th ed. 2005). Thus, in this context, the judge does not automatically instruct the jury on a voluntary act without any prompting or suggestion from either of the parties. *Mooney*, 105 P.3d at 155.

[52] Baird v. State, 604 N.E.2d 1170, 1176 (Ind. 1992) (reasoning "[i]n most cases there is no issue of voluntariness and the State's burden is carried by proof of commission of the act itself"); *see also* HAW. REV. STAT. ANN. § 702-200 cmt. (West 2008) (stating that "[generally,] the issue of whether the defendant's conduct includes a voluntary act or a voluntary omission will not be separately litigated. . . . [I]nvoluntariness [is] a defense, [and] puts the ultimate burden on the defendant to inject that issue into the case").

[53] 706 P.2d 664, 667 (Wyo. 1985) (stating "[m]ental illness or deficiency is an affirmative defense which relieves an accused of responsibility for the crime he committed").

[54] *See, e.g.*, Walker v. State, 652 P.2d 88, 91 (Alaska 1982) (articulating "[t]he law assumes that every person intends the natural consequences of his voluntary acts"); *see also infra* notes 55–75 and accompanying text.

[55] Farahany & Coleman, *supra* note 32, at 139 n.174. Stating

> [c]riminal law provides that a criminal act may be attributed to the accused (and therefore "voluntary") by making two presuppositions: first, individuals have control over their behavior (legal free will), and second, a human agent causes the actions he performs by the exercise of his capacities and control. Thus, one can infer a defendant chose to act from proof that he engaged in the prohibited act. Because criminal law allows this inference, the question whether the defendant engaged voluntarily in an act does not usually arise.

*Id.*

[56] 685 P.2d 1, 6 (Wyo. 1984).

[57] *Id.*

For example, Illinois defines armed robbery as a general intent crime and this crime is proven if the evidence establishes an inference that "the prohibited result" came about because of the defendant's voluntary act.[58] But, the state does not have to independently prove voluntariness.[59] The state simply presents evidence that the defendant engaged in the prohibited act, by taking the victim's belongings, along with other facts sufficient for the court to conclude that an armed robbery took place.[60] Unless there is any evidence to the contrary, the fact finder may then infer that the defendant committed a voluntary act.[61] Similarly, Alaska defines rape as a general intent crime, which requires proof of a voluntary act.[62] Here, the state meets its burden if it proves the prohibited act—forced intercourse against the victim's will—and the state need not independently prove voluntariness.[63] Except where the evidence raises any issue to the contrary, the jury may infer the defendant intended all the consequences resulting from his voluntary act.[64] Therefore, unless the defendant raises the issue of voluntariness and introduces some relevant evidence to rebut the presumption, the defendant does not get an instruction, *sua sponte*, on voluntariness.[65]

Difficulties arise when courts try to distinguish between essential elements and presumed facts; yet, not all fundamental conditions to criminal liability are essential elements.[66] For example, in *Clark v. Arizona* the United States Supreme Court held that sanity, a fundamental condition to criminal liability, is presumed and does not constitute an essential element.[67] *Clark* established both a presumption of sanity and allowed the presumption of a fundamental condition to criminal liability.[68] The Wyoming Supreme Court likewise allows for the presumption of sanity and expressly rejects mental responsibility as an essential

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[58] People v. Jamison, 756 N.E.2d 788, 801 (Ill. 2001).

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Walker*, 652 P.2d at 91.

[63] *Id.*

[64] *Id.*

[65] *Mooney*, 105 P.3d at 154–55 (holding the defendant did not raise the issue of voluntariness and nothing in the record entitled the defendant to an automatic instruction on voluntariness); Brown v. State, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997) (holding the jury shall be charged on the issue of voluntariness only when admitted evidence raises the issue of voluntariness and the defendant requests the charge); State v. Lara, 902 P.2d 1337, 1338 (Ariz. 1995) (holding the defendant not entitled to a jury instruction on voluntary act because nothing in the evidence indicated any involuntary bodily movements).

[66] *See infra* notes 67–75 and accompanying text.

[67] Clark v. Arizona, 548 U.S. 735, 766 (2006) (stating "[t]he presumption of sanity is equally universal in some variety or other, being (at least) a presumption that a defendant has the capacity to form the mens rea necessary for a verdict of guilt and the consequent criminal responsibility").

[68] *Id.*

element.[69] Thus, while sanity, and the actor's capability to act voluntarily, remains a fundamental condition to the imposition of liability, the Wyoming Supreme Court held sanity is not an essential element, but a presumption.[70]

To further stress this point, several jurisdictions, including Wyoming, allow a defendant to raise the affirmative defense of "unconsciousness" or "automatism."[71] Here, the court presumes consciousness when the accused commits the criminal act, and, if the accused wants the jury to know otherwise, he must raise the affirmative defense of unconsciousness.[72] As the Wyoming Supreme Court stated in *Fulcher v. State*, the defense of unconsciousness or automatism exists because a defendant, who performs actions unconsciously, performs these actions involuntarily.[73] But, unless the defendant invokes the unconsciousness defense, a presumption of consciousness and voluntariness remains.[74] In effect, courts have repeatedly rejected consciousness as an essential element, but clearly view consciousness and voluntariness as fundamental conditions to criminal liability.[75]

*Defendant Must Raise Voluntariness as a Defensive Issue*

A presumption, such as the voluntary act presumption, shifts the burden of proof to the defendant.[76] Under the burden of proof, the defendant carries the burden of production, which means he must produce enough evidence on

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[69] *Brooks*, 706 P.2d at 667. Stating:

> Mental responsibility is not an element of the offense charged. [Mental responsibility] is an issue separate and apart from the essential element of the criminal intent. Mental illness or deficiency is an affirmative defense which relieves an accused of responsibility for the crime he committed. Requiring the accused to prove the affirmative defense of mental illness or deficiency does not constitute a shifting of the burden of proof to the accused to disprove an essential element of the crime charged.

*Id.*

[70] *Id.*

[71] *See, e.g.*, People v. Nihell, 77 P. 916 (Cal. 1904) (recognizing the unconsciousness defense); Polston v. State, 685 P.2d 1 (Wyo. 1984) (recognizing the unconsciousness defense); State v. Caddell, 215 S.E.2d 348 (N.C. 1975) (recognizing the unconsciousness defense).

[72] *Nihell*, 77 P. at 917 (stating "[m]en are presumed to be conscious when they act as if they were conscious, and if they would have the jury know that things are not what they seem they must impart that knowledge by affirmative proof"); *see also Polston*, 685 P.2d at 6 (holding a person who raises this defense "is presumed to be a person with a healthy mind [and] the burden is on the defendant who raises the defense of automatism to prove the elements necessary to establish the defense"); *Caddell*, 215 S.E.2d 348, 363 (holding the presumption that the defendant committed the act voluntarily applies to the consciousness defense and "the burden rests upon the defendant to establish this defense").

[73] 633 P.2d 142, 145 (Wyo. 1981).

[74] *See, e.g.*, *Polston*, 685 P.2d at 6; *Nihell*, 77 P. at 917; *Caddell*, 215 S.E.2d at 363.

[75] *See supra* notes 71–74 and accompanying text.

[76] JOHN W. STRONG ET. AL., MCCORMICK ON EVIDENCE § 343, at 520 (5th ed. 1999).

the disputed issue to satisfy the judge, or the defendant carries the burden of persuasion and must persuade the judge or jury regarding the correctness of a disputed fact.[77] A presumption may assign both burdens.[78] After the defendant meets his burden of proof the burden shifts to the opposing party to prove the nonexistence of the particular fact.[79]

According to required procedure for an affirmative defense in Wyoming, a defendant must introduce some evidence before he receives a jury instruction on the defensive issue.[80] Also, the defendant must request an instruction from the court.[81] Since courts do not ordinarily instruct the jury on the requirement of a voluntary act, but instead presume the defendant's actions are voluntary, one may infer the defendant bears the burden of proof with respect to this issue.[82] Thus, at a minimum, the defendant must raise the issue of voluntariness and must introduce some evidence, to the satisfaction of the judge, disputing the voluntariness of his act; otherwise, the defendant does not get an automatic jury instruction on voluntariness.[83]

*The Constitutionally Permissible Allocation of Proof*

Requiring the defendant to raise the issue of voluntariness as an affirmative defense is constitutionally permissible.[84] Certainly, the prosecution must prove all facts that constitute the crime, but the prosecution need not prove every fact that might affect "culpability or severity of punishment."[85] Accordingly, the burden of proof regarding a particular issue may shift from the state to the defendant.[86]

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[77] *Id.* § 336, at 508.

[78] *Id.* § 343, at 520.

[79] *Id.* § 342, at 518.

[80] Ortega v. State, 966 P.2d 961, 964 (Wyo. 1998). If a defendant wants a jury instruction on a defensive issue, he must timely submit a jury instruction that "correctly states the law and is supported by the evidence." *Id.* Furthermore, statutes or case law must recognize the defense in the jurisdiction. Bouwkamp v. State, 833 P.2d 486, 490 (Wyo. 1992).

[81] *Ortega*, 966 P.2d at 964.

[82] *See supra* notes 51–81 and accompanying text.

[83] *See, e.g.*, *Brooks*, 706 P.2d at 667; *Polston*, 685 P.2d at 6; *see also* Angelo v. State, 977 S.W.2d 169, 178 (Tex. App. 1998) (reasoning that "when the accused voluntarily engages in conduct that includes a bodily movement sufficient for the gun to discharge a bullet, '*without more—such as a precipitation by another individual*,' a jury need not be charged on the voluntariness of the accused's conduct") (quoting George v. State, 681 S.W.2d 43, 47 (Tex. Crim. App. 1884)); State v. Sparks, 68 S.W.3d 6, 12 (Tex. App. 2001) (stating a defendant is entitled to an instruction on voluntariness when "warranted by the evidence").

[84] Patterson v. New York, 432 U.S. 197, 205–06 (1977) (holding that shifting the burden of proof of an affirmative defense to the defendant is consistent with due process so long as the State has the burden of proving "beyond a reasonable doubt 'every fact necessary to constitute the crime with which [the defendant was] charged.'").

[85] *Id.* at 204, 207.

[86] *Id.* at 203 n.9 (citing WIGMORE, EVIDENCE, Vol. 5, §§ 2486, 2512).

While the prosecution bears the burden of proof regarding every essential element of the crime charged, the defendant carries the burden of proving an affirmative defense.[87] However, a presumption cannot shift the burden of proof to the extent that it places upon the defendant the burden of proving, or disproving, an essential element of the crime as defined by the legislature.[88] Rather, the affirmative defense must be a "separate issue" where the accused carries the burden of proof.[89]

To illustrate, the North Carolina Court of Appeals, in *State v. Jones*, upheld the constitutionality of forcing the defendant to raise voluntariness as a defensive issue.[90] In that case, Jones challenged the jury instructions arguing they required him to disprove the voluntariness of his acts, thereby relieving the state of its burden to prove an essential element of the crime.[91] Specifically, Jones argued the trial court erred when it instructed the jury that the defendant had the burden of establishing the unconsciousness defense.[92] In support of his argument, Jones argued the court should apply the holding of *Mullaney v. Wilbur*, in which the United States Supreme Court held it unconstitutional to place the burden on the defendant to disprove an essential element.[93]

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[87] *Proof Issues*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 652, 657 (2008).

[88] *Patterson*, 432 U.S. at 208. In this case, the state charged Patterson under a New York statute which did not have malice aforethought as "an element of the crime," but permitted "a person accused of murder to raise an affirmative defense that he 'acted under the influence of extreme emotional disturbance.'" *Id.* at 198. The New York Court of Appeals upheld the constitutionality of the New York statute because it did not require the defendant to disprove an essential element; rather, it simply allowed the defendant to raise an affirmative defense. *Id.* at 201. The United States Supreme Court affirmed the holding because once the state proves all essential elements "beyond a reasonable doubt" the defendant may then raise an affirmative defense as long as the defense "does not serve to negative any facts of the crime which the State is to prove in order to convict of murder." *Id.* at 201, 206–07. Consequently, *Patterson* stands for the proposition that "essential elements" just means those identified by the legislature as elements of the offense and something is not an element of the offense unless the legislature makes it one. *Id.*

[89] *Id.* at 207. Yet, no violation of due process exists simply because evidence used to prove an affirmative defense also shows the existence or nonexistence of an essential element as long as the state still has the ultimate burden of proof regarding that element. *Proof Issues*, *supra* note 87, at 657 (citing Martin v. Ohio, 480 U.S. 228, 234 (1987)).

[90] 527 S.E.2d 700 (N.C. Ct. App. 2000).

[91] *Id.* at 706.

[92] *Id.*

[93] *Id.* (citing Mullaney v. Wilbur, 421 U.S. 684 (1975)). In *Mullaney*, the state charged the defendant under a statute which required the defendant to prove that "he acted in the heat of passion on sudden provocation in order to reduce the murder [charge] to manslaughter." *Mullaney*, 421 U.S. at 688–91. The Court reasoned that since malice aforethought was "a critical fact in dispute" it would be unconstitutional to place the burden on the defendant to disprove malice by showing that he acted in the heat of passion upon sudden provocation. *Id.* at 701, 703. On the contrary, due process "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation" and the Court ultimately held that "it was unconstitutional for a state to require a defendant to negate a required element of an offense." *Id.* at 704, 707.

The North Carolina Court of Appeals disagreed and distinguished the issue in Jones' case from *Mullaney* because the prosecution still had the burden of proving all essential elements of the crime charged.[94] Therefore, the jury instructions did not require Jones disprove an essential element; rather, they merely required that he raise an affirmative defense to overcome the presumption of the voluntariness of his acts.[95] Since a voluntary act is not an essential element, it is constitutionally permissible to place the burden on the defendant to prove the involuntariness of his actions and the trial court can instruct the jury to that effect.[96]

## PRINCIPAL CASE

On June 2, 2004, Brian Seymore did not return to the Frontier Corrections System as required and such a violation constituted escape.[97] Seymore recognized his violation and tried to turn himself in; however, the jail declined to take him without an arrest warrant.[98] Eventually, authorities arrested and charged Seymore with escape and a jury subsequently convicted Seymore.[99]

### *Majority Opinion (Chief Justice Voigt, joined by Justices Kite and Burke)*

The issue on appeal for the Wyoming Supreme Court turned on whether the trial judge "misinformed" the jury regarding the intent element of escape.[100] Seymore alleged error occurred because the trial judge did not instruct the jury as to the essential element of *mens rea*.[101] Specifically, Seymore argued the trial court erred when it failed to instruct the jury on the specific intent necessary for the crime of escape.[102] The court held the trial judge incorrectly informed the jury regarding the *mens rea* element of escape and subsequently reversed and remanded for new trial.[103]

First, the court reviewed this case under the plain error standard because Seymore did not object to the jury instructions at trial.[104] Second, the court addressed Seymore's argument that escape was a specific intent crime and rejected

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[94] *Jones*, 527 S.E.2d at 707.

[95] *Id.* at 706–07.

[96] *See supra* notes 84–95 and accompanying text.

[97] Seymore v. State, 152 P.3d 401, 403 (Wyo. 2007).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 405.

[102] *Seymore*, 152 P.3d at 405.

[103] *Id.* at 411.

[104] *Id.* at 404; *see also* note 10 and accompanying text (explaining the plain error standard).

the argument because previous cases established escape as a general intent crime.[105] As a result, the court found the non-instruction on the specific intent element correct.[106] Nevertheless, the court held the jury instructions insufficient because, even for a general intent crime, the state must prove the voluntariness of the actor's criminal conduct.[107]

In its reasoning, the court recognized *mens rea* as an essential element to almost every crime charged, and since the court equated voluntariness with *mens rea*, an actor is not criminally responsible for his actions unless the state proves he acted voluntarily.[108] Therefore, the *Seymore* court found instructing a jury on the voluntary act requirement as paramount; otherwise, the trial court commits reversible error.[109] Read broadly, this holding implies that a trial judge must now instruct on a voluntary act in each and every case, and if it does not, the case is subject to reversal.[110]

Although the holding on the first issue required reversal, the Wyoming Supreme Court also addressed a second issue which turned on whether the prosecutor committed prosecutorial misconduct.[111] Seymore alleged nine such instances and the court found the "cumulative effect" of these instances also required reversal.[112]

*Dissenting Opinion (Justice Hill)*

Justice Hill's analysis began by recognizing no argument of voluntariness appeared in Seymore's brief; consequently, the court raised the issue for Seymore and framed his argument on appeal.[113] The dissent noted that, as a general rule, the court should not define the scope of the appellant's argument nor raise an issue for him; on the contrary, the defendant himself must meet this obligation.[114] As Justice Hill argued, Seymore neglected to establish and argue the issue of

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[105] *Seymore*, 152 P.3d at 406 (citing Slaughter v. State, 629 P.2d 481, 483 (Wyo. 1981)).

[106] *Id.*

[107] *Id.* (quoting Rowe v. State, 974 P.2d 937, 939 (Wyo. 1999)).

[108] *Id.* at 405–06.

[109] *Id.* at 407. A fundamental error, which requires reversal, occurs when the trial judge does not instruct the jury as to all the essential elements of the crime charge. *Id. But see supra* note 18 and accompanying text (discussing that the defendant must now also show prejudice before a reversal is warranted).

[110] *Seymore*, 152 P.3d at 407.

[111] *Id.* at 403, 407.

[112] *Id.* at 407–11. The discussion of prosecutorial misconduct is not part of this case note and will not be addressed.

[113] *Id.* at 411 (Hill, J., dissenting).

[114] *Id.* (Hill, J., dissenting) (citing Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring)).

voluntariness on appeal, which forfeits "any claim of error."[115] Therefore, the court overstepped its boundaries when it framed the issue for Seymore on appeal.[116]

*Dissenting Opinion (Justice Golden)*

In a second dissenting opinion, Justice Golden disagreed with the majority and argued the statute defines a strict liability crime and not a general intent crime.[117] Justice Golden argued the legislature purposely created the escape statute without including a *mens rea* element.[118] To support this argument, Justice Golden referred to a different statute which requires a showing of intentional conduct in its definition of "escape from a work release program."[119] Therefore, according to Justice Golden, the statute applicable to Seymore's case defines a strict liability crime; otherwise, the legislature would have included an intentional act as it did with the other escape statute.[120] Justice Golden concluded that the trial judge correctly barred a jury instruction on *mens rea* as an essential element of the crime of escape.[121]

## ANALYSIS

The Wyoming Supreme Court erroneously held that trial judges must automatically instruct juries on a voluntary act.[122] This section will discuss several arguments in support of the proposition that the court erred in its holding and will articulate why trial judges usually do not instruct a jury, *sua sponte*, on a voluntary act.[123] First, a presumption of voluntariness exists and the court disregarded its own precedent establishing this presumption.[124] Second, a presumption of voluntariness shifts the burden of proof to the defendant; however, nothing in the record indicates Seymore introduced any evidence alleging his actions were involuntary.[125] Lastly, it makes sense not to instruct jurors, *sua sponte*, on a voluntary act because such an instruction causes great jury confusion.[126]

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[115] *Seymore*, 152 P.3d at 411 (Hill, J., dissenting).

[116] *Id.* (Hill, J., dissenting).

[117] *Id.* (Golden, J., dissenting).

[118] *Id.* (Golden, J., dissenting).

[119] *Id.* (Golden, J. dissenting) (arguing Wyoming Statute § 7-16-309 "defines an escape from a work release program to require an 'intentional act'").

[120] *Seymore*, 152 P.3d at 411 (Golden, J. dissenting).

[121] *Id.* (Golden, J., dissenting).

[122] *See infra* notes 127–68 and accompanying text.

[123] *Id.*

[124] *See infra* notes 127–40 and accompanying text.

[125] *See infra* notes 141–51 and accompanying text.

[126] *See infra* notes 152–68 and accompanying text.

*Presumption of Voluntariness Exists*

Defendants continuously try to argue the burden is on the state to prove they acted voluntarily.[127] Nevertheless, several jurisdictions recognize that even though a voluntary act is a minimum requirement for the imposition of criminal liability, a jury may infer the voluntariness of the defendant's actions.[128] Unless there is evidence to the contrary, the defendant does not receive an instruction on voluntariness.[129] Yet, the *Seymore* court found instructing a jury on the voluntary act requirement essential to withstand a conviction because the court equated voluntariness with an essential element.[130] This is clearly erroneous considering the vast amount of authority rejecting voluntariness as an essential element.[131] Indeed, the court even ignores its own precedent which allows for the presumption of voluntariness.[132]

For example, *Brooks v. State* allows for a presumption of sanity and places upon the defendant the burden to prove his actions were involuntary.[133] *Polston v. State* specifically states every man is presumed "normal" and in possession of ordinary sense and a defendant who raises an involuntariness defense must prove otherwise.[134] Furthermore, *Fulcher v. State* allows the presumption of voluntariness and places the burden on the defendant to prove he acted involuntarily by asserting the defense of unconsciousness.[135] In short, Wyoming precedent allows for the presumption of voluntariness and requires the defendant raise the involuntariness defense.[136] No doubt, *Seymore* contradicts the proposition that previous cases allow

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[127] State v. Lara, 902 P.2d 1337, 1338–39 (Ariz. 1995); State v. Baird, 604 N.E.2d 1170, 1176 (Ind. 1992); Mooney v. State, 105 P.3d 149, 154–55 (Alaska Ct. App. 2005).

[128] Walker v. State, 652 P.2d 88, 91 (Alaska 1982); People v. Jamison, 756 N.E.2d 788, 801 (Ill. 2001); *Baird*, 604 N.E.2d at 1176.

[129] Polston v. State, 685 P.2d 1, 6 (Wyo. 1984); Fulcher v. State, 633 P.2d 142, 147 (Wyo. 1981); Brooks v. State, 706 P.2d 664, 667 (Wyo. 1985) (recognizing the insanity defense); *Lara*, 902 P.2d at 1338; *Baird*, 604 N.E.2d at 1176; *Mooney*, 105 P.3d at 154–55; *Walker*, 652 P.2d at 91.

[130] Seymore v. State, 152 P.3d 401, 407 (Wyo. 2007).

[131] *See, e.g.*, Farahany & Coleman, *supra* note 32, at 139 n.174 (articulating the criminal law allows the inference that individuals can control their behavior and causes their actions "by the exercise of [their] capacities and control. Thus, one can infer a defendant chose to act from proof that he engaged in the prohibited act. Because criminal law allows this inference, the question whether the defendant engaged voluntarily in an act does not usually arise"); Clark v. Arizona, 548 U.S. 735, 766 (2006) (allowing for the presumption of sanity); *Mooney*, 105 P.3d at 154–55 (holding a voluntary act fundamental to criminal liability, but the defendant must raise the issue; otherwise, no jury instruction is given).

[132] *See infra* notes 133–36 and accompanying text.

[133] 706 P.2d at 667.

[134] 685 P.2d at 6.

[135] 633 P.2d at 145, 147.

[136] Eric A. Johnson, *The Crime That Wasn't There: Wyoming's Elusive Second-Degree Murder Statute*, 7 WYO. L. REV. 1, 13–20 (2007) (articulating a presumption of voluntariness and stating

for the presumption of voluntariness; yet, the *Seymore* court, without discussing or explicitly overruling these cases, implicitly held a voluntary act as an essential element to every crime charged.[137]

When the Wyoming Supreme Court reviews jury instructions on appeal, with no objection given at trial, the court will uphold the jury instructions as long as the trial court correctly presented the law to the jurors and included in the instructions all relevant issues introduced at trial.[138] According to previous discussion, established law in Wyoming prior to *Seymore* required the defendant to raise the issue of voluntariness and the defendant did not automatically get a jury instruction on voluntariness.[139] In this regard, the trial judge in *Seymore* did not commit plain error and the trial judge gave the jury adequate instructions because no requirement existed, *sua sponte*, to instruct the jurors on a voluntary act.[140]

*Presumption of Voluntariness Shifts the Burden of Proof*

Another argument supporting the proposition that the Wyoming Supreme Court incorrectly decided *Seymore* arises from the fact that a presumption shifts the burden of proof.[141] This means the defendant must raise an affirmative defense and, at the very least, produce some evidence.[142] In *Seymore*, the statute relevant to the crime charged does not mention a voluntary act; subsequently, voluntariness is neither statutorily defined as an essential element, nor as a statutory defense.[143] Accordingly, one must assume the legislature intended to retain the common law defense of involuntariness.[144] In these cases, a presumption of voluntariness exists and the Wyoming Supreme Court has allocated at least the burden of production,

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"the Wyoming courts impose on the defendant the burden of raising the 'defense' of involuntariness and the burden of proving by a preponderance of the evidence that his acts were performed involuntarily").

[137] *Seymore*, 152 P.3d at 406–07; *see also supra* notes 12–17, 108–10 and accompanying text (articulating the Wyoming Supreme Court recognizes *mens rea* as an essential element to almost every crime charged, and since the court equates voluntariness with *mens rea*, an actor is not criminally liable for his actions unless the state proves he acted voluntarily). Therefore, *Seymore* implicitly stands for the proposition that trial courts must now instruct on a voluntary act in each and every case because, according to the court, voluntariness is an essential element. *Seymore*, 153 P.3d at 406–07.

[138] *Seymore*, 152 P.3d at 404.

[139] *See supra* notes 133–36 and accompanying text.

[140] *Id.* As already articulated, cases such as *Brooks*, 706 P.2d at 667, *Polston*, 685 P.2d at 6, and *Fulcher*, 633 P.2d at 145, 147, allow for the presumption of voluntariness and place the burden on the defendant to raise the issue of voluntariness in order to receive a jury instruction. *Id.*

[141] STRONG ET. AL., *supra* note 76, § 343, at 520.

[142] *Id.* § 336, at 508.

[143] *See supra* note 7 and accompanying text.

[144] WYO. STAT. ANN. § 6-1-102(b) (West 2008) (stating "[c]ommon law defenses are retained unless otherwise provided by this act").

and sometimes the burden of persuasion, in regard to the voluntariness defense.[145] Thus, according to Wyoming, and other jurisdictions, the defendant bears at least the burden of production on the issue of voluntariness before he receives a jury instruction.[146] However, no indication appeared from the record that Seymore argued the involuntariness of his bodily movements nor did he introduce any evidence at trial on the matter.[147]

Additionally, nothing in the record indicated Seymore failed to return to FCS involuntarily.[148] No evidence emerged that Seymore failed to return to FCS due to a car accident, disabling injuries, or a natural misfortune such as being tied down or drugged.[149] Nonetheless, the court injected the issue of voluntariness, contrary to precedent, and thereby framed the issue for Seymore.[150] This is certainly inconsistent with prior decisions and creates unpredictability for future litigation as to who injects the issue of voluntariness: the defendant, the state, or the court?[151]

*Automatic Jury Instruction on Voluntariness May Cause Confusion*

A final argument supporting the position that the Wyoming Supreme Court erred in its holding arises from the notion that an automatic instruction on a voluntary act causes jury confusion.[152] For example, in *People v. Bui*, the Appellate Court of Illinois held the lower court properly denied a jury instruction requiring an instruction on a voluntary act, because little evidence indicated the defendant acted involuntarily. [153] Furthermore, the disputed issue at trial did not center on voluntariness, so the proposed jury instructions would have only contributed to jury confusion because of the uncertain significance of including voluntariness in the instructions.[154] In other words, if the defendant does not raise the issue of

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[145] *Id.*; *see e.g.*, *Polston*, 685 P.2d at 6 (placing the burden on the defendant to prove the defense); *Brooks*, 706 P.2d at 667 ("requiring the accused to prove the affirmative defense of mental illness or deficiency"); *Fulcher*, 633 P.2d at 147 (holding "the burden rests upon the defendant to establish this defense").

[146] *See, e.g.*, *Brooks*, 706 P.2d at 667; *Fulcher*, 633 P.2d at 147; *Mooney,* 105 P.3d at 155; Brown v. State, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997); State v. Jones, 527 S.E.2d 700 (N.C. Ct. App. 2000).

[147] *Seymore*, 152 P.3d at 411 (Hill, J., dissenting).

[148] *Id.* at 403–05.

[149] *Id.*

[150] *Id.* at 411 (Hill, J., dissenting) (arguing there was no indication from the record that Seymore raised the issue of voluntariness).

[151] *See supra* notes 141–50 and accompanying text.

[152] *See infra* notes 153–68 and accompanying text.

[153] 885 N.E.2d 506, 531 (Ill. App. Ct. 2008).

[154] *Id.*

voluntariness himself, the jurors likely become confused as to why they have to consider the issue at all.[155]

The Alaska Court of Appeals came to a similar conclusion in *Nelson v. State*.[156] In that case, the jury instruction given at trial turned on whether the defendant recklessly caused the result of an assault.[157] On appeal, Nelson objected to this instruction because the trial judge did not require a finding that Nelson engaged in the conduct "knowingly."[158] Thus, according to Nelson, not only should the state have proved her recklessness in causing the result, but the state also should have proved she acted knowingly or voluntarily.[159]

In its brief, the prosecution agreed that the assault statutes, which charged Nelson for her criminal conduct, contained the implied "requirement" that the conduct be undertaken knowingly or voluntarily.[160] However, the state argued a separate instruction on voluntariness was unnecessary, because by determining recklessness the jury also determines a sequence of acts including the defendant's awareness and voluntariness of these acts.[161] Any further instruction on recklessness would have only served to confuse the jurors because they understood the "everyday use" and ordinary meaning of the word reckless.[162] The Alaska Court of Appeals agreed and upheld the instructions given at trial.[163] The court reasoned that since the issue turned on whether Nelson recklessly caused the result, jurors "will approach their task correctly if they are told the statutory meaning of . . . recklessly."[164]

The concept of voluntariness appears difficult even for judges, practitioners, and commentators to understand; therefore, it is unfair to expect jurors to understand voluntariness. Furthermore, without some conduct to attach

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[155] *Id.*

[156] 927 P.2d 331 (Alaska Ct. App. 1996). In that case, Nelson went to a Sears store to satisfy her "compulsive urge to shoplift." *Id.* at 331. A security guard (Davis) followed Nelson and her companion (Matthews) into the parking lot where he confronted Nelson. *Id.* at 332. A scuffle arose and another security guard (Jasso) arrived at the scene to help out Davis. *Id.* Nelson decided to get in her truck; she put her truck in drive and after three attempts of driving towards the men, she finally succeeded in running over Jasso, causing bodily injury, and, at the same time, causing Davis to fear for his life. *Id.*

[157] *Id.* at 333.

[158] Brief for Appellee at 11, Nelson v. Alaska, 927 P.2d 331 (Alaska Ct. App. 1996) (No. A–5688).

[159] *Id.*

[160] *Id.*

[161] *Id.* at 12.

[162] *Id.* at 13–14.

[163] *Nelson*, 927 P.2d at 334.

[164] *Id.* at 333–34, 334 n.4.

voluntariness to, the jury will likely be confused as to what conduct it has to find voluntary or involuntary.[165] Additionally, how does that conduct interact with the requisite mental state such as recklessness?[166] As becomes evident from the state's brief in *Nelson*, the jury already considers a sequence of acts and uses common sense to determine the voluntariness of these acts.[167] Therefore, a separate jury instruction on voluntariness is unnecessary.[168]

## CONCLUSION

The Wyoming Supreme Court erred in holding that juries must automatically be instructed on a voluntary act.[169] In deciding *Seymore*, the Wyoming Supreme Court passed down a landmark decision because it dramatically changes existing practice of not instructing jurors on a voluntary act in the State of Wyoming.[170] Furthermore, *Seymore* will undoubtedly cause great impairment because of its likelihood to confuse judges, practitioners and jurors alike.[171] Unfortunately, this fundamental change in Wyoming's criminal law was based on a hasty decision by the Wyoming Supreme Court and the court misspoke when it said a voluntary act is an essential element which requires an automatic jury instruction.[172]

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[165] *Bui*, 885 N.E.2d at 531; *Nelson*, 927 P.2d at 333–34, 334 n.4; Brief for Appellee, *supra* note 158, at 11–14.

[166] *See supra* note 165 and accompanying text.

[167] *See supra* notes 160–62 and accompanying text.

[168] *See supra* notes 152–67 and accompanying text.

[169] *See supra* notes 24–168 and accompanying text

[170] *See supra* notes 127–51 and accompanying text.

[171] *See supra* notes 152–68 and accompanying text.

[172] *See supra* notes 127–51 and accompanying text.

## CASE NOTE

# TORT LAW—Re-writing Wyoming's Co-employee Liability Statute; *Hannifan v. American National Bank of Cheyenne*, 185 P.3d 679 (Wyo. 2008).

*Kara L. Hunter**

## Introduction

On January 22, 2002, Leslie Roy Butts suffered severe injuries while working at the Black Thunder Mine, a coal mine near Gillette, Wyoming.[1] At the time of the accident, Butts worked laying electrical cable in an area of the mine known as the East-West Boxcut.[2] As Butts worked, a large boulder fell from the high wall of the mine and landed on top of the Terra Gator operated by Butts.[3] As a result, Butts sustained severe injuries that rendered him a paraplegic.[4]

The day before Butts's accident, a safety advisor at the mine, Marty Martens, noticed dangerous conditions in the boxcut.[5] In addition to noticing high wall instability, Martens noticed that debris filled the catch benches intended to protect workers by catching rubble dislodged from the high wall and, thus, rendered them ineffective as a protective measure.[6] Martens relayed his concerns to Michael Hannifan, a manager at the Mine.[7] Hannifan and Kevin Hampleman, also a manager at the Mine, went to the boxcut and visually inspected the high walls.[8]

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* Candidate for J.D., University of Wyoming, 2010. I would like to thank Richard Mincer and Richard Schneebeck, of Hirst Applegate, LLP, and Professor Michael Duff for their insight and advice.

[1] Hannifan v. Am. Nat'l Bank of Cheyenne, 185 P.3d 679, 681, 685 (Wyo. 2008). American National Bank appeared in the caption because it served as the conservator of Butts's estate. *Id.* at 681.

[2] *Id.* at 685.

[3] *Id.* A Terra Gator is a piece of heavy equipment used to lay electrical cable. *Id.* Arch Coal, Inc. defines a high wall as "the unexcavated face of exposed overburden and coal in a surface mine or in a face or bank on the uphill side of a contour mine excavation." Arch Coal, Inc., *Mining Terms*, (2008), http://www.archcoal.com/community/miningterms.asp (last visited March 22, 2009).

[4] *Hannifan*, 185 P.3d at 681.

[5] *Id.* at 687.

[6] *Id.* (stating Martens noticed debris filled the catch benches); Brief in Support of Motion for Summary Judgment at 7, Hannifan v. Am. Nat'l Bank of Cheyenne, No. 25736 (Dist. Ct., 6th Judicial Dist., Campbell County, Wyo. 2007) [hereinafter Plaintiffs' Brief] (discussing the purpose of catch benches).

[7] *Hannifan*, 185 P.3d at 686–87. As the Mine's safety manager, Hannifan's responsibilities included identifying dangers and taking action to protect against identified dangers. *Id.* at 686.

[8] *Id.* at 687. As the general mine manager, Hampleman's responsibilities included ensuring the overall functioning of the mine. *Id.*

While Hannifan and Hampleman inspected the area, blasting operations took place.[9] Neither Hannifan nor Hampleman observed the dislodging of any rubble as a result of the blasts.[10] They, therefore, decided to allow mining operations to continue.[11]

Even before Martens expressed his concerns to Hannifan, others had warned both Hannifan and Hampleman of dangerous conditions in the boxcut.[12] Dan Dowdy, also a mine employee, specifically warned Hannifan and Hampleman that dangerous conditions existed in the boxcut after Dowdy narrowly escaped death when a section of the high wall collapsed.[13] Additionally, in the months before Butts's accident, a number of employees submitted written comments complaining of high wall instability and referring to the boxcut as a "death trap" and "death valley."[14] Despite these warnings, neither Hannifan nor Hampleman stopped mining operations in the boxcut prior to Butts's injury.[15]

Following the accident, Butts applied for and received Wyoming Worker's Compensation benefits.[16] The Wyoming Worker's Compensation Act provides:

> The rights and remedies provided in this act . . . are in lieu of all other rights and remedies against any employer . . . or their employees . . . unless the employees intentionally act to cause physical harm or injury to the injured employee.[17]

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[9] Appellants' Brief at 5–6, Hannifan v. Am. Nat'l Bank of Cheyenne, 185 P.3d 679 (Wyo. 2008) (No. S070156).

[10] *Id.*

[11] *Id.*

[12] *See Hannifan*, 185 P.3d at 686–87 (discussing other employees' conversations with Hannifan and Hampleman and written comments delivered to Hannifan).

[13] *Id.* at 686.

[14] Plaintiffs' Brief, *supra* note 6, at 8–9. Employees submitted these comments as part of a safety training course. *Id.* Hannifan received daily reports summarizing the miners written comments. *Id.* at 9. Following Butts's injury, Hannifan ordered his secretary, Emma Barks, to destroy the comments. *Id.* at 18. Hannifan later produced a copy of one of the reports, but Barks identified the report as missing some critical comments. *Id.* at 21. Specifically, the report no longer contained the references to miners calling the pit "death valley" and a "death trap." *Id.*

[15] *See Hannifan*, 185 P.3d at 688 (noting Hannifan and Hampleman decided to continue operations). Both Hannifan and Hampleman stated in their depositions that they possessed the authority to remedy unsafe situations. Plaintiffs' Brief, *supra* note 6, at 16.

[16] Appellants' Brief, *supra* note 9, at 2.

[17] WYO. STAT. ANN. § 27-14-104(a) (2007). By providing injured workers benefits in lieu of all other remedies, the Act effectively provides employers and co-employees immunity from suit, with the exception that co-employees remain liable for intentional acts. *E.g.*, Krier v. Safeway Stores 46, Inc., 943 P.2d 405, 411 n.2 (Wyo. 1997) (citing WYO. STAT. ANN. § 27-14-104 (1997)) (addressing immunity of employers); Franks v. Olson, 975 P.2d 588, 592 n.1 (Wyo. 1999) (citing WYO. STAT. ANN. § 27-14-104(a) (1997)) (addressing immunity of co-employees for all but intentional acts).

Pursuant to the statutory exception, Butts filed suit against Hannifan and Hampleman.[18] Citing Hannifan and Hampleman's failure to halt mining operations or take other corrective action, Butts alleged Hannifan and Hampleman intentionally failed to correct the dangerous conditions they knew existed in the boxcut.[19] At the close of trial, the jury returned a verdict in favor of Butts, and the court entered judgment on the verdict.[20] Hannifan and Hampleman appealed.[21]

On appeal to the Wyoming Supreme Court, Hannifan and Hampleman contended Butts failed to prove that either appellant "intentionally" acted to cause physical harm or injury to Butts.[22] Hannifan and Hampleman also argued the court previously erred when it held, in *Bertagnolli v. Louderback*, that the phrase "intentionally act to cause physical harm" extended co-employee liability for willful and wanton misconduct.[23] The court rejected both arguments and affirmed the judgment of the trial court.[24]

This note evaluates the impact of *Hannifan v. American National Bank of Cheyenne*. First, the background section briefly discusses the history of co-employee liability in Wyoming.[25] Second, the principal case section summarizes the reasoning supporting the court's decision to affirm the judgment in favor of the defendants.[26] Third, the analysis section illustrates the flaws underlying the court's conclusion that Wyoming Statute § 27-14-104(a) extends liability for willful

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[18] *Hannifan*, 185 P.3d at 681. Butts's wife and his two children also filed suit claiming loss of consortium. *Id.* Butts's wife voluntarily dismissed her consortium claim prior to trial. *Id.*

[19] Plaintiffs' Brief, *supra* note 6, at 23 ("Here the undisputed facts demonstrate that these Defendants had knowledge of the dangerous conditions which existed in the east/west boxcut and intentionally in disregard of this risk failed to correct the dangerous conditions.").

[20] *Hannifan*, 185 P.3d at 681–82. The jury found Hannifan 18% at fault, Hampleman 25% at fault, and the Thunder Basin Coal Company ("Thunder Basin") 57% at fault. *Id.* While the court included Thunder Basin on the verdict form, Thunder Basin enjoyed statutory immunity under Wyoming Statute § 27-14-104(a), and, therefore, Thunder Basin was not liable for the portion of fault attributed to it by the jury. *See* WYO. STAT. ANN. § 27-14-104(a). The jury awarded damages totaling $18,000,000 to Butts and $2,000,000 to his minor children. *Hannifan*, 185 P.3d at 682. The trial court reduced the monetary award to reflect only that portion of fault attributed to Hannifan and Hampleman, and entered judgment for Butts in the amount of $7,740,000, and for his children in the amount of $860,000. *Id.*

[21] Appellants' Brief, *supra* note 9, at 3.

[22] *Hannifan*, 185 P.3d at 681.

[23] Appellants' Brief, *supra* note 9, at 3.

[24] *Hannifan*, 185 P.3d at 695.

[25] *See infra* notes 29–68 and accompanying text (tracking the history of workers' compensation in Wyoming).

[26] *See infra* notes 69–88 and accompanying text (discussing the analysis supporting the Wyoming Supreme Court's decision to affirm the judgment in favor of the plaintiffs).

and wanton misconduct.[27] Fourth, this note explains how the court's decision to broaden the exception to co-employee immunity adversely affects both employees and employers in Wyoming.[28]

## BACKGROUND

In 1913, the Wyoming State Legislature took the first step toward the creation of Wyoming's workers' compensation system by amending the Wyoming Constitution.[29] The Legislature believed the enactment of a workers' compensation system required a constitutional amendment because the provision of benefits, in lieu of all other remedies, limited damages in violation of article 10, § 4 of the Wyoming Constitution.[30] The constitutional amendment specifically allowed for the establishment of a workers' compensation fund.[31] Following the amendment, in 1915, the Legislature enacted the "Workmen's Compensation Law."[32]

The Workmen's Compensation Law, as originally enacted, provided immunity from suit to employers contributing to the state fund.[33] While the statute expressly provided immunity from suit only to employers, the Wyoming Supreme Court, nevertheless, extended immunity to co-employees.[34] Co-employees enjoyed

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[27] *See infra* notes 89–135 and accompanying text (explaining why the language of Wyoming Statute § 27-14-104(a) does not extend liability for willful and wanton misconduct).

[28] *See infra* notes 136–42 and accompanying text (addressing the impacts of the court's decisions on both employees and employers in Wyoming).

[29] 1913 Wyo. Sess. Laws 75 (amending article 10, § 4 of the Wyoming Constitution).

[30] Mills v. Reynolds (Mills I), 807 P.2d 383, 389 (Wyo. 1991), *overruled by*, Mills v. Reynolds (Mills II), 837 P.2d 48 (Wyo. 1992), *superseded by statute*, 1993 Wyo. Sess. Laws 68. Prior to amendment, article 10, § 4 of the Wyoming Constitution provided: "No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. Any contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void." WYO. CONST. art. 10, § 4 (amended 1913, 1986, 1988, 2004).

[31] WYO. CONST. art. 10, § 4 (amended 1986, 1988, 2004). The amendment added the following sentence: "As to all extrahazardous employments the legislature shall provide by law for the accumulation and maintenance of a fund or funds out of which shall be paid compensation . . . to each person injured in such employment." *Id.*

[32] 1915 Wyo. Sess. Laws 172.

[33] *Id.* The statute provided: "The right of each employee to compensation from such funds shall be in lieu of and shall take the place of any and all rights of action against any employer contributing, as required by law to such fund." *Id.*

[34] *Mills I*, 807 P.2d at 390. The extension of co-employee immunity resulted from the court's decision in *Byrne*. *Id.* (citing In re Byrne, 86 P.2d 1095 (Wyo. 1939)). In *Byrne*, the court considered whether an employee injured by a third party could recover workers' compensation benefits. 86 P.2d at 1097. The court held the employee could recover benefits regardless of the liability of a third party. *Id.* at 1102. Apparently, the Wyoming Supreme Court perceived this decision as extending immunity from suit to co-employees. *Mills I*, 807 P.2d at 390.

immunity from suit until 1974 when the Wyoming Supreme Court reinstated the right to sue a negligent co-employee in *Markle v. Williamson*.[35]

Shortly after the court decided *Markle*, the Legislature amended Wyoming's workers' compensation statute to provide co-employees immunity from suit for all but gross negligence.[36] In 1977, the Legislature again amended the statute, changing the standard for co-employee liability from gross negligence to culpable negligence.[37] In 1986, the Legislature amended the statute to extend complete immunity to co-employees.[38] The court considered the constitutionality of complete immunity in *Mills v. Reynolds* (*Mills I*).[39]

### *The* Mills *Decisions*

In *Mills I*, the Wyoming Supreme Court considered whether Wyoming Statute § 27-14-104(a) violated the Wyoming Constitution.[40] Timothy Mills filed suit against two co-employees for injuries resulting when a pressure regulator burst in his face.[41] In a separate action, Levi Bunker filed suit against a co-employee for injuries resulting when Bunker attempted to move electrical equipment connected to electricity.[42] Both Mills and Bunker acted pursuant to instructions from their co-employee supervisors, the defendants.[43] In both actions, the defendants moved for summary judgment, arguing Wyoming Statute § 27-14-104(a) extended complete immunity to co-employees.[44] The district court consolidated the two cases for purposes of a summary judgment hearing.[45] Following a hearing, the

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[35] *See* Markle v. Williamson, 518 P.2d 621, 621–25 (Wyo. 1974) (affirming the entry of judgment against defendant, a co-employee of the decedent, for the wrongful death of the decedent on the ground that neither Wyoming Statute § 27-50 (1957) nor the Wyoming Constitution provided co-employees immunity from suit).

[36] WYO. STAT. ANN. § 27-312(a) (1975) ("The rights and remedies provided in this act . . . are in lieu of all other rights against any employer . . . or his employees . . . unless the employees are *grossly negligent*.") (emphasis added).

[37] *Id.*

[38] WYO. STAT. ANN. § 27-14-104(a) (1986). The Legislature repealed Wyoming Statute § 27-312(a) and enacted Wyoming Statute § 27-14-104(a). *Id.* Wyoming Statute § 27-14-104(a) (1986) stated: "The rights and remedies provided in this act . . . are in lieu of all other rights and remedies against any employer . . . or their employees."

[39] *Mills I*, 807 P.2d at 385.

[40] *Id.* at 385–86.

[41] *Id.* at 387–88.

[42] *Id.* at 388.

[43] *Id.* at 388. While Marks, one of the co-employees sued by Mills, never instructed Mills to use the equipment, Marks provided the painting equipment used by Mills. *Id.* at 387.

[44] *Mills I*, 807 P.2d at 388.

[45] *Id.*

district court granted summary judgment for all defendants.[46] Mills and Bunker appealed, arguing the statute violated various provisions of the Wyoming Constitution.[47] On appeal, the Wyoming Supreme Court rejected the appellants' arguments and held the statute constitutional.[48]

Following the court's decision, the court granted appellants' petition for rehearing.[49] Upon rehearing, the court reversed its prior decision and held the statute unconstitutional.[50] While a majority of the court held the statute unconstitutional, a majority of the court failed to reach a conclusion as to why the statute violated the Wyoming Constitution.[51] The case, therefore, establishes as precedent only the conclusion that complete co-employee immunity violates the Wyoming Constitution.[52]

Following *Mills II*, the legislature again amended Wyoming Statute § 27-14-104(a).[53] Pursuant to the amendment, the Legislature provided co-employees immunity "unless the employees *intentionally act* to cause physical harm or injury to the injured employee."[54] The Wyoming Supreme Court considered the statute, in depth, in *Bertagnolli v. Louderback*.[55]

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[46] *Id.*

[47] *Id.* at 392. Mills and Bunker argued the statute limited damages in violation of the art. 10, § 4 of the Wyoming Constitution and deprived appellants of the right to access the courts in violation of equal protection guarantees. *Id.*

[48] *Id.* at 386.

[49] *Mills II*, 837 P.2d at 49, *superseded by statute*, 1993 Wyo. Sess. Laws 68.

[50] *Id.* The court reversed by a three to two (3-2) decision. *Id.* at 49–55.

[51] *See id.* at 49–71. Chief Justice Macy held the statute unconstitutional as violative of Equal Protection, reasoning the right to access the courts constituted a fundamental right. *Id.* at 55. Justice Cardine held the statute unconstitutional because it violated article 10, § 4 of the Wyoming Constitution. *Id.* at 56. He characterized the right to access the courts as an ordinary right. *Id.* at 56. Justice Urbigkit held the statute violated equal protection, concluding the right to access the courts was a fundamental right. *Id.* at 60. Justice Thomas held the statute constitutional and held the right to access the courts constituted an ordinary right. *Id.* at 67. Justice Golden also held the statute constitutional and also characterized the right to access the courts as fundamental. *Id.* at 71.

[52] *See* McCutcheon v. State, 604 P.2d 537, 542 (Wyo. 1979) (quoting North v. Superior Court of Riverside County, 502 P.2d 1305, 1309 (Cal. 1972)) (stating the judgment of an equally divided court is without force as precedent); *see also* Altria Group v. Good, 129 S. Ct. 538, 554 (2008) (quoting CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987)) ("Because the 'plurality opinion . . . did not represent the views of a majority of the Court, we are not bound by its reasoning.'"); Hertz v. Woodman, 218 U.S. 205, 213–14 (1910) ("[T]he principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.").

[53] WYO. STAT. ANN. § 27-14-104(a) (1993).

[54] *Id.* (emphasis added).

[55] 67 P.3d 627, 631–32 (Wyo. 2003).

## Bertagnolli v. Louderback

In *Bertagnolli*, the Wyoming Supreme Court considered whether the district court erred by granting summary judgment in favor of two co-employee defendants.[56] Joe Bertagnolli filed suit against two co-employee supervisors, Larry Westbrook and Max Louderback, after Bertagnolli suffered a severe injury that resulted in the eventual amputation of his right leg, to a point just below the knee.[57] Bertagnolli filed suit pursuant to Wyoming Statute § 27-14-104(a), alleging Westbrook and Louderback intentionally ordered him to work next to equipment they knew posed significant dangers to workers.[58] Westbrook and Louderback moved for summary judgment on the basis that Bertagnolli failed to prove the defendants knew of the dangerous conditions.[59] The trial court granted the defendants motions.[60]

On appeal, the Wyoming Supreme Court began by clarifying the standard for co-employee liability.[61] The court reviewed Wyoming Statute § 27-14-104(a) and concluded the statute extended liability for both intentional acts and willful and wanton misconduct.[62] The court reasoned the statutory language and the willful and wanton misconduct standard were legally equivalent because both the statute and the willful and wanton misconduct required intentional acts.[63] The court also concluded the Legislature intended to extend liability for willful and wanton misconduct because the Legislature amended the statute in light of the court's decision in *Mills II*, declaring immunity for intentional acts and willful and wanton misconduct unconstitutional.[64]

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[56] *Id.* at 629.

[57] *Id.* at 630. Bertagnolli tripped while shoveling coal and caught his right heel in the components of a shuttle belt. *Id.* The shuttle belt moved ore through the mine. *Id.* at 629. When Bertagnolli's heel caught, the components severed his right heel. *Id.* at 630. Following eleven unsuccessful surgeries, doctors amputated Bertagnolli's foot. *Id.*

[58] *Id.*

[59] *Id.*

[60] *Bertagnolli*, 67 P.3d at 630. For purposes of the summary judgment motion, both parties stipulated the standard codified in Wyoming Statute § 27-14-104(a) and the willful and wanton misconduct standard constituted the appropriate co-employee liability standard. *Id.* A stipulation of the parties as to the law is not binding on the court, however. L.U. Sheep Co. v. Bd. of County Comm'rs, 790 P.2d 663, 674 (Wyo. 1990).

[61] *Bertagnolli*, 67 P.3d at 631.

[62] *Id.* at 632.

[63] *Id.*

[64] *Id.* at 632–33 (citing *Mills II*, 837 P.2d at 55). The court characterized *Mills II* as holding co-employee immunity for intentional acts and willful and wanton misconduct unconstitutional. *Id.* (citing *Mills II*, 837 P.2d at 55). The court then relied on the premise that the Legislature knows the state of the law and enacts statutes in accordance with the law. *Id.* at 633 (citing Fosler v. Collins, 13 P.3d 686, 689 (Wyo. 2000)).

Following the court's clarification of the standard for co-employee liability, the court addressed the defendants' motions for summary judgment.[65] The court concluded the district court erred by granting the motions because questions of fact remained.[66] The court, therefore, remanded.[67] While the actual disposition of *Bertagnolli* is not relevant for purposes of this note, the legal conclusions reached in *Bertagnolli* remain relevant because the court relied on the same conclusions in reaching its decision in *Hannifan*.[68]

## PRINCIPAL CASE

In *Hannifan v. American National Bank of Cheyenne*, the Wyoming Supreme Court considered the appropriateness of a jury verdict in favor of an injured mine employee against two co-employee defendants.[69] The court held Wyoming Statute § 27-14-104(a) extended co-employee liability for both intentional acts and willful and wanton misconduct.[70] The court then concluded sufficient evidence existed to support the jury finding that Hannifan and Hampleman "acted with willful and wanton, *intentional negligence*."[71]

### *Majority Opinion (Justice Hill, Joined by Justices Golden, Kite, and Burke)*

The majority began its analysis by addressing the standard for co-employee liability.[72] The court stated, in no uncertain terms, that *Bertagnolli* serves as a complete restatement of the law.[73] Following this statement, the court quoted a substantial portion of the *Bertagnolli* decision, including the conclusion "the concept of willful and wanton misconduct has essentially the same legal effect as the statutory language."[74] The court supported this conclusion by advancing two lines of reasoning.[75] First, the court reasoned both the statutory standard and the willful and wanton misconduct standard require intentional acts.[76] Second, the court reasoned the Legislature intended to extend co-employee liability for willful

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[65] *See id.* at 634–35 (reviewing the facts and the propriety of the district court's judgment).

[66] *Bertagnolli*, 67 P.3d at 635.

[67] *Id.*

[68] *See Hannifan*, 185 P.3d at 682–84 (quoting *Bertagnolli* extensively).

[69] *Id.* at 681.

[70] *Id.* at 683.

[71] *Id.* at 695.

[72] *Id.* at 683.

[73] *Hannifan*, 185 P.3d at 683.

[74] *Id.* (quoting *Bertagnolli*, 67 P.3d at 632).

[75] *Id.*

[76] *Id.* (quoting *Bertagnolli*, 67 P.3d at 632).

and wanton misconduct because the Legislature amended the statute after the court's decision in *Mills II*, holding co-employee immunity for intentional acts and willful and wanton misconduct unconstitutional.[77]

After concluding willful and wanton misconduct constituted the appropriate standard for co-employee liability, the court addressed the remaining issues raised by Hannifan and Hampleman on appeal.[78] First, the court considered whether sufficient evidence existed to support the jury verdict in favor of Butts.[79] The court reviewed the evidence and concluded sufficient evidence existed to support the finding that (1) Hannifan and Hampleman knew of the dangerous conditions in the boxcut, (2) had supervisory authority for Butts's safety, and (3) disregarded the risks of danger.[80]

Second, the court addressed the adequacy of the jury instructions given by the trial court.[81] The court compared the proposed and given instructions and concluded the trial court adequately apprised the jury of the law.[82] Third, the court considered whether the trial court abused its discretion by denying Hannifan and Hampleman's motions for either a mistrial or new trial.[83] The court found the trial court did not abuse its discretion by denying either motion and, therefore affirmed the lower court's judgment.[84]

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[77] *Id.* (quoting *Bertagnolli*, 67 P.3d at 632–33).

[78] *Hannifan*, 185 P.3d at 684–85.

[79] *Id.* at 684.

[80] *Id.* at 689.

[81] *Id.*

[82] *Id.* at 692. The court, however, proposed the following instruction for future use:

> A co-employee is liable to another co-employee if the employee acts intentionally to cause physical harm or injury. To act intentionally to cause physical injury is to act with willful and wanton misconduct. Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to another. In the context of co-employee liability, willful and wanton misconduct requires the co-employee to have 1) actual knowledge of the hazard or serious nature of the risk involved; 2) direct responsibility for the injured employee's safety and work conditions; and 3) willful disregard of the need to act despite the awareness of the high probability that serious injury or death may result.

*Id.* at 692 n.2.

[83] *Hannifan*, 185 P.3d at 693. At the conclusion of the trial, Hannifan and Hampleman requested the trial court grant a mistrial or new trial based upon statements made by Butts's counsel during closing arguments. *Id.* at 694–95. Butts's counsel informed the jury that any fault attributed to Thunder Basin, a non-party to the suit on account of immunity extended under the Wyoming Worker's Compensation Act, would diminish the Butts's recovery. *Id.*

[84] *Id.* at 695. The majority concluded, "[t]he evidence was sufficient to sustain the jury's conclusion that the Appellants acted with willful and wanton, *intentional negligence*." *Id.* (emphasis added).

### *Concurring Opinion (Chief Justice Voigt)*

In a concurring opinion, Chief Justice Voigt expressed concern that the court created an exception to co-employee immunity not intended by the Legislature.[85] First, Chief Justice Voigt reasoned the court's decision blurred the distinction between intentional harms and willful and wanton misconduct.[86] Second, Chief Justice Voigt interpreted Wyoming Statute § 27-14-104(a) as requiring both an intent to act and an intent to cause harm and highlighted that the court's definition of willful and wanton misconduct contemplated only an intent to act.[87] Nevertheless, Chief Justice Voigt cited adherence to stare decisis and joined the result reached by the majority.[88]

## ANALYSIS

This section begins by discussing the doctrine of stare decisis, cited by Chief Justice Voigt as his primary reason for concurring in the court's decision.[89] Next, the analysis illuminates the flaws underlying the court's decisions in *Bergtagnolli* and *Hannifan*.[90] The analysis concludes by considering the adverse impact of the court's decision on Wyoming employees and employers.[91]

### *The Doctrine of Stare Decisis*

The doctrine of stare decisis charges courts to adhere to past decisions.[92] Despite the commanding nature of the doctrine, stare decisis constitutes a policy doctrine, not an unyielding rule requiring blind adherence to past decisions.[93] As the court previously recognized, courts should not adhere to past decisions when those decisions rely upon incorrect principles of law, poor reasoning, or unworkable standards.[94] In *Cook v. State*, the Wyoming Supreme Court stated,

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[85] *Id.* at 695 (Voigt, C.J., concurring).

[86] *Id.* (Voigt, C.J., concurring).

[87] *Id.* (Voigt, C.J., concurring).

[88] *Hannifan*, 185 P.3d at 695 (Voigt, C.J., concurring).

[89] *See infra* notes 92–96 and accompanying text (clarifying the doctrine of stare decisis).

[90] *See infra* notes 97–135 and accompanying text (explaining the errors made by the court in both *Bertagnolli* and *Hannifan*).

[91] *See infra* notes 136–42 and accompanying text (discussing the adverse impact of the court's decision on employees and employers in Wyoming).

[92] *E.g.*, Borns v. Voss, 70 P.3d 262, 271 (Wyo. 2003) (citing BLACK'S LAW DICTIONARY 1414 (7th ed. 1999)); State ex rel. Wyo. Worker's Comp. Div. v. Barker, 978 P.2d 1156, 1161(Wyo. 1999) (quoting Goodrich v. Strobbe, 908 P.2d 416, 420 (Wyo. 1995)); *see also* BLACK'S LAW DICTIONARY 1443 (8th ed. 2004) (defining stare decisis as "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation").

[93] *E.g., Barker*, 978 P.2d at 1161 (quoting *Goodrich*, 908 P.2d at 420); *Goodrich*, 908 P.2d 420 (quoting Jones v. State, 902 P.2d 686, 692–93 (Wyo. 1995).

[94] *E.g., Borns*, 70 P.3d at 271 (citations omitted); Dunnegan v. Laramie County Commr's, 852 P.2d 1138, 1140 (Wyo. 1993); Cook v. State, 841 P.2d 1345, 1353 (Wyo. 1992).

"[w]isdom does not come to us often. . . . When it does, we should embrace [it,] not slavishly reject it because of a questionable application of legal doctrine."[95] Nevertheless, in *Hannifan*, the court chose to follow the flawed co-employee liability standard adopted in *Bertagnolli*.[96]

*The Flawed Standard of Liability*

In *Bertagnolli*, the court initially held that Wyoming Statute § 27-14-104(a) extended co-employee liability for both intentional acts and willful and wanton misconduct.[97] The court supported this conclusion by reasoning: (1) the statutory standard and the willful and wanton standard amounted to legal equivalents, and (2) the Legislature intended the 1993 amendment to extend liability for willful and wanton misconduct.[98] As the following analysis illustrates, the court's conclusion that the statutory standard amounts to willful and wanton misconduct ignores the structure of the statutory language and equates two contrary legal concepts.[99]

As indicated by the statutory language "unless the employees intentionally act to cause physical harm or injury," Wyoming Statute § 27-14-104(a) contemplates both the intent to act and the intent to cause harm.[100] Intent requires the actor *desire* the consequence of his act or believe the consequence is substantially certain to follow.[101] Willful and wanton misconduct requires that the actor *disregard* the

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[95] *Cook*, 841 P.2d at 1353.

[96] *Hannifan*, 185 P.3d at 683 ("The *Bertagnolli* case now serves as a complete restatement of Wyoming's jurisprudence in this regard."); *see infra* notes 97–135 and accompanying text (explaining the flaws underlying the *Bertagnolli* court's adoption of a willful and wanton misconduct standard for co-employee liability).

[97] *Bertagnolli*, 67 P.3d at 633.

[98] *Id.* at 632–33 ("We continue to believe the concept of willful and wanton misconduct has essentially the same legal effect as the statutory language 'intentionally act to cause physical harm or injury.'").

[99] *See infra* notes 100–15 and accompanying text (explaining that the statute requires both an intent to act and an intent to cause harm and illustrating the differences between the concepts of intent and willful and wanton misconduct).

[100] *Hannifan*, 185 P.3d at 695 (Voigt, C.J., concurring) ("It appears to me that the word 'intentionally' applies both to the word 'act' and to the word 'cause.' If that was not the legislature's intent, the phrase would read 'unless the employees intentionally act and cause physical harm or injury to the injured employee.'").

[101] *E.g.*, Burrow v. Delta Container, 887 So. 2d 599, 602 (La. Ct. App. 2004) (citing Bazley v. Tortorich, 397 So. 2d 475, 481 (La. 1981)); Vasquez v. Six Flags Houston, Inc., 120 S.W.3d 445, 448 (Tex. App. 2003) (citing Rodriguez v. Naylor Industries, Inc., 763 S.W.2d 411, 412 (Tex. 1989)); Security Title Guar. Corp. of Baltimore v. McDill Columbus Corp., 543 So. 2d 852, 855 (Fla. Dist. Ct. App. 1989) (citing Deane v. Johnston, 104 So. 2d 3, 8 (Fla. 1958)); *cf.* BLACK'S LAW DICTIONARY 825 (8th ed. 2004) (defining intent as "[t]he state of mind accompanying an act, esp. a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial.").

consequence of an act when a reasonable person would know the act would, in a high probability, result in harm to another.[102]

The two standards differ in substantial ways.[103] First, the standards differ in the intent required.[104] In *Danculovich v. Brown*, the court expressly stated "the intent in willful and wanton misconduct is not intent to cause the injury."[105] In *Hannifan*, the court also acknowledged the difference by noting that willful and wanton misconduct requires only "a state of mind approaching intent to do harm."[106] Second, the standards differ with respect to the showing of knowledge required.[107] Willful and wanton misconduct, as defined by the court in *Hannifan*, requires knowledge of a high degree of probability of harm.[108] Intent, however, requires either the actor desire to cause the harm or act with substantial certainty harm will follow.[109] While knowledge of a probability of harm suffices to prove willful and wanton misconduct, it fails to prove intent.[110] Third, the standards differ in whether an objective or subjective state of mind is required.[111] The

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[102] *E.g.*, *Hannifan*, 185 P.3d at 692 n.2 (proposing future instruction on the appropriate standard for co-employee liability); *Bertagnolli*, 67 P.3d at 632 (citing Weaver v. Mitchell, 715 P.2d 1361, 1370 (Wyo. 1986)); Mayflower Rest. Co. v. Griego, 741 P.2d 1106, 1115 (Wyo. 1987)); *see also* PROSSER AND KEETON ON TORTS 213 (W. Page Keeton ed., West Publishing Co. 1984) (1941) (citing RESTATEMENT (SECOND) OF TORTS, § 500 (1965)).

[103] *See infra* notes 104–15 and accompanying text (illustrating the ways the standards differ).

[104] *See* Danculovich v. Brown, 593 P.2d 187, 193 (Wyo. 1979) (stating the intent in willful and wanton misconduct differs from the intent to cause harm).

[105] *Id.*

[106] *Hannifan*, 185 P.3d at 692.

[107] *Compare id.* at 692 n.2 (defining willful and wanton misconduct as requiring knowledge of a high degree of probability of harm), *with Burrow*, 887 So. 2d at 602 (citing *Bazley*, 396 So. 2d at 481) (stating intent requires the actor desire to cause the consequence of the act or believe the consequence is substantially certain to follow).

[108] *Hannifan*, 185 P.3d at 692 n.2. The court defined willful and wanton misconduct as follows:

> Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to another.

*Id.*

[109] *E.g.*, *Burrow*, 887 So. 2d at 602 (citing *Bazley*, 397 So. 2d at 481); *Vasquez*, 120 S.W.3d at 448 (citing *Rodriguez*, 763 S.W.2d at 412); *Security Title Guar. Corp. of Baltimore*, 543 So. 2d at 855 (citing *Deane*, 104 So. 2d at 8).

[110] *See* PROSSER, *supra* note 102, at 36; *see also* Oros v. Hull & Assocs., Inc., 302 F. Supp. 2d 839, 844 (D. N.D. Ohio 2004) (citing Fyffe v. Jeno's, Inc., 570 N.E.2d 1108, 1112 (Ohio 1991)); Jackson v. Latini Mach. Co., 960 F. Supp. 1043, 1049 (D. E.D. La. 1997) (citing Williams v. Gervais F. Favrot Co., Inc., 573 So. 2d 533 (La. Ct. App. 1991)).

[111] *Compare Hannifan*, 185 P.3d at 692 n.2 (stating willful and wanton misconduct requires a reasonable person would know harm would result), *with Burrow*, 887 So. 2d at 602 (citing *Bazley*, 397 So. 2d at 481) (defining intent as requiring the actor desire the consequences of his act).

court's formulation of the willful and wanton misconduct standard requires a reasonable person would know a high probability of danger existed, an objective standard.[112] Intent requires the "actor desire" the consequence of his act, a subjective standard.[113] With respect to the subjective standard, the focus is on the actor rather than a hypothetical reasonable person.[114] As this discussion suggests, the Wyoming Supreme Court erred by equating two contrary legal principles.[115] The court also erred by reasoning the Legislature intended to extend liability for willful and wanton misconduct.[116]

In *Bertagnolli*, the court concluded the Legislature intended co-employees to remain liable for willful and wanton misconduct.[117] The court reasoned the Legislature amended the statute knowing of the court's decision in *Mills II*, which the court construed as holding co-employee immunity for intentional acts and willful and wanton misconduct unconstitutional.[118] In *Mills II*, the court defined the issue as whether Wyoming Statute § 27-14-104(a), granting co-employees *complete* immunity from suit, violated the Wyoming Constitution.[119] In the opening paragraph of the decision, the court specifically held that the extension of *complete* immunity to co-employees violated the Wyoming Constitution.[120] Following the court's initial statement of the holding, Justice Macy, the author of the plurality opinion, addressed the reasoning supporting the plurality's holding.[121] In this discussion, Justice Macy only discussed complete immunity.[122] In fact, he failed to even mention "willful and wanton misconduct" until the second to last paragraph of the plurality's nearly eight page decision.[123]

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[112] *Hannifan*, 185 P.3d at 692 n.2 ("Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act . . . under circumstances and conditions that a *reasonable person would know, or have reason to know*, that such conduct would . . . result in harm to another." (emphasis added)).

[113] *E.g.*, *Burrow*, 887 So. 2d at 602 (citing *Bazley*, 397 So. 2d at 481); *Vasquez*, 120 S.W.3d at 448 (citing *Rodriguez*, 763 S.W.2d at 412); *Security Title Guar. Corp. of Baltimore*, 543 So. 2d at 855 (citing *Deane*, 104 So. 2d at 8).

[114] BLACK'S LAW DICTIONARY 1465 (8th ed. 2004) (defining subjective as "[b]ased on an individual's perceptions, feelings, or intentions, as opposed to externally verifiable phenomena").

[115] *See supra* notes 97–114 and accompanying text (explaining why the concepts of intent and willful and wanton misconduct differ).

[116] *See infra* notes 117–34 and accompanying text (explaining why the court erred by concluding the Legislature intended to extend liability for willful and wanton misconduct).

[117] *Bertagnolli*, 67 P.3d at 632–34.

[118] *Id.*

[119] *Mills II*, 837 P.2d at 49.

[120] *Id.*

[121] *See id.* at 49–55 (providing the court's analysis).

[122] *See id.* (considering the constitutional challenge to *complete immunity*).

[123] *See id.* at 49–56 (stating for the first time "[i]n summary, the legislature's grant of complete immunity to co-employees, which includes immunity for intentional acts and for willful and wanton misconduct, infringed upon the fundamental right to access to the courts").

While the plurality opinion fleetingly mentioned willful and wanton misconduct, the opinion focused almost entirely on complete immunity.[124] Taken as a whole, the opinion makes it very difficult for the Legislature to discern whether the court would hold the extension of co-employee immunity for willful and wanton misconduct unconstitutional.[125] Therefore, the *Bertagnolli* court erred by assuming the court enunciated its holding in *Mills II* with the clarity necessary to provide the Legislature with notice as to the state of the law.[126] In addition to this error, the court also erred by failing to consider the legislative history behind the amendment to the statute.[127]

In 1993, when the Legislature sought to amend Wyoming Statute § 27-14-104(a), the State Senate considered and rejected a State House amendment seeking to impose co-employee liability for culpable negligence.[128] Following the Senate's rejection of a culpable negligence standard, the Senate adopted an amendment imposing liability only when employees "intentionally act to cause physical harm or injury."[129] The Senate's rejection of a willful and wanton misconduct standard becomes evident by comparing the court's definitions of "culpable negligence" and "willful and wanton misconduct."[130]

A comparison of the Wyoming Supreme Court's definitions of "culpable negligence" and "willful and wanton misconduct" reveals that the definitions essentially mirror one another.[131] In fact, in *McKennan v. Newman*, the court defined "culpable negligence" as willful and serious misconduct.[132] The court then

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[124] *Mills II*, 837 P.2d at 49–55 (illustrating the court's devotion of its efforts to a discussion of the constitutionality of complete immunity).

[125] *See id.* (discussing the constitutionality of complete immunity and mentioning willful and wanton misconduct only in the second to last paragraph of the opinion).

[126] *See Bertagnolli*, 67 P.3d at 632–33 (stating the court presumes the Legislature knows of the court's decisions and enacts legislation accordingly).

[127] *See id.* at 632–33 (stating the court's conclusion is "consistent with the parameters of statutory construction" but failing to consider any legislative history).

[128] 1993 LEGISLATIVE DIGEST, H.B. 0034, 82–85.

[129] *See id.* (containing the votes rejecting the culpable negligence standards and approving the intentional language).

[130] *See infra* notes 131–34 and accompanying text (comparing the definitions of culpable negligence and willful and wanton misconduct).

[131] *Compare Krier*, 943 P.2d at 417 (citing Smith v. Throckmartin, 893 P.2d 712, 716 (Wyo. 1995)) (defining culpable negligence as "the intentional commission of an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm will follow"), *with Hannifan*, 185 P.3d at 683 (quoting *Bertagnolli*, 67 P.3d at 632) (defining willful and wanton misconduct as "the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances . . . a reasonable person would know, or have reason to know that such conduct would, in a high degree of probability, result in harm to another").

[132] 902 P.2d 1285, 1286 (Wyo. 1995) (citations omitted).

used the definition of culpable negligence to define willful misconduct.[133] If the terms "culpable negligence" and "willful and wanton misconduct" actually equate to the same standard, the Legislature's rejection of a culpable negligence standard also rejects the willful and wanton misconduct standard.[134] The court's decision to impose co-employee liability, regardless of the Legislature's intent, significantly impacts employees in Wyoming.[135]

*Impact of the Court's Decision in* Hannifan

The court's decision in *Hannifan* significantly and adversely impacts employees in the State by imposing the incidental costs of industry on those employees personally.[136] As a result of the court's decision, a manager who makes one questionable decision in the course and scope of employment, such as the decision to allow mining to continue, now faces personal liability.[137] A manager's life savings, the investments he plans to use to pay for his children's college, and potentially even the retirement funds he will depend on in his later years of life are now at risk.[138] Such a result is inherently unfair.

The court's decision also adversely impacts employers in Wyoming by imposing additional costs.[139] Some employers, facing pressure from risk adverse management employees, will ultimately obtain additional insurance to cover those employees.[140] Employers end up paying twice, once in the form of

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[133] *Id.* (citations omitted) ("[C]ourts allow a party to establish that willful misconduct has occurred by demonstrating that an actor has intentionally committed an act of unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow.").

[134] *Compare Krier*, 943 P.2d at 417 (citing *Smith*, 893 P.2d at 716) (defining culpable negligence), *with Hannifan*, 185 P.3d at 682 (quoting *Bertagnolli*, 67 P.3d at 632) (defining willful and wanton misconduct).

[135] *See infra* notes 136–42 and accompanying text (addressing the impact of the decision on employees and the employers in Wyoming).

[136] *See Mills II*, 837 P.2d at 66 (Thomas, J., dissenting) (discussing his concern that employees will face personal liability for their co-employees work-related injuries).

[137] *See id.* (Thomas, J., dissenting) (considering the consequences of the court's decision in *Mills II*).

[138] *Id.* (Thomas, J., dissenting) (stating "[t]he homeowner's insurance of every worker who owns a home; that worker's personal and real property; that worker's savings accounts and investments; and, perhaps, even that worker's retirement fund may all become available to respond to the claim for damages").

[139] *See id.* (Thomas, J., dissenting) (discussing the effects of the court's decision in *Mills II*, including increased costs to the employer resulting because "[h]e pays by his contribution to the workers compensation fund, and he pays by virtue of what will have to be additional premium for his liability insurance").

[140] *See id.* (Thomas, J. dissenting) (discussing the effect of the decision on employers and stressing the increased cost to employers deriving from the maintenance of liability insurance).

contributions to the State's workers' compensation fund and a second time in the form of insurance premiums paid to insure managers from personal liability.[141] The Legislature could not have intended such a result.[142]

## CONCLUSION

In *Hannifan v. American National Bank of Cheyenne*, the Wyoming Supreme Court affirmed a jury verdict in favor of an injured mine employee against two co-employees.[143] The court reached this conclusion by adopting its earlier holding, reached in *Bertagnolli*, that Wyoming Statute § 27-14-104(a) extends co-employee liability for intentional acts and willful and wanton misconduct.[144] While Chief Justice Voigt expressed concern the court's decision created an exception to co-employee immunity not intended by the Legislature, he cited stare decisis and joined the majority result.[145] As discussed, however, courts should not adhere to precedent based upon incorrect conclusions of law.[146]

*Bertagnolli* advanced several incorrect conclusions, including the conclusion that the statutory standard and the "willful and wanton misconduct" standard constitute legal equivalents.[147] *Bertagnolli* also advanced the incorrect conclusion that the Legislature intended to extend liability for willful and wanton misconduct.[148] Despite the errors in *Bertagnolli*, the *Hannifan* court adopted and extended *Bertagnolli's* holdings.[149] As a result, employees in Wyoming now face personal liability for decisions made in the course and scope of employment and employers face increased costs deriving from paying both workers' compensation dues and liability insurance premiums.[150]

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[141] *Mills II*, 837 P.2d at 66 (Thomas, J., dissenting).

[142] *Id.* (Thomas, J. dissenting) ("When this situation is recognized for what it is, it does seem that the product of the new decisions is antithetical to the intent of the workers' compensation statutes.").

[143] *Hannifan*, 185 P.3d at 695.

[144] *Id.* at 683.

[145] *Id.* at 695 (Voigt, C.J., concurring).

[146] *See supra* notes 92–96 and accompanying text (discussing the doctrine of stare decisis and the principle that courts should not adhere to decisions based on incorrect legal conclusions).

[147] *See supra* notes 97–115 and accompanying text (explaining why the statutory standard and the willful and wanton misconduct standard differ).

[148] *See supra* notes 117–34 and accompanying text (explaining why the court's conclusion that the Legislature intended to extend liability for willful and wanton misconduct is incorrect).

[149] *See Hannifan*, 185 P.3d at 683 (stating that *Bertagnolli* serves as a complete restatement of the law and quoting *Bertagnolli* extensively).

[150] *See supra* notes 136–42 and accompanying text (discussing in detail the adverse impact of the court's decision on Wyoming's employees and employers).

## CASE NOTE

# TORT LAW—Duty a Little Unthought Of: The Wyoming Supreme Court's Confused Duty Analysis in *Glenn v. Union Pacific R.R. Co.*, 176 P.3d 640 (Wyo. 2008)

*Kerry Luck-Torry**

## Introduction

On June 30, 2006, Steve Glenn arrived for work at the Black Butte mine.[1] That day he did not proceed to his usual work assignment as a blaster, instead he reported to the coal-loading area.[2] Union Pacific coal cars arrived in the coal-loading area, where Black Butte's workers proceeded to open the coal car doors and securely lock them before they loaded coal.[3] A more experienced worker instructed Glenn on how to open the coal car doors with a pry bar, swinging them closed to engage the locking mechanism.[4] For some time, Glenn walked along the balloon track, opening and closing the coal car doors.[5] As he went about his job, he noticed some cars still contained coking coal.[6] At the fifteenth coal car, Glenn's pry bar slipped out of the door notch, and released an avalanche of coking coal pellets.[7] The coking coal scattered along the balloon track, causing Glenn to fall and severely break his leg.[8] An ambulance rushed him to the hospital, but despite medical intervention, Glenn could not return to work.[9]

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* Candidate for J.D., University of Wyoming, 2010. I would like to thank my husband, Bob, my family, and friends for their encouragement and patience regarding this project. Particularly, I would like to thank my advisor, Professor Eric Johnson, for his thoughtful support and insightful critiques.

[1] Glenn v. Union Pacific R.R. Co., 176 P.3d 640, 641 (Wyo. 2008).

[2] *Id.*

[3] *Id.* at 642 n.2.

[4] *Id.* at 642.

[5] Brief of Appellant at 12, Glenn v. Union Pacific R.R. Co., No. 07-16 (Wyo. May 25, 2007). A balloon track consists of a long loop of rail, and acts as part of Union Pacific's right-of-way passage through the mine. *Id.*

[6] *Glenn*, 176 P.3d at 642. To produce coking coal, mines process coal into round pellets, similar to briquettes. *Id.* Coking coal presents a potential for harm because it rolls around under a person's feet. *See id.* at 643.

[7] *Id.* at 642.

[8] Brief of Appellant, *supra* note 5, at 12. After Glenn's accident, the mine's safety manager noted that most of the cars contained coking coal, which settled on the lip of the doors of the car, preventing them from closing and/or locking securely. *Id.* at 13. Workers load coal cars from above and unload them by releasing the dump doors below. *Id.* at 8. Thus, the load should fall straight down, completely emptying the car. *Id.* at 8.

[9] *Id.* at 32.

The Black Butte mine regularly delivered its coal to customers via a train of coal cars provided by Union Pacific.[10] Frequently, coal cars returning to Black Butte from the Union Pacific hub contained "carry-back" product (*i.e.*, residue from the shipment of coal).[11] Though Union Pacific's contracts with its customers stipulate that they must clear out the cars of any carry-back product or face fines, it rarely enforces these provisions.[12] Additionally, mine workers anticipate the coal cars contain carry-back product; however, this usually consists of unprocessed coal and not coking coal.[13] On the day of Glenn's injury, the train arrived with 40 unlocked or open doors out of 102, many containing coking coal.[14]

Glenn filed suit against Union Pacific claiming its negligence caused his injury.[15] The District Court for Sweetwater County granted Union Pacific's motion for summary judgment.[16] Specifically, the court found Union Pacific only owed a duty to provide coal cars free of defects.[17] This duty, in the district court's opinion, did not run to Glenn's situation.[18] Glenn timely appealed to the Wyoming Supreme Court.[19] The Wyoming Supreme Court disagreed with the district court.[20] Specifically, one issue proved dispositive: duty.[21] It found Union Pacific owed Glenn a duty to provide coal cars reasonably safe for their intended use.[22] Subsequently, the Wyoming Supreme Court reversed the district court's findings and remanded for further proceedings consistent with its opinion.[23]

The *Glenn* decision proves confusing for practitioners because it remains unclear whether it supports its finding of duty through (1) premises liability,

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[10] *Id.* at 5. Coal cars pick up the coal loaded by the mine workers and deliver it to customers. *Id.* The customer then unloads the car of its coal cargo, and its employees must close the car's doors. *Id.* In fact, the contracts between Union Pacific and its customers who receive the coal shipments explicitly state the customers must close the doors or pay a fine. *Id.* Although this fine can be in excess of $100 per car, Union Pacific refused to enforce this particular provision of its contracts for fear of losing customers. *Id.* Union Pacific forbids its employees who operate the train from closing the doors themselves. *Id.*

[11] *See id*. at 19.

[12] *Id.* at 9.

[13] Brief of Appellant, *supra* note 5, at 13.

[14] *Glenn*, 176 P.3d at 642.

[15] *Id.*

[16] *Id.*

[17] Brief of Appellant, *supra* note 5, at 16.

[18] *Id.*

[19] *Glenn*, 176 P.3d at 641.

[20] *Id.*

[21] *See id.* at 642–43.

[22] *Id.* at 643.

[23] *Id.* at 645.

(2) specific duty elsewhere, or (3) generalized duty.[24] Though the court reached a unanimous decision, nothing in the opinion explains how and why the Wyoming Supreme Court recognized this duty.[25] Additionally, the appellant's brief analyzed the facts using the eight-factor test first adopted by Wyoming in *Gates v. Richardson*.[26] The Wyoming Supreme Court adopted the *Gates* factor test as a tool for analyzing whether a new duty exists.[27] However, the *Glenn* court ignores this useful tool and issues what amounts to an ad hoc decision.[28] As such, the *Glenn* opinion offers no insight into how lower courts and practitioners could apply this new duty in negligence actions regarding railroads and their customers' employees.[29]

This case note evaluates the Wyoming Supreme Court's declaration of duty in *Glenn v. Union Pacific Ry. Co*.[30] First, this case note examines the adoption of generalized duty by the Restatement (Third) of Torts and the resultant backlash by those demanding duty remain an element of negligence claims.[31] Next, it examines Wyoming's *Gates* factor test, as a method of evaluating duty and resolving the confusion inherent in the discussion of duty.[32] Third, this note walks through the principal case and the court's discussion of duty.[33] Finally, it analyzes the *Glenn* court's confusion regarding duty and the role duty now plays as an element of negligence.[34] Additionally, as this note explains, application of the *Gates* eight-factor test would provide guidance for lower courts and practitioners likely to deal with similar situations in the future.[35]

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[24] *Glenn*, 176 P.3d at 643–44.

[25] *Id.*

[26] Brief of Appellant, *supra* note 5, at 30–33 (citing Borns ex rel. Gannon v. Voss, 70 P.3d 262, 273); Gates v. Richardson, 719 P.2d 193, 196 (Wyo. 1986).

[27] *Gates*, 719 P.2d at 196.

[28] *See Glenn*, 176 P.3d at 643–44.

[29] *See id.* at 641–45.

[30] *See infra* notes 112–72 and accompanying text (analyzing the *Glenn* court's duty discussion).

[31] *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657, 658–61 (2001); *see infra* notes 56–83 and accompanying text (discussing support and criticism regarding the Restatement (Third) of Torts).

[32] *See Gates*, 719 P.2d at 196; *see infra* notes 84–95 and accompanying text (discussing the *Gates* factor test).

[33] *See infra* notes 96–111 and accompanying text (analyzing the *Glenn* court's use of generalized and specialized duty).

[34] *See infra* notes 112–72 and accompanying text (discussing the danger of the Wyoming Supreme Court's confusion regarding duty, the general prevalence of confusion regarding duty, and why such puzzlement harms the practitioners and the courts).

[35] *See infra* notes 158–72 and accompanying text (discussing how the *Gates* factor test helps resolve confusion regarding duty).

## BACKGROUND

### *Why Does the Question of Duty Matter?*

Duty remains a difficult concept for practitioners, judges and courts alike.[36] First year law students learn duty is the first element of a negligence claim.[37] However, in actual practice, this certain knowledge gives way to confusion.[38] Often, practitioners and courts think of duty as a conundrum, rather than a vital element.[39] Searching through negligence decisions, one realizes that courts frequently mean different things when they invoke duty.[40] Additionally, courts do not always clearly articulate the principles and rules concerning duty.[41] In short, courts sometimes make mistakes because of their own confusion regarding duty.[42]

To make matters more complicated, much criticism surrounds the concept of duty.[43] The Restatement (Third) of Torts eliminates duty as an element for negligence claims.[44] Instead, it establishes a generalized duty requiring everyone to exercise reasonable care.[45] However, a backlash arose, insisting duty remain an integral part of a negligence claim.[46] This conflict regarding the role of duty creates

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[36] *See* Goldberg & Zipursky, *supra* note 31, at 657–95 (discussing confusion among attorneys and judges regarding the interpretation of duty as an element of a negligence claim evidenced by many confusing and contradictory opinions).

[37] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31, at 180 (2d ed. 1941).

[38] *See generally* Robert L. Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787, 790 (2001).

[39] *See generally* Goldberg & Zipursky, *supra* note 31, at 697.

[40] *Id.*

[41] *See id.*

[42] *See id.*; *see also* Ky. Fried Chicken of Cal. v. Superior Court, 927 P.2d 1260, 1266–69 (Cal. 1997).

[43] Aaron D. Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the Restatement (Third) of Torts*, 60 HASTINGS L.J. 1, 2–3 (2008).

[44] RESTATEMENT (THIRD) OF TORTS: DUTY § 7 (2005):

> (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.

[45] *Id.*

[46] *See, e.g.*, Twerski, *supra* note 43, at 2–3; W. Johnathan Cardi, *Purging Foreseability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739 *passim* (2005); Dilan A. Esper & Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265 *passim* (2006); David Owen, *Duty Rules*, 54 VAND. L. REV. 767 *passim* (2001). *See generally* Jane Stapleton, *Evaluating Goldberg and Zipursky's Civil Recourse Theory*, 75 FORDHAM L. REV. 1529 *passim* (2006); Ernest J. Weinrub, *The Passing of Palsgraf?*, 54 VAND. L. REV. 803 *passim* (2001).

greater confusion among courts and practitioners.[47] Indeed, this misunderstanding of the role of duty has led courts to skip to examining affirmative defenses without ever analyzing the prima facie element of duty.[48] The court must recognize that between these two extremes lies substantial room to analyze the element of duty.[49]

*The Restatement (Third) of Torts: The End of Duty?*

The Restatement (Third) of Torts eliminates duty from the negligence equation.[50] Instead, everyone has a duty to act reasonably when a possibility of injury exits.[51] This generalized duty replaces the traditional four-element test for negligence.[52] As described in the Third Restatement, duty is not an element of a prima facie negligence case.[53] Under this negligence regime, an injured plaintiff need only show that the defendant failed to act reasonably to avoid causing harm to another.[54] Additionally, courts may relieve defendants of liability for otherwise negligent conduct because of policy reasons.[55] The removal of duty as an element of negligence represents the result of long-simmering criticism among tort scholars.[56] Many scholars denigrate duty as "wholly unnecessary or hopelessly confused."[57] Some commentators have thrown up their hands, claiming duty defies definition because of its changing nature.[58] The drafters of the Third Restatement intended to resolve this confusion and frustration by proclaiming a generalized duty applies to all, making duty a background principle rather than an element.[59]

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[47] Rabin, *supra* note 38, at 790–91. It must be recognized that this sort of analytical confusion cannot remain a matter of indifference. *Id.* at 791.

[48] *See id.* at 791. For example, courts routinely state baseball game attendees assume the risk when attending a game without examining whether the ballpark even owed the attendee a duty. *Id.*

[49] *See* Goldberg & Zipursky, *supra* note 31, at 730.

[50] RESTATEMENT (THIRD) OF TORTS: DUTY § 7(a) (2005).

[51] *Id.*

[52] *See* W. PAGE KEETON ET AL., PROSSER AND KEATON ON TORTS § 30 (1984); Stroup v. Oedekoven, 995 P.2d 125, 130 (Wyo. 1999). The elements of negligence remain duty, breach, proximate cause, and damage. *Id.*

[53] Goldberg & Zipursky, *supra* note 31, at 659–60.

[54] RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 101 (2005) ("An actor has a legal obligation, in the conduct of the actor's own affairs, to act reasonably to avoid causing legally cognizable harm to another.").

[55] *Id.* § 105. This approach represents a drastic difference from the model of finding no duty. *See* Goldberg & Zipursky, *supra* note 31, at 659–60. Instead, the court presumes duty and only relieves the defendant of liability because of an overarching policy reason. *See id.*

[56] *See* Twerski, *supra* note 43, at 2–3.

[57] John C.P. Goldberg, *Duty & the Structure of Negligence*, 10 KAN. J.L. & PUB. POL'Y 149, 150 (2000).

[58] Peter F. Lake, *Common Law "Duty" Analysis: The Conceptual Expansion of "Duty" in a Period of Doctrinal Consolidation/Retrenchment*, 10 KAN. J.L. & PUB. POL'Y 153, 154 (2000).

[59] *See* Esper & Keating, *supra* note 46, at 266–67.

The problem with this approach lies in the fact that it radically upsets recognized standards of tort law.[60] For example, in *Benton v. City of Oakland*, plaintiff would only need to establish the defendant failed to use reasonable care while maintaining a public swimming pool and this failure caused plaintiff's paralysis.[61] Similarly, in *McGlothin v. Anchorage*, by unreasonably failing to inform plaintiff that the scoreboard he was about to lift was extremely heavy, defendant committed negligence resulting in plaintiff's back injuries.[62] These examples demonstrate the significant difference between the Third Restatement and the traditional four-element negligence test.[63] The Third Restatement's shift to a generalized duty represents a substantial change in the law of negligence.[64] As such, it has engendered a considerable amount of controversy.[65]

*The Backlash: Arguing for the Traditional Role of Duty*

The major criticism rests in the fact that almost every state court handles negligence cases according to the traditional four-element test, which requires the plaintiff to satisfy the duty element.[66] Additionally, commentators argue the Third Restatement suffers from serious defects as a restatement of negligence law.[67] Specifically, duty often remains at issue in "straightforward cases involving 'accidental personal injury or physical damage.'"[68]

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[60] *See* Goldberg & Zipursky, *supra* note 31, at 665–66. "[The Third Restatement] is a substantial departure in the expression of the structure of negligence from that of the courts." *Id.* at 665. "Most notably, there is no duty requirement in this provision, even though there is according to the usual formulation." *Id.*

[61] *Id*. at 666 (citing Benton v. City of Oakland, 721 N.E.2d 224, 233 (Ind. 1999)). In *Benton*, the court held that in the face of confusing precedent, the city did owe the plaintiff a duty. *Benton*, 721 N.E.2d at 224. However, the court carefully analyzed whether a duty existed, rather than relying on the concept of general reasonable care, as advocated by the Third Restatement. *Id*. at 233.

[62] Goldberg & Zipursky, *supra* note 31, at 666 (citing McGlothin v. Anchorage, 991 P.2d 1273 (Alaska 1999)) (holding where plaintiff injured his back while lifting a sign owned by defendant, he owed no duty to plaintiff to warn him of the associated risks of lifting the sign).

[63] *See id.*

[64] *Id.* at 665–66.

[65] *See* Twerski, *supra* note 43, at 2–3.

[66] *See* Albert v. Hsu, 602 So. 2d 895, 897 (Ala. 1992) (quoting Rose v. Miller & Co., Inc., 432 So. 2d 1237, 1238 (Ala. 1983)) ("Where there is no duty, there can be no negligence."); Lauer v. City of New York, 733 N.E.2d 184, 187 (N.Y. 2000) (citing Pulka v. Edelman, 358 N.E.2d 1019 (N.Y. 1976)) ("Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm."); Duncan v. Afton, Inc., 991 P.2d 739, 742 (Wyo. 1999) (quoting Goodrich v. Seamands, 870 P.2d 1061, 1064 (Wyo. 1994)) ("Essential to any negligence cause of action is proof of facts which impose a duty upon defendant.").

[67] *See* Goldberg & Zipursky, *supra* note 31, at 678.

[68] *Id.*

Even in "easy" physical injury cases, the duty element remains a point of contention which the courts must decide.[69] The case of *Mussivand v. David* illustrates this point.[70] Plaintiff acquired a sexually transmitted disease from his wife.[71] Plaintiff's wife contracted the disease from defendant, her secret lover.[72] When plaintiff sued defendant for negligence, defendant claimed the duty element remained unsatisfied.[73] However, the Ohio Supreme Court rejected defendant's argument, partly on the basis that he could have reasonably foreseen his lack of precautions put plaintiff at risk.[74] Thus, defendant owed a duty to plaintiff to not transmit the disease to him, at least until plaintiff's wife became aware of her own infection.[75] This case demonstrates a court need not find a generalized duty to provide relief to plaintiffs.[76] An analysis of duty, such as that found in *Mussivand*, remains the standard almost all courts use in negligence cases.[77] Critics argue the Third Restatement must lay bare the elements of negligence as defined by the courts, not impose a contrary definition.[78] Thus, the Third Restatement serves only to confuse courts and practitioners about the developing role of duty and its current place in a negligence analysis.[79]

### *Wyoming's Measure of Duty*–Gates's *Factor Test*

Wyoming provides a test for determining and outlining duty that balances a generalized duty while respecting the traditional four-element test.[80] The Wyoming Supreme Court first introduced this test in *Gates v. Richardson*.[81] For twenty-two years, the Wyoming Supreme Court used the *Gates* test to (1) determine if a duty existed and (2) provide rationalization for a finding of duty.[82] This test provides a middle road in duty analysis, designed to provide

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[69] *Id.* at 678–79.

[70] Mussivand v. David, 544 N.E.2d 265, 266–67 (Ohio 1989).

[71] *Id.* at 266–67.

[72] *Id.* at 267.

[73] *Id.* at 272.

[74] *Id.* at 270.

[75] *Mussivand*, 544 N.E.2d at 272–73.

[76] *See* Goldberg & Zipursky, *supra* note 31, at 678–79.

[77] *See id.* at 676-77; Esper & Keating, *supra* note 46, at 268.

[78] Goldberg & Zipursky, *supra* note 31, at 676.

[79] *See generally id*. at 677.

[80] *See Gates*, 719 P.2d at 196.

[81] *Id.* (holding that Wyoming recognizes the tort of negligent infliction of emotional distress, and providing an eight-factor test to determine duty).

[82] *See, e.g.*, Mostert v. CBL & Associates, 741 P.2d 1090, 1093 (Wyo. 1987); R.D. v. W.H., 875 P.2d 26, 31 (Wyo. 1994); Natrona County v. Blake, 81 P.3d 948, 951 (Wyo. 2003); Black v. William Insulation Co., Inc., 141 P.3d 123, 127 (Wyo. 2006).

courts and practitioners with both an answer to a question of duty and a rationale for that answer.[83] Indeed, both practitioners and Wyoming courts use the *Gates* factor-test extensively to find duty in negligence cases.[84] Specifically, Glenn used the *Gates* factor-test to argue for a finding of duty in his brief.[85] However, the *Glenn* court ignored this test in its analysis.[86]

Factor tests try to balance fairness, public policy concerns and justice while providing flexibility for courts.[87] In Wyoming, the courts balance these sometimes conflicting goals by applying the following eight factors to the facts presented: (1) the foreseeability of harm to the plaintiff; (2) the closeness of the connection between the defendant's conduct and the injury suffered; (3) the degree of certainty that the plaintiff suffered injury; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden upon the defendant; (7) the consequences to the community and the court system; and (8) the availability, cost and prevalence of insurance for the risk involved.[88] The *Gates* factor test continues to serve as a valuable tool for the Wyoming Supreme Court and practitioners when questions of duty arise in new and difficult situations.[89] However, the court has become increasingly inconsistent in its approach to the *Gates* factor test by ignoring it in some cases or merely glossing over it in others.[90] This inconsistency may soon lead to more confusion among practitioners regarding duty as it now appears unclear when the Wyoming Supreme Court would use the *Gates* factor test to determine if a duty exists.[91]

## PRINCIPAL CASE

The Wyoming Supreme Court held in a unanimous opinion that Union Pacific owed Glenn a duty to provide rail cars reasonably safe for their intended

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[83] *See Gates*, 719 P.2d at 196.

[84] *See, e.g.*, Brief of Appellant, *supra* note 5, at 31; Ortega v. Flaim, 902 P.2d 199, 203, 206 (Wyo. 1995).

[85] Brief of Appellant, *supra* note 5, at 33–43.

[86] *See Glenn*, 176 P.3d at 642–43.

[87] *See* David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1676 (2007).

[88] *Gates*, 719 P.2d at 196 (*citing* Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976)).

[89] *See, e.g.*, Killian v. Caza Drilling, Inc., 131 P.3d 975, 980 (Wyo. 2006); Erpelding v. Lisek, 71 P.3d 754, 758 (Wyo. 2003); Larsen v. Banner Health Sys., 81 P.3d 196, 199 (Wyo. 2003).

[90] *See* Nulle v. Gillette–Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1173 (Wyo. 1990) (distinguishing from *Gates* and refusing to apply the *Gates* factors test); Hendricks v. Hurley, 184 P.3d 680, 686 (Wyo. 2008) (applying only the foreseeability aspect of the *Gates* factors test).

[91] *See Hendricks*, 184 P.3d at 686. In a fact pattern similar to *Gates*, the court did not apply the *Gates* factor test and only remarked on the foreseeability of injury as a basis for duty. *Id.*

use.[92] First the *Glenn* court, largely reasoning by analogy, discussed a generalized duty of reasonable care.[93] Then, again reasoning by analogy, the court switched to a discussion of specialized duty, including premises liability and carrier liability, before arriving at an ad hoc determination of duty.[94]

*General Duty and Specific Duties:*
*Trying to Find the Basis for Union Pacific's Duty*

The *Glenn* court used reasoning by analogy to address Union Pacific's long-recognized duty to exercise ordinary and reasonable care and prudence in operating its railway.[95] Here, the court likened the railroad's obligation to clear its right-of-way to a generalized duty to operate in a reasonable manner.[96] It went on to state that if the railroad violates this generalized duty and an injury results, then liability could ensue.[97] The court then likened an injury resulting from a violation of this generalized duty to when a door from a rail car falls and hurts a railroad employee while he unloads cargo.[98]

The court next discussed *Chicago, B. & Q. R.R. v. Murray*, noting that a railroad's duty seems similar to that of a premises owner to an invitee.[99] The opinion analogizes Union Pacific's new-found duty regarding its rail cars to that of a premises owner who must keep her premises reasonably safe for the invitee's protection.[100] In a footnote to this discussion, the court notes that *Chicago & N.W. R.R. v. Ott* and *Murray* involve a railroad's liability to its own employees and no other, though it uses these cases to analogize a duty to a third party; in this case, Glenn.[101]

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[92] *Glenn*, 176 P.3d at 643.

[93] *Id.* at 642–43.

[94] *Id.* at 643.

[95] *Id.* at 642–43.

[96] *Id.* at 642.

[97] *Glenn*, 176 P.3d at 642.

[98] *Id.* at 643 (citing Chicago & N.W. Ry. v. Ott, 237 P. 238, 239 (Wyo. 1925)).

[99] *Id.* (citing Chicago, B. & Q. R.R. v. Murray, 277 P. 703, 707 (Wyo. 1929)).

[100] *Id.*

[101] *Id.* at 643 n.3 (citing Ott, 237 P. at 238); *Murray*, 277 P. at 707. The court also mentions Glenn's reliance upon a First Circuit case that also involved a railroad's liability to its own employees. *Glenn*, 176 P.3d at 643 n.3. The court then acknowledged Union Pacific's assertion that Boston & Maine R.R. Co. v. Sullivan, 275 F. 890 (1st Cir. 1928) and similar cases remain inapplicable because the Federal Employers Liability Act ("FELA") governs the railroads' liability to its own employees. *Id.* It did note that the principles of negligence form the foundation of FELA. *Id.* It also mentioned other states' cases holding railroads owe the same duty to its own employees as it does to non-employees authorized to load, unload, or work on its rail cars. *Id.*

The court next addressed Union Pacific's duty to perform a reasonable inspection of its rail cars.[102] This duty entails either remedying or warning customers about dangerous conditions.[103] The opinion goes on to agree with the district court's finding that Union Pacific's customer was Black Butte, and Black Butte's duty to Glenn as his employer included providing a safe place to work.[104] It then disagreed with the district court on the issue of whether a customer's duty to provide a reasonably safe workplace supplants the railroad's duty to provide reasonably safe rail cars.[105] The court determined the railroad's duty remained, and supported its finding with *Chicago, R.I. & P.R. Co. v. Williams*, which held an employer's duty to provide a reasonably safe workplace could not supplant a carrier's duty.[106] Ultimately, the court concluded Union Pacific owed Glenn a duty to provide rail cars reasonably safe for their intended use.[107]

## ANALYSIS

This analysis section begins by exploring the court's own confusion about the place of duty, as evidenced in the *Glenn* opinion's shift between generalized duty and very specialized duty, like premises liability and carrier liability.[108] Next, it discusses the court's decision as part of a greater confusion regarding duty present among courts, practitioners, and the American Law Institute ("ALI").[109] Finally, this analysis argues that the only remedy for this continuing confusion resides in the Wyoming Supreme Court reaffirming the *Gates* factor test as the analysis for finding a new duty.[110]

### *The* Glenn *Decision Demonstrates the Wyoming Supreme Court's Confusion Regarding Duty*

The *Glenn* court ignored the importance of grounding its decision on logic and past precedents.[111] To support its holding, the court rifles through various

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[102] *Glenn*, 176 P.3d at 643.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* (citing Chicago, R.I. & P.R. Co. v. Williams, 245 F.2d 397, 402 (8th Cir. 1957)).

[107] *Glenn*, 176 P.3d at 643.

[108] *See infra* notes 115–29 and accompanying text (discussing the *Glenn* court's disregard of past precedents and the relevance of such action to Wyoming practitioners).

[109] *See infra* notes 130–57 and accompanying text (discussing confusion regarding duty among many elements of the legal community and placing the *Glenn* court's decision within that general confusion).

[110] *See infra* notes 158–72 and accompanying text (discussing the importance of reaffirming the *Gates* test as Wyoming's measure of duty).

[111] *See* Rabin, *supra* note 38, at 790–91.

interpretations of duty, including a generalized duty and specialized duties.[112] However, the court's ultimate holding remains an ad hoc decision, lacking clarification because it discusses generalized and specialized duties while applying neither.[113] The court's ruling clearly ignores the importance of providing rationale for this new duty.[114]

*Why the* Glenn *Court's Confusion is Relevant to Wyoming Practitioners*

The *Glenn* court's confusion regarding duty may seem like an unimportant matter.[115] However, the Wyoming Supreme Court's confusion regarding duty in *Glenn* becomes problematic because it creates the potential for incorrectly understood precedents, leading to error in future cases.[116] This kind of confusion strikes at the very foundations of negligence law.[117] Negligence law gauges decisions to engage in harmful behavior as proper or improper.[118] Behavior becomes improper only if it breaches a preexisting obligation to refrain from harm carelessly inflicted on others.[119] Thus, duty provides reason to a negligence inquiry.[120] As the foundational element of a negligence claim, duty acts as a portal through which every negligence claim must pass.[121]

This "duty portal" sets the boundary of the scope of recovery for negligently-inflicted harm.[122] Even more importantly, how strongly a court frames duty rules controls which negligence suits pass to full adjudication or suffer summary judgment.[123] When courts rely on categories of generalized duty, more suits which lack foundation in negligence law make their way into local courtrooms.[124] Conversely, when courts rely on categories of specialized duty, such as traditional

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[112] *See Glenn*, 176 P.3d at 642–43.

[113] *See id.* at 643.

[114] *See, id.*; *see also* Rabin, *supra* note 38, at 791. When courts fail to provide rationalization for their findings of duty, practitioners cannot effectively support future arguments. *Id.*

[115] Owen, *supra* note 91, at 1673 ("Normally, most courts and commentators have other (arguably more important) fish to fry and little interest in trifling with how one element or another should be conceived or phrased.").

[116] *See* Honorable Theodore R. Boehm, *A Tangled* Webb—*Reexamining the Role of Duty in Indiana Negligence Actions*, 37 IND. L. REV. 1, 14–15 (2003).

[117] *Id.* at 15.

[118] Owen, *supra* note 91, at 1675.

[119] *Id.*

[120] *See* Goldberg & Zipursky, *supra* note 31, at 672.

[121] Owen, *supra* note 91, at 1675.

[122] *See* Twerski, *supra* note 43, at 21–22.

[123] Owen, *supra* note 91, at 1675; *see* Joseph W. Little, *Palsgraf Revisited (Again)*, 6 PIERCE L. REV. 75, 106–07 (2007).

[124] Owen, *supra* note 91, at 1675.

premises liability, injured plaintiffs are forced to fend for themselves or seek relief from insurance providers and other entities outside the courts.[125]

*The Court's Decision is Clear Evidence of a Greater Confusion Regarding Duty*

The *Glenn* court's confusion regarding duty reflects the turmoil in tort law surrounding the concept of duty present among practitioners, courts, and the ALI.[126] Disputes regarding the elements of negligence, particularly duty, arise every time the ALI issues its Restatement on the Law of Torts.[127] The importance of one element of a claim may not appear self-evident.[128] However, the outline of torts, including the place of duty, structures how lawyers frame specific issues.[129] In turn, lawyers' analyses of duty affect how judges apply this element to cases.[130] Thus, the formulation of negligence's elements remains important to a fundamental understanding of the essence of negligence and how to properly apply it.[131]

The *Glenn* court's discussion of generalized duty reflects one side of this controversy.[132] While the *Glenn* court did not openly adopt a generalized duty in *Glenn*, the court must recognize what confusion such a declaration would cause for practitioners and the court alike.[133] The draft Restatement (Third) of Torts, which eliminates duty as an element for ordinary negligence claims, and the controversy surrounding this change, demonstrates a general uncertainty regarding the role of duty.[134] By eliminating duty as an element for an ordinary negligence claim, the Third Restatement relegates duty to a background principle.[135] Alternatively, some commentators find the prospect of rewriting duty an invitation for chaos.[136]

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[125] *See id.*

[126] W. Johnathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 673–82 (2008).

[127] *See* Little, *supra* note 127, at 82–83.

[128] *See* Owen, *supra* note 91, at 1672–73.

[129] *Id.*

[130] *See* Goldberg & Zipursky, *supra* note 31, at 661–62 (discussing the impact of such arguments on the California Supreme Court).

[131] Owen, *supra* note 91, at 1673.

[132] *See Glenn*, 176 P.3d at 643. The *Glenn* court mirrors the language of the Third Restatement by stating railroads have a duty to act reasonably. *Id.*

[133] Little, *supra* note 127, at 96–100.

[134] RESTATEMENT (THIRD) OF TORTS: DUTY § 7 (2005).

[135] Goldberg & Zipursky, *supra* note 31, at 658–64.

[136] *See id.*

Unfortunately, some states have accepted the invitation to eliminate duty as an element of a negligence claim, resulting in inconsistent verdicts.[137]

The Wyoming Supreme Court need only look to the Wisconsin courts to see the absurd outcomes resulting from such a generalized duty.[138] Sincere hope that plaintiffs recover more often under a general duty regime fade into the mist upon examination of an illustrative case: *Smaxwell v. Bayard*.[139] The defendant owned two adjoining parcels of land, L1 and L2.[140] L1 contained several residential buildings, occupied by the defendant's tenants, T1 and T2.[141] L2 remained vacant.[142] In this case, the defendant allowed T1 to build a dog kennel on L2 to house wolf-dog hybrids.[143] Surrounding inhabitants complained about this use of L2, noting a wolf-hybrid had recently bitten a deputy sheriff.[144] The defendant knew of this incident.[145] As feared, one of the hybrids escaped, came upon L1, and attacked T2.[146] T2 then sued the defendant.[147] The lower courts granted the defendant's motion for summary judgment on public policy grounds.[148] The Wisconsin Supreme Court affirmed this finding, citing fear of opening a floodgate of litigation against landlords and landowners for dog attacks when they do not own the offending dog.[149]

The frustration attending this decision rests in the recognition that many, if not most, courts would have held the defendant owed the foreseeable plaintiffs a duty of care to restrain the animals.[150] The Wyoming Supreme Court must not embrace the generalized duty advocated by the Third Restatement and Wisconsin because of the confusion and absurd verdicts it engenders.[151] Instead, it must

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[137] Little, *supra* note 127, at 98–106. Wisconsin remains the only state to adopt officially a generalized duty to all to act reasonably. *Id.* However, California may soon follow suit. Cardi & Green, *supra* note 46, at 726–32.

[138] *See* Little, *supra* note 127, at 96–107.

[139] Smaxwell v. Bayard, 682 N.W.2d 923, 925 (Wis. 2004).

[140] *Id.* at 925–26.

[141] *Id.*

[142] *Id.* at 927–28.

[143] *Id.*

[144] *Smaxwell*, 682 N.W. at 927.

[145] *Id.* at 927.

[146] *Id.* at 928.

[147] *Id.*

[148] *Id.*

[149] *Smaxwell*, 628 N.W. at 928.

[150] Little, *supra* note 127, at 105–06.

[151] *See* Owen, *supra* note 91, at 1673-75; *see generally* Goldberg & Zipursky, *supra* note 31, at 661–75.

return to its own precedent.[152] The Wyoming Supreme Court can avoid all this bewilderment by using the *Gates* eight-factor test, which established the correct precedent for determining duty.[153]

### *The Wyoming Supreme Court Must Reaffirm the* Gates *Eight-Factor Test for Finding Duty*

The Wyoming Supreme Court mistakenly ignored the *Gates* factor test in its discussion of duty.[154] By not using the *Gates* test to provide rationale for its finding, the court confuses practitioners.[155] The Wyoming Supreme Court must recognize that when analyzing a new duty, it must not think categorically by restricting itself to either a generalized duty or specialized duty.[156] Instead, it must weigh the facts presented with the *Gates* factor test to provide a rationalized holding.[157] As the element of duty draws upon such concepts as fairness, justice, and social policy, the *Gates* factor test provides a means for the court to balance conflicting values and policies while avoiding the pitfalls of categorizing duty too openly or restrictively.[158]

Other states found the solution to problematic questions of duty by applying factor tests to the specific facts of various cases.[159] Indiana stands out as a potent example of a state adopting a factor test to determine duty in all situations.[160] Indiana courts routinely found, or did not find, duty in a haphazard manner, lacking any thought given to factual contexts, such as relationships or other tort obligations.[161] To combat this confusion, the Indiana Supreme Court adopted a factor test as a formula to identify duty in *Webb v. Jarvis*.[162] The Indiana Supreme Court announced a three-part test to identify duty: (1) the relationship between the parties, (2) the foreseeability of harm, and (3) public policy concerns.[163]

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[152] *Gates*, 719 P.2d at 196.

[153] *See id.*

[154] *See Glenn*, 176 P.3d at 642–43.

[155] *See* Goldberg & Zipursky, *supra* note 31, at 657. Duty lacking foundation remains useless to the practitioner and courts. *Id.*

[156] Twerski, *supra* note 43, at 21–22.

[157] *See* Boehm, *supra* note 120, at 5.

[158] *See* Owen, *supra* note 91, at 1676.

[159] *See* Boehm, *supra* note 120, at 5.

[160] *See id.*

[161] *See* Jay Tidmarsh, *Tort Law: The Languages of Duty*, 25 IND. L. REV. 1419, 1425 (1992).

[162] Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991). *Webb* involved a patient who shot his brother-in-law in a fit of rage caused by an over-prescription of steroids. *Id.* at 994. The brother-in-law sued the prescribing doctor, claiming the doctor breached his duty to administer medical treatment so as to account for possible harm to others. *Id.* at 995. Holding the doctor owed no duty, the Indiana Supreme Court adopted a three factor test to determine duty. *Id.*

[163] *Id.*

Indiana has inconsistently applied the *Webb* test, leading to confusion about whether the test supersedes existing formulations of duty, complements them, or applies only when new duty arises.[164] Additionally, some Indiana courts have ignored the *Webb* test, or misapplied it.[165] The solution cannot rest in copying Indiana's approach of adopting policy considerations in lieu of an actual inquiry into duty.[166] Instead, the Wyoming Supreme Court must clarify when and how the *Gates* factor test applies, rather than ignoring it or overly simplifying the factors.[167] To do otherwise confuses practitioners and lower courts, and has the potential to create ill-considered legal precedent.[168]

## CONCLUSION

*Glenn* reaffirms the foundations of basic tort law: provide compensation in order to make the plaintiff "whole" again.[169] However, to provide the plaintiff relief in this situation, the court needed to find Union Pacific owed Glenn a duty.[170] Though the court ultimately reached this conclusion, it fails to explain its holding.[171]

The new duty invoked by the court does not seem useful to future claims because of the confusion engendered by its lack of rationalization.[172] The *Glenn* court should have used the *Gates* factor test to better serve lower courts and

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[164] *See* Boehm, *supra* note 120, at 5 (discussing Indiana's application of factor tests).

[165] *Id.*

[166] *Id.* at 18.

[167] *See Glenn*, 176 P.3d at 643–45 (analyzing duty regarding Union Pacific and Glenn). Glenn used the *Gates* test in the Brief of Appellant, including going through a step-by-step analysis applying the factors and determining a duty existed. Brief of Appellant, *supra* note 5, at 10. The court ignored the *Gates* factors in its *Glenn* opinion. *See Glenn*, 176 P.3d at 643–45. *See also Hendricks*, 184 P.3d at 686. In *Hendricks*, an eight-year-old boy died from electrocution after touching an ungrounded well-head at his grandparents' house. *Id.* at 681. Hendricks, the boy's mother, sued the grandparents, the Hurleys, to recover for emotional injuries from their failure to use reasonable care to inspect the well and in supervising the child. *Id.* The Wyoming Supreme Court affirmed the district court's summary judgment in favor of the Hurleys. *Id.* In coming to its conclusion, the court only mentions *Gates* when discussing proximate cause. *Id.* at 686. The absence of the *Gates* factor test in this context seems particularly shocking because the test arose to address claims for emotional injuries. *Id.*; *Gates,* 719 P.2d at 196–98.

[168] *See* Goldberg & Zipursky, *supra* note 31, at 658.

[169] Esper & Keating, *supra* note 46, at 273.

[170] *See supra* note 84 and accompanying text.

[171] *See supra* notes 85–109 and accompanying text.

[172] *See Glenn*, 176 P.3d at 642–43.

practitioners because it would have articulated a rationale for its finding.[173] Instead, the court delivers a new duty without supporting rationale.[174]

An opinion lacking necessary rationale concerning an essential element lacks true usefulness for practitioners and lower courts.[175] Though the court correctly overturned the district court's finding of no duty, only once this new duty is explained and rationalized can it truly become a part of Wyoming case law to serve as a tool for injured plaintiffs.[176]

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[173] *See supra* notes 159–73 and accompanying text (discussing the importance of the *Gates* factor test in supporting findings of duty).

[174] *See supra* notes 100–12 and accompanying text (discussing the court's finding of duty).

[175] *See* Goldberg & Zipursky, *supra* note 31, at 657.

[176] Brief of Appellant, *supra* note 5, at 6–7; *see also Glenn*, 176 P.3d at 643.

## CASE NOTE

# TORT LAW—What Happened to Duty in Wyoming? Negligent Supervision of Minors, Loss of a Sibling's Consortium, Duty to Inspect One's Premises, and Negligent Infliction of Emotional Distress; *Hendricks v. Hurley*, 184 P.3d 680 (Wyo. 2008).

*Erin Murphy**

## Introduction

On July 31, 2004, an eight-year-old boy, Ryan Hendricks, suffered electrocution and died after simultaneously touching an outdoor water hydrant and an ungrounded well head while playing in the yard at his grandparents' home.[1] Though he screamed and fell to the ground, the other children playing in the yard thought he was joking and failed to immediately realize his injury.[2] After trying to rouse Ryan with no success, one of the children notified Ryan's grandparents, the Hurleys.[3] Mr. Hurley carried Ryan into the home and performed CPR while Mrs. Hurley called for emergency medical personnel.[4] The Hurleys called Ryan's father, Shawn Hendricks, who arrived on the scene a short time later.[5] Shawn called his wife, Linda, and informed her of the situation as the paramedics tried to revive their son.[6] Paramedics could not revive Ryan at the scene and took him to the hospital where he later died.[7] An inspection of the well by a professional from the energy company revealed an electrical short at the well cap from the pump caused the electrocution.[8] When Ryan touched the water hydrant and the metal well cap simultaneously, he became grounded between the two, as approximately 242 volts of electricity passed through him.[9]

Ryan's mother, Linda Hendricks, sued the Hurleys on Ryan's behalf for failure to use reasonable care in inspecting the well on their property and for

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* Candidate for J.D., University of Wyoming, 2010. I would like to thank my family and friends for their love and support. Special thanks Professor John Burman for his advice and guidance.

[1] Hendricks v. Hurley, 184 P.3d 680, 681 (Wyo. 2008).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Answer of Petitioner at 7, Hendricks v. Hurley, 184 P.3d 680 (Wyo. 2008) (No. S-007-0178).

[6] *Hendricks*, 184 P.3d at 681.

[7] *Id.*

[8] *Id.*

[9] *Id.*

negligent supervision of the child.[10] Linda Hendricks claimed damages on her own behalf for negligent infliction of emotional distress, and on behalf of Ryan's siblings for loss of consortium.[11] The District Court of Laramie County granted the grandparents' summary judgment motion and Linda Hendricks appealed.[12] The issues before the Supreme Court of Wyoming included whether the district court properly granted summary judgment on: 1) Hendricks's claim of negligent supervision on behalf of her son, 2) the loss of consortium claim on behalf of Ryan's siblings, 3) Hendricks's claim of negligent inspection on behalf of her son, and 4) the claim of negligent infliction of emotional distress on Hendricks's own behalf.[13]

This case note will first outline the four areas of Wyoming law under which Linda Hendricks brought her claims: the duty to supervise minors, loss of consortium, premises liability, and negligent infliction of emotional distress.[14] Next, this note will examine the *Hendricks* court's ruling under those areas of law and argue the court ruled correctly on all four of Hendricks's claims.[15] However, the court would have been more persuasive in its ruling on negligent supervision had it evaluated the claim based on the traditional eight-factor test used in Wyoming for assessing the imposition of duty.[16] Finally, this note will examine the current state of Wyoming law regarding a plaintiff's claim for loss of consortium of a sibling.[17]

## BACKGROUND

The Supreme Court of Wyoming does not recognize a claim for negligent supervision of minors.[18] In causes of action for loss of consortium the court has yet to address a plaintiff's right to recover for loss of consortium based on injuries to a sibling. In premises liability actions, Wyoming treats trespassers as a distinct group and applies the rule of "reasonable care under the circumstances" to all

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[10] *Id.* at 684. John and Maureen Hurley purchased their home near Cheyenne, Wyoming in 2003. *Id.* at 683. The home inspection done prior to the purchase indicated on its cover page that the inspection did not include any features on the property outside of the actual residence. Brief of Petitioner at 3, Hendricks v. Hurley, 184 P.3d 680 (Wyo. 2008) (No. S-007-0178). The Hurleys had no work done on the well prior to the incident and the well head cover completely hid most of the wire connections of the well. *Hendricks*, 184 P.3d at 683–84.

[11] *Hendricks*, 184 P.3d at 684.

[12] *Id.* at 682.

[13] *Id.* at 681.

[14] *See infra* notes 18–55 and accompanying text.

[15] *See infra* notes 56–166 and accompanying text.

[16] *See infra* notes 105–42 and accompanying text.

[17] *See infra* notes 143–53 and accompanying text.

[18] *Hendricks*, 184 P.3d at 685.

other entrants.[19] Finally, the court recognizes claims for negligent infliction of emotional distress (hereinafter "NIED"), but places limits on who can recover and when.[20]

*Negligent Supervision (Duty to Supervise)*

In her first claim, Hendricks argued the Hurleys had a duty to supervise her son Ryan.[21] Most jurisdictions, including Wyoming, do not hold a possessor of land liable for failing to supervise the activities of minors.[22] However, other jurisdictions have addressed the issue of negligent supervision and have formally recognized this tort.[23] Some courts hold an occupier of land liable for injuries to a child if the child's guardian entrusts the occupier with the supervision of that child and lack of supervision is the act of negligence causing the injury.[24] While these authorities hold a person entrusted with the child's supervision owes a duty of reasonable care to keep the child safe, that duty does not extend to unforeseeable circumstances.[25]

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[19] Clarke v. Beckwith, 858 P.2d 293, 295–96 (Wyo. 1993).

[20] Gates v. Richardson, 719 P.2d 193, 195–203 (Wyo. 1986).

[21] *Hendricks*, 184 P.3d at 685.

[22] 62 AM. JUR. 2D *Premises Liability* § 263 (2008); *Hendricks*, 184 P.3d at 685. The Supreme Court of Wyoming has not addressed this issue. However, when deciding whether to impose a common law duty upon a defendant under the theory of negligence, the court traditionally balances eight factors. Daniels v. Carpenter, 62 P.3d 555, 563 (Wyo. 2003) (citing Duncan v. Afton, Inc., 991 P.2d 739, 742 (Wyo. 1999) (citing ABC Builders, Inc. v. Phillips, 632 P.2d 925, 932 (Wyo. 1981))). The eight factors include the foreseeability of the harm to the plaintiff; the closeness of the connection between the defendant's conduct and the injury suffered; the degree of certainty that the plaintiff suffered injury; the moral blame attached to the defendant's conduct; the policy of preventing future harm, the extent of the burden upon the defendant; the consequences to the community and the court system; and the availability; cost and prevalence of insurance for the risk involved. *Gates*, 719 P.2d at 196 (quoting Tarasoff v. Regents of U. of Cal., 551 P.2d 334, 342 (Cal. 1976)).

[23] *See, e.g.*, Daniel N. McPherson, *Missouri Law on Negligent Supervision*, 59 J. MO. B. 127, 127–29 (2003) (discussing requirements under Missouri law for negligent supervision claims); A.R.H. v. W.H.S., 876 S.W.2d 687, 689 (Mo. Ct. App. 1994); Broadbent v. Broadbent, 907 P.2d 43, 50 (Ariz. 1995); Bang v. Tran, 1997 Mass.App.Div. 122, 124 (Mass. Dist. Ct. App. Div. 1997); Gulledge v. Gulledge, 367 N.E.2d 429, 431 (Ill. App. 4th Dist. 1977); Busillo v. Hetzel, 374 N.E.2d 1090, 1091–92 (Ill. App. 1st Dist. 1978); Oakley v. State, 298 N.E.2d 120, 120 (N.Y. 1973).

[24] *See, e.g.*, 62 AM. JUR. 2D *Premises Liability* § 263 (2008); 65 C.J.S. *Negligence* § 81 (2008); Barry v. Cantrell, 258 S.E.2d 61, 63–64 (Ga. 1979); Babula v. Robertson, 536 N.W.2d 834, 837–38 (Mich. 1995); Adolph E. by Susan E. v. Lori M., 166 A.D.2d 906, 906 (N.Y.A.D. 4th Dept. 1990).

[25] *See* 65 C.J.S. *Negligence* § 81 (2008); Barrera v. Gen. Elec. Co., 378 N.Y.S.2d 239, 241 (N.Y. Sup. Ct. 1975) (holding when one, other than a parent, undertakes to control an infant, the person becomes responsible for any injury proximately caused by his or her negligence; the person is required to use reasonable care, measured by the reasonable person standard, to protect the infant he or she has assumed temporary custody and control over).

While a possessor of land is not responsible for supervising the activities of minors on his or her property, the Supreme Court of Wyoming has held a driver of an automobile liable for supervision over activities of minor passengers.[26] In *Dellapenta v. Dellapenta*, the court held parents have a duty to buckle the seatbelts of their minor passengers who depend on adult care and supervision for their well-being and safety.[27] The court, however, clearly limited its holding to the facts of that case and stated the ruling did not create a general duty of supervision.[28]

*Loss of Consortium*

The basis of Hendricks's second claim, loss of consortium, is the recognition of a legally protected interest in personal relationships and the effects negligent or intentional acts of others may have beyond those suffered by the injured party.[29] The claim recognizes loss of the comfort, society, and companionship of an injured person with the appropriate relationship to the plaintiff.[30] In Wyoming, a claim for loss of consortium is derivative of the injured party's claim; therefore, the loss of consortium claim must fail if the injured party's underlying claim fails.[31] The Supreme Court of Wyoming allows recovery for the loss of a spouse's consortium and the loss of a parent's consortium.[32] However, the court does not allow parental claims for loss of a child's consortium and has not addressed a claim for loss of consortium based on the death or injuries inflicted on a plaintiff's sibling.[33]

With respect to a plaintiff's right of recovery for damages resulting from the loss of his or her sibling's consortium, only five jurisdictions recognize this claim and six courts expressly hold the siblings of a deceased child cannot recover under this claim.[34] The Supreme Court of Wyoming, along with many other jurisdictions, has yet to address this issue.

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[26] Dellapenta v. Dellapenta, 838 P.2d 1153, 1160 (Wyo. 1992).

[27] *Id.*

[28] *Id.* at 1158–59.

[29] *See* 24 CAUSES OF ACTION 2D 427 § 1 (2008).

[30] Hannifan v. Am. Nat. Bank of Cheyenne, 185 P.3d 679, 681 (Wyo. 2008).

[31] Worman v. Carver, 44 P.3d 82, 89 (Wyo. 2002) (citing Massengill v. S.M.A.R.T. Sports Med. Clinic, PC, 996 P.2d 1132, 1137(Wyo. 2000)).

[32] Weaver v. Mitchell, 715 P.2d 1361, 1369 (Wyo. 1986) (holding both husbands and wives may recover for loss of a spouse's consortium); Nulle v. Gillete–Campbell Co. Jt. Powers Fire Bd., 797 P.2d 1171, 1175 (Wyo. 1990) (holding a child may recover for loss of consortium of a parent).

[33] *Gates*, 719 P.2d at 201.

[34] *See* Elizabeth Trainor, Annotation, *Who, Other Than Parent, May Recover for Loss of Consortium on Death of Minor Child*, 84 A.L.R. 5TH 687 (2000). The following cases recognize the claim: In re Estate of Finley, 601 N.E.2d 699 (Ill. 1992); In re Air Crash Disaster at New Orleans, La., 795 F.2d 1230 (5th Cir. 1986) (applying Louisiana law); Thornton v. Ins. Co. of N. Am., 287 So. 2d 262 (Miss. 1973); Leavy v. Yates, 142 N.Y.S.2d 874 (Sup. Ct. 1955); Complaint of Patton-Tully Transp. Co., 797 F.2d 206 (5th Cir. 1986). The following cases expressly disallow the

*Premises Liability*

For Hendricks's third claim based on premises liability, the traditional common law duty of care an occupant of real property owes a person injured on his or her premises depends upon the legal status of the entrant at the time of the accident.[35] In *Clarke v. Beckwith*, the Supreme Court of Wyoming altered premises liability law in Wyoming and chose to treat trespassers as a distinct group, but adopted the rule of "reasonable care under the circumstances" for all other entrants.[36] In articulating the new rule, it held the possessor of land must act reasonably in maintaining his or her property in a safe condition in light of all of the circumstances, including the likelihood of injury, the seriousness of the injury, and the burden of avoiding the risk.[37] The court indicated the foreseeability of the injury, rather than the traditional status of the lawful entrant, is now the basis for premises liability in Wyoming.[38]

In *Goodrich v. Seamands*, the court held a possessor of land liable if he or she has reason to know a dangerous condition exists.[39] The court held a person has "reason to know" when that person has information from which someone of reasonable intelligence, or by his own superior intelligence, would infer a certain condition exists and realize the condition involves an unreasonable risk of harm.[40] More than ten years later, in *Landsiedel v. Buffalo Properties, LLC*, the court again addressed the issue of premises liability and, when prompted by the plaintiff, expressly refused to impose upon occupants the duty to inspect their property.[41]

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claim: Solomon v. Harman, 489 P.2d 236 (Ariz. 1971); Scalise v. Bristol Hosp., 1995 WL 410751 (Conn. Super. Ct. 1995); Clark v. Jones, 658 P.2d 1147 (Okla. 1983); Ford Motor Co. v. Miles, 967 S.W.2d 377 (Tex. 1998); In Long v. Dugan, 788 P.2d 1 (Wash. 1990); Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984).

[35] Vitauts M. Gulbis, Annotation, *Modern Status of Rules Conditioning Landowner's Liability upon Status of Injured Party as Invitee, Licensee, or Trespasser*, 22 A.L.R. 4TH 294 § 2(a) (1983). The categories of entrants include trespassers, licensees, and invitees. *Id.*

[36] *Clarke*, 858 P.2d at 296.

[37] *Id.*

[38] *Id.*

39 870 P.2d 1061, 1064–65 (Wyo. 1994) (quoting RESTATEMENT (SECOND) OF TORTS § 353 (1965)). In the *Goodrich* case, a patron filed a negligence suit against a vendor for failing to discover, disclose, and warn of a latent defect in the construction of a ceiling and ceiling fan when the ceiling tiles and fan fell on her, causing injury. *Id*. at 1062.

[40] *Id.* at 1064–65 (quoting RESTATEMENT (SECOND) OF TORTS, § 12(1) (1965)).

[41] 112 P.3d 610 (Wyo. 2005). The plaintiff offered a jury instruction imposing on the premises owners an explicit duty to inspect. *Id.* at 615. The plaintiff argued the court should adopt the Restatement Second of Torts, as the court recognized essentially the same rule in previous cases. *Id.* The court noted the instruction offered by the plaintiff went much further than the rule recognized in the previous cases or the Restatement because it imposed an express duty to inspect. *Id.*

*Negligent Infliction of Emotional Distress*

Hendricks's fourth claim, negligent infliction of emotional distress ("NIED"), allows a claimant to recover for emotional damages after witnessing a tragic accident in which someone known to the plaintiff is seriously injured or killed.[42] The plaintiff must show he or she has the requisite relationship to the injured party, and that he or she observed the infliction of serious bodily harm or death, or its immediate aftermath, without material change in the condition or location of the victim.[43] A claimant must also prove the defendant's negligence and that his or her negligence proximately caused the plaintiff's mental injuries.[44]

Traditionally, states have required the plaintiff to show actual or threatened physical impact in conjunction with the emotional harm suffered.[45] In *Gates v. Richardson*, the seminal NIED case in Wyoming, the court recognized a negligent defendant's liability for purely emotional damages.[46] While not requiring a showing or threat of physical impact makes the court slightly liberal in its requirements for damages in these cases, the court limited a plaintiff's ability to claim he or she observed the immediate aftermath of the injury or death in *Contreras By and Through Contreras v. Carbon County School District # 1*.[47] In that case, the Wyoming Supreme Court articulated the "immediacy test," applying it to all situations in which a plaintiff does not actually observe the accident.[48] Under this test, the court allowed some time to exist between the moment of injury and the time at which the plaintiff observed the victim.[49] However, once the victim's condition or location materially changes, the "moment of crisis" is over, regardless of how little time passed between the accident and the plaintiff's observation.[50] The court also held that a plaintiff may not recover for NIED if he or she does not see the victim until after the victim is in a hospital.[51]

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[42] *Hendricks*, 184 P.3d at 686 (citing *Gates*, 719 P.2d at 199).

[43] *Id.*

[44] *Id.* (citing *Gates*, 719 P.2d at 201).

[45] Larsen v. Banner Health Sys., 81 P.3d 196, 199 (Wyo. 2003) (citing *Gates,* 719 P.2d at 195) (citing W. KEETON, PROSSER AND KEETON ON TORTS § 54, at 362–64 (5th ed. 1984)).

[46] *Gates*, 719 P.2d at 198. In *Gates*, plaintiff brought an action for negligent infliction of emotional distress following an accident in which an automobile collided with a bicycle ridden by a child. *Id.* at 193. The Supreme Court of Wyoming held a plaintiff could recover under an NIED claim if he or she observed the infliction of serious bodily harm or death, or if he or she observed the harm shortly after its occurrence, but without material change in the condition or location of the victim. *Id.* at 199.

[47] 843 P.2d 589, 593 (Wyo. 1992).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 594.

In sum, the Supreme Court of Wyoming does not recognize a general duty to supervise minors, though regular negligence principles still apply.[52] Wyoming does recognize derivative claims of loss of consortium for spouses and children; however, the court does not recognize a parent's claim and has yet to address whether plaintiffs can recover for loss of consortium for an injured sibling.[53] Wyoming does not recognize a duty to inspect one's premises, though the law imposes a duty of reasonable care under the circumstances when entrants are licensees and invitees.[54] Finally, Wyoming does recognize the tort of negligent infliction of emotional distress and allows recovery for purely emotional damages; however, the court places specific limitations on when a plaintiff can recover.[55]

## PRINCIPAL CASE

After Ryan Hendricks's electrocution by an improperly wired well head at his grandparents' home, his mother, Linda Hendricks, asserted multiple claims against the Hurleys.[56] In a unanimous decision, the Supreme Court of Wyoming affirmed the district court's grant of summary judgment in favor of the Hurleys for all of Hendricks's claims.[57]

### *Negligent Supervision*

For her negligent supervision claim, Hendricks argued Wyoming recognizes a general common law duty to supervise minors.[58] In advancing this argument, Hendricks used *Daniels v. Carpenter* to support her claim that the court must decide whether a duty exists, and a duty will exist under the theory of negligence when society says it should exist.[59]

The *Daniels* court held that when deciding whether to impose a common law duty on a defendant under the theory of negligence, the court must balance eight factors.[60] In her brief, Hendricks analyzed each of the eight factors as they

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[52] *Hendricks*, 184 P.3d at 685.

[53] *See Weaver*, 715 P.2d at 1361; *Gates*, 219 P.2d at 201.

[54] *Clarke*, 858 P.2d at 295.

[55] *Gates*, 719 P.2d 193.

[56] Hendricks v. Hurley, 184 P.3d 680, 681 (Wyo. 2008).

[57] *Id.*

[58] *Id.* at 684.

[59] Daniels v. Carpenter, 62 P.3d 555, 563 (Wyo. 2003) (quoting Duncan v. Afton, Inc., 991 P.2d 739, 742 (Wyo. 1999) (citing ABC Builders, Inc. v. Phillips, 632 P.2d 925, 932 (Wyo. 1981))).

[60] *Daniels*, 62 P.3d at 563. When analyzing whether to impose a duty under common law for the purpose of a negligence claim, the court balances eight factors first recognized in *Gates v. Richardson*: (1) the foreseeability of harm to the plaintiff, (2) the closeness of the connection between the defendant's conduct and the injury suffered, (3) the degree of certainty that the plaintiff suffered injury, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future

pertained to this case and concluded the defendants had a duty to supervise the child and a jury should have determined whether there was a breach of that duty.[61]

In advancing her argument, Hendricks cited *Dellapenta v. Dellapenta*, in which the court held parents have a duty to buckle the seatbelts of their minor passengers who depend on adult care and supervision for their well-being and safety.[62] Hendricks argued *Dellapenta* imposed a duty similar to the one she asserted and she argued there must be some significance in the *Dellepenta* court directly quoting a New Jersey case recognizing negligent supervision.[63]

The court, however, held Hendricks's interpretation of *Daniels* and *Dellapenta* incorrect.[64] First, the court indicated the *Daniels* court upheld the dismissal of a claim for negligent supervision against property possessors by applying what the *Hendricks* court called "the usual test for imposition of a duty under common law negligence."[65] This test imposes a duty of reasonable care to avoid injury only where it is reasonably foreseeable a failure to use such care might result in injury.[66] The *Daniels* court held an allegation to supervise minors, without more, cannot establish a duty.[67]

Second, the court distinguished *Dellapenta* by asserting the *Dellepenta* court clearly limited its holding to the facts of that case and in no way created a general common law duty of supervision.[68] As the *Hendricks* court noted, it based its decisions in both *Daniels* and *Dellapenta* on the foreseeability of the danger to victims, not a general duty to supervise.[69] Since no general duty to supervise exists in Wyoming the court affirmed the lower court's grant of summary judgment in the Hurleys' favor.[70]

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harm, (6) the extent of the burden upon the defendant, (7) the consequences to the community and the court system, and (8) the availability, cost and prevalence of insurance for the risk involved. *Id.* at 563 (citing *Gates,* 719 P.2d at 196 (quoting Tarasoff v. Regents of U. of Cal., 551 P.2d 334, 342 (Cal. 1976))).

[61] Brief of Petitioner, *supra* note 10, at 20–23.

[62] *Hendricks*, 184 P.3d at 685 (quoting Dellapenta v. Dellapenta, 838 P.2d 1153, 1160 (Wyo. 1992)).

[63] Brief of Petitioner, *supra* note 10, at 22 (citing Foldi v. Jeffries, 461 A.2d 1145, 1152 (N.J. 1983)).

[64] *Hendricks*, 184 P.3d at 685.

[65] *Id.* (citing *Daniels*, 62 P.3d at 563).

[66] *Id.*

[67] *Id.* at 685 (quoting *Daniels*, 62 P.3d at 564).

[68] *Id.* The *Dellapenta* court stated it only imposed a duty on parents to buckle their minor children's seat belts after an extensive showing that national and state statistics make serious injury or death a foreseeable result of not wearing a seat belt. *Dellapenta*, 838 P.2d at 1158–59.

[69] *Hendricks*, 184 P.3d at 685.

[70] *Id.*

*Loss of Consortium*

Hendricks next asserted a claim for loss of consortium on behalf of Ryan's siblings.[71] The court held that if the injured party fails to establish the defendant's liability for his or her claim, the loss of consortium claim must fail also.[72] Hendricks could not establish the Hurleys' liability for Ryan's underlying negligence claim, and therefore, the district court dismissed the claim for loss of consortium and the Supreme Court of Wyoming affirmed.[73]

*Premises Liability*

Hendricks's third claim regarding premises liability contained two arguments.[74] First, Hendricks argued the defendants, as homeowners and possessors of the premises, had a duty to inspect their property to ensure its safety.[75] Next, Hendricks argued the Hurleys breached their duty of reasonable care under the circumstances because evidence indicated the well and hydrant created an unsafe condition.[76] That evidence, she argued, consisted of the close proximity of the water hydrant and the well pedestal, the polarity of the electrical system, and visible electrical connections.[77] Hendricks noted that although the Hurleys believed their home inspection when purchasing the home included the well, the inspection report indicated otherwise.[78]

In response, the court found a possessor of land has an affirmative duty to protect visitors against dangers known to him and dangers discoverable with the exercise of reasonable care, but must only use ordinary care to keep the premises in a safe condition.[79] The court ruled that the evidence presented regarding the well and hydrant, wiring issues, and the inspection report, when viewed in the

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[71] *Id.* at 681.

[72] *Id.*

[73] *Id.* at 687; *see infra* notes 77–83 and accompanying text (discussing the court's evaluation of Hendricks's underlying negligence claim).

[74] *Hendricks*, 184 P.3d at 687.

[75] Brief of Petitioner, *supra* note 10, at 12. However, as the court pointed out, a 2005 decision already held a duty to inspect one's premises does not exist in Wyoming. *Hendricks*, 184 P.3d at 682 (citing Landsiedel v. Buffalo Prop., LLC, 112 P.3d 610, 615 (Wyo. 2005)).

[76] Brief of Petitioner, *supra* note 10, at 12.

[77] *Id.* at 17.

[78] *Id.*

[79] *Hendricks*, 184 P.3d at 683 (citing Rhoades v. K-Mart Corp., 863 P.2d 626 (Wyo. 1993)). The court uses the term "ordinary care" in the *Hendricks* opinion; however, it uses the term "reasonable care under the circumstances" in other rulings. *See supra* notes 36–37 and accompanying text (stating the usual test for imposing liability on possessors of land when the occupant is a licensee or invitee is reasonable care under the circumstances).

light most favorable to Hendricks, could not establish the Hurleys knew or should have known of any problems with the well wiring before Ryan's injury.[80]

The Hurleys had a duty to investigate the well for problems only if they knew the well created a dangerous condition or would have discovered the danger with the exercise of reasonable care.[81] Hendricks could not offer any facts from which a jury could find the Hurleys had actual or constructive knowledge of the defects.[82] As the defense noted, the court concluded general or conclusory allegations cannot establish a genuine issue of material fact.[83]

*Negligent Infliction of Emotional Distress*

In Hendricks's final claim, she argued she became a witness to her son's death under the requirements for NIED when her husband called from the scene of the accident and described the events to her as medical personnel attempted to revive their son.[84] As the court noted, Hendricks did not observe the infliction of her son's injuries or the immediate aftermath without material change in his condition or location.[85] In fact, she did not see him until he was already in the hospital.[86] Wyoming law clearly states a plaintiff cannot recover for NIED if he or she does not see the victim until after the victim arrives at a hospital.[87]

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[80] *Hendricks*, 184 P.3d at 683. The court noted the home inspector's report, explicitly excluding the well, would not put a reasonable person on notice that the well presented a dangerous condition. *Id.* at 683–84. In addition, it took a professional inspection done after the accident to actually identify the issues with the well. *Id.* at 684. The court also clarified that, in Wyoming, an installer's possible knowledge of defects does not mean *a reasonable person in the occupant's position* should know of the defect. *Id.* at 684 (citing Goodrich v. Seamands, 870 P.2d 1061, 1065 (Wyo. 1994)) (emphasis added). Therefore, the Hurleys were not liable for damages even if Hendricks could prove the original installers of the well knew of its improper installation. *Id.*

[81] *Id.* at 683–84.

[82] *Id.* at 684. Hendricks presented evidence consisting of her own assertions regarding the position of the well and pedestal, the polarity of the electrical systems, and the existence of electric connections in the vicinity. *Id.*

[83] Brief of Respondent at 8, Hendricks v. Hurley, 184 P.3d 680 (Wyo. 2008) (No. S-007-0178) (citing Jones v. Schabron, 113 P.3d 34, 40 (Wyo. 2005)).

[84] *Hendricks*, 184 P.3d at 685. The claim of NIED allows a parent, spouse, child or sibling to bring forth a claim if he or she observes the infliction of serious bodily harm or death, or its immediate aftermath, without material change in the condition or location of the victim. *Id.* at 686 (citing *Gates*, 719 P.2d at 199).

[85] *Id.* at 686.

[86] *Id.*

[87] Contreras By & Through Contreras v. Carbon Co. Sch. Dist. # 1, 843 P.2d 589, 593 (Wyo. 1992).

Hendricks also argued the exception to the general rule requiring observation of the immediate aftermath of the injury, as recognized in *Larsen v. Banner Health System*, should have applied in her case.[88] The *Larsen* court introduced what it characterized as an "extremely limited" exception.[89] It held that in the limited circumstances where a person breaches a *contractual relationship for services* that carry with them *deeply emotional responses*, a duty arises to exercise ordinary care to avoid causing emotional harm.[90] In the case at hand, Hendricks did not claim or attempt to prove a contractual relationship existed between her and the defendants.[91]

In sum, the court upheld the district court's summary judgment order on all counts because Linda Hendricks could not establish the Hurleys' negligence as premises owners or in supervising her son.[92] The fire hydrant and well casing pedestal proximity and the visible electrical connections nearby did not demonstrate the Hurleys had information from which they could infer existence of a dangerous condition.[93] The court precluded liability for the remaining loss of consortium claim because the law bases liability for this claim on the defendant's negligence, which Hendricks failed to establish.[94]

## ANALYSIS

The Supreme Court of Wyoming properly affirmed the grant of summary judgment on Hendricks's negligent supervision, loss of consortium, negligent inspection of premises, and negligent infliction of emotional distress claims.[95] However, the court would have been more persuasive had it evaluated the negligent supervision claim based on the traditional eight-factor test used in Wyoming for assessing the imposition of a duty.[96] In addition, while the court chose not to

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[88] *Hendricks*, 184 P.3d at 686. In *Larsen*, a hospital switched two babies at birth and one of the mothers and her daughter discovered the switch forty-three years later. *Larsen*, 81 P.3d at 198. The mother and daughter sued the hospital for purely emotional damages stemming from its negligence. *Id.*

[89] *Larsen*, 81 P.3d at 206.

[90] *Id.* (emphasis added).

[91] *Hendricks*, 184 P.3d at 686. Hendricks also cited other jurisdictions allowing an exception to the general NIED rule where the nature of the relationship between the parties gives rise to a duty to exercise ordinary care to avoid causing emotional harm. *Id.* (quoting *Lawrence*, 534 N.W.2d at 421 (holding a client cannot recover for emotional distress resulting from negligence of the defendant without showing physical injury)). The court denied this expansion and refused to extend the exception recognized in *Larsen*. *Id.*

[92] *Id.* at 683–84.

[93] *Id.*

[94] *Id.* at 687.

[95] *See infra* notes 99–166 and accompanying text.

[96] *See infra* notes 105–42 and accompanying text.

address the issue of whether a child can claim loss of consortium for a sibling under Wyoming law, previous case law suggests the court may reject this claim if presented with the issue in the future.[97] Finally, the court properly affirmed the dismissal of Hendricks's premises liability and NIED claim, as Wyoming does not recognize a duty to inspect one's premises and Hendricks did not witness her son's injuries or their immediate aftermath.[98]

*Negligent Supervision*

The Supreme Court of Wyoming has not recognized a claim for negligent supervision of a minor. Even though other jurisdictions have addressed and recognized this claim, those courts noted the duty is narrow and hinges on whether a reasonable person would have foreseen the type of injury that occurred and taken precautions to avoid such injury.[99] While the (Second and Third) Restatements of Torts recognize special relationships as imposing a duty to aid or protect, the duty only includes the exercise of reasonable care under the circumstances.[100] The Restatement (Second) of Torts specifically states the defendant is not liable if he neither knows nor should know of an unreasonable risk.[101]

In addition, Hendricks sought to extend the duty of supervision to someone outside of the child's immediate family (his grandparents).[102] This gave her argument less validity because courts are reluctant to recognize family membership as creating a special relationship carrying with it a heightened standard of care.[103]

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[97] *See infra* notes 143–53 and accompanying text.

[98] *See infra* notes 154–66 and accompanying text.

[99] *See* McPherson, *supra* note 23, at 127–29 (stating the duty to supervise has been said to be a narrow one (citing Hill v. Herbert Hoover Boys Club, 990 S.W.2d 19, 22 (Mo. App. E.D. 1999))); Broadbent v. Broadbent, 907 P.2d 43, 46–47 (Ariz. 1995) (stating the pertinent inquiry is whether parent acted as reasonable and prudent parent with respect to act or omission that injured his child); Bang v. Tran, 1997 Mass. App. Div. 122, 127 (Mass. Dist. Ct. App. Div.) (stating the test is what an ordinarily reasonable and prudent parent would have done in similar circumstances); A.R.H. v. W.H.S., 876 S.W. 2d 687, 689 (Mo. Ct. App. 1994) (holding the duty to supervise is a narrow one and breach turns upon whether a reasonable person would recognize that an incident of the type alleged could occur and that steps should be taken to prevent it. Also, that more vigilance and caution may be required when a child is involved *if there is a potentially dangerous condition of which the supervisor is or should be aware*); Barrera v. Gen. Elec. Co., 378 N.Y.S.2d 239, 241 (N.Y. Sup. Ct. 1975) (holding when one, other than parent, undertakes to control infant, such person becomes responsible for any injury proximately caused by his negligence; such person is required to use reasonable care, as measured by reasonable man standard, to protect infant over whom he has assumed temporary custody and control).

[100] RESTATEMENT (SECOND) OF TORTS § 314A (1965); RESTATEMENT (THIRD) OF TORTS: LIAB. PHYS. HARM § 41 (P.F.D. No. 1, 2005).

[101] RESTATEMENT (SECOND) OF TORTS § 314A cmt. e (1965).

[102] Hendricks v. Hurley, 184 P.3d 608, 685 (Wyo. 2008).

[103] RESTATEMENT (THIRD) OF TORTS: LIAB. PHYS. HARM § 40 Reporter's Notes cmt. o (Tentative Draft No. 5, 2007) (citing Chastain v. Fuqua Indus., Inc., 275 S.E.2d 679 (Ga.Ct.App.1980)).

Beyond cases discussing a child's ability to bring a negligent supervision claim against his or her parents, almost no judicial consideration of affirmative duties of other family members to each other exists.[104]

In analyzing the issue of whether to impose a duty upon a defendant at common law, the Supreme Court of Wyoming has said duty is an expression of those policy considerations which lead the law to declare the plaintiff is entitled to protection.[105] In Wyoming, when the court considers whether to impose a duty based on a particular relationship, the traditional eight-factor test adopted by the court in *Gates v. Richardson* encompasses the various policy considerations the court balances.[106] This test applies to cases involving premises liability.[107] The Supreme Court of Wyoming has ruled the eight-factor test does not require the existence of a relationship recognized under some specialized theory of law, such as premises liability agency.[108]

The *Hendricks* court would have been more persuasive had it applied the eight-factor test in discussing the issue of negligent supervision because the court consistently turns to this test when assessing the imposition of duty.[109] The *Hendricks* court actually cited and discussed several cases in its opinion in which the court applied the traditional eight-factor test.[110] However, the court avoided the eight-factor analysis by proclaiming the "usual test" for imposition of a duty in these circumstances is that of reasonable care to avoid injury where it is reasonably foreseeable a failure to use such care may result in injury.[111]

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[104] *Id.*

[105] Duncan v. Afton, Inc., 991 P.2d 739, 744–45 (Wyo. 1999); *accord, e.g.*, Natrona County v. Blake, 81 P.3d 948, 951 (Wyo. 2003); Gates v. Richardson, 719 P.2d 193, 196 (Wyo. 1986).

[106] *Gates*, 719 P.2d at 196 (adopting the eight-factor test in Wyoming) (quoting Tarasoff v. Regents of U. of Cal., 551 P.2d 334, 342 (Cal. 1976)); *accord, e.g.*, Black v. William Insulation Co., 141 P.3d 123, 128 (Wyo. 2006) (stating the court uses the factors adopted in *Gates* when deciding whether to adopt a particular tort duty); Killian v. Caza Drilling, Inc., 131 P.3d 975, 980 (Wyo. 2006) (stating the court uses the factors adopted in *Gates* when deciding whether to adopt a particular tort duty); Erpelding v. Lisek, 71 P.3d 754, 758 (Wyo. 2003) (stating, since *Gates,* the court utilizes the eight-factor test which balances factors to determine whether a defendant should owe a duty of care to a plaintiff); Anderson v. Two Dot Ranch, Inc., 49 P.3d 1011, 1025 (Wyo. 2002) (stating in order to conclude the scope encompasses the defendant's actions, the court must consider the factors adopted in *Gates*); *Duncan*, 991 P.2d at 744 (listing the factors in *Gates* when holding it balances numerous factors in considering the imposition of duty based on a particular relationship); Mostert v. CLB & Assocs., 741 P.2d 1090, 1094 (Wyo. 1987) (following the factors adopted in *Gates*).

[107] Daniels v. Carpenter, 62 P.3d 555, 563 (Wyo. 2003).

[108] *Id.*

[109] *Gates*, 719 P.2d at 196.

[110] *See Daniels*, 62 P.3d at 563 (citing *Duncan*, 991 P.2d at 739; *Goodrich*, 870 P.2d 1061; Ortega v. Flaim, 902 P.2d 199 (Wyo. 1995)).

[111] *Hendricks*, 184 P.3d at 684 (citing *Daniels*, 62 P.3d at 563).

*Application of the Traditional Eight-Factor Test to the Facts in* Hendricks v. Hurley

The *Hendricks* court found Ryan Hendricks's injury not reasonably foreseeable.[112] While the traditional *Gates* test includes foreseeability, it is just one factor among many to be weighed and is not the most important factor.[113] The second factor the court considers in evaluating whether to impose a duty upon a defendant is the closeness of connection between the defendant's conduct and the plaintiff's injury.[114] The closer the connection between the defendant's conduct and the plaintiff's injury, the more this factor supports imposing a duty on the defendant.[115] In addressing the closeness of connection between the Hurleys' conduct and Ryan's injury, the court may have found the connection too tenuous because Ryan's injury did not result from a directly injurious action, but from the Hurleys' failure to inspect for and repair a latent defect, the danger of which they had no reason to know.[116]

The third factor the court should have considered is the certainty of injury to the plaintiff.[117] If injury to the plaintiff is uncertain or the claim is possibly disingenuous, this factor weighs against imposing a duty on the defendant.[118] The degree of certainty that Ryan suffered injury is not at issue in this case, as he died from his injuries inflicted on the Hurleys' land.[119]

The fourth factor the court should have analyzed is the moral blame attached to the defendant's conduct.[120] Moral blame arising out of the defendant's actions supports a finding that the defendant had a duty to the plaintiff.[121] If the defendant had direct control over establishing and ensuring proper procedures to avoid the harm or when the defendant is in the best position to prevent injury, the court deems him or her morally blameworthy.[122] In this case, the Hurleys were not blameworthy, as the well presented a latent danger and there is no evidence

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[112] *Id.* at 683.

[113] *Duncan*, 991 P.2d at 745. The court has recognized the policy of preventing future harm as one of the most important factors in the eight-factor test. *Id.*

[114] *Gates*, 719 P.2d at 196.

[115] *See Andersen*, 49 P.3d at 1025; *Duncan*, 991 P.2d at 745.

[116] *Hendricks*, 184 P.3d at 683–84.

[117] *Gates*, 719 P.2d at 196.

[118] *See Killian*, 131 P.3d at 986; *Larsen*, 81 P.3d at 205; *Gates*, 719 P.2d at 196–97.

[119] *Hendricks*, 184 P.3d at 681.

[120] *Gates*, 719 P.2d at 196.

[121] *See Killian*, 131 P.3d at 986; *Erpelding*, 71 P.3d at 759; *Larsen*, 81 P.3d at 205; *Duncan*, 991 P.2d at 745.

[122] *Killian*, 131 P.3d at 986; *Larsen*, 81 P.3d at 205; *see Duncan*, 991 P.2d at 745.

showing harm could have been prevented if the Hurleys directly supervised Ryan in the yard or if he received more immediate medical assistance.[123]

The fifth factor the court should have considered is the policy of preventing future harm.[124] If placing a duty upon a defendant in a certain situation will succeed in preventing future harm, this factor will strongly support imposing a duty upon the defendant.[125] The court has recognized the policy of preventing future harm as one of the most important factors in the eight-factor test.[126] In this case, imposing a duty of supervision upon the defendants cannot prevent future harm, as the Hurleys' were unaware of the danger posed by the well, and no evidence exists to show how increased supervision could have prevented the injury.[127]

The sixth factor the court should have examined is the burden a duty places on the defendant.[128] If the burden on the defendant is not significant, this factor supports finding a duty.[129] If a duty were imposed in this case, the burden would be significant because it holds supervisors liable even when harm is unforeseeable. A supervisor should not be forced to keep a constant vigil over his or her supervisees and prevent injury from risks the supervisor has no reason to know exist.[130]

The seventh factor the court should have considered is the impact the imposition of a duty would have on the community and the court system.[131] This factor considers the burdens associated with creating a new cause of action and the increase of litigation in courts.[132] If the burden on the community and the court system is insignificant, this factor supports finding a duty on behalf of the defendant.[133]

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[123] *Hendricks*, 184 P.3d at 683, 685.

[124] *Gates*, 719 P.2d at 196.

[125] *See Larsen*, 81 P.3d at 205; *Duncan*, 991 P.2d at 745.

[126] *Duncan*, 991 P.2d at 745.

[127] *Hendricks*, 184 P.3d at 683–85. In addition, no medical evidence existed to prove that a faster response time on behalf of the Hurleys could have prevented Ryan Hendricks's injury or death. *Id.* at 685.

[128] *Gates*, 719 P.2d at 196.

[129] *See Larsen*, 81 P.3d at 205; *Duncan*, 991 P.2d at 745; *Gates*, 719 P.2d at 197.

[130] *See, e.g.*, Smith, Etc. v. Archbishop of St. Louis, 632 S.W.2d 516, 521 (Mo. App. E.D. 1982) (stating the duty to supervise is narrow, the defendant is not an insurer of plaintiff's safety, and is not required to maintain a "constant vigil" over every person under their supervision); Stewart v. Harvard, 520 S.E.2d 752, 759 (Ga. 1999) (holding the person caring for a child is not an "insurer of the safety of the child. He is required only to use reasonable care commensurate with the reasonably foreseeable risk of harm." (quoting Hemphill v. Johnson, 497 S.E.2d 16, 18 (Ga. 1998))).

[131] *Gates*, 719 P.2d at 196.

[132] *Larsen*, 81 P.3d at 205; *Duncan*, 991 P.2d at 746.

[133] *See Larsen*, 81 P.3d at 206; *Erpelding*, 71 P.3d at 760; *Duncan*, 991 P.2d at 746.

Recognizing a duty to supervise may increase litigation, as a court subjects itself to increased litigation any time it recognizes a new cause of action.[134] However, as the Supreme Court of Wyoming recognized in *Gates*, an increased chance of litigation should not deter a court from recognizing a duty that allows an innocent plaintiff to recover for a loss suffered.[135] The court, in imposing a duty under a cause of action for NIED stated, "[i]f the only purpose of our law was to unburden the court system, then we would reach the zenith of judicial achievement simply by closing the district courts to all litigants and allowing all wrongs to come to rest on innocent victims."[136] Hence, this factor is not necessarily in the Hurley's favor.

The final factor the court should have examined in evaluating whether to impose a duty on a defendant is the availability, cost and prevalence of insurance for the risk involved.[137] If an insurance policy is available to the defendant for the type of risk and is not unreasonably expensive, the factor may support finding a duty.[138] However, the court rejected insurance arguments as a basis for denying recovery in *Gates v. Richardson*, ruling a person's liability under law should not change according the availability and cost of liability insurance.[139]

In summary, the Supreme Court of Wyoming considers the sum total of the above factors when analyzing whether to impose a duty upon a defendant at common law.[140] In the present case, the total number of factors against establishing

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[134] Theama by Bichler v. City of Kenosha, 344 N.W.2d 513, 521 (Wis. 1984) ("The fear of an increase in litigation has been voiced in almost every instance where the courts have been asked to recognize a new cause of action. . . . As a result, we feel that this argument does not merit any weight."); *see also* Note, *The Child's Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent*, 56 B.U. L. REV. 722, 732 (1976).

[135] *Gates*, 719 P.2d at 197; *see also* Bevan v. Fix, 42 P.3d 1013, 1022 (Wyo. 2002) (stating the court again will reject arguments to effectively close the courts to a class of plaintiffs); Leithead v. Am. Colloid Co., 721 P.2d 1059, 1065 (Wyo. 1986) (stating while problems in recognizing a new claim are not to be dismissed lightly, they can be solved without rejecting the action entirely). Rejecting the claim entirely would be the equivalent of "employing a cannon to kill a flea." *Leithead*, 721 P.2d at 1065 (quoting *Gates*, 719 P.2d at 197 (quoting Nehring v. Russell, 582 P.2d 67, 79 (1978))).

[136] *Gates*, 719 P.2d at 197.

[137] *Id.* at 196.

[138] *See Larsen*, 81 P.3d at 206. Conflict exists as to whether claims for negligent supervision fall within the coverage of insurance policies. McPherson, *supra* note 23, at 131–33. Therefore, this factor may weigh in favor of the Hurleys, as the Restatement (Third) of Torts notes the unavailability of liability insurance in this area. RESTATEMENT (THIRD) OF TORTS: LIAB. PHYS. HARM § 40 Reporter's Notes cmt. o (Tentative Draft No. 5, 2007) (speculating that the unavailability of liability insurance may be inhibiting the doctrinal development in this area).

[139] *See Gates*, 719 P.2d at 197 ("A person's liability in our law still remains the same whether or not he has liability insurance; properly, the provision and cost of such insurance varies with potential liability under the law, not the law with the cost of insurance.").

[140] *Duncan*, 991 P.2d at 746; *accord, e.g.*, *Natrona County*, 81 P.3d at 951; *Gates*, 719 P.2d at 196.

a duty, as well as the comparative weight of the factors against establishing a duty, indicates the court should not impose a duty upon the Hurleys for negligent supervision of their grandson.[141] A thorough analysis of these factors by the *Hendricks* court would have bolstered the court's ruling, as the court consistently turns to this test when assessing the imposition of duty upon a defendant.[142]

*Loss of Consortium*

The court correctly upheld the dismissal of Hendricks's second claim, loss of consortium on behalf of Ryan's siblings, because Hendricks failed to prove the underlying claim of negligence, and Wyoming has not recognized a claim of loss of a sibling's consortium.[143] By asserting the loss of consortium claim on behalf of Ryan's siblings, Hendricks argued for an extension of the current law, which only recognizes claims for spouses or children who suffer the loss of a parent's consortium.[144] The court declined to address the issue and instead based its ruling on Hendricks's failure to prove the underlying claim of negligence.[145]

Recent case law suggests a possible trend toward courts accepting this theory of recovery for persons other than parents and spouses.[146] The courts allowing recovery for this claim reject arguments suggesting there can be no "special relationship" between siblings or losses of this type are intangible and too speculative.[147] However, the majority of courts around the country either refuse to address the issue or deny recovery for this cause of action.[148]

Courts expressly disallowing this claim hold the governing wrongful death statutes preclude sibling recovery, the injuries in these cases are impermissibly speculative, or the relationship between siblings differs from relationships between spouses or parents and children in ways that preclude recovery.[149] The argument centered on the differing relationships among spouses, parents, and siblings is most valid as to why the Wyoming Supreme Court should not recognize this

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[141] *See supra* notes 112–39 and accompanying text.

[142] *See supra* note 106 and accompanying text.

[143] *Hendricks*, 184 P.2d at 683–84; *see supra* notes 29–34 and accompanying text.

[144] Brief of Respondent, *supra* note 83, at 17–18.

[145] *Hendricks*, 184 P.3d at 687.

[146] Trainor, *supra* note 34, Summary.

[147] *Id.* § 4(a) (citing In re Estate of Finley, 601 N.E.2d 699 (1992); Sheahan v. Ne. Ill. Reg'l Commuter R.R. Corp., 496 N.E.2d 1179, 1182 (Ill. 1986)).

[148] *See supra* note 34 and accompanying text.

[149] *See* Trainor, *supra* note 34, § 4(b) (citing Scalise v. Bristol Hosp., 1995 WL 410751 (Conn. Super. Ct. 1995) (not reported); Solomon v. Harman, 489 P.2d 236 (Ariz. 1971); *Sheahan*, 496 N.E.2d at 1182).

claim in Wyoming.[150] The law generally does not impose the same duty of care and socially expected companionship on sibling relationships that is does on spousal and parent-child relationships.[151] The Supreme Court of Wyoming affirmed this in *Nulle v. Gillette–Campbell County Joint Powers Fire Board*, when it recognized a child's claim for loss of a parent's consortium and held a child's relational interest with a parent is one of unique dependence.[152] In contrast, sibling relationships are not characterized by any unique dependencies, such as the need for socialization or financial dependence.[153]

*Premises Liability*

With respect to Hendricks's third claim, negligent failure to inspect, Wyoming does not recognize a general duty to inspect one's premises and Hendricks failed to present evidence showing a reasonable person would foresee the well presenting a dangerous condition.[154] The Supreme Court of Wyoming ruled correctly on this issue because an occupant should not have the duty to scour or comb through his premises.[155]

When the possessor of land has no knowledge of a defect, and nothing in the appearance or character of the premises indicates the existence of a defect, no reason for an inspection exists and ordinary diligence does not require an inspection prior to a person entering upon the land.[156] To hold differently would

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[150] Wyoming's wrongful death statute allows siblings to recover for a child's death; therefore one could not argue loss of a sibling's consortium is limited by the wrongful death law's failure to recognize this relationship. Wetering v. Eisele, 682 P.2d 1055, 1062 (Wyo. 1984). Also, the mental and emotional injuries associated with the injury or death of a sibling are arguably not speculative. *See* Hopson v. St. Mary's Hosp., 408 A.2d 260, 264 (Conn. 1979) ("Although disparagingly referred to as 'sentimental' or 'parasitic' damages, the mental and emotional anguish caused by seeing a healthy, loving, companionable mate turn into a shell of a person is undeniably a real injury.").

[151] *See* Trainor, *supra* note 34, § 4(b) (citing *Scalise*, 1995 WL 410751 (Conn. Super. Ct. 1995) (not reported)); Reagan v. Vaughn, 804 S.W.2d 463, 465–66 (Tex. 1990) (stating the distinction between the parent-child relationship and the relationship between a child and other relatives is rational and easily applied); Trainor, *supra* note 34, § 2(b) (stating the loss between siblings is often characterized in terms of companionship as opposed to dependency).

[152] 797 P.2d 1171, 1175 (Wyo. 1990).

[153] *Reagan*, 804 S.W.2d at 466 ("While . . . all family members enjoy a mutual interest in consortium, the parent-child relationship is undeniably unique and the wellspring from which other family relationships derive.") (quoting Villareal v. State, 774 P.2d 213, 217 (Ariz. 1989)).

[154] *Clarke*, 858 P.2d at 295; *Hendricks*, 184 P.3d at 684.

[155] Parks v. Rogers, 825 A.2d 1128, 1131 (N.J. 2003).

[156] Sisson v. Elliot, 628 S.E.2d 232, 234 (Ga. 2006) (citing Howerdd v. Whitaker, 75 S.E.2d 572 (Ga. 1953)); *see also* Clemmons v. Griffin, 498 S.E.2d 99, 100–01 (Ga. 1998) (holding repairman burned due to improper wiring of air conditioning unit could not hold homeowner liable for negligence of prior contractor in wiring unit); McCarthy v. Hiers, 59 S.E.2d 22, 24 (Ga. 1950); Williamson v. Kidd, 15 S.E.2d 801, 803 (Ga. 1941); S. Bell Tel. Co. v. Starnes, 50 S.E. 343, 344 (Ga. 1905).

force the occupants of land to anticipate the existence of hazards they have no reason to believe exist and, therefore, impose a duty to exercise extraordinary care in order to uncover latent defects.[157]

*Negligent Infliction of Emotional Distress*

The court correctly ruled against Hendricks in her final claim, NIED, as Hendricks did not observe her son's injuries or the immediate aftermath without material change.[158] When discussing the fundamentals of NIED in *Gates*, the court explained that the essence of this tort is the shock caused by the perception of an especially horrendous event.[159] The court stated, "[i]t is more than the shock one suffers when he learns of the death or injury of a child, sibling or parent *over the phone*, from a witness, *or at the hospital*."[160] The claim Linda Hendricks asserted did not meet the requirements of this rule.[161]

The Supreme Court of Wyoming has often expressed the need to limit claims in this area and cautions that allowing a plaintiff to assert a claim without observing the injuries to the victim, or at least arrive before material change occurs, would open a floodgate of litigation in this area.[162] In addition, the financial burdens placed upon defendants will increase if recovery is more easily attainable.[163] While the law should provide redress for a plaintiff's suffering, the law should not inflict undue harm upon occupants by imposing unreasonably excessive measures of liability.[164]

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[157] *Sisson*, 628 S.E.2d at 235 (citing Armenise v. Adventist Health Sys./Sunbelt, 466 S.E.2d 58 (Ga. 1995)).

[158] *Hendricks*, 184 P.3d at 686.

[159] *Gates*, 719 P.2d at 199 (quoting Yandrich v. Radic, 433 A.2d 459, 461 (Pa. 1981)).

[160] *Id.* (citing John D. Burley, *Dillon Revisited: Toward a Better Paradigm for Bystander Cases*, 43 OHIO ST. L.J. 931, 948 (1982) (emphasis added)).

[161] *Hendricks*, 184 P.3d at 686.

[162] *Gates*, 719 P.2d at 197 (stating the burden that most worries the court is the burden that an overbroad liability would impose on the court system). Administrative concerns include the possibility of multiplicity of suits and the burden to the court system due to increased litigation. *Id.*; *see also Larsen*, 81 P.3d at 199, 202. In addition, due to the nature of this cause of action, the court may be burdened with even more potentially fraudulent claims if it recognizes the exception Hendricks asserted. *Gates*, 719 P.2d at 197; *see also* Thing v. La Chusa, 771 P.2d 814, 828 (Cal. 1989) (stating greater certainty and a more reasonable limit on the exposure to liability for negligent conduct is possible by limiting the right to recover for negligently caused emotional distress to plaintiffs who personally and contemporaneously perceive the injury-producing event and its traumatic consequences).

[163] *Gates*, 719 P.2d at 197 (referring to the district court's concern that such actions will result in a burden to the individual defendant and impose upon the public the unwarranted economic burden of increased insurance premiums, but ruling insurance will help spread the loss); Ochoa v. Superior Court, 703 P.2d 1, 6 (Cal. 1985).

[164] Bischoff v. Kohlrenken, 449 A.2d 1347, 1349 (N.J. Super. Law Div. 1982) (quoting Portee v. Jaffee, 417 A.2d 521, 527 (N.J., 1980)).

Finally, even though the *Hendricks* court discussed the telephone call between Hendricks and her husband, the court did not need to address the issue, because the tort of NIED clearly requires a plaintiff to prove the emotional distress he or she suffers is a result of the defendant's negligence.[165] The court already indicated Hendricks failed to meet her burden in proving the Hurleys knew or had reason to know the well presented a dangerous condition, and this precluded their negligence.[166]

## CONCLUSION

The Supreme Court of Wyoming, in *Hendricks v. Hurley*, properly affirmed the grant of summary judgment on Hendricks's negligent supervision, loss of consortium, negligent inspection of premises, and negligent infliction of emotional distress claims.[167] However, the court would have been more persuasive in its ruling had it evaluated the negligent supervision claim under the traditional eight-factor test used for assessing the imposition of duty in Wyoming.[168]

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[165] Sims v. Gen. Motors Corp., 751 P.2d 357, 366 (Wyo. 1988).

[166] *Hendricks*, 184 P.3d at 685.

[167] *See supra* notes 95–166 and accompanying text.

[168] *See supra* notes 105-42 and accompanying text.

## CASE NOTE

# FAMILY LAW—Wyoming Courts Continue to Struggle with Termination of Parental Rights Cases: The Problem with "Reasonable Efforts"; *In re FM*, 163 P.3d 844 (Wyo. 2007).

*Wendy S. Ross**

## Introduction

When a state removes a child from a home due to abuse and/or neglect, federal law, specifically the Adoption and Safe Families Act, requires states to make reasonable efforts to reunify the child with his or her family, with some exceptions.[1] While Congress made a child's safety the paramount concern, it did not further clarify what "reasonable efforts" means, leaving states to make their own interpretations.[2]

On September 1, 2002, a sheriff's deputy performed a welfare check at BA's ("Mother") home.[3] The sheriff's deputy found two girls, ages eleven and thirteen, alone in the home.[4] He found the home dirty and discovered a glass pipe in the master bedroom, indicating the use of methamphetamine.[5] The deputy took the two girls into protective custody based on the home's condition and because Mother left them alone.[6] Mother's other child, FM, age nine, visited his grandmother the day the deputy placed his sisters into protective custody.[7] Nevertheless, the Department of Family Services ("DFS") chose to place FM in protective custody as well.[8] After DFS placed FM and his sisters in protective custody, the District Attorney's office filed a neglect petition in juvenile court against Mother.[9]

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* Candidate for J.D., University of Wyoming, 2010. I would like to thank my parents, Jan and Dale Ross, my little brother, Lucas Ross, and the rest of my family for supporting me through this adventure. I would also like to thank CASA of Laramie County for piquing my interest in this subject and inspiring me to write this piece.

[1] Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 326 U. Tol. L. Rev. 321, 326–27 (2005).

[2] *See* Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden under Federal Child Welfare Child Protection Legislation*, 12 B.U. Pub. Int. L.J. 259, 261–62 (2003).

[3] In re FM, 162 P.3d 844, 846 (Wyo. 2007).

[4] *Id.*

[5] *Id.*

[6] *Id.* Next, the sheriff's deputy called a caseworker with the Department of Family Services ("DFS"). *Id.*

[7] *Id.*

[8] *FM*, 163 P.3d at 846.

[9] *Id.* The State retained legal custody of all three children: FM and his two sisters, HA and BA. *Id.*

DFS developed a case plan, setting forth certain tasks for Mother to complete.[10] DFS listed family reunification as the permanency goal for the children, meaning Mother would regain legal and physical custody of her children after completing the required tasks.[11] The case plan did not, however, contain a concurrent, or alternate, permanency goal for FM or his sisters.[12] Nor did DFS inform Mother of the possible termination of her parental rights if she did not comply and complete the tasks DFS assigned.[13]

In February 2003, the State arrested Mother for delivery and conspiracy to deliver methamphetamine, for which the State later convicted her.[14] Mother received probation with a suspended sentence of incarceration for five to eight years.[15] Mother then left Wyoming for approximately six or seven months, in violation of her probation.[16] Mother surrendered to authorities in May 2004 and the State imposed Mother's suspended sentence of incarceration.[17]

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[10] *Id.* DFS defines case plan as: "a written plan, which guides all participants toward the safety, permanency, and well-being of the child." 049-240-001 WYO. CODE R. § 4(e) (Weil 2008). Mother began working on the case plan in December 2002. *FM*, 163 P.3d at 846.

[11] *FM*, 163 P.3d at 846. DFS defines permanency as: "an individualized, most appropriate, permanent home for the child, including but not limited to family reunification, relatives, adoption, guardianship, or independent living." 049-240-001 WYO. CODE R. § 4(t). The case plan identified eleven tasks for Mother to complete. Brief of Appellee at 8, In re FM, 163 P.3d 844 (No. C-06-14) (Wyo. Feb. 20, 2007), 2007 WL 2752854. The case plan required Mother to: (1) find and maintain appropriate housing; (2) find and maintain stable employment; (3) not engage in illegal activity or associate with persons who engage in illegal activity; (4) complete a substance abuse evaluation; (5) complete random urinalysis tests; (6) provide a substance free home for the family; (7) go to individual counseling sessions; (8) go to family counseling sessions with the children at least once per month; (9) complete DFS's "Love and Logic" parenting classes; (10) complete visitation with the children; and (11) provide financially for FM and his sisters, HA and BA, while they remained in state custody. *Id.*

[12] *FM*, 163 P.3d at 846. DFS defines concurrent plan as: "a case plan developed in addition to the child's main case plan with other possible outcomes to assure safety and permanency for the child." 049-240-001 WYO. CODE R. § 4(j).

[13] *FM*, 163 P.3d at 846. Mother did not satisfactorily comply with the first case plan. *Id.* Mother lived in several different residences, had no proof of employment, and continued to have problems involving law enforcement. Brief of Appellee, *supra* note 11, at 8.

[14] *FM*, 163 P.3d at 846.

[15] Brief of Appellee, *supra* note 11, at 8. Mother would receive the incarceration sentence only if she violated any conditions of her probation. *Id.* As a condition of her probation, the state ordered Mother to complete the Transitions Residential Program, in which she enrolled, but ultimately left without completing. *FM*, 163 P.3d at 846.

[16] Brief of Appellee, *supra* note 11, at 8. Mother attempted to maintain contact with her children from outside of Wyoming by sending them cards and clothing. *FM*, 163 P.3d at 846. She also maintained telephone contact with DFS. *Id.*

[17] *FM*, 163 P.3d at 846. The criminal court supposedly reduced Mother's original suspended sentence of incarceration of five to eight years, to three to six years. Brief of Appellee, *supra* note 11, at 8 n.2.

The neglect proceedings against Mother continued in juvenile court during Mother's absence from the jurisdiction and subsequent time in prison.[18] The next case plan listed adoption as the permanency goal for FM, and required Mother to voluntarily relinquish her parental rights to FM.[19] The State filed a termination petition in February 2006.[20] The Laramie County District Court held the termination action trial in June 2006 and subsequently terminated Mother's parental rights to FM.[21]

Mother appealed the termination decision to the Wyoming Supreme Court.[22] She claimed the State did not present sufficient evidence to support terminating her parental rights to FM and the Wyoming Supreme Court agreed.[23] Specifically, the court held the State did not provide clear and convincing evidence to show DFS made reasonable efforts toward family reunification before moving to terminate Mother's parental rights to FM.[24]

This note analyzes the leading Wyoming cases regarding "reasonable efforts" towards family reunification in termination of parental rights cases.[25] More specifically, this note focuses on the lack of guidance Wyoming case law provides in determining what constitutes "reasonable efforts" towards family reunification.[26] Next, this note offers an analysis of the court's ruling in *In re FM* and argues the Wyoming Supreme Court correctly reversed the termination of Mother's parental rights.[27] Finally, this note will explore formulations of "reasonable efforts" towards family reunification in other states and recommend how Wyoming should proceed in determining what constitutes "reasonable efforts."[28]

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[18] *FM*, 163 P.3d at 846. The DFS caseworker twice recommended, once in October 2003 and once in October 2004, that the State terminate Mother's parental rights to FM. *Id.* However, Mother did not admit to the allegations in the neglect petition until November 2004, at which point the court adjudicated Mother neglectful. *Id.* at 847. DFS did not develop another case plan in response to Mother's admission until June 2005. *Id.*

[19] *Id.* at 847. DFS again recommended terminating Mother's parental rights to FM in January 2006. *Id.*

[20] *Id.*

[21] *Id.* The State did not terminate Mother's parental rights to her daughters because both girls had a strong bond with their mother and desired to maintain a relationship with her. Brief of Appellee, *supra* note 11, at 8 n.1.

[22] *FM*, 163 P.3d at 846.

[23] *Id.*

[24] *Id.* at 848.

[25] *See infra* notes 36–76 and accompanying text.

[26] *See id.*

[27] *See infra* notes 79–106 and accompanying text.

[28] *See infra* notes 111–91 and accompanying text.

## BACKGROUND

Wyoming state law requires DFS to make reasonable efforts toward family reunification.[29] Wyoming state law closely resembles the federal law requiring reasonable efforts—the Adoption and Safe Families Act of 1997 ("ASFA").[30] The statute does not, however, give much guidance in determining what constitutes "reasonable efforts."[31] It simply states, "reasonable efforts determinations shall include whether or not services to the family have been accessible, available, and appropriate."[32] At best, this statement identifies a few factors of what constitutes "reasonable efforts."[33] While it appears the Wyoming legislature left it to the courts to provide further guidance in determining "reasonable efforts," Wyoming courts have not taken full advantage of these opportunities.[34] The Wyoming Supreme Court has primarily upheld termination of parental rights decisions on reasonable efforts grounds, only reversing in a few cases, and in none of the cases has "reasonable efforts" gained a clearer meaning.[35]

### *Wyoming Cases Upholding Termination of Parental Rights*

The Wyoming Supreme Court, in upholding terminations of parental rights, gives some guidance in determining whether the State made reasonable efforts toward family reunification.[36] Two cases, *In re HP* and *In re MN*, are leading examples of what constitutes reasonable efforts toward family reunification in

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[29] WYO. STAT. ANN. § 14-3-440(a) (2008). The statute states:

> (a) Except as provided in W.S. 14-2-309(b) or (c), reasonable efforts shall be made to preserve and reunify the family:
>
> (i) Prior to placement of the child outside the home, to prevent or eliminate the need for removing the child from the child's home; and
>
> (ii) To make it possible for the child to safely return to the child's home.

*Id.*

[30] *Compare id.*, *with* The Adoption and Safe Families Act, 42 U.S.C. § 671(a)(15)(B) (2008) ("Except as provided in subparagraph (d), reasonable efforts shall be made to preserve and reunify families—(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to safely return to the child's home.").

[31] *See* WYO. STAT. ANN. § 14-3-440 (leaving "reasonable efforts" undefined).

[32] *Id.* § 14-3-440(e).

[33] *See* MINN. STAT. ANN. § 260.012(h)(4) (West 2008) (listing available and accessible state provided services as one factor contributing to reasonable efforts).

[34] *E.g.*, *FM*, 163 P.3d 844; In re HP, 93 P.3d 982 (Wyo. 2004); In re MN, 78 P.3d 232 (Wyo. 2003); MB v. Laramie County Dep't of Family Servs., 933 P.2d 1126 (Wyo. 1997).

[35] *See, e.g.*, *FM*, 163 P.3d at 851 (reversing a termination of parental rights); *HP*, 93 P.3d at 992 (upholding a termination of parental rights); *MN*, 78 P.3d at 241 (upholding a termination of parental rights); *MB*, 933 P.2d at 1130 (reversing a termination of parental rights).

[36] *See, e.g.*, *HP*, 93 P.3d 982; *MN*, 78 P.3d 232.

Wyoming.[37] In *In re HP*, the State took two children into custody after their paternal grandparents informed DFS they could no longer care for the children.[38] Shortly thereafter, Mother received an eighteen to twenty-four month prison sentence for drug-related offenses.[39] Mother worked with DFS and a Multi-Disciplinary Team ("MDT") on a case plan throughout her time in prison.[40] After Mother's release from prison, DFS placed the children temporarily in Mother's physical custody, while the State retained legal custody.[41] Following what the juvenile court determined reasonable efforts to reunify the family, DFS pursued proceedings to terminate Mother's parental rights.[42] Mother subsequently challenged the court's order.[43]

The Wyoming Supreme Court held DFS made reasonable efforts to reunify the family and those efforts proved unsuccessful.[44] The MDT held six meetings to review Mother's progress.[45] DFS developed four different case plans for Mother, each of which outlined specific objectives she needed to complete to regain physical and legal custody of her children.[46] During Mother's time in prison, DFS arranged unsupervised, overnight visits with the children's maternal grandmother, who took them to visit Mother.[47] After Mother's release from prison, DFS allowed visitation.[48] DFS then allowed the children to live with Mother within two weeks

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[37] *HP*, 93 P.3d 982; *MN*, 78 P.3d 232.

[38] *HP*, 93 P.3d at 984. Mother was in jail at the time. *Id.*

[39] *Id.* At an initial hearing on the neglect petition filed against Mother, she admitted to the allegations in the petition and the district court adjudicated Mother neglectful. *Id.* The children remained in DFS custody and the district court ordered DFS to make reasonable efforts towards family reunification. *Id.*

[40] *Id.* at 984–86. Wyoming requires the appointment of an MDT within ten days of the filing of a neglect petition. WYO. STAT. ANN. § 14-3-427 (2008). An MDT should consist of: the child's parent or guardian, the child's psychologist or other mental health professional, the district attorney, the guardian ad litem, the volunteer lay advocate, and the foster parent. *Id.* § 14-3-427(c). The MDT has the responsibility of making case planning recommendations. *Id.* § 14-3-427(e). With this purpose in mind, the MDT reviews the child's history, school records, mental health records, DFS records, and other pertinent information. *Id.* § 14-3-427(d). While making recommendations, the MDT gives consideration to the child's best interests, the family's best interests, and costs of care. *Id.* § 14-3-427(f).

[41] *HP*, 93 P.3d at 986. Mother gained her release from prison in March 2003. *Id.* However, Mother subsequently returned HP and NP to DFS, who then placed the children in a new foster home. *Id.* DFS continued to provide Mother with assistance and made a fourth case plan for her to complete. *Id.* at 987.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *HP*, 93 P.3d at 990.

[47] *Id.* These visits occurred at least twice monthly while Mother remained incarcerated. *Id.*

[48] *Id.*

of her release from prison.[49] After Mother returned the children to DFS, they offered her transportation so she could comply with the visitation schedule.[50] Additionally, DFS assisted Mother in finding suitable housing and referred her to counseling services.[51] The court upheld the termination of Mother's parental rights, reasoning DFS made the aforementioned reasonable efforts to reunify the family and Mother failed to take advantage of the offered services.[52]

The Wyoming Supreme Court also upheld a termination of parental rights in *In re MN*.[53] DFS's first involvement with this family came three years before the State filed a neglect petition against the mother.[54] After these services proved unsuccessful, the State commenced neglect proceedings against Mother.[55] DFS continued assisting Mother on her parenting issues for three more years.[56] Ultimately the State filed a petition to terminate Mother's parental rights.[57]

The court upheld the termination of Mother's parental rights, reasoning DFS made reasonable efforts to reunify the family.[58] The State provided services for the family even before the filing of an abuse/neglect petition.[59] DFS continued to make efforts to help Mother, "providing her with Medicaid, money for daycare, food stamps, and other financial assistance."[60] After the juvenile court proceedings commenced, DFS created four separate case plans.[61] DFS also invited

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[49] *Id.*

[50] *Id.*

[51] *HP*, 93 P.3d at 990.

[52] *Id.* Mother did not maintain employment or stable housing, she did not remain sober, and she left the children alone without adequate supervision on a few occasions. *Id.* at 986–87.

[53] *MN*, 78 P.3d at 241.

[54] *Id.* at 233, 235. DFS received reports of Mother giving her two-year old child alcohol in an infant cup and reusing diapers. *Id.* at 235. In 1997, DFS received reports of Mother feeding her child a diet of soda and candy, leaving the child with inappropriate caregivers, leaving the child to play in the street unsupervised, leaving the child unattended in a bar, and leaving the child unattended in a restroom, which led to the child smearing feces in the restroom. *Id.* In 1998, DFS received reports of the child arriving dirty to daycare, Mother and the child living in filth, and Mother feeding the child nothing but candy and soda. *Id.*

[55] *Id.* at 235. The neglect proceedings commenced after MN dropped her child off at a co-worker's house, unannounced, and left before anybody answered the door. *Id.*

[56] *See id.* at 237–38 (detailing the services DFS provided).

[57] *Id.* at 233–34, 236–38.

[58] *MN*, 78 P.3d at 238. These efforts included: scheduling and paying for evaluations in substance abuse, psychological, neuro-psychological, and parenting areas; providing Mother with transportation; and assisting Mother with procuring low-income housing applications. *Id.*

[59] *Id.* at 236. DFS attempted to offer services to this family as early as 1997 and made a voluntary case plan for Mother in 1998. *Id.* DFS also made a second case plan for Mother before the State filed any charges against Mother in juvenile court. *Id.*

[60] *Id.*

[61] *Id.*

an individual experienced with handling brain injuries to the MDT to attempt to help Mother.[62] DFS continued to provide services, but Mother ultimately refused all services and became uncooperative, including failing to visit the child regularly.[63] The court concluded DFS made reasonable efforts toward family reunification, of which Mother failed to take advantage.[64]

*Wyoming Cases Reversing Termination of Parental Rights*

Other than *FM*, the Wyoming Supreme Court overturned only one other termination of parental rights case in recent years on reasonable efforts grounds: *MB v. Laramie County Dept. of Family Services*.[65] This case illustrates an example of DFS's failure to provide reasonable efforts toward family reunification.[66] Shortly after LB's birth, the State placed LB in protective custody because Mother needed to treat her schizophrenia.[67] DFS created a case plan listing the permanency goal for LB as family reunification.[68] However, the case plan did not inform Mother of the consequences of failing to comply with the case plan, i.e., the State could terminate her parental rights.[69] Mother continued to express interest in LB, but DFS informed her that she should worry about regaining custody of another child in Texas first and then worry about regaining custody of LB from Wyoming.[70] DFS subsequently filed a petition to terminate Mother's parental rights to LB.[71] Ultimately, the State issued an order terminating Mother's parental rights.[72]

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[62] *Id.* at 237. A doctor diagnosed MN with a cognitive disorder and a moderate to severe brain injury. *Id.*

[63] *MN*, 78 P.3d at 237–38.

[64] *Id.*

[65] *MB*, 933 P.2d at 1130.

[66] *See id.*

[67] *Id.* While pregnant, Mother did not take her schizophrenia medication. *Id.* at 1128. The State involuntarily placed Mother in the Wyoming State Mental Hospital ("State Hospital") in Evanston, Wyoming shortly after LB's birth. *Id.* A few months later Mother contacted DFS inquiring about LB and requesting pictures of him. *Id.* DFS did not take LB to the State Hospital to visit. *Id.*

[68] *Id.* The case plan listed short-term goals for Mother, including voluntarily taking her medication, working to treat her mental illness, and working with the Immigration and Naturalization Service ("INS") to become a legal citizen. *Id.*

[69] *Id.* Mother may not have known about the first case plan. *Id.* INS deported Mother to Mexico after her release from the State Hospital. *Id.* DFS subsequently received a letter from Mother in December 1993 in which she expressed interest in LB; however, DFS could not contact Mother at the address given in the letter. *Id.* Mother again contacted DFS in June 1994. *Id.* at 1128. About a year after LB's birth DFS learned of Mother's placement in a mental facility in Texas and of the birth of another child. *Id.* Mother contacted DFS again in August and September 1994. *Id.*

[70] *MB*, 933 P.2d at 1128. Again, DFS did not inform Mother that she risked termination of her parental rights to LB. *Id.* Mother again contacted DFS in October 1994 expressing interest in LB and asking for pictures. *Id.*

[71] *Id.*

[72] *Id.* at 1129.

The Wyoming Supreme Court reversed the termination of Mother's parental rights to LB.[73] First, the court stated DFS had the responsibility of attempting to rehabilitate Mother and reunify the family, including providing needed services.[74] Then it articulated that DFS did not make reasonable efforts to reunify the family because DFS did not provide Mother with a written copy of the case plan.[75] Finally, the court noted DFS did not provide Mother with any notification that the State could terminate her parental rights to LB.[76]

While Wyoming state law requires DFS to make reasonable efforts toward family reunification, the statute does not provide much guidance for determining "reasonable efforts."[77] The Wyoming Supreme Court has had several opportunities to clarify "reasonable efforts," but has yet to take full advantage of such opportunities.[78]

## PRINCIPAL CASE

The Wyoming Supreme Court rendered the *In re FM* decision in December 2007.[79] Justice Golden delivered the unanimous majority opinion.[80] BA, the mother, ("Mother") asked the court to reverse the Laramie County District Court's decision to terminate her parental rights to FM.[81] Mother primarily challenged the sufficiency of the state's evidence supporting the termination of her parental rights.[82]

The court began its discussion with the standard of proof required to terminate a parent's right to his or her children: clear and convincing evidence.[83] The United States Supreme Court articulated a high standard of proof required for termination of parental rights cases because parents have a fundamental right to raise their children.[84] Here, the court determined the State did not provide clear and convincing evidence of DFS's reasonable efforts toward family reunification.[85]

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[73] *Id.* at 1130.

[74] *Id.*

[75] *MB*, 933 P.2d at 1130.

[76] *Id.*

[77] *See supra* note 29.

[78] *See supra* notes 36–76 and accompanying text.

[79] *FM*, 163 P.3d at 844.

[80] *Id.*

[81] *Id.* at 845–46.

[82] *Id.* at 846.

[83] *Id.* at 847

[84] Santosky v. Kramer, 455 U.S. 745, 768–70 (1982).

[85] *FM*, 163 P.3d at 848.

On this basis, the court overturned the termination of Mother's parental rights to FM.[86]

The court reiterated the statutory requirement of DFS to provide reasonable efforts toward family reunification after the State has removed children from their homes due to abuse or neglect.[87] The court relied on several facts indicating DFS failed to provide these efforts.[88] First, DFS only developed two case plans for Mother.[89] Also, the State did not present evidence of services provided to Mother to help her complete her case plans.[90]

Second, DFS began recommending the termination of Mother's parental rights to FM in October 2003, while the case plan still listed family reunification as the permanency goal.[91] While Mother remained incarcerated, family reunification remained difficult, but not impossible.[92] DFS still had an obligation to provide reasonable efforts toward family reunification, regardless of Mother's incarceration status.[93]

Finally, the court focused on DFS's lack of effort to facilitate communication between FM and Mother.[94] DFS could not achieve family reunification without such communication.[95] However, no evidence indicated DFS made attempts to facilitate any communication.[96] Mother wrote letters to FM, but DFS made no attempt to ensure FM received these letters.[97]

The court relied on *In re HP* as an example of what constitutes reasonable efforts.[98] In *HP*, as in *FM*, the mother remained incarcerated.[99] However, in *HP*, DFS made it possible for the children to visit their mother while she remained incarcerated by arranging overnight visits with the children's grandmother.[100]

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[86] *Id.* at 851.

[87] *Id.* at 848.

[88] *Id.*

[89] *Id.*

[90] *FM*, 163 P.3d at 848.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *FM*, 163 P.3d at 848.

[96] *Id.*

[97] *Id.* DFS let FM's aunt decide the fate of the letters. *Id.*

[98] *Id.* at 848 n.3.

[99] *Id.*

[100] *FM*, 163 P.3d at 848 n.3.

DFS also provided four separate case plans for HP in an attempt to reunite the family.[101] In comparison, DFS provided FM's mother with two case plans, only one of which listed family reunification as the goal.[102] Also, in *HP*, the MDT met six times to assist Mother with completing her case plan.[103] The *FM* court stated the district court did not appoint an MDT for FM's mother as required by state law.[104]

The Wyoming Supreme Court reversed the order from the Laramie County District Court terminating Mother's parental rights to FM.[105] The court found the State did not prove DFS's attempts at providing reasonable efforts toward family reunification by clear and convincing evidence.[106]

## ANALYSIS

The Wyoming Supreme Court correctly reversed the order terminating Mother's parental rights to FM.[107] This analysis provides guidance to practitioners and caseworkers in Wyoming in determining what constitutes "reasonable efforts."[108] It analyzes statutes and case law from Minnesota and Connecticut which clarify reasonable efforts toward family reunification.[109] Finally, this analysis evaluates whether reasonable efforts remains a problem in Wyoming.[110]

### *Minnesota*

Minnesota's legislature took an active role in providing the courts with guidance on what constitutes "reasonable efforts."[111] The applicable statute begins by requiring courts to ensure the social service agency makes reasonable efforts at family reunification.[112] Then, it emphasizes reasonable efforts should include

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[101] *Id.*

[102] *Id.* at 848.

[103] *Id.* at 848 n.3.

[104] *Id.* at 847 n.2. The statute states the following, "Within ten (10) days after a petition is filed alleging a child is neglected, the court shall appoint a multidisciplinary team. Upon motion by a party, the court may add or dismiss a member of the multidisciplinary team." WYO. STAT. ANN. § 14-3-427(b).

[105] *FM*, 163 P.3d at 851.

[106] *Id.* at 848; *see supra* notes 79–104 and accompanying text.

[107] *See infra* notes 153–75 and accompanying text.

[108] *See infra* notes 111–91 and accompanying text.

[109] *See id.*

[110] *See infra* notes 192–99 and accompanying text.

[111] Crossley, *supra* note 2, at 298.

[112] MINN. STAT. ANN. § 260.012(a).

"culturally appropriate services."[113] The heart of the statute provides a six-factor test for courts to consider when determining if reasonable efforts have been made.[114] It requires provided services: (1) take into account the child's safety; (2) meet the child's and family's needs; (3) complement the family's culture; (4) remain available and accessible to the family; (5) continue consistently and in a timely manner; and (6) are realistic under the circumstances.[115] These factors provide guidance to courts because they limit the need for judicial interpretation.[116]

The Minnesota courts have applied this six-factor test to determine whether the State has satisfied its requirement to make reasonable efforts toward family reunification in many termination of parental rights cases.[117] Through application, each factor has gained a clearer meaning.[118]

The first factor looks at whether the services provided to the family take into account the child's safety.[119] One court determined services addressing a parent's chemical dependency took into account the child's safety because the original incidents of neglect occurred due to the mother's chemical dependency.[120] Another court found the suspension of visitation between the mother and her children reasonable because the visits emotionally damaged the children.[121] Finally, a court found it reasonable to deny an increase in supervised visits because the parents physically abused the children during visits.[122]

The second factor asks whether provided services adequately met the child's and family's needs.[123] Courts have interpreted this factor to mean services provided

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[113] *Id.*

[114] *Id.* § 260.012(h)(1)–(6).

[115] *Id.*

[116] Crossley, *supra* note 2, at 303.

[117] *E.g.*, In re Welfare of Child of S.H., No. A07-808, 2007 WL 3343078, at *4–5 (Minn. App. Nov. 13, 2007), *review denied* (Minn. App. Jan. 19, 2008); In re Welfare of Children of C.R.P., Nos. A06-1609, A06-1635, 2007 WL 447241, at *4–5 (Minn. App. Feb. 13, 2007); In re Welfare of Child of J.D.C., Nos. A06-436, A06-654, 2006 WL 3290612, at *4–5 (Minn. App. Nov. 14, 2006), *review denied* (Minn. App. Jan. 16, 2007).

[118] *See infra* notes 119–44 and accompanying text (discussing each factor of the Minnesota six-factor test to determine whether the state has made reasonable efforts toward family reunification).

[119] MINN. STAT. ANN. § 260.012(h)(1).

[120] In re Welfare of N.V., No. C8-00-1949, 2001 WL 682589, at *2–3 (Minn. App. June 19, 2001).

[121] In re Welfare of Children of F.M.P., No. A07-1162, 2008 WL 223677, at *4 (Minn. App. Jan. 29, 2008), *review denied* (Minn. App. March 26, 2008).

[122] In re Welfare of A.P., No. C7-99-171, 1999 WL 710623, at *2 (Minn. App. Sept. 14, 1999), *review denied* (Minn. App. Nov. 23, 1999).

[123] MINN. STAT. ANN. § 260.012(h)(2).

address the conditions which led to the removal of the children from the home.[124] One court found the second factor satisfied when a mother with chemical dependency issues gained a referral for a chemical dependency assessment and received coordination for outpatient treatment.[125] Another court found services adequate to meet the family's needs when the State provided the mother with several mental health services after the State removed her child due to the mother's initial suicide attempt and hospitalization.[126] Finally, a court held this factor fulfilled when the State identified issues affecting the mother's ability to manage her son's diabetes.[127]

The third factor inquires as to whether provided services complement the family's culture.[128] One court found culturally appropriate services when the State referred the mother to African American family services.[129] Another court held culturally appropriate services included obtaining interpreters for each service provided and efforts by service providers to comprehend the Oromo culture.[130] Finally, a court found culturally appropriate services involved obtaining an interpreter whenever possible.[131]

The fourth factor assesses the availability and accessibility of the services offered.[132] One court found provided services available and accessible when a mother received in-home visits and transportation to out-of-home appointments because she did not have a driver's license.[133] Another court held available and accessible services included providing such services while the father remained incarcerated.[134] Finally, a court found available and accessible services when a mother and father had to use the same counselor.[135]

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[124] *E.g.*, In re Welfare of Children of J.K., No. A05-203, 2005 WL 1804904, at *2 (Minn. App. Aug. 2, 2005); In re Whelan, Nos. A03-247, A03-275, 2003 WL 22952207, at *2 (Minn. App. Dec. 16, 2003), *review denied* (Minn. App. Feb. 17, 2004); In re Welfare of Child of Kuschill, No. C0-03-311, 2003 WL 22176702, at *2 (Minn. App. Sept. 23, 2003).

[125] *J.D.C.*, 2006 WL 3290612, at *4.

[126] *Kuschill*, 2003 WL 22176702, at *3.

[127] In re Welfare of Child of E.L., No. C6-01-938, 2002 WL 798260, at *6 (Minn. App. April 30, 2002). The mother received medical assistance to manage her son's diabetes, a mental health evaluation and subsequent medication, and lessons in parenting skills. *Id.*

[128] MINN. STAT. ANN. § 260.012(h)(3).

[129] *S.H.*, 2007 WL 3343078, at *5.

[130] In re Welfare of M.A., No. CX-01-98, 2001 WL 881642, at *7 (Minn. App. Aug. 7, 2001).

[131] In re Welfare of T.N.L., No. C4-00-1947, 2001 WL 379114, at *4 (Minn. App. April 17, 2001).

[132] MINN. STAT. ANN. § 260.012(h)(4).

[133] *J.K.*, 2005 WL 1804904, at *3.

[134] In re Welfare of Children of M.L.G., No. A03-1571, 2004 WL 1098715, at *3 (Min. App. May 18, 2004).

[135] *Whelan*, 2003 WL 22952207, at *3. The court reasoned the county had access to only one therapist, therefore, providing both parents with the same therapist constituted the use of all available and accessible resources. *Id.*

The fifth factor requires reasonable efforts to include consistent and timely services.[136] A court found reasonable efforts even though in-home services commenced two years after the district court ordered these services.[137] Courts generally give this factor less weight than the other five factors, finding the reasonable efforts requirement satisfied when services provided fail to continue consistently or in a timely manner.[138] However, another court relied on the consistency language of the factor to prove reasonable efforts in another case.[139] The court reasoned the services provided met the consistency requirement because the caseworker visited the mother over fifty times and continued to initiate services after the mother's repeated failure to attend appointments.[140]

The sixth and final factor addresses whether services provided are realistic under the circumstances.[141] The courts in Minnesota have generally defined this factor in the negative by detailing what constitutes unrealistic services.[142] One court determined it unrealistic to provide family therapy when visits with the mother emotionally damaged the children.[143] Another court found it unrealistic for the parents to participate in counseling programs with the child until each parent received treatment for his/her chemical dependency problems.[144]

Wyoming should adopt this six-factor test to determine if the State has met its reasonable efforts requirement.[145] Minnesota's factors give guidance and allow for the individualized analysis of each case.[146] Termination of parental rights cases revolve around the specific facts of each case, which these factors take into account.[147] It is important that Wyoming courts adopt this test to clarify what constitutes reasonable efforts.[148] While statutory reform provides

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[136] MINN. STAT. ANN. § 260.012(h)(5).

[137] *A.P.*, 1999 WL 710623, at *2. The court reasoned the services, even delayed, did not help the parents' progress and the county provided the parents with numerous other services, nullifying the untimely nature of the in-home counseling services. *Id.*

[138] *See id.* (dismissing the fact the county waited two years to administer court-ordered services).

[139] *J.K.*, 2005 WL 1804904, at *3.

[140] *Id.*

[141] MINN. STAT. ANN. § 260.012(h)(6).

[142] *See, e.g.*, *F.M.P.*, 2008 WL 223677, at *4; In re Welfare of Child H.E.P., No. A07-299, 2007 WL 1982259, at *5 (Minn. App. July 10, 2007).

[143] *F.M.P.*, 2008 WL 223677, at *4.

[144] *H.E.P.*, 2007 WL 1982259, at *5.

[145] *See supra* notes 111–44 and accompanying text (discussing Minnesota's six-factor test for determining whether the State has met the reasonable efforts requirement).

[146] Crossley, *supra* note 2, at 303.

[147] *Id.* at 298.

[148] *Id.*

courts with factors to consider, the courts ultimately interpret and apply them.[149] Those applications and interpretations of statutes direct the court's evaluation of reasonable efforts toward family reunification.[150] The court, by adopting this six-factor test will clarify the "reasonable efforts" standard the lower level district courts utilize during termination of parental rights proceedings.[151] Using this test, Wyoming courts can proceed with termination of parental rights cases where necessary and appropriate, without fear of reversal.[152]

### *Application of Minnesota's Six-Factor Test to* FM

*FM* neither solves, nor further complicates, the law surrounding reasonable efforts.[153] *FM* merely adds to the mystery of what constitutes "reasonable efforts."[154] While the *FM* court came to the correct conclusion, the court could have articulated its decision more clearly if it used this six-factor test to analyze whether the State made reasonable efforts toward family reunification.[155] The first factor requires services to take into account the child's safety.[156] Here, DFS accounted for FM's safety by removing him from his mother's care and allowing only visitations with Mother.[157] The second factor asks whether services provided adequately met the child's and family's needs.[158] DFS provided Mother the opportunity to receive assistance with her substance abuse issues by having her complete a drug evaluation.[159] However, no evidence indicates Mother received assistance in finding appropriate housing or employment.[160] Also, DFS did not provide services to facilitate communication between Mother and FM.[161] Evidence indicates the services did not adequately meet the family's needs.[162] The third factor inquires as to whether the services complemented the family's culture.[163] It does appear that FM's family needed any special cultural consideration in the services DFS provided.[164]

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[149] Bean, *supra* note 1, at 331.

[150] *Id.*

[151] Crossley, *supra* note 2, at 298.

[152] *See infra* notes 153–75 and accompanying text.

[153] *See FM*, 163 P.3d 844 (failing to further clarify reasonable efforts).

[154] *Id.*

[155] *See supra* notes 79–106 and 111–44 accompanying text.

[156] MINN. STAT. ANN. § 260.012(h)(1).

[157] Brief of Appellee, *supra* note 11, at 7–8.

[158] MINN. STAT. ANN. § 260.012(h)(2).

[159] Brief of Appellee, *supra* note 11, at 8.

[160] *FM*, 163 P.3d at 848.

[161] *Id.*

[162] *See supra* notes 159–61 and accompanying text.

[163] MINN. STAT. ANN. § 260.012(h)(3).

[164] *See FM*, 163 P.3d 844 (lacking any evidence of the family's cultural needs).

The fourth factor assesses the availability and accessibility of the services offered.[165] Before Mother's incarceration, there is little evidence indicating whether the services provided remained available and accessible.[166] However, during Mother's incarceration, it appears DFS provided few, if any, available and accessible services.[167] These facts show the State did not provide available and accessible services to Mother.[168] The fifth factor requires consistent and timely services.[169] Since DFS provided few, if any, needed services while Mother remained incarcerated, the fifth factor does not appear met.[170] The sixth and final factor addresses whether services provided are realistic under the circumstances.[171] It seems unrealistic to require Mother to complete a multitude of tasks without assistance.[172] Also, DFS had previously facilitated communication between an incarcerated mother and her children.[173] Based on the foregoing, it appears DFS did not provide services realistic under the circumstances.[174] Weighing the factors, one arrives at the same conclusion as the court: the State did not make reasonable efforts toward family reunification.[175]

*Connecticut*

Like Wyoming and Minnesota, the Connecticut statute requires the Department of Children and Families ("DCF") to make reasonable efforts toward family reunification.[176] The statute provides that courts should consider the timeliness of services provided, the nature of services provided, and the availability of services provided towards family reunification.[177] While this statement lacks

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[165] MINN. STAT. ANN. § 260.012(h)(4).

[166] *See FM*, 163 P.3d 844 (lacking evidence as to whether services remained available and accessible to Mother).

[167] *Id.* at 848.

[168] *See supra* notes 166–67 and accompanying text.

[169] MINN. STAT. ANN. § 260.012(h)(5).

[170] *FM*, 163 P.3d at 848.

[171] MINN. STAT. ANN. § 260.012(h)(6).

[172] *FM*, 163 P.3d at 848.

[173] *HP*, 93 P.3d at 990.

[174] *See supra* notes 172–73 and accompanying text.

[175] *See supra* notes 153–74 and accompanying text.

[176] CONN. GEN. STAT. ANN. § 17a-111b(a) (2006).

[177] *Id.* § 17a-112(k)(1). The statute states:

> (k) Except in the case where termination is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding:
>
> (1) The timeliness, nature, and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent.

*Id.*

the specificity of the Minnesota statutes, the Connecticut courts have provided guidance as to what constitutes reasonable efforts by interpreting the statute.[178]

The Appellate Court of Connecticut decided *In re Eden F.* in 1998, shortly after the Adoption and Safe Families Act of 1997 ("ASFA") took effect.[179] Ann F., mother to Eden and Joann, had a long history of psychiatric problems.[180] Ann's involvement with DCF began five days after Ann gave birth to her first child, Eden.[181] Ann's involvement with DCF continued until the State moved to terminate Ann's parental rights to Eden and her second daughter, Joann.[182] The trial court subsequently terminated Ann's parental rights to both Eden and Joann.[183]

The appellate court recognized the duty DCF had to make reasonable efforts toward family reunification.[184] The legislature failed to define both "reasonable" and "efforts" in the statute.[185] The court stressed that determining whether the State has made reasonable efforts towards family reunification depends on the consideration of the specific circumstances of each case.[186] The court's most important point defined reasonable efforts as "doing everything reasonable, not possible."[187] This definition, while not as expansive as the definition from the Minnesota statutes, still provides value because it gives the courts further guidance on what constitutes reasonable efforts.[188]

Connecticut's courts indicate the State has a high burden to carry in making reasonable efforts.[189] Wyoming can meet this high burden by specifically enumerating the efforts DFS made in each case, showing they made every reasonable effort, but not necessarily every possible effort.[190] While ASFA does not require this high level of specificity, Wyoming courts should use this high level to ensure a lower rate of erroneous terminations of parental rights at the trial level.[191]

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[178] Crossley, *supra* note 2, at 302.

[179] In re Eden F., 710 A.2d 771 (Conn. App. 1998), *rev'd on other grounds*, 741 A. 2d 873 (Conn. 1999).

[180] *Id.* at 774.

[181] *Id.*

[182] *Id.*

[183] *Id.* at 779.

[184] *Eden F.*, 710 A.2d at 782.

[185] *Id.*

[186] *Id.* at 783.

[187] *Id.*

[188] Crossley, *supra* note 2, at 298.

[189] *Id.* at 301.

[190] *Id.* at 302.

[191] *Id.* at 301, 302.

*Is Reasonable Efforts Really a Problem in Wyoming?*

As noted previously, the Wyoming Supreme Court has only reversed two terminations of parental rights cases because of the State's failure to prove reasonable efforts toward family reunification in recent years.[192] One reason for the absence of termination of parental rights cases at the appellate court level resides in the fact that a majority of the families in the child welfare system live in poverty.[193] Statistics show children in lower income families face a greater risk of harm due to abuse or neglect than children who do not live in lower income families.[194] Since many families in the child welfare system live in poverty, many parents must rely on state-appointed counsel.[195] However, the United States Supreme Court found indigent parents do not have an absolute right to counsel in termination of parental rights cases.[196] The Court articulated the states should decide whether to appoint counsel on a case-by-case basis in termination cases.[197] Wyoming does not guarantee indigent parents the right to counsel in termination of parental rights cases.[198] If a parent cannot afford to provide his or her own counsel at a termination of parental rights proceeding, the parent will likely not have the resources to get a lawyer to appeal an adverse termination decision.[199]

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[192] *See supra* note 65 and accompanying text.

[193] Diana Telfer, Case Note, In re T.M.*: Who Protects the Indigent Parents?*, 6 J.L. & FAM. STUD. 161, 168, 170 (2004); Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023, 1025, 1037 (2003); Jim Moye & Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 376 (2002); Sarah H. Ramsey, *Children in Poverty: Reconciling Children's Interests with Child Protective and Welfare Policies a Response to Ward Doran and Roberts*, 61 MD. L. REV. 437, 438 (2002); Paul Anthony Wilhelm, Note, *Permanency at What Cost? Five Years of Imprudence under the Adoption and Safe Families Act of 1997*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 617, 631 (2002); Cynthia R. Mabry, *Second Chances: Insuring that Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty*, 102 W. VA. L. REV. 607, 609 (2000).

[194] ANDREA J. SEDLAK & DIANE D. BROADHURST, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 8–10 (1996).

[195] See Bullock, *supra* note 193, at 1037 (explaining that indigent parents cannot afford private legal representation).

[196] Lassiter v. Dep't. of Soc. Servs. of Durham County, 452 U.S. 18, 31–32 (1981) (holding that parents in termination of parental rights cases do not have an absolute right to counsel and that states should decide on a case-by-case basis whether to provide a parent state-appointed counsel in a termination of parental rights proceeding).

[197] *Id.*

[198] WYO. STAT. ANN. § 14-2-318(a) (2008). The statute states in relevant part:

> (a) The court *may* appoint counsel for any party who is indigent.

*Id.* (emphasis added).

[199] *See* Bullock, *supra* note 193, at 1037 (noting that indigent parents cannot afford the high legal costs of child abuse/neglect cases).

## CONCLUSION

Parents have a fundamental right to raise their children and the State cannot take that right away until the State gives a parent a reasonable amount of time and services towards rehabilitation.[200] DFS had an obligation to provide reasonable efforts toward family reunification to Mother and FM.[201] DFS did not fulfill its obligation.[202] Here, DFS did not give Mother a chance to continue to raise her children, even when it was obvious she very much desired to remain a part of their lives.[203] The Wyoming Supreme Court correctly reversed the order terminating Mother's parental rights, based on DFS's lack of reasonable efforts towards family reunification.[204] However, the court again declined to clarify what constitutes "reasonable efforts."[205] Wyoming courts should adopt the six-factor test articulated in the Minnesota statutes.[206] With this test, Wyoming courts can proceed with termination of parental rights cases where necessary and appropriate, without fear of reversal.[207] Additionally, DFS and other partners in the child welfare system will be better versed on "reasonable efforts," hopefully creating more permanency for children in Wyoming.[208]

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[200] *See supra* note 84 and accompanying text.

[201] *See supra* note 87 and accompanying text.

[202] *See supra* notes 88–106 and accompanying text.

[203] *See supra* note 97 and accompanying text.

[204] *See supra* notes 105–06 and accompanying text.

[205] *See supra* notes 79–106 and accompanying text.

[206] *See supra* notes 111–44 and accompanying text.

[207] *See supra* notes 145–75 and accompanying text.

[208] *See id.*

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