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8 **INTERVENTION COMPLAINT & CITIZEN'S ARREST OF JUDICIAL TAKING**  
9 **INTERLOCUTORY APPEAL IN THE UNITED STATES OF AMERICA**  
10 **COURT OF APPEALS FOR THE NINTH CIRCUIT**

11 **CITIZENS, EX REL. HUTCHENS, No. 09-17411 ABSOLUTE ORDER**  
12 **TWO MINERS & 8000 ACRES OF LAND) WRIT DE EJECTIONE FIRMAE; WASTE**  
13 **T.W. ARMAN and JOHN F. HUTCHENS,) PETITION FOR ADVERSE CLAIMS WRITS**  
14 **(real parties in interest), "Two Miners" ) OF POSSESSION & EJECTMENT; FRAUD &**  
15 **Grantees, patentees, trustees, immunities. ) DECLARED DETRIMENT CONTINUING.**  
16 **v. UNITED STATES OF AMERICA ) NEGLECT & FAILURE TREBLE DAMAGES**  
17 **STATE OF CALIFORNIA; Grantors ) JOINT AND SEVERAL TRESPASSERS VOID**  
18 **UNCONSTITUTIONAL DETAINER ) AND VACATE, REMISSION & REVERSION.**  
19

20 **RIGHT OF PRESENT POSSESSION COMPELLED ON FACTS PLEAD IN EVIDENCE**

21 380. In an action brought by a person out of possession of real property, to determine  
22 an adverse claim of an interest or estate therein, the person making such adverse claim  
23 and persons in possession may be joined as defendants; and if the judgment be for the  
24 plaintiff, he may have a writ for the possession of the premises, as against the defen-  
25 dants in the action, against whom the judgment has passed.

26 381. Any two or more persons claiming any estate or interest in lands under a com-  
27 mon source of title, whether holding as tenants in common, joint tenants, coparceners, or  
28 in severalty, may unite in an action against any person claiming an adverse estate or in-  
terest therein, for the purpose of determining such adverse claim, or of establishing such  
common source of title, or of declaring the same to be held in trust, or of removing a  
Cloud Upon the Same. [Approved March 24; effect July 1, 1874.]

Ejectment, 426 n. Quiet title, action to, 738. Intervention, Eminent Domain 1244.

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Interlocutory appeal and supersedeas by right.

An interlocutory appeal, in the law of civil procedure is an appeal of a ruling by a trial court that is made before the trial itself has concluded. Most jurisdictions generally prohibit such appeals, requiring parties to wait until the trial has concluded before they challenge any of the decisions made by the judge during that trial. However, many jurisdictions make an exception for decisions that are particularly prejudicial to the rights of one of the parties. For example, if a party is asserting some form of immunity from suit, or is claiming that the court completely lacks personal jurisdiction over them, then it is recognized that being forced to wait for the conclusion of the trial would violate their right not to be subjected to a trial at all.

Federal courts

The Supreme Court of the United States delineated the test for the availability of interlocutory appeals, called the collateral order doctrine, for United States federal courts in the case of *Lauro Lines s.r.l. v. Chasser et al.*, 490 U.S. 495 (1989), holding that under the relevant statute (28 U.S.C. § 1291) such an appeal would be permitted only if:

the outcome of the case would be conclusively determined by the issue;

**TRUE!**

the matter appealed was collateral to the merits;

**TRUE!**

and,

the matter was effectively unreviewable if immediate appeal were not allowed.

**TRUE!**

The Supreme Court created the test in the case *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), where it was applied to a requirement of bond to be posted in certain stockholders derivative actions by plaintiffs, in anticipation of being liable for defendant's attorney's fees. Since the substantial deterrent effect of the statute would be meaningless if not enforceable at the outset of litigation, but did not touch on the merits of plaintiff's claim, the Court allowed interlocutory appeal from the trial court's decision. 337 U.S. at 546-47. The doctrine was restricted in *Digital Equipment Corp. v. Desktop Direct Inc.*, 511 U.S. 863 (1994), which added an explicit importance criterion to

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1 the test for interlocutory appeals, holding that relief on a claim of immunity from suit because of a  
2 previous settlement agreement could not come through interlocutory appeal. The Supreme Court  
3 stated that the only matters of sufficient importance to merit a collateral appeal were "those origi-  
4 nating in the Constitution or statutes". 511 U.S. at 879.

5 Several U.S. statutes directly confer the right to interlocutory appeals, including appeals from or-  
6 ders denying arbitration, 9 U.S.C. § 16, and some judicial actions against the debtor upon filing  
7 bankruptcy proceedings, 11 U.S.C. § 362(a). There is a major split in the United States courts of  
8 appeals as to whether a stay of proceedings should issue in the district court while interlocutory ap-  
9 peals on the arbitrability of disputes are decided. Compare *Bradford-Scott Data Corp., Inc. v. Phy-*  
10 *sician Computer Network*, 128 F.3d 504 (7th Cir. 1997), and *Britton v. Co-op Banking Group*, 916  
11 F.2d 1405 (9th Cir. 1990). An interlocutory appeal under the collateral order doctrine usually merits  
12 a stay of proceedings while the appeal is being decided. Currently, the Second and Ninth Circuits  
13 have refused to stay proceedings in the district court while an arbitration issue is pending [See, *Mo-*  
14 *torola Credit Corp. v. Uzan*, 388, F.3d 39, 53-4 (2d Cir. 2004; *Britton v. Co-Op Banking Group*,  
15 916 F.2d 1405, 1412 (9th Cir. 1990)]. The Seventh, Tenth and Eleventh Circuit courts conversely  
16 hold that a non-frivolous appeal warrants a stay of proceedings. See, *Bradford-Scott Data Corp. v.*  
17 *Physician Computer Network, Inc.*, 128 F.3d, 504, 506 (7th Cir. 1997); *Blinco v. Green Tree Ser-*  
18 *vice, LLC*, 366 F.3d 1249, 1251-2 (11th Cir. 2004); *McCauley et al. v. Halliburton Energy Ser-*  
19 *vices, Inc.*, (citation unavailable, but see: <http://ca10.washburnlaw.edu/cases/2005/06/05-6011.htm>).

#### 20 1) State courts

21  
22 In California, interlocutory appeals are usually sought by filing a petition for writ of mandate with  
23 the Court of Appeal. If granted, the writ directs the appropriate superior court to vacate a particular  
24 order. Writs of mandate are a discretionary remedy; such petitions are almost always denied due to  
the state's public policy of encouraging efficient litigation of civil actions on the merits in the  
superior courts.

25 In New York, various interlocutory appeals can be found under the Civil Practice Remedies Code  
26 section 51.014. This section, along with a writ of mandamus are the only exceptions to filing an  
27 appeal only after the final judgment has been given.

28 "The mythical giant: Clean Water Act section 401 and nonpoint source pollution"

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## I. INTRODUCTION

The Clean Water Act (CWA)(1) was passed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."(2) Few Americans would disagree that this was a laudable goal, and America's waters have improved significantly since the enactment of the CWA in 1972.(3) However, the focus of the CWA is point source pollution,(4) and many of the nation's waters remain impaired because of nonpoint source pollution.(5) Unlike point source pollution, nonpoint source pollution cannot be traced to a specific source and is often described in terms of diffuse runoff.(6) According to the General Accounting Office, the leading cause of nonpoint source pollution is agriculture.(7) In fact, a 1995 General Accounting Office briefing report indicated that agricultural nonpoint source pollution impaired seventy-two percent of the miles of affected rivers and streams, fifty-six percent of the affected lake acres, and forty-three percent of the square miles of affected estuaries.(8) Obviously, something must be done about nonpoint source pollution.

Environmentalists advocate using section 401 of the CWA to address the nonpoint source pollution problem.(9) Section 401 requires anyone **applying** for a federal permit or license for any activity that may result in a discharge to obtain **certification** from the state in which the discharge originates.(10) Traditionally, section 401 applied only to point source pollution.(11) Some commentators, however, interpret the Supreme Court's treatment of section 401 in PUD No. 1 of Jefferson County v. Washington Department of Ecology (PUD No. 1)(12) as blessing the use of section 401 for nonpoint source pollution.(13) Proponents of applying section 401 to nonpoint source pollution also point to Oregon Natural Desert Ass'n v. Thomas (ONDA I),(14) in which a federal district court held that section 401 applies to grazing permits on public lands. The Ninth Circuit Court of Appeals declined to adopt that interpretation in Oregon Natural Desert Ass'n v. Dombeck (ONDA II).(15) However, that opinion was withdrawn in response to the plaintiffs petition for reconsideration.(16)

Although the holding in ONDA II persuasively determined that section 401 does not **apply** to nonpoint source pollution, the question remains open pending reconsideration. Another unresolved question is whether the application of section 401 would have any effect on agricultural nonpoint source pollution. Targeting agricultural users of federal lands with more unnecessary government regulation will do little to reduce nonpoint source pollution. Time, money, and energy needed to deal with nonpoint source pollution on farm and ranch land is wasted fighting court battles over the applicability of section 401, and other ways must be found to deal with the problem.

This Comment addresses the issue of section 401 and nonpoint source pollution. Part II discusses the historical use of section 401 and why it has been applied solely to point source pollution. Part III discusses attempts to apply section 401 to nonpoint source pollution, specifically in light of PUD No. I and ONDA I. Part IV briefly examines the Ninth Circuit decision in ONDA II and takes a more in-depth look at the CWA and its legislative history to illustrate that the Ninth Circuit's initial conclusion, that section 401 does not apply to nonpoint source pollution, is the correct interpretation of the statute. Part V discusses the likely impact of section 401 on the agricultural community if it were applied to nonpoint source pollution. Particularly, Part V analyzes the impact on ranchers who graze livestock on public lands and farmers who use federal reclamation water for irrigation. Finally, Part VI explores alternative ways of dealing with agricultural nonpoint source pollution.

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## II. TRADITIONAL APPLICATIONS OF SECTION 401

The full text of section 401 requires that:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of section 301, 302, 303, 306, and 307 of this title. (17) Section 401 ensures that federal agencies cannot override the states' water quality standards. (18) It allows states to certify the activity first, to ensure that the activity meets the specific provisions of the CWA and the states' water quality standards. This allows for a balance between the states and the federal government, similar to the balance preserved in the section 402 permit process of the CWA. (19) Section 402 allows either the Environmental Protection Agency (EPA) or a state, if it has been approved to do so, to issue permits for the discharge of pollutants. (20) The national pollution discharge elimination system (NPDES) in section 402 was designed to prevent polluters from "shopping around" (21) for a state with a weak permit program by allowing EPA to withdraw a state's permitting authority if the state was not running its program correctly. (22) In a similar manner, section 401 maintains a balance between the states and the federal government. If a state has a weak program, the federal government still reviews the activity after the state has issued its certification. (23) Likewise, if the federal permitting agency is not taking water quality standards seriously, the state can impose conditions under section 401 to prevent degradation of its waters. (24)

Technically, section 401 applicants must apply for state **certification** first. Once state certification is received, the applicant sends it with a federal permit or license **application** to the responsible agency. (25) If the state denies certification, the project is essentially dead. In reality, the section 401 process does not always work this way. States sometimes allow responsible federal agencies to review an application first. Following federal review, the application goes to the state for, in essence, rubber-stamp certification. (26) States reason that federal agencies have the expertise to determine whether a project meets the provisions of the CWA. While this may not be how Congress intended states to use section 401, it still allows states to maintain some control over the quality of their navigable waters.

### A. Sections of the CWA that States Must Consider in Granting a Section 401 Permit

Section 401(a) outlines certain provisions of the CWA that states must consider in the certification process. These provisions deal almost exclusively with point source pollution. (27) Section 301, the first listed provision, makes the discharge of pollutants unlawful and sets up a two phase program for **applying** effluent limitations. (28) "[A]ny restriction established by a State or the Administrator [of the EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters" is an effluent limitation. (29) Obviously, section 301 deals with regulation of point source pollution. The same is true of section 302, which allows for stricter effluent limitations if the "discharges of pollutants

from a point source or group of point sources" would affect a certain portion of a navigable waterway and would interfere with the designated uses of that waterway.(30) Section 306 establishes federal standards of performance for controlling discharge of pollutants.(31) The CWA defines the phrase "discharge of pollutants" as "any addition of any pollutant to navigable waters from any point source."(32) Therefore, this section also applies to point source pollution only. Section 307 establishes toxic and pretreatment effluent standards.(33) This section subjects each toxic pollutant to effluent limitations,(34) which, as previously noted, are limitations on discharges from point sources. Pretreatment standards are established to prevent the discharge of pollutants from treatment works,(35) and treatment works are point sources under the CWA.(36) Therefore, section 307 deals with point sources as well.

Lastly, section 303 requires the states to establish water quality standards and to implement plans to achieve these standards.(37) While effluent-limitation-based regulation controls water pollution by regulating the amount of pollutants discharged by a particular source, water quality standards control pollution by regulating the amount of pollutants discharged into a particular segment of water.(38) Therefore, water quality standards could include point and nonpoint source pollution.(39) However, section 303 only mentions effluent limitations, which apply to point source pollution.(40) Specifically, the section requires each state to look at its own waters and determine if the effluent limitations required by section 301 are strict enough to meet state water quality standards.(41) The provisions of the CWA that a state must look at before issuing a section 401 certification basically address point source pollution. Because of this, when the states use their section 401 power, they apply it to activities that result in discharges from point sources and not to activities that result in nonpoint source pollution.

## B. The Three Traditional Uses of Section 401

States use their section 401 power in three federal permit and license processes. These are section 402 permits issued by EPA, section 404 permits issued by the Army Corps of Engineers (Army Corps), and hydroelectric plant permits issued by FERC.(42) All three permits deal with point source pollution.

### 1. Section 402 Permits

National Pollution Discharge Elimination System (NPDES) permits issued under section 402 allow the discharge of pollutants as long as the discharge meets established effluent limitation standards.(43) Section 402 permits are solely for discharges from point sources, and most states are authorized to issue them.(44) However, EPA does issue some section 402 permits, and by regulation the state of origin must issue a section 401 certification first.(45) In fact, if EPA receives a request for a 402 permit, EPA's Regional Administrator is required to send the request to the state for certification.(46) In essence, EPA forces the states to use section 401.

### 2. Section 404 Permits

Another area in which states have traditionally used their section 401 power is with section 404 permits. The Army Corps of Engineers is authorized to issue or deny section 404 permits for the discharge of dredged or fill material into navigable waters at specified disposal sites.(47) These are

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1 point source discharges because a discernible conveyance is used. Section 401 puts section 404  
2 within its scope when it discusses "use of spoil disposal areas." (48) In addition, Congress made it  
3 abundantly clear during the legislative work on the CWA in 1972 that section 401 was to cover  
4 section 404 permits. A proposed amendment would have exempted dredging from the section 401  
process, (49) but the amendment never became part of the Senate bill, and the states retained  
authority to certify section 404 permits under section 401. (50)

### 5 3. FERC Permits

6 The last traditional use of section 401 is for FERC permits for hydroelectric projects. (51) The  
7 controversy surrounding hydroelectric projects centered around dams. In *National Wildlife*  
8 *Federation v. Gorsuch*, (52) EPA maintained that dams fell under their definition of nonpoint source  
9 pollution. Environmentalists disagreed with this interpretation and argued that a dam was a point  
10 source. The D.C. Circuit held that the statute would support defining hydroelectric projects as either  
11 a point or nonpoint source. The court deferred to the agency's position because it was not  
12 unreasonable. (53) Although *Gorsuch* dealt with a section 402 permit, not section 401 certification,  
13 the question the court was deciding was whether a dam was a point source. The court deferred to  
14 the agency's interpretation that a dam was a nonpoint source. However, most people would  
15 probably agree with the environmentalists' interpretation that a dam is a point source. A dam falls  
16 under the definition of a point source (54) because it is a single structure that has observable effects  
17 on navigable water, and those effects can be modified through technology. (55) Certainly, the  
building and operation of a hydroelectric project result in point source discharges. (56) Although  
hydroelectric projects may result in some nonpoint source pollution, taken as a whole hydroelectric  
projects are point sources. (57) Ultimately, EPA backed away from its original stance that a  
hydroelectric project is not a point source. (58) Accordingly, everyone seems to be in agreement that  
a dam is a point source. Therefore, this traditional application of section 401 permits also relates  
primarily to point sources only.

### 18 C. The States' Power Under Section 401

19 The use of section 401 is left up to the states. Each state may decide whether to waive certification  
20 for an activity. (59) Sometimes, waivers result simply from a state's inaction. If the state does not act  
21 on the request for certification within a year, the federal permitting agency will consider  
22 certification waived. (60) Although states use section 401 in different manners, (61) most seem to  
have confined themselves to the three traditional uses of section 401 mentioned above.

## 23 III. THE EMERGING EFFORT TO APPLY SECTION 401 TO NONPOINT SOURCE 24 POLLUTION

25 PUD No. 1 (62) and ONDA I (63) represent a growing interest in applying section 401 to nonpoint  
26 source pollution. As the previous section discussed, states have been applying section 401 only to  
27 point source discharges. However, many say that states can, and should, apply section 401 to  
28 nonpoint source pollution, arguing that PUD No. 1 supports that position. (64) The following  
discussion looks at the holdings in PUD No. 1 and ONDA I in connection with section 401 and  
nonpoint source pollution.

1 A. PUD No. 1

2 The PUD No. 1 case addressed the section 401 permit process for a hydroelectric project on the  
3 Dosewallips River.(65) The Washington Department of Ecology, the state agency responsible for  
4 section 401, conditioned the permit on minimum stream flows. At issue in the case was whether the  
5 Washington Department of Ecology could condition a section 401 certification on the maintenance  
6 of minimum stream flows to protect fish habitats.(66)

7 1. The Court's Holding

8 PUD No. 1 was not about whether a section 401 certification was needed for the project.  
9 Washington state was using its section 401 power in a traditional manner to certify a hydroelectric  
10 project prior to FERC granting a permit.(67) Although the need for a section 401 certification was  
11 not in question,(68) the Court did touch briefly on this issue. The Court used the traditional two-part  
12 analysis to determine if a section 401 permit could be required by the state.(69) This analysis is  
13 relatively simple. A court must first determine if a federal permit or license is necessary for the  
14 project. Then it must determine if some kind of discharge may result from the project. Here, the  
15 Court found that the project would need a FERC license and that at least two discharges would  
16 result from the project, so Washington could require a section 401 certification.(70)

17 The question for the Court was not whether a section 401 certification was required, but exactly  
18 what the state could consider in granting it. In PUD No. 1 the state wanted to impose a minimum  
19 stream flow between one hundred and two hundred cubic feet per second (cfs).(71) The Court  
20 allowed the condition under section 401, recognizing that a state may condition its permit not only  
21 on the specific provisions of the CWA outlined in section 401(a), but also on "any effluent  
22 limitations and other limitations" needed to meet state water quality standards.(72) The Court  
23 interpreted this provision of section 401 to mean that the state could consider the effect that the  
24 entire project or activity would have on water quality, not just effects from specific discharges.(73)  
25 But, in order for the state to consider the effects of the activity as a whole, the activity must first be  
26 one that would fall under section 401, as the building of PUD No. 1 did in this case. This  
27 interpretation by the Court to allow the state to look at the effects of the activity as a whole does not  
28 expand the scope of section 401 to include nonpoint source pollution. The court's interpretation  
only expanded what states can consider when considering point source certification.

The Court also addressed whether the state was preempted by the Federal Power Act because FERC  
has comprehensive authority to issue permits for hydroelectric projects and is required to look at the  
effects the project will have on wildlife and fish habitats. The Court held that no preemption  
problem existed because FERC had not yet acted on the project license.(74) In the end, the Court's  
holding concerned the scope of a state's power under section 401. The holding did not address what  
kind of discharge, point source or nonpoint source pollution, triggers the section 401 permit  
requirement.

2. The Holding as Applied to Nonpoint Source Pollution

Commentators who advocate expanding the use of section 401 are not interested in the PUD No. 1  
holding. Rather, they are interested in the Court's brief mention of the two discharges that would

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1 result from dam construction: "the release of dredged and fill material during the construction of the  
2 project and the discharge of water at the end of the tailrace after the water has been used to generate  
3 electricity." (75) Some commentators believe the second of these two discharges can be interpreted  
4 to include nonpoint source pollution, (76) even though the case did not hold that and the Court never  
5 specifically addressed point source versus nonpoint source pollution.

#### 6 a. Discharge from a Tailrace Is Not Nonpoint Source Pollution

7 Water coming out of a tailrace has a changed temperature, and this can affect the ability of the  
8 water to support certain fish. A tailrace is defined as "a race for conveying water away from a point  
9 of industrial application (as a waterwheel or turbine) after use." (77) A race is defined as "a strong or  
10 rapid current of water flowing through a narrow channel." (78) The narrow channel created to carry  
11 the water away from a hydroelectric project is normally a tunnel, some kind of pipe, or a ditch.  
12 Each of these items is a "discernible, confined and discrete conveyance" within the definition of a  
13 point source in the CWA. (79) Therefore, a tailrace is a point source. In fact, in one PUD No. I brief,  
14 tailrace is defined as a conveyance for "[w]ater that has passed through the turbine." (80) And if a  
15 tailrace is a point source, then the water coming out of it is discharged from a point source, and is  
16 not a nonpoint source. So, the Court's mention of discharge from the tailrace does not indicate an  
17 expansion of section 401 to nonpoint source pollution.

#### 18 b. The Power Authority of New York Case: Tailrace Water Is Not Nonpoint Source Pollution

19 At least one commentator asserts that most courts would hold that water coming out of a tailrace is  
20 nonpoint source pollution because water temperature has been changed and temperature is not an  
21 identifiable pollutant. (81) This assertion is based on Power Authority of New York v. Williams (82)  
22 in which the court addressed the denial of a section 401 permit for a hydroelectric project. One of  
23 the reasons for the denial was the Power Authority of New York's failure to assure the state that  
24 water temperatures in the affected waters would be kept at a satisfactory level. (83) The Power  
25 Authority of New York argued that water temperatures could not be considered under state water  
26 quality standards because a section 401 permit required that the discharge involved contain an  
27 identifiable pollutant. (84) The court rejected this argument holding that "a transfer of water from  
28 the upper reservoir to the lower reservoir is a 'discharge'" because the water transfer fell within the  
state's definition of industrial waste. (85) Industrial waste includes any liquid from any process of  
industry that may cause water pollution, and under the state's section 401 regulations, a permit is  
required to discharge industrial waste. (86) Thus, the court held that the transfer of the water from  
one reservoir to another could be a discharge that would trigger a section 401 permit even though it  
contained no specific pollutant.

Without ever mentioning point sources or nonpoint sources, the court's reasoning supposedly  
supports the contention that section 401 applies to a discharge regardless of its source. (87)  
However, this contention makes little sense because the water was transferred by a pipe, (88) which  
is a point source, and a discharge from a point source must contain a pollutant to be covered under  
the CWA. (89) So, although the court held that this discharge contained no specific pollutant, it  
defined the discharge as an industrial waste. (90) Industrial waste is one of the specific pollutants  
listed in the definition of pollutant in the CWA. (91) Thus, water with a lowered temperature is a  
point source discharge, not nonpoint source pollution. Therefore, Power Authority of New York

1 does not support the contention that water from a tailrace would be viewed as nonpoint source  
2 pollution.

3 PUD No. I never specifically addressed whether section 401 applies to point sources or nonpoint  
4 source pollution. All the Court did was mention two types of discharges from this specific project  
5 and give some examples of other statutes that set up federal permits which may require 401  
6 certification.(92) Trying to interpret its holding as a blessing of the use of section 401 for nonpoint  
7 source pollution is a stretch indeed.(93) All PUD No. I did was increase the scope of section 401  
8 certification conditions.

#### 9 c. Caswell Shows PUD No. I Did Not Decide Section 401 Applies to Nonpoint Source Pollution

10 In Idaho Conservation League v. Caswell,(94) a group of environmentalists who tried to use PUD  
11 No. I to support a claim that section 401 applies to nonpoint source pollution lost their case on  
12 summary judgment. The environmentalists sued the United States Forest Service (Forest Service)  
13 because it did not require a timber company to obtain section 401 certification prior to building two  
14 logging roads on Forest Service land. The discharge in question was nonpoint source pollution.(95)  
15 First, the court looked at the language of section 401 and found that it was "evident that section 401  
16 was only intended to encompass those projects which resulted in a `point source discharge.'"(96)  
17 Then, the court dismissed the environmentalists' reliance on PUD No. I because it "does not stand  
18 for the proposition that all nonpoint sources are subject to section 401 certification."(97) This is  
19 supported by the ONDA I court, which did not rely on PUD No. 1 to decide that section 401 does  
20 apply to nonpoint source pollution.(98)

#### 21 B. Oregon Natural Desert Ass'n (ONDA I)

22 ONDA I was a citizen suit brought by environmentalists seeking a declaratory judgment that  
23 permittees must apply for state certification under section 401 before a federal agency issues a  
24 grazing permit.(99) The case concerned a Forest Service grazing permit issued to an Oregon  
25 rancher to turn cattle out onto grazing land in the Malheur National Forest.(100) The case is  
26 believed to be the first to look specifically at whether section 401 covers nonpoint source  
27 pollution.(101)

28 ONDA I was also the first case to hold that section 401 "applies to all federally permitted activities  
that may result in a discharge, including discharges from nonpoint sources."(102) The court used a  
three-part analysis to interpret the meaning of the term "discharge" as used in the CWA. First, it  
looked at the plain meaning of discharge as defined in the statute.(103) Section 502 states that  
discharge "when used without qualification includes a discharge of a pollutant and a discharge of  
pollutants."(104) The definitions of "discharge of a pollutant" and a "discharge of pollutants" both  
encompass point sources only.(105) However, the court found that the use of the term "including"  
within the definition of discharge permitted additional, unstated meanings.(106) Therefore, the  
court found that discharge was not restricted to "point source or nonpoint sources with  
conveyances."(107)

The second part of the court's analysis explored whether the Forest Service's practice of not  
requiring a state certification prior to granting a grazing permit should be given any deference. The

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1 court thought that the Forest Service was not entitled to deference because it is not the agency  
2 responsible for administering the CWA. EPA is responsible for administering the CWA and only  
its interpretation of section 401 should be given deference.(108)

3 Lastly, the court looked at the legislative history of the CWA.(109) The court first said that the  
4 Water Quality Improvement Act of 1970 did not make any distinctions between point sources and  
5 nonpoint sources.(110) Then, the court looked at the history of the 1972 Amendments and found  
6 that nonpoint sources were not mentioned. Even though this was true, the court believed that  
Congress did not mean to limit section 401 to point sources.(111) From this rather simplistic look at  
7 the legislative history, the court concluded that the legislative history of the CWA supported its  
opinion that section 401 was not limited to point sources only.(112)

8 Therefore, based on the plain meaning of the statutory language and the legislative history of the  
9 CWA, the court held that section 401 applies to nonpoint source pollution and, specifically, to  
10 grazing.(113) However, on appeal the Ninth Circuit initially reached an opposite conclusion,  
holding that a section 401 certification "is not required for grazing permits or other federal licenses  
11 that may cause pollution solely from nonpoint sources."(114) The next section will examine this  
12 holding and then illustrate why this was the correct result based on the statutory language and  
legislative history of section 401.

#### 13 IV. ONDA II: THE CORRECT INTERPRETATION OF SECTION 401

14 In section 401, the nonpoint source pollution dispute centers on the meaning of the word  
15 "discharge."(115) In concluding that discharge in section 401 does not **apply** to releases from  
16 nonpoint sources, the Ninth Circuit examined "the language of the governing statute, guided not by  
17 a single sentence or member of a sentence, but by look[ing] to the provisions of the whole law, and  
to its object and policy."(116) Rather than focusing on the definition of discharge, as the lower  
18 court had done, the Ninth Circuit focused on the intent and purposes of the CWA as a whole.  
ONDA H does not go far enough because both the definition of discharge and related terms, and the  
19 legislative history of section 401 mandate the same conclusion.

##### 20 A. The Ninth Circuit Decision

21 In some respects, the Ninth Circuit's analysis was as cursory as the lower court's. The court  
22 emphasized that the CWA "banned only discharges from point sources" and did not directly  
regulate nonpoint source pollution.(117) The court pointed out that another provision of the CWA,  
23 section 208, was designed to deal with nonpoint source pollution.(118) The court also drew support  
for its conclusion from the fact that in 1987, section 1329 was added to the CWA to require states to  
24 adopt nonpoint source pollution **management** programs.(119) This consistently separate treatment  
25 of point and nonpoint sources in the CWA led the court to conclude that the term "discharge" does  
not include nonpoint sources.

26 The court rejected the environmentalists' argument that nonpoint sources were somehow swept into  
27 the scope of section 401 by the section's reference to section 303. The court noted that before 1972  
28 this provision required a "state to certify that a licensed activity would not violate applicable water  
quality standards."(120) In 1972 the provision was changed to require a state to certify that a

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1 licensed activity complies with the applicable provisions of sections 301, 302, 303,306, and 307.  
2 The change was made "to assure consistency with the bill's changed emphasis from water quality  
3 standards to effluent limitations based on the elimination of any discharge of pollutants." (121) The  
4 change, according to the court, was not made to bring nonpoint sources into the scope of section  
5 401, especially in light of the Ninth Circuit's holding in Oregon Natural Resources Council v.  
6 United States Forest Service. (122) In that case, the Ninth Circuit held that reference to water quality  
7 standards in section 301 "did not sweep nonpoint sources into the scope of [sections] 1311." (123)  
8 Similarly, the court held that the mention of water quality standards in section 303 did not include  
9 nonpoint source pollution. Thus, all the sections cross-referenced in section 401 deal with point  
10 source regulation, not nonpoint source pollution.

11 Like the Caswell court, the Ninth Circuit found any reliance by the environmentalists on PUD No. i  
12 misplaced. Both discharges mentioned by the Supreme Court, according to the Ninth Circuit, were  
13 discharges from point sources. Thus "[t]he Supreme Court in PUD No. I did not broaden the  
14 meaning of the term 'discharge' under [section 401]." (124)

15 The Ninth Circuit also found support for its conclusion in the CWA's use of the term "runoff" as  
16 compared to the term "discharge". (125) According to the Ninth Circuit, when Congress meant point  
17 source pollution it used discharge, and when it meant nonpoint source pollution it used runoff. (126)  
18 Therefore, if Congress had intended section 401 to include nonpoint sources as well as point  
19 sources, it would have used language similar to section 313. (127) In that provision, federal agencies  
20 "engaged in any activity which may result in the discharge or runoff of pollutants" are required to  
21 comply with applicable water quality standards. (128) Had section 401 used such language, then it  
22 would include nonpoint sources. But use of the term discharge alone limits its application to point  
23 sources. Lastly, the Ninth Circuit rejected the plaintiffs' argument that discharge is defined more  
24 broadly than the discharge of pollutants from point sources. The court flatly stated that this view "is  
25 incorrect." (129) According to the court, the broader meaning of discharge concerns whether  
26 releases from point sources are polluting or nonpolluting. Discharge includes both polluting and  
27 nonpolluting releases from point sources but cannot be read to include nonpoint sources. Any other  
28 interpretation would not "comport[] with the structure and lexicon of the Clean Water Act." (130)  
By examining section 401 in light of the CWA as a whole, the Ninth Circuit concluded that section  
401 does not apply to nonpoint source pollution. (131) While some may fault the court's reasoning  
and analysis, a closer look at the statutory language of section 401 and the legislative history  
relating specifically to section 401 shows that the Ninth Circuit was correct.

## 22 B. A Closer Look at Section 401: The Definition of Discharge

23 "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a  
24 discharge of pollutants." (132) That is all the definition section of the CWA says about discharge.  
25 Yet, the meaning of discharge is important to understanding section 401 because the section does  
26 not mention the source of the discharge, only the discharge itself. As the Ninth Circuit noted, the  
27 meaning of discharge literally holds the key to understanding the type of source to which Congress  
28 was referring in section 401.

The Water Quality Improvement Act of 1970, which first established what is now section 401, did  
not define discharge. (133) However, in 1972 a definition for discharge was added. How that

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1 definition came about sheds considerable light on what it means. The Committee on Public Works  
2 in the Senate wrote that the definition of discharge was added to define the scope of the control that  
3 would be required under the CWA.(134) It then discussed pollutants added by any point source,  
4 outfall or other pipeline, and publicly owned treatment works.(135) Discharge was said to be a term  
5 of art in the legislation(136) that "refers to the actual discharge from a point source into the  
6 navigable waters, territorial seas, or the oceans."(137) The report seems to limit the meaning of  
7 discharge to point sources only.

8 The actual definition includes two other terms that are defined in the CWA, "discharge of a  
9 pollutant" and "discharge of pollutants." These two terms are defined to mean "(A) any addition of  
10 any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the  
11 waters of the contiguous zone or the ocean from any point source other than a vessel or other  
12 floating craft."(138) Both of these terms limit their meaning to point sources only.

13 These definitions, along with the legislative history concerning the actual definition of discharge,  
14 would seem to end the inquiry as to whether or not discharge applies to nonpoint source pollution.  
15 However, the definition of discharge "includes" the discharge of a pollutant and the discharge of  
16 pollutants. And, "[t]he use of the word 'includes' rather than 'means' in a definition indicates that  
17 what follows is a nonexclusive list which may be enlarged upon."(139) So, the term "discharge" is  
18 not limited to the meaning given to "discharge of pollutant" and "discharge of pollutants."

19 Environmentalists argue that discharge was not meant to be limited to point sources.(140) They  
20 point to the fact that the definition of discharge in the CWA is the only one that uses the term  
21 "includes."(141) All the other definitions use the term "means," which is a limiting word in  
22 definitions. Therefore, Congress must have intended discharge to include, but not be limited to,  
23 point sources.(142) Otherwise, it would have used the term "means" in the definition of discharge.

24 While the absence of nonpoint source pollution from this list is not conclusive evidence that it was  
25 meant to be excluded, it does not mean that nonpoint source pollution was included in the definition  
26 of discharge. After all, noscitur a sociis, a traditional canon of statutory construction, provides that  
27 words in a list should be interpreted in light of the surrounding words.(143) The words in the list of  
28 what is included in the definition of discharge all deal with point sources. To imply that nonpoint  
source pollution would also fit in that list violates this basic rule of statutory construction.  
Discharge is further limited by the use of the word "pollutant" in its definition. In the CWA,  
pollutant "means dredged spoil, solid waste, incinerator residue, **sewage**, garbage, sewage sludge,  
munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded  
equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into  
water."(144) Because this definition uses the limiting term "means," only substances that appear on  
the list are pollutants under the CWA. The listed pollutants came from the Refuse Act, with the  
exception of "municipal discharges," which was added to the definition in 1972.(145) The Refuse  
Act requires permits for industrial discharges of refuse into navigable waters.(146) These industrial  
discharges come from point sources. The same would be true of any municipal wastes that would  
be discharged. Therefore, the definition of pollutant only encompasses discharges from point  
sources. This further limits discharge because its definition only mentions discharging pollutants. If  
per the definition of pollutant, a pollutant can only come from a point source, then discharge can  
only **apply** to point sources, not nonpoint sources.

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1 In addition to the Ninth Circuit's ONDA II decision, other case law supports a limited meaning of  
2 discharge. Commonwealth of Pennsylvania v. Harrisburg held that the plain meaning of the statute  
3 meant that a discharge was a "discharge of pollutants" which is defined to include a point source  
4 only.(147) Idaho Conservation League v. Caswell also held that discharge was limited to point  
5 sources only.(148) Lastly, National Wildlife Federation v. Gorsuch hesitated to add new meaning to  
6 the definition of pollutant, which would by inference expand the meaning of discharge.(149)  
7 Therefore, based on the plain meaning, legislative history, and case law, the definition of discharge  
8 is limited to discharges from point sources only.

### 9 C. Legislative History of Section 401

10 The statutory language and corresponding legislative history of section 401 indicate that section  
11 401 was not meant to include nonpoint source pollution. However, even if the language itself was  
12 not clear, the legislative history behind section 401 further supports the contention that the section  
13 was not meant to be used to regulate nonpoint sources.

#### 14 1. 1970 Amendments

15 As previously mentioned, section 21(b) of the Water Quality Improvement Act of 1970 was the  
16 forerunner for section 401. Section 21 was designed to encourage cooperation by all federal  
17 agencies in the control of pollution.(150) The House report mentioned a "wide variety of licenses  
18 and permits" issued by federal agencies that may affect water quality.(151) While the legislative  
19 history did not exclude permits for nonpoint source pollution activities, the only permits specifically  
20 mentioned were for industrial and power plant sources that cause thermal pollution.(152)  
21 Obviously, an industrial plant or a power plant is a point source, not a nonpoint source. The concern  
22 was that the permit process between state and federal agencies for permits issued by the Atomic  
23 Energy Commission would be duplicative.(153) Section 21 was not meant to be merely a  
24 duplication of another regulation. Congress was only concerned with trying to achieve "reasonable  
25 assurance ... that no license or permit will be issued by a Federal agency for any activity that  
26 through inadequate planning or otherwise could in fact become a source of pollution."(154)  
27 Referring to "sources of pollution" also indicates that in section 21, the legislature was concerned  
28 with what would become known as point source pollution, not nonpoint source pollution.

Because the term "point source" was not used in 1970, environmentalists contend that section 21(b)  
was not limited to discharges from point sources.(155) Because Congress did not differentiate  
between point and nonpoint sources in 1970, it could not have intended section 21(b) only to  
regulate discharges from point sources. This argument ignores the thrust of section 21(b) and the  
1970 amendments in general. In enacting section 21(b), Congress was concerned about projects that  
the Atomic Energy Commission was building.(156) While Congress emphasized that section 21(b)  
was not limited to just those projects but to any federal project,(157) nothing indicated that it was  
also thinking about nonpoint source pollution, especially because nonpoint source pollution was not  
the focus of the 1970 Amendments.

#### 2. 1972 Clean Water Act



1 In 1972, Congress revamped the water pollution control statutes, resulting in the passage of what is  
2 now known as the Clean Water Act (CWA). Basically, section 21(b) of the Water Quality  
3 Improvement Act of 1970 became section 401 of the CWA.(158) The Senate modified the language  
4 to ensure consistency with the bill's emphasis on effluent limitations as opposed to water quality  
5 standards.(159) The CWA defines the term "effluent limitations" as restrictions on discharges from  
6 point sources only.(160) So, the Senate only appeared to be considering point sources when it  
7 reworked section 401. The debate in the House centered on whether section 401 was to include  
8 discharges from point sources necessary to meet the provisions of sections 306 or 307, both of  
9 which deal with point sources.(161) The Senate version of the bill did not include compliance with  
10 sections 306 and 307. However, the conference report accepted the House version, which included  
11 compliance with two more point sources.(162) Over and over again, the emphasis in section 401  
12 was on point source pollution. In fact, in 1972 the concern was controlling point source pollution:  
13 "[t]he heart of the bill is the new focus on point source limitations."(163) During the debate on the  
14 amendments, the fact that the bill did not cover nonpoint source pollution and was not meant to  
15 cover nonpoint source pollution came up again and again.(164) That Congress actually meant to  
16 include nonpoint source pollution in section 401 when it incorporated section 21 (b) from the 1970  
17 bill into the CWA seems hard to believe, especially because the focus of the bill was not nonpoint  
18 source pollution.

19 Environmentalists argue that because Congress was aware of the problems of nonpoint source  
20 pollution in 1972, it surely meant to include nonpoint source pollution in section 401.(165) They  
21 argue that this interpretation fits into the general statutory scheme that Congress developed in 1972  
22 for nonpoint source pollution. Congress established section 208 of the CWA to deal with nonpoint  
23 source pollution.(166) Section 208 required that the states create areawide waste treatment  
24 **management** plans that include nonpoint source pollution.(167) In essence, the control of nonpoint  
25 source pollution was given to the states. Environmentalists argue that Congress would not limit the  
26 states then to reviewing point sources when they reviewed federal activity under section 401.(168)

27 Congress specifically gave the states the authority and power to control nonpoint source pollution  
28 through section 208.(169) If the control of nonpoint source pollution was already part of the CWA,  
then section 208 would be unnecessary. The fact that Congress enacted section 208 supports the  
contention that section 401 was not meant to include nonpoint source pollution. Because other  
sections of the CWA did not deal with nonpoint source pollution, Congress had to create a specific  
section to deal with the problem. Therefore, in 1972 Congress did not intend nonpoint source  
pollution to be included in section 401.

### 3. 1977 Amendments

The 1977 amendments to the CWA reinforce the interpretation that Congress did not intend section  
401 to include nonpoint source pollution. The only change made to section 401 itself was the  
addition of section 303 to the list of other provisions of the CWA that a state must consider when  
granting a section 401 certification.(170) Section 303 deals with water quality standards.(171)  
Congress originally intended water quality standards to be considered during the section 401  
process;(172) however, the states were confused about Congress's intent.(173) To end the  
confusion, Congress added section 303 to the list of provisions in section 401.(174) Congress felt  
that it was reasonable to have states include water quality standards when looking at the permit

process. This did nothing, however, to increase the scope of section 401 to include nonpoint source pollution. It simply meant that when looking at a section 401 certification, a state should look at its section 303 water quality plan to make sure the activity complies with that plan. This change in section 401 was for clarification, not expansion.(175)

The 1977 amendments did, however, address nonpoint source pollution, just not in the debate surrounding section 401. Agricultural nonpoint source pollution, in particular, was recognized as a major problem in the fight for clean waters.(176) In fact, EPA testimony during the hearings on the 1977 amendments centered around this problem and called for cooperation among federal agencies to find ways to address the problem.(177) However, in its testimony, EPA stressed that section 208 of the CWA, not section 401, would help solve the problem.(178) So, in 1977 Congress was concerned about nonpoint source pollution but chose to address it through section 208, with EPA's backing.

#### 4. 1987 Amendments

The 1987 amendments to the CWA continued to focus on nonpoint source pollution, but once again, not through the use of section 401. Again, Congress recognized that nonpoint source pollution was a problem in need of a solution. Therefore, in the 1987 amendments, Congress created section 319 of the CWA.(179) Section 319 established a national policy and programs for the control of nonpoint source pollution through the creation of nonpoint source pollution **management** programs.(180) If Congress had intended section 401 to address the problem of nonpoint source pollution, then it could have turned to that section as part of the solution. However, in 1987 Congress never even looked at section 401 as part of the solution.

The legislative history indicates that Congress never intended section 401 to **apply** to nonpoint source pollution. Since the section's inception in 1970, Congress has considered section 401 to be part of the control mechanisms for point source pollution only. However, there is no reason to believe that environmentalists will not continue their efforts to apply section 401 to nonpoint source pollution, especially if the Ninth Circuit changes the ONDA II holding on reconsideration. The following discussion looks at the implications of **applying** section 401 to nonpoint source pollution, focusing particularly on the implications to the agricultural community.

#### V. IMPLICATIONS FOR AGRICULTURE, IF SECTION 401 IS APPLIED TO NONPOINT SOURCE POLLUTION

Agriculture is a major source of nonpoint source pollution. If courts apply section 401 to nonpoint source pollution, the agricultural community would face new regulatory hurdles. The two areas most likely to be affected are grazing on public lands and irrigation of private lands through federal reclamation projects. In fact, commentators have already suggested that these two federal "permits" should require a section 401 certification.(181)

##### A. Implications for Grazing

Much of the public land in the western states is grazed.(182) The Bureau of Land Management (BLM) administers grazing allotments on 163.3 million acres, and the Forest Service administers

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1 grazing allotments on 89.6 million acres.(183) Ranchers in the western states rely on these grazing  
2 allotments, and some commentators argue that ranchers would not be able to operate without  
3 them.(184) Currently, ranchers apply for a ten year grazing permit from either BLM or the Forest  
4 Service, and that is the only permit they are required to obtain in order to graze livestock, primarily  
5 cattle, on public lands.(185) Should section 401 apply to nonpoint source pollution, then ranchers  
6 would have to obtain a section 401 certification from the state before applying to BLM or the Forest  
7 Service for a grazing permit.

## 6 1. Current Certification Process in Oregon

7 Oregon provides an example of how this might work. After ONDA I, the Oregon Department of  
8 Agriculture (ODA) promulgated temporary rules for section 401 certification applications to the  
9 Department of Environmental Quality (DEQ).(186) Permanent rules were adopted in March  
10 1998.(187) However, they are considered moot following ONDA H.(188)

10 Under the Oregon rules, "[a]ny person seeking a grazing permit from a federal agency may request  
11 water quality certification from DEQ."(189) Two types of certification are available under the rules  
12 1) individual and 2) general.(190) The general certification allows a federal agency to obtain a  
13 certification for all its grazing permits in a specific geographical area or other defined area.(191)  
14 Individual certificates are required for individuals not encompassed by a general certification or if  
15 the state decides to impose additional conditions on a particular application otherwise covered by a  
16 general certificate.(192)

15 Applicants must submit information such as a description of the grazing activity; a statement of  
16 current upland, riparian, and water quality conditions along with some historical information; a  
17 description of current and proposed measures to prevent water quality degradation; and elements to  
18 be monitored to ensure continued water quality compliance.(193) ODA evaluates the application  
19 and recommends to DEQ whether to certify the activity.(194)

19 The evaluation criteria attempt to integrate best management practices that include "stipulations  
20 regarding season of use, number of animals, intensity of use, kind and class of livestock, types of  
21 grazing systems applied, [and] the spacial distribution of grazing."(195) The season, timing,  
22 frequency, duration, and intensity of grazing activity must be managed to gradually improve any  
23 water-quality-limited waters.(196) Specific components of this grazing management include the  
24 following:

23 (i) Vegetative cover and plant soil conditions that promote water  
24 infiltration, conserve soil moisture and maintain soil stability in upland  
25 areas;

25 (ii) Vegetative cover and plant community structure to promote streambank  
26 stability, debris and sediment capture, shade to moderate water  
27 temperature, and floodwater energy dissipation in riparian areas;

27 (iii) Diverse riparian plant populations and communities that enhance soil  
28 stability and increase water infiltration and storage.(197)

ODA also can require rest from grazing as an appropriate way to improve riparian conditions, as well as placing conditions and limitations on livestock dispersal and handling as a means to ensure water quality standards. But the rules do not require that any specific restrictions be imposed.(198)

Once ODA recommends that DEQ grant a certification, the state's role in the process is basically over. Monitoring for compliance with any conditions placed on the certification is left up to the federal permitting agency.(99) Similarly, enforcement is left primarily to the federal permitting agency, although DEQ retains the discretion to revoke a certification should it so desire.(200)

No one was happy with Oregon's permanent rules. Environmentalists complained that the state had "bent over backward protecting the cattle industry, rather than the state's natural resources."(201) Ranchers complained that "[i]t's an additional permit process that's completely unnecessary."(202) The Forest Service complained that the state's involvement could create additional work for the Forest Service and called for state reimbursement of added costs.(203) DEQ complained that the temporary rules are convoluted and difficult to **apply**.(204)

Presumably, environmentalists brought the ONDA I case because they believed the Forest Service was not doing an adequate job of protecting water quality in the grazing allotments it managed. By requiring state 401 certification, they hoped for a better review of grazing on public lands. Yet, Oregon's rules leave much of the reviewing process, monitoring, and enforcement to the federal permitting agency. In reality, under the temporary rules, the state may simply defer to the federal agency and not really review the grazing activity at all. The end result is that the review of possible negative impacts from grazing on public land is no better than it was before requiring a section 401 certification.(205)

DEQ was concerned that state certification would simply be another layer of regulation that accomplished little. For one thing, the State of Oregon and the Forest Service have a Memorandum of Agreement under which permittees must adhere to state-approved best **management** practices designed to control the water pollution problems associated with grazing.(206) Further, DEQ does not have the **manpower** at this time to establish additional best management practices for each permit site.(207) They must continue to rely on the Forest Service and BLM to determine what should be done on each site because the federal agencies have the technical skill to evaluate each site.(208) Both the Forest Service and BLM already evaluate each site and require that the grazing management of each site include environmental considerations.(209) For example, Forest Service permits require consideration of the need to protect watersheds and fish and wildlife habitats.(210) BLM regulations require that the agency ensure that the watersheds in grazing allotments are in, or making substantial progress towards, properly functioning physical condition.(211) Permit conditions also must ensure that water quality complies with state water quality standards.(212) The state assumes that the federal land management agencies are actually doing what they are required by law to do when it comes to protecting the land and water from the damages of grazing. So, the state is willing to defer to the agencies. Because of this deferral, a section 401 certification could easily have no impact on grazing nonpoint source pollution.

## 2. Grazing and Nonpoint Source Pollution

1 Grazing on public and private rangeland may cause damage to the navigable waters of the United  
2 States. However, the extent of that damage is debatable. Environmentalists often blame grazing for  
3 much of the damage to the riparian areas in the western states. Riparian areas are the lands next to  
4 waterways and support an abundance of vegetation and wildlife. These areas comprise about one  
5 percent of the public lands in the West; however, they are also said to be some of the most valuable  
6 lands in the West.(213) Riparian areas influence operation of the entire watershed in which they are  
7 located.(214) Many birds and other wildlife depend on riparian habitats for survival.(215) Cattle  
8 like to congregate in riparian areas because of the access to water and the abundance of vegetation  
9 on the banks.(216) Therefore, without proper management, grazing can result in damage to the  
10 riparian areas.(217) Cattle walk up and down the streambanks, increasing erosion and preventing  
11 new vegetation from growing on the banks.(218) They also eat and trample the vegetation growing  
12 in the riparian areas.(219)

9 Not only does proper range management increase the grazing productivity of the riparian areas by  
10 increasing vegetation and decreasing erosion, but the habitats necessary to support the fish and  
11 wildlife that depend on riparian areas improve as well. Grazing has been blamed for the loss of fish  
12 habitats in many western states.(220) The loss of vegetation and increased erosion that may result  
13 from grazing can raise the water temperature of streams, affecting the ability of fish to live and  
14 reproduce.(221) Animal-waste runoff from grazing may contribute to the negative impact of  
15 grazing on fish habitats. Runoff can introduce excessive nutrients such as nitrogen, phosphorus, and  
16 organic matter into the water. Excessive nutrient loading can overstimulate the growth of algae,  
17 which is harmful for fish habitats.(222) Further, the decomposition of organic matter requires  
18 oxygen that would otherwise be used by fish.(223)

15 In Idaho, grazing is blamed for the loss of trout spawning grounds in the Henry's Lake area.(224)  
16 Due to poor grazing management, summer water temperatures increased and the spawning gravel  
17 was covered in sediment.(225) In Arizona, livestock grazing has been called the greatest threat to  
18 native fish.(226) The threat to fish habitats posed by grazing played a role in ONDA I.  
19 Environmentalists were concerned about the effect of fecal coliform and elevated water  
20 temperatures on the John Day River's ability to support fish.(227)

20 In addition to affecting fish habitats, grazing also may affect wildlife that depends on riparian  
21 habitats. For example, grazing has been blamed for the loss of habitat for the Sonoran desert  
22 tortoise in the Santa Maria Community allotment in Arizona.(228) This area also has the potential  
23 to support desert bighorn sheep, bald eagles, and peregrine falcons.(229) In California,  
24 environmentalists claim that grazing on Santa Rosa Island is threatening the Western snowy plover  
25 as well as several other endangered or threatened species.(230) Supposedly, grazing is harming  
26 ninety threatened or endangered species on BLM land alone.(231)

25 According to the environmentalists, damage to riparian areas from grazing extends beyond loss of  
26 fish and wildlife habitats. Not surprisingly, one of the impacts often mentioned is the loss of  
27 recreational use of the riparian areas. Recreational use and grazing are just two of the many  
28 designated uses of public lands. Of course, using land for grazing affects the recreational use of that  
land, just as recreational use of land affects grazing. For example, in the Comb Wash grazing  
allotment in Utah, degradation of the riparian areas in the canyons that make up the allotment has  
caused local outfitters to stop taking campers into the canyons. Also, the American Automobile

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1 Association has advised hikers and backpackers to avoid the area due to problems from  
2 grazing.(232) In addition to these specific examples, some environmentalists argue that the grazing-  
3 induced degradation of the waters on public lands will prevent future generations from ever fishing  
4 or picnicking along shady streams.(233) This last argument is perhaps extreme and seems to  
5 suggest that grazing should.

6 Reducing grazing damage to riparian areas does not require keeping cattle off public lands entirely.  
7 Adding another layer of regulation by requiring a section 401 certification will not solve the  
8 problem either. The solution is proper grazing management. Proper grazing management centers  
9 around seasons of use for an allotment and the number of livestock allowed to graze on an  
10 allotment. Regulating seasonal use may mean not turning cattle out on an allotment in the spring so  
11 that vegetation in a riparian area has a better chance to grow and develop. This will then provide  
12 cattle with better forage later in the grazing season. Reducing the number of cattle grazing on an  
13 allotment can also make a significant difference to the health of a riparian area.(234) Examples of  
14 proper management abound all over the West. Using funds and programs that were set up under  
15 section 319 of the CWA (the provision of the CWA meant to deal with nonpoint source pollution),  
16 riparian areas in Arizona, Idaho, Oregon, Nevada, South Dakota, Utah, and Wyoming have been  
17 restored or significantly improved.(235) Techniques used to accomplish the improvements include  
18 resting the land, building fences, reducing numbers, and changing turnout times.(236) In almost all  
19 cases, permittees cooperated with the federal land management agency involved.(237) In most  
20 cases, the productivity of the allotments increased, and permittees saw a long-term benefit even  
21 though, in some cases, they reduced numbers or rested land in the short term.(238)

### 22 3. Existing Regulations

23 Participation in section 319 programs is voluntary. Grazing permittees chose to participate to help  
24 minimize the possible adverse environmental effects of grazing. However, federal legislation other  
25 than the CWA already regulates much of what grazing permittees can do on their allotments. In  
26 particular, the Federal Land Policy and Management Act of 1976 (FLPMA)(239) and the Public  
27 Rangelands Improvement Act of 1978 (PRIA)(240) require BLM and the Forest Service to consider  
28 the environmental impacts, including water quality impacts, of grazing on public lands.  
Specifically, FLPMA declares the policy of the United States as follows:

[that] the public lands be managed in a manner that will protect the  
quality of scientific, scenic, historical, ecological, environmental, air  
and atmospheric, water resource, and archeological values, that, where  
appropriate, will preserve and protect certain public lands in their  
natural condition, that will provide food and habitat for fish and wildlife  
and domestic animals; and that will provide outdoor recreation and human  
occupancy and use. (241)

25 This act allows BLM and the Forest Service to incorporate allotment management plans in grazing  
26 permits and leases.(242) Allotment management plans are site-specific plans intended to improve  
27 range conditions.(243) While such plans are not mandatory, if either agency decided not to  
28 complete an allotment plan, or decided that one was not necessary, the terms and conditions are  
attached to the affected grazing permits.(244) The terms and conditions cover anything that might  
be necessary to adequately manage the land as prescribed by law.(245)

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1 Congress passed PRIA two years later to further define what land management agencies must do  
2 under FLPMA. Congress said that "vast segments of the public rangelands are producing less than  
3 their potential for livestock, wildlife habitat, recreation, forage, and water and soil conservation  
4 benefits, and for that reason remain in an unsatisfactory condition." (246) PRIA reaffirms the  
5 national commitment to "inventory and identify current public rangelands conditions and trends as a  
6 part of the inventory process required by section 1711(a) of this title" (247) and to "manage,  
7 maintain, and improve the condition of public rangelands so that they become as productive as  
8 feasible for all rangeland values in accordance with management objectives and land use planning  
9 process established pursuant to section 1712 of this title." (248) In fact, section 1903 of PRIA  
10 specifically calls upon both land management agencies to maintain inventories of range conditions  
11 and trends. (249)

12 Pursuant to FLPMA and PRIA, BLM and the Forest Service promulgated regulations designed to  
13 improve the overall condition of public rangelands. The Forest Service regulations concentrate on  
14 allotment management plans. Allotment management plans establish what livestock operations  
15 must do to meet "the multiple-use, sustained yield, economic, and other needs and objectives as  
16 determined for the lands, involved." (250) The Forest Service prepares the allotment plan in  
17 cooperation with the permittee, consistent with the Forest Service's land use planning method. (251)  
18 This strategy allows the Forest Service to manage grazing on the federal forests under their existing  
19 laws. Additionally, the Forest Service must consider damage to the surrounding waters when  
20 developing a more general land management plan for any use of National Forest lands, including  
21 grazing. (252)

22 In contrast, BLM promulgated extensive new rules "to promote healthy sustainable rangeland  
23 ecosystems." (253) The regulations called for grazing management to ensure that watersheds were in  
24 properly functioning physical condition, or at least moving in that direction. (254) The riparian area  
25 of the watershed, as well as uplands, are included in range management, and water quality must  
26 comply with state water quality standards. (255) Under the regulations, each state develops its own  
27 standards to meet these requirements, thus ensuring that states control their own water quality. (256)  
28 The rules laid out twelve requirements that the states had to address in their guidelines. (257) If a  
state failed to develop its own guideline by a specific time, then BLM-developed fallback standards  
automatically went into effect. (258)

29 The end result is that federal land management agencies are heavily regulating grazing on public  
30 lands. This regulation includes considering the effects of grazing on the overall water quality of a  
31 state. (259) Requiring a section 401 certification in addition would just add another layer of  
32 regulation. However, many complain that BLM and the Forest Service are doing little in the way of  
33 actual enforcement. (260) They argue that although the regulations may be on the books, in reality,  
34 grazing continues unchecked, with no regard for the impacts of nonpoint source pollution. In  
35 particular, critics argue that BLM favors grazing over other uses of the land it manages, regardless  
36 of the health of riparian areas. (261) Moreover, BLM allows permittees to control the use of their  
37 allotment. For example, permittees often control turnout times, even though determining turnout  
38 times is BLM's responsibility. (262) So, the argument goes, because the federal land management  
39 agencies do not want to use their authority to protect the quality of the nation's waters, then the  
40 states should be able to use their section 401 power to do so.

1 The grazing numbers from the federal land management agencies do not support the assertion that  
2 grazing is going unchecked on public lands. According to the Forest Service, the number of animals  
3 grazing on Forest Service lands declined from eleven million in 1986 to about nine million in each  
4 of the last three years.(263) The reasons for the reduction included efforts to repair degraded  
5 riparian areas and adjustments for effects on endangered and threatened species.(264) Likewise,  
6 there are fewer livestock grazing on BLM lands. According to Department of Interior statistics, the  
7 number of animal unit months (AUMs)(265) went down by almost two million between 1979 and  
8 1996, or nearly one-fifth of the total AUMs for those years.(266) Grazing fewer animals reduces the  
9 amount of forage consumed on public lands.(267) While many claim that nothing is being done  
10 about the impact of grazing on nonpoint source pollution, the numbers do not support such an  
11 assertion. The truth is that grazing is controlled by the federal land management agencies, and  
12 adding another layer of regulation would accomplish little.

#### 13 4. Cost of Regulating Grazing Through Section 401

14 In addition to adding another needless layer of regulation, requiring a section 401 permit for grazing  
15 on public lands would increase the cost of grazing on public lands, which is already more expensive  
16 for a rancher than grazing on his private land.(268) However, the biggest impact of increased costs  
17 would not be felt by the individual rancher. State governments would bear most of the increased  
18 costs because they are responsible for granting section 401 certification.

19 Environmentalists contend that requiring section 401 certification for grazing permits is cost  
20 effective.(269) They argue that it is cheaper for states to deal with nonpoint source pollution up  
21 front, rather than undertaking enforcement actions after the damage is done.(270) Yet, the initial  
22 concern for Oregon following ONDA I was how to pay for the costs of issuing additional section  
23 401 certifications. At that time, DEQ had one full-time staff person to handle approximately one  
24 thousand section 401 applications received each year.(271) Certifying every grazing permit would  
25 add substantially to administrative costs for the department because half of the land in the state is  
26 public land and grazing occurs on much of it.(272) DEQ, in fact, estimates between one thousand  
27 and fifteen hundred grazing permits would require certification.(273) Add this to the cost of  
28 promulgating rules, and cost becomes a big issue for any state. States may be reluctant to take on  
this cost, especially because they may feel, as Oregon appeared to, that this is simply a duplication  
of efforts already being made at the federal level. As illustrated by reaction from the Forest Service  
to Oregon's permanent rules, trying to pass the cost on to the federal permitting agency is likely to  
meet with resistance as well.

Of course, at least some, and possibly all, of the additional costs to the states could be passed on to  
the permittees. Those who favor requiring a section 401 certification for grazing would more than  
likely advocate this approach,(274) especially because many believe that grazing on federal lands is  
already subsidized by taxpayers.(275) However, in most states, the costs of permits do not solely  
support the agencies responsible for permitting, and it is unlikely that state agencies would be able  
to pass all the cost on to the permittees. For example, Oregon does not currently charge for a section  
401 certification.(276) It is hard to believe that everyone in the state would sit idly by if the state  
were suddenly to begin charging the true cost of certification. For this reason, the public would  
probably have to bear some of the cost. At this time, though, it remains to be seen whether the  
public would be willing to do so.

1 The end result of imposing section 401 on federal grazing permits may do little in the way of  
2 solving the problem with agricultural nonpoint source pollution. In a recent assessment from the  
3 General Accounting Office concerning agricultural nonpoint source pollution, rangeland impaired  
4 only about eight percent of the affected river and stream miles and accounted for about twenty-five  
5 percent of impaired miles of all waterways.(277) The assessment did not separate federal rangeland  
6 from private rangeland. Nonetheless, because most of the potential damage from grazing would be  
7 to rivers and streams, eight percent seems a small number, especially when compared to the six  
8 billion tons of soil entering our nation's waterways each year.(278) While the potential  
9 environmental impacts of grazing should not be ignored, focusing on other types of agricultural  
10 nonpoint source pollution will have a greater impact on the health of navigable waterways.

## 11 B. Implications for Irrigation

12 Irrigation is essential to the agricultural community, and like grazing on public lands, this is  
13 especially true in the West.(279) The seventeen western states account for over eighty-one percent  
14 of all irrigated land in the United States.(280) Irrigated cropland is much more productive than  
15 nonirrigated land.(281) For instance, in 1977, although irrigated cropland accounted for only one-  
16 seventh of all cropland in the United States, it produced over one-fourth the value of all crops.(282)  
17 Much of the water necessary to irrigate the West comes from projects operated by the Bureau of  
18 Reclamation (Bureau). The Bureau came into being when Congress passed the Reclamation Act of  
19 1902.(283) One of the objectives of the Act was to encourage settlement of the West by providing  
20 low-cost irrigation water.(284) The Bureau built dams, canals, and other facilities to bring irrigation  
21 water to small family farms across the West.(285) Today, the Bureau provides about thirty million  
22 acre-feet of water to the western states each year.(286)

23 Importantly, water for irrigation is not free. Reclamation water for irrigation is delivered pursuant to  
24 contracts. These contracts are between an organization, usually an irrigation district, and the United  
25 States.(287) Two types of contracts exist: repayment contracts and water service contracts.(288)  
26 Repayment contracts require the irrigation district to make scheduled payments on a portion of the  
27 costs of a specific project in return for irrigation water.(289) These contracts resemble a mortgage  
28 that the irrigation district holds on the project itself(290) and the right to receive the water attaches  
to the land being irrigated.

Although water service contracts help pay for the cost of projects, they may be for a more limited  
time period. These contracts require the irrigation district to pay an agreed-upon rate to receive  
irrigation water for a year. These water service contracts more closely resemble a lease; however,  
they also may convey a permanent right to use the water.(291) It is the existence of these contracts  
that could make irrigation subject to section 401 certification if section 401 is held to be applicable  
to nonpoint source pollution.

Most pollution associated with irrigation is nonpoint source pollution, although confusion over how  
to label irrigation return flows existed when the CWA was enacted.(292) Eventually, irrigation  
return flows were designated as nonpoint source pollution under section 208, the initial nonpoint  
source program in the CWA.(293) Irrigation return flows and drainage are probably the biggest  
pollution problem associated with irrigation.(294) In fact, recent estimates say that irrigated  
cropland accounts for eighty-nine percent of the impaired river miles in the West.(295) Irrigation

1 return flows and drainage can introduce trace elements, nitrogen, salts, pesticides, and herbicides  
2 into waterways.(296) Environmental impacts from irrigation are not limited to return flows and  
3 drainage. Other impacts include erosion and sedimentation,(297) lowering of stream flows,(298)  
4 and lowering of water temperatures.(299) All of these, along with discharges from return flows and  
5 drainage, may greatly affect the ability of the waters to support fish habitats.(300)

6 Even if section 401 is construed to **apply** to nonpoint source pollution, it may be difficult to apply it  
7 to irrigation. The language of section 401 requires that "[a]ny applicant for a Federal license or  
8 permit" obtain state certification if the activity to be conducted may result in a discharge.(301) As  
9 noted above, irrigation with federal reclamation water may result in a discharge. But does it require  
10 a federal license or permit? It does require a contract with the United States, but a contract is not a  
11 license or a permit. "A contract is a promise or a set of promises for the breach of which the law  
12 gives a remedy, or the performance of which the law in some way recognizes as a duty."(302) A  
13 permit is a "document which **grants** a person the right to do something."(303) A license may be  
14 defined as a "certificate or the document itself which gives permission" to do some activity.(304) A  
15 license or a permit is not usually thought to create a contract with the grantor.(305) A contract  
16 between the United States and an irrigation district creates property rights to the water such that if  
17 the Bureau decides to take away the water, the landowners may have a valid takings claim.(306)  
18 This is vastly different from what a grazing permit does. A grazing permit gives a rancher  
19 permission to graze on public lands for a fee. It creates no property right for the rancher.(307) The  
20 contract by which irrigation districts and, hence, individual farmers get federal irrigation water  
21 cannot be construed as a "permit or license." Therefore, irrigation should be safe from further  
22 regulation if section 401 is applied to nonpoint source pollution.

## 23 VI. OTHER WAYS TO CONTROL AGRICULTURAL NONPOINT SOURCE POLLUTION

24 If section 401 cannot be used to help regulate nonpoint source pollution, then what can be used to  
25 regulate nonpoint source pollution? The most obvious answer is to better use the existing regulatory  
26 tools, such as other provisions of the CWA designed specifically to deal with nonpoint source  
27 pollution and enforcement provisions in grazing regulations. Voluntary programs, economic  
28 incentives, and land use controls offer other reasonable solutions.

### 29 A. Nonpoint Source Pollution Provisions of the CWA

30 Sections 208 and 319 of the CWA provide adequate means to deal with nonpoint source pollution.  
31 Although the original CWA did not concentrate on nonpoint source pollution, Congress was aware  
32 of the nonpoint source pollution problem and began to look for ways specifically to address it. In  
33 fact, with the 1987 amendments, the declaration of goals and policies of the CWA was amended to  
34 include nonpoint source pollution in the national policy concerning **clean water**. "It is the national  
35 policy that programs for the control of nonpoint sources of pollution be developed and implemented  
36 ... so as to enable the goals of this chapter to be met through the control of both point and nonpoint  
37 sources of pollution."(308) One such goal is "to assure adequate control of sources of pollutants in  
38 each state."(309) Congress did not intend to let nonpoint source pollution continue running  
39 rampant, but it was looking for specific, effective ways to deal with it.

#### 40 1. Section 208 of the CWA

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1 Section 208 was the first attempt in the CWA to deal with nonpoint source pollution. Congress  
2 added section 208 in 1972 when it first distinguished between point sources and nonpoint  
3 sources.(310) Section 208 called for states to develop areawide waste treatment plans.(311) Plans  
4 included

5 [a] process to (i) identify, if appropriate, agriculturally and  
6 silviculturally related nonpoint sources of pollution, including return  
7 flows from irrigated agriculture, and their cumulative effects, runoff from  
8 manure disposal areas, and from land used for livestock and crop  
9 production, and (ii) set forth procedures and methods (including land use  
10 requirements) to control to the extent feasible such sources.(312)

11 Control of nonpoint source pollution was thought best left to state and local governments,(313) so  
12 section 208 required states to consider nonpoint source pollution when developing their waste  
13 management plans.

14 Eventually 176 section 208 plans were developed.(314) These plans furthered the states'  
15 understanding of nonpoint source pollution and how to Control it. As early as 1977, Congress  
16 wondered whether section 208 was accomplishing anything. "Between requiring regulatory  
17 authority for nonpoint sources, or continuing the section 208 experiment, the committee chose the  
18 latter course, judging that these matters were appropriately left to the level of government closest to  
19 the sources of the problem."(315) And in 1977, the experimental Rural Clean Water Program  
20 (RCWP) grew out of section 208.(316) The program was designed to test best management  
21 practices for reducing agricultural nonpoint source pollution in twenty watersheds across the  
22 country, beginning in 1980.(317) The program was a cost-sharing program in which farmers  
23 contracted with the federal government for funds to help in the "installing and maintaining  
24 measures incorporating best management practices to control nonpoint source pollution for  
25 improved water quality."(318) Although the success of the program varied, it was at least a step  
26 towards reducing agricultural nonpoint source pollution.

27 Doubts about the ability of section 208 to help control nonpoint source pollution continued. In  
28 1979, Congress held hearings to evaluate how section 208 was working. These hearings outlined  
several problems with the 208 program, such as the following: too little time to create the plans,  
lack of federal funding, inadequate water **quality data**, and poor management by EPA.(319) The  
hearings also outlined the following obstacles to implementing nonpoint source pollution controls:  
inadequate data on the effectiveness of controls, institutional conflicts, lack of **public education** on  
the benefits of nonpoint source pollution controls, and debates over whether the way to get  
cooperation with the plans was through regulation or by voluntary means.(320)

Another complaint about section 208 was that it provided no means to penalize individual nonpoint  
source polluters.(321) However, the provision is not totally without enforcement capacity; EPA can  
withhold funds from states that fail to comply with section 208.(322) Although Congress turned to a  
different mechanism for controlling nonpoint source pollution under the CWA in 1987, section 208  
still exists and provides one way for states to deal with agricultural nonpoint source pollution.

## 2. Section 319 of the CWA



1 In 1987, Congress enacted section 319 to deal with nonpoint source Pollution.(323) Section 319  
2 requires each state to complete an assessment report that "identifies those navigable waters within  
3 the State, which, without additional action to control nonpoint sources of pollution, cannot  
4 reasonably be expected to attain or maintain applicable water quality standards or the goals or  
5 requirements of this chapter."(324) The assessment must identify best management practices(325)  
6 and measures to control each type of nonpoint source pollution and identify and describe the  
7 programs that would be used to control nonpoint source pollution.(326) Section 319 calls upon  
8 states to reduce nonpoint source pollution to "the maximum extent practicable."(327) This is a  
9 much higher standard than that in section 208.(328)

10 Section 319 has achieved some success,(329) but it has faced criticism for being a voluntary  
11 program. Like section 208, it does not require states to penalize individual nonpoint source polluters  
12 who do not adopt best management practices.(330) It has also been criticized for being too  
13 piecemeal because each state has its own program and the programs differ drastically.(331)  
14 However, EPA remains committed to section 319 to combat nonpoint source pollution. In its recent  
15 guidance for section 319, EPA states that its long-term vision is that "all states are implementing  
16 dynamic and effective nonpoint source programs designed to achieve and maintain beneficial uses  
17 of water."(332) The guidance sets out nine key elements that states must use as they review their  
18 section 319 programs, and it is "intended to serve as the basis for a nationally consistent approach  
19 for State nonpoint source management programs and grants."(333) EPA will now reward states with  
20 grant money based on how well they implement these nine key elements in their nonpoint source  
21 pollution programs.(334) This should encourage states to aggressively address their nonpoint source  
22 pollution problems because there will be a monetary incentive to do so. This is in distinct contrast  
23 to requiring states to use their section 401 power because states have a monetary incentive for  
24 implementing the elements of the section 319 guidance. States get no monetary incentive to certify  
25 activities under section 401. This may explain, in part, why states have been reluctant to use the full  
26 extent of their 401 power even to regulate point source pollution.

## 27 B. Other Federal Regulatory Tools

28 Besides the CWA, other regulatory tools exist within the federal scheme to help fight agricultural  
nonpoint source pollution. This section will focus only on existing regulatory schemes that can be  
applied to grazing and irrigation. Although these two activities are not the main sources of  
agricultural nonpoint source pollution, these are the two activities that would be most affected by  
the extension of section 401 to nonpoint source pollution. Therefore, this section is limited to a  
discussion of federal regulation, other than the CWA, that affects irrigation and grazing.

### 1. Grazing

FLPMA gives BLM and the Forest Service authority "to cancel or suspend a grazing permit or lease  
for any violation of a grazing regulation or of any term or condition of such grazing permit or  
lease."(335) Because grazing permits must include terms and conditions that address nonpoint  
source pollution problems associated with grazing, federal land agencies have the authority to  
control the effects of grazing on public lands. In addition, BLM regulations allow for reducing the  
number of livestock permitted to graze on an allotment if the agency finds that range conditions do  
not support the original permitted use.(336)



1 Likewise, Forest Service regulations state that a permit can be modified by seasons of use and  
2 numbers, kind, and class of livestock, due to resource condition.(337) Furthermore, Forest Service  
3 regulations provide for the cancellation or suspension of a grazing permit if "the permit holder is  
4 convicted for failing to comply with Federal laws or regulations or State law relating to protection  
5 of air, water, soil and vegetation, fish and wildlife, and other environmental values when exercising  
6 the grazing use authorized by the permit.(338) Therefore, a permittee cannot ignore environmental  
7 laws on his grazing allotment. If he does, he is subject to losing his permit. BLM regulations subject  
8 a permittee to civil penalties for the violation of federal and state laws pertaining to "pollution of  
9 water sources," among other things.(339) Once again, a permittee cannot do whatever he wants on  
10 his allotment without being mindful of the impact his activity may have on the water. Quite simply,  
11 the powers that BLM and the Forest Service have to enforce the terms and conditions of the grazing  
12 permits they grant are adequate to achieve the purpose behind the CWA. As discussed previously,  
13 BLM and the Forest Service may need to be encouraged to truly enforce the terms and conditions of  
14 grazing permits, but another layer of regulation is not needed.

## 10 2. Irrigation

11 The easiest way to reduce nonpoint source pollution associated with irrigation is to use less water.  
12 If less water is used to irrigate, then less runoff occurs. If less runoff and drainage occur, then there  
13 are fewer environmental impacts to other waters. Irrigation districts are required to develop and  
14 submit water conservation plans to the Bureau.(340) These plans are required to have "definite  
15 objectives which are economically feasible" and must contain a time frame for completion.(341)  
16 Although a conservation plan is mandatory, the Bureau has no authority to force irrigation districts  
17 to complete one. This does not mean, however, that section 401 is needed to enforce environmental  
18 compliance from irrigators. In 1992, the Bureau set forth a new mission "to manage, develop, and  
19 protect water and related resources in an environmentally and economically sound manner."(342)  
20 California's Central Valley Project (CVP), the largest federal water system in the country, illustrates  
21 the value of the Bureau's new direction.(343) Under the Central Valley Project Improvement  
22 Act,(344) 800,000 acre-feet of CVP water that would have been used for irrigation is now being  
23 used for fish and wildlife habitat.(345) The Bureau has shown its commitment to manage water in  
24 an environmentally sound way. At this point in time, it would be more cost effective for the Bureau  
25 to continue with its mission rather than inventing new ways, such as section 401 certification, to  
26 regulate irrigation.

## 22 C. Other Ways to Reduce Agricultural Nonpoint Source Pollution

23 The answer to agricultural nonpoint source pollution is not necessarily further regulation. Contrary  
24 to what some environmentalists may believe, the agricultural community is concerned about  
25 nonpoint source pollution and is looking for ways to control it. Federal watershed projects represent  
26 one significant effort to reduce agricultural nonpoint source pollution.(346) In 1995 there were 618  
27 watershed projects specifically aimed at agricultural nonpoint source pollution across the  
28 nation.(347) Approximately \$514 million in federal funds was spent on these projects.(348) The  
General Accounting Office looked closely at nine of these projects to provide information to other,  
future projects about what worked.(349)

1 As an illustration, the GAO examined the Coos Bay project on the Coquille River in Oregon.  
2 Twenty landowners along the river participated in the program, fencing and replanting forty-five  
3 miles of streambanks.(350) The fecal coliform count went down enough in one section of the  
4 project to open oyster beds that had been closed for thirteen years because of fecal  
5 contamination.(351) By government agencies, environmentalists, and private landowners working  
6 together, tremendous strides were taken in improving the overall condition of the watershed. This  
7 type of voluntary cooperation can accomplish much more than regulation and litigation.

8 Unfortunately, the program is voluntary, and getting farmers and ranchers to participate may be  
9 difficult. Even though the Coos Bay program was successful, far too few landowners participated.  
10 The answer may lie in educating farmers and ranchers about the benefits of improving water  
11 quality. To be effective the benefits need to be couched in terms of economic benefits to the farmers  
12 and ranchers. As businessmen, farmers and ranchers will be more willing to participate in programs  
13 that will help their businesses. An argument that they need to preserve a streambank so future  
14 generations can picnic along it will not be as persuasive to them as an argument about preserving a  
15 streambank so their cows will have something to eat ten years from now.

16 Another approach for controlling agricultural nonpoint source pollution is the environmental quality  
17 incentives program (EQIP) included in the 1996 Farm Bill.(352) In fact, it was one of the programs  
18 highlighted by Vice-President Al Gore when he launched the Clinton Administration's new strategy  
19 for clean water in America.(353) The program is a voluntary program designed to provide technical  
20 and financial support to farmers and ranchers in their fight against nonpoint source pollution.(354)  
21 The program will pay for up to seventy-five percent of a project's cost,(355) and Congress initially  
22 appropriated \$1.2 billion to the program.(356) The program is still too new to determine its  
23 effectiveness; however, because it is based on economic incentives and voluntary participation, its  
24 chance for success is certainly great.

## 25 VII. CONCLUSION

26 No one, including farmers and ranchers, can afford to ignore the effects of nonpoint source  
27 pollution on this nation's navigable waters. The agricultural industry, in particular, needs to be  
28 concerned about nonpoint source pollution because it is responsible for much of the nonpoint  
29 source pollution problem. However, as the initial Ninth Circuit decision in ONDA II indicated,  
30 extending section 401 to apply to nonpoint source pollution cannot be part of the solution to this  
31 problem. Section 401 is not a "nice hook"(357) for states to use in enforcing the CWA. Congress  
32 simply did not intend section 401 to apply to nonpoint source pollution. Neither the statute on its  
33 face nor the legislative history of the CWA supports such a contention.

34 Furthermore, even if section 401 was extended to apply to nonpoint source pollution, it would have  
35 little effect on agricultural nonpoint source pollution. Section 401 only deals with activities that  
36 require a federal license or permit. This limits its agricultural application to grazing and perhaps  
37 irrigation. Both of these activities are already heavily regulated by federal agencies. If these  
38 agencies are not doing a good job, they should be required to do a better job. Shifting the burden to  
39 the states by requiring a section 401 certification would only result in another layer of useless  
40 regulation.

1 The answer to the nonpoint source pollution problem is not more regulation. Instead, the answer  
2 includes more effective use of the provisions of the CWA that were intended to apply to nonpoint  
3 source pollution, namely sections 208 and 319. The answer also includes more effective use of the  
4 environmental provisions of existing federal land management regulations and more effective  
5 education of farmers and ranchers about the benefits of clean water and healthy riparian areas.  
6 Lastly, the answer includes more effective economic incentives for farmers and ranchers to  
7 implement environmentally sound practices. The answer is not to extend section 401 to nonpoint  
8 source pollution.

9 (1) Federal Water Pollution Control Act 33 U.S.C. [subsections] 1251-1387 (1994) [hereinafter  
10 Clean Water Act].

11 (2) Id. [sections] 1251(a).

12 (3) Sustainable Wastewater and Water Infrastructure for the 21st Century, 1997: Hearings on  
13 Reauthorization of the Clean Water Act Before the Subcomm. on Water Resources and Env't of the  
14 Comm. on Transp. and Infrastructure, 105th Cong. 301 (1997) (testimony of Billy G. Turner,  
15 President of the Water Environment Federation).

16 (4) Federal Water Pollution Control Act Amendments of 1977: Hearings Before the Subcomm. on  
17 Env'tl. Pollution of the Comm. on Env't and Pub. Works, 95th Cong. 1094 (1977) (statement of  
18 Thomas C. Jorling, assistant administrator for Water and Hazardous Materials, Environmental  
19 Protection Agency), reprinted in 4 A LEGISLATIVE HISTORY OF THE WATER POLLUTION  
20 CONTROL AMENDMENTS OF 1977, at 1104 (1978). The CWA defines a point source to mean  
21 "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch,  
22 channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding  
23 operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33  
24 U.S.C. [sections] 1362(14) (1994).

25 (5) Lawrence R. Liebesman & Elliott P. Laws, The Water Quality Act of 1987: A Major Step in  
26 Assuring the Quality of the Nation's Water, in CLEAN WATER DESKBOOK 21, 33  
27 (Environmental Law Reporter ed., 1991).

28 (6) However, the Environmental Protection Agency (EPA), the agency responsible for the  
implementation and enforcement of the CWA, has defined NPS as follows:

NPS pollution is caused by diffuse sources that are not regulated as point  
sources and normally is associated with agricultural, silvicultural and  
urban runoff, runoff from construction activities, etc. Such pollution  
results in the human-made or human-induced alteration of the chemical,  
physical, biological, and radiological integrity of the water. In  
practical terms, nonpoint source pollution does not result from a discharge  
at a specific, single location (such as a single pipe) but generally  
results from land runoff, precipitation, atmospheric deposition, or  
percolation. It must be kept in mind that this definition is necessarily  
general; legal and regulatory decisions have sometimes resulted in certain  
sources being assigned to either the point or nonpoint source categories  
because of considerations other than their manner of discharge. For

example, irrigation return flows are designated as "nonpoint sources" by section 402(1) of the Clean Water Act, even though the discharge is through a discrete conveyance.

Office of Regulations and Standards, U.S. Environmental Protection Agency, Nonpoint Source Guidance, in CLEAN WATER DESKBOOK 173, 177 (Environmental Law Reporter ed., 1991).

(7) U.S. GENERAL ACCOUNTING OFFICE, AGRICULTURE AND THE ENVIRONMENT: INFORMATION ON AND CHARACTERISTICS OF SELECTED WATERSHED PROJECTS 1 (1995) [hereinafter WATERSHED PROJECTS].

(8) U.S. GENERAL ACCOUNTING OFFICE, ANIMAL AGRICULTURE: INFORMATION ON WASTE MANAGEMENT AND WATER QUALITY ISSUES 9 (1995) [hereinafter ANIMAL AGRICULTURE].

(9) See generally Debra L. Donahue, The Untapped Power of Clean Water Act Section 401, 23 ECOLOGY L.Q. 201 (1996); Alia S. Miles, Searching for the Definition of "Discharge": Section 401 of the Clean Water Act, 28 ENVTL. L. 191 (1998); Katherine P. Ransel, The Sleeping Giant Awakens: Public Util. Dist. No. 1 of Jefferson County v. Washington Department of Ecology, 25 ENVTL. L. 255 (1995); Katherine Ransel & Erik Meyers, State Water Quality Certification and Wetland Protection: A Call to Awaken the Sleeping Giant, 7 VA. J. NAT. RESOURCES L. 339 (1988).

(10) 33 U.S.C. [sections] 1341(a)(1) (1994).

(11) Tom Alkire, Water Pollution: Federal Judge in Oregon Applies CWA Section 401 to Non-point Sources, DAILY ENV'T REP. (BNA), Oct. 4, 1996, at A-3.

(12) 511 U.S. 700 (1993).

(13) Donahue, supra note 9, at 214; see also Ransel, supra note 9, at 268-69 (speaking to the "breadth of the Court's decision" and how "authority would seem to apply equally to non-point as well as point source discharges").

(14) 940 F. Supp. 1534 (D. Or. 1996).

(15) Nos. 97-35065, 97-35112, 1998 WL 407711 (9th Cir. July 22, 1998).

(16) 151 F.3d 945 (9th Cir. 1998). As of June 1999, the Ninth Circuit had not reached a decision on the rehearing request.

(17) 33 U.S.A. [sections] 1341(a)(1) (1994).

(18) S. REP. No 92-414, at 69 (1971), reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF 1972, at 1487 (1973).

1 (19) Section 402 is the main regulatory mechanism of the CWA. It established the National  
2 Pollution Discharge Elimination System (NPDES). 33 U.S.C. [sections] 1342 (1994).

3 (20) Id.

4 (21) H.R. 11896 TOGETHER WITH DEBATE AND REPORT (Mar. 27, 1972), reprinted in 1 A  
5 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF  
6 1972, at 466 (1973).

7 (22) 33 U.S.C. [sections] 1342(c)(3) (1994).

8 (23) Id. [sections] 1342 (d)(2).

9 (24) Public Util. Dist. No. I of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700  
10 (1993).

11 (25) In PUD No. 1 the Federal Energy Regulatory Commission (FERC) was not involved because  
12 the applicant could not **apply** for a federal license until the state certified the project. Id. at 707-10.

13 (26) See, e.g., OR. ADEN. R. 603-076-0040 (1996) (listing temporary rules for [sections] 401  
14 certification for grazing permits that allow applicant to submit federal permit to state during  
15 certification). But see OR. ADEN. R. 340-048-0025 (1998) (adopting permanent rules that changed  
16 this procedure). Applicants can no longer submit a federal permit as evidence of compliance with  
17 state water quality standards. They may request a general certification--a blanket certification  
18 requested by a federal agency for a specified area. See also *infra* note 189 (discussing Oregon's  
19 permanent 401 certification rules for grazing permits).

20 (27) Lisa M. Bogardus, State Certification of Hydroelectric Facilities Under Section 401 of the  
21 Clean Water Act, 12 VA. ENVTL L.J. 43 (1992); see also Oregon Natural Desert Ass'n v.  
22 Dombeck, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*5 (9th Cir. July 22, 1998) (opinion  
23 withdrawn from bound volume 151 F.3d 945 (9th Cir. 1998)) (concluding that "[a]ll of the sections  
24 cross-referenced in [sections] 1341 [401] relate to the regulation of point sources").

25 (28) 33 U.S.C. [sections] 1311(11) (1994).

26 (29) Id. [sections] 1362.

27 (30) Id. [sections] 1312(a).

28 (31) Id. [sections] 1316.

(32) Id. [sections] 1362(12).

(33) Id. [sections] 1317.

(34) Id. [sections] 1317(a)(2).

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1 (35) Id. [sections] 1317(b).

2 (36) Id. [sections] 1317(b)(1).

3 (37) Id. [sections] 1313.

4 (38) John P.C. Fogarty, A Short History of Federal Water Pollution Control Law, in CLEAN  
5 WATER DESKBOOK 5, 9 (1991).

6 (39) The Ninth Circuit considered and rejected this argument in ONDA II. Oregon Natural Desert  
7 Ass'n v. Dombeck, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*5 (9th Cir. July 22, 1998)  
8 (opinion withdrawn from bound volume 151 F.3d 945 (9th Cir. 1998)).

9 (40) 33 U.S.C. [sections] 1313 (1994).

10 (41) Id. [sections] 1313(d).

11 (42) See, e.g., Donahue, supra note 9, at 291. The three traditional uses of [sections] 401 apply  
12 mostly to industrial polluters, not agriculture polluters. In fact, [sections] 404 permits exempt  
13 discharges from normal farming activities such as plowing, seeding, cultivating, minor drainage,  
14 and food production harvesting. 33 U.S.C. [sections] 1344 (1994). However, [sections] 402 does  
15 encompass concentrated animal feeding operations (CAFOs). 40 C.F.R. [sections] 122.23 (Dec. 16,  
16 1997).

16 (43) 33 U.S.C. [sections] 1342 (1994).

17 (44) Currently, 43 states have approved NPDES programs, and 28 are fully authorized. State  
18 Program Requirements; Approval of [Application](#) by Oklahoma to Administer the National Pollutant  
19 Discharge Elimination System Program, 61 Fed. Reg. 65,047, 65,051 (Dec. 10, 1996).

19 (45) 40 C.F.R. [sections] 124.53 (1998).

20 (46) Id.

21 (47) 33 U.S.C. [sections] 1344 (1994).

22 (48) Id. [sections] 1341(c).

23 (49) S. 2770 TOGETHER WITH DEBATE AND REPORT, reprinted in 2 A LEGISLATIVE  
24 HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF 1972 (1973).

25 (50) Ransel & Meyers, supra note 9, at 374-75.

26 (51) In fact, regulations governing FERC permits state that a [sections] 401 permit is required. 18  
27 C.F.R. [sections] 4.38 (1997).  
28



1 (52) 693 F.2d 156, 161 (D.C. Cir. 1982).

2 (53) Id. at 175; see also United States v. Tennessee Water Quality Control Bd., 717 F.2d 992, 999  
3 (6th Cir. 1983) (holding that Tennessee could not require the Tennessee Valley Authority to acquire  
4 a 402 permit for the reconstruction and operation of a dam). But see WILLAM H. RODGERS,  
5 ENVIRONMENTAL LAW 315.16 1994 (casting doubt on the determination made in Gorsuch that  
6 a dam is not a point source).

6 (54) 33 U.S.C. [sections] 1362(14) (1994).

7 (55) See RODGERS, supra note 53, at 315-16.

8 (56) See Andrew H. Sawyer, Rock Creek Revisited: State Water Quality Certification of  
9 Hydroelectric Projects in California, 25 PAC. L.J. 973, 997-98 (1994).

10 (57) Public Util. Dist. No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700,  
11 712 (1994). In fact, EPA is now helping states look at the totality of water quality impacts when  
12 they evaluate a hydroelectric project under [sections] 401. Sawyer, supra note 56, at 997.

13 (58) See Sawyer, supra note 56, at 997-98.

14 (59) 33 U.S.C. [sections] 1341(a)(1) (1994).

15 (60) Id.

16 (61) For example, Oregon issues a [sections] 401 certification when the federal agency requires the  
17 permittee to obtain one. Interview with Debra Sturdevant, Oregon Department of Environmental  
18 Quality (DEQ), Nonpoint Source Pollution-Agriculture Division, Portland, Or. (Nov. 12, 1997).  
19 Oregon's certification procedures specifically mention hydroelectric projects, Army Corps projects  
20 ([sections] 404 permits), and Coast Guard projects (construction of dams and dikes). OR. ADMIN.  
21 R. 340-048-0020 (1998). Montana's permit procedures specifically mention 404 permits. MONT.  
22 ADMIN. R. 17.30.108 (1995). Colorado spells out procedures to follow for an Army Corps  
23 [sections] 404 permit, [sections] 402 permits issued by EPA, and FERC permits. 5 COLO. CODE  
24 REGs. [sections] 2.4.5 (1994). Colorado's procedures include "all other federal licenses or permits"  
25 in the same subsection as FERC permits. Id. Washington's procedures mention only [sections] 404  
26 permits. WASH. ADMIN. CODE [sections] 173-204-410 (1995). California also mentions only  
27 [sections] 404 permits specifically. CAL. CODE REGS. tit. 13, [sections] 13396 (1997); see also  
28 Donahue, supra note 9, at 221 & n.106 (describing the [sections] 401 certification procedures of  
South Carolina, Ohio, Kansas, and Minnesota).

(62) Public Util. Dist. No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700  
(1993).

(63) Oregon Natural Desert Ass'n v. Thomas, 940 F. Supp. 1534 (D. Or. 1996).

(64) See Donahue, supra note 9, at 214; Ransel, supra note 9, at 268; Sawyer, supra note 56, at 998.

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1 (65) PUD No. 1,511 U.S. at 703.

2 (66) Id. at 703.

3 (67) Id. at 709.

4 (68) Id. at 711.

5  
6 (69) See Donahue, supra note 9, at 218 (explaining that before a state can review an activity under  
7 [sections] 401, it must first find 1) that the activity requires a federal permit or license, and 2) that a  
8 discharge may result from the activity). Cf. Bogardus, supra note 27, at 51 (asserting that courts  
9 normally presume the presence of a discharge and so never really look at the second part of the  
10 test).

11 (70) PUD No. 1,511 U.S. at 710, 712.

12 (71) Id. at 709.

13 (72) Id. at 712 (quoting 33 U.S.C. [sections] 1341(d) (1994)).

14 (73) Id.

15 (74) Id. at 722.

16 (75) Id. at 711.

17 (76) See Donahue, supra note 9, at 214; Ransel, supra note 9, at 268.

18 (77) WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2329 (3d ed. 1971).

19 (78) Id. at 1869.

20 (79) 33 U.S.C. [sections] 1362(14) (1994).

21  
22 (80) Petitioners' Brief at 28, Public Util. Dist. No. 1 of Jefferson County v. Washington Dep't of  
23 Ecology, 511 U.S. 700 (1993) (No. 92-1911).

24 (81) Donahue, supra note 9, at 239 n.205.

25 (82) 475 N.Y.S.2d 901 (N.Y. App. Div. 1984).

26 (83) Id. at 903.

27 (84) Id. at 904.

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1 (85) Id.

2 (86) Id. at 905.

3 (87) Donahue, supra note 9, at 239.

4 (88) Power Authority of N.Y., 475 N.Y.S.2d at 904.

5 (89) 33 U.S.C. [sections] 1362(14) (1994).

6 (90) Power Authority of N.Y., 475 N.Y.S.2d at 903.

7 (91) 33 U.S.C. [sections] 1362(6) (1994).

8 (92) Public Util. Dist. No. I of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700,  
9 711, 722-23 (1994). The federal permits referred to by the Court were [sections] 404 permits issued  
10 by the Army Corps to install structures in navigable waters and allow the discharge of dredged and  
11 fill materials and permits from the Secretary of the Interior or Agriculture for the construction of  
12 water storage systems on public lands. Id. at 722-23. The Court, however, said that it assumed "that  
13 a [sections] 401 certification would also be required for some licenses obtained pursuant to these  
14 statutes." Id. at 723 (emphasis added).

15 (93) Even commentators who support these assertions have had to admit that the relationship  
16 between [sections] 401 and nonpoint source pollution is not clear. Donahue, supra note 9, at 207  
17 (stating that the discharge of the water from the tailrace is probably (not definitely) a nonpoint  
18 source discharge); Ransel, supra note 9, at 271 (stating that the question of whether nonpoint source  
19 pollution requires [sections] 401 certification has not been definitively answered).

20 (94) No. CV 95-394-S-MHW, slip op. at 18 (D. Idaho Aug. 12, 1996). The Ninth Circuit also found  
21 reliance on PUD No. I misplaced in ONDA II. Oregon Natural Desert Ass'n v. Dombeck, 1998 WL  
22 407711, at \*6 (9th Cir. July 22, 1998) (opinion withdrawn from bound volume 151 F.3d 945 (9th  
23 Cir. 1998)).

24 (95) Idaho Conservation League, No. CV 95-394-S-MHW, slip op. at 18.

25 (96) Id. at 16.

26 (97) Id. at 18.

27 (98) Oregon Natural Desert Ass'n v. Thomas (ONDA I), 940 F. Supp. 1534 (D. Or 1996).

28 (99) Id. at 1537.

(100) Id.

1 (101) Cattle grazing is considered a nonpoint source because the pollution associated with it is  
2 diffuse runoff. See ANIMAL AGRICULTURE, supra note 8, at 1.

3 (102) ONDA I, 940 F. Supp. at 1541.

4 (103) Id. at 1539.

5 (104) 33 U.S.C. [sections] 1362(16) (1994).

6 (105) Id. [sections] 1362(12).

7 (106) ONDA I, 940 F. Supp. at 1540.

8  
9 (107) Id. at 1540. The court did not explain what it meant by "nonpoint sources with conveyances"  
10 or why it chose to use that term in defining discharge. One thought may be that the court was trying  
11 to make sure that its holding would go beyond any traditional uses of [sections] 401 certifications.  
12 As has been noted, a hydroelectric project may be considered a point source or a nonpoint source. If  
13 it is a nonpoint source, though, most would probably agree that a dam would fall under the court's  
14 term "nonpoint sources with conveyances." For example, if water discharged from a tailrace is  
15 nonpoint source pollution, then it is nonpoint source pollution with a conveyance because the  
16 tailrace itself is a conveyance. So, by using this term and stating that discharges that fall under  
17 [sections] 401 are not limited to it, the court ensures that its holding will be seen as an expansion of  
18 the traditional uses of [sections] 401.

19 (108) Id. at 1540. The environmentalists asserted that EPA agreed with them that [sections] 401  
20 applies to nonpoint source pollution. A memo to this effect was stricken from the record by the  
21 judge in the district court. Response Brief of Plaintiffs/Appellees at 25, Oregon Natural Desert  
22 Ass'n v. Dombeck, 940 F. Supp. 1534 (D. Or. 1996)(No. 95065, 97-35112, 97-35115). However,  
23 the environmentalists hoped to get the memo in on appeal. Id. The Department of Justice (DO J)  
24 filed a motion with the Ninth Circuit to keep out the memo. Reply Brief of Federal Appellants at 3,  
25 Oregon Natural Desert Ass'n v. Dombeck, 940 F. Supp. 1534 (D. Or. 1996) (Nos. 95065, 97-35112,  
26 97-35115). Also, the environmentalists included quotes from a letter EPA wrote to DOJ following  
27 the ONDA I decision. According to this letter, EPA wanted the Forest Service to go along with the  
28 idea of [sections] 401 **applying** to grazing. EPA wanted to retain the option of using [sections] 401  
for nonpoint source pollution available for the states, should they decide to use it. Response Brief of  
Plaintiffs/Appellees at 28, Oregon Natural Desert Ass'n v. Dombeck, 940 F. Supp. 1534 (D. Or.  
1996) (No 97-35065, 95112, 97-35115).

(109) ONDA I, 940 F. Supp. at 1540.

(110) Id. at 1541.

(111) Id.

(112) Id.

1 (113) Id.

2 (114) Oregon Natural Desert Ass'n v. Dombeck, Nos. 97-35065, 97-35112, 1998 WL 407711, at \*8  
3 (9th Cir. July 22, 1998) (opinion withdrawn from bound volume 151 F.3d 945 (9th Cir. 1998)).

4 (115) Id. at \*3.

5 (116) Id.

6 (117) Id. at \*4.

7  
8 (118) Id. (noting that although the CWA does not regulate nonpoint source pollution directly,  
9 [sections] 208 encourages control of nonpoint sources by making federal grants available for  
approved state wastewater treatment plants). 119 Id.

10 (120) Id. at \*5.

11 (121) Id. (citing S. REP. No. 414, at 69 (1971), reprinted in 1972 U.S.C.C.A.N. 3764, 3735).

12 (122) 834 F.2d 842 (9th Cir. 1987) (deciding that only effluent limitations are enforceable under the  
13 citizen suit provision of the CWA and therefore citizens could not enforce water quality standards).

14 (123) ONDA 1I, 1998 WL 407711, at \*5.

15 (124) Id. at \*6.

16 (125) Id. at \*7.

17  
18 (126) Id. This was an argument put forth by the Department of Justice. Reply Brief of Federal  
19 Appellants at 6, Oregon Natural Desert Ass'n v. Dombeck, 940 F. Supp. 1534 (D. Or. 1996) (Nos.  
97-35065, 97-35112, 97-35115).

20 (127) ONDA II, 1998 WL 407711, at \*6.

21 (128) Id.

22 (129) Id. at \*7.

23 (130) Id.

24  
25 (131) Although not central to this Comment's purpose, the court made some other interesting and  
26 noteworthy conclusions. The court rejected intervenor Confederated Tribes' argument that a cow is  
27 a point source and also that fifty cows grazing on the open range would constitute a concentrated  
28 animal feeding operation (CAFO), thus requiring a [sections] 402 permit. Id.

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1 (132) 33 U.S.C. [sections] 1362(16) (1994).

2 (133) Water Quality Improvement Act, Pub. L. No. 91-224, [sections] 11(a), 80 Stat. 91 (1970)  
3 (codified as amended at 33 U.S.C. [sections] 1163 (1994)). The government argued in ONDA II  
4 that the term "discharge" as used in the 1970 Act meant discharges only from point sources. The  
5 government asserted that the statute was concerned with developing controls for oil and hazardous  
6 waste discharges from vessels and from on- and off-shore facilities. The statute also dealt with  
7 **sewage** discharges from vessels: In this context, vessels would be considered point sources. So,  
8 when using "discharge" in [sections] 21(b), which became [sections] 401, Congress was only  
9 concerned with discharges from point sources. Reply Brief of Federal Appellants at 8, Oregon  
10 Natural Desert Ass'n v. Dombeck, 940 F. Supp. 1534 (D. Or. 1996) (Nos. 97-35065, 97-35112, 97-  
11 35115).

12 (134) S. REP. No. 92-414, at 77 (1971) reprinted in 2 A LEGISLATIVE HISTORY OF THE  
13 WATER POLLUTION CONTROL AMENDMENTS OF 1972, at 1495 (1973).

14 (135) Id.

15 (136) SENATE CONSIDERATION ON REPORT OF THE CONFERENCE COMMITTEE (Oct.  
16 4, 1972), reprinted in 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL  
17 AMENDMENTS OF 1972, at 178 (1973).

18 (137) Id.

19 (138) 33 U.S.C. [sections] 1362(12) (1994).

20 (139) Exxon Corp. v. Lujan, 730 F. Supp. 1535, 1545 (D. Wyo. 1990) (interpreting the term "gas  
21 plant products" for the Outer Continental Shelf Lands Act, 43 U.S.C. [sections] 1331 (1994)); see  
22 also National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 172 (D.C. Cir. 1982) (distinguishing  
23 Congress's definition of "pollutant" in the CWA, which uses the term "means"). Cf. John Hancock  
24 Mutual Life Ins. Co. v. Weisman, 27 F.3d 500, 504 (10th Cir. 1994) (noting that there are instances  
25 where "includes" can be unambiguous and therefore exclude what is not specifically listed).

26 (140) Donahue, supra note 9, at 230.

27 (141) 33 U.S.C. [sections] 1362(16) (1994).

28 (142) Dohanue, supra note 9, at 230.

(143) See, e.g., Dole v. United Steel Workers of Am., 494 U.S. 26, 36 (1990) (holding that the  
phrase "reporting and recordkeeping requirements" in the Paperwork Reduction Act of 1980, 44  
U.S.C. [sections] 3507(a)(2) (1994), is analogous to other listed phrases and comprises rules  
requiring information to be sent or made available to a federal agency, and not disclosure rules).

(144) 33 U.S.C. [sections] 1362(6) (1994). It was suggested by one reviewer that the inclusion of  
animal waste in this definition somehow might sweep nonpoint source pollution into the definition

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1 of a pollutant. In light of the history of the definition of "pollutant," such an interpretation of the  
2 meaning of pollutant seems unlikely.

3 (145) S. REP. No. 92-414, at 76 (1971), reprinted in 2 A LEGISLATIVE HISTORY OF THE  
4 WATER POLLUTION CONTROL AMENDMENTS OF 1972, at 1494 (1973). The reason the  
5 term was defined was to prevent litigation over its meaning. Based on the abundance of litigation  
6 over the CWA, this definition probably did not meet its goal. See National Wildlife Fed'n v.  
7 Gorsuch, 693 F.2d 156, 173 (D.C. Cir. 1982).

8 (146) 33 U.S.C. [sections] 407 (1994).

9 (147) 578 A.2d 563, 566 (Pa. Commw. Ct. 1990) (upholding a state Environmental Hearing Board  
10 ruling that the Department of Environmental Resources (DER) could not introduce evidence of  
11 discharges from dredged and fill material in the city of Harrisburg's appeal of DER's denial of  
12 section 401 certification for the city's proposed hydroelectric dam). But see Donahue, supra note 9,  
13 at 241 (calling this opinion poorly reasoned and asserting that the court would decide the issue  
14 differently today because it is bound by the Supreme Court's decision in PUD No. 1).

15 (148) No. CV 95-394-S-MHW, slip op. at 16 (D. Idaho Aug. 12, 1996).

16 (149) 693 F.2d 156, at 171-72. However, as mentioned by the Ninth Circuit, Gorsuch did expand  
17 the meaning of "discharge" to include both polluting and nonpolluting discharges from point  
18 sources. Oregon Natural Desert Ass'n v. Dombeck, Nos. 97-35065, 97-35112, 1998 WL 407711, at  
19 \*7 (9th Cir. July 22, 1998) (opinion withdrawn from bound volume 151 F.3d 945 (9th Cir. 1998)).

20 (150) H.R. REP. No. 91-127 (1969), reprinted in 1970 U.S.C.C.A.N. 2697.

21 (151) Id.

22 (152) Id.

23 (153) Id.

24 (154) H.R. REP. No. 91-127 (1969), reprinted in 1970 U.S.C.C.A.N. 2697.

25 (155) Donahue, supra, note 9, at 232.

26 (156) Id.

27 (157) Id. at 235.

28 (158) S. REP. No. 92-414, at 69 (1972), reprinted in 2 A LEGISLATIVE HISTORY OF THE  
WATER POLLUTION CONTROL AMENDMENTS OF 1972, at 1487 (1973).

(159) Id.

1 (160) 33 U.S.C. [sections] 1362(11) (1994).

2 (161) Hearings on H.R. 11896, Comm. on Public Works, 93d Cong. 306 (1973), reprinted in 2 A  
3 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF  
4 1972, at 1204 (1973). Section 306 established national standards of performance for point sources.  
5 33 U.S.C. [sections] 1316 (1994). Section 307 established effluent limitations for toxic pollutants  
6 based on the category or class of point source from which it was discharged. Id. [sections] 1317.

7 (162) S. CONF. REP. No. 92-1236, at 138 (1972), reprinted in 1 A LEGISLATIVE HISTORY OF  
8 THE WATER POLLUTION CONTROL AMENDMENTS OF 1972, at 321 (1973).

9 (163) H.R. 11896 TOGETHER WITH DEBATE AND REPORT (Mar. 27, 1972), reprinted in 1 A  
10 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF  
11 1972, at 466 (1971).

12 (164) Id.

13 (165) Donahue, supra note 9, at 236.

14 (166) 33 U.S.C. [sections] 1288 (1994). The legislative history from the 1977 amendments makes  
15 this clear as well. "In 1972, the Congress made a clear and precise distinction between point  
16 sources, which would be subject to direct Federal regulation, and nonpoint sources, control of  
17 which was specifically reserved to State and local governments through the section 208 process." S.  
18 REP. No. 95-370, at 8 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4334 (emphasis added).  
19 Congress only mentioned [sections] 208 in connection with nonpoint source pollution. It never  
20 mentioned [sections] 401.

21 (167) 33 U.S.C. [sections] 1288 (b)(2)(F) (1994).

22 (168) Donahue, supra note 9, at 232.

23 (169) 33 U.S.C. [sections] 1288 (b)(2)(F) (1994).

24 (170) S. REP. No. 95-370, at 72 (1977), reprinted in 4 A LEGISLATIVE HISTORY OF THE  
25 WATER POLLUTION CONTROL AMENDMENTS OF 1977, at 705 (1978). Section 303  
26 established water quality standards and implementation standards for the states. 33 U.S.C.  
27 [sections] 1313 (1994).

28 (171) 33 U.S.C. [sections] 1288 (b)(2)(F) (1994).

(172) S. REP. No. 95-370, at 72 (1977), reprinted in 4 A LEGISLATIVE HISTORY OF THE  
WATER POLLUTION CONTROL AMENDMENTS OF 1977, at 705 (1978).

(173) Id. at 706.

(174) Id. at 705.

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1 (175) Id. at 706.

2 (176) SEN. DEBATE (Aug. 4, 1977), reprinted in 4 A LEGISLATIVE HISTORY OF THE  
3 WATER POLLUTION CONTROL AMENDMENTS OF 1977, at 868 (1978).

4 (177) Federal Water Pollution Control Act Amendments of 1977: Hearings Before the Comm. on  
5 Env't and Pub. Works, Subcomm. on Envtl Pollution, 95th Cong. 1094 (1978) (statement of  
6 Thomas C. Jorling, Assistant Administrator for Water and Hazardous Materials, Environmental  
7 Protection Agency), reprinted in 4 A LEGISLATIVE HISTORY OF THE WATER POLLUTION  
8 CONTROL AMENDMENTS OF 1977, at 1104 (1978).

9 (178) Id.

10 (179) ROBERT W. ADLER ET AL., THE CLEAN WATER ACT 20 YEARS LATER 185 (1993).

11 (180) 33 U.S.C. [sections] 1329 (1994).

12 (181) See Donahue, *supra* note 9, at 227-28.

13 (182) Depending on the source, the Western states can number either 15, 16, or 17. The states  
14 included are Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New  
15 Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and  
16 Wyoming. KENNETH D. FREDERICK & JAMES C. HANSON, WATER FOR WESTERN  
17 AGRICULTURE 2 (1982).

18 (183) U.S. GENERAL ACCOUNTING OFFICE, RANGELAND MANAGEMENT: PROFILES  
19 OF THE BUREAU OF LAND MANAGEMENT'S GRAZING ALLOTMENTS AND PERMITS 2  
(1992) [hereinafter BLM GRAZING ALLOTMENTS AND PERMIT]; U.S. GENERAL  
20 ACCOUNTING, OFFICE, RANGELAND MANAGEMENT: PROFILES OF THE FOREST  
21 SERVICE'S GRAZING ALLOTMENTS AND PERMITEES 3 (1993).

22 (184) See Hearings on Grazing on Pub. Lands Before the Subcomm. on Nat'l Parks and Pub. Lands,  
23 105th Cong. (1997) (statement of Dick Loper, private rangeland management consultant) (testifying  
24 that intermingled public and private land in the West requires ranchers to use public lands for  
25 grazing in order to support their herds) [hereinafter Loper]. However, many believe that federal  
26 grazing is not necessary to the survival of most Western ranches.

27 (186) OR. ADMIN. R. 603-076-0010 (1996). The rules were to only be in effect for 180 days and  
28 were passed specifically to allow Forest Service permittees to do their 1997 turnouts. Addendum to  
Brief for Federal Appellants, Oregon Natural Desert Ass'n v. Dombeck, Nos. 9735065, 997-35112,  
1998 WL 407711 (9th Cir. July 22, 1998) (opinion withdrawn from bound volume 151 F.3d 945  
(9th Cir. 1998)).

(187) OR. ADMIN. R. 340-048-0005 to 340-0484)040 (1998).

1 (188) Tom Alkire, Water Pollution: CWA Decision Moots Oregon Grazing Rules, Could Affect  
2 TMDLS in Many Western States, DAILY ENV'T REP. (BNA), Aug. 3, 1998, at A-9.

3 (189) OR. ADMIN. R. 340-048-0110(1) (1998). It is worth noting that the rule does not require  
4 someone to seek a state certification; it only provides that someone may seek certification. This  
5 may be because the ONDA I case was considered to **apply** only to Forest Service permits and not  
6 BLM permits. By keeping the language permissive, Oregon would not be required to change the  
7 rules if BLM permits were later determined to require certification as well. At the time the rules  
8 were adopted, however, a similar case had been filed concerning grazing permits on BLM lands.  
9 Oregon: DEQ Sets Hearings for Certifying that Grazing Will Not Harm Water Quality, DAILY  
10 ENV'T REP. (BNA), Jan. 8, 1998, at A-2.

11 (190) OR. ADMIN. R. 340-048-0110 (1998).

12 (191) Id.

13 (192) Id.

14 (193) Id. at 340-048-0120 (1998).

15 (194) Id. at 340-048-0140 (1998).

16 (195) Id.

17 (196) Id.

18 (197) Id.

19 (198) Id.

20 (199) Id. at 340-048-0150 (1998).

21 (200) Id. at 340-048-0160 (1998).

22 (201) Gordon Gregory, State Grazing Rules Upset All Sides, OREGONIAN, Feb. 27, 1998, at B10.

23 (202) Id.

24 (203) Id.

25 (204) Id.

26 (205) Under the temporary rules, Oregon granted certification for 64 permits and denied none. Id.

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1 (206) Brief for Federal Appellants at 4-5, *Oregon Natural Desert Ass'n v. Dombeck*, Nos. 97-  
2 35065, 97-35112, 1998 WL 40771 (9th Cir. July 22, 1998) (opinion withdrawn from bound volume  
151 F.3d 945 (9th Cir. 1998)).

3 (207) See *Sturdevant*, supra note 61.

4 (208) *Id.* DEQ does not have the range conservationists, hydrologists, botanists, fish experts, and  
5 soil scientists on staff that both the Forest Service and BLM have.

6 (209) See 36 C.F.R. [sections] 222.1 (1998) (defining an allotment management plan to prescribe  
7 the manner in which livestock operations will be conducted in order to sustain multiple-use,  
8 sustained yields, and other objectives); 43 C.F.R. [sections] 4180.2 (1997) (setting grazing  
9 guidelines that consider watershed functions, nutrient cycling and energy flow, water quality,  
10 habitat for endangered and threatened species, and habitat quality for native plant and animal  
11 populations). But see *Livestock Grazing Policies: Hearings Before the House Comm. on Resources*,  
105th Cong. (1997) (testimony of Linn Kincannon, Idaho Conservation League) (asserting that  
12 enforcement of permit terms and conditions by both BLM and the Forest Service are very poor)  
[hereinafter *Kincannon*]; *Donahue*, supra note 9, at 292 (asserting that federal agencies are doing  
nothing more than giving lip service to the mandates of existing federal laws, including the CWA).

13 (210) 36 C.F.R. [sections] 222.1 (1997).

14 (211) 43 C.F.R [sections] 4180.1 (1997).

15 (212) *Id.*

16 (213) ED CHANEY ET AL., *LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS AS 2*  
17 (1990). As an example of the value of riparian areas, they are said to produce more than 10 times  
18 the forage per acre for livestock grazing of upland rangeland. *Loper*, supra note 184.

19 (214) *Chaney*, supra note 213, at 2.

20 (215) *Id.* For instance, in southeastern Oregon more than 75% of terrestrial wildlife species need or  
21 use riparian habitats; the same is true in southeastern Wyoming. In Arizona and New Mexico, at  
22 least 80% of all vertebrates depend on riparian habitats for at least half their life cycle. *Id.*

23 (216) Cattle are not the only animals that graze on public lands, but they are the most prevalent.  
24 Permittees may also graze horses, sheep, and even burros or mules. See LYNN JACOBS, *WASTE*  
*OF THE WEST: PUBLIC LANDS RANCHING* 23-24 (1991).

25 (217) It is important to keep in mind that much of the damage to riparian areas in the West  
26 happened long before anyone, including environmentalists, were aware of the problems of  
27 overgrazing. *Chaney*, supra note 213, at 5. However, since 1980 rangeland conditions across the  
West have improved significantly. *Id.*

28 (218) See *Chaney*, supra note 213, at 12.

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1 (219) Id.

2 (220) Id. at 5.

3 (221) Id. at 2.

4 (222) ANIMAL AGRICULTURE, supra note 8, at 11.

5 (223) Id.

6 (224) Chaney, supra note 213, at 12.

7 (225) Id.

8 (226) Steve Yozwiak, Number of Native Fish Dwindling in Rivers Demise Blamed on Livestock,  
9 ARIZ. REPUBLIC, Mar. 9, 1996, at A1.

10 (227) Response Brief for Plaintiffs/Appellees at 2, Oregon Natural Desert Ass'n v. Dombeck, Nos.  
11 97-35065, 97-35112, 1998 WL 407711 (9th Cir. July 22, 1998) (opinion withdrawn from bound  
12 volume 151 F.3d 945 (9th Cir. 1998)).

13 (228) Joseph M. Feller, What Is Wrong with the BLM's Management of Livestock Grazing on the  
14 Public Lands?, 30 IDAHO L. REV. 555, 598 (1993-1994). In fact, in 1992, when a cow stepped on  
15 and "mangled" one of these tortoises, several environmental groups sent a letter to the BLM stating  
16 their intention to sue because the BLM had let the cow violate the Endangered Species Act. Lisa  
17 Drew, Wrangling for a Change on the Range, NAT'L WILDLIFE, Feb./ Mar. 1992, at 46, 49  
18 (emphasis added). Grazing in the Sonoran desert continues to generate litigation concerning  
19 wildlife. On March 17, 1997, the Defenders of Wildlife filed an appeal against BLM for the  
20 issuance of a grazing permit because they claimed that BLM had failed to do a site-specific  
21 environmental analysis. Defenders of Wildlife Files Grazing Appeal to Urge BLM to Follow  
22 Regulations, U.S. Newswire, available in 1997 WL 5711448 (Mar. 17, 1997).

23 (229) Feller, supra note 228, at 596. Whether the allotment is currently supporting any of these  
24 species is not known, but environmentalists make much of the fact that the riparian area in the  
25 allotment has this potential.

26 (230) Mack Reed, Group Sues U.S. to Curb Grazing on Island Parks: Environmentalists Claim  
27 Ranching Permit Has Allowed Animals to Damage Lush Site Off Ventura Coast, L.A. TIMES, Oct.  
28 23, 1996, at A3.

(231) JOHN HORNING, GRAZING TO EXTINCTION: ENDANGERED, THREATENED AND  
CANDIDATE SPECIES IMPERILED BY LIVESTOCK GRAZING ON WESTERN PUBLIC  
LANDS 9 (1994).

(232) Feller, supra note 228, at 591.

1 (233) Kincannon, supra note 209. This argument also does not seem to consider the damage that  
2 humans might do to the streambanks in riparian areas.

3 (234) See Feller, supra note 228, at 583-86 (advocating reduction in number of cattle grazing on  
4 BLM lands).

5 (235) See CHANEY, supra note 213, at 10-30 (detailing case studies on specific riparian areas in  
6 listed states).

7 (236) Id.

8 (237) Id. However, in not all cases do ranchers embrace efforts to improve the riparian areas within  
9 their allotments. For instance, in 1996 the BLM proposed setting a stubble height for 255 miles of  
10 damaged streambanks in Owyhee County, Idaho. The proposal called for permittees to leave  
11 vegetation at least four inches high along the banks. Ranchers felt that the proposal was overly  
12 restrictive and too broad, especially because there were areas within the 255 miles where the grass  
13 never reached a height of four inches, even when grazed properly. Jonathan Brinckman, BLM  
14 Promoting Stream-Saving Rules, IDAHO STATESMAN, June 18, 1996. BLM hoped to have a  
15 final plan for the Owyhee area by the end of 1997. See Rocky Barber, BLM Plans Grazing Limits,  
16 Giving Land Time to Recover, IDAHO STATESMAN, NOV. 4, 1997, at 1B.

17 (238) CHANEY, supra note 213, at 10-30.

18 (239) 43 U.S.C. [subsections] 1701-1784 (1994 & Supp. II 1996).

19 (240) 43 U.S.C. [subsections] 1901-1908 (1994).

20 (241) Id. [sections] 1701(a)(8).

21 (242) Id. [sections] 1752.

22 (243) Id.

23 (244) Id.

24 (245) Id.

25 (246) 43 U.S.C. [sections] 1901(a)(1) (1994).

26 (247) 43 U.S.C. [sections] 1901(b)(1) (1994). Section 1711(a) requires an inventory of "all public  
27 lands and their resource and other values (including but not limited to, outdoor recreation and  
28 scenic values), giving priority to areas of critical environmental concerns" to be prepared and  
maintained. Id. [sections] 1711(a) (1994).

1 (248) Id. [sections] 1901(b)(2) (1994). Section 1712 requires that land use plans be developed for  
2 all public lands. These land use plans must be based on multiple use and sustained yields and give  
3 priority to the protection of critical environments on public lands. Id. [sections] 1712 (1994).

4 (249) Id. [sections] 1903 (1994).

5 (250) 36 C.F.R. [sections] 222.1 (1997). The term "multiple use" was defined in FLPMA as:

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

22 43 U.S.C. [sections] 1702(c) (1994). "Sustained yield" is defined to mean "the achievement and  
23 maintenance in perpetuity of high-level annual or regular periodic output of the various renewable  
24 resources of the public lands consistent with multiple use." Id. [sections] 1702(h).

25 (251) 36 C.F.R. [sections] 222.2(b), (c) (1997).

26 (252) Id. [sections] 219.1. Little has been written about the Forest Service's allotment management  
27 plans because they are usually part of a larger forest plan. These larger plans tend to deal with  
28 timber usage more than anything, because that is the primary use of Forest Service lands. See  
generally George C. Coggins, The Developing Law of Land Use Planning on Federal Lands, 61 U.  
COLO. L. REV. 307, 337 (1990) (describing in detail land use planning by the Forest Service).

(253) C.F.R. [sections] 4100.0-2 (1997). For an in-depth discussion of the BLM rules, see Bruce M.  
Pendery, Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based  
Standards and Guidelines Blaze a New Path for Range Management, 27 ENVTL. L. 513 (1997).

(254) 43 C.F.R. [sections] 4180.1 (1997).

(255) Id.

(256) Id. [sections] 4180.2. This continues the trend in federal law of allowing states and local  
governments to regulate NPS.

1 (257) Id. [sections] 4180.2(e). Significantly, the guidelines must consider the riparian functions  
2 including stream bank stability, sediment capture, and water quality necessary to meet wildlife  
3 needs. Id.

4 (258) Id. [sections] 4180.2(f). The fallback standards encompass 15 different requirements.

5 (259) In fact, according to one commentator, the water quality component of the BLM rules is one  
6 of the most enforceable. Pendery, *supra* note 253, at 566.

7 (260) See, e.g., Feller, *supra* note 228, at 570 (calling BLM's grazing **administration** practices the  
8 equivalent of universal grazing on BLM land); Drew, *supra* note 228, at 48 (citing examples of  
9 BLM deference to ranchers).

10 (261) Feller, *supra* note 228, at 557.

11 (262) Id.

12 (263) Grazing Fees and Public Lands, Hearings Concerning Livestock Grazing Policies on Nat'l  
13 Forest Sys., Before the Comm. on Agric. Subcomm. on Livestock, Dairy, and Poultry, 105th Cong.  
14 (1997) (statement of Mike Dombeck, Chief of the Forest Service).

15 (264) Id.

16 (265) An animal unit month (AUM) is the amount of forage needed to sustain one of the following  
17 for a month: a 1000-pound cow, five sheep, or a horse. BLM GRAZING ALLOTMENTS AND  
18 PERMITS, *supra* note 183, at 1.

19 (266) Grazing on Public Lands: Oversight Hearing on Grazing, 105th Cong. (1997) (opening  
20 statement of Chairman James V. Hansen (R-Utah)).

21 (267) At least in part, BLM has reduced the number of AUMs in order to comply with other federal  
22 regulations, such as the Endangered Species Act, 16 U.S.C. [subsections] 1531-1544 (1994).

23 (268) See Why Is the 'Forage Improvement Act of 1997' Needed?: Hearings on the Forage  
24 Improvement Act of 1997 Before the Subcomm. on Livestock, Dairy, and Poultry of the House  
25 Comm. on Agric. 105th Cong. (1997) (statement of Frederick W. Obermiller, Professor of  
26 Agriculture and Resource Economics at Oregon State University). Obermiller testified that because  
27 of the geography of federal grazing lands and the excessive federal regulations imposed to use that  
28 land, the cost of grazing on federal lands is actually much higher than grazing on private lands.  
Because of this cost, Obermiller suggests that grazing fees for federal lands should be less than  
what one would pay to rent private land for grazing. Id. This could be interpreted to mean that the  
public should subsidize ranching on public lands. This may be true; however, it would not  
distinguish grazing from any other use of public lands. Most uses of public lands end up being  
subsidized by the public, including recreational uses. For example, the Army Corps spends \$184  
million per year on recreational programs. Fees charged for these programs bring in only \$22



1 million. Friends of the Earth, Recreational Fees (visited April 1, 1999)  
2 <<http://www.essential.org/orgs/FOE/eco/scissors97/recfees.html>>.

3 (269) Donahue, supra note 9, at 294.

4 (270) Id.

5 (271) Alkire, supra note 11, at A-3.

6 (272) Id. It is important to remember that Oregon did not decide on its own to use its [sections] 401  
7 power to cover grazing permits. Rather, it was forced to by the environmentalists when they chose  
8 to sue the Forest Service for its failure to require a [sections] 401 certification prior to granting a  
9 grazing permit.

10 (273) Sturdevant, supra note 61.

11 (274) See, e.g., Donahue, supra note 9, at 295.

12 (275) See Drew, supra note 228, at 48 (stating that taxpayers have subsidized grazing fees by \$650  
13 million dollars over the past six years). But see Obermiller, supra note 268 (testifying that there is  
14 no subsidy in federal land grazing). According to Obermiller, the grazing fee that would have been  
15 set for 1997 was \$1.67 per AUM. In 1992, the cost of administering grazing permits for the BLM  
16 was \$2.18 per AUM. The difference of 41 cents is much less than many other federal programs.

17 (276) OR. ADMIN. R. 340-045-0070 (1998).

18 (277) ANIMAL AGRICULTURE, supra note 8, at 11.

19 (278) John H. Davidson, Thinking About Nonpoint Sources of Water Pollution and South Dakota  
20 Agriculture, 34 S.D.L. REV. 20, 23 (1988-1989).

21 (279) The Bureau of Reclamation defines the west as the following 17 states: Arizona, California,  
22 Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma,  
23 Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. 43 C.F.R. [sections] 426.4(hh)  
(1997).

24 (280) NATIONAL RESEARCH COUNCIL, A NEW ERA FOR IRRIGATION 48 (1996).

25 (281) FREDERICK & HANSON, supra note 182, at 24-27.

26 (282) Id. at 1.

27 (283) Act of June 17, 1902, ch. 1093, 32 Stat. 388.

28 (284) FREDERICK & HANSON, supra note 182, at 232. Federal irrigation water is highly  
subsidized. It is estimated that irrigation subsidies have cost the federal government somewhere

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1 around \$70 billion since 1902. Friends of the Earth, Soaking up the Bucks (visited Apr. 1, 1999)  
2 <<http://www.essential.org/orgs/FOE/eco/scissors97/irrigate.html>>. In 1982, the subsidy averaged  
3 \$500 per acre, calculated in 1972 dollars. FREDERICK & HANSON, supra note 182, at 70.

4 (285) Reed D. Benson, Whose Water Is It? Private Rights and Public Authority over Reclamation  
5 Project Water, 16 VA. ENVTL. L.J. 363, 365 (1997).

6 (286) Id. at 364.

7 (287) 43 U.S.C. [sections] 485h (1994). The Bureau regulations define a contract to mean "any  
8 repayment or water service contract or agreement between the United States and a district providing  
9 for the payment to the United States of construction charges and normal operation, maintenance,  
10 and replacement costs under Federal reclamation law." 43 C.F.R. [sections] 426.4 (1997).

11 (288) 43 U.S.C. [sections] 485h(d), (e) (1994).

12 (289) Benson, supra note 285, at 371.

13 (290) Id.

14 (291) Id.

15 (292) FREDERICK & HANSON, supra note 182, at 202.

16 (293) 33 U.S.C. [sections] 1288(b)(2)(F) (1994).

17 (294) Irrigation return flow is "the part of applied water that is not consumed by evapotranspiration  
18 and that migrates to an aquifer or surface water body." NATIONAL RESEARCH COUNCIL, supra  
19 note 280, at 192.

20 (295) Id. at 73.

21 (296) Id.

22 (297) See FREDERICK & HANSON, supra note 182, at 190-91 (suggesting that erosion and  
23 sedimentation are consequences of irrigation but not important contributors to the overall problem  
24 of erosion and sedimentation in the West). (298) Id. at 188.

25 (299) NATIONAL RESEARCH COUNCIL, supra note 280, at 72.

26 (300) Id.

27 (301) 33 U.S.C. [sections] 1341(a)(1) (1994) (emphasis added).

28 (302) RESTATEMENT (SECOND) OF CONTRACTS [sections] 1 (1979).

1 (303) BLACK'S LAW DICTIONARY 1140 (6th ed. 1990).

2 (304) Id. at 920.

3 (305) Rosenblatt v. California State Bd. of Pharmacy, Dep't of Prof'l and Vocational Standards, 158  
4 P.2d 199, 203 (Cal. Dist. Ct. App., 945) (stating that the issuance of a license does not create a  
5 contract with the state).

6 (306) See, e.g., Nevada v. United States, 463 U.S. 110, 123 (1983) (quoting Ickes v. Fox, 300 U.S.  
7 82, 94-96 (1937) (explaining property rights created by Reclamation contracts)).

8 (307) See, e.g., United States v. Fuller, 409 U.S. 488, 494 (1973) (holding that a grazing permit  
9 does not create any kind of property right).

10 (308) 33 U.S.C. [sections] 1251(a)(7)(1994).

11 (309) Id. [sections] 1251(a)(5).

12 (310) S. REP. No. 95-370, at 8 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4334.

13 (311) 33 U.S.C. [sections] 1288 (1994).

14 (312) Id. [sections] 1288(b)(2)(F).

15 (313) S. REP. No. 95-370, at 8-9 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4334-35.

16 (314) ADLER, supra note 179, at 184.

17 (315) S. REP. No. 95-370, at 9 (1977), reprinted in 1977 U.S.C.C.A.N. 4326, 4335.

18 (316) 33 U.S.C. [sections] 1288(j) (1994). Although the Rural Clean Water Program (RCWP) was  
19 adopted as part of the 1977 amendments, the original appropriations to fund the program were  
20 never made. Eventually funding for the program was appropriated as part of the Farm Bill, rather  
21 than as part of the CWA. U.S. Environmental Protection Agency & U.S. Department of  
22 Agriculture, THE PROGRAM 4 (1987) [hereinafter EPA & USDA PROGRAM]; see Rural Clean  
23 Water Programs 7 C.F.R. [sections] 634 (1994) (providing details of RCWP implementation).

24 (317) EPA & USDA PROGRAM, supra note 316, at 2.

25 (318) 33 U.S.C. [sections] 1288(j) (1994).

26 (319) ADLER, supra note 179, at 184.

27 (320) Id.

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(321) See *Natural Resources Defense Council v. United States Env'tl. Protection Agency*, 915 F.2d 1314, 1316 (9th Cir. 1990).

(322) See *Natural Resources Defense Council v. Costle*, 564 F.2d 573, 579 (D.C. Cir. 1977).

(323) 33 U.S.C. [sections] 1329 (1994).

(324) *Id.* [sections] 1329(a)(1)(A).

(325) Best management practices (BMPs) are defined as "[m]ethods, measures or practices selected by an agency to meet its nonpoint source control needs." 40 C.F.R. [sections] 130.2 (1997). BMPs include structural and nonstructural controls, and operation and maintenance procedures. *Id.*

(326) 33 U.S.C. [sections] 1329(a)(1)(C), (D) (1994).

(327) *Id.* [sections] 1329(a)(1)(C).

(328) See ADLER, *supra* note 179, at 186.

(329) *Id.* at 186-88 (describing three specific watershed restoration success stories).

(330) See *Natural Resources Defense Council v. United States Env'tl. Protection Agency*, 915 F.2d 1314, 1318 (9th Cir. 1990).

(331) See ADLER, *supra* note 179, at 191.

(332) U.S. Environmental Protection Agency, Nonpoint Source Program and Grants Guidance for Fiscal Year 1997 and Future Years (last modified Dec. 30, 1997) <<http://www.epa.gov/OWOW/NPS/npsguid.html>>.

(333) *Id.* The nine key elements are:

1. Explicit short- and long-term goals, objectives, and strategies to protect surface and ground water.
2. A balanced approach that emphasizes both State-wide nonpoint source programs and on-the ground [sic] management of individual watersheds where waters are impaired and threatened.
3. The State program (a) abates water quality impairments from existing sources and (b) prevents significant threats to water quality from present and future activities.
4. An identification of waters and watersheds impaired or threatened by nonpoint source pollution and a process to progressively address these waters.
5. The State reviews, upgrades and implements all program components required by section 319 of the Clean Water Act, and establishes flexible, targeted, iterative approaches to achieve and maintain beneficial uses of water as expeditiously as possible.
6. Efficient and effective management and implementation of the State's nonpoint source program, including necessary financial management.
7. Strong working partnerships with appropriate State, Tribal, regional and local entities, private sector groups, citizens groups, and Federal agencies.
8. Identification of Federal lands and objectives which are not

1 managed consistently with State program objectives. 9. A feedback loop  
2 whereby the State reviews, evaluates, and revises its nonpoint source  
assessment and its management program at least every five years.

3 Id.

4 (334) Id.

5 (335) 43 U.S.C. [sections] 1752(a) (1994).

6  
7 (336) 43 C.F.R. [sections] 4110.3-2 (1997). But see Feller, *supra* note 228, at 581 (suggesting that  
BLM's policy is not to maintain livestock numbers regardless of range conditions).

8  
9 (337) 36 C.F.R. [sections] 222A(a)(8) (1998).

10 (338) Id. [sections] 222.4(a)(6).

11 (339) 43 C.F.R. [sections] 4140.1(c)(1)(iv) (1997).

12 (340) Id. [sections] 427.1(6).

13 (341) Id.

14  
15 (342) NATIONAL RESEARCH COUNCIL, *supra* note 280, at 111.

16 (343) Id.

17 (344) Pub. L. No. 102-575, [subsections] 3401-3412, 106 Stat. 4600, 4706-31 (1992).

18 (345) NATIONAL RESEARCH COUNCIL, *supra* note 280, at 113-14.

19  
20 (346) "A watershed is generally a geographic area in which water, sediments, and other dissolved  
materials drain to a common outlet." WATERSHED PROJECTS, *supra* note 7, at 1.

21 (347) Id.

22 (348) Id.

23 (349) Id.

24 (350) Id.

25 (351) Id.

26  
27 (352) 16 U.S.C. [sections] 3839aa (Supp. III 1997).

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(353) See Clean Water Act; Vice President's Initiatives, 62 Fed. Reg. 60,448, 60,449 (Nov. 7, 1997). The strategy was launched in conjunction with the twenty-fifth anniversary of the CWA.

(354) 7 C.F.R. [sections] 1466.23 (1998). The specific support that will be offered by EQIP is:

A) flexible technical and financial assistance to farmers and ranchers that face the most serious threats to soil, water, and related natural resources, including grazing lands, wetlands, and wildlife habitat;

(B) assistance to farmers and ranchers in complying with this chapter and Federal and State environmental laws, and encourages [sic] environmental enhancement,

(C) assistance to farmers and ranchers in making beneficial, cost-effective changes to cropping systems, grazing management, manure, nutrient, pest, or irrigation management, land uses, or other measures needed to conserve and improve soil, water, and related natural resources; and

(D) for the consolidation and simplification of the conservation planning process to reduce administrative burdens on producers.

16 U.S.C. [sections] 3839AA (Supp. III 1997).

(355) Id. [sections] 1466.23(a)(1).

(356) Neil D. Hamilton, Plowing New Ground: Emerging Policy Issues in a Changing Agriculture, 2 DRAKE J. AGRIC. L. 181, 191 (1997).

(357) Alkire, *supra* note 11, at A-3 (quoting Kristen Boyles, Staff Attorney, Sierra Club Legal Defense Fund (now called Earth Justice)).

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Congress and charismatic megafauna: a legislative history of the Endangered Species Act

The last; word of ignorance is the man who says of an animal or plant: 'What good is it?' ... If the biota, in the course of aeons, has built something we like but do not understand, then who but a fool would discard seemingly useless parts? To keep every cog and wheel is the first precaution of intelligent tinkering.(1)

--Aldo Leopold

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1 I would be in favor of undertaking tremendous costs to preserve the bald eagle, and other major  
2 species, but that kind of effort is out of proportion to the value of the woundfin minnow, or the snail  
3 darter, or the lousewort, or the waterbug, or many others that we are attempting to protect.(2)

4 --Senator Jake Garn (R-Utah)

## 5 I. INTRODUCTION

6 Today, the Endangered Species Act of 1973 (ESA)(3) stands among the strongest of environmental  
7 laws. The U.S. Supreme Court has described it as "the most comprehensive legislation for the  
8 preservation of endangered species ever enacted by any nation."(4) The ESA is also unique among  
9 environmental laws because its link to the protection of human health and quality of life is most  
10 tenuous. For this reason, historian Roderick Nash has called it "the strongest American legal  
11 expression to date of environmental ethics."(5) Secretary of the Interior Bruce Babbitt describes the  
12 ESA as "undeniably the most innovative, wide-reaching, and successful environmental law which  
13 has been enacted in the last quarter century."(6) But while the ESA may be the "crown jewel of the  
14 nation's environmental laws,"(7) it is also the "pit bull of environmental laws."(8)

15 The power of the ESA rests primarily in three sections: section 4, section 7, and section 9.(9)  
16 Together, these sections form the substantive foundation of the Act, and the source of most  
17 controversy over the ESA today. The ESA also includes a citizen suit provision that has served as a  
18 powerful tool for environmental groups to expand and enforce the powers in sections 4, 7, and  
19 9.(10) Indeed, litigation has played a crucial role in expanding the scope of the Act and provoking  
20 controversy. Although many other sections of the Act provide significant protection for species,  
21 these three sections are the most important.

22 Section 4 instructs the Secretaries of the Interior and Commerce to list species as either threatened  
23 or endangered "solely on the basis of the best scientific and commercial data available.(11) The  
24 Secretary of the Interior, responsible for avian, terrestrial, and freshwater species, has delegated this  
25 power to the Fish and Wildlife Service (FWS), while the Secretary of Commerce, responsible for  
26 marine and anadromous species, has delegated the power to the National Marine Fisheries  
27 Service.(12) The ESA defines the term "species" to include subspecies of fish or wildlife or plants,  
28 and distinct population segments of vertebrate fish or wildlife, that interbreed when mature.(13)  
Endangered species are those in danger of extinction throughout all or a significant portion of their  
range, while threatened species are those likely to become endangered in the near future.(14)  
Species eligible for listing include all plants, mammals, fish, birds, amphibians, reptiles, mollusks,  
crustaceans, arthropods, or other invertebrates.(15) Section 4 precludes any consideration of  
economic factors when determining whether or not a species should be listed as threatened or  
endangered.(16)

Labeled "Interagency Cooperation," section 7 commands federal agencies not to take any action  
that might harm a listed species. Specifically, it directs all federal agencies to consult with the  
Secretary to ensure that "any action authorized, funded, or carried out by such agency ... is not  
likely to jeopardize the continued existence of any endangered species or threatened species."(17)  
Originally twelve lines long, this section has since expanded to several pages, beginning with a  
series of amendments starting in 1978.(18) The power of section 7 came not from amendments,

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1 however, but from the judiciary. In *Tennessee Valley Authority v. Hill*, (19) decided in 1978, the  
2 U.S. Supreme Court interpreted section 7 as an absolute bar against any federal action that might  
3 jeopardize a listed species. (20) The Court's decision in that case halted the completion of Tellico  
Dam on the Little Tennessee River to protect the endangered snail darter, a small fish. (21)

4 Section 9 prohibits the taking of endangered species. (22) The term "take" means "to harass, harm,  
5 pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such  
6 conduct." (23) In 1975 the Secretary of the Interior promulgated a regulation interpreting "harm" to  
7 include activities that result in "significant environmental modification or degradation." (24) Under  
8 this definition, the ESA may limit land use activities on private property that might indirectly harm  
9 a listed species, making the ESA "perhaps the most powerful regulatory provision in all of  
10 environmental law." (25) The courts consistently have upheld this broad interpretation of section  
11 9. (26)

12 The ESA's very strength, however, threatens its future. Some critics claim that while the ESA was  
13 "[o]nce lauded as the salvation of the bald eagle and the grizzly bear, the law often thwarts  
14 individuals and businesses from using their property in order to protect little-known birds, rodents,  
15 and insects." (27) In 1995 the newly elected conservative Congress pledged to "rethink, not repair"  
16 environmental laws. (28) Newt Gingrich (R-Ga.), Speaker of the House at that time, said that it  
17 made little sense to spend money on species protection because extinction is "the way life is." (29)  
18 That same year, Congress succeeded in placing a temporary moratorium on ESA listings. (30) Since  
19 the spotted owl controversy in the early 1990s, Congress has deadlocked over the Act, and attempts  
20 to weaken it by amendment have failed. (31) Nevertheless, the fate of the ESA remains uncertain.

21 This Note, however, does not analyze the current debate over the ESA or propose ways to improve  
22 the Act. Instead, it examines the Act's past, particularly its legislative history, in an attempt to  
23 demonstrate what Congress intended when it passed the Act in 1973. This Note concludes that the  
24 Act has had unanticipated consequences. Specifically, it argues that Congress did not intend to pass  
25 a law that would protect seemingly insignificant species irrespective of economic considerations,  
26 halt federal development projects, and regulate private property. Instead, most in Congress believed  
27 the Act to be a largely symbolic effort to protect charismatic megafauna representative of our  
28 national heritage, like bald eagles, bison, and grizzly bears. Congress believed it could accomplish  
this simply by preventing the direct killing of endangered species and by halting the international  
trade in such species.

But if this was the case, then how did the ESA eventually become one of the most powerful and  
controversial of environmental laws? There are two reasons. First, Congress and the affected  
economic interest groups simply lacked the foresight to anticipate how environmental groups might  
use the relatively plain language found in sections 4 and 7 to force the listing of obscure species  
without economic consideration and to halt federal development projects. Second, scientific  
developments after 1973, especially the popularization of ecology and the emergence of the idea of  
biodiversity, led scientists and environmentalists to a more expansive interpretation of what it  
meant to "take" a species under section 9 and to "jeopardize" a species under section 7. These  
developments in scientific understanding transformed section 9 from essentially a ban on hunting to  
a powerful provision for the regulation of land use, and justified the rigorous application of section

1 7 to save critical habitat. In 1973 it would have been difficult, if not impossible, for Congress to  
2 anticipate such a fundamental change in circumstances.

3 Despite its conclusions, this Note does not argue that the ESA should be weakened or repealed. Nor  
4 does it advocate that the courts should adhere to the original intent of the legislators who enacted  
5 the ESA. Instead, it merely attempts to provide a historical context for discussion about the future  
6 of endangered species policy. This story of unanticipated consequences, while not new, typifies  
7 much legislation, and Congress should occasionally be reminded of it. Finally, this Note will  
8 demonstrate the important role that Congress, the administration, and the courts played in shaping  
9 the modern environmental movement.

## 10 II. PROTECTING SPECIES BEFORE THE ESA

### 11 A. Saving Individual Species

12 Prior to the twentieth century, the federal government played a minor role in wildlife management.  
13 It limited its efforts primarily to the conservation of natural resources that lay outside of state  
14 jurisdictions. For example, in 1868 Congress passed a law prohibiting the killing of certain  
15 furbearing animals in the territory of Alaska.<sup>(32)</sup> Three years later, it created the Office of the U.S.  
16 Commissioner of Fish and Fisheries to conserve fisheries along the coasts and navigable  
17 waterways.<sup>(33)</sup> Congress also took indirect steps to secure wildlife habitat when it passed the  
18 Forest Reserve Act of 1891,<sup>(34)</sup> which authorized the President to establish national forests out of  
19 the public domain to protect timber, water, and wildlife resources from overexploitation.<sup>(35)</sup>  
20 However, the various states assumed the primary responsibility for protecting wildlife during the  
21 nineteenth century.

22 Whether regulation originated from the states or the federal government, the economic logic of  
23 conservation motivated early efforts to protect wildlife. Conservationists like President Theodore  
24 Roosevelt and the first Chief of the U.S. Forest Service, Gifford Pinchot, believed that natural  
25 resources needed to be managed for sustainable use so as to provide the greatest good to the  
26 greatest number of people over time.<sup>(36)</sup> Conservationists turned to practical sciences, like forestry  
27 and eventually game management, to meet their utilitarian goals.<sup>(37)</sup> In contrast, preservationists,  
28 like John Muir, founder of the Sierra Club, believed that nature should be protected for its own  
29 sake, rather than merely conserved for human use.<sup>(38)</sup> Later in the twentieth century,  
30 environmentalists awkwardly embraced the ideas of both conservationists and preservationists.<sup>(39)</sup>

31 **Conservationist** thought dominated natural resource policy throughout the late nineteenth century,  
32 but the annihilation of the bison on the Great Plains during the 1870s aroused some preservationist  
33 sentiment. To prevent extinction and preserve a remnant of frontier heritage, Congress passed a bill  
34 in 1874 to outlaw the slaughter of buffalo in the federal territories.<sup>(40)</sup> However, President Grant  
35 pocket-vetoed the bill. Two years later, the House passed a similar bill, but it died in Senate  
36 Committee.<sup>(41)</sup> In 1894, in part to protect the remaining herds of bison, Congress prohibited  
37 hunting within Yellowstone National Park.<sup>(42)</sup> Nevertheless, throughout the nineteenth century  
38 federal involvement in the conservation and preservation of wildlife remained minimal.

1 Instead, the states assumed the primary responsibility for wildlife management. State laws,  
2 however, were not intended to protect species per se, but usually took the form of fish and game  
3 regulations designed to guard the interests of sport hunters.(43) In 1896, the Supreme Court  
4 validated the states' power to regulate wildlife in *Geer v. Connecticut*.(44) In that decision, the  
5 Supreme Court held that the states have the "undoubted authority to control the taking and use of  
6 that which belonged to no one in particular but was common to all."(45) But almost as soon as the  
7 courts articulated this state ownership doctrine, it began to erode.

8 Early in the twentieth century, progressive conservationists began to wrest control of wildlife  
9 management from the states. The first significant direct step toward national wildlife regulation  
10 came when Congress passed the Lacey Act of 1900.(46) The inability of states alone to prevent  
11 species extinctions motivated the Act's sponsor, Representative John Lacey (R-Iowa).(47) The  
12 Lacey Act prohibited interstate commerce in animals, birds, or their products killed in violation of  
13 state law, and required the Secretary of Agriculture to take measures to ensure the preservation,  
14 introduction, and restoration of game animals and birds.(48) The Act recognized the national scope  
15 of species protection problems and marked the beginning of federal involvement in species  
16 preservation.

17 Three years after its passage, President Theodore Roosevelt created the first national refuge  
18 explicitly for the protection of wildlife on Florida's Pelican Island.(49) Roosevelt also extended  
19 federal involvement in wildlife management indirectly by greatly expanding the U.S. forest  
20 reserves.(50) The federal government thus extended protection to species both directly and  
21 indirectly.

22 In 1914, the last passenger pigeon, a species that had once covered the skies in flocks numbering in  
23 the millions, died in a zoo in Cincinnati.(51) Partly in response to this tragedy, the United States  
24 signed the Migratory Bird Treaty of 1916(52) with Canada, recognizing for the first time the  
25 international scope of the extinction crisis.(53) Two years later, Congress ratified this treaty with  
26 the Migratory Bird Treaty Act of 1918.(54) The state of Missouri, however, promptly challenged  
27 the constitutionality of the law under the Tenth Amendment, invoking the state ownership doctrine  
28 to claim exclusive state regulation of wildlife. In the landmark decision of *Missouri v. Holland*,(55)  
the Supreme Court upheld the Act based on the federal treaty making power and rejected outright  
the contention that the state ownership doctrine precluded federal regulation.(56) In 1929, Congress  
extended bird protection with the Migratory Bird Conservation Act.(57)

29 New Deal conservationists took more indirect--but potentially more effective--steps to slow  
30 extinctions. In 1934, Congress passed the Fish and Wildlife Coordination Act.(58) It directed the  
31 Secretary of the Interior to investigate the effects of "domestic sewage, trade wastes, and other  
32 polluting substances on wild life."(59) It also encouraged dam-building agencies to consult with the  
33 Bureau of Fisheries about the potential impact on fish before a dam would be built.(60) The  
34 voluntary nature of these two provisions doomed them to failure, but they were nonetheless  
35 significant because they recognized the connection between habitat degradation and wildlife health.  
36 The Fish and Wildlife Coordination Act also called for federal and state cooperation to conserve  
37 and rehabilitate wildlife and proposed that federal lands be set aside to protect wildlife habitat.(61)  
38 This third provision realized some success through the expansion of national forest reserves,



1 national wildlife refuges, and the national, park system. In 1940 Congress passed the Bald Eagle  
2 Protection Act(62) to save the nation's symbol from extinction.

3 While Presidents and Congress made tentative steps to protect wildlife during the first half of the  
4 twentieth century, ecology emerged as an independent discipline. Aldo Leopold helped popularize  
5 this knowledge, teaching Americans to care about the land and the "wild things" that live on it.(63)  
6 About the passenger pigeon, he eulogized: "Our grandfathers were less well-housed, well-fed, well-  
7 clothed than we are. The strivings by which they bettered their lot are also those which deprived us  
8 of pigeons. Perhaps we now grieve because we are not sure, in our hearts, that we have gained by  
9 the exchange."(64) Leopold, known as the father of modern wildlife management, merged science,  
10 philosophy, and plain writing into his classic bestseller, A Sand County Almanac, published  
11 posthumously in 1949.(65)

12 By the 1960s, a growing awareness of environmental problems, including species extinction,  
13 fostered a national environmental movement. In 1962, Rachel Carson, a former biologist with FWS,  
14 published Silent Spring.(66) It described how the nation's growing addiction to pesticides,  
15 herbicides, and insecticides poisoned wildlife and threatened human health.(67) The image of  
16 songbirds falling dead from suburban trees provided a graphic symbol of environmental destruction  
17 with which people could identify and empathize.(68) More than any other single factor, Carson's  
18 book acted as a catalyst for the modern environmental movement.(69)

## 14 B. Toward Comprehensive Species Protection

15 The environmental movement raised public awareness about the modern extinction crisis,  
16 prompting the passage of comprehensive endangered species legislation. But first, in 1964,  
17 Congress created the National Wilderness Preservation System, which indirectly provided crucial  
18 habitat for endangered species.(70) That same year, the Department of Interior's Bureau of Sport  
19 Fisheries and Wildlife, later renamed the U.S. Fish and Wildlife Service, created a Committee on  
20 Rare and Endangered Species.(71) Comprised of nine biologists, it published the first federal list of  
21 species known to be threatened with extinction.(72) Called the "Redbook," the 1964 edition  
22 included sixty-three wildlife species.(73)

23 In 1966 Congress passed the Endangered Species Preservation Act (1966 Act),(74) the first  
24 comprehensive legislative response to the modern extinction crisis. The 1966 Act directed the  
25 Departments of Interior, Agriculture, and Defense to protect threatened species "insofar as is  
26 practicable and consistent" with the primary purposes of the services, bureaus, and agencies within  
27 their departments.(75) It also charged the Department of the Interior with the duty to consult with  
28 and "encourage" all other federal agencies to conform to the purposes of the Act "where  
practicable."(76) In addition, it instructed the Department of the Interior to continue compiling lists  
of endangered species.(77) Most important, the 1966 Act created the National Wildlife Refuge  
System out of a hodgepodge of federal lands, and authorized funds for the maintenance and  
expansion of this system.(78) Finally, the 1966 Act prohibited the "taking" of a species or its  
product within these wildlife refuges without a permit.(79)

But the 1966 Act suffered from several serious weaknesses. First, the 1966 Act applied only to  
domestic vertebrate species of fish and wildlife, and did not extend to plants, subspecies, or



1 population segments.(80) Second, the language of the Act made agency cooperation explicitly  
2 voluntary, and thus contrasted with the present interpretation of section 7 under the ESA.(81) Most  
3 important, the restriction against the taking of a species applied only within the National Wildlife  
4 Refuges.(82) Moreover, this meager prohibition did not extend to activities that indirectly harmed a  
5 listed species. Nevertheless, the 1966 Act directed the Department of the Interior to better identify  
6 endangered species and provided funding to acquire wildlife habitat.(83)

7 Three years later, Congress supplemented the 1966 Act with the Endangered Species Conservation  
8 Act of 1969 (1969 Act).(84) The 1969 Act explicitly recognized the international scope of the  
9 extinction crisis, authorizing the expansion of the Redbook to include those species threatened  
10 worldwide.(85) Most importantly, it banned the importation of any product of a species listed as  
11 endangered,(86) which, for example, curtailed the market in leopard, jaguar, and ocelot fur coats  
12 that, between 1968 and 1970, accounted for 18,456 leopard skins, 31,105 jaguar skins, and 249,680  
13 ocelot skins,(87) Furthermore, the 1969 Act extended the Lacey Act by prohibiting the selling or  
14 transporting of any listed species or its product taken illegally to include reptiles, amphibians,  
15 mollusks, and crustaceans.(88) Finally, the 1969 Act expanded the definition of "fish or wildlife" to  
16 include amphibians, reptiles, and invertebrates, and called for an international convention to protect  
17 endangered species from extinction.(89)

18 That convention and two other species protection acts followed in the wake of Earth Day on April  
19 22, 1970.(90) First, in 1971 Congress passed the Wild Free-Roaming Horses and Burros Act(91) to  
20 preserve what Congress called "living symbols of the historic and pioneer spirit of the West." (92) A  
21 year later, Congress approved the Marine Mammal Protection Act,(93) which prohibited the taking  
22 or importation of endangered marine mammals.(94) In the spring of 1973, the Convention on  
23 International Trade in Endangered Species of Wild Flora and Fauna (CITES)(95) established an  
24 elaborate scheme of import-export restrictions for endangered species. Significantly, both the  
25 Marine Mammal Protection Act and CITES recognized a management classification for species  
26 threatened with being endangered but not yet depleted enough to be called endangered, a system  
27 later incorporated into the ESA.(96) The inadequacy of the 1966 and 1969 Acts and a growing  
28 appreciation for the scope of the extinction crisis led many to push for more potent legislation for  
species protection.

Early in 1972, President Nixon called for the adoption of a stronger law to protect endangered  
species. Nixon claimed that "even the most recent act to protect endangered species, which dates  
only from 1969, simply does not provide the kind of management tools needed to act early enough  
to save a vanishing species." (97) In this address, Nixon also announced the promulgation of an  
executive order barring the use of poisons to control predators, like grizzly bears and gray wolves,  
on all public lands.(98) The same day of the President's address, Representative John Dingell (D-  
Mich.) introduced in the House endangered species legislation endorsed by the Nixon  
administration.(99) Ten days later, Senator Mark Hatfield (R-Or.) submitted identical legislation to  
the Senate.(100) Congress, however, failed to pass new species legislation in 1972.

### III. THE ENDANGERED SPECIES ACT OF 1973

#### A. Passage of the ESA

1 Early in 1973, the 93rd Congress, dominated by Democrats, reconsidered four new endangered  
2 species bills. On January 3, Representative John Dingell (D-Mich.) introduced H.R. 37, co-  
3 sponsored by seventy members of the House of Representatives.(101) On June 12, Senator Harrison  
4 Williams (D-N.J.) introduced S. 1983.(102) The newly re-elected Nixon administration also  
5 supported a stronger endangered species law, and had its own bills introduced in both the House  
6 and the Senate, where they found bipartisan support.(103) Congress eventually approved the  
7 Democrat-sponsored bills, H.R. 37 and S. 1983, which differed little from the administration's  
8 proposal.(104)

9 Congress debated little over the various provisions of these bills. Moreover, the few congressional  
10 concerns centered not on sections 4, 7, or the application of the section 9 prohibition to habitat  
11 modification, but on issues relatively inconsequential to later developments. The most significant  
12 topic debated was the potential preemption of traditional state authority to manage wildlife. Senator  
13 Theodore Stevens (R-Alaska), for example, observed that "the bill is drawn on the basis of making  
14 the Federal law preemptive[.]" and unsuccessfully proposed an amendment to bolster state authority  
15 under the ESA.(105) The only conservation organization to oppose the ESA, the Wildlife  
16 Management Institute, did so because it believed that the Act would usurp state power.(106)

17 Debate over the preemption of state authority arose from section 9, although this debate had nothing  
18 to do with whether habitat modification fell within the definition of the take prohibition. Under the  
19 1966 and 1969 Acts, the federal prohibition against taking a listed species extended only to species  
20 taken within the National Wildlife Refuge System, and, through the Lacey Act, to any taking or  
21 trade in listed species contrary to any existing state law.(107) No independent federal prohibition  
22 against killing or otherwise directly harming listed species existed outside of the National Wildlife  
23 Refuge System.(108) Section 9 of the ESA changed this, making it a federal crime to take any listed  
24 species anywhere within the United States.(109) By doing so, the ESA necessarily intruded on state  
25 prerogative.

26 Proponents of the ESA successfully assuaged concerns over federal preemption. Representative  
27 James Grover (R-N.Y.) observed, "we have adequately protected legitimate State interests, powers,  
28 and authorities, in H.R. 37 by providing for concurrent Federal/State jurisdiction and permitting the  
States to enact their own, more restrictive laws, if so desired."(110) Outside of Congress, ESA  
supporters tried to justify the need for federal authority because few states adequately protected  
endangered species. The Washington Post, for example, argued that "the ultimate authority" for  
species protection should rest with the federal government rather than with the states.(111)  
Representative Dingell stressed that the ESA would not preempt the states from enacting their own  
endangered species legislation.(112) Senator Williams stated simply that the act "in no way limits  
the power of any State to enact legislation or regulations more restrictive than the provisions of the  
act."(113)

These concerns, however, were minor, and congressional support for the bills soon became  
widespread and enthusiastic. In the Senate especially, debate over the ESA was almost nonexistent.  
Even Senator Stevens, who initially expressed concern over the bill's potential impact on state  
authority, rose to speak in support of S. 1983, stating that while "the bill is not perfect, I believe it  
takes a major step in the protection of American endangered and threatened species."(114) The  
bill's supporters also included those who would later regret their decisions, including Bob Dole (R-

1 Kan.), Jesse Helms (R-N.C.), Howard Baker (R-Tenn.), Bob Packwood (R-Or.), and Mark Hatfield  
2 (R-Or.).(115) On July 24, 1973, the Senate approved S. 1983 unanimously, ninety-two to zero, with  
3 eight Senators not voting.(116)

4 House support for H.R. 37 was also strong. Representative Grover observed, "I know of no  
5 opposition to H.R. 37 and urge its immediate passage."(117) Representative Dingell remarked that  
6 in the month since the committee report on the House bill(118) had been available for review, he  
7 had "yet to hear a whisper of opposition to its passage at the earliest opportunity."(119) On  
8 September 18, 1973, the House of Representative passed H.R. 37 by a vote of 390 to 12, with 31  
9 not voting.(120) None of the twelve who voted against the bill voiced their opposition during  
10 congressional deliberations just prior to the vote.(121)

11 The House and Senate bills then proceeded to the conference committee. That committee  
12 essentially adopted the Senate version of the bill, although it incorporated a few elements from the  
13 House bill. The conference report explained what it believed to be all the significant differences  
14 between the Senate and House bills, but it failed to mention at least one major difference.(122) For  
15 the purposes of the section 9 prohibition against the take of a listed species, S. 1983 defined the  
16 term "take" to include actions that might "harm" a listed species, while H.R. 37 only included  
17 actions that would directly injure or kill a listed species.(123) Despite its importance to later  
18 developments, this difference went unnoticed or, at least, it provoked no comment or debate. For  
19 the most part, however, the House and Senate bills were remarkably similar, including the parts of  
20 section 4 and section 7 relevant to subsequent controversies over the ESA. The topic most discussed  
21 during the conference concerned the relatively minor point of the division of administrative duties  
22 between the Secretaries of the Interior and Commerce.(124)

23 The ESA emerged from the conference committee even more popular than it had been before. On  
24 December 19, the Senate agreed to the conference report, again unanimously.(125) The next day,  
25 while the House considered the conference report Representative Dingell observed, "It would be no  
26 exaggeration to say that scarcely a voice has been heard in dissent."(126) The House agreed to the  
27 conference report by a vote of 345 to 4, with 73 representatives not voting.(127) Those four who  
28 voted against the Act included Robin Beard (R-Tenn.), Harold Gross (R-Iowa), Earl Landgrebe (R-  
Ind.), and Robert Price (R-Tex.).(128) None of them articulated their opposition to the report on the  
floor of Congress.

The bill then proceeded to the desk of the President. President Nixon supported the bill even though  
it was not precisely the initiative introduced by his **administration**. During the signing ceremony, he  
concluded, "Nothing is more priceless and more worthy of preservation than the rich array of  
animal life with which our country has been blessed."(129) On December 28, 1973, President  
Nixon signed the ESA into law.(130)

B. Why?

The ESA received such overwhelming support for a variety of reasons. First, when Congress  
considered new endangered species legislation, environmentalism enjoyed a level of popularity  
unknown today. Indeed, the ESA arrived on the "peak of [the environmental] wave" and  
represented the "quintessential environmental issue."(131) The year before its passage, Tom

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1 Garrett, wildlife conservation director for Friends of the Earth, noted that environmental legislation,  
2 particularly wildlife protection, was "a richly rewarded political issue." (132) The Washington Post  
3 editorialized that there was strong public sentiment supporting increased protection for endangered  
species. (133)

4 Many politicians sought to capitalize on this popularity. Some hoped that by doing so they could  
5 unite a country divided by civil rights, women's liberation, and the Vietnam War. (134) Nixon  
6 himself declared, "The quality of life on this good land is a cause to unite all Americans." (135)  
7 Nixon, sinking ever deeper into the morass of Watergate, probably yearned for a little unity by the  
8 end of 1973, while the Republicans in Congress may have hoped to rehabilitate their party. (136)  
9 Nixon, and perhaps conservatives generally, supported the ESA not so much out of sincere  
10 commitment to species preservation, but for self-serving reasons. (137) To many politicians, the  
11 ESA seemed to be a win-win situation.

12 The mutually beneficial nature of the proposed law seemed especially true because no significant  
13 special interest group came forward to oppose the ESA. During the Senate hearings in June of 1973,  
14 numerous administrative agency experts and every major environmental organization testified in  
15 support of the ESA. (138) Even the National Rifle Association urged the passage of a stronger  
16 act. (139) The only opposition came from a few groups representing state fish and game agencies,  
17 which worried about the preemption of state authority, and from the fur industry. (140) Lack of  
18 significant special interest opposition was also evident during the House hearings. (141) With "little  
19 open opposition to the bills," there appeared to be no reason, "except congressional inertia, for  
20 inaction." (142)

21 Few at the time opposed the ESA because no one anticipated how the Act might significantly  
22 interfere with economic development or personal property interests. (143) One leading advocate of  
23 the ESA observed, "since someone does not necessarily have to combat vested economic interests,  
24 some politicians use the issue to parade themselves as environmentalists knowing they will not  
25 seriously offend corporate interests." (144) The timber industry, other natural resource industries,  
26 and private property groups declined to fight the ESA in 1973 because they failed to see how the  
law might affect their interests. In addition, unlike today, no organized anti-environmental coalition  
existed to probe and protest proposed environmental legislation.

27 Members of Congress also failed to anticipate many of the Act's consequences. In particular, they  
28 overlooked or underestimated the potential powers of sections 4, 7, and 9, referring instead to  
relatively minor provisions of the Act. Representative Dingell listed the nine "principal" changes  
that would be effected by the bill's passage. (145) None of these, however, predicted that section 4  
would cause a wide diversity of species to be listed without regard to economic considerations, that  
section 7 would halt federal projects that might jeopardize species, or that section 9 might result in  
the regulation of land use on private property. (146) For Representative Dingell, at least, significant  
aspects of the ESA included its distinction between threatened and endangered species and its ban  
on the export of listed species. (147)

Others believed that section 6, (148) which provides for federal cooperation with the states, was the  
most significant provision of the Act. Senator John Tunney (D-Cal.), the Senate manager of the bill,  
called section 6 "perhaps the most important section" of the ESA. (149) Senator Stevens (R-Alaska)

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1 called section 6 "the major backbone" of the ESA.(150) The Senate Report stated that the purpose  
2 of the Act was to promote cooperative management between the states and the federal  
3 government.(151) Of course, it is difficult to ascertain whether the legislators actually believed this  
4 or if they were just trying to assuage the concerns over federal preemption. Nevertheless, Congress  
5 either found the inherent powers of sections 4, 7, and 9 unworthy of debate or it underestimated  
6 them.(152)

7 To begin with, Congress failed to recognize the diversity of species protected under section 4.  
8 Instead, it displayed a profound bias toward charismatic megafauna.(153)

9 In the House, Representative Dingell, for example, claimed that his bill would protect American  
10 species like the eastern timber wolf, the wolverine, and the eastern cougar, as well as the kangaroo  
11 and the elephant.(154) Representative Leonor Sullivan (D-Mo.), the chair of the committee that  
12 oversaw H.R. 37, urged the passage of the ESA to protect whales and "spotted cats."(155) No one  
13 in the House mentioned mollusks or anthropods, and only a few mentioned plants.(156)

14 Senators also referred almost exclusively to the need to protect charismatic wildlife. Senator  
15 William Roth (R-Del.) urged the passage of the ESA because his constituents in Delaware "admire  
16 the graceful and inspiring flight of the few American bald eagles remaining in the state."(157)  
17 Senator Williams, the sponsor of the Senate bill, exclaimed, "Most animals are worth very little in  
18 terms of dollars and cents. However, their esthetic value is great indeed. The pleasure of simply  
19 observing them ... is unmeasurable."(158) These sentiments applied poorly to species like the snail  
20 darter and furbish lousewort that later aroused ESA controversy.

21 Congress's failure to recognize that the ESA would protect plants almost as much as wildlife can  
22 perhaps be explained by other reasons, too. When Congress considered the ESA in 1973, the status  
23 of plant species was poorly understood. To remedy this problem, Congress included a provision in  
24 the ESA, section 12, directing the Smithsonian Institute to study and report on endangered and  
25 threatened plant species in the United States.(159) Congress indicated that the results of the study  
26 would provide a basis for amending the ESA or writing new legislation, although in the meantime  
27 plants would continue to be listed under section 4 according to the same criteria as wildlife.(160)  
28 When the report was finally completed in 1974, it did not lead to any amendments in the ESA or to  
additional legislation.(161) Instead, plants continued to be listed according to section 4. In this way,  
the strong protections of the ESA apply almost equally to plants.(162)

The Nixon **administration** shared congressional sentiment regarding the kinds of species the ESA  
would, or should, protect. Although the Nixon administration bills were in other ways remarkably  
similar to the bills introduced by the Democrats in Congress, the administration bills explicitly did  
not extend protection to threatened or endangered plants.(163) During the signing ceremony,  
Nixon's comments seemed oblivious to the change. "[T]his legislation provides the Federal  
Government with the needed authority to protect an irreplaceable part of our national heritage--  
threatened wildlife."(164) Not only did Nixon ignore plants, but his comments reflected the  
widespread perception of the Act as an attempt to preserve only wildlife that was representative of  
the nation's heritage.



1 Congress and the administration's focus on charismatic megafauna reflected the emphasis of the  
2 news media, special interests, and, presumably, the public. In June of 1973, The Washington Post  
3 wrote an editorial supporting the passage of the ESA. Of the "some 900" animal species threatened  
4 with extinction, the editorial specifically mentioned only the cheetah, the Puerto Rican parrot, and  
5 the red wolf.(165) A couple of months later, The Washington Post wrote another editorial in  
6 support of the ESA, in which it focused on the plight of endangered wolves.(166) In September,  
7 The Washington Post published an article on the ESA that featured a picture of a timber wolf. The  
8 article indicated that aside from the wolf, the ESA would also protect "the bald eagle, mountain  
9 lion, grizzly bear, black footed ferret, cheetah, and other endangered animals."(167) Defenders of  
10 Wildlife urged passage of the ESA to protect the endangered eastern timber wolf, American  
11 alligator, and grizzly bear.(168)

12 Even the scientific literature of the time emphasized charismatic megafauna. For example, one  
13 treatise on extinct and vanishing animals, originally published in German, began with a summary of  
14 the disappearance of the bison from the American Great Plains and proceeded from there to focus  
15 exclusively on large, appealing animals.(169) A pictorial work entitled Endangered Species,  
16 published in 1972, advocated the role of zoos in species conservation.(170) Of the seventy-five  
17 species featured, every one was either an animal or a bird, and most were big animals like the  
18 "maned" wolf, the polar bear, and the Rocky Mountain goat.(171) In 1973, the International Union  
19 for the Conservation of Nature and Natural Resources published a list of species that had become  
20 extinct since 1600.(172) The list consisted entirely of mammals.(173)

21 Members of Congress almost universally ignored section 7's requirement of interagency  
22 cooperation, presumably because they found it relatively unimportant or uncontroversial.(174)  
23 There was, however, at least one instance during deliberations over the ESA in which Congress  
24 discussed section 7. Senator Tunney, the Senate manager of the bill, described what he thought  
25 Section 7 meant:

26 [A]s I understand it, after the consultation process took place ... the  
27 Corps of Engineers would not be prohibited from building such a road if  
28 they deemed it necessary to do so[;] ... they would have the final decision  
after consultation .... So, as I read the language, there has to be  
consultation. However, the Bureau of Public Roads or any other agency would  
have the final decision as to whether such a road should be built.(175)

According to Tunney, section 7 meant that agencies proposing development projects that might  
jeopardize listed species must consult with the Department of the Interior; however, the ultimate  
decision whether or not to continue with a project rested with the development agency. This would  
have rendered section 7 largely procedural rather than substantive, much like the requirements for  
an Environmental Impact Statement found in the National Environmental Policy Act of 1969.(176)  
Of course, this interpretation differed entirely from the Supreme Court's interpretation of section 7  
five years later.(177)

As for section 9, no one in Congress contemplated that the prohibition against taking a listed  
species might lead to the regulation of land use activities on private property. Congress also failed  
to make the connection between habitat degradation and the taking of a species as revealed by the  
silence of the committee reports, floor debates, and congressional hearings on the subject.

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1 Furthermore, there is little evidence that environmental organizations believed that section 9  
2 extended to land use regulation. Only one reference by a representative of an environmental  
3 organization supported the position that section 9 applied to habitat degradation.(178) No member  
4 of Congress questioned him on this point or raised the issue elsewhere.

5 Despite the emergence of ecology earlier in the century and the rise of the modern environmental  
6 movement, congressional ignorance largely reflected the state of scientific understanding at the  
7 time. Not until the early 1980s did an appreciation for biological diversity become  
8 widespread.(179) Indeed, the word "biodiversity" was not known prior to the 1980s. The very idea  
9 of biodiversity "represented a distinct advance in conceptualization" because it stressed the  
10 importance of all species and emphasized habitat protection.(180) During the 1990s, scientists  
11 began to speak of the need to protect ecosystem health as well as biodiversity. Some even criticized  
12 the ESA's emphasis on identifying and protecting individual species as scientifically  
13 anachronistic.(181)

14 Few scientists critical of the ESA today argue that it should be scrapped altogether. Instead, most  
15 propose that the ESA merely be reinterpreted and implemented to better conform with current  
16 scientific understanding.(182) To a certain extent, this has been the case with section 7 and section  
17 9, where what it means to jeopardize or harm a species differs today from what it meant in  
18 1973.(183)

19 Congressional inability to predict the potential scope of sections 4, 7, and 9 also reflected an  
20 inaccurate assessment of the nature of the modern extinction crisis. For example, Senator Williams,  
21 the Senate sponsor of the ESA, stated that overhunting was "undoubtedly" the "major reason" for  
22 species extinction.(184) This view supports the argument that Congress was concerned primarily  
23 with protecting game species rather than plants and relatively unknown species of fish and wildlife.  
24 Moreover, if overhunting was the primary cause for species extinctions, then all that was required  
25 to solve the problem was to prohibit hunting and other activities that directly harmed species.  
26 Provisions like section 7 and section 9 that extended to habitat modification would not be  
27 necessary. Of course, scientists today believe the modern extinction crisis stems primarily from  
28 adverse habitat modification associated with human activities, not overhunting.(185)

29 Congressional scientific knowledge in 1973 also mirrored the popular understanding of the day. An  
30 editorial in The Washington Post, for example, blamed the extinction crisis largely on the market in  
31 international trade of endangered species.(186) The Washington Post stated, "Big money is at stake  
32 for many nations that trade in wild animal skins, in whale oil for cosmetics, in supplying wildlife  
33 for zoos, pets and medical research."(187) To take another example, in urging the passage of a  
34 stronger ESA, The Washington Post criticized the weaknesses of the 1969 act, but for the wrong  
35 reasons. Specifically, the paper criticized the lack of protection for species that were merely  
36 threatened with becoming endangered.(188) Although the distinction drawn by the ESA between  
37 threatened and endangered species was significant, it was not nearly as crucial to species survival as  
38 sections 4, 7, and 9.(189)

39 Finally, despite the rhetoric over the ESA, most people in and outside of Congress thought the Act  
40 relatively insignificant. With the exception of The Washington Post, the national press all but  
41 ignored congressional consideration of the ESA during 1973. Moreover, the press barely even

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1 mentioned the ESA's enactment. The day after the ESA became law, The New York Times noted its  
2 passage as an afterthought in an unrelated article on an act transferring federal job-training funds to  
3 the states.(190) The New York Times sandwiched the one-sentence byline about the passage of the  
4 ESA between descriptions of an act to build a Lyndon Baines Johnson Memorial grove of trees on  
5 the banks of the Potomac and an act to insure mortgage insurance for fire safety equipment in  
6 nursing homes. Despite earlier editorials about protecting endangered species, The Washington Post  
7 gave no more coverage to the passage of the ESA than did The New York Times.(191) The Los  
8 Angeles Times, too, covered the signing of the ESA in one sentence, while The Chicago Tribune  
9 ignored the Act altogether.(192)

#### 10 IV. IN THE WAKE OF THE ESA--THE SNAIL DARTER CONTROVERSY

11 For several years after 1973, the scope of the ESA remained untested, and the ESA continued to  
12 enjoy almost unqualified support.(193) In 1975, however, FWS listed the snail darter, a three-inch  
13 perch, as endangered.(194) Although it had no known commercial or recreational worth, soon after  
14 listing a local conservation group brought a suit against the Tennessee Valley Authority (TVA) to  
15 halt the completion of Tellico Dam on the Little Tennessee River, the only known habitat of the  
16 darter.(195) The suit asserted that the dam would jeopardize the darter, contrary to the ESA's  
17 requirement that all federal agencies "take such action necessary to ensure that actions authorized,  
18 funded, or carried out by them do not jeopardize the continued existence of such endangered  
19 species and threatened species."(196) Based on this language, plaintiffs argued that section 7  
20 prevented TVA from completing the dam.(197)

21 TVA countered that section 7 could not stop the dam because TVA had the final say, after  
22 consulting with the Department of the Interior, on whether or not to continue its project.(198) TVA  
23 also argued that section 7 did not apply because TVA began construction of the dam before the  
24 ESA was enacted and because Congress had demonstrated its support for the dam by repeatedly  
25 allocating money for its completion.(199) Finally, TVA stressed that the dam was vital for the  
26 economic rehabilitation of the entire region.(200) But in 1978, in the landmark decision of  
27 Tennessee Valley Authority v. Hill,(201) the Supreme Court disagreed with TVA's arguments.

28 The Supreme Court stated that it relied primarily on the plain language of section 7 to reach its  
decision. Chief Justice Burger wrote for the majority opinion that "one would be hard pressed to  
find a statutory provision whose terms were any plainer than those in [sections] 7."(202) The Court  
further concluded that the Act's legislative history revealed that Congress intended to halt and  
reverse the trend toward species extinction--whatever the cost.(203) In this way, Congress perhaps  
fell victim to its own rhetoric. In a five to three decision, the Court interpreted section 7 as an  
absolute bar against any action by any federal agency that might jeopardize a species listed as  
threatened or endangered.(204)

The Court's decision outraged many in Congress. Representative Robert Duncan (R-Tenn.) claimed  
that Congress never "intended for this legislation to afford any single-purposed interest [to exercise]  
a potential veto over virtually any Federally funded or authorized project."(205) Senator Malcolm  
Wallop (R-Wyo.), worried that the decision would lead to a wave of lawsuits designed "to stop  
Federal projects as a primary goal and in a way never intended by Congress."(206) Representative  
Wesley Watkins (D-Okla.) said, "There is a serious possibility that a mutation or long-distant

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1 cousin of the snail darter or something in my district will prevent any type of economic growth for  
2 our people."(207) Most congressmen believed that the Supreme Court had misinterpreted section 7.

3 The Supreme Court's ruling also contributed to a popular perception of the Act as inflexible and  
4 antidevelopmental. To many, the fact that an almost unknown, unimportant fish could stop a  
5 hundred-million-dollar dam in the midst of an energy crisis and rampant inflation seemed  
6 ridiculous. The industrial lobby, too, proved to be a growing counter-weight to the environmental  
7 lobby, pressuring many in Congress to revise the Act.(208) Ultimately, the Senate voted to amend  
8 the ESA 94 to 3, while the House approved the amendments with a vote of 384 to 12.(209) This  
9 lopsided vote indicates that most in Congress in 1978 believed that the Supreme Court was wrong  
10 and that economic considerations should limit the ESA. Congress designed the 1978 amendments to  
11 counteract the Court's expansive interpretation of section 7.(210) The amendments created the  
12 Endangered Species Committee (ESC), dubbed the "God Squad," and gave it the power to grant  
13 exemptions to federal projects halted by the Act if the economic benefits of those projects  
14 outweighed the benefits of species protection.(211) The committee consisted of the Secretaries of  
the Interior, Agriculture, and Army, the Chairman of the Council of Economic Advisors, the  
Administrator of the EPA, the Administrator of the National Oceanic and Atmospheric  
Administration, and an individual nominated by the governor of the affected state and appointed by  
the President.(212) An exemption could be granted on the approval of five out of the seven  
members, and Congress anticipated that the ESC would promptly exempt Tellico Dam.(213)  
Surprisingly, however, the God Squad refused to do this, in part because the dam made no  
economic sense.(214)

15 Exasperated, Congress then sought a way around the God Squad's decision. Senator John Chafee  
16 (R-R.I.), for example, exclaimed, "We who voted for the Endangered Species Act with the honest  
17 intention of protecting such glories of nature as the wolf, the eagle, and other natural treasures have  
18 found that others with wholly different motive are using this noble act ... for merely obstructive  
19 ends."(215) Senator James Sasser (D-Tenn.) remarked, "I do not believe that most of the Members  
20 who voted for that bill ever intended it to be used to halt water resources development."(216) In  
21 1979, Congress approved a nongermane rider to the Energy and Water Development  
Appropriations Act of 1980, which granted a legislative exemption from section 7.(217) TVA  
finally finished its dam. Ironically, however, soon after the dam's completion, FWS discovered  
healthy populations of snail darters in other Tennessee rivers and down-listed the species from  
endangered to threatened.(218)

22 The snail darter controversy had several consequences. First, FWS became more cautious about  
23 listing species, using its discretion to avoid the mandate of section 4. Section 4 instructs the  
24 Secretary of the Interior to list species based solely upon the best scientific knowledge  
25 available,(219) but the 1978 amendments that created the God Squad also increased the agency's  
26 discretionary power over the Act's implementation.(220) For example, the 1978 amendments  
27 required the Secretary of the Interior to designate critical habitat, but the Secretary could delay or  
28 withdraw the proposed listing if the critical habitat was not yet determinable. In the wake of  
Tennessee Valley Authority v. Hill, FWS began to exercise its discretion to avoid controversy, even  
if that meant circumventing section 4.(221)

1 The snail darter controversy also altered congressional perception of the ESA. Congress no longer  
2 viewed the Act as having relatively no cost in preserving only certain symbolic species. Indeed, the  
3 ESA acquired many enemies within Congress, and nationwide, as a result of the snail darter. The  
4 controversy also contributed to a general reaction against the environmental movement in the late  
5 1970s and early 1980s.(222)

6 In 1980, widespread antiregulatory sentiment helped elect Ronald Reagan to the Presidency.  
7 Reagan rode into the White House as part of the sagebrush rebellion, an antienvironmental  
8 movement originating in the West.(223) Reagan called himself a "Sagebrush Rebel" and pledged  
9 "to work toward a Sagebrush solution" for the nation's environmental problems.(224) Reagan  
10 appointed James Watt, a known antienvironmentalist, as the Secretary of the Interior.(225)

11 Watt led, in the words of historian Sam Hays, "a massive assault on environmental programs."(226)  
12 Spearheading the sagebrush rebellion in the early eighties, Watt profoundly influenced FWS,  
13 virtually halting the ESA's implementation and enforcement. During the first year of the Reagan  
14 presidency not one new species was proposed for listing, and, although Watt did not last long as  
15 Secretary of the Interior, FWS refused to implement and aggressively enforce the ESA throughout  
16 the 1980s.(227) Eventually, however, in a number of cases arising from the controversy over the  
17 northern spotted owl, the courts forced the hand of the reluctant administration.(228) As with the  
18 snail darter, controversy over the spotted owl during the early 1990s led to hot debate in the halls of  
19 Congress over the future of the ESA.(229)

## 20 V. CONCLUSION

21 The ESA is a political response to the modern extinction crisis, which is itself part of a much larger  
22 history of evolution. Since life began on this planet about four billion years ago, the number of  
23 species has grown steadily, perhaps reaching as many as one hundred million.(230) Our species,  
24 Homo sapiens, emerged only about one hundred thousand years ago, at the time of the greatest  
25 biodiversity in the history of life.(231) Since then, however, the number of species on this planet  
26 has plummeted--especially over the last few centuries--chiefly as a result of human activity.(232)  
27 We destroy species in three ways: 1) overhunting or harvesting, 2) introduction of nonnative  
28 species to new areas--including the spread of disease, and, most importantly, 3) degradation of  
habitat.(233) Because of human activity, biodiversity today has fallen to its lowest level in sixty-  
five million years--about the time the dinosaurs died out.(234)

As the fate of the dinosaurs attests, however, extinctions occurred long before humans evolved.  
Specifically, scientists have identified five periods of mass extinctions within the last five hundred  
million years.(235) The most well known of these include the Permian-Triassic extinctions 245  
million years ago, the Cretaceous-Tertiary extinctions 65 million years ago, and the Pleistocene-  
Holocene extinctions only 11,000 years ago.(236) Approximately sixty-five percent of terrestrial  
species perished during the Permian-Triassic, while ninety percent of terrestrial and marine reptiles,  
including the dinosaurs, disappeared during the Cretaceous-Tertiary.(237) During the Pleistocene-  
Holocene, climate change and prehistoric human overhunting killed off many large mammal  
species like the giant sloth, the mastodon, and the sabertooth tiger.(238) A period of massive  
species extinction, therefore, is nothing new.

1 Nevertheless, the modern extinction crisis differs in important ways from earlier events. First,  
2 modern extinctions occur at an unprecedented rate, prompting many scientists to conclude the  
3 present situation has reached "crisis" proportions.(239) Second, with the possible exception of the  
4 Pleistocene-Holocene extinctions, major physical events like climate change precipitated earlier  
5 periods of mass extinction while the activities of one species alone have caused the current crisis.  
6 Finally, modern extinctions threaten all groups of organisms, not just particular groups like  
7 dinosaurs or large mammals.(240) While extinction may be the natural end of evolution, humans  
8 have altered and accelerated the process.

9 The precise rate of modern extinctions, however, is difficult to estimate. Currently, FWS has listed  
10 over 1000 animals and more than 600 plants worldwide as either endangered or threatened.(241) In  
11 the United States, FWS has listed 924 species as endangered and 255 as threatened.(242) One  
12 estimate places the current global extinction rate somewhere between one hundred to one thousand  
13 times the prehuman level.(243)

14 There are many reasons why we should care about the scope and rate of modern extinctions. To  
15 begin with, many of our modern drugs derive from plants and animals. For example, the rosy  
16 periwinkle, a tropical flower, supplies compounds necessary for a chemotherapy treatment that has  
17 increased dramatically the remission rates of certain cancers.(244) Plants and animal products  
18 provide medical and pharmaceutical benefits to humans in countless other ways, even though  
19 scientists have studied only a small fraction of species for their potential uses. The overall economic  
20 value of plant- and animal-derived drugs and pharmaceuticals tops tens of billions of dollars  
21 annually.(245)

22 Biodiversity also preserves genetic diversity, essential for protecting and improving our food  
23 supply. Only about 130 plant species supply virtually all of the world's food crops and feed  
24 grains.(246) Modern agriculture has achieved unprecedented productivity among these crops, in  
25 part because of the uniformity of crop strains.(247) But this uniformity has left modern crops  
26 vulnerable to quickly evolving pests and blights.(248) Genetic diversity supplied by the wild  
27 cousins of commercial crops helps protect these crops, thus safeguarding our food supply.(249) To  
28 cite just one example, scientists added disease-resistant genes from a seemingly useless strain of  
wild wheat grass from Turkey to commercial wheat in the United States for a savings of \$50  
million annually.(250)

Furthermore, biodiversity contributes to ecosystem stability, sustaining natural resources and  
energy flows upon which we all depend. For example, through the process of photosynthesis, plants  
supply oxygen to the air we breathe. Forests reduce evaporation, limit erosion, and protect our  
water supplies. Insects and microorganisms feed on the wastes of animals, supplying nutrients to  
the soil from which we grow the food we eat. Species extinctions erode this ecological foundation.  
If enough species die out, our planetary ecosystem may collapse to the point where it can no longer  
support human life.(251)

But biodiversity is important for less ominous reasons. Many people simply enjoy plants and  
animals and feel extinction causes irreparable loss. "I wish to know an entire heaven and an entire  
earth," wrote Henry David Thoreau.(252) Less poetically, over one hundred years later Congress  
declared that species of fish, wildlife, and plants possess "esthetic," "educational," "historical," and



1 "recreational" value.(253) Even for those who do not take direct pleasure from contact with  
2 endangered species, just knowing that wild things thrive in faraway places can provide sufficient  
3 reason for preservation.

4 Finally, many simply believe that species should be protected for their own sake, that life has  
5 inherent value. Hindus, for example, hold all life sacred, while Judeo-Christians believe that  
6 humans are to be stewards for the Earth and the living things upon it. Al Gore, for example,  
7 interprets the Old Testament story of Noah's Ark as a modern commandment: "Thou shalt preserve  
8 biodiversity."(254) For deep ecologists and many environmentalists, the human-caused loss of a  
9 species is both incalculable and immoral.(255)

10 Nevertheless, to many, the need to protect biodiversity seems less obvious than the need to protect  
11 other resources, like clean air and water. In part, this is because scientists often cannot quantify the  
12 loss of any particular species. No one knows exactly the worth of the snail darter or the spotted owl,  
13 or what affect their disappearance may have on human **welfare**. When confronted with palpable  
14 costs--like lost **jobs** and land use restrictions--enthusiasm for the protection of a particular species  
15 often fades. Congress passed the ESA in part to compensate for this scientific uncertainty and to  
16 remove the fate of species from the free market. By doing so, Congress sought to protect a common  
17 resource and a common heritage.

18 The ESA is now over a quarter-century old. It remains the "broadest and most powerful law" in the  
19 world for the protection of species.(256) Yet it is unclear whether the law has been successful. A  
20 recent report by the National Research Council found that the ESA has prevented the extinction of  
21 some species and slowed the decline of others, but "that the ESA by itself cannot prevent the loss of  
22 many species and their habitats."(257) Despite some ambivalence, the report concluded that the  
23 ESA is based on sound scientific principles.(258)

24 If success means the ESA has halted the global flood of modern extinctions, however, then the Act  
25 has failed. FWS claims that between 1968 and 1993, it removed seven species from the list because  
26 of extinction, while another eight still listed are probably extinct, awaiting final confirmation of  
27 their fate.(259) Yet, since the ESA's passage in 1973, an average of eighty-five species have been  
28 added to the list every year.(260) Moreover, scientists believe that sixty species of mammals have  
died out in the recent past, and that about forty species of freshwater fishes in the United States  
have become extinct over the last one hundred years.(261) Given the scope of the modern crisis, the  
ESA may seem to have had a negligible impact on the rate of global extinctions.

Yet these numbers do not tell the whole story. Clearly, endangered and threatened species are better  
off with the ESA than without it. When originally listed, virtually all species were declining in  
numbers. After listing, however, many species have stabilized and improved. One statistical  
estimate concludes that for every year of listing three out of two hundred listed species formerly  
declining in number began to increase.(262) To date, listing appears to have turned the fortunes of  
about half of the species protected by the Act.(263) Slowly, the ESA seems to be making a  
difference in the rate of global extinctions.

Furthermore, if Congress primarily intended the ESA to save charismatic megafauna, then the Act  
has clearly succeeded. In May of 1998, Secretary of the Interior Bruce Babbitt announced, "In the

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1 near future, many species will be flying, splashing and leaping off the list. They made it. They're  
2 graduating."(264) The twenty-nine species to be upgraded from endangered to threatened, or  
3 removed from the list altogether, include the gray wolf, the Columbian white-tailed deer, and the  
4 bald eagle. The graduating class, however, included few species that could not fly, splash, or  
5 leap.(265) The ESA may not have halted the flood of global extinctions, but it has helped save  
6 those species most representative of our national heritage and dearest to the American people.  
7 Despite the Act's unanticipated consequences, perhaps it has achieved what Congress intended it to  
8 after all.

9 (1) ALDO LEOPOLD, The Round River, in A SAND COUNTY ALMANAC AND ESSAYS ON  
10 THE CONSERVATION FROM ROUND RIVER 190 (Ballantine ed., 1970).

11 (2) 124 CONG. REC. 21,331 (July 18, 1978) (statement of Sen. Garn), reprinted in COMMITTEE  
12 ON ENV'T & PUB. WORKS, LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES  
13 ACT OF 1973, at 1009 (1982) [hereinafter LEGISLATIVE HISTORY].

14 (3) 16 U.S.C. [subsections] 1531-1544 (1994).

15 (4) Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

16 (5) RODERICK F. NASH, RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL  
17 ETHICS 175 (1989); see also JOSEPH M. PETULLA, AMERICAN ENVIRONMENTALISM 51  
18 (1980) (comparing the ESA with the Declaration of Independence and its guarantees of life and  
19 liberty).

20 (6) Bruce Babbitt, The Endangered Species Act and "Takings": A Call for Innovation Within the  
21 Terms of the Act, 24 ENVTL. L. 355, 356 (1994).

22 (7) Endangered Species Act Amendments of 1993: Hearings on S. 921 Before Subcomm. on Clean  
23 Water, Fisheries, & Wildlife of the Senate Comm. on Env't and Pub. Works, 103d Cong. 2 (1994)  
24 (statement of Sen. Graham).

25 (8) Id.

26 (9) 16 U.S.C. [subsections] 1533, 1536, 1538 (1994).

27 (10) Id. [sections] 1540(g).

28 (11) Id. [sections] 1533(b)(1)(A).

(12) Id. [subsections] 1533(15), 1533(a)(1) (statutory authority to delegate).

(13) Id. [sections] 1532(16).

(14) Id. [sections] 1532(6), (20).

1 (15) Id. [sections] 1532(8), (14), (16).

2 (16) Id. [sections] 1533(b)(1)(A).

3 (17) Id. [sections] 1536(a)(2).

4 (18) Act of Nov. 14, 1986, Pub. L. No. 99-659, 100 Stat. 3706 (1986); Endangered Species Act  
5 Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411 (1982); Act of Dec. 28, 1979, Pub. L. No.  
6 96-159, 93 Stat. 1225 (1979); Endangered Species Act Amendments of 1978, Pub. L. No. 95-632,  
7 92 Stat. 3751 (1978).

8 (19) 437 U.S. 153 (1978).

9 (20) Id. at 173.

10 (21) Id. at 195.

11 (22) 16 U.S.C. [sections] 1538(a) (1994). The [sections] 9 prohibition does not automatically **apply**  
12 to threatened species. Rather, threatened species are protected by regulations the Secretary deems  
13 "necessary and advisable." Id. [sections] 1533(d).

14 (23) Id. [sections] 1532(19). This broad prohibition applies only to the taking of fish and wildlife.  
15 Weaker prohibitions apply to the taking of plants. Id. [sections] 1538(a)(2)(B).

16 (24) 40 Fed. Reg. 44,412, 44,416 (Sept. 26, 1975). In 1981 the Secretary revised the original 1975  
17 regulation to emphasize that actual death or injury is required for a [sections] 9 violation. See 50  
18 C.F.R. [sections] 17.3 (1994).

19 (25) J.B. Ruhl, Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and  
20 Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species, 25 ENVTL. L.  
21 1107, 1115 (1995). Amendments to the ESA in 1982 provided for incidental take permits allowing  
22 limited exemptions from the [sections] 9 prohibition, but because the application process is lengthy,  
23 expensive, and difficult, few landowners had applied for such permits. See Robert Meltz, Where the  
24 Wild Things Are: The Endangered Species Act and Private Property, 24 ENVTL. L. 369 (1994).  
25 However, the Clinton administration's "no surprises" policy has dramatically increased the use of  
26 the incidental take permit allowance. See Donald C. Baur & Karen L. Donovan, The No Surprises  
27 Policy: Contracts 101 Meets the Endangered Species Act, 27 ENVTL. L. 767 (1997).

28 (26) See *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979),  
affd, 639 F.2d 495 (9th Cir. 1981); see also *Babbitt v. Sweet Home Chapter of Communities for a  
Great Oregon*, 515 U.S. 687 (1995).

(27) James Bornemeier, Bipartisan Bid to Revamp Endangered Species Act Introduced in House,  
L.A. TIMES, Sept. 8, 1995, at A3.

(28) Heather Dewar, Gingrich Is Going for the Green, Wis. ST. J., Apr. 25, 1996, at 3A.

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1 (29) Id.

2 (30) See Emergency Supplemental Appropriations and Recissions for the Department of Defense to  
3 Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73, 86 (1995)  
4 (including a rider withdrawing all **funding** from FWS for listing new species as endangered or  
threatened during the remainder of the fiscal year 1995).

5 (31) See John H. Cushman, Linking Endangered Species Act to Spending, N.Y. TIMES, Oct. 10,  
6 1998, at A10 (reporting on the most recent attempts to amend the ESA).

7 (32) Act of July 27, 1868, ch. 273, [sections] 6, 15 Stat. 240 (repealed 1944).

8 (33) Act of February 9, 1871, 16 Stat. 593 (repealed 1964).

9 (34) Act of March 3, 1891, ch. 561, [sections] 24, 26 Stat. 1103 (repealed 1976).

10 (35) Id.

11 (36) See SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE  
12 PROGRESSIVE CONSERVATION MOVEMENT 1890-1920, at 122-46 (1959).

13 (37) See id.

14 (38) See id. at 143, 192-93.

15 (39) See PETULLA, *supra* note 5.

16 (40) See 43 CONG. REC. H2105-09 (daily ed. Mar. 10, 1874); see also Tina S. Boradiansky,  
17 Conflicting Values: The Religious Killing of Federally Protected Wildlife, 30 NAT. RESOURCES  
18 J. 709, 714-15 (1990).

19 (41) See 44 CONG. REC. H1237-41 (daily ed. Feb. 23, 1876).

20 (42) Act of May 7, 1894, ch. 72, 28 Stat. 73 (codified as amended at 16 U.S.C. [sections] 26  
21 (1981)); see generally ALFRED RUNTE, NATIONAL PARKS (2d ed. 1987) (describing the  
22 importance of national parks for wildlife preservation).

23 (43) See JOHN REIGER, AMERICAN SPORTSMEN AND THE ORIGINS OF  
24 CONSERVATION (1975); JAMES TOBER, WHO OWNS THE WILDLIFE? (1982).

25 (44) 161 U.S. 519 (1896).

26 (45) Id. at 523.

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1 (46) Lacey Act of 1900, 31 Stat. 187 (codified at 16 U.S.C. [subsections] 701, 3371-3378 and 18  
2 U.S.C. [subsections] 42-44 (1994)).

3 (47) See 33 CONG. REC. H4871 (1900) (statement of Rep. Lacey) (describing the problem of  
4 illegal hunting in one state being trafficked to another state). as 18 U.S.C. [sections] 43 (1994).

5 (49) See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAW LAND AND  
6 RESOURCES LAW 782 (3d ed. 1993).

7 (50) See id. at 107.

8 (51) See JAMES TREFETHEN, AN AMERICAN CRUSADE FOR WILDLIFE 65 (1975).

9 (52) Convention for the Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit., T.S. No. 628  
10 (Great Britain signing on behalf of Canada as overseer of Canadian foreign affairs).

11 (53) Id.

12 (54) Migratory Bird Treaty Act of 1918, ch. 128, 40 Stat. 755 (codified as amended at 16 U.S.C.  
13 [subsections] 703-712 (1994)).

14 (55) 252 U.S. 416 (1920).

15 (56) Id. at 434-35.

16 (57) Migratory Bird Conservation Act of 1929, ch. 257, 45 Stat. 1222 (codified at 16 U.S.C.  
17 [sections] 715-715s (1994)).

18 (58) Fish and Wildlife Coordination Act, ch. 55, 48 Stat. 401 (1934) (codified as amended at 16  
19 U.S.C. 88 661-667e (1994)).

20 (59) Id. [sections] 2.

21 (60) Id. [sections] 3(b).

22 (61) Id. 88 1-3.

23 (62) Bald Eagle Protection Act, ch. 278, 54 Stat. 50 (1940) (codified at 16 U.S.C. [sections] 8 668-  
24 668(d) (1994)).

25 (63) ALDO LEOPOLD, A SAND COUNTY ALMANAC vii (commemorative ed., Oxford 1989)  
26 (1949).

27 (64) Id. at 109.

1 (65) See id. at xv.

2 (66) RACHEL CARSON, SILENT SPRING (1962).

3 (67) Id.

4 (68) See generally STEVEN YAFFEE, PROHIBITIVE POLICY 37-38 (1982) (on the catalyzing  
5 effect of charismatic endangered species on environmental activism in general).

6 (69) See SAMUEL HAYS, BEAUTY, HEALTH, AND PERMANENCE (1987).

7 (70) See Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16  
8 U.S.C. [subsections] 1131-1136 (1994)).

9 (71) YAFFEE, *supra* note 68, at 34.

10 (72) Id. at 35.

11 (73) Id.

12 (74) Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, [sections] 1(a), 80 Stat. 926,  
13 repealed by Endangered Species Act of 1973 [sections] 14, 87 Stat. 884, 903.

14 (75) Id. [sections] 1(b).

15 (76) Id. [sections] 2(d).

16 (77) Id. [sections] 1(c).

17 (78) Id. [sections] 4.

18 (79) Id. [sections] 4(c).

19 (80) Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 8 1(a), 80 Stat. 926,  
20 repealed by Endangered Species Act of 1973 8 14, 87 Stat. 884, 903.

21 (81) Id. [sections] 1(b).

22 (82) Id. [sections] 4(c).

23 (83) Id. [subsections] 1(c), 2(b).

24 (84) Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275, repealed by  
25 Endangered Species Act of 1973 8 14, 87 Stat. 884, 903.

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1 (85) Id. 8 3(a).

2 (86) Id. 82.

3 (87) See Tom Garrett, Wildlife, in NIXON AND THE ENVIRONMENT 129, 131 (James  
4 Rathlesberger ed., 1972).

5 (88) Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 repealed by  
6 Endangered Species Act of 1973 8 14, 87 Stat. 884, 903.

7 (89) Id. [subsections] (2), 5(b).

8 (90) See Carole L. Gallagher, The Movement to Create an Environmental Bill of Rights: From  
9 Earth Day, 1970 to the Present, 9 FORDHAM ENVTL. L.J. 107, 107 (1997).

10 (91) Pub. L. No. 92-195, 85 Stat. 649 (1971) (codified at 16 U.S.C. 88 1331-1340 (1994)).

11 (92) Id.

12 (93) Pub. L. No. 92-552, 86 Stat. 1027 (1972) (codified at 16 U.S.C. 88 1361-1421 (1994)).

13 (94) Id.

14 (95) Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3,  
15 1973, 27 U.S.T. 1087, 493 U.N.T.S. 293.

16 (96) Id. at 1092; 16 U.S.C. [subsections] 1361-1362 (1994).

17 (97) Richard Nixon's Statement on Transmitting a Special Message to the Congress Outlining the  
18 1972 Environmental Program, 50 PUB. PAPERS 183 (Feb. 8, 1972).

19 (98) Id. at 182-83.

20 (99) See YAFFEE, supra note 68, at 49.

21 (100) Id.

22 (101) See H.R. 37, 93d Cong. (1973); see also 119 CONG. REC. 922 (Jan. 11, 1973) (statement of  
23 Rep. Dingell), reprinted in LEGISLATIVE HISTORY, supra note 2, at 72.

24 (102) See S. 1983, 93d Cong. (1973).

25 (103) See President Nixon's State of the Union Message to the Congress on Natural Resources and  
26 the Environment, 44 PUB. PAPERS RS 94, 101; see also H.R. 4758, 93d Cong. (1973); S. 1592,  
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1 93d Cong. (1973) (sponsored by Sen. Warren Magnuson (D-Wash.) and Sen. Mark Hatfield (R-  
2 Or.)).

3 (104) See SENATE COMM. ON INTERIOR & INSULAR AFF., 93d CONG., CONG. AND THE  
4 NATION'S ENVIRONMENT: ENVIRONMENTAL AND NATURAL RESOURCE AFFAIRS  
OF THE 93D CONGRESS 561 (Comm. Print 1950).

5 (105) 119 CONG. REC. 25,769 (July 24, 1973) (statement of Sen. Stevens), reprinted in  
6 LEGISLATIVE HISTORY, *supra* note 2, at 385.

7 (106) See Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm.  
8 on Env't. of the Senate Comm. on Commerce, 93d Cong. 108-11 (1973) [hereinafter 1973 Senate  
9 Hearings] (statement of Lawrence Jahn, Vice-President of the Wildlife Management Institute); see  
10 also George Wilson, Hill Vote Set on Bill to Save Animals from Extinction, WASH. POST, Sept.  
11 16, 1973, at A2.

12 (107) See YAFFEE, *supra* note 68, at 39-40, 42.

13 (108) *Id.*

14 (109) 16 U.S.C. [sections] 1538 (1994).

15 (110) 119 CONG. REC. 30,165 (Sept. 18, 1973) (statement of Rep. Grover), reprinted in  
LEGISLATIVE HISTORY, *supra* note 2, at 199.

16 (111) Editorial, Protecting Endangered Species, WASH. POST, June 26, 1973, at A22; see also  
17 Stephen Seater, Defenders of Wildlife, Protection of Wildlife, WASH. POST, July 4, 1973, at A27  
18 (arguing for federal oversight of endangered species legislation).

19 (112) 119 CONG. REC. 30,163 (Sept. 18, 1973) (statement of Rep. Dingell), reprinted in  
LEGISLATIVE HISTORY, *supra* note 2, at 194.

20 (113) 119 CONG. REC. 30,163 (Sept. 18, 1973) (statement of Sen. Williams), reprinted in  
21 LEGISLATIVE HISTORY, *supra* note 2, at 376.

22 (114) 119 CONG. REC. 25,670 (July 24, 1973) (statement of Rep. Stevens), reprinted in  
23 LEGISLATIVE HISTORY, *supra* note 2, at 361.

24 (115) 119 CONG. REC. 25,694 (July 24, 1973), reprinted in LEGISLATIVE HISTORY, *supra* note  
25 2, at 409-10.

26 (116) *Id.*

27 (117) 119 CONG. REC. 30,165 (Sept. 18, 1973) (statement of Sen. Grover), reprinted in  
28 LEGISLATIVE HISTORY, *supra* note 2, at 200.

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1 (118) H.R. REP. No. 93-412 (1973).

2 (119) 119 CONG. REC. 30,164 (Sept. 18, 1973) (statement of Rep. Dingell), reprinted in  
3 LEGISLATIVE HISTORY, supra note 2, at 196.

4 (120) 119 CONG. REC. 30,167-68 (Sept. 18, 1973), reprinted in LEGISLATIVE HISTORY, supra  
5 note 2, at 200.

6 (121) See 119 CONG. REC. 30,157-68 (Sept. 18, 1973), reprinted in LEGISLATIVE HISTORY,  
7 supra note 2, at 180-205.

8 (122) H.R. CONF. REP. No. 93-740, at 2 (1973), reprinted in 1973 U.S.C.C.A.N. 3001, 3001-07.

9 (123) Compare H.R. 37 [sections] 3(11), 93d Cong. (1973) with S. 1983 [sections] 3(15), 93d  
10 Cong. (1973).

11 (124) H.R. CONF. REP. No. 93-740 (1973), reprinted in 1973 U.S.C.C.A.N. 3001, 3001-07; see  
12 also 119 CONG. REC. 42,912 (Dec. 20, 1973) (statement of Rep. Dingell), reprinted in  
LEGISLATIVE HISTORY, supra note 2, at 480.

13 (125) 119 CONG. REC. 42,535 (Dec. 19, 1973), reprinted in LEGISLATIVE HISTORY, supra  
14 note 2, at 474.

15 (126) 119 CONG. REC. 42,912 (Dec. 20, 1973) (statement of Rep. Dingell), reprinted in  
16 LEGISLATIVE HISTORY, supra note 2, at 479-80.

17 (127) 119 CONG. REC. 42,915-16 (Dec. 20, 1973), reprinted in LEGISLATIVE HISTORY, supra  
18 note 2, at 483-85.

19 (128) Coincidentally, three of these four representatives were not re-elected in 1974. See  
20 Biographical Directory of the U.S. Congress (visited Dec. 5, 1998) <[http://bioguide.congress.  
gov/](http://bioguide.congress.gov/)>.

21 (129) President Nixon's Statement on Signing the Endangered Species Act of 1973, 374 PUB.  
22 PAPERS 1027, 1027-28 (Dec. 28, 1973).

23 (130) Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16  
24 U.S.C. [subsections] 1531-.1544 (1994)).

25 (131) YAFFEE, supra note 68, at 48.

26 (132) Garrett, supra note 87, at 130.

27 (133) Saving the World's Wildlife, WASH. POST, Feb. 19, 1973, at A14.

28 (134) See HAYS, supra note 69, at 57-58.

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1 (135) President Nixon's Statement on Transmitting a Special Message to the Congress Outlining the  
2 1972 Environmental Program, 50 PUB. PAPERS 173 (Feb. 8, 1972).

3 (136) The consideration and passage of the ESA proceeded the Saturday Night Massacre and the  
4 beginning of the fight over the Nixon tapes. Nixon resigned on August 8, 1974. See STANLEY  
5 KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 383442,  
547- 48 (1990).

6 (137) See John B. Flippen, The Nixon [Administration](#), Timber, and the Call of the Wild, 19  
7 ENVTL. HIST. REV. 37 (1995) (arguing that Nixon's commitment to the environment was  
insincere and opportunistic).

8 (138) 1973 Senate Hearings, *supra* note 106, at 50-148.

9 (139) *Id.* at 122-23 (statement of Maxwell Rich, Executive Vice-President of the National Rifle  
10 Association).

11 (140) *Id.* at 106, 108, 127 (statements of John Gottschalk, Executive Vice President of the  
12 International Association of Game, Fish, and Conservation Commissioners; Lawrence Jahn, Vice  
13 President of the Wildlife Management Institute; and James Sharp, [attorney](#) for the Fur Conservation  
Institute).

14 (141) Endangered Species: Hearings on H.R. 37 and Seven Identical Bills Before the Subcomm. on  
15 Fisheries and Wildlife Conservation and the Env't of the House Comm. on Merchant Marine and  
16 Fisheries, 93d Cong. 1 (1973) (statement of Rep. Dingell).

17 (142) Protecting Endangered Species, WASH. POST, June 26, 1973, at A22.

18 (143) YAFFEE, *supra* note 68, at 51.

19 (144) *Id.*; Garrett, *supra* note 87, at 130.

20 (145) 119 CONG. REC. 30,162-63 (Sept. 18, 1973) (statement of Rep. Dingell), reprinted in  
21 LEGISLATIVE HISTORY, *supra* note 2, at 193-94. 146 *Id.* (147) 119 CONG. REC. 922 (Jan. 11,  
22 1973) (statement of Rep. Dingell), reprinted in LEGISLATIVE HISTORY, *supra* note 2, at 72-73.

23 (148) 16 U.S.C. [sections] 1535 (1994).

24 (149) 119 CONG. REC. 25,668 (July 24, 1973) (statement of Sen. Tunney), reprinted in  
25 LEGISLATIVE HISTORY, *supra* note 2, at 359.

26 (150) 119 CONG. REC. 25,670 (July 24, 1973) (statement of Sen. Stevens), reprinted in  
27 LEGISLATIVE HISTORY, *supra* note 2, at 362.

28 (151) S. REP. No. 93-307, at 1 (1973).

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1 (152) ROCKY BARKER, SAVING ALL THE PARTS 19 (1993); see also YAFFEE, *supra* note  
2 68, at 54-56.

3 (153) This phrase was coined by Dennis Murphy, Director, Center for Conservation Biology,  
4 Stanford University. Charles C. Mann & Mark L. Plummer, The Butterfly Problem, ATLANTIC  
MONTHLY, Jan. 1992, at 49.

5 (154) 119 CONG. REC. 922 (Jan. 11, 1973) (statement of Rep. Dingell), reprinted in  
6 LEGISLATIVE HISTORY, *supra* note 2, at 72-73.

7 (155) 119 CONG. REC. 30,162 (Sept. 18, 1973) (statement of Rep. Sullivan), reprinted in  
8 LEGISLATIVE HISTORY, *supra* note 2, at 192.

9 (156) See, e.g., 119 CONG. REC. 25,692 (July 24, 1973) (statement of Sen. Roth), reprinted in  
10 LEGISLATIVE HISTORY, *supra* note 2, at 406.

11 (157) 119 CONG. REC. 25,693 (July 24, 1973) (statement of Sen. Roth), reprinted in  
12 LEGISLATIVE HISTORY, *supra* note 2, at 407.

13 (158) 119 CONG. REC. 25,675 (July 24, 1973) (statement of Sen. Williams), reprinted in  
14 LEGISLATIVE HISTORY, *supra* note 2, at 374.

15 (159) 16 U.S.C. [sections] 1541 (1994).

16 (160) *Id.*

17 (161) SMITHSONIAN INST., REPORT ON ENDANGERED AND THREATENED PLANT  
18 SPECIES OF THE UNITED STATES, H.R. Doc. No. 94-51 (1975), expanded and reprinted in  
19 EDWARD A. AYENSU & ROBERT A. DE FILIPPS, ENDANGERED AND THREATENED  
PLANTS OF THE UNITED STATES (1978).

20 (162) One major difference between the protection offered to plants and the protection offered to  
21 wildlife under the ESA is the lack of statutory "take" protection of plants under [sections] 9 of the  
ESA. 16 U.S.C. [sections] 1538 (1994).

22 (163) H.R. 4758, 93d Cong. (1973); S. 1592, 93d Cong. (1973).

23 (164) President Nixon's Statement on Signing the Endangered Species Act of 1973, 374 PUB.  
24 PAPERS 1027 (Dec. 28, 1973).

25 (165) Protecting Endangered Species, WASH. POST, June 26, 1973, at A22.

26 (166) The Dwindling Wolf Pack, WASH. POST, Aug. 7, 1973, at A18.

27 (167) George Wilson, Hill Vote Set on Bill to Save Animals from Extinction, WASH. POST, Sept.  
28 16, 1973, at A2.

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1 (168) Stephen R. Seater, Letter to the Editor: Protection of Wildlife, WASH. POST, July 4, 1973, at  
2 A27.

3 (169) VINSENZ ZISWILER, EXTINCT AND VANISHING ANIMALS: A BIOLOGY OF  
4 EXTINCTION AND SURVIVAL 1 (Fred & Pille Bunnell trans., Springer-Verlag ed., 1967)  
(1965).

5 (170) WOLFGANG ULLRICH, ENDANGERED SPECIES 6 (Erich Tylinek & Isabella Tylinek,  
6 trans.) (1971).

7 (171) Id.

8 (172) HARRY A. GOODWIN & J.M. GOODWIN, IUCN PAPER NO. 8, LIST OF MAMMALS  
9 THAT HAVE BECOME EXTINCT SINCE 1600 (1973).

10 (173) Id.

11 (174) See, e.g., S. REP. No. 93-412, at 9 (1973), reprinted in 1973 U.S.C.C.A.N. 2989, 2997  
12 (analyzing the effects of [sections] 7 in two sentences).

13 (175) The language referred to in this Senate bill was the identical language adopted in the ESA.  
14 119 CONG. REC. 25,689-90 (July 24, 1973) (statement of Sen. Tunney), reprinted in  
15 LEGISLATIVE HISTORY, supra note 2, at 398-99 (responding to a concern that [sections] 7 might  
stop the Army Corps of Engineers from building a road in Kentucky).

16 (176) 42 U.S.C. [subsections] 4321-4370(d) (1994).

17 (177) Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

18 (178) 1973 Senate Hearings, supra note 106, at 80 (statement of Thomas Garrett, wildlife director,  
19 Friends of the Earth).

20 (179) Bryan Norton, Biological Resources and Endangered Species: History, Values, and Policy, in  
21 PROTECTION OF GLOBAL BIODIVERSITY 247, 250 (Lakshman D. Guruswamy & Jeffrey A.  
22 McNeely eds., 1998).

23 (180) Id. at 251.

24 (181) Id.

25 (182) Id.

26 (183) See supra notes 19-26 and accompanying text (discussing recent Supreme Court decisions  
27 that have redefined the meaning of the terms "harm" and "jeopardy" under the ESA).

28 (184) 1973 Senate Hearings, supra note 106, at 114.

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- (185) COMMITTEE ON SCIENTIFIC ISSUES IN THE ENDANGERED SPECIES ACT, SCIENCE AND THE ENDANGERED SPECIES ACT 72-73 (1995) [hereinafter SCIENCE AND THE ESA].
- (186) Saving the World's Wildlife, WASH. POST, Feb. 19, 1973, at A14.
- (187) Id.
- (188) Protecting Endangered Species, WASH. POST, June 26, 1973, at A22.
- (189) The ESA defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. [sections] 1532(6) (1994). A "threatened species" is one "which is likely to become endangered species within the foreseeable future throughout all or a significant portion of its range." Id. [sections] 1532(20).
- (190) President Signs **Manpower** Bill, N.Y. TIMES, Dec. 29, 1973, at 13.
- (191) Austin Scott, Nixon Signs Bill, to Give States Manpower Funds, WASH. POST, Dec. 29, 1973, at A1.
- (192) President Signs Bill Reshaping Federal Manpower Programs, L.A. TIMES, Dec. 29, 1973, at 1.
- (193) Act of June 30, 1976, Pub. L. No. 94-325, 90 Stat. 724 (1976) (increasing appropriations \$7 million beyond what the Secretary of the Interior requested); see also LEGISLATIVE HISTORY, supra note 2, at 505-11.
- (194) 40 Fed. Reg. 47,505-06 (Oct. 9, 1975); see also 50 C.F.R. [sections] 17.11(I) (1976).
- (195) Hill v. Tennessee Valley Auth., 419 F. Supp. 753 (E.D. Tenn. 1976), rev'd, 549 F.2d 1064 (6th Cir. 1977), aff'd sub nom. Tennessee Valley Auth. (TVA) v. Hill, 437 U.S. 153 (1978).
- (196) 16 U.S.C. [sections] 1536(a)(2) (1994).
- (197) TVA, 437 U.S. at 161.
- (198) Id. at 185 n.31.
- (199) Id. at 173.
- (200) Endangered Species Act Oversight: Hearing Before the Subcomm. on Resource Protection of the Senate Comm. on Env't and Pub. Works, 95th Cong. 279 (1977) [hereinafter ESA Oversight Hearing] (statement of Lynn Seeber, General Manager of the TVA).
- (201) TVA, 437 U.S. at 153.



1 (202) Id. at 173.

2 (203) Id. at 174-87.

3 (204) Id. at 173.

4 (205) ESA Oversight Hearing, *supra* note 200, at 11.

5 (206) 124 CONG. REC. 9805 (Apr. 12, 1978) (statement of Sen. Wallop), reprinted in  
6 LEGISLATIVE HISTORY, *supra* note 2, at 922.

7 (207) 123 CONG. REC. 38,164 (Nov. 30, 1977) (Statement of Rep. Watkins), reprinted in  
8 LEGISLATIVE HISTORY, *supra* note 2, at 637.

9 (208) See Zygmunt J.B. Plater, The Embattled Social Utilities of the Endangered Species Act--A  
10 Noah Presumption and Caution Against Putting Gasmasks on the Canaries in the Coalmine, 27  
11 ENVTL. L. 845, 860 (1997).

12 (209) 123 CONG. REC. 38,164 (Nov. 30, 1977) (statement of Rep. Watkins), reprinted in  
13 LEGISLATIVE HISTORY, *supra* note 2, at 895-98, 1167-68.

14 (210) 16 U.S.C. [sections] 1531 (1994).

15 (211) Id. [sections] 1536(e).

16 (212) Id. [sections] 1536(e)(3)(G).

17 (213) Id. [sections] 1536(e)(5)(A).

18 (214) See Plater, *supra* note 208, at 858.

19 (215) S. REP. No. 96-151, at 14 (1979), reprinted in LEGISLATIVE HISTORY, *supra* note 2, at  
20 1403 (additional views of Sen. Baker).

21 (216) 125 CONG. REC. 14,573 (June 13, 1979) (statement of Sen. Sasser), reprinted in  
22 LEGISLATIVE HISTORY, *supra* note 2, at 1411.

23 (217) Energy and Water Development Appropriation Act of 1979, Pub. L. No. 96-69, 93 Stat. 437  
24 (codified as amended at 16 U.S.C. [sections] 1539 (1979)).

25 (218) 50 C.F.R. [sections] 17.11 (1999).

26 (219) 16 U.S.C. [sections] 1533(b)(1)(A) (1994).

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1 (220) MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL  
2 WILDLIFE LAW 263-64 (3d ed. 1983).

3 (221) Amending the Endangered Species Act of 1973: Hearing Before the Subcomm. on Resource  
4 Protection of the Senate Comm. on Env't and Pub. Works, 95th Cong. 85 (1978).

5 (222) HAYS, *supra* note 69, at 60.

6 (223) WILLIAM GRAF, WILDERNESS PRESERVATION AND THE SAGEBRUSH  
7 REBELLION (1990).

8 (224) *Id.* at 231 (quoting Ronald Reagan).

9 (225) Robust Economy and Buyout Boom Highlighted 1983, WALL ST. J., Jan. 2, 1984.

10 (226) HAYS, *supra* note 69, at 59-60.

11 (227) Endangered Species Act Oversight: Hearing Before the Subcomm. on Env'tl. Pollution of the  
12 Senate Comm. on Env't and Pub. Works, 97th Cong. 53 (1982).

13 (228) *Id.*

14 (229) *Id.*

15 (230) Thomas Lovejoy, Biodiversity: What is It?, in BIODIVERSITY II 7 (Marjorie L. Reaka-  
16 Kudla et al. eds., 1997); see also Richard Monastersky, The Rise of Life on Earth, 193 NAT'L  
17 GEOGRAPHIC, Mar. 1998, at 54.

18 (231) Edward Wilson, Threats to Biodiversity, SCL AM., Sept. 1989, at 108; see also SCIENCE  
19 AND THE ESA, *supra* note 185, at 71 (1995) (stating that the number of unclassified living species  
20 is thought to be from two to ten times the number that have been identified and named).

21 (232) SCIENCE AND THE ESA, *supra* note 185, at 5.

22 (233) *Id.* at 35.

23 (234) Wilson, *supra* note 167.

24 (235) SCIENCE AND THE ESA, *supra* note 185.

25 (236) *Id.* at 25.

26 (237) *Id.* at viii.

(238) Id. at 27-29; see also, Paul Martin, Prehistoric Overkill, in QUATERNARY EXTINCTIONS 354, 354-403 (Paul S. Martin & Richard G. Klein eds., 1984) (arguing that prehistoric human over-hunting contributed significantly to the Pleistocene-Holocene extinctions).

(239) SCIENCE AND THE ESA, supra note 185, at 1.

(240) Id. at 25.

(241) 50 C.F.R. [subsections] 17.11-17.12 (1997).

(242) U.S. Fish and Wildlife Service, Endangered Species Page (visited Mar. 3, 1999) [www.fws.gov/r9endspp/endspp.html](http://www.fws.gov/r9endspp/endspp.html)>.

(243) F. Stuart Chapin III et al., Biotic Control over the Functioning of Ecosystems, 277 Sci. 500, 500 (1997).

(244) NORMAN MYERS, A WEALTH OF Wind SPECIES 106-07 (1983).

(245) Id.; see also Ruth Patrick, Biodiversity: Why Is it Important?, in BIODIVERSITY II, supra note 230, at 15-24; STEPHEN R. KELLERT, THE VALUE OF LIFE (1996); Alan Randall, What Mainstream Economists Have to Say About the Value of Biodiversity, in BIODIVERSITY 217, 217-23 (Edward Wilson ed., 1988).

(246) ALBERT GORE, EARTH IN THE BALANCE 132 (1992).

(247) Id.

(248) Id. at 129.

(249) Id. at 129-30.

(250) Id. at 139 (1992); see also CAREY FOWLER, FOOD, POLITICS, AND THE Loss OF GENETIC DIVERSITY (1990).

(251) See PAUL EHRLICH, THE SCIENCE OF ECOLOGY (1987); see also Chapin III et al., supra note 243, at 500-03.

(252) HENRY DAVID THOREAU, THE JOURNAL OF HENRY D. THOREAU 221 (1856).

(253) 16 U.S.C. [sections] 1531(a)(3) (1994).

(254) GORE, supra note 246, at 245.

(255) See ENVIRONMENTAL PHILOSOPHY (Michael Zimmerman et al. eds., 1993).

(256) SCIENCE AND THE ESA, supra note 185, at 1.

(257) Id. at 4.

(258) Id.

(259) U.S. Fish & Wildlife Service, Endangered Species Page (visited Mar. 3, 1999) [www.fws.gov/r9endspp/endspp.html](http://www.fws.gov/r9endspp/endspp.html)>.

(260) Peter Kendall, Eagle Soaring Off Threatened List, CHI. TRIB., May 7, 1998, at 1.

(261) SCIENCE AND THE ESA, supra note 185, at 33.

(262) Jeffrey J. Rachlinski, Noah by the Numbers: An Empirical Evaluation of the Endangered Species Act, 82 CORNELL L. REV. 356, 383 (1997) (book review).

(263) Id.

(264) Joby Warrick, Babbitt Sets Plan to Pare Endangered Species List, WASH. POST, May 6, 1998, at A3.

(265) Id.

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On January 9, 2001 the U.S. Supreme Court issued a decision, Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers. The decision reduces the protection of isolated wetlands under Section 404 of the Clean Water Act (CWA), which assigns the U.S. Army Corps of Engineers (Corps) authority to issue permits for the discharge of dredge or fill material into "waters of the United States." Prior to the SWANCC decision, the Corps had adopted a regulatory definition of "waters of the U.S." that afforded federal protection for almost all of the

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1 nation's wetlands.

2  
3 The Supreme Court also concluded that the use of migratory birds to assert jurisdiction over the site  
4 exceeded the authority that Congress had granted the Corps under the CWA. The Court interpreted  
5 that Corps jurisdiction is restricted to navigable waters, their tributaries, and wetlands that are adja-  
6 cent to these navigable waterways and tributaries. The decision leaves "isolated" wetlands unpro-  
7 tected by the CWA. These wetlands are very significant to many wildlife populations, especially  
8 migratory waterfowl. This report examines the possible implications to wetlands that are important  
9 to waterfowl across the Nation.

10  
11 We considered other state and federal laws and regulations that would protect isolated wetlands in  
12 the absence of Section 404. The most significant Federal provision is Swampbuster, a provision of  
13 the Farm Bill that excludes agricultural producers from receiving federal subsidies if they destroy  
14 wetlands for crop production. We considered how factors responsible for wetland loss varied re-  
15 gionally. We especially focused on areas that are continentally important to waterfowl and we gen-  
16 erally assessed the consequences for the nation's wetlands as a whole.

17  
18 East Coast and Great Lakes states generally have laws that offer moderate to strong protection of  
19 isolated wetlands even in the absence of Section 404, although there are exceptions. Protection is  
20 weak to non-existent in the Mississippi Alluvial Valley (MAV) and Prairie Pothole Region (PPR).  
21 However, the majority of isolated wetlands located in these regions occur on agricultural land  
22 where most producers are enrolled in Farm Bill programs and wetlands are afforded some protec-  
23 tion under Swampbuster. In the western half of the country state wetland protection laws are gener-  
24 ally weaker and a high percentage of wetlands are found on non-agriculture land.

25  
26 In general, isolated wetlands play a minor role in meeting the needs of waterfowl in areas that are  
27 important for migration and wintering. In contrast, the SWANCC decision could have significant  
28 consequences for breeding waterfowl, especially in the PPR and migrating waterfowl, especially in

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the Rainwater Basin. Within these states, Section 404 and Swampbuster represent complimentary wetland protection programs that have proven highly effective in reducing wetland loss. As a result, Swampbuster now remains as the only effective legal or regulatory deterrent to wetland drainage.

#### Corps of Engineers and EPA Guidance Memorandum on Supreme Court Ruling Concerning CWA Jurisdiction over Isolated Waters

The guidance identifies intrastate lakes, rivers, streams, mudflats, sandflats, wetland sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, formerly considered waters of the United States under the criteria of use by migratory birds or an effect on interstate or foreign commerce, as being **potentially** affected by SWANCC. The guidance further directs COE field offices to seek legal counsel on specific cases involving such wetlands because jurisdiction under the CWA could still be asserted under other criteria, for example:

- if use, degradation, or destruction of isolated waters could affect other “waters of the United States”
- isolated and intrastate navigable waters if their use, degradation, or destruction could affect interstate or foreign commerce
- impoundments of these waters.

Based on this, the following types of waters are not affected by the SWANCC decision:

- All waters which are currently used, or were used in the past, or maybe susceptible to use, in interstate or foreign commerce, including tidal waters
- All interstate waters, including interstate wetlands
- All impoundments of waters otherwise defined as waters of the United States
- All tributaries to the above waters
- Territorial seas
- Wetlands adjacent (bordering, contiguous, or neighboring) to other waters of the United States; wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are still “adjacent”.)

FHWA Divisions can expect the Corps to continue to exert CWA jurisdictional authority over all wetlands adjacent to navigable or interstate waters and their tributaries to the highest reach of the



1 drainage, including any adjacent wetlands that form the border of, or are in reasonable proximity to,  
2 other waters of the United States. These include sloughs, cutoffs, and oxbows which are on active  
3 floodplains, or wetlands which are within high water elevations of large interstate lakes, such as the  
4 Great Lakes, or large intrastate lakes, such as the Great Salt Lake. Other isolated, intrastate waters,  
5 such as prairie potholes and vernal pools, may become excluded from jurisdiction, however, these  
6 ecosystems are wetlands by ecological definition and are subject to requirements of Executive Or-  
7 der 11990.

8  
9 Until further interpretation is made and possible case law history is developed, we continue to rec-  
10 ommend that all isolated wetlands be considered as potentially jurisdictional, unless the Corps Dis-  
11 trict office advises to the contrary. Ideally jurisdictional calls would occur during the very early  
12 stages of project coordination. We will also recommend that the Corps consider making program-  
13 matic determinations in areas dominated by isolated waters. This could eliminate the need to ana-  
14 lyze individual isolated wetlands on a project-by-project basis for Section 404 permit purposes.  
15 However, Executive Order 11990, Protection of Wetlands, still applies to these wetlands. We,  
16 therefore, continue to recommend that all wetlands that could be potentially affected by a highway  
17 proposal be adequately identified and assessed for probable impacts.

18  
19 The FHWA will not apply Executive Order 11990 to drainage ditches, either highway or for other  
20 purposes, which were not originally excavated in waters of the United States (as currently defined),  
21 or to sites exhibiting wetland characteristics which are solely caused and supported by human ac-  
22 tivities, such as but not limited to, stormwater runoff which is concentrated by man-made ditches or  
23 agricultural irrigation leakage, and which are not considered jurisdictional waters of the United  
24 States by the Corps of Engineers.

25  
26 Divisions should contact the local Corps of Engineers field offices to determine how the new juris-  
27 dictional limits under SWANCC may be specifically interpreted on a local basis. If issues on the  
28 jurisdictional status of isolated wetlands arise, please contact Paul Garrett, 303-969-5772x332

([pgarrett@fhwa.dot.gov](mailto:pgarrett@fhwa.dot.gov)) , Fred Bank, 202-366-5004, ([fbank@fhwa.dot.gov](mailto:fbank@fhwa.dot.gov)) , or Fred Skaer, (202) 366-2058, ([fskaer@fhwa.dot.gov](mailto:fskaer@fhwa.dot.gov)).

**"ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND SUBJECT TO THE EXPEDITED HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE."**

**Authorities of Sec. 2326 Perfected Title Law. 1881.**

**JUDICIAL DETERMINATION OF RIGHT OF POSSESSION**

Sec. 2326 “verified by the oath of any duly authorized agent or attorney in fact. Cognizant of the facts stated; oath of adverse claim before the clerk of any court of record of the United States”.

Pursuant to provisions of the General Mining Law of 1872 and amendments thereto.

§ 26. Locators’ rights of possession and enjoyment; exclusive right.

§ 29. Patents; ...the affidavits required made by authorized agent conversant with the facts.

§ 30. Adverse claims; judicial determination of right of possession;

§ 31. Oath: agent or attorney in fact, title may be verified by the oath of any duly authorized agent.

§ 33. Existing rights; all the rights and privileges conferred.

§ 40. Verification of affidavits before officer authorized to administer oaths within land district

§ 51. Vested and accrued rights; by priority of possession, rights vested and accrued,

...the possessors and owners of such vested rights shall be maintained and protected in the same;

**LOCATORS RIGHTS OF POSSESSION AND ENJOYMENT;**

**§ 1988. Proceedings in vindication of civil rights**

**CAUSE OF ACTION: EJECTMENT**

**Adverse Claims ...to their and their heirs and assigns use and behoof forever.**

Agricultural College Patent: 360 acres of land, May 1<sup>st</sup>, 1862, President Abraham Lincoln.

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1 United States of America State of California Patent: January 4<sup>th</sup>, 1875, Governor Newton Booth.  
2 April 8<sup>th</sup>, 1880 Location of the “Lost Confidence” lode mining claim (Iron Mountain mine, apex of  
3 the Shasta Copper belt, Flat Creek mining district). 1895 to present: Largest mine in California.  
4 Discoveries & Junior Locations. Battery storage & hydropower pump-storage reclamation and spe-  
5 cial uses.  
6 T.W. Arman, owner; John F. Hutchens, administrator, grantees agent and expert.  
7 In performance of the complete development of Iron Mountain mine, remission and prosecution of  
8 same under the General Mining Law and by Patent Title.  
9 Relocation of the Camden and Magee Agricultural College Land Patent of 1862.  
10  
11 Discoveries §336: Assays of diamond drill cores to 1700 ft by USGS in 1952; horizons of recover-  
12 able metals, junior locations recoverable by modern methods.  
13 Remediation of copper, cadmium, and zinc in the Flat Creek mining district.  
14  
15 Relocation by amendment; the Scott & Noble lode renamed Arman & Hutchens  
16 lode, i.e. the “Arman Consolidated lode mining claim”.  
17 Relocation of the Home Stake, Homestake Fraction, and Home Stake Extension No. 1 lode mining  
18 claims.  
19  
20 Relocation of the Fine Gold, Oversight, Foresight, Backsight, Red Star, Gold Bar, Owl, Grey Squir-  
21 rel, Crown Point, Pershing. Mountain Copper, Shasta Copper, Trinity Copper, Tehama Copper, and  
22 the Congress lode mining claims.  
23 Date: \_\_\_\_\_ Signature: \_\_\_\_\_  
24 s/ T.W. Arman; owner - operator, Iron Mountain Mines, Inc.  
25  
26 Where an agent commits an active trespass on behalf of his principal, such principal is a “joint tres-  
27 passers” with the agent. Williams v. Inman, 57 S.E. 1000, 1010, 1 Ca.App. 321.  
28

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1 Joint and Several Trespassers damages & ejectment;

2 *coram nobis incidental and peremptory mandamus*

4 Including an accounting of the damages. Leave for quo Warranto

5 *administrative and judicial mandamus.*

7 “Persons engaged in committing the same trespass are “joint and several trespassers,” and not “joint  
8 trespassers,” exclusively. Like persons liable on a joint and several contract, they may all be sued in  
9 one action, or one may be sued alone, and cannot plead the nonjoinder of the others in abatement;  
10 and so far is the doctrine of several liability carried that the defendants, where more than one are  
11 sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on  
12 several verdicts of guilty may assess different sums as damages.” The executive officer of a corpo-  
13 ration, who is the stockholder, and full management of its affairs, who's rights were violated by de-  
14 fendants who instigated and controlled the joint and several trespassers in willfully infringed com-  
15 plainants mine, and for bringing disrepute to the corporation, and violating environmental law to  
16 spoil said property, diminish its value, and claim a lien upon said property for recompensation for  
17 unnecessary arbitrary and capricious actions under color of law .

19 Because of the corporeal and perpetual injuries, including the damages found due complainant, on  
20 an accounting, a suit will lie against them to recover the property and the amount of such decree  
21 from them individually, when, through their control and influence, they caused the corporation to  
22 be unable to transfer its property and to declare and pay dividends pending the suit against it, by  
23 which it was rendered substantially yet falsely insolvent. See Saxlehner v. Elsner, 140 Fed. 938,  
24 941 adopting the definition I Lovejoy v. Murray , 3 Wall. 1, 18 L. Ed. 129.

26 **PETITION FOR REVIEW OF ABUSE OF PROCESS AND ABUSE OF DISCRETION BY**  
27 **FALSE & MALICIOUS PROSECUTION FOR CRIME OF INFAMY EX POST FACTO LAW**

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12. 1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript shall be borne by the respondent.

#### **PROCEEDINGS PURSUANT TO SECTION 1088.5**

13. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

14. (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

#### **THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE**

15. (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

1 16. (810.) Section Eight Hundred and Ten. When the action is brought upon the information or ap-  
2 plication of a private party, the Attorney General may require such party to enter into an undertak-  
3 ing, with sureties to be approved by the Attorney General, conditioned that such party or the sure-  
4 ties will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and  
5 expenses incurred in the prosecution of the action.

6 **§ 1985. Conspiracy to interfere with civil rights**

7 17. (3) Depriving persons of rights or privileges

8 If two or more persons in any State or Territory conspire or go in disguise on the highway or on the  
9 premises of another, for the purpose of depriving, either directly or indirectly, any person or class of  
10 persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or  
11 for the purpose of preventing or hindering the constituted authorities of any State or Territory from  
12 giving or securing to all persons within such State or Territory the equal protection of the laws; or if  
13 two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is law-  
14 fully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of  
15 the election of any lawfully qualified person as an elector for President or Vice President, or as a  
16 Member of Congress of the United States; or to injure any citizen in person or property on account  
17 of such support or advocacy; in any case of conspiracy set forth in this section, if one or more per-  
18 sons engaged therein do, or cause to be done, any act in furtherance of the object of such conspir-  
19 acy, whereby another is injured in his person or property, or deprived of having and exercising any  
20 right or privilege of a citizen of the United States, the party so injured or deprived may have an ac-  
21 tion for the recovery of damages occasioned by such injury or deprivation, against any one or more  
22 of the conspirators.

23 Where the plaintiff sued on behalf of himself and others, residents and property-holders of the city  
24 of Oakland, to set aside certain conveyances operating as a cloud upon the title to a tract of land oc-  
25 cupied by the city, and to obtain an injunction, etc., and the court below entered a judgment declar-  
26 ing the conveyances fraudulent and void, and enjoining the defendants from future alienations in  
27 respect to the land of the plaintiff, the relief in this particular being confined to the plaintiff alone,  
28 the Supreme Court held that there was no such community of interest between the plaintiff and

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1 those whom he represented in the action as entitled him to an injunction in their favor. *Gibbons v.*  
2 *Peralta*, 21 Cal. 632, 633.

3 383. (15.) Persons severally liable upon the same obligation or instrument, including the parties to  
4 bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or  
5 any of them be included in the same action, at the option of the plaintiff.  
6 Sureties, 1059.

7 384. All persons holding as tenants in common, joint tenants, or coparceners, or any number less  
8 than all, may jointly or severally commence or defend any civil action or proceeding for the en-  
9 forcement or protection of the rights of such party.

10 387. (659, 660, 661.) Any person may, before the trial, intervene in an action or proceeding, who  
11 has an interest in the matter in litigation, in the success of either of the parties, or an interest against  
12 both. An intervention takes place when a third person is permitted to become a party to an action or  
13 proceeding between other persons, either by joining the plaintiff in claiming what is sought by the  
14 complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding  
15 anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth  
16 the grounds Upon which the intervention rests, filed by leave of the court, and served upon the par-  
17 ties to the action or proceeding who have not appeared, and upon the attorneys of the parties who  
18 have appeared, who may answer or demur to it as if it were an original complaint. [Approved  
19 March 24; effect July 1, 1874.]

20  
21 **Intervention. Eminent domain, 1244.**

22 (1097.) Section Ten Hundred and Ninety-seven. When a peremptory mandate has  
23 been issued and directed to any inferior tribunal, corporation, Board, or person, if it  
24 appear to the Court that any member of such tribunal, corporation, or Board, or such  
25 person upon whom the writ has been personally served, has, without just excuse, re-  
26 fused or neglected to obey the same, the Court may, upon motion, impose a fine not  
27 exceeding one thousand dollars. In case of persistence in a refusal of obedience, the  
28

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1 Court may order the party to be imprisoned until the writ is obeyed, and may make  
2 any orders necessary and proper for the complete enforcement of the writ.

3  
4 1107. When an application is filed for the issuance of any prerogative writ, the appli-  
5 cation shall be accompanied by proof of service of a copy thereof upon the respondent  
6 and the real party in interest named in such application. The provisions of Chapter 5  
7 (commencing with Section 1010) of Title 14 of Part 2 shall apply to the service of the  
8 application. However, when a writ of mandate is sought pursuant to the provisions of  
9 Section 1088.5, the action may be filed and served in the same manner as an ordinary  
10 action under Part 2 (commencing with Section 307)

11 . Where the real party in respondent's interest is a board or commission, the service  
12 shall be made upon the presiding officer, or upon the secretary, or upon a majority of  
13 the members, of the board or commission. Within five days after service and filing of  
14 the application, the real party in interest or the respondent or both may serve upon  
15 the applicant and file with the court points and authorities in opposition to the grant-  
16 ing of the writ.

17 The court in which the application is filed, in its discretion and for good cause, may  
18 grant the application ex parte, without notice or service of the application as herein  
19 provided. The provisions of this section shall not be applicable to applications for the  
20 writ of habeas corpus, or to applications for writs of review of the Industrial Accident  
21 or Public Utilities Commissions.

22 1108. Writs of review, mandate, and prohibition issued by the Supreme Court, a court  
23 of appeal, or a superior court, may, in the discretion of the court issuing the writ, be  
24 made returnable, and a hearing thereon be had at any time.

25 1138. Parties to a question in difference, which might be the subject of a civil action,  
26 may, without action, agree upon a case containing the facts upon which the contro-  
27 versy depends, and present a submission of the same to any Court which would have  
28 jurisdiction if an action had been brought; but it must appear, by affidavit, that the

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1 controversy is real and the proceedings in good faith, to determine the rights of the  
2 parties. The Court must thereupon hear and determine the case, and render judg-  
3 ment thereon, as if an action were depending.

4 1139. Judgment must be entered as in other cases, but without costs for any proceed-  
5 ing prior to the trial. The case, the submission, and a copy of the judgment constitute  
6 the judgment roll.

7 1140. The judgment may be enforced in the same manner as if it had been rendered  
8 in an action of the same jurisdictional classification in the same court, and is in the  
9 same manner subject to appeal.

10 1159. Every person is guilty of a forcible entry who either:

11 2. Who, after entering peaceably upon real property, turns out by force, threats, or  
12 menacing conduct, the party in possession.

13 The "party in possession" means any person who hires real property and includes a  
14 boarder or lodger, except those persons whose occupancy is described in subdivision (b)  
15 of Section 1940 of the Civil Code.

16 1160. Every person is guilty of a forcible detainer who either:

17 1. By force, or by menaces and threats of violence, unlawfully holds and keeps the  
18 possession of any real property, whether the same was acquired peaceably or other-  
19 wise; or,

20 2. Who, in the night-time, or during the absence of the occupant of any lands, unlaw-  
21 fully enters upon real property, and who, after demand made for the surrender  
22 thereof, for the period of five days, refuses to surrender the same to such former occu-  
23 pant.

24 The occupant of real property, within the meaning of this subdivision, is one who,  
25 within five days preceding such unlawful entry, was in the peaceable and undisturbed  
26 possession of such lands.

1 1161. A tenant of real property, for a term less than life, or the executor or adminis-  
2 trator of his or her estate heretofore qualified and now acting or hereafter to be quali-  
3 fied and act, is guilty of unlawful detainer:

4  
5 “It has been justly thought a matter of importance to determine from what source the United States  
6 derives its authority... The question here proposed is whether our bond of union is a compact en-  
7 tered into by the states, or whether the Constitution is an organic law established by the People. To  
8 this we answer: ‘We the People... ordain and establish this Constitution’...

9 **WE NEED TO KNOW THE LINE ON WHICH TO DRAW THE LIMITS OF FEDERAL**  
10 **POWERS; WE WILL SO DETERMINE HERE!**

11 Therefore, to “establish certain limits not to be transcended by the government.”

12  
13 Given [mining's] unique political history, as well as the breadth of the authority that the [EPA] has  
14 asserted, the Court is obliged to defer not to the agency's expansive construction of the statute, but  
15 to Congress' consistent judgment to deny the [EPA] this power....

16  
17 “Full relief and restore possession to the party entitled thereto. a general verdict for plaintiff on a  
18 complaint which alleges that the plaintiff is entitled to the possession of certain described property,  
19 which is unlawfully detained by the defendant, and the possession of which the plaintiff prays to  
20 recover, is held by the United States Supreme Court to be sufficient.”

21  
22 “One Co-tenant may recover the whole estate in ejectment against strangers.”

23 King Solomon Co. v. Mary Verna Co. 22 Cal . App. 528, 127 P 129, 130

24  
25 “The owner is not liable for pollution of stream incidental to placer mining, or to washing iron ore.  
26 It is classed among non-actionable injuries. Nor will such use of the stream be enjoined even if an  
27 action lies, except in willful or extreme cases. Clifton Co. v. Pye 87 Ala. 468 6So 192. Hill v. King  
28 4 M.R. 533. 8 Cal. 337, Atchison v. Peterson 1 M.R. 583 20 Wall 501.

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1 California Statute Sec. 1426 7/1/09

2  
3 In the absence of clearly expressed legislative intent, retrospective operation will not be given to  
4 statutes, nor, in absence of such intent, will a statute be construed as impairing rights relied upon in  
5 past conduct when other legislation was in force. *Union Pacific R. Co. v. Laramie Stock Yards*,  
6 ante, p. 231 U. S. 190 .

7  
8 .. In all applications therefore, pending at the date of the passage of the Act of 1872, although the  
9 patents were not issued till afterward, they conveyed the surface-ground embrace by the interior  
10 boundaries of the survey, and the right to follow the vein as above indicated, and also all other  
11 veins, lodes, or ledges, throughout their entire depth, the top or apex of which lay inside of such  
12 surface-lines extended downward vertically, although such other veins, lodes, or ledges, might so  
13 far depart from a perpendicular in their course downward as to extend outside the vertical side-lines  
14 of the surface-location *provided*, that their right of possession to such outside parts of such other  
15 veins, lodes, or ledges was confined to such portions thereof as lay between vertical planes drawn  
16 downward through the end-lines of their locations, so continued in their direction that such planes  
17 would intersect such exterior parts of such veins, lodes, or ledges; no right being granted, however,  
18 to the claimant of a vein or lode which extended in its downward course beyond the vertical lines of  
19 his claim, to enter upon the surface of a claim owned or possessed by another.

### 21 ***U.S. Supreme Court Revives Citizen Suit Standing***

22 The U.S. Supreme Court has overturned a lower court's decision that had dismissed a Clean Water  
23 Act (CWA) citizen suit on the ground that the suit was "moot"

24 In the case, *Laidlaw Environmental Services (TOC), Inc. (Laidlaw)*, began to discharge treated  
25 wastewater from a treatment plant in 1987 under authority of a National Pollutant Discharge Elimination  
26 System (NPDES) permit issued by the South Carolina Department of Health and Environmental  
27 Control (DEHC). The facility repeatedly discharged higher concentrations of mercury than  
28 the permit allowed. In 1992, Friends of the Earth and others (FOE) notified Laidlaw of their inten-

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tion to file a citizen suit against it under Section 505(a) of the CWA after the expiration of the required 60-day notice period.

Before the expiration of the notice period, Laidlaw asked DEHC to file suit against it for the alleged violations. The DEHC did so, and the parties quickly entered into a settlement requiring Laidlaw to pay \$100,000 in civil penalties and to make “every effort” to comply with its permit obligations (in fact, the violations continued until January 1995). On June 12, 1992, FOE filed its citizen suit, alleging noncompliance with the NPDES permit and seeking declaratory and injunctive relief and an award of civil penalties. Laidlaw moved to dismiss the action on the ground that the citizen suit was barred under CWA Section 505(b)(1), which bars citizen suits where the U.S. or a state “has commenced and is diligently prosecuting a civil or criminal action” to require compliance. The federal district court held that DHEC’s action had not been “diligently prosecuted” and, therefore, FOE’s action was not barred by CWA Section 505(b)(1). Laidlaw also moved for summary judgment on the ground that FOE lacked “standing” to bring its suit because FOE’s members had not suffered any “injury in fact” from the violations. The district court denied this motion also, finding that FOE had standing to bring the suit based on affidavits from FOE members alleging harm to their interests. The court then rendered its decision, imposing a civil penalty of \$405,800 for the violations. Both FOE and Laidlaw appealed to the Court of Appeals for the Fourth Circuit. FOE claimed that the civil penalty was inadequate, and Laidlaw argued, among other things, that FOE lacked standing to bring the suit and that DEHC’s action qualified as diligent prosecution precluding FOE’s litigation. The court assumed without deciding that FOE had standing to bring the action, but then held that the case had become moot. The court stated that the elements of standing – injury, causation, and redressability – must exist at every stage of review, or else the action becomes moot. The court noted that the Supreme Court’s 1998 decision in *Steel Co. v. Citizens for a Better Environment*, meant that the “redressability” element of the standing test does not exist where the only remedy available to the citizen suit plaintiff would be civil penalties payable to the government, because such penalties would not redress any injury that the citizen has suffered. Because FOE could not receive money under the CWA for its injuries, the



1 court held, the action was moot. The court vacated the district court's order and remanded with in-  
2 structions to dismiss the action.

3 The U.S. Supreme Court (Court) reversed the Fourth Circuit's decision. The Court first observed  
4 that, although the Fourth Circuit had assumed that FOE had standing, the Court had an obligation to  
5 assure itself that FOE had standing at the outset of the litigation. The Court noted that, to have  
6 "standing" to bring an action in federal court, a plaintiff must show that: (1) it has suffered an "in-  
7 jury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or  
8 hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is  
9 likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.  
10 Laidlaw contended that no "injury in fact" existed because there was no proof of harm to the envi-  
11 ronment from the violations – a claim that had been accepted by the district court. The Court, how-  
12 ever, held that the relevant inquiry is not injury to the environment, but injury to the plaintiff. The  
13 Court held that "environmental plaintiffs adequately allege injury in fact when they [allege] that  
14 they use the affected area and are persons 'for whom the aesthetic and recreational values of the  
15 area will be lessened' by the challenged activity." The Court found that FOE members had demon-  
16 strated sufficient injury by claiming that they lived near Laidlaw's facility and avoided recreating in  
17 or near the waters to which Laidlaw discharged and, that, in some cases, home values were lowered  
18 because of concerns about pollution from the facility. The Court distinguished its 1990 holding in  
19 *Lujan v. National Wildlife Federation*, in which the Court had denied citizen suit standing to an en-  
20 vironmental group that challenged a government decision that would open public lands to mining  
21 activities. The Court stated that the plaintiff in that case did not survive the government's motion  
22 for judgment before trial "merely by offering '[claims] which state only that one of [the organiza-  
23 tion's] members uses unspecified portions of an immense tract of territory, on some portions of  
24 which mining activity has occurred or probably will occur by virtue of the governmental action.'"  
25 Similarly, in *Lujan v. Defenders of Wildlife* (1992), the plaintiffs lacked standing because their  
26 claim of injury rested on "'some day' intentions" to visit endangered species in foreign countries.  
27 In the case at hand, in contrast, the Court found "nothing 'improbable' about the proposition that a  
28 company's continuous and pervasive illegal discharges of pollutants into a river would cause

1 nearby residents to curtail their recreational use of that waterway and would subject them to other  
2 economic and aesthetic harms.” Because of the FOE members’ “reasonable concerns” about the  
3 effects of Laidlaw’s discharges, the Court held they had demonstrated an injury in fact.

4 Laidlaw next argued that, even if FOE had standing to seek injunctive relief, it lacked standing to  
5 seek civil penalties. Civil penalties offer no redress to private plaintiffs, Laidlaw argued, because  
6 they are paid to the government and, therefore, a citizen plaintiff can never have standing to seek  
7 them.

8 Although the Court agreed that a plaintiff must demonstrate standing separately for each form of  
9 relief sought, the Court disagreed with the argument “that citizen plaintiffs facing ongoing viola-  
10 tions never have standing to seek civil penalties” because payment of penalties to the government  
11 cannot redress the plaintiffs’ injuries. Rather, the Court stated, “[t]o the extent that [civil penalties]  
12 encourage defendants to discontinue current violations and deter them from committing future ones,  
13 they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence  
14 of ongoing unlawful conduct.” The Court deflected Laidlaw’s argument that its 1998 *Steel Co.* de-  
15 cision requires a different result by limiting that case to its particular facts: *Steel Co.*, the Court  
16 held, denies standing only where the citizen plaintiffs are seeking civil penalties for violations that  
17 have ended by the time of suit. The Court did allow that, in some cases, the deterrent effect of a  
18 claim for civil penalties may be so insubstantial that it cannot support citizen standing, but, it held,  
19 that was not the case here.

20 Having found that FOE had standing to bring its action, the Court turned to the question of moot-  
21 ness. Laidlaw argued that the case was moot because it had achieved substantial compliance in  
22 1992 and later shut down the facility in question. The Court observed that “a defendant claiming  
23 that its voluntary compliance moots a case bears the formidable burden of showing that it is abso-  
24 lutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” The Court  
25 was not satisfied with Laidlaw’s claim that the closure of the facility permanently prevented future  
26 violations, noting that Laidlaw still retained its NPDES permit. Because “[t]he effect of both Laid-  
27 law’s compliance and the facility closure on the prospect of future violations is a disputed factual  
28 matter,” the Court sent the case back to the district court for further consideration.

1 In a scathing dissent, Justice Scalia, joined by Justice Thomas, charged that the Court had created  
2 new standing law that will “place the immense power of suing to enforce the public laws in private  
3 hands.” Scalia’s dissent leaves no doubt that, in his view, at least, *Laidlaw* represents a significant  
4 rollback of the standing principles enunciated by the Court only a few years ago in the *Lujan* and  
5 *Steel Co.* cases discussed above. *Laidlaw* represents an ideological setback for Scalia, who authored  
6 those earlier cases. Implications: It appears that the pendulum has swung back in the direction of  
7 the Court’s support of citizen standing to enforce environmental laws. If, as the Court held, citizens  
8 may have standing without proving environmental injury, “injury in fact” may no longer be a mean-  
9 ingful hurdle for citizen plaintiffs. As Scalia stated in his dissent, under the Court’s “lenient stan-  
10 dard,” purely “subjective apprehensions” of environmental harm now may be sufficient to demon-  
11 strate injury in fact.

12 Further, *Steel Co.* no longer seems to be good law. As Scalia noted, the Court, “by approving the  
13 novel theory that public penalties can redress anticipated private wrongs, . . . has come close to  
14 ‘mak[ing] the redressability requirement vanish.’”

15 Importantly, *Laidlaw* was decided by a solid 7-2 majority of the Court. It seems clear, therefore,  
16 that the Court is re-thinking the significant limitations on citizen standing imposed by the two *Lujan*  
17 cases and *Steel Co.* Whether *Laidlaw* harkens a complete return to the easystanding days of the pre-  
18 1990s remains to be seen.

19 ***Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.***, 2000 U.S. Lexis  
20 501, 2000 WL 16307 (Jan. 12, 2000).

## 21 RCRA Citizen Suit for Injunctive Relief

### 22 1) Introduction

23 The Citizen Suit provisions of the Resource Conservation and Recovery Act are important. Through  
24 it a party can obtain injunctive relief to address contamination and can recover attorney fees and  
25 expert costs.

### 26 2) RCRA Citizen Suits for Injunctive Relief

27 The Citizen Suit provisions are set forth in Section 7002 and 7003 of the Resource Conservation  
28 and Recovery Act (RCRA), 42 U.S.C. Section 6972, where in subpart (a)(1)(B), it states that any

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1 person may commence a civil action on his own behalf or:[A]gainst any person ... and including  
2 any past or present generator, past or present transporter, or past or present owner or operator of a  
3 treatment, storage, or disposal facility, who has contributed or who is contributing to the past or  
4 present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste  
5 which may present an imminent and substantial endangerment to health or the environment.  
6 Thus, where an entity “may” present an “imminent and substantial endangerment” to “health or the  
7 environment” as a result of the disposal of any “solid or hazardous waste,” such a claim is permit-  
8 ted. These terms have been liberally interpreted. *Maine People’s Alliance v. Mallinckrodt, Inc.*, 471  
9 F. 3d 277 (1st Cir. 2006) (after first noting that at least four of its sister circuits have also construed  
10 the terms liberally, the court did so as well holding that “reasonable prospect of future harm” is  
11 adequate so long as the threat, as opposed to the harm, is near-term, and involves potentially serious  
12 harm, but not need be an emergency situation and does not require a showing an immediate threat  
13 of grave harm); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162 (D.C. Mo. 1985)  
14 (endangerment need not be immediate to be imminent; specific quantification of the endangerment  
15 not required, rather a consideration of all factors is proper based on the unique facts of each case;  
16 and, if an error is to be made in applying the endangerment standard, it must be made in favor of  
17 protecting the environment); *Paper Recycling, Inc. v. Amoco Oil Co.*, 856 F. Supp. 671, 678 (N.D.  
18 Ga. 1993) (“imminent and substantial endangerment ” to “health or the environment” requires only  
19 a showing that a risk of threatened harm is present, not that actual harm will immediately occur);ii  
20 *Lincoln Props., Ltd. v. Higgins*, 1993 WL 217429 (E.D. Cal. 1993) (merely need show a risk of  
21 threatened harm, not actual injury; remedy is not limited to emergency situations )iii. The fact that  
22 the disposal that created the endangerment happened years ago is of no matter—a claim can still be  
23 brought if the endangerment exists. *Main People’s Alliance, supra.*; *City of Toledo v. Beazer Mate-*  
24 *rials & Services, Inc.*, 833 F. Supp. 646 (N.D. Ohio 1993); *Gache v. Town of Harrison*, 813 F.  
25 Supp. 1037 (S.D.N.Y. 1993); *Nuckols v. National Heat Exchange Cleaning Corporation*, Case No.  
26 4:00CV1698 (N.D. Ohio 2000) (case prosecuted by the author in which Judge Economus held that  
27 former tenant’s contamination of leased property can be the basis of an endangerment claim).  
28

1 The types of waste covered under the Citizen Suit provisions are not confined to “hazardous  
2 waste”; rather, it includes “solid waste”, which is very broadly defined. 42 U.S.C. Section 6803  
3 (5) defines “hazardous waste” to include solid hazardous waste which may cause or significantly  
4 contribute to an increase in mortality or serious irreversible or incapacitating reversible illness or  
5 pose a substantial present or potential hazard to human health or the environment. 42 U.S.C. Sec-  
6 tion 6803 (27) defines “solid waste” to include “discarded material, including solid, liquid, semi-  
7 solid, or contaminated gaseous material resulting from industrial, commercial, mining and agricul-  
8 tural operations, and from community activities”. *Connecticut Costal Fisherman’s Ass’n. v. Rem-  
9 ington Arms Co. Inc.*, 989 F. 2d 1305 (2nd Cir. 1993) (discussion of hazardous and solid waste under  
10 the Citizen Suit provisions); *Zands v. Nelson*, 779 F.Supp. 1254 (S.D. Cal. 1991); *Paper Recycling*,  
11 *supra.* (gasoline included as solid waste); *Southern Fuel Co. v. Amoco Oil Co.*, 1994 U.S. Dist.  
12 LEXIS 15769 (D.Md. 8/23/94) (analysis of interplay between hazardous and solid waste provi-  
13 sions); *Lincoln, supra.*

14 Causation must, ultimately, be established between the endangerment and the defendant’s acts. *Ag-  
15 ricultural Excess v. ABD Tank & Pump Co.*, 878 F. Supp. 1091 (N. Ill 1995) (claim against a UST  
16 manufacturer); *First San Diego Properties v. Exxon Co.*, 859 F. Supp. 1313 (S.D. Cal. 1994) (no  
17 liability for mere “passive” owner of contaminated property). Liability is joint and several unless  
18 the defendant can establish that the damages are divisible and that there is a reasonable basis for an  
19 apportionment. *Maine People’s Alliance, supra.*; *Waste, Inc. Cost Recovery Group v. Allis  
20 Chalmers Corp.*, 51 F. Supp. 2d 936 (N.D. Ind. 1999); *United States v. Conservation Chem. Co.*,  
21 *supra.* Liability is strict, as is true under CERCLA, though there is legislative language that can be  
22 cited to the contrary. *United States v. Northeastern Pharm. & Chem. Co.*, 810 F. 2d 726 (8th Cir.  
23 1986); *Cox v. City of Dallas*, 256 F. 3d 281 (5th Cir. 2001) (court cites case law and legislative his-  
24 tory supportive of strict liability and cites contrary legislative history)<sup>iv</sup>. Jurisdiction over such ac-  
25 tion is granted to the United States District Court pursuant to that same subpart:

26 Any action under paragraph (a)(1) ... shall be brought in the district court for the district in which  
27 the alleged violation occurred or the alleged endangerment may occur. Any action brought under  
28 paragraph (a)(2) of this subsection may be brought in the district court for the district in which the

1 alleged violation occurred or in the District Court of the District of Columbia. *Sauers v. Pfiffner*, 29  
2 Env't Rep. Cas (BNA) 1716 (D. Minn. March 23, 1991) (venue proper where violation or endan-  
3 germent occurs).

4 The grant of jurisdiction extends to all parties, regardless of the amount at issue and in controversy  
5 and regardless of the citizenship of the parties; and, the court's power is broad, including the power  
6 to grant injunctive relief: The district court shall have jurisdiction, without regard to the amount in  
7 controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition,  
8 requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has  
9 contributed or who is contributing to the past or present handling, storage, treatment, transportation,  
10 or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to  
11 take such other action as may be necessary, or both, or to order the Administrator to perform the act  
12 or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties  
13 under section 6928(a) and (g) of this title.

14 The nature of the remedy, under a Citizen Suit, is injunctive in nature, which can include an order  
15 that the defendant is responsible for site investigation, monitoring and testing costs as well as an  
16 order barring further endangerment; however, such a claim cannot be brought for money damages,  
17 such as plaintiff's past cleanup costs. *Mehrig v. KFC Western, Inc.*, 516 U.S. 479 (1996)  
18 (CERCLA, not RCRA, provides the framework for recovery of past cleanup costs)<sup>v</sup>; *Interfaith*  
19 *Community Organization v. Honeywell Inc.*, 399 F. 3d 248 (3rd Cir. 2005) (defendant ordered to  
20 abate the endangerment by removal of the contamination); *Tanglewood E. Homeowner v. Charles-*  
21 *Thomas, Inc.*, 849 F. 2d 1568 (5th Cir. 1988) (the remedy package includes civil penalties, injunc-  
22 tive relief and attorney fees); *Walls v. Waste Resource Corp.*, 761 F. 2d 311 (6th Cir. 1985) (there is  
23 no private cause of action for economic compensation or punitive damage s); *Express Car Wash*  
24 *Corp. v. Irinaga Brothers, Inc.*, 967 F. Supp. 1188 (D. Or. 1997) (while declining to issue an in-  
25 junction requiring plaintiff to pay response costs that may be incurred in the future, the court noted  
26 that a request to require defendant to take additional action to address the contamination, including  
27 that it take over responsibility for the remediation, would be viable)<sup>vi</sup>; *cf. Southern Fuel Co., supra.*  
28 (cannot transform a claim for damages into one for equitable relief by requesting an injunction that



1 orders the performance of future abatement work because RCRA does not provide for the payment  
2 nt of restoration costs); *Fallowfield Dev. Corp. v. Strunk*, 1993 WL 157723 (E. D. Pa.) (order to  
3 remediate the site not permitted under RCRA, where CERCLA remedy was available). Damage  
4 claims can be asserted as separate counts with a request that the federal court exercise supplemental  
5 jurisdiction, pursuant to 28 U.S.C. Section 1367 (a) and (c), over such claims (such as state com-  
6 mon law claims for trespass, nuisance, etc.).

7 *Murray v. Bath Iron Works*, 867 F.Supp. 33 (D.Maine 1994)(claims under state law can be filed in  
8 federal court with Citizen Suit claim, as the state claims do not “substantially predominate”); *City of*  
9 *Toledo v. Beazer, supra.*; *Nuckols, supra.* (assertion of state common law claims for nuisance and  
10 trespass addressed); *but see Avondale Federal Savings Bank v. Amoco Oil Company*, 997 F. Supp.  
11 1073 (N.D. Ill., E. Div. 1998) (court declines exercise of supplemental jurisdiction after barring a  
12 RCRA Citizen Suit).

13 Costs, including attorney and expert fees, may be awarded to the prevailing or substantially prevail-  
14 ing party pursuant to 42 U.S.C. Section 6972 (e):

15 The court may award costs of litigation (including reasonable attorney and expert witness fees) to  
16 the prevailing or substantially prevailing party, whenever the court determines such an award is ap-  
17 propriate.

18 *Browder v. Moab*, 2005 LEXIS 22200 (10<sup>th</sup> Cir. 10/14/05) (court, after noting the dearth of case  
19 law construing the statute, reversed the trial court’s denial of attorney fees, noting, on remand, that  
20 while such award is discretionary, where a party has prevailed on at least one count, thereby chang-  
21 ing the legal relationship between the parties, that party qualifies for consideration of an award of  
22 fees); *Environmental Defense Fund v. EPA*, 1 F. 3<sup>rd</sup> 1254 (D.C. Cir. 1993) (fees granted to “prevail-  
23 ing” party, with an excellent discussion of that term and how request for fees should be analyzed);  
24 *Fallowfield Dev. Corp., supra.* (fee request denied, noting court’s granting of such claims have  
25 done so where, unlike here, the suit was brought to benefit a community, rather than an individual  
26 property).

27 Before a Citizen Suit can be filed, notice to potential defendants and the government (state and US  
28 EPA) must be provided, pursuant to subpart (b). The notice must be provided 60 days before suits

1 brought pursuant to (a)(1)(A) and 90 days for suits brought pursuant to (a)(1)(B). *Hallstrom v. Til-*  
2 *lamook County*, 493 U.S. 20 (1988) (promotes goal of resolving disputes without court involvement  
3 by providing both potentially responsible defendants and the government an opportunity to address  
4 the problem)<sup>viii</sup>; *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F. 2d 1320 (7<sup>th</sup> Cir.  
5 1992) (en banc); *Portsmouth Redevelopment & Housing Auth.v. BMI Apartments Assocs.*, 857 F.  
6 Supp. 1427 (D. Or. 1994). Interestingly, the filing of an amended complaint after the 90 day period  
7 may cure an original violation of the 90 day requirement). *Buggsi v. Chevron*, supra. (court retains  
8 jurisdiction because amended complaint was filed after expiration of 90 day period). Specifics  
9 about the notice (content, service of copies on the appropriate public officials, etc.) are set forth in  
10 40 C.F.R., Part 254.

11 Once the notice period has expired, the United States Attorney General and Director of the EPA  
12 must be served with the Complaint, where the claim is asserted pursuant to subsection (a)(1)(B). 42  
13 U.S.C. Section 6972 (b) (2) (F). *Murray v. Bath Iron Works Corp.*, supra. (no deadline for such ser-  
14 vice); *Petropoulos v. Columbia Gas of Ohio, Inc.*, 840 F. Supp. 511 (S.D. Ohio 1993).

15 A Citizen Suit claim cannot duplicate government action, provided such action is already com-  
16 menced and is being diligently prosecuted to resolve the endangerment. 42 U.S.C. Section 6972 (b)  
17 (1) (B), (b) (2) (B) and (b) (2) (C); *Meghrig, supra.*; *Supporters to Oppose Pollution, supra.* (EPA's  
18 actions precluded private RCRA claim; despite claim that such action had not, in fact, been success-  
19 ful in resolving the risk; collateral attack on the agency's strategy or tactics is not permitted);  
20 *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F. 2d 1146 (1<sup>st</sup> Cir. 00000.00000.936287.1  
21 1989); *City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971 (S.D. Ohio 1993); *Paper Recycling, su-*  
22 *pra.* (no bar to RCRA Citizen Suit where neither the federal nor state government had acted to rem-  
23 edy the contamination).

24 There is no statute of limitations set forth in the Citizen Suit provisions for claims by one private  
25 party against another; however, at least two circuit courts have held the five year statute of limita-  
26 tions set forth in 28 U.S.C. Section 2462<sup>viii</sup> applies. See *Public Interest Research Group of N.J. v.*  
27 *Powell Duffryn Terminals, Inc.*, 913 F. 2d 64 (3<sup>d</sup> Cir. 1990), *cert. denied* <sup>ix</sup>; *Sierra Club v. Chevron*

1 *U.S.A., Inc.*, 834 F. 2d 1517 (9<sup>th</sup> Cir. 1987); *But see Public Interest Research Group of New Jersey*  
2 *v. U.S. Metals Refining Co.*, 681 F. Supp. 237 (D.N.J. 1987) (no applicable statute of limitations).  
3 There is no right to a jury trial of the RCRA Citizen Suit claims; however, a jury can be requested  
4 for pendant and other claims. *Southern Fuel, supra*. (RCRA claims can be tried to judge and others  
5 to a jury).

### 6 3) Conclusion

7 A RCRA Citizen Suit can be an effective tool in addressing contamination of property, particularly  
8 in light of the broad nature of the injunctive relief that can be granted and the potential for recovery  
9 of attorney fees and expert costs. Due notice was given and has expired in this case.

10 i The court held that proof of a violation of an EPA standard or regulation is not required.

11 ii In *Paper Recycling*, the passage of six years of remediation efforts did not bar plaintiff's case because thousands of  
12 gallons of gasoline were still contaminating the ground.

13 iii A threat, the court noted, can be established even without proof of endangerment to human or other life forms.

14 *Id.*, fn. 30.

15 iv *Cox* also presents an excellent overview of the RCRA Citizen provisions.

16 v The court held that a RCRA Citizen Suit authorizes issuance of a mandatory injunction requiring the responsible  
17 party to "take action" by attending to the cleanup and disposal or a prohibitory injunction that restrains that party  
18 from any further violations of RCRA.

19 vi The court provides a comprehensive analysis of the limits to the injunctive relief that may be granted under the  
20 RCRA Citizen Suit provisions.

21 vii The court held that unlike a statute of limitations, RCRA's 60 day notice provision is not triggered by the violation  
22 giving rise to the action. Rather, plaintiff has full control as to when to send the notice. The court further discussed  
23 the limited exceptions to notice requirements.

24 viii The five year period in 28 U.S.C. Section 2462 utilizes an "accrual" trigger for commencement.

25 ix The court also held that the statute of limitations is tolled during the notice period.

26 Pollution is legally defined as the wrongful contamination of the atmosphere, water or soil  
27 to the material injury of the right of an individual. Air pollutants may be either particles or  
28 gases. They are also classified as primary, meaning they are created at a particular

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1 source, or secondary, meaning they result from transformation and reaction in the air. Air  
2 pollution may take the form of smoke, fumes, dust, gas or vapors, mist and odors. Noise is  
3 unwanted sound that produces unwanted effects. It is generally considered a form of pollu-  
4 tion and, due to major expansions of airport facilities, industrial activities, traffic arterials  
5 and the like, is recognized as a social problem, which may be the basis of a nuisance  
6 claim. Remedies include several generally accepted methods: (1) reducing noise at its  
7 source; (2) keeping it at a distance; and (3) absorbing it between its source and the re-  
8 ceiver

9 <http://definitions.uslegal.com/p/pollution/>

10 Without healthy water for drinking, cooking, fishing, and farming, the human race would perish.  
11 Clean water is also necessary for recreational interests such as swimming, boating, and water ski-  
12 ing. Yet, when Congress began assessing national water quality during the early 1970s, it found that  
13 much of the country's groundwater and surface water was contaminated or severely compromised.  
14 Studies revealed that the nation's three primary sources of water pollution—industry, agriculture,  
15 and municipalities—had been regularly discharging harmful materials into water supplies through-  
16 out the country over a number of years.

17 These harmful materials included organic wastes, sediments, minerals, nutrients, thermal pollutants,  
18 toxic chemicals, and other hazardous substances. Organic wastes are produced by animals and hu-  
19 mans, and include such things as fecal matter, crop debris, yard clippings, food wastes, rubber, plas-  
20 tic, wood, and disposable diapers. Such wastes require oxygen to decompose. When they are  
21 dumped into streams and lakes and begin to break down, they can deprive aquatic life of the oxygen  
22 it needs to survive.

23 Sediments may be deposited into lakes and streams through soil erosion caused by the clearing, ex-  
24 cavating, grading, transporting, and filling of land. Minerals, such as iron, copper, chromium, plati-  
25 num, nickel, zinc, and tin, can be discharged into streams and lakes as a result of various mining  
26 activities. Excessive levels of sediments and minerals in water can inhibit the penetration of  
27 sunlight, which reduces the production of photosynthetic organisms.

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1 Nutrients, like phosphorus and nitrogen, support the growth of algae and other plants forming the  
2 lower levels of the food chain. However, excessive levels of nutrients from sources such as fertilizer  
3 can cause eutrophication, which is the overgrowth of aquatic vegetation. This overgrowth clouds  
4 the water and smothers some plants. Over time, excessive nutrient levels can accelerate the natural  
5 process by which bodies of water evolve into dry land.

6 Thermal pollution results from the release of heated water into lakes and streams. Most thermal pol-  
7 lution is generated by power plant cooling systems. Power plants use water to cool their reactors  
8 and turbines, and discharge it into lakes and tributaries after it has become heated. Higher water  
9 temperatures accelerate biological and chemical processes in rivers and streams, reducing the wa-  
10 ter's ability to retain dissolved oxygen. This can hasten the growth of algae and disrupt the repro-  
11 duction of fish.

12 Toxic chemicals and other hazardous materials present the most imminent threat to water quality.  
13 The Environmental Protection Agency (EPA) has identified 582 highly toxic chemicals, which are  
14 produced, manufactured, and stored in locations across the United States. Some chemical plants in-  
15 cinerate toxic waste, which produces dangerous by-products like furans and chlorinated dioxins,  
16 two of the most deadly carcinogens known to the human race. Other hazardous materials are pro-  
17 duced or stored by households (motor oil, antifreeze, paints, and pesticides), dry cleaners (chlorin-  
18 ated solvents), farms (insecticides, fungicides, rodenticides, and herbicides), and gas stations and  
19 airports (fuel).

20 Water pollution regulation consists of a labyrinth of state and federal statutes, administrative rules,  
21 and common-law principles.

## 22 Statutory Law

23 Federal statutory regulation of water pollution has been governed primarily by three pieces of legis-  
24 lation: the Refuse Act, the Federal Water Pollution Control Act, and the Clean Water Act. The Riv-  
25 ers and Harbors Appropriations Act of 1899, 33 U.S.C.A. § 401 et seq., commonly known as the  
26 Refuse Act, was the first major piece of federal legislation regulating water pollution. The Refuse  
27 Act set effluent standards for the discharge of pollutants into bodies of water. An effluent standard  
28 limits the amount of pollutant that can be released from a specific point or source, such as a smoke-

1 stack or sewage pipe. The Refuse Act flatly prohibited pollution discharged from ship and shore  
2 installations.

3 The Refuse Act was followed by the Federal Water Pollution Control Act of 1948 (FWPCA), 33  
4 U.S.C.A. § 1251 et seq. Instead of focusing on sources of pollution through effluent standards, the  
5 FWPCA created water quality standards, which prescribed the levels of pollutants permitted in a  
6 given body of water. Where the Refuse Act concentrated on deterring specific types of polluters, the  
7 FWPCA concentrated on reducing specific types of pollution.

8 Since 1972, federal regulation of water pollution has been primarily governed by the Clean Water  
9 Act (CWA) 33 U.S.C.A. § 1251 et seq., which overhauled FWPCA. The CWA forbids any person  
10 to discharge pollutants into U.S. waters unless the discharge conforms with certain provisions of the  
11 act. Among those provisions are several that call upon the EPA to promulgate effluent standards for  
12 particular categories of water polluters.

13 To implement these standards, the CWA requires each polluter to obtain a discharge permit issued  
14 by the EPA through the National Pollutant Discharge Elimination System (NPDES). Although the  
15 EPA closely monitors water pollution dischargers through the NPDES, primary responsibility for  
16 enforcement of the CWA rests with the states. Most states have also drafted permit systems similar  
17 to the NPDES. These systems are designed to protect local supplies of groundwater, surface water,  
18 and drinking water. Persons who violate either the federal or state permit system face civil fines,  
19 criminal penalties, and suspension of their discharge privileges.

20 The CWA also relies on modern technology to curb water pollution. It requires many polluters to  
21 implement the best practicable control technology, the best available technology economically  
22 achievable, or the best practicable waste treatment technology. The development of such technol-  
23 ogy for nontoxic polluters is based on a cost-benefit analysis in which the feasibility and expense of  
24 the technology is balanced against the expected benefits to the environment.

25 The CWA was amended in 1977 to address the nation's increasing concern about toxic pollutants.  
26 Pursuant to the 1977 amendments, the EPA increased the number of pollutants it deemed toxic from  
27 nine to 65, and set effluent limitations for the 21 industries that discharge them. These limitations  
28



1 are based on measures of the danger these pollutants pose to the public health rather than on cost-  
2 benefit analyses.

3 Many states have enacted their own water pollution legislation regulating the discharge of toxic and  
4 other pollutants into their streams and lakes.

5 The mining industry presents persistent water pollution problems for state and federal governments.  
6 It has polluted over a thousand miles of streams in Appalachia with acid drainage. In response, the  
7 affected state governments now require strip miners to obtain licenses before commencing activity.  
8 Many states also require miners to post bonds in an amount sufficient to repair potential damage to  
9 surrounding lakes and streams. Similarly, the federal government, under the Mineral Leasing Act,  
10 30 U.S.C.A. § 201 et seq., requires each mining applicant to "submit a plan of construction,  
11 operation and rehabilitation" for the affected area, that takes into account the need for "restoration,  
12 revegetation and curtailment of erosion."

13 The commercial timber industry also presents persistent water pollution problems. Tree harvesting,  
14 yarding (the collection of felled trees), and road building can all deposit soil sediments into water-  
15 courses, thereby reducing the water quality for aquatic life. State governments have offered similar  
16 responses to these problems. For instance, clear-cutting (the removal of substantially all the trees  
17 from a given area) has been prohibited by most states. Other states have created buffer zones around  
18 particularly vulnerable watercourses, and banned unusually harmful activities in certain areas. En-  
19 forcement of these water pollution measures has been frustrated by vaguely worded legislation and  
20 a scarcity of inspectors in several states.

## 21 Common Law

22 State and federal water pollution statutes provide one avenue of legal recourse for those harmed by  
23 water pollution. The common-law doctrines of Nuisance, Trespass, Negligence, Strict Liability, and  
24 riparian ownership provide alternative remedies.

25 Nuisances can be public or private. Private nuisances interfere with the rights and interests of pri-  
26 vate citizens, whereas public nuisances interfere with the common rights and interests of the people  
27 at large. Both types of nuisance must result from the "unreasonable" activities of a polluter, and in-  
28 flict "substantial" harm on neighboring landowners. An injury that is minor or inconsequential will

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1 not result in liability under common-law nuisance. For example, dumping trace amounts of fertil-  
2 izer into a stream abutting neighboring property will not amount to a public or private nuisance.  
3 The oil and agricultural industries are frequently involved in state nuisance actions. Oil companies  
4 often run afoul of nuisance principles for improperly storing, transporting, and disposing of hazard-  
5 ous materials. Farmers represent a unique class of persons who fall prey to water pollution nui-  
6 sances almost as often as they create them. Their abundant use of fungicides, herbicides, insecti-  
7 cides, and rodenticides makes them frequent creators of nuisances, and their use of streams, rivers,  
8 and groundwater for irrigation systems makes them frequent victims.

9 Nuisance actions deal primarily with continuing or repetitive injuries. Trespass actions provide re-  
10 lief even when an injury results from a single event. A polluter who spills oil, dumps chemicals, or  
11 otherwise contaminates a neighboring water supply on one occasion might avoid liability under  
12 nuisance law but not under the law of trespass. Trespass does not require proof of a substantial in-  
13 jury. However, only nominal damages will be awarded to a landowner whose water supply suffers  
14 little harm from the trespass of a polluter.

15 Trespass requires proof that a polluter intentionally or knowingly contaminated a particular course  
16 of water. Yet, water contamination often results from unintentional behavior, such as industrial ac-  
17 cidents. In such instances, the polluter may be liable under common-law principles of negligence.  
18 Negligence occurs when a polluter fails to exercise the degree of care that would be reasonable un-  
19 der the circumstances. Thus, a landowner whose water supply was inadvertently contaminated  
20 might bring a successful lawsuit against the polluter for common-law negligence where a lawsuit  
21 for nuisance or trespass would fail.

22 Even when a polluter exercises the utmost diligence to prevent water contamination, an injured  
23 landowner may still have recourse under the doctrine of strict liability. Under this doctrine, pollut-  
24 ers who engage in "abnormally dangerous" activities are held responsible for any water contamina-  
25 tion that results. Courts consider six factors when determining whether a particular activity is ab-  
26 normally dangerous: the probability that the activity will cause harm to another, the likelihood that  
27 the harm will be great, the ability to eliminate the risk by exercising reasonable care, the extent to  
28

1 which the activity is uncommon or unusual, the activity's appropriateness for a particular location,  
2 and the activity's value or danger to the community.

3 The doctrine of strict liability arose out of a national conflict between competing values during the  
4 industrial revolution. This conflict pitted those who believed it was necessary to create an environ-  
5 ment that promoted commerce against those who believed it was necessary to preserve a healthy  
6 and clean environment. For many years, courts were reluctant to impose strict liability on U.S.  
7 businesses, out of concern over retarding industrial growth.

8 Since the early 1970s, courts have placed greater emphasis on preserving a healthy and clean envi-  
9 ronment. In *Cities Service Co. v. State*, 312 So. 2d 799 (Fla. App. 1975), the court explained that  
10 "though many hazardous activities ... are socially desirable, it now seems reasonable that they pay  
11 their own way." *Cities Service* involved a situation in which a dam burst during a phosphate mining  
12 operation, releasing a billion gallons of phosphate slime into adjacent waterways, where fish and  
13 other aquatic life were killed. The court concluded that this mining activity was abnormally danger-  
14 ous.

15 Some activities inherently create abnormally dangerous risks to abutting waterways. In such cases,  
16 courts do not employ a Balancing test to determine whether an activity is abnormally dangerous.  
17 Instead, they consider these activities to be dangerous in and of themselves. The transportation and  
18 storage of high explosives and the operation of oil and gas wells are activities courts have held to  
19 create inherent risks of abnormally dangerous proportions.

20 The doctrine of riparian ownership forms the final prong of common-law recovery. A riparian pro-  
21 prietor is the owner of land abutting a stream of water, and has the right to divert the water for any  
22 useful purpose. Some courts define the term useful purpose broadly to include almost any purpose  
23 whatsoever, whereas other courts define it more narrowly to include only purposes that are reason-  
24 able or profitable.

25 In any event, downstream riparian proprietors are often placed at a disadvantage because the law  
26 protects upstream owners' initial use of the water. For example, an upstream proprietor may con-  
27 struct a dam to appropriate a reasonable amount of water without compensating a downstream pro-  
28 prietor. However, cases involving thermal pollution provide an exception to this rule. For example,

1 downstream owners who use river water to make ice can seek injunctive relief to prevent upstream  
2 owners from engaging in any activities that raise the water temperature by even one degree Fahren-  
3 heit.

#### 4 Further readings

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#### 16 Cross-references

17 Environmental Law; Fish and Fishing; Law of the Sea; Mine and Mineral Law; Pollution; Riparian  
18 Rights; Solid Wastes, Hazardous Substances, and Toxic Pollutants; Tort Law; Water Rights.

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21  
22 How to thank TFD for its existence? Tell a friend about us, add a link to this page, add the site to  
23 iGoogle, or visit webmaster's page for free fun content.

24 <a href="http://legal-dictionary.thefreedictionary.com/Water+Pollution">Water Pollution</a>  
25

26 Federal pollution definition gets court challenge  
27  
28

1 "The National Center for Conservation Science & Policy has joined five other environmental  
2 groups in filing a lawsuit against the Environmental Protection Agency over a change in the Clean  
3 Water Act."

4 By Paul Fattig

5 Medford Mail Tribune

6 January 01, 2007

7 ASHLAND — The National Center for Conservation Science & Policy has joined five other envi-  
8 ronmental groups in filing a lawsuit against the Environmental Protection Agency over a change in  
9 the Clean Water Act.

10 Filed earlier this month, the lawsuit in the 9th Circuit Court of Appeals in San Francisco seeks to  
11 reverse the EPA's decision made earlier this year to redefine the word "pollutant" to exclude pesti-  
12 cides, explained Chad Woodward, water quality project manager for the Ashland-based center.

13 "If the rule is not contested, the Clean Water Act will allow pesticide applications directly to our  
14 drinking water sources," Woodward said in a prepared statement. "This would create unacceptable  
15 ecological and human health risks."

16 The center believes the EPA's decision could result in aerial spraying and other direct applications  
17 of pesticides into wetlands, streams and rivers, Woodward said.

18 The EPA had concluded that pesticide applications are not covered by the act because the Federal  
19 Insecticide Fungicide & Rodenticide Act label on the pesticides provided adequate protection

20 But Woodward countered that the warning labels on pesticides do not provide adequate regulatory  
21 safeguards.

22 "For the EPA to say that pesticides are not pollutants is like saying poison is good for you," said  
23 Charlie Tebbutt, an attorney for the Western Environmental Law Center and lead counsel for the  
24 petitioners. "The EPA is ignoring the requirements of the Clean Water Act and cannot go unchal-  
25 lenged."

26 If the decision is not changed, it would place fresh water, fish, wildlife and human populations at  
27 risk, according to the plaintiffs.

28 "This is not what the Clean Water Act intended," Tebbutt concluded.

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1 Joining the center in the legal challenge are Oregon Wild, Californians for Alternatives to Toxics,  
2 California Sportfishing Protection Alliance, Baykeeper and Saint John's Organic Farm. The groups  
3 represent a farm in Idaho and a cross section of environmental groups from California and Oregon.  
4

5 Alert: Ninth Circuit Rules Unaltered Groundwater Is a "Pollutant" Under the Clean Water Act  
6 April 18, 2003

7 Last week, the Ninth Circuit Court of Appeals ruled in Northern Plains Resource Council v. Fidel-  
8 ity Exploration and Development Company that unaltered groundwater produced in extracting coal  
9 bed methane ("CBM") and discharged into surface waters is a "pollutant" within the meaning of the  
10 Clean Water Act (the "Act"). While the factual context of the court's ruling is narrowly confined to  
11 CBM producers, the court's emphasis on the overall goals of the Act may have far-reaching impacts  
12 for discharge of unaltered groundwater by developers, excavation and trenching contractors, quarry  
13 operators, energy production facilities and mining companies.

14 Section 402 of the Act prohibits the discharge of any "pollutant" from a point source into "naviga-  
15 ble waters of the United States" without a National Pollution Discharge Elimination System  
16 ("NPDES") permit. 33 U.S.C. §§ 1311(a); 1342. The Act includes "industrial . . . waste discharged  
17 into water" as a "pollutant" and defines "pollution" as "man-made or man-induced alteration of the  
18 chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(6) and (19).  
19 Unpermitted discharges of such "pollutants" may result in civil or criminal liability under the Act.  
20 33 U.S.C. § 1319.

21 In Northern Plains Resource Council, an energy company, Fidelity Exploration & Development  
22 Company ("Fidelity"), extracted methane gas from coal seams located deep below the Powder  
23 River Basin in Montana. In extracting coal bed methane, Fidelity pumped groundwater to the sur-  
24 face and discharged it "unaltered" into the Tongue River without obtaining an NPDES permit. Al-  
25 though unaltered, the extracted groundwater had a "salty" chemical composition different from the  
26 chemistry of the river to which it was discharged.

27 The Montana Department of Environmental Quality took the position that Montana's program im-  
28 plementing the federal Clean Water Act exempted such unaltered groundwater from the Act's per-



1 mit requirements. Nevertheless, an environmental group called the Northern Plains Resource Coun-  
2 cil filed a "citizen suit," alleging that the unaltered groundwater constituted a "pollutant," and that  
3 the unpermitted discharge subjected Fidelity to liability. The district court ruled in favor of Fidelity,  
4 concluding that the water discharged from the CBM extraction did not fall with the Act's definition  
5 of "pollutant" since the water was not altered in any fashion and that Montana state law exempted  
6 the discharge of unaltered groundwater.

7 The Ninth Circuit reversed, addressing two issues on appeal: (1) whether the unaltered groundwater  
8 produced from the CBM extraction process was a "pollutant" within the meaning of the Act; and, if  
9 so, (2) whether Montana state law could exempt Fidelity from federal permitting requirements for  
10 discharge of a pollutant under the Act.

11 As to the first issue, the court concluded that the CBM water was a "pollutant" regulated by the Act.  
12 First, the court examined the plain language of the statute and reasoned that CBM water was a "pol-  
13 lutant" because it was an "industrial waste" even though it was unaltered groundwater with a natu-  
14 rally occurring salty chemical composition. The court observed that industrial waste includes "any  
15 useless byproduct derived from the commercial production and sale of goods and services." Second,  
16 the court found that the CBM water was a "pollutant" even without the addition of chemicals under  
17 EPA regulations governing "produced water" from gas extraction. The court rejected Fidelity's ar-  
18 gument that the unaltered groundwater was within the Act's limited exception for reinjection into a  
19 well isolated from other water bodies.

20 Most significantly, the court went beyond the actual definition of "pollutant," and examined the  
21 Act's policy goals and the definition of "pollution" to support its conclusion that CBM water was a  
22 "pollutant." Specifically, the court focused on the effect of the discharge on the receiving water, cit-  
23 ing the Act's "antidegradation policy" requiring state water quality standards to prevent further deg-  
24 radation of the nation's waters and the overall objective to "restore and maintain the chemical,  
25 physical and biological integrity of the nation's waters." The court found that Fidelity's discharge  
26 caused "pollution" under the Act because it altered the water quality of the Tongue River. In other  
27 words, a "man-induced" alteration "refers to the effect of the discharge on the receiving water; it  
28 does not require the discharged water be altered by man."

1 Having concluded that Fidelity's discharge of unaltered groundwater was subject to the Act, the  
2 court considered whether Montana state law provided an exemption. The court concluded that nei-  
3 ther EPA nor the State of Montana had the authority to create exemptions to federal statutory re-  
4 quirements for discharge of pollutants, such as the CBM water discharge, otherwise subject to per-  
5 mitting under the Act.

6 The Ninth Circuit's ruling in Northern Plains Resource Council has potential significance for devel-  
7 opers, excavation and trenching contractors, quarry operators, energy production facilities and min-  
8 ing companies with operations involving infiltrated or extracted groundwater. Unaltered groundwa-  
9 ter with "naturally occurring" constituents may still be considered a "pollutant," requiring NPDES  
10 permitting under the Act, if the discharge affects the chemical, physical or biological integrity of the  
11 receiving waters.

12  
13 The Environmental Law Department of Farella Braun + Martel LLP is among the largest and most  
14 experienced in the nation, with attorneys specializing in Clean Water Act compliance counseling,  
15 regulatory representation and enforcement defense, including defense of "citizen suits." Please con-  
16 tact the attorneys listed below, or any of our environmental attorneys, for more information.

17  
18 **October 23, 2006**

19 **FEDERAL DISTRICT COURT CREATES THREE PRONG POLLUTION**  
20 **EXCLUSION TEST**

21 Recently, a Federal District Court Judge in the Northern District of Texas, in *Evanston Insurance*  
22 *Company v. Adkins*, 2006 WL 2848054 (Oct. 04, 2006), enunciated a three prong test to be used in  
23 the interpretation of the ISO CGL Pollution Exclusion. In *Adkins*, TXI owned and operated a ce-  
24 ment plant. TXI hired Adkins, a welding and fabrication company, as an independent contractor for  
25 welding services at the cement plant. TXI sued Adkins in Texas state court for allegedly causing a  
26 fire at the cement plant. Evanston, Adkins' insurer, sought declaratory relief that its CGL policy  
27 issued to Adkins precluded coverage for TXI's claims.

28  
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1 As the basis of its coverage position and motion for summary judgment, Evanston asserted that the  
2 underlying lawsuit and TXI's claims for damages alleged merely economic damages not covered by  
3 the policy, or, alternatively, that four exclusions precluded coverage under the policy.

4 First, the Court addressed Evanston's argument that TXI's claims for "economic damages in the  
5 form of a gross business interruption loss" did not comprise "property damage." Essentially, Evans-  
6 ton argued that business interruption losses were not property damages, but rather economic losses  
7 not covered by the policy. The Court noted that the policy's definition of "property damage" in-  
8 cluded "loss of use of tangible property that is not physically injured." The Court observed that  
9 while TXI did indeed use the term "economic damages" in its pleadings, the Court stated that it  
10 must focus its analysis on the factual allegations that show the origin of the damages, rather than on  
11 the legal theories asserted. Finding that the underlying lawsuit alleged that Adkins' negligence  
12 caused the fire that resulted in physical damage to the plant where production of materials necessary  
13 for the manufacture of cement resulted in the loss of use of that property for 27 days constituted  
14 covered "property damage" for loss of use of that property.

15 Next, the Court addressed Evanston's reliance upon the Pollution Exclusion. Evanston argued that  
16 the welding slag which caused the fire was a pollutant which triggered the Pollution Exclusion. The  
17 Court first examined precedent which defines what constitutes a "pollutant." Noting that the terms  
18 "irritant" and "contaminant" are overly broad, the Court stated that, without some limiting princi-  
19 ple, the Pollution Exclusion would extend far beyond its intended scope. The *Adkins* Court noted  
20 the Fifth and Seventh Circuits' "common sense" approach when interpreting the Pollution Exclu-  
21 sion. From the Fifth Circuit's opinion in *Certain Underwriters at Lloyd's London v. C.A. Turner*  
22 *Construction Company*, 112 F.3d 184 (1997), the *Adkins*' Court advocates a three prong test to ana-  
23 lyze pollution claims.

24 □ "First, the court should determine whether the substance at issue falls within the insurance pol-  
25 icy's literal definition of pollutant. If it does not, then no pollutant exclusion would apply, and no  
26 analysis is necessary. If, however, the substance falls within the policy's literal definition of pollut-  
27 ant," then the analysis proceeds to the second prong; "then, the court must next determine whether  
28 it caused the damages in the underlying insurance claim."

1 “The clause excludes coverage for expenses ‘arising out of’ or ‘as a result of’ the ‘discharge, dis-  
2 persal, seepage, migration, release, escape or placement of pollutants.’ . . . If the substance did not  
3 cause the damages in the underlying claim, then no pollution exclusion applies, despite the sub-  
4 stance meeting the literal definition of pollutant. . . . If the substance at issue falls within the literal  
5 definition of pollutant, and it caused the damages in the underlying claim, the court should make a  
6 third inquiry: . . .”; and “[W]hether common sense and the ‘reasonable, objective expectations of  
7 the insured’ at the time of contracting make it reasonable to trigger the pollutant exclusion.”  
8 Notably, the Northern District takes the *C.A. Turner* Court’s common sense analysis and boot straps  
9 the Massachusetts’ “reasonable expectations” test from *Western Alliance Insurance Company v.*  
10 *Gill*, 686 N.E.2d 997 (Mass. 1997), a test not adopted by any other Texas court.  
11 In reliance upon this “reasonable expectations” test, the Northern District determined that the  
12 Evanston Pollution Exclusion did not apply to the welding slag which purportedly started the fire  
13 and loss at issue.  
14 Although the Northern District did indeed find that welding slag was a pollutant and that the weld-  
15 ing slag/pollutant did cause the fire and loss made the basis of the claim, the Court noted that the  
16 insured’s reasonable expectation when purchasing the policy should be considered.  
17 [W]elding slag, which is present whenever one welds, or the molten metal particles produced dur-  
18 ing welding, qualifies as a “pollutant” under this policy, since such an interpretation would lead to  
19 clearly absurd results. Evanston issued a commercial general liability policy to Adkins, a welder. It  
20 would defy common sense and all reasonable expectations to interpret a welder’s general liability  
21 insurance policy as negated by its pollutant exclusion any time welding slag causes damage or in-  
22 jury. Such an interpretation would reduce the contractual promise of coverage to a dead letter. Ac-  
23 cordingly, this court finds that even though welding slag falls within the policy’s literal definition of  
24 a pollutant, and even though the slag is the alleged cause of the damages in the underlying suit, the  
25 pollutant exclusion does not apply to bar coverage based on the presence of welding slag.

## 26 27 **PROFESSIONAL SERVICES EXCLUSION RE-VISITED**

1 In *Mid-Continent Casualty Company v. Davis-Ruiz Corporation*, 2006 WL 2850067 (Oct. 03,  
2 2006), the Southern District of Texas had the opportunity to again review and construe the ISO Pro-  
3 fessional Services Exclusion. The Court noted that the Professional Services Exclusion failed to de-  
4 fine “professional services” which are excluded under the Professional Services Exclusion. Thus,  
5 the Court examined established precedent which defined “professional services” as:  
6 A professional must perform more than an ordinary task to perform a professional service. To qual-  
7 ify as a professional service, the task must arise out of acts particular to the individual’s specialized  
8 vocation. We do not deem an act a professional service merely because it is performed by a profes-  
9 sional. Rather, it must be necessary for the professional to use his specialized knowledge or training.  
10 The Court expressly found that the term “professional services” was not ambiguous. While the term  
11 is not specifically defined in the policy, the term is not ambiguous as it has been defined by the  
12 courts of Texas and is not reasonably subject to multiple interpretations.  
13 In applying the definition of “professional services,” the Court examined the relevant pleadings. It  
14 is noteworthy that the Court examined the pleadings under which the insured had been brought into  
15 the underlying lawsuit: the insured had been third-partied in under theories of contribution and in-  
16 demnity. The Court did not examine or review the claimant/plaintiff’s petition against the defendant  
17 as providing the factual basis and allegations to be construed against the policy under an eight cor-  
18 ners’ analysis. The Court examined and expressly addressed the factual claims and allegations made  
19 the basis of the defendant’s third-party petition against the insured. This analysis is noteworthy be-  
20 cause of the practical implications and often used practice that many third-party claims for indem-  
21 nity and contribution fail to include or assert any express or specific factual allegations – instead,  
22 common practice merely provides that a third-party plaintiff will simply assert that, in the off  
23 chance that the third-party plaintiff is found liable, that it is the fault and liability of the third party  
24 defendant and that the third-party defendant is liable for contribution and/or indemnity to the third-  
25 party plaintiff. Thus, the common practice of factually-sparse and broad allegations in a third-party  
26 petition for contribution and/or indemnity may lack the factual predicate to implicate coverage un-  
27 der a third-party defendant’s insurance policy.

Applying the “professional services” criteria to the factual allegations of the third-party petition, the Court found that the insured’s inspection of the subject tank and ladder was the performance of a professional service. The third-party plaintiff alleged that it had contracted with the insured to perform the inspection and the insured “performed the inspection in accordance” with the Master Service Agreement. The MSA required that “the Work shall be performed in a good and workmanlike manner by qualified . . . workers,” and the insured warranted that it was “experienced in the Work to be undertaken on behalf of” the third-party plaintiff and that the insured “possessed the skills and resources to complete the Work.” Because the insured performed the work it was paid to do and as based upon the insured’s experience and qualifications and specialized skills, the third party plaintiff’s factual allegations referring to the insured’s tank and ladder inspections constituted the rendition of “professional services” which were excluded from coverage under the policy.

4. Petitioner submits that due notice was given to both the California and United States Attorney General of a citizen suit by the private attorney general in the vindication of civil rights, that the action involves civil rights that are in the interests of California and United States citizens, and on behalf of a class, but the attorney generals are moot. Prior to this enactment, two or more of several co-tenants could not join in an action of ejectment, the interest of each being separate and distinct. *Df Johnson v. Sejmlbeda*, 5 Cal. 149; *Tkrockmorton v. Burr*, 5 Cal. 401; *Welch y. Sullivan*, 8 Cal. 187. Nor could a tenant in common maintain an action at law to recover his share of the rents and profits from his co-tenant. *Pico v. Columbet*, 12 Cal. 420. But that principle had no application to the case of money received by one tenant in common from sales of water or profits derived from the business of a ditch or mine. *Oooilenow v. Ewer*, 16 Cal. 461; *AM v. Love*, 17 Cal. 237. Under this section the right of one tenant in common to recover in an action of ejectment the possession of the entire tract as against all persons but his co-tenants, has been repeatedly held by the Supreme Court. *Tovchard v. Crow*, 20 Cal. 150; *Stark v. Barrett*, 15 Cal. 371; *Mahoney v. Van Winkle*, 21 Cal. 58.3; *Ooller v. Fett*, 30 Cal. 484. And executors and administrators can maintain such jointly with the other tenants in common in all cases where their testators or intestates could have done so until the administration of the estates they represent is closed, or the property distributed under decree of

1 the Probate Court. 1581 et seq.; Meeks v. Hahn, 20 Cal. 620; Toucliard v. Keyes, 21 Cal. 208;  
2 Jie.t/noMs v. Jfottmcr, 45 Cal. 631. If an estate should be sold in lots to different persons, the pur-  
3 chaser could not join in exhibiting one bill against the vendor for specific performance; but where  
4 there was a contract to convey with but one person, under which the purchaser conveyed his equita-  
5 ble interest of a moiety to each one of two persons, it was held that "these two persons might sue  
6 the original vendor for specific performance. The general rule used to be that unconnected parties  
7 may join in bringing a bill in equity, where there is one connected interest among them all, center-  
8 ing in the point in issue in the cause. Owen v. Frink, 24 Cal. 177.

9 Parties numerous, one suing for all. In March term, 1850, it was held that a suit ought not to be  
10 dismissed for defect of parties, where, although the complaint did not expressly allege that it was  
11 filed on behalf of the plaintiffs, and all others interested, etc., its scope was to protect the rights not  
12 only of the plaintiffs, but also of a numerous class, and from the nature of the enterprise, the condi-  
13 tion of the country, and the ever-changing locations of the people engaged in mining, it was, if not  
14 utterly impracticable, productive of manifest inconvenience and oppressive delays, to require that  
15 all parties should be brought into court. Von Schmidt v. Huntingdon, 1 Cal. 68.

16 But the Supreme Court have held that this section in the former Practice Act was intended to apply  
17 to suits in equity, and not to actions at law. Andrews v. Mokelumne Hill Co., 7 Cal. 333.

18 In equity the strict rule, that all persons materially interested must be parties, was always dispensed  
19 with, where it was impracticable or very inconvenient, as in case of a very numerous association in  
20 a joint concern— in effect a partnership. Cockburn v. Thompson, 16 Ves.321; Slo. &/ PI., Sec.  
21 135. Oormanv. RusuM, 14 Cal. 540.

22 California Code of Civil Procedure.

23 5. 1085. (a) A writ of mandate may be issued by any court to any inferior tribunal, corporation,  
24 board, or person, to compel the performance of an act which the law specially enjoins, as a duty re-  
25 sulting from an office, trust, or station, or to compel the admission of a party to the use and enjoy-  
26 ment of a right or office to which the party is entitled, and from which the party is unlawfully pre-  
27 cluded by such inferior tribunal, corporation, board, or person.

28 **THE COURT IS COMPELLED TO ISSUE THE WRIT OF POSSESSION EX PARTE**

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1 THE COURT IS COMPELLED TO FILE THE DECLARATION FOR EX PARTE WRIT  
2 THE COURT IS COMPELLED TO ORDER A WRIT OF EJECTMENT  
3 THE COURT IS COMPELLED TO DIRECT THE CLERK TO ISSUE THE WRIT IMMEDIATELY

4 6. 1086. The writ must be issued in all cases where there is not a plain, speedy, and adequate rem-  
5 edy, in the ordinary course of law. It must be issued upon the verified petition of the party benefi-  
6 cially interested.

7 7. 1087. The writ may be either alternative or peremptory. The alternative writ must command the  
8 party to whom it is directed immediately after the receipt of the writ, or at some other specified  
9 time, to do the act required to be performed, or to show cause before the court at a time and place  
10 then or thereafter specified by court order why he has not done so. The peremptory writ must be in  
11 a similar form, except that the words requiring the party to show cause why he has not done as  
12 commanded must be omitted.

13 8. 1088. When the application to the court is made without notice to the adverse party, and the writ  
14 is allowed, the alternative must be first issued; but if the application is upon due notice and the writ  
15 is allowed, the peremptory may be issued in the first instance. With the alternative writ and also  
16 with any notice of an intention to apply for the writ, there must be served on each person against  
17 whom the writ is sought a copy of the petition. The notice of the application, when given, must be  
18 at least ten days. The writ cannot be granted by default. The case must be heard by the court,  
19 whether the adverse party appears or not.

20 9. 1088.5. In a trial court, if no alternative writ is sought, proof of service of a copy of the petition  
21 need not accompany the application for a writ at the time of filing, but proof of service of a copy of  
22 the filed petition must be lodged with the court prior to a hearing or any action by the court.

23 10. 1089. On the date for return of the alternative writ, or on which the application for the writ is  
24 noticed, or, if the Judicial Council shall adopt rules relating to the return and answer, then at the  
25 time provided by those rules, the party upon whom the writ or notice has been served may make a  
26 return by demurrer, verified answer or both. If the return is by demurrer alone, the court may allow  
27 an answer to be filed within such time as it may designate. Nothing in this section affects rules of  
28 the Judicial Council governing original writ proceedings in reviewing courts.

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1                   **PETITION FOR ADJUDICATION AND JUDGMENT ON THE MERITS**

2   11. 1094. If no return be made, the case may be heard on the papers of the applicant. If the return  
3   raises only questions of law, or puts in issue immaterial statements, not affecting the substantial  
4   rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the  
5   case. If a petition for a writ of mandate filed pursuant to Section 1088.5 presents no triable issue of  
6   fact or is based solely on an administrative record, the matter may be determined by the court by  
7   noticed motion of any party for a judgment on the peremptory writ.

8                   **PETITION FOR REVIEW OF ABUSE OF PROCESS AND ABUSE OF DISCRETION**  
9                   **FALSE AND MALICIOUS PROSECUTION FOR CRIME OF INFAMY EX POST FACTO**

10   12. 1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final  
11   administrative order or decision made as the result of a proceeding in which by law a hearing is re-  
12   quired to be given, evidence is required to be taken, and discretion in the determination of facts is  
13   vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sit-  
14   ting without a jury. All or part of the record of the proceedings before the inferior tribunal, corpora-  
15   tion, board, or officer may be filed with the petition, may be filed with respondent's points and au-  
16   thorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute,  
17   the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded  
18   pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that sec-  
19   tion and where the transcript is necessary to a proper review of the administrative proceedings, the  
20   cost of preparing the transcript shall be borne by the respondent.

21                   **PROCEEDINGS PURSUANT TO SECTION 1088.5**

22   13. Where the party seeking the writ has proceeded pursuant to Section 1088.5, the administrative  
23   record shall be filed as expeditiously as possible, and may be filed with the petition, or by the re-  
24   spondent after payment of the costs by the petitioner, where required, or as otherwise directed by  
25   the court. If the expense of preparing all or any part of the record has been borne by the prevailing  
26   party, the expense shall be taxable as costs.

27   14. (b) The inquiry in such a case shall extend to the questions whether the respondent has pro-  
28   ceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was

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any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

#### **THE FINDINGS ARE NOT SUPPORTED BY THE EVIDENCE**

15. (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

16. (810.) Section Eight Hundred and Ten. When the action is brought upon the information or application of a private party, the Attorney General may require such party to enter into an undertaking, with sureties to be approved by the Attorney General, conditioned that such party or the sureties will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and expenses incurred in the prosecution of the action.

#### **§ 1985. Conspiracy to interfere with civil rights**

17. (3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any

1 right or privilege of a citizen of the United States, the party so injured or deprived may have an ac-  
2 tion for the recovery of damages occasioned by such injury or deprivation, against any one or more  
3 of the conspirators.

4 Where the plaintiff sued on behalf of himself and others, residents and property-holders of the city  
5 of Oakland, to set aside certain conveyances operating as a cloud upon the title to a tract of land oc-  
6 cupied by the city, and to obtain an injunction, etc., and the court below entered a judgment declar-  
7 ing the conveyances fraudulent and void, and enjoining the defendants from future alienations in  
8 respect to the land of the plaintiff, the relief in this particular being confined to the plaintiff alone,  
9 the Supreme Court held that there was no such community of interest between the plaintiff and  
10 those whom he represented in the action as entitled him to an injunction in their favor. *Gibbons v.*  
11 *Peralta*, 21 Cal. 632, 633.

12 383. (15.) Persons severally liable upon the same obligation or instrument, including the parties to  
13 bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or  
14 any of them be included in the same action, at the option of the plaintiff.

15 Sureties, 1059.

16 384. All persons holding as tenants in common, joint tenants, or coparceners, or any number less  
17 than all, may jointly or severally commence or defend any civil action or proceeding for the en-  
18 forcement or protection of the rights of such party.

19 387. (659, 660, 661.) Any person may, before the trial, intervene in an action or proceeding, who  
20 has an interest in the matter in litigation, in the success of either of the parties, or an interest against  
21 both. An intervention takes place when a third person is permitted to become a party to an action or  
22 proceeding between other persons, either by joining the plaintiff in claiming what is sought by the  
23 complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding  
24 anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth  
25 the grounds Upon which the intervention rests, filed by leave of the court, and served upon the par-  
26 ties to the action or proceeding who have not appeared, and upon the attorneys of the parties who  
27 have appeared, who may answer or demur to it as if it were an original complaint. [Approved  
28 March 24; effect July 1, 1874.]

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**Intervention. Eminent domain, 1244.**

(1097.) Section Ten Hundred and Ninety-seven. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, Board, or person, if it appear to the Court that any member of such tribunal, corporation, or Board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the Court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the Court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

1107. When an application is filed for the issuance of any prerogative writ, the application shall be accompanied by proof of service of a copy thereof upon the respondent and the real party in interest named in such application. The provisions of Chapter 5 (commencing with Section 1010) of Title 14 of Part 2 shall apply to the service of the application. However, when a writ of mandate is sought pursuant to the provisions of Section 1088.5, the action may be filed and served in the same manner as an ordinary action under Part 2 (commencing with Section 307)

. Where the real party in respondent's interest is a board or commission, the service shall be made upon the presiding officer, or upon the secretary, or upon a majority of the members, of the board or commission. Within five days after service and filing of the application, the real party in interest or the respondent or both may serve upon the applicant and file with the court points and authorities in opposition to the granting of the writ.

The court in which the application is filed, in its discretion and for good cause, may grant the application ex parte, without notice or service of the application as herein provided. The provisions of this section shall not be applicable to applications for the

writ of habeas corpus, or to applications for writs of review of the Industrial Accident or Public Utilities Commissions.

1108. Writs of review, mandate, and prohibition issued by the Supreme Court, a court of appeal, or a superior court, may, in the discretion of the court issuing the writ, be made returnable, and a hearing thereon be had at any time.

1138. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which would have jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real and the proceedings in good faith, to determine the rights of the parties. The Court must thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

1139. Judgment must be entered as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment constitute the judgment roll.

1140. The judgment may be enforced in the same manner as if it had been rendered in an action of the same jurisdictional classification in the same court, and is in the same manner subject to appeal.

1159. Every person is guilty of a forcible entry who either:

2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession.

The "party in possession" means any person who hires real property and includes a boarder or lodger, except those persons whose occupancy is described in subdivision (b) of Section 1940 of the Civil Code.

1160. Every person is guilty of a forcible detainer who either:

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,

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1 2. Who, in the night-time, or during the absence of the occupant of any lands, unlaw-  
2 fully enters upon real property, and who, after demand made for the surrender  
3 thereof, for the period of five days, refuses to surrender the same to such former occu-  
4 pant.

5 The occupant of real property, within the meaning of this subdivision, is one who,  
6 within five days preceding such unlawful entry, was in the peaceable and undisturbed  
7 possession of such lands.

8 1161. A tenant of real property, for a term less than life, or the executor or adminis-  
9 trator of his or her estate heretofore qualified and now acting or hereafter to be quali-  
10 fied and act, is guilty of unlawful detainer:

11 1. When he or she continues in possession, in person or by subtenant, of the prop-  
12 erty, or any part thereof, after the expiration of the term for which it is let to him or  
13 her; provided the expiration is of a nondefault nature however brought about without  
14 the permission of his or her landlord, or the successor in estate of his or her landlord,  
15 if applicable; including the case where the person to be removed became the occupant  
16 of the premises as a servant, employee, agent, or licensee and the relation of master  
17 and servant, or employer and employee, or principal and agent, or licensor and licen-  
18 see, has been lawfully terminated or the time fixed for occupancy by the agreement  
19 between the parties has expired; but nothing in this subdivision shall be construed as  
20 preventing the removal of the occupant in any other lawful manner; but in case of a  
21 tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

22 2. When he or she continues in possession, in person or by subtenant, without the  
23 permission of his or her landlord, or the successor in estate of his or her landlord, if  
24 applicable, after default in the payment of rent, pursuant to the lease or agreement  
25 under which the property is held, and three days' notice, in writing, requiring its pay-  
26 ment, stating the amount which is due, the name, telephone number, and address of  
27 the person to whom the rent payment shall be made, and, if payment may be made  
28 personally, the usual days and hours that person will be available to receive the pay-



1 ment (provided that, if the address does not allow for personal delivery, then it shall  
2 be conclusively presumed that upon the mailing of any rent or notice to the owner by  
3 the tenant to the name and address provided, the notice or rent is deemed received by  
4 the owner on the date posted, if the tenant can show proof of mailing to the name and  
5 address provided by the owner), or the number of an account in a financial institution  
6 into which the rental payment may be made, and the name and street address of the  
7 institution (provided that the institution is located within five miles of the rental  
8 property), or if an electronic funds transfer procedure has been previously  
9 established, that payment may be made pursuant to that procedure, or possession of  
10 the property, shall have been served upon him or her and if there is a subtenant in ac-  
11 tual occupation of the premises, also upon the subtenant.

12 The notice may be served at any time within one year after the rent becomes due. In  
13 all cases of tenancy upon agricultural lands, where the tenant has held over and re-  
14 tained possession for more than 60 days after the expiration of the term without any  
15 demand of possession or notice to quit by the landlord or the successor in  
16 estate of his or her landlord, if applicable, he or she shall be deemed to be holding by  
17 permission of the landlord or successor in estate of his or her landlord, if applicable,  
18 and shall be entitled to hold under the terms of the lease for another full year, and  
19 shall not be guilty of an unlawful detainer during that year, and the holding over for  
20 that period shall be taken and construed as a consent on the part of a tenant to hold  
21 for another year.

22 3. When he or she continues in possession, in person or by subtenant, after a neglect  
23 or failure to perform other conditions or covenants of the lease or agreement under  
24 which the property is held, including any covenant not to assign or sublet, than the  
25 one for the payment of rent, and three days' notice, in writing, requiring the  
26 performance of such conditions or covenants, or the possession of the property, shall  
27 have been served upon him or her, and if there is a subtenant in actual occupation of  
28 the premises, also, upon the subtenant. Within three days after the service of the no-

1 tice, the tenant, or any subtenant in actual occupation of the premises, or any mort-  
2 gagee of the term, or other person interested in its continuance, may perform the con-  
3 ditions or covenants of the lease or pay the stipulated rent, as the case may be, and  
4 thereby save the lease from forfeiture; provided, if the conditions and covenants of  
5 the lease, violated by the lessee, cannot afterward be performed, then no notice, as last  
6 prescribed herein, need be given to the lessee or his or her subtenant, demanding the  
7 performance of the violated conditions or covenants of the lease.

8 A tenant may take proceedings, similar to those prescribed in this chapter, to obtain  
9 possession of the premises let to a subtenant or held by a servant, employee, agent, or  
10 licensee, in case of his or her unlawful detention of the premises underlet to him or  
11 her or held by him or her.

12 4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore  
13 qualified and now acting, or hereafter to be qualified and act, assigning or subletting  
14 or committing waste upon the demised premises, contrary to the conditions or cove-  
15 nants of his or her lease, or maintaining, committing, or permitting the maintenance  
16 or commission of a nuisance upon the demised premises or using the premises for an  
17 unlawful purpose, thereby terminates the lease, and the landlord, or his or her succes-  
18 sor in estate, shall upon service of three days' notice to quit upon the person or per-  
19 sons in possession, be entitled to restitution of possession of the demised premises un-  
20 der this chapter.

21 5. When he or she gives written notice as provided in Section 1946 of the Civil Code  
22 of his or her intention to terminate the hiring of the real property, or makes a written  
23 offer to surrender which is accepted in writing by the landlord, but fails to deliver pos-  
24 session at the time specified in that written notice, without the permission  
25 of his or her landlord, or the successor in estate of the landlord, if applicable.

26 As used in this section, tenant includes any person who hires real property except  
27 those persons whose occupancy is described in subdivision (b) of Section 1940 of the  
28 Civil Code. This section shall remain in effect only until January 1, 2012,

1 and as of that date is repealed, unless a later enacted statute, that is enacted before  
2 January 1, 2012, deletes or extends that date.

3 1161. A tenant of real property, for a term less than life, or the executor or adminis-  
4 trator of his or her estate heretofore qualified and now acting or hereafter to be quali-  
5 fied and act, is guilty of unlawful detainer:

6 1. When he or she continues in possession, in person or by subtenant, of the prop-  
7 erty, or any part thereof, after the expiration of the term for which it is let to him or  
8 her; provided the expiration is of a nondefault nature however brought about without  
9 the permission of his or her landlord, or the successor in estate of his or her landlord,  
10 if applicable; including the case where the person to be removed became the occupant  
11 of the premises as a servant, employee, agent, or licensee and the relation of master  
12 and servant, or employer and employee, or principal and agent, or licensor and licen-  
13 see, has been lawfully terminated or the time fixed for occupancy by the agreement  
14 between the parties has expired; but nothing in this subdivision shall be construed as  
15 preventing the removal of the occupant in any other lawful manner; but in case of a  
16 tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

17 2. When he or she continues in possession, in person or by subtenant, without the  
18 permission of his or her landlord, or the successor in estate of his or her landlord, if  
19 applicable, after default in the payment of rent, pursuant to the lease or agreement  
20 under which the property is held, and three days' notice, in writing, requiring its pay-  
21 ment, stating the amount which is due, the name, telephone number, and address of  
22 the person to whom the rent payment shall be made, and, if payment may be made  
23 personally, the usual days and hours that person will be available to receive the pay-  
24 ment (provided that, if the address does not allow for personal delivery, then it shall  
25 be conclusively presumed that upon the mailing of any rent or notice to the owner by  
26 the tenant to the name and address provided, the notice or rent is deemed received by  
27 the owner on the date posted, if the tenant can show proof of mailing to the name and  
28 address provided by the owner), or the number of an account in a financial institution

1 into which the rental payment may be made, and the name and street address of the  
2 institution (provided that the institution is located within five miles of the rental  
3 property), or if an electronic funds transfer procedure has been previously  
4 established, that payment may be made pursuant to that procedure, or possession of  
5 the property, shall have been served upon him or her and if there is a subtenant in ac-  
6 tual occupation of the premises, also upon the subtenant.

7 The notice may be served at any time within one year after the rent becomes due.

8 4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore  
9 qualified and now acting, or hereafter to be qualified and act, assigning or subletting  
10 or committing waste upon the demised premises, contrary to the conditions or cove-  
11 nants of his or her lease, or maintaining, committing, or permitting the maintenance  
12 or commission of a nuisance upon the demised premises or using the premises for an  
13 unlawful purpose, thereby terminates the lease, and the landlord, or his or her succes-  
14 sor in estate, shall upon service of three days' notice to quit upon the person or per-  
15 sons in possession, be entitled to restitution of possession of the demised premises un-  
16 der this chapter.

17 As used in this section, tenant includes any person who hires real property except  
18 those persons whose occupancy is described in subdivision (b) of Section 1940 of the  
19 Civil Code.

20 1161.1. With respect to application of Section 1161 in cases of possession of commer-  
21 cial real property after default in the payment of rent:

22 (a) If the amount stated in the notice provided to the tenant pursuant to subdivision  
23 (2) of Section 1161 is clearly identified by the notice as an estimate and the amount  
24 claimed is not in fact correct, but it is determined upon the trial or other judicial de-  
25 termination that rent was owing, and the amount claimed in the notice was reasona-  
26 bly estimated, the tenant shall be subject to judgment for possession and the actual  
27 amount of rent and other sums found to be due. However, if (1) upon receipt of such a  
28 notice claiming an amount identified by the notice as an estimate, the

1 tenant tenders to the landlord within the time for payment required by the notice, the  
2 amount which the tenant has reasonably estimated to be due and (2) if at trial it is de-  
3 termined that the amount of rent then due was the amount tendered by the tenant or  
4 a lesser amount, the tenant shall be deemed the prevailing party for all purposes. If  
5 the court determines that the amount so tendered by the tenant was less than the  
6 amount due, but was reasonably estimated, the tenant shall retain the right to posses-  
7 sion if the tenant pays to the landlord within five days of the effective date of the  
8 judgment (1) the amount previously tendered if it had not been previously accepted,  
9 (2) the difference between the amount tendered and the amount determined by the  
10 court to be due, and (3) any other sums as ordered by the court.

11 (b) If the landlord accepts a partial payment of rent, including any payment pursu-  
12 ant to subdivision (a), after serving notice pursuant to Section 1161, the landlord,  
13 without any further notice to the tenant, may commence and pursue an action under  
14 this chapter to recover the difference between the amount demanded in that notice  
15 and the payment actually received, and this shall be specified in the complaint.

16 (c) If the landlord accepts a partial payment of rent after filing the complaint pursu-  
17 ant to Section 1166, the landlord's acceptance of the partial payment is evidence only  
18 of that payment, without waiver of any rights or defenses of any of the parties. The  
19 landlord shall be entitled to amend the complaint to reflect the partial payment  
20 without creating a necessity for the filing of an additional answer or other responsive  
21 pleading by the tenant, and without prior leave of court, and such an amendment  
22 shall not delay the matter from proceeding. However, this subdivision shall apply  
23 only if the landlord provides actual notice to the tenant that acceptance of the  
24 partial rent payment does not constitute a waiver of any rights, including any right  
25 the landlord may have to recover possession of the property.

26 (d) "Commercial real property" as used in this section, means all real property in  
27 this state except dwelling units made subject to Chapter 2 (commencing with Section  
28 1940) of Title 5 of Part 4 of Division 3 of the Civil Code, mobilehomes as defined in

1 Section 798.3 of the Civil Code, or recreational vehicles as defined in Section 799.24 of  
2 the Civil Code.

3 (e) For the purposes of this section, there is a presumption affecting the burden of  
4 proof that the amount of rent claimed or tendered is reasonably estimated if, in rela-  
5 tion to the amount determined to be due upon the trial or other judicial determination  
6 of that issue, the amount claimed or tendered was no more than 20 percent more or  
7 less than the amount determined to be due. However, if the rent due is contingent  
8 upon information primarily within the knowledge of the one party to the lease and  
9 that information has not been furnished to, or has not accurately been furnished to,  
10 the other party, the court shall consider that fact in determining the reasonableness of  
11 the amount of rent claimed or tendered pursuant to subdivision (a).

12 1161.2. (a) The clerk may allow access to limited civil case records filed under this  
13 chapter, including the court file, index, and register of actions, only as follows:

14 (1) To a party to the action, including a party's attorney.

15 (2) To any person who provides the clerk with the names of at least one plaintiff and  
16 one defendant and the address of the premises, including the apartment or unit num-  
17 ber, if any.

18 (3) To a resident of the premises who provides the clerk with the name of one of the  
19 parties or the case number and shows proof of residency.

20 (4) To any person by order of the court, which may be granted ex parte, on a showing  
21 of good cause.

22 (5) To any other person 60 days after the complaint has been filed, unless a defen-  
23 dant prevails in the action within 60 days of the filing of the complaint, in which case  
24 the clerk may not allow access to any court records in the action, except as provided in  
25 paragraphs (1) to (4), inclusive.

26 (b) For purposes of this section, "good cause" includes, but is not limited to, the gath-  
27 ering of newsworthy facts by a person described in Section 1070 of the Evidence Code.

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1 It is the intent of the Legislature that a simple procedure be established to request the  
2 ex parte order described in subdivision (a).

3 (c) Upon the filing of any case so restricted, the court clerk shall mail notice to each  
4 defendant named in the action. The notice shall be mailed to the address provided in  
5 the complaint. The notice shall contain a statement that an unlawful detainer com-  
6 plaint (eviction action) has been filed naming that party as a defendant, and that ac-  
7 cess to the court file will be delayed for 60 days except to a party, an attorney for one  
8 of the parties, or any other person who (1) provides to the clerk the names of at least  
9 one plaintiff and one defendant in the action and provides to the clerk the address,  
10 including any applicable apartment, unit, or space number, of the subject premises, or  
11 (2) provides to the clerk the name of one of the parties in the action or the case num-  
12 ber and can establish through proper identification that he or she lives at the subject  
13 premises.

14 The notice shall also contain a statement that access to the court index, register of ac-  
15 tions, or other records is not permitted until 60 days after the complaint is filed, ex-  
16 cept pursuant to an order upon a showing of good cause therefor. The notice shall con-  
17 tain on its face the name and telephone number of the county bar association  
18 and the name and telephone number of an office or offices funded by the federal Legal  
19 Services Corporation or qualified legal services projects that receive funds distributed  
20 pursuant to Section 6216 of the Business and Professions Code, that provide legal ser-  
21 vices to low-income persons in the county in which the action is filed. The  
22 notice shall state that these numbers may be called for legal advice regarding the case.  
23 The notice shall be issued between 24 and 48 hours of the filing of the complaint, ex-  
24 cluding weekends and holidays. One copy of the notice shall be addressed to "all occu-  
25 pants" and mailed separately to the subject premises. The notice shall not  
26 constitute service of the summons and complaint.  
27  
28



1 (d) Notwithstanding any other provision of law, the court shall charge an additional  
2 fee of fifteen dollars (\$15) for filing a first appearance by the plaintiff. This fee shall be  
3 added to the uniform filing fee for actions filed under this chapter.

4 (e) This section does not apply to a case that seeks to terminate a mobilehome park  
5 tenancy if the statement of the character of the proceeding in the caption of the com-  
6 plaint clearly indicates that the complaint seeks termination of a mobilehome park  
7 tenancy.

8 1161.5. When the notice required by Section 1161 states that the lessor or the land-  
9 lord may elect to declare the forfeiture of the lease or rental agreement, that declara-  
10 tion shall be nullified and the lease or rental agreement shall remain in effect if the  
11 lessee or tenant performs within three days after service of the notice or if the breach  
12 is waived by the lessor or the landlord after service of the notice.

13 1162a. In any case in which service or exhibition of a receiver's or levying officer's  
14 deed is required, in lieu thereof service of a copy or copies of the deed may be made as  
15 provided in Section 1162.

16 1164. No person other than the tenant of the premises and subtenant, if there be one,  
17 in the actual occupation of the premises when the complaint is filed, need be made  
18 parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff  
19 be nonsuited for the nonjoinder of any person who might have been made  
20 party defendant, but when it appears that any of the parties served with process, or  
21 appearing in the proceeding, are guilty of the offense charged, judgment must be ren-  
22 dered against him or her. In case a defendant has become a subtenant of the premises  
23 in controversy, after the service of the notice provided for by subdivision 2 of Section  
24 1161 of this code, upon the tenant of the premises, the fact that such notice was not  
25 served on each subtenant shall constitute no defense to the action. All persons who  
26 enter the premises under the tenant, after the commencement of the suit, shall  
27 be bound by the judgment, the same as if he or they had been made party to the ac-  
28 tion.

1 1165. Except as provided in the preceding section, the provisions of Part II of this  
2 Code, relating to parties to civil actions, are applicable to this proceeding.

3 1166. (a) The complaint shall:

4 (1) Be verified and include the typed or printed name of the person verifying the  
5 complaint.

6 (2) Set forth the facts on which the plaintiff seeks to recover.

7 (3) Describe the premises with reasonable certainty.

8 (4) If the action is based on paragraph (2) of Section 1161, state the amount of rent  
9 in default.

10 (5) State specifically the method used to serve the defendant with the notice or no-  
11 tices of termination upon which the complaint is based. This requirement may be sat-  
12 isfied by using and completing all items relating to service of the notice or notices in  
13 an appropriate Judicial Council form complaint, or by attaching a proof of service  
14 of the notice or notices of termination served on the defendant.

15 (b) The complaint may set forth any circumstances of fraud, force, or violence that  
16 may have accompanied the alleged forcible entry or forcible or unlawful detainer, and  
17 claim damages therefor.

18 (c) (1) In an action regarding residential property, the plaintiff shall attach to the  
19 complaint the following:

20 (A) A copy of the notice or notices of termination served on the defendant upon which  
21 the complaint is based.

22 (B) A copy of any written lease or rental agreement regarding the premises. Any  
23 addenda or attachments to the lease or written agreement that form the basis of the  
24 complaint shall also be attached. The documents required by this subparagraph are  
25 not required to be attached if the complaint alleges any of the following:

26 (i) The lease or rental agreement is oral.

27 (ii) A written lease or rental agreement regarding the premises is not in the posses-  
28 sion of the landlord or any agent or employee of the landlord.

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1 (iii) An action based solely on subdivision (2) of Section 1161.

2 (2) If the plaintiff fails to attach the documents required by  
3 this subdivision, the court shall grant leave to amend the complaint  
4 for a 5-day period in order to include the required attachments.

5 (d) Upon filing the complaint, a summons shall be issued thereon.

6 1166a. (a) Upon filing the complaint, the plaintiff may, upon motion, have immediate  
7 possession of the premises by a writ of possession of a manufactured home, mobile-  
8 home, or real property issued by the court and directed to the sheriff of the county or  
9 marshal, for execution, where it appears to the satisfaction of the court, after a hear-  
10 ing on the motion, from the verified complaint and from any affidavits filed or oral tes-  
11 timony given by or on behalf of the parties, that the defendant resides out of state, has  
12 departed from the state, cannot, after due diligence, be found within the  
13 state, or has concealed himself or herself to avoid the service of summons. The motion  
14 shall indicate that the writ applies to all tenants, subtenants, if any, named claimants,  
15 if any, and any other occupants of the premises.

16 (b) Written notice of the hearing on the motion shall be served on the defendant by  
17 the plaintiff in accordance with the provisions of Section 1011, and shall inform the  
18 defendant as follows: "You may file affidavits on your own behalf with the court and  
19 may appear and present testimony on your own behalf. However, if you fail to  
20 appear, the plaintiff will apply to the court for a writ of possession of a manufactured  
21 home, mobilehome, or real property."

22 (c) The plaintiff shall file an undertaking in a sum that shall be fixed and deter-  
23 mined by the judge, to the effect that, if the plaintiff fails to recover judgment against  
24 the defendant for the possession of the premises or if the suit is dismissed, the plain-  
25 tiff will pay to the defendant those damages, not to exceed the amount fixed in the un-  
26 dertaking, as may be sustained by the defendant by reason of that dispossession under  
27 the writ of possession of a manufactured home, mobilehome, or real property.

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1 (d) If, at the hearing on the motion, the findings of the court are in favor of the plain-  
2 tiff and against the defendant, an order shall be entered for the immediate possession  
3 of the premises.

4 (e) The order for the immediate possession of the premises may be enforced as pro-  
5 vided in Division 3 (commencing with Section 712.010) of Title 9 of Part 2.

6 (f) For the purposes of this section, references in Division 3 (commencing with Sec-  
7 tion 712.010) of Title 9 of Part 2 and in subdivisions (e) to (m), inclusive, of Section  
8 1174, to the "judgment debtor" shall be deemed references to the defendant, to the  
9 "judgment creditor" shall be deemed references to the plaintiff, and to the "judgment  
10 of possession or sale of property" shall be deemed references to an order for the imme-  
11 diate possession of the premises.

12 1167. The summons shall be in the form specified in Section 412.20 except that when  
13 the defendant is served, the defendant's response shall be filed within five days, in-  
14 cluding Saturdays and Sundays but excluding all other judicial holidays, after the  
15 complaint is served upon him or her. If the last day for filing the response falls on a  
16 Saturday or Sunday, the response period shall be extended to and including the next  
17 court day.

18 In all other respects the summons shall be issued and served and returned in the  
19 same manner as a summons in a civil action.

20 1167.3. In any action under this chapter, unless otherwise ordered by the court for  
21 good cause shown, the time allowed the defendant to answer the complaint, answer  
22 the complaint, if amended, or amend the answer under paragraph (2), (3), (5), (6), or  
23 (7) of subdivision (a) of Section 586 shall not exceed five days.

24 1167.4. Notwithstanding any other provision of law, in any action under this chapter:

25 (a) Where the defendant files a notice of motion as provided for in subdivision (a) of  
26 Section 418.10, the time for making the motion shall be not less than three days nor  
27 more than seven days after the filing of the notice.

28 (b) The service and filing of a notice of motion under subdivision

1 (a) shall extend the defendant's time to plead until five days after  
2 service upon him of the written notice of entry of an order denying his motion, except  
3 that for good cause shown the court may extend the defendant's time to plead for an  
4 additional period not exceeding 15 days.

5 1167.5. Unless otherwise ordered by the court for good cause shown, no extension of  
6 time allowed in any action under this chapter for the causes specified in Section 1054  
7 shall exceed 10 days without the consent of the adverse party.

8 1169. If, at the time appointed, any defendant served with a summons does not ap-  
9 pear and defend, the clerk, upon written application of the plaintiff and proof of the  
10 service of summons and complaint, shall enter the default of any defendant so served,  
11 and, if requested by the plaintiff, immediately shall enter judgment for restitution of  
12 the premises and shall issue a writ of execution thereon. The application for default  
13 judgment and the default judgment shall include a place to indicate that the judgment  
14 includes tenants, subtenants, if any, named claimants, if any, and any other occupants  
15 of the premises. Thereafter, the plaintiff may apply to the court for any other relief  
16 demanded in the complaint, including the costs, against the defendant, or defendants,  
17 or against one or more of the defendants.

18 1170. On or before the day fixed for his appearance, the defendant may appear and  
19 answer or demur.

20 1170.5. (a) If the defendant appears pursuant to Section 1170, trial of the proceeding  
21 shall be held not later than the 20th day following the date that the request to set the  
22 time of the trial is made. Judgment shall be entered thereon and, if the plaintiff  
23 prevails, a writ of execution shall be issued immediately by the court upon the request  
24 of the plaintiff.

25 (b) The court may extend the period for trial upon the agreement of all of the parties.  
26 No other extension of the time for trial of an action under this chapter may be granted  
27 unless the court, upon its own motion or on motion of any party, holds a hearing and  
28 renders a decision thereon as specified in subdivision (c).

1 (c) If trial is not held within the time specified in this section, the court, upon finding  
2 that there is a reasonable probability that the plaintiff will prevail in the action, shall  
3 determine the amount of damages, if any, to be suffered by the plaintiff by reason of  
4 the extension, and shall issue an order requiring the defendant to pay that amount  
5 into court as the rent would have otherwise become due and payable or into an escrow  
6 designated by the court for so long as the defendant remains in possession pending the  
7 termination of the action.

8 The determination of the amount of the payment shall be based on the plaintiff's  
9 verified statement of the contract rent for rental payment, any verified objection  
10 thereto filed by the defendant, and the oral or demonstrative evidence presented at  
11 the hearing. The court's determination of the amount of damages shall include con-  
12 sideration of any evidence, presented by the parties, embracing the issue of diminu-  
13 tion of value or any set off permitted by law.

14 (d) If the defendant fails to make a payment ordered by the court, trial of the action  
15 shall be held within 15 days of the date payment was due.

16 (e) Any cost for administration of an escrow account pursuant to this section shall  
17 be recoverable by the prevailing party as part of any recoverable cost in the action.

18 (f) After trial of the action, the court shall determine the distribution of the payment  
19 made into court or the escrow designated by the court.

20 (g) Where payments into court or the escrow designated by the court are made pur-  
21 suant to this section, the court may order that the payments be invested in an insured  
22 interest-bearing account.

23 Interest on the account shall be allocated to the parties in the same proportions as the  
24 original funds are allocated.

25 (h) If any provision of this section or the application thereof to any person or circum-  
26 stances is held invalid, such invalidity shall not affect other provisions or applications  
27 of the section which can be given effect without the invalid provision or application,  
28 and to this end the provisions of this section are severable.

1 (i) Nothing in this section shall be construed to abrogate or interfere with the prece-  
2 dence given to the trial of criminal cases over the trial of civil matters by Section 1050  
3 of the Penal Code.

4 1170.7. A motion for summary judgment may be made at any time after the answer is  
5 filed upon giving five days notice.

6 Summary judgment shall be granted or denied on the same basis as a motion under  
7 Section 437c.

8 1170.8. In any action under this chapter, a discovery motion may be made at any time  
9 upon giving five days' notice.

10 1170.9. The Judicial Council shall adopt rules, not inconsistent with statute, prescrib-  
11 ing the time for filing and serving opposition and reply papers, if any, relating to a mo-  
12 tion under Section 1167.4, 1170.7, or 1170.8.

13 1171. Whenever an issue of fact is presented by the pleadings, it must be tried by a  
14 jury, unless such jury be waived as in other cases. The jury shall be formed in the  
15 same manner as other trial juries in an action of the same jurisdictional classification  
16 in the Court in which the action is pending.

17 1172. On the trial of any proceeding for any forcible entry or forcible detainer, the  
18 plaintiff shall only be required to show, in addition to the forcible entry or forcible de-  
19 tainer complained of, that he was peaceably in the actual possession at the time of the  
20 forcible entry, or was entitled to the possession at the time of the forcible detainer.

21 The defendant may show in his defense that he or his ancestors, or those whose inter-  
22 est in such premises he claims, have been in the quiet possession thereof for the space  
23 of one whole year together next before the commencement of the proceedings, and that  
24 his interest therein is not then ended or determined; and such  
25 showing is a bar to the proceedings.

26 1173. When, upon the trial of any proceeding under this chapter, it appears from the  
27 evidence that the defendant has been guilty of either a forcible entry or a forcible or  
28 unlawful detainer, and other than the offense charged in the complaint, the Judge



1 must order that such complaint be forthwith amended to conform to such proofs; such  
2 amendment must be made without any imposition of terms. No continuance shall be  
3 permitted upon account of such amendment unless the defendant, by affidavit filed,  
4 shows to the satisfaction of the Court good cause therefor.

5 1174. (a) If upon the trial, the verdict of the jury, or, if the case be tried without a  
6 jury, the findings of the court be in favor of the plaintiff and against the defendant,  
7 judgment shall be entered for the possession of the premises; and if the proceedings be  
8 for an unlawful detainer after neglect, or failure to perform the conditions or cove-  
9 nants of the lease or agreement under which the property is held, or after default in  
10 the payment of rent, the judgment shall also declare the forfeiture of that lease or  
11 agreement if the notice required by Section 1161 states the election of the landlord to  
12 declare the forfeiture thereof, but if that notice does not so state that election, the  
13 lease or agreement shall not be forfeited.

14 (b) The jury or the court, if the proceedings be tried without a jury, shall also assess  
15 the damages occasioned to the plaintiff by any forcible entry, or by any forcible or  
16 unlawful detainer, alleged in the complaint and proved on the trial, and find the  
17 amount of any rent due, if the alleged unlawful detainer be after default in the pay-  
18 ment of rent. If the defendant is found guilty of forcible entry, or forcible or unlawful  
19 detainer, and malice is shown, the plaintiff may be awarded statutory damages of up  
20 to six hundred dollars (\$600), in addition to actual damages, including rent found due.  
21 The trier of fact shall determine whether actual damages, statutory damages, or both,  
22 shall be awarded, and judgment shall be entered accordingly.

23 (c) When the proceeding is for an unlawful detainer after default in the payment of  
24 rent, and the lease or agreement under which the rent is payable has not by its terms  
25 expired, and the notice required by Section 1161 has not stated the election of the  
26 landlord to declare the forfeiture thereof, the court may, and, if the lease or agreement  
27 is in writing, is for a term of more than one year, and does not contain a forfeiture  
28 clause, shall order that a writ shall not be issued to enforce the judgment until the ex-

1 piration of five days after the entry of the judgment, within which time the tenant, or  
2 any subtenant, or any mortgagee of the term, or any other party interested in its con-  
3 tinuance, may pay into the court, for the landlord, the amount found due as rent, with  
4 interest thereon, and the amount of the damages found by the jury or the court for the  
5 unlawful detainer, and the costs of the proceedings, and thereupon  
6 the judgment shall be satisfied and the tenant be restored to the tenant's estate. If  
7 payment as provided in this subdivision is not made within five days, the judgment  
8 may be enforced for its full amount and for the possession of the premises. In all other  
9 cases the judgment may be enforced immediately.

10 (d) Subject to subdivision (c), the judgment for possession of the premises may be en-  
11 forced as provided in Division 3 (commencing with Section 712.010) of Title 9 of Part 2.

12 (e) Personal property remaining on the premises which the landlord reasonably be-  
13 lieves to have been lost shall be disposed of pursuant to Article 1 (commencing with  
14 Section 2080) of Chapter 4 of Title 6 of Part 4 of Division 3 of the Civil Code. The  
15 landlord is not liable to the owner of any property which is disposed of in this  
16 manner. If the appropriate police or sheriff's department refuses to accept that prop-  
17 erty, it shall be deemed not to have been lost for the purposes of this subdivision.

18 (f) The landlord shall give notice pursuant to Section 1983 of the Civil Code to any  
19 person (other than the tenant) reasonably believed by the landlord to be the owner of  
20 personal property remaining on the premises unless the procedure for surrender of  
21 property under Section 1965 of the Civil Code has been initiated or completed.

22 (g) The landlord shall store the personal property in a place of safekeeping until it is  
23 either released pursuant to subdivision (h) or disposed of pursuant to subdivision (i).

24 (h) The landlord shall release the personal property pursuant to Section 1965 of the  
25 Civil Code or shall release it to the tenant or, at the landlord's option, to a person rea-  
26 sonably believed by the landlord to be its owner if the tenant or other person pays the  
27 costs of storage as provided in Section 1990 of the Civil Code and claims the property  
28 not later than the date specified in the writ of possession before which the tenant must

1 make his or her claim or the date specified in the notice before which a person other  
2 than the tenant must make his or her claim.

3 (i) Personal property not released pursuant to subdivision (h) shall be disposed of  
4 pursuant to Section 1988 of the Civil Code.

5 (j) Where the landlord releases personal property to the tenant pursuant to subdivi-  
6 sion (h), the landlord is not liable with respect to that property to any person.

7 (k) Where the landlord releases personal property pursuant to subdivision (h) to a  
8 person (other than the tenant) reasonably believed by the landlord to be its owner, the  
9 landlord is not liable with respect to that property to:

10 (1) The tenant or to any person to whom notice was given pursuant to subdivision (f),  
11 or

12 (2) Any other person, unless that person proves that, prior to releasing the property,  
13 the landlord believed or reasonably should have believed that the person had an inter-  
14 est in the property and also that the landlord knew or should have known upon rea-  
15 sonable investigation the address of that person.

16 (l) Where personal property is disposed of pursuant to Section 1988 of the Civil Code,  
17 the landlord is not liable with respect to that property to:

18 (1) The tenant or to any person to whom notice was given pursuant to subdivision (f),  
19 or

20 (2) Any other person, unless that person proves that, prior to disposing of the prop-  
21 erty pursuant to Section 1988 of the Civil Code, the landlord believed or reasonably  
22 should have believed that the person had an interest in the property and also that the  
23 landlord knew or should have known upon reasonable investigation the address  
24 of that person.

25 (m) For the purposes of subdivisions (e), (f), (h), (k), and (l), the terms "owner,"  
26 "premises," and "reasonable belief" have the same meaning as provided in Section  
27 1980 of the Civil Code.

1 1174.2. (a) In an unlawful detainer proceeding involving residential premises after  
2 default in payment of rent and in which the tenant has raised as an affirmative de-  
3 fense a breach of the landlord's obligations under Section 1941 of the Civil Code or of  
4 any warranty of habitability, the court shall determine whether a substantial breach  
5 of these obligations has occurred. If the court finds that a substantial breach has oc-  
6 curred, the court (1) shall determine the reasonable rental value of the premises in its  
7 untenable state to the date of trial, (2) shall deny possession to the landlord and  
8 adjudge the tenant to be the prevailing party, conditioned upon the payment by the  
9 tenant of the rent that has accrued to the date of the trial as adjusted pursuant to this  
10 subdivision within a reasonable period of time not exceeding five days, from the date  
11 of the court's judgment or, if service of the court's judgment is made by mail, the pay-  
12 ment shall be made within the time set forth in Section 1013, (3) may order the land-  
13 lord to make repairs and correct the conditions which constitute a breach of  
14 the landlord's obligations, (4) shall order that the monthly rent be limited to the rea-  
15 sonable rental value of the premises as determined pursuant to this subdivision until  
16 repairs are completed, and (5) except as otherwise provided in subdivision (b), shall  
17 award the tenant costs and attorneys' fees if provided by, and pursuant to, any  
18 statute or the contract of the parties. If the court orders repairs or corrections, or  
19 both, pursuant to paragraph (3), the court's jurisdiction continues over the matter for  
20 the purpose of ensuring compliance. The court shall, however, award possession of the  
21 premises to the landlord if the tenant fails to pay all rent accrued to the date of trial,  
22 as determined due in the judgment, within the period prescribed by the court pursu-  
23 ant to this subdivision. The tenant shall, however, retain any rights conferred by Sec-  
24 tion 1174.

25 (b) If the court determines that there has been no substantial breach of Section 1941  
26 of the Civil Code or of any warranty of habitability by the landlord or if the tenant  
27 fails to pay all rent accrued to the date of trial, as required by the court pursuant to  
28 subdivision (a), then judgment shall be entered in favor of the landlord, and the land-

1 lord shall be the prevailing party for the purposes of awarding costs or attorneys' fees  
2 pursuant to any statute or the contract of the parties.

3 (c) As used in this section, "substantial breach" means the failure of the landlord to  
4 comply with applicable building and housing code standards which materially affect  
5 health and safety.

6 (d) Nothing in this section is intended to deny the tenant the right to a trial by jury.  
7 Nothing in this section shall limit or supersede any provision of Chapter 12.75 (com-  
8 mencing with Section 7060) of Division 7 of Title 1 of the Government Code.

9 1174.21. A landlord who institutes an unlawful detainer proceeding based upon a  
10 tenant's nonpayment of rent, and who is liable for a violation of Section 1942.4 of the  
11 Civil Code, shall be liable to the tenant or lessee for reasonable attorneys' fees and  
12 costs of the suit, in an amount to be fixed by the court.

13 1174.25. (a) Any occupant who is served with a prejudgment claim of right to posses-  
14 sion in accordance with Section 415.46 may file a claim as prescribed in Section  
15 415.46, with the court within 10 days of the date of service of the prejudgment claim to  
16 right of possession as shown on the return of service, which period shall include Sat-  
17 urday and Sunday but excluding all other judicial holidays. If the last day for filing  
18 the claim falls on a Saturday or Sunday, the filing period shall be extended to and in-  
19 cluding the next court day. Filing the prejudgment claim of right to possession  
20 shall constitute a general appearance for which a fee shall be collected as provided in  
21 Section 70614 of the Government Code.

22 Section 68511.3 of the Government Code applies to the prejudgment claim of right to  
23 possession.

24 (b) At the time of filing, the claimant shall be added as a defendant in the action for  
25 unlawful detainer and the clerk shall notify the plaintiff that the claimant has been  
26 added as a defendant in the action by mailing a copy of the claim filed with the court  
27 to the plaintiff with a notation so indicating. The claimant shall answer or otherwise  
28 respond to the summons and complaint within five days, including Saturdays and

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1 Sundays but excluding all other judicial holidays, after filing the prejudgment claim of  
2 possession. Thereafter, the name of the claimant shall be added to any pleading, filing  
3 or form filed in the action for unlawful detainer.

4 1174.3. (a) Unless a prejudgment claim of right to possession has been served upon  
5 occupants in accordance with Section 415.46, any occupant not named in the judgment  
6 for possession who occupied the premises on the date of the filing of the action may ob-  
7 ject to enforcement of the judgment against that occupant by filing a claim  
8 of right to possession as prescribed in this section. A claim of right to possession may  
9 be filed at any time after service or posting of the writ of possession pursuant to sub-  
10 division (a) or (b) of Section 715.020, up to and including the time at which the levying  
11 officer returns to effect the eviction of those named in the judgment of possession. Fil-  
12 ing the claim of right to possession shall constitute a general appearance for which a  
13 fee shall be collected as provided in Section 70614 of the Government Code. Section  
14 68511.3 of the Government Code applies to the claim of right to possession. An  
15 occupant or tenant who is named in the action shall not be required to file a claim of  
16 right to possession to protect that occupant's right to possession of the premises.

17 (b) The court issuing the writ of possession of real property shall set a date or dates  
18 when the court will hold a hearing to determine the validity of objections to enforce-  
19 ment of the judgment specified in subdivision (a). An occupant of the real property for  
20 which the writ is issued may make an objection to eviction to the levying officer at the  
21 office of the levying officer or at the premises at the time of the eviction.

22 If a claim of right to possession is completed and presented to the sheriff, marshal,  
23 or other levying officer, the officer shall forthwith (1) stop the eviction of occupants at  
24 the premises, and (2) provide a receipt or copy of the completed claim of right of  
25 possession to the claimant indicating the date and time the completed form was re-  
26 ceived, and (3) deliver the original completed claim of right to possession to the court  
27 issuing the writ of possession of real property.

28 (c) A claim of right to possession is effected by any of the following:

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ARREST of adverse claimants writ of possession and ejectment, Motion: leave to file quo Warranto

1 (1) Presenting a completed claim form in person with identification to the sheriff,  
2 marshal, or other levying officer as prescribed in this section, and delivering to the  
3 court within two court days after its presentation, an amount equal to 15 days' rent  
4 together with the appropriate fee or form for proceeding in forma pauperis. Upon re-  
5 ceipt of a claim of right to possession, the sheriff, marshal, or other levying officer  
6 shall indicate thereon the date and time of its receipt and forthwith deliver the origi-  
7 nal to the issuing court and a receipt or copy of the claim to the claimant and notify  
8 the plaintiff of that fact. Immediately upon receipt of an amount equal to 15 days' rent  
9 and the appropriate fee or form for proceeding in forma pauperis, the court shall file  
10 the claim of right to possession and serve an endorsed copy with the notice of the  
11 hearing date on the plaintiff and the claimant by first-class mail.  
12 The court issuing the writ of possession shall set and hold a hearing on the claim not  
13 less than five nor more than 15 days after the claim is filed with the court.

14 (2) Presenting a completed claim form in person with identification to the sheriff,  
15 marshal, or other levying officer as prescribed in this section, and delivering to the  
16 court within two court days after its presentation, the appropriate fee or form for pro-  
17 ceeding in forma pauperis without delivering the amount equivalent to 15 days' rent.  
18 In this case, the court shall immediately set a hearing on the claim to be held on the  
19 fifth day after the filing is completed. The court shall notify the claimant of the hear-  
20 ing date at the time the claimant completes the filing by delivering to the court the  
21 appropriate fee or form for proceeding in forma pauperis, and shall notify the plaintiff  
22 of the hearing date by first-class mail. Upon receipt of a claim of right to possession,  
23 the sheriff, marshal, or other levying officer shall indicate thereon the date and  
24 time of its receipt and forthwith deliver the original to the issuing court and a receipt  
25 or copy of the claim to the claimant and notify the plaintiff of that fact.

26 (d) At the hearing, the court shall determine whether there is a valid claim of pos-  
27 session by the claimant who filed the claim, and the court shall consider all evidence  
28 produced at the hearing, including, but not limited to, the information set forth in the



1 claim. The court may determine the claim to be valid or invalid based upon the evi-  
2 dence presented at the hearing. The court shall determine the claim to be invalid if  
3 the court determines that the claimant is an invitee, licensee, guest, or trespasser. If  
4 the court determines the claim is invalid, the court shall order the return to the claim-  
5 ant of the amount of the 15 days' rent paid by the claimant, if that amount was paid  
6 pursuant to paragraph (1) or (3) of subdivision (c), less a pro rata amount for each day  
7 that enforcement of the judgment was delayed by reason of making the claim of right  
8 to possession, which pro rata amount shall be paid to the landlord.  
9 If the court determines the claim is valid, the amount equal to 15 days' rent paid by  
10 the claimant shall be returned immediately to the claimant.

11 (e) If, upon hearing, the court determines that the claim is valid, then the court shall  
12 order further proceedings as follows:

13 (1) If the unlawful detainer is based upon a curable breach, and the claimant was  
14 not previously served with a proper notice, if any notice is required, then the required  
15 notice may at the plaintiff's discretion be served on the claimant at the hearing or  
16 thereafter. If the claimant does not cure the breach within the required time, then a  
17 supplemental complaint may be filed and served on the claimant as defendant if the  
18 plaintiff proceeds against the claimant in the same action. For the purposes of this  
19 section only, service of the required notice, if any notice is required, and of the sup-  
20 plemental complaint may be made by first-class mail addressed to the claimant  
21 at the subject premises or upon his or her attorney of record and, in either case, Sec-  
22 tion 1013 shall otherwise apply. Further proceedings on the merits of the claimant's  
23 continued right to possession after service of the Summons and Supplemental Com-  
24 plaint as prescribed by this subdivision shall be conducted pursuant to this chapter.

25 (2) In all other cases, the court shall deem the unlawful detainer Summons and  
26 Complaint to be amended on their faces to include the claimant as defendant, service  
27 of the Summons and Complaint, as thus amended, may at the plaintiff's discretion be  
28

made at the hearing or thereafter, and the claimant thus named and served as a defendant in the action shall answer or otherwise respond within five days thereafter.

(f) If a claim is made without delivery to the court of the appropriate filing fee or a form for proceeding in forma pauperis, as prescribed in this section, the claim shall be immediately deemed denied and the court shall so order. Upon the denial of the claim, the court shall immediately deliver an endorsed copy of the order to the levying officer and shall serve an endorsed copy of the order on the plaintiff and claimant by first-class mail.

(g) If the claim of right to possession is denied pursuant to subdivision (f), or if the claimant fails to appear at the hearing or, upon hearing, if the court determines that there are no valid claims, or if the claimant does not prevail at a trial on the merits of the unlawful detainer action, the court shall order the levying officer to proceed with enforcement of the original writ of possession of real property as deemed amended to include the claimant, which shall be effected within a reasonable time not to exceed five days. Upon receipt of the court's order, the levying officer shall enforce the writ of possession of real property against any occupant or occupants.

(h) The claim of right to possession shall be made on the following form:

The Claim of Right to Possession form appears in the hard-copy publication of the chaptered bill. See Sec. 43 of Chapter 75, Statutes of 2005.

1174.5. A judgment in unlawful detainer declaring the forfeiture of the lease or agreement under which real property is held shall not relieve the lessee from liability pursuant to Section 1951.2 of the Civil Code.

1176. (a) An appeal taken by the defendant shall not automatically stay proceedings upon the judgment. Petition for stay of the judgment pending appeal shall first be directed to the judge before whom it was rendered. Stay of judgment shall be granted when the court finds that the moving party will suffer extreme hardship in the absence of a stay and that the nonmoving party will not be irreparably injured by its issuance.

1 If the stay is denied by the trial court, the defendant may forthwith file a petition for  
2 an extraordinary writ with the appropriate appeals court. If the trial  
3 or appellate court stays enforcement of the judgment, the court may condition the stay  
4 on whatever conditions the court deems just, but in any case it shall order the pay-  
5 ment of the reasonable monthly rental value to the court monthly in advance as rent  
6 would otherwise become due as a condition of issuing the stay of enforcement. As used  
7 in this subdivision, "reasonable rental value" means the contract rent unless the  
8 rental value has been modified by the trial court in which case that modified rental  
9 value shall be used.

10 (b) A new cause of action on the same agreement for the rental of real property shall  
11 not be barred because of an appeal by any party.

12 1177. Except as otherwise provided in this Chapter the provisions of Part II of this  
13 Code are applicable to, and constitute the rules of practice in the proceedings men-  
14 tioned in this Chapter.

15 1178. The provisions of Part 2 of this code, relative to new trials and appeals, except  
16 insofar as they are inconsistent with the provisions of this chapter or with rules  
17 adopted by the Judicial Council, apply to the proceedings mentioned in this chapter.

18 1179. The court may relieve a tenant against a forfeiture of a lease or rental agree-  
19 ment, whether written or oral, and whether or not the tenancy has terminated, and  
20 restore him or her to his or her former estate or tenancy, in case of hardship, as pro-  
21 vided in Section 1174. The court has the discretion to relieve any person against  
22 forfeiture on its own motion.

23 An application for relief against forfeiture may be made at any time prior to restora-  
24 tion of the premises to the landlord. The application may be made by a tenant or sub-  
25 tenant, or a mortgagee of the term, or any person interested in the continuance of the  
26 term. It must be made upon petition, setting forth the facts upon which the  
27 relief is sought, and be verified by the applicant. Notice of the application, with a copy  
28 of the petition, must be served at least five days prior to the hearing on the plaintiff in

1 the judgment, who may appear and contest the application. Alternatively, a person  
2 appearing without an attorney may make the application orally, if the plaintiff either  
3 is present and has an opportunity to contest the application, or has been given ex  
4 parte notice of the hearing and the purpose of the oral application. In no case shall  
5 the application or motion be granted except on condition that full payment of rent due,  
6 or full performance of conditions or covenants stipulated, so  
7 far as the same is practicable, be made.

8 1179a. In all proceedings brought to recover the possession of real property pursuant  
9 to the provisions of this chapter all courts, wherein such actions are or may hereafter  
10 be pending, shall give such actions precedence over all other civil actions therein, ex-  
11 cept actions to which special precedence is given by law, in the matter of the setting  
12 the same for hearing or trial, and in hearing the same, to the end that all such actions  
13 shall be quickly heard and determined.

14 Where, in a suit to quiet title, Hager, the original defendant, filed his answer in the court below, in  
15 the nature of a disclaimer, denying that he had any interest in the property in controversy, and alleg-  
16 ing that he had sold the same to Lent, and Lent sought to intervene and defend, which was refused  
17 by the court. from which order an appeal was brought, the Supreme Court said it would be truly hard,  
18 if in such a suit Lent, who brought pendente lite, and who would be bound by the decree, was not  
19 allowed to be heard; that the only objection was that such transfers might be "made ad infinitum, and  
20 justice entirely frustrated or delayed; but the court did not think such consequences need reasonably  
21 be apprehended; no one would willfully thrust himself into a controversy where he was sure to lie  
22 much in costs for his mendacity. Brooks v. Hayer, 5 Cal. 283. Where a suit of plaintiff had been  
23 pending for some time to foreclose a mortgage, and a creditor of defendant holding a mechanic's lien  
24 moved to intervene at the time of trial, just as the plaintiff was about asking judgment, the Supreme  
25 Court thought the application was too late, and that the court below was not bound to allow it when  
26 so interposed. Hotker v. Kellry, 14 Cal. 165. In a suit on a note or mortgage where creditors of the  
27 defendant intervene, alleging the note and mortgage to be fraudulent as against them, the interveners  
28

1 cannot prevent a judgment for plaintiff against defendant. The most they can claim is protection  
2 against enforcement of the judgment to their prejudice.

3 The interest which entitles a person to intervene in a suit between other parties, must be in the mat-  
4 ter in litigation, and of such a direct and immediate character, that the intervener will either gain or  
5 lose by the direct legal operation and effect of the judgment. It must be that created by a claim to  
6 the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part  
7 thereof, which is the subject of litigation. A simple contract creditor of a common debtor cannot  
8 intervene in a foreclosure suit. But judgment creditors, being as such subsequent encumbrancers,  
9 may intervene. And a court may order them to be made parties. *Horn v. Volcano W. Co.*, 13 Cal.  
10 62.

11 Where an action is brought to foreclose a mortgage upon property claimed as a homestead, the wife  
12 of a mortgagor is a necessary party to a full adjustment of the controversy, and should be allowed to  
13 intervene. *Sargent v. Wilson*, 5 Cal 505; *McDonald v. Badger*, 23 Cal. 396.

14 On the tenth of January, 1861, plaintiff caused an attachment to be levied upon the property of Ih-  
15 mels & Co.; on the same day Eggers & Co. caused an attachment to be levied upon the same prop-  
16 erty, but subsequent to the plaintiffs levy, and in due course obtained judgment. On the day previ-  
17 ous E. L. Goldstein had caused an attachment to be levied upon the same property, but also subse-  
18 quent to the plaintiffs levy. Before a default was entered against the defendants in this action, E. L.  
19 Goldstein and Eggers & Co. severally filed interventions setting forth these facts, and also averring  
20 that the property attached was only sufficient to satisfy the plaintiffs claim, and also charging that  
21 the plaintiffs demand was not due at the time he commenced his action; and also that he had no  
22 valid demand against the defendants, and that his action was prosecuted for the purpose of hinder-  
23 ing and defrauding creditors of the defendants. A general demurrer was interposed to these com-  
24 plaints of intervention; that is, that the facts set forth did not constitute a cause of intervention. The  
25 two main points presented were: 1st, whether the facts showed a case for a proceeding by interven-  
26 tion; and 2d, whether the onus prooandi was on the plaintiff to prove his cause of action as between  
27 him and the interveners, or on the interveners to prove their cause of action against the plaintiff. The  
28 court said that before the introduction of these provisions, and as doubtless might still be done, the

1 proceedings would have been by bill in chancery: see *Heyneman v. Dannen-* bfrg, 6 Cal. 376; or by  
2 motion to the court: see *Dizey v. Pollock*, 8 Id. 570. But in *Davis v. Eppingfr*, 18 Id. 378, where the  
3 facts were similar to the above, it was decided to be a proper case for intervention. Although the  
4 interveners had not a claim to or hen upon any property which was the direct subject of litigation,  
5 they had a lien upon property which was held subject to the results of the litigation, and which  
6 would be lost to the interveners if the original action should proceed to judgment and execution. If  
7 the case did not fall within the precise definition of the cases in which intervention takes place, as  
8 explained in the case of *Horn v. Volcano Water Works*, 13 Cal. 62, it was substantially within the  
9 object; and as the law was only regulating modes of procedure, and not affecting rights of property,  
10 the interpretation given to it in the case of *Davin v. Eppinger*, ought not to be changed. As to the  
11 second point, the interveners were interested in preventing the plaintiff recovering a judgment. They  
12 were for this purpose defendants in the action, and after they had proved the facts alleged to show  
13 their right to intervene, he was required to prove his cause of action. Although in the case of *Davis*  
14 *v. Eppinger*, and in the case of *ffornv. The Volcano Water Works Co.*, 13 Cal. 70, it was decided  
15 that judgment might be rendered against the original defendants; it was because under our system  
16 the court by its judgment could make various depositions to meet all the exigencies of the case.  
17 *Speyer v. Ihmels*, 21 Cal. 286-288.

18 If the court finds that a portion only of the debt on which a prior attachment issued was fraudulent,  
19 the lien of the prior attachment should be postponed only as to that portion of the debt which was  
20 fraudulent. If the debt on which an attachment was issued was not due when the suit was com-  
21 menced, a subsequent attaching creditor cannot by intervention postpone the lien of the first at-  
22 tachment to his own, unless the plaintiffs in the first action fraudulently commenced their action.  
23 *Coghill & Co. v. Marks*, 29 Cal. 673.

24 In a suit upon a promissory note and mortgage by the holder against the maker, a third person, who  
25 claims to be the rightful owner of the securities, has the right to intervene. The court thought that  
26 although the intervener certainly had no interest in common either with the plaintiff or the defen-  
27 dant, he had an interest in the matter in litigation adverse to both, within the meaning of the section.  
28 He had an interest against the pretension of the plaintiff to be owner of the note and mortgage, and

1 to have a decree of foreclosure for his benefit, and against, the defendant for the collection of the  
2 debt. *Stick v. OoUlner*, 38 Cal. 608. After having gone to trial without any objection, it was too late  
3 to raise an objection for the first time to the intervention for the first time in the appellate court.  
4 *McKenty v. Gladwin*, 10 Cal. 228; *Smith v. Penney*, 44 Cal. 164. One who indemnifies the sheriff  
5 for an act done by virtue of his office, may, and should, intervene, 1055. *DutU v. Pacheto*, 21 Cal.  
6 442.

7 An ex parte order may be made allowing an intervention to be filed. *Spanagel v. Reay*, 47 Cal.  
8 608. Demurrer, 430. Answer, 437.

9 388. (656.) When two or more persons, associated in any business, transact such business under a  
10 common name, whether it comprises the names of such persons or not, the associates may be sued  
11 by such common name, the summons in such cases being served on one or more of the associates;  
12 and the judgment in the action shall bind the joint property of all the associates, in the same manner  
13 as if all had been named defendants and had been sued upon their joint liability.

14 Where the title of the action, as given at the head of the complaint, was *Martin Walsh v. M. Walsh*  
15 *et al.*, composing the Red Star Mining Company, and in the body of the complaint it was stated that  
16 "said Red Star Company," omitting the word "Mining," was a mining association, composed of a  
17 great number of persons who were so numerous and so much scattered over the country, that plain-  
18 tiff could not serve them with process without much delay and great expense, and he therefore sued  
19 them by the company name, and then the complaint proceeded and set out a cause of action for the  
20 recovery of money, and concluded with a prayer for judgment for the amount alleged to owe due  
21 and owing against the "Red Star Mining Company, and in his return to the summons, the sheriff  
22 certified that he served the same by delivering a copy thereof to M. Walsh, personally, one of the  
23 members of the "Red Star Mining Co.," defendant, etc., and the time for answering having expired  
24 without any appearance, the clerk entered the default, and immediately thereafter entered a judg-  
25 ment against the "Red Star Mining Co.," without naming Walsh, for the amount sued for, to be en-  
26 forced against the joint property of the members of the company; the court held in a collateral pro-  
27 ceeding that this was substantially within the section, and that there was certainly not an entire ab-  
28 sence of averment on the subject, and nothing short of that would justify the court in holding the



1 judgment absolutely void in a collateral proceeding. Moreover it might be doubted whether a ques-  
2 tion whether the defendants had been sued by the proper name, was anything more than matter in  
3 abatement, and to say the least, was analogous to the case of a misnomer, which never rendered the  
4 judgment void. If the defendant does not choose to appear and plead matter in abatement, such mat-  
5 ter is waived and cannot be assigned for error, if he has been actually served, and much less is a  
6 judgment by default against him, though by the wrong name, void. *Wtlah v. Kirkpatrick*, 30 Cal.  
7 204; *Ex parte Kellogg*, 6 Vt. 509; *Guinard \: Heyfinger*, 15 111. 288; *Hammond v. The People*, 32  
8 111. 446. On the ground that the statute was in derogation of the common law (as to which see 4,  
9 ante), the court held it must be strictly construed, and that the record in an action commenced not  
10 against the " Independent Tunnel Co.," but against the "Independent Co.," which was certainly a  
11 different name, and in which the summons was addressed to the Independent Tunnel Co., failed to  
12 show, in a collateral proceeding, a valid judgment against the Independent Tunnel Co. *King v.*  
13 *Randlet*, 33 Cal. 321.

14 (17.) The court may determine any controversy between the parties before it, when it can be done  
15 without prejudice to the rights of others, or by saving their rights; but when a complete determina-  
16 tion of the controversy cannot be had without the presence of other parties, the court must then or-  
17 der them to be brought in. And when, in an action for the recovery of real or personal property, a  
18 person not a party to the action, but having an interest in the subject thereof, makes application to  
19 the court to be made a party, it may order him to be brought in by the proper amendment.

20 Adding parties. A plaintiff who moved on 19th April to add a party defendant, and stipulated on  
21 13th May that the answer should be filed on that day as of 19th April, could not, it was held, be  
22 heard to say that the added party was not a party on the last-named day. *Lawrence v. Ballou*, 50  
23 Cal. 263. An instance where a party should be added is a case where defendants and one Brodie had  
24 a claim to a mine, and the possession of land, each holding an equal share, also some sort of an  
25 agreement to explore and develop it. A subcontract was then entered into between defendants and  
26 plaintiff, by which plaintiff was to devote his skill, time and labor to the enterprise; and in consid-  
27 eration thereof, they were to furnish provisions and coals, and share their interests equally. Brodie  
28 had nothing to do with this sub-contract. The court held that if Brodie still had an interest, and an

1 account was to be taken, the association dissolved, and the interests severed as prayed for, Brodie  
2 was a necessary party, and might be added. If, however, the plaintiff was content with a judgment  
3 establishing his right, and for a conveyance of the interest to which he was entitled, the court saw  
4 no reason why he might not waive any relief which required the presence of other parties. Settem-  
5 bre v. Putnam, 30 Cal. 497. Landlord, admitting to defend in ejectment, 379. Adding or striking out  
6 the names of parties, 473.

7 409. (27.) In an action affecting the title or the right of possession of real property, the plaintiff, at  
8 the time of filing the complaint, and the defendant, at the time of filing his answer, when affirma-  
9 tive relief is claimed in such answer, or at any time afterwards, may record in the office of the re-  
10 corder of the county in which the property is situated, a notice of the pendency of the action, con-  
11 taining the names of the parties, and the object of the action or defense, and a description of the  
12 property in that county affected thereby. From the time of filing such notice for record only, shall a  
13 purchaser or incumbrance of the property affected thereby be deemed to have constructive notice of  
14 the pendency of the action, and only of its pendency' against parties designated by their real names.

15 [Approved March 24; effect July 1, 1874.]

16 Attorney-General, information by. The court considered the attorney-general had power to file an  
17 information in the name of the people, and in the nature of a bill in chancery, to annul a patent of  
18 lands granted by the State, but the suit was dismissed on other grounds, and the court said the party  
19 in interest in such cases might maintain an action in his own name, and thereby could attain to the  
20 same end in effect that could be accomplished by a proceeding in the name of the people of the  
21 State, upon his relation; and that course better accorded with the system of procedure provided in  
22 the State. People v. Straton, 25 Cal. 246-252.

23 As to the use of the name of the people generally, 367 n., p. 123.

24 Cloud on title, action to remove, 738, 1050, and notes.

25 Waiver of tort, and action on implied contract. Plaintiff may waive a tort, and sue on the implied  
26 contract created by the facts. Perhaps the better way of stating the proposition is, that plaintiff  
27 should allege the exact facts, and if they are such that an implied contract arises upon them, he is

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1 entitled to introduce evidence accordingly. Frattv. Clark, 12 Cal. 90; Sheldon v. " Uncle Sam," 18  
2 Cal. 526; Mills v. Barney, 22 Cal. 246.

3 If plaintiff is a tenant in common with persons other than defendant, and defendant tortiously enters  
4 and ousts him, he mav recover the whole premises as against defendant, and he is not precluded from  
5 doing so by the fact that the defendant has acquired by adverse possession the title of the other tenants  
6 in common. Chipman v. Hastings, 50 Cal. 310. Landlord against Tenant, see" Lessor and Lessee," in-  
7 fra. Tenants in common, etc., mav unite as plaintiffs, 381; also see "Demand. A complaint by an ex-  
8 ecutor in ejectment is not necessarily defective because it fails to allege any title in the testator, as nei-  
9 ther the legal title nor the right of possession may have been in him at his death, and yet both may  
10 have been afterwards acquired by the executor as such. Where a complaint in ejectment by an execu-  
11 trix, after setting forth the will, its probate and issuance of letters, averred that by virtue thereof, she,  
12 as executrix, possessed herself of the real estate of the testator, and that she ever since had been and  
13 was the owner, seised in fee of an estate of inheritance therein, both as such executrix and heir at law,  
14 and was entitled to the possession thereof, it was held a sufficient averment of seisin and right of pos-  
15 session in her capacity of executrix. Salmon v. Wilson, 41 Cal. 595. Where the husband sold the  
16 homestead to plaintiffs, who brought ejectment, and being defeated on the ground that it was " home-  
17 stead," plaintiffs contended that they were entitled to the excess of the value of the premises over  
18 85000, the amount exempted by homestead law, the court said if the plaintiffs had any rights they  
19 must establish them in a different action. They could take nothing by a suit in ejectment. Cook v.  
20 McChristian, 4 Cal. 27. The property must be described so as to enable the officer, upon execution, to  
21 identify it, 455. In ejectment it need only be alleged that the plaintiff is seised of the premises, or some  
22 estate therein, as, in fee, or for life, or for years, and that the defendant was in possession at the com-  
23 mencement of the action. The seisin is the fact to be alleged. It is a pleadable and issuable fact, to be  
24 established by conveyances from a paramount source of title, or by evidence of prior possession. It is  
25 the ultimate fact upon which the claim to recover depends, and it is facts of this character which must  
26 be alleged, and not the prior or probative facts which go to establish them. It is the ultimate facts,  
27 which could not be struck out of a pleading without leaving it insufficient, and not the evidence of  
28 those facts, which must be stated. The right of the possession follows as a conclusion of law from the

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1 seisin, and need not be alleged. The possession of the defendant is of course a pleadable and issuable  
2 fact, and the only question of difficulty arises from the supposed necessity of negating its possible  
3 rightful character. If the defendant's holding rests upon any existing right, he should be compelled to  
4 show it affirmatively, in defense. The right of possession accompanies the ownership; and from the  
5 allegation of the fact of ownership, which is the allegation of seisin in "ordinary language," the right  
6 of present possession is presumed. Payne «£, Dewey v. Treadwell, 16 Cal. 243; Haight v. Oreen, 19  
7 Cal. 118; Salmon v. Xymonds, 24 Cal. 266; McCarthy \. Yale, 39 Cal. 586; Keller v. Suiz de Ocana,  
8 48 Cal. 638. Aa to allegation that plaintiff is the "owner" being sufficient. Qarwood v. Hatting\*, 38  
9 Cal. 218.

10 If plaintiff attempt to set forth in his complaint a specific deraignment of his title, he must aver  
11 every fact that he could be required to prove. Where one of the links of his chain of title set out in  
12 the complaint is a will, the complaint must aver that the will has been admitted to probate. Castro v.  
13 Richardson, 18 Cal. 478. If he allege his title and fails to establish it, he must fail. Talbft v. Hop-  
14 per, 42 Cal. 402. If he allege seisin generally as above suggested he may offer to prove a documen-  
15 tary title; and if he rail, may rely on prior possession. Morton v. Folger, 15 Cal. 283.

16 Where plaintiff relied upon the adverse possession of the demanded premises by himself and his  
17 grantor for the period of five years prior to the commencement of the suit, but only averred his  
18 ownership in fee and right to the possession of the land at the date of the commencement of the suit,  
19 it was held he might prove any facts which would entitle him to possession at that time. The aver-  
20 ment that the plaintiffs grantor had been in possession for more than five years would have been  
21 superfluous. Gillespif. v. Jones, 47 Cal. 263. If plaintiff alleges that defendant is in possession he  
22 cannot say that defendant was not in possession, if defendant relies on adverse possession as a de-  
23 fense. Lawrence v. Ballou, 50 Cal. 258.

24 An allegation in a complaint that the plaintiff "assumed to and did exercise acts of control over and  
25 possession of portions " of a tract of land, is not equivalent to an averment that the plaintiff had ac-  
26 tual possession of the tract of land or any part of it. Brennan v. Ford, 46 Cal. 8.

27 The possession to be shown in the defendant in an action of ejectment need not be actual, as contra-  
28 distinguished from constructive, in its character. Noe v. Card, 14 Cal. 609; Crane v. Ghirardelli, 45

Cal. 236. An action of ejectment may be brought against an officer of the army of the United States who is in possession of the demanded premises for the Purposes of a military camp or fortification under the direction of the Secretary of War or the President of the United States. Polactv. VMansfield, 44 Cal. 36. One who, without the permission of the grantee, takes possession of land within the boundaries of a Mexican grant, whether perfect or inchoate, before the final survey is made by the United States, is guilty of an ouster, although when he entered into possession he was informed by the grantee that the possession so taken was not within the limits of the grant. Love v. Shartzrr, 31 Cal. 487. If in ejectment the defendant admits in his answer that he is in possession of a portion of the demanded premises, it is not necessary for the plaintiff to prove his possession. Salmon v. Wilson, 41 Cal. 595; McCretry v. Everdina, 44 Cal. 284. But it is indispensable that it should in some way appear that defendant was, at the commencement of the suit, in possession of some part of the tract to which the plaintiff establishes his title. Brown v. Brackett, 45 Cal. 173. Misjoinder, non-joinder, etc., 430 and note. Ejectment, order for party to make survey of property in dispute, 742-3. Estoppel, 1908 n.

Libel Extrinsic facts need not be alleged, 460. If a party, in an application to the Supreme Court for an extension of time to file a transcript, goes outside of the facts material to procure the order, and states matter wholly foreign to the application, in which he charges his attorney with having entered into a collusive agreement with the attorney of the other party, this charge against his attorney is not a privileged communication, but is libelous par »e. WyaU v. Buell, 47 Cal. 624.

Limitations, statute of, 312-363. How pleaded, 458. What is sufficient allegation of acknowledgment in writing, 360 n.

Malicious prosecution. To support this action there must be both malice and want of probable cause. King v. Montgomery, 50 Cal. 115. Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by plaintiff. Orant v. Moore, 29 Cal. 651. As to the question of malice, it is one solely for the jury; and to sustain the averment, the charge must be shown to have been willfully false. Levy v. Brannan, 39 Cal. 488. Probable cause is a mixed question of law and fact. Whether the alleged circumstances

1 existed or not, is simply a question of fact; and conceding their existence, whether or not they con-  
2 stitute probable cause is a question of law. Where the circumstances are admitted, or clearly proved  
3 by uncontradicted testimony, it is the province of the court to determine the question of probable  
4 cause, and the court may order a nonsuit But if there be a conflict of testimony, or the credibility of  
5 witnesses is to be estimated, the cause must go to a jury. As the question of probable cause is a  
6 mixed question of both law and fact, it is error to submit to the jury to say whether there was prob-  
7 able cause. The jury have solely the right to decide, in cases of reasonable doubt, whether the al-  
8 leged circumstances really existed. Probable cause is a suspicion founded upon circumstances suffi-  
9 ciently strong to warrant a reasonable man in the belief that the charge is true. 2 Oreenl, Ev., Sees.  
10 453-7; 6 Barhour S. C. K. 86, and the authorities there cited. Where defendant laid his case fully  
11 before his counsel, and before instituting proceedings the counsel demanded the return of certain  
12 notes which were the foundation of the charge of fraud on which defendant prosecuted plaintiff,  
13 from the plaintiff, and heard from him the alleged ground upon which he refused to return them;  
14 and counsel being then in possession of all the material facts of the case, the arrest was made under  
15 his advice, and by his professional assistance, the court held that the question, whether the defen-  
16 dant acted bona fide under the advice of his counsel, was a question to be determined by the jury in  
17 all cases where there was any legitimate evidence to show a want of good faith in following profes-  
18 sional advice, but there being no such evidence in the case, there was probable cause. Potter v.  
19 Stale, 8 Cal. 220. An action for malicious prosecution will lie against several defendants; a conspir-  
20 acy need not be averred. An action lies for a conspiracy unjustly to prosecute a person, but the gist  
21 of this action is the malicious prosecution; that of the other is the combining of two or more to do  
22 an unlawful and injurious act. In the first case, the cause of action is complete before an acquittal; in  
23 the other, the acquittal or termination of the prosecution is necessary to enable the plaintiff to main-  
24 tain the suit. Druux v. Domec, 18 Cal. 88. As to necessity for acquittal, see Hillmng v. Hyde, 50 Cal.  
25 206.

26 Mistake. A complaint claiming relief on the ground of mistake, must not only distinctly aver the  
27 fact of the mistake, but also set forth the circumstances under which it occurred, in so far as those  
28

1 circumstances may be necessary to present a case within the rule of equity, upon which relief is  
2 granted. *Wirth v. Shafler*, 48 Cal. 276; see 1856, post.

3 Owners of steamers who purchased stamps from the defendant, as treasurer of the city and county  
4 of San Francisco, to be placed on passage tickets, were held not entitled to recover back the money  
5 on the ground that the act of 1857, as amended by the act of 1858, declared that such tickets should  
6 not be admitted in evidence in any court unless stamped as required; and hence that the tickets  
7 could not be sold without stamps. The influence exerted by these provisions of the statute did not  
8 constitute that kind of compulsion or coercion which the law recognizes as sufficient to render the  
9 payment in a legal sense involuntary. There was no compulsion or coercion on the part of the de-  
10 fendant. The stamps were by the law deposited with him to be sold to applicants. The compulsion  
11 or coercion which is sufficient in law to render a payment involuntary, must come from the party to  
12 whom or by whose direction the payment is made, and arise from the exercise of some power, pos-  
13 sessed, or supposed to be possessed, by him, over the person or property of the party making the  
14 payment. Whether the provisions of the stamp act were constitutional or not, did not affect the ques-  
15 tion of plaintiffs' right to recover. If they were constitutional, there was no basis for the action; if  
16 unconstitutional, and plaintiffs were ignorant of this at the time, the case became one when a recov-  
17 ery was sought, because made under a mistake of law, a ground which could not avail (but see *C. C.*  
18 *1578, 1712, 1713*); but if the plaintiffs knew the act to be unconstitutional, as they protested it was,  
19 then the case was only an attempt to recover an illegal demand, voluntarily paid, knowing it to be  
20 illegal at the time, and was not entitled to any consideration. *Garrison v. Tillinghast*, 18 Cal. 404;  
21 *Brummagim v. Tillinghast*, 18 Cal 270. The mere fact that a party made an unjust claim, and sup-  
22 ported it by unjust practices, is not enough to authorize the interposition of equity. *Terrill v. Groves*,  
23 18 Cal. 149. It was held, in *Hayes v. ffogan*, 5 Cal. 243; *McMillan \. Pichards*, 9 Cal. 417; *Falkner*  
24 *v. Hunt*, 16 Cal. 170, and *Guy y. Washbum*, 23 Cal 113, that if money which in not legally due is  
25 exacted by means of duress or coercion, it may, if paid under protest, be recovered back. The court  
26 said the purpose and effect of the protest had not been satisfactorily defined in any of these cases. In  
27 most of the cases the payment was made to a public officer; and the only purpose of the protest was  
28 to give the officer notice that the money was not legally due, and thus to enable the officer to pro-

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1 tect himself. The officer was thereby put on inquiry; and if he found that the demand was illegal, he  
2 might protect himself by refusing to receive the money; or, if he found that it was of doubtful legal-  
3 ity, he might take the proper steps to protect himself against responsibility. If the officer has notice  
4 of the matter which renders the demand illegal, another notice in the form of a protest is useless; but  
5 if he has no knowledge of such matter, he ought not to be subjected to the costs and consequences  
6 of an action to recover the money from him—and that, too, perhaps, after he has paid over the  
7 money in the usual course of official business—without notice from the party paying the money of  
8 the grounds upon which he claims, that the demand is not legally due. Whenever a protest is essen-  
9 tial, it is therefore necessary to state the grounds upon which the party paying the money claims that  
10 the demand is illegal. The statement of the precise amount which is claimed to be illegal, when a  
11 part of the demand is legal, is of but little moment, for that can be readily ascertained by the official  
12 to whom the money is paid, upon being informed of the ground, upon which payment would be re-  
13 fused, except for the coercion or duress. *Sieth v. McClare*, 49 Cal. 627.

14 Where the complaint charges that A., being indebted to plaintiff in a sum of money, it was agreed  
15 between A., plaintiff, and defendant, that A. should pay the same to defendant, who should pay the  
16 same to plaintiff on the request of plaintiff; that thereafter A. paid to defendant said sum, in gold  
17 coin of the United States, to and for the use and benefit of plaintiff; that defendant refused to pay  
18 the same to plaintiff upon said request duly made; an action to recover said sum in said coin is an  
19 action for money had and received, and therein defendant is not charged, nor, upon said facts,  
20 chargeable as a bailee. *Wendt v. Ross*, 33 Cal. 650.

21 Money paid. A surety who pays may maintain an action for contribution, against the other sureties,  
22 and the executor of a deceased surety. *Dytsol v. Bruguere*, 50 Cal. 456. Money paid by husband  
23 for wife. 370 n.

24 Multiplicity of actions. If a claim is founded upon one entire contract, where the breaches are not  
25 recurring, or upon one single or continuous tortuous act, it cannot be divided up into distinct de-  
26 mands, and made the subject of separate actions; and if this is attempted, a judgment in one action  
27 will be a conclusive bar to any other action, upon the principle that if a plaintiff bring an action for  
28 a part only of an entire and indivisible demand, the verdict and judgment in that action will be a

1 conclusive bar to any subsequent suit for another part of the same demand. *fferriter v. Porter*, 23  
2 Cal. 387; *Phillips v. Berit*, 16 Johns. 136; *Farrington v. Payne*, 15 J. K. 432; *Cunningham v. Harris*,  
3 5 CaL 81.

4 Mortgage, 726 n.

5 Recognizance. In an action upon a recognizance, the complaint must aver that the recognizance was  
6 filed in court, or that it became a matter of record. A recognizance is an obligation of record. With-  
7 out record, there is no recognizance; and in an action on such obligation it should be alleged that the  
8 same was a record. *Mendocino Co. v. Lamar*, 30 Cal. 629; *People v. Ihiygins*, 10 Wend. 465;  
9 *Bidye. v. Ford*, 4 Mass. 641; *Tarbell v. Oray*, 4 Gray, 445.

10 Right, statutory, infringement of. See "Franchise," *supra*. In the cases of the creation of a power or  
11 duty by statute, the statute giving the power or casting the duty is alone looked to to determine the  
12 power given or duty cast, and has provided its own exclusive remedy for the execution of the  
13 power or the enforcement of the duty. The statute is complete in itself, giving a power or imposing  
14 a duty on its own terms; the remedy to be taken in connection with and as a part of the right. But  
15 this is a matter of legal inference from the statute, and this inference may be repelled by its express  
16 language or the general scope. *State v. Poulterer*, 16 Cal. 531.

17 Slander. Extrinsic facts need not be stated, 460.

18 In an action by a tenant in common against his co-tenant, who is in the sole possession of the prem-  
19 ises, to recover a share of the profits of the estate, a complaint which avers a tenancy in common  
20 between the parties; the sole and exclusive possession of the premises by the defendant; the receipt  
21 by him of the rents, issues and profits thereof; a demand by the plaintiff of an account of the same,  
22 and the payment of his share; the defendant's refusal; and that the rents, issues, and profits amount  
23 to \$84,000—is insufficient to support the action.

24 In such complaint the court held there were no special circumstances alleged which withdrew the  
25 case from the ordinary remedies at law, and required the interposition of equity. They said the ac-  
26 tion was a common-law action of account; and, viewed in this light, the complaint was fatally de-  
27 fective in not averring that the defendant occupied the premises upon any agreement with the plain-  
28

1 tiff as receiver or bailiff of his share of the rents and profits; that it was essential to a recovery that  
2 this circumstance should exist, and equally essential to the complaint that it be  
3 alleged; that at common law one tenant in common had no remedy against the other who exclu-  
4 sively occupied the premises, and received the entire profits, unless he was ousted of possession,  
5 when ejectment might be brought, or unless the other was acting as bailiff of his interest by agree-  
6 ment, when the action of account would lie. The occupation by him, so long as he did not exclude  
7 his co- tenant, was but the exercise of a legal right. His cultivation and improvements were made at  
8 his own risk; if they resulted in loss, he could not call upon his co-tenant for contribution; and if  
9 they produced a profit his co- tenant was not entitled to a share of them. The co-tenant could at any  
10 moment enter into equal enjoyment of his possession; his neglect to do so might be regarded as an  
11 assent to the sole occupation of the other. There was no equity in the claim asserted by the tenant to  
12 snare in the profits resulting from the labor and money of his co-tenant, when he had expended nei-  
13 ther and had never claimed possession, and never been liable for contribution in cases of loss. There  
14 would be no equity in giving to a tenant who would neither work himself nor subject himself to any  
15 expenditures or risks, a share in the fruits of another's labor, investments and risks. The statute of 4  
16 and 5 Anne, 16, gave a right of action to one joint tenant in common against the other as bailiff,  
17 who received more than his proportional share of the profits; at common law the bailiff was an-  
18 swerable, not only for his actual receipts, but for what he might have made from the property with-  
19 out willful neglect: Co. Litt. 172 a; Willis, 210; but it was never adopted in this State, nor have we  
20 any similar statute. Pico v. Columbet, 12 Cal. 414. Where plaintiff was employed by special agree-  
21 ment as the agent of defendant and others, to render services in respect to land, the fact that he was  
22 himself an owner in the tract did not prevent his enforcing his claim for compensation under his  
23 agreement. Thompson v. Salmon, 18 Cal. 634.

24 If several persons are the owners, as tenants in common, of a mining claim, and one of them is also  
25 a tenant in common with several other persons in the ownership of an adjoining claim, and the first-  
26 named owners lease their claim to the second-named owners, to be mined for a given term, and the  
27 one of the lessees who is a tenant in common in both claims, and superintendent of the lessees'  
28 claim, after the term of the lease has expired, as superintendent of the lessees and a member of their

1 company, sells the tailings of the claim leased, and accounts to the lessees for the proceeds, the  
2 other lessors cannot maintain an action against him as a tenant in common in their company for  
3 their proportion of the proceeds. *Clark v. Jones*, 49 Cal. 618. Demand, when necessary, *supra*; Part-  
4 ners, *supra*; *Replevin*, *supra*.

5 Trust, enforcement of A complaint averring that defendant agreed to buy in, as agent of plaintiff,  
6 plaintiff's property, about to be sold under process, and pay for it and allow plaintiff to redeem it,  
7 and that defendant purchased the property, and in violation of his agreement and of the trust had  
8 sold the property, and that plaintiff had sustained damages, etc., was held a good complaint in eq-  
9 uity. *Wingate v. Ferris*, 50 Cal. 107.

10 Use and occupation. No action for use and occupation will lie when possession has been adverse  
11 and tortious, for such excludes the idea of a contract, which in all cases of this action must be ex-  
12 press or implied. The Supreme Court said this was undoubtedly the correct as well as the general  
13 rule, and was fully supported by the case of *Birch v. Wright*, 1 Term Rep.; *Durnford and East*, 378;  
14 *Smith v. Stewart*, 6 Johns. Rep. 46; *Wharton v. Fitzgerald*, 3 Dal I., and innumerable cases cited by  
15 these authorities. See *Sampson v. Shaeffer*, 3 Cal. 201, 203; followed, *O'Connor v. Corbett*, 3 Cal.  
16 373.

17 If a lease or agreement is invalid under 1973, subd. 5, post, Stat. of Frauds, it would seem that if the  
18 tenant has been in possession, plaintiff may recover for use and occupation. *folsom v. .Pen-in*, 2  
19 Cal. 603.

20 Verification of pleadings, 446.

21 Averments necessary to sustain claim. If damages are claimed, the fact that they have been sus-  
22 tained must be alleged, or plaintiff will not be entitled to any judgment for damages: *BohaU v. Dit-*  
23 *ter*, 41 Cal. 535; and it must be borne in mind, that, if there is no answer, the relief granted to plain-  
24 tiff cannot exceed that claimed in the complaint. 580, post. Where plaintiffs laid their damages at  
25 \$1000, and judgment was rendered in their favor for \$1500, it was reversed on appeal; and though  
26 by 580, post, if an answer is put in, the court may grant any relief consistent with the case made by  
27 the complaint, the relief must be embraced within the issue, as specified in that section, and the  
28 court cannot render a judgment, to base which the averments in the complaint are not sufficient.

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1 Sterling v. Hanson, 1 Cal. 479. Justice requires that parties should be confined to that to which they  
2 are entitled within their pleadings. Benedict v. Bray, 2 Cal. 256. Where the judgment was for a lar-  
3 ger sum than was claimed at the commencement of the action, but the complaint was amended by  
4 leave of the District Court, before the commencement of the trial, and the amount claimed by the  
5 amended complaint was in excess of the sum for which judgment was given, it was held that the  
6 judgment was good. Tally v. Harlot, 35 Cal 306.

7 There is no rule of pleading which requires a party to aver the precise amount he claims; but he may  
8 recover an amount less than that which is stated in the complaint. Meek v. McClure, 49 Cal. 627. If  
9 the complaint contains two independent counts, each complete within itself, and concluding with its  
10 own appropriate prayer for relief and separately signed by counsel, the prayer to the second count  
11 will not be deemed to have any reference to the first; and on a verdict on the first count only the  
12 relief granted will follow the prayer of that count. N. C. A S. C. Coy v. KM, 37 Cal. 283. The  
13 amount of the damages sustained should also be alleged, for if the allegation is not denied by the  
14 answer no issue is raised upon it. McLaughlin v. Kelly, 22 Cal 221. From this decision it would  
15 seem that in such a case the jury do not assess the damages, for there is no issue on that point; but it  
16 was said in Patterson v. Ely, 19 Cal. 28, that the allegation being deemed admitted was conclusive  
17 evidence of the extent of the damages, and authorized the jury to assess them to the extent claimed.  
18 See also 437 n., post.

19 Kinds of relief, etc. As a general rule compensation is the relief or remedy provided by the law of  
20 this State for the violation of private rights and the means of securing their observance; and specific  
21 and preventive relief may be given in no other cases than those specified in C. C., Div. IV, Part I (t.  
22 e., C. C. 3274-3423, for which sections see infra). C. C. 3274.

23 Forfeiture. Whenever by the terms of an obligation a party thereto incurs a forfeiture, or a loss in  
24 the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved  
25 therefrom, upon making full compensation to the other party, except in case of a grossly negligent,  
26 willful, or fraudulent breach of duty. C. C. 3275 Damages, persons suffering detriment may recover  
27 reasonable. Every person who suffers detriment from the unlawful act or omission of another may  
28 recover from the person in fault a compensation therefor in money, which is called damages. C. C.

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1 3281. Damages must, in all cases, be reasonable; and where an obligation of any kind appears to  
2 create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no  
3 more than reasonable damages can be recovered. C. C. 3359.

4 Damages on revoking submission, 1290. Damages are exclusive of exemplary damages and inter-  
5 est, except where those are expressly mentioned. C. C. 3357. No person can recover a greater  
6 amount in damages for the breach of an obligation than he could have gained by the full perform-  
7 ance thereof on both sides, except in the cases specified in the articles on Exemplary Damages and  
8 Penal Damages, and in U. C., sections 3319, 3339 and 3340. C. G. 3358.

9 The Supreme Court approved the rule stated by Mr. Justice Wilde, in *Wooster v. Proprietors of Ca-*  
10 *nal Bridge*, 16 Pick. 547: " In all cases where there is no rule of law regulating the assessment of  
11 damages, and the amount does not depend on computation, the judgment of the jury and not the  
12 opinion of the court is to govern, unless the damages are so excessive as to warrant the belief that  
13 the jury must have been influenced by partiality or prejudice, or have been misled by some mis-  
14 taken view of the merits of the case." *Boyce v. California Stage Co.*, 25 Cal. 473. As to new trial for  
15 excessive damages, etc., 657, and notes. The fact that the plaintiffs claim damages beyond the just  
16 measure of their right, is not a ground for reversing the judgment. If plaintiffs at the trial offer tes-  
17 timony to prove damages which they had no right to claim, defendant can object to its introduction.  
18 *Aitleen v. Mendenhall*, 25 Cal. 213. As by Pol. C. 3274 in judgments and executions the amount  
19 thereof must be stated as near as may be, in dollars and cents, rejecting fractions, it is no doubt  
20 proper to apply the same rule to the claim for damages in the complaint.

21 Nominal damages. When a breach of duty has caused no appreciable detriment to the party affected,  
22 he may yet recover nominal damages. C. C. 3360.

23 In actions for a breach of a contract, nominal damages are presumed to follow as a conclusion of  
24 law, from proof of the breach. *Browner \. Davis*, 15 Cal. 11. Also from a trespass. *Attwood v. Fri-*  
25 *cott*, 17 Cal. 43.

26 Special damages. Inasmuch as the object of the rules of pleading is, to have the pleading so framed  
27 as to apprise the parties of the facts to be proved by them: *Piercy v. Sabin*, 10 Cal. 28; the rule laid  
28 down in *Cole v. Swan- toa*, 1 Cal. 54; *Stevenson v. Smith*, 28 Cal. 102; *Gay v. Winter*, 34 Cal.

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1 153; *Lewiston, etc., Co. v. tiltasta, etc., Co.*, 41 Cal. 565, and *Potter v. Froment*, 47 Cal. 165, that  
2 where the damages are special (that is, such as do not necessarily arise or are not implied by law),  
3 the facts out of which such special damages arise must be averred, must be adhered to. In an action  
4 against a carrier of passengers for damages for detention of a passenger, an instruction to the jury  
5 that, " It being shown in evidence that the plaintiff was a good bookkeeper, and his servant an able-  
6 bodied man, the measure of damages would be the wages at the then rate in San Francisco, of a  
7 good bookkeeper and able-bodied workingman, during the period of detention of the plaintiff and  
8 his servant at New Orleans and Panama," was held to depend on too many contingencies (probabil-  
9 ity of plaintiffs procuring employment immediately on his arrival, and of such employment being  
10 continued, etc.) to admit of its being applied as an absolute and fixed criterion by which the dam-  
11 ages could be measured, *range v. P. M. S. '61 Co.*, 1 Cal. 354. Where an award showed that the arbi-  
12 trator had based his calculation of damages for breach of covenants of a lease on the fact that the  
13 product of twenty acres of land was worth \$9000, from which he inferred that the product of two  
14 hundred acres would have been worth \$96,000, it was held that the damages thus estimated were  
15 too remote and speculative, and involved too many contingencies. *Muldrow v. Norrii*, 2 Cal. 78,  
16 citing *Sedgwick*, p. 98; and *Yonge v. P. M. S. S. Co.*, *supra*.

17 In an action against surgeons for negligence, per quod amputation became necessary, where there  
18 was no allegation as to bodily pain, suffering, etc., it was held that the court erred in directing the  
19 jury that if they believed that the defendants were guilty of negligence, etc., by which plaintiff was  
20 caused great bodily pain and suffering, the plaintiff was entitled to a verdict. The court said the de-  
21 fendants were not sued for causing bodily pain and suffering by their negligence or carelessness;  
22 they were sued for alleged malpractice, by which amputation became necessary. *Moor v. Teed*, 3  
23 Cal. 190.

24 In an action for slander of a person as a clerk or tradesman, it is unnecessary to allege special dam-  
25 age. *Butler v. Howes*, 1 Cal. 89. Plaintiff sued for the balance of the agreed price of a steam engine.  
26 By the contract the engine was to be delivered by 5th April, under a penalty of \$20 for every day's  
27 delay. The engine was not delivered until the 6th May. Defendants claimed damage for loss of time,  
28 services, and wages of employed at defendant's mill, and the profits which defendants would have



1 realized during the delay. The referee omitted to find damages for any of these, considering them  
2 too remote. But the court held that the loss of time, value of services, and wages of employee's,  
3 caused by the failure of the respondents to perform their contract, were damages by no means re-  
4 mote, but, on the contrary, strictly proximate and immediate, and they ought to have been consid-  
5 ered and allowed. *Kenyan v. Goodall*, 3 Cal. 259.

6 Where a plaintiff sued in respect to the destruction by the defendants of a book of plaintiff's, and  
7 offered to prove that the book contained the names of subscribers to his newspaper, and that it cost  
8 him two dollars to obtain each subscriber, and the evidence was excluded, the Supreme Court held  
9 that the plaintiff was entitled to recover the value of his subscription book, but not the amount that  
10 the subscriptions cost him, for that he had not alleged in his complaint that he sustained, by the de-  
11 struction of the book, any special damage. *Nimian v. City & Co. of S. F.*, 38 Cal. 690. But if the  
12 plaintiff mistake his measure of damages, his allegations are surplusage; and if a cause of action  
13 and general damages are alleged, this is sufficient on demurrer. *Barber v. Cazalis*, 30 Cal. 97.

14 General damages are the immediate and necessary loss caused by defendant's act. Special damages  
15 comprise the loss which follows as its natural and proximate consequence beyond its necessary and  
16 immediate effect; and special damages must come within this latter definition, or they will be too  
17 remote.

18 Where a master suffers a loss of profits in his business, owing to his servant's breach of  
19 his contract to faithfully serve, the master may recover from the servant for the loss of profits in-  
20 volved in the diminution of business caused by the servant's neglect. Loss of profits as an element  
21 of damage is usually too remote, hut not in such a case as this. It is the natural and first effect of the  
22 neglect alleged. *Stoddard v. Treadwell*, 26 Cal. 307; *Sedgicick on Dam.* 72; *Ma«terton\*. Mayor of  
23 Brooklyn, 7 Hill, 62; *Laurence v. Wardwell*, 6 Barb. S. C. 423; *Bracket v. McNair*, 14 Johns. 170;  
24 *Sedg.* 337-338.

25 Detriment, definition of Detriment is a loss or harm suffered in person or property. C. C. 3282.

26 Prospective damages. Damages may he awarded in a judicial proceeding, for detriment resulting  
27 after the commencement thereof, or certain to result in the future. C. C. 3283. In an action for waste  
28 pending an action of forcible entry and detainer, the Supreme Court held the rule to be that the

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1 proof of damages might extend to all matters up to verdict, which were the natural result of the pre-  
2 vious injury. Hicks v. Herring, 17 Cal. 569. But prospective damages can be allowed only when it  
3 appears that the party will be subjected to the particular loss or injury for which he demands com-  
4 pensation. De Costa v. Mass. M. Co., 17 CaL 613.

5 Peculiar value, property of Where certain property has a peculiar value to a person recovering dam-  
6 ages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who  
7 had notice thereof before incurring a liability to damages in respect thereof, or against a willful  
8 wrongdoer. C. C. 3355.

9 Writing, value of. For the purpose of estimating damages, the value of an instrument in writing is  
10 presumed to be equal to that of the property to which it entitles its owner. C. C. 3356. Where a  
11 check had been lost and paid by a banker upon a forged indorsement, it was held that upon a suit for  
12 the same, after a refusal by the banker to deliver the check to the owner, in the absence of rebutting  
13 evidence, the measure of damages was the full value of the amount for which it was drawn. Survey  
14 v. Wells, Fargo & Co., 5 Cal. 125.

15 Interest in actions not ex contract!! In an action for the breach of an obligation not arising from  
16 contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion  
17 of the jury. O. C. 3288.

18 Where the jury rendered a verdict for the value of the property, with "legal interest" thereon from  
19 the time of the seizure by the sheriff to the date of the verdict, and damages in the sum of \$50, the  
20 court said that section 200 of the Practice Act, which was in force when the action was brought, au-  
21 thorized the recovery of damages for the detention of personal property. But a party was not entitled  
22 to a gross sum for such damages, and to interest upon the value of the property from the time it was  
23 taken. Interest in such case was given for damages; and if allowed in addition to a gross sum for  
24 damages, it would amount to double damages. Freeborn v. Norcross, 49 CaL 314. If the plaintiff in  
25 replevin takes possession of the property when the suit is commenced, and the jury, on the trial, find  
26 for the defendant, and assess the value of the property at a time subsequent to the taking, they can-  
27 not add to this value interest from the time of the taking, up to about the time the value was as-  
28 sessed. Atherton v. Fowler, 46 Cal. 323.

1 Exemplary Damages. In any action for the breach of an obligation not arising from contract, where  
2 the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addi-  
3 tion to the actual damages, may give damages for the sake of example, and by way of punishing the  
4 defendant. C. C. §294. For wrongful injuries to animals being subjects of property, committed will-  
5 fully or by gross negligence, in disregard of humanity, exemplars- damages may be given. C, C.  
6 3340. It was held that exemplary damages might be given for a wanton, malicious, and unprovoked  
7 assault upon the person, in *Wade. v. Thayer*, 40 Cal. 585. But in an action for taking plaintiff's  
8 goods in a former action, the judgment under which they were seized being invalid, the court held  
9 that the fact of the invalidity of the judgment was not sufficient to warrant the conclusion that the  
10 seizure was malicious, the defendants acted in the matter under the advice of counsel, and there was  
11 no reason for supposing that they either knew or suspected that the judgment was invalid. The sei-  
12 zure was undoubtedly a hardship upon the plaintiff, but the court below acted properly in refusing  
13 to allow exemplar)' damages. *Selden v. Caghman*, 20 Cal. 67. Where in an action on a contract for  
14 conveyance of a passenger, the carrier was guilty of acts of willful oppression, the court said it  
15 would be a reproach to the law if nothing could be recovered but the mere pecuniary loss resulting  
16 from the breach of contract. *Janet v. "Cortes,"* 17 Cal. 495. If the proprietor of a stage-coach should  
17 wantonly and maliciously overturn it, with the intent to kill or inflict bodily injury upon a passen-  
18 ger, in an action by the passenger the jury might give punitive damages. In like manner, if a family  
19 picture, having no appreciable market value, be delivered to a common carrier to be transported for  
20 hire, and if he wantonly destroy it, the damages would not be confined to the mere money value of  
21 the picture. But though the principal is liable for the actual damage caused by the act of his agent  
22 done in the usual course of his employment, he is not responsible for wanton and malicious damage  
23 done by the agent without the consent, approval, or subsequent ratification of the principal. *Turner*  
24 *v. The N. B. & N. R. K. Co.*, 34 Cal. 594; *Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 661.  
25 In an action for breaking and entering the plaintiff's rooms, and injuring and destroying his prop-  
26 erty, the jury were instructed that,  
27 in awarding exemplary damages, they might take into consideration the expenses which the plaintiff  
28 had incurred about the business in and about the litigation; that the amount had not been proved, but

1 that their knowledge of such matters would enable them to arrive at something like a just calcula-  
2 tion as to what should be allowed as counsel fees, legal expenses, and other expenses. It was held  
3 that the instruction was erroneous. *Falk v. Waterman*, 49 Cal. 225.

4 An officer acting in the discharge of his official duties, is no less responsible for the consequences  
5 of a malicious act than a private person, and the effect of a different rule would be to turn loose  
6 upon every community a set of licensed wrongdoers. *San Joaquin v. Jones*, 18 Cal. 327; see, also,  
7 "Carriers, damages for omitting to carry," *infra*.

8 Torts, damages for. For the breach of an obligation not arising from contract, the measure of dam-  
9 ages, except where otherwise expressly provided by this Code, is the amount which will compen-  
10 sate for all the detriment proximately caused thereby, whether it could have been anticipated or not.  
11 C. C. 3333; see "Exemplary Damages," *ante*. Where a part-owner sues *ex dtlieto*, and the objection  
12 of defect of parties is not get up in the answer, the damages should be apportioned at the trial.

13 *Whitney v. Stark*, 8 Cal. 514. In an action by a reversioner for injury done to the freehold, the dura-  
14 tion of the term of the tenant in possession is material in evidence as affecting the measure of dam-  
15 ages. *Uttendorffer v. Saeger*, 50 Cal. 496. In an action for nuisance, by obstructing a street oppo-  
16 site plaintiff's residence, defendant is liable only for damages actually sustained prior to the com-  
17 mencement of the action. . *Hopkins v. W. P. R. R. Co.*, 50 Cal. 191.

18 If a person having a good cause of action against another, willfully sue for a much greater amount  
19 than is due, and attach the property of the other, and put him to charges, he is liable. The jury are  
20 not confined to the actual pecuniary loss sustained by the plaintiff, but may take into consideration  
21 the character and position of the parties, and all the circumstances attending the transaction. In such  
22 a case the court would not disturb a verdict, unless it clearly appeared that injustice has been done.

23 *Weaver v. Pagt*, 6 Cal. 685; 16 Pick. 453. In an action for personal torts, the law does not fix any  
24 precise rule of damages, but leaves their assessment to the unbiased judgment of the jury. *Wheaton*  
25 *v. N. B. Jc M. JR. R. Co.*, 36 Cal. 590.

26 In cases of simple negligence, the rule governing the measure of damages is to allow the . actual  
27 damages. The allowance of "smart money" in such cases is improper. *Moody v. McDonald*, 4 Cal.  
28 297. Proximate, or immediate and direct damages, are the ordinary and natural results of the negli-

1 gence. Therefore a spreading of a fire from one field to another is, in our dry season, the natural,  
2 direct, and proximate consequence of a firing by sparks from a locomotive. *Henry v. 8. P. B. S.*, 50  
3 Cal. 183.

4 In an action for trespass, where plaintiff complained of the destruction of his fences, and trampling  
5 of grain, etc., it was held that plaintiff could not recover for injury to the grain by cattle of others.  
6 *Berry v. S. F. & N. P. R. R. Co.*, 50 Cal. 437.

7 Libel or slander, damages on. In actions for libel or slander, defendant may justify and allege miti-  
8 gating circumstances, and whether he prove justification or not he may give in evidence the mitigat-  
9 ing circumstances, 461.

10 Mesne profits. The detriment caused by the wrongful occupation of real property, in cases not em-  
11 braced in sections 3335, 3344 and 3345 of this Code (C. C.), or section 1174 of the Code of Civil  
12 Procedure, is deemed to be the value of the use of the property for the time of such occupation, not  
13 exceeding five years next preceding the commencement of the action or proceeding to enforce the  
14 right to damages, and the costs, if any, of recovering the possession. C. C. 3334.

15 Ejectment, damages on, 427 and notes. Where plaintiff's right terminates during pendency of action,  
16 plaintiff may recover damages for withholding the property, 740. Defendant may set off value of  
17 improvements where made' under color of title, 741. Damages can never be recovered in the action  
18 of ejectment for use and occupation anterior to the existence of the plaintiff's right of possession.

19 *Clark v. Boyreau*, 14 Cal. 637. Where the plaintiff, at the time the action was brought, was himself  
20 in possession of 180 acres, parcel of the 500 acres demanded, and the possession continued in him  
21 thereafter to the day of the trial, and defendants in their answers denied the plaintiff's title to the  
22 whole or tiny part of the 500 acres, it was held that plaintiff could not recover damages for the use  
23 of the land of which the defendants had never dispossessed him. *Ellis v. Jeans*, 26 Cal. 278.

24 In an action to recover lands, the plaintiff can recover the rents and profits only for the period prior  
25 to the commencement of the action allowed by the Statute of Limitations, if the defendant pleads  
26 the statute. A party ousted by his co-tenant can recover the dam- ages resulting from such ouster, as  
27 well as when ousted by a stranger. His injury is no less because it was done by a co-tenant. *Carpenter*  
28 *v. Mitchell*, 29 Cal. 330; *Ad. on Eject.*, *Waterman's* 449; *Oodttitley. Tombs*, 3 Wilson, 118;

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1 Lanyendyck v. Burhans, 11 John. 461; Campy, ffometley, 11 Ircdell, 212; Hare v. Fury, 3 Yeates,  
2 13.

3 Holding over real property, damages for. For willfully holding over real property, by a person who"  
4 entered upon the same, as guardian or trustee for an infant, or by right of an estate terminable with  
5 any life or lives, after the termination of the trust or particular estate, without the consent of the  
6 party immediately entitled after such termination, the measure of the damages is the value of the  
7 profits received during such holding over. C. C. 3335; see "Penal Damages," infra.

8 Conversion of goods, damages for. The detriment caused by the wrongful conversion of personal  
9 property is presumed to be: 1. The value of the property at the time of the conversion, with the in-  
10 terest from that time; and 2. A fair compensation for the time and money properly expended in pur-  
11 suit of the property. C. 6. 3336.

12 If plaintiff does not exercise his option, damages may be awarded under either rule. Barraide v.  
13 Garrall, 60 Cal. 115.

14 The presumption declared by the last section cannot be repelled in favor of one whose possession  
15 was wrongful from the beginning, by his subsequent application of the property to the benefit of the  
16 owner, without his con- Bent. C. C. 3337. Where, in an action to recover possession of personal  
17 property, the person making any affidavit did not truly state the value, and the officer or his sureties  
18 are sued for taking the same, they may set up the true value of the same in their answer. 473, post.  
19 Where the property is delivered and accepted pending the suit, that is, before verdict, the damages  
20 should be merely nominal; but where the goods are only delivered after verdict, it must be pre-  
21 sumed that the delivery was in pursuance of the verdict which had already determined the rights of  
22 the parties. A referee found as part or damages the difference in value of certain iron at the time of  
23 detention and delivery, and judgment was entered on the report. The Supreme Court held that  
24 there\*was no

25 principle of law which recognized such a measure of damages. The most liberal rule would allow  
26 the highest value of the goods at any time between the conversion and the judgment, and interest  
27 thereupon. But that where the plaintiff accepts the goods, he makes his election to take the goods in  
28 lieu of their value, and the only damage he can recover is the interest upon their highest value, ex-

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cept in cases where some special damage is specifically averred in the complaint. *C'mroy v. Flint*, 5 Cal. 329. The court also held that when property converted had a fixed value, the measure of damages was that value, with the legal interest from the time of its conversion. *Douglass v. Kraft*, 9 Cal. 562. Where the value was fluctuating, the court said the correct measure was the highest market value within a reasonable time after the property was taken, with interest from that time. *Page v. Fowler*, 39 Cal. 412.

Some qualification of the rule may be found necessary when there has been an unreasonable delay in bringing suit, or under special circumstances. It was held that the market value is to be ascertained at the place of the conversion, and that interest was to be allowed, as a matter of legal right, from the time at which the value is estimated. *Hamer v. Hathaway*, 33 Cal. 119, 120.

The Supreme Court held it error to allow proof of injury to plaintiff's business, as a criterion of damage, in an action against the sheriff for seizing plaintiff's goods under attachment, without any improper motive. *Nightingale v. fienndl*, 18 CaL 315; *Dexter v. Paugh*, 18 Cal. 372.

In an action against a sheriff for wrongfully seizing and selling property under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure, the court held the measure of damages was the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. *Phelps v. Owens*, 11 CaL 22; *Pelberg v. Qorham*, 23 Cal. 349. Plaintiff cannot recover the value of the goods and also the profits which might have been made on their sale. *Butler v. Collins*, 12 Cal. 460. An instruction as follows: "In estimating the value of the property, you will take as the basis of your verdict the cash value of the articles in the market at the time they were taken out of the possession of the plaintiff by defendant. What amount of money will it take in the market to replace the articles seized by the sheriff? That sum will be the measure of damages," was held, taken altogether, to give the true standard of damages. *Cattin v. Marshall*, 18 Cal. 689. In an action for wrongfully taking gold from a mining claim, if defendants decline to prove the exact amount they have taken, as the evidence of the amount is necessarily exclusively confined to or under the control of the defendants, the plaintiffs must rely to a great extent upon the judgment and estimates of men who are not fully acquainted with the facts; and if more than the real amount is given as damages, the defendants



1 cannot complain. *Antoine Co. v. Ridge Co.*, 23 Cal. 221. In such a case, the right of plaintiffs to  
2 recover damages which they have actually sustained is not affected by the fact that the trespass was  
3 not willful in its character. The true measure of damages is the value of the gold-bearing earth at the  
4 time it is separated from the surrounding soil, and becomes a chattel. In estimating the damages, the  
5 expense of separating the earth from the gold after it is moved to the place of washing, is to be de-  
6 ducted from the value of the gold. Unless a demand is made for the possession of the gold after it is  
7 separated from the earth, and an action is then brought for the conversion of the chattel, the measure  
8 of damages would be the value of the gold detained. *Maye v. Tappan*, 23 Cal. 306. The measure of  
9 damages depends, in some instances, on the way in which plaintiff puts his case. Thus, where de-  
10 fendant broke down and removed plaintiff's fence, the court held that if plaintiff had sued for the  
11 damage to the freehold, he might have recovered the value of the fence as it stood, if it was a part of  
12 the realty. But having elected to sue in replevin for the materials as personal property, he could only  
13 recover their value as such. *Pennybecker v. McDougal*, 48 Cal. 164. One having a mere lien on per-  
14 sonal property, cannot recover greater damages for its conversion from one having a right thereto  
15 superior to his, after his lien is discharged, than the amount secured by the lien, and the compensa-  
16 tion allowed by section 3336 for loss of time and expenses. C. C. 3338. It was said that in an action  
17 by the pledgee against a stranger for the conversion of goods, the plaintiff is entitled to recover the  
18 full value of the goods, because he is answerable over to the pledgor for the surplus. But if the  
19 goods be converted by the owner or by any one acting in privity with him, the pledgee can recover  
20 only the value of his special interest in the pledge. *Treadwell v. Davig*, 34 Cal. 606; *Story on Bail*,  
21 sec. 352; *Lyle v. Barker*, 5 Bin. 457; *Heydan tt Smith's Case*, 3 Coke, 7; *fingeroll v. Van Bokktn*,  
22 7 Cow. 670; *Pomeroy v. Smith*, 17 Pick. 85

23 Penal damages. Waste by guardians, tenants for life or years, joint tenants, or tenants in common,  
24 731, post. Wasting or embezzling estate of deceased, 1458-1460. Executor fraudulently selling real  
25 property, 1572. In an action for waste, upon the authority of the rule laid down in *Bacon's Abridg-*  
26 *ment*, that "where treble damages are given by a statute, the demand for such damages must be ex-  
27 pressly inserted in the declaration, which must either recite the statute, or conclude to the damage of  
28 the plaintiff against the form of a statute." *Rees v. Enteric*, 6 S. and R. 288; *Jfetccomb v. Butterfield*,

1 8 Johns. 342; *Livingston v. Plainer*, 1 Cow. 175; *Benton v. Dale*, Id. 160; the Supreme Court held  
2 that where treble damages were not claimed, judgment should have been entered in favor of the  
3 plaintiff for single damages only, and reversed a judgment for treble damages. *Chipman v. Emeric*,  
4 5 Cal. 239. This decision never seems to have been overruled; but as to forcible entry and detainer  
5 cases, the rule is otherwise; see 1174, and notes. Forcible or unlawful entry upon, or detention of  
6 any building or cultivated real property, 735; see also as to forcible entry, or forcible or unlawful  
7 detainer, 1174. If any tenant give notice of his intention to quit the premises, and does not deliver  
8 up the possession at the time specified in the notice, he must pay to the landlord treble rent during  
9 the time he continues in possession after such notice. C. C. 3344. If any tenant, or any person in col-  
10 lusion with the tenant, holds over any lands or tenements after demand made and one month's no-  
11 tice, in writing given, requiring the possession thereof, such person holding over must pay to the  
12 landlord treble rent during the time he continues in possession after such notice. C. C. 3345.  
13 For wrongful injuries to timber, trees, or underwood, upon the land of another, or removal thereof,  
14 the measure of damages is three times such a sum as would compensate for the actual detriment,  
15 except where the trespass was casual and involuntary, or committed under the belief that the land  
16 belonged to the trespasser, or where the wood was taken by the authority of highway officers for the  
17 purposes of a highway; in which case the damages are a sum equal to the actual detriment. C. C.  
18 3346. For cutting down or carrying off wood, underwood, trees, or timber, or girdling or otherwise  
19 injuring trees or timber, or on the street or highway in front of any person's house, village or city lot  
20 or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or  
21 highway in front thereof, 733; see note "Waste," supra. The wording of 733 more resembles the  
22 wording of 735, 1174, the sections as to forcible entry, etc., than that as to waste, 732.  
23 The measure of damages for cutting trees, etc., is not the actual value of the trees for firewood, but  
24 the damage done to the land by reason of destroying them. This damage should be estimated by all  
25 the circumstances and the purposes for which the trees are used or designed, and not according to  
26 the speculative or fancied ideas that the jury or plaintiff may draw of their worth. *Chipman v. Hib-*  
27 *btrd*, 6 Cal. 162.

28 SPECIFIC AND PREVENTIVE RELIEF.

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1 Specific or preventive relief may be given in cases specified in this title («' e., C. C. 3366- 3423)  
2 and, in no others. C. C. 3366.

3 Specific relief is given: 1. By taking possession of a thing, and delivering it to a claimant; 2. By  
4 compelling a party himself to do that which ought to be done; or 3. By declaring and determining  
5 the rights of parties, otherwise than by an award of damages. C. C. 3367. Preventive relief is given  
6 by prohibiting a party from doing that which ought not to be done. C. C. 3368. Preventive relief, see  
7 526 and notes. Neither specific nor preventive relief can be granted to enforce a penal law, except in  
8 a case of nuisance, nor to enforce a penalty or forfeiture in any case. C. C. 3369.

9 Possession of real property. A person entitled to specific real property, by reason either of a per-  
10 fected title, or of a claim to title which ought to be perfected, may recover the same in the manner  
11 prescribed by the Code Of Civil Procedure, either by a judgment for its possession, to be executed  
12 by the sheriff, or by a judgment requiring the other party to perfect the title and to deliver posses-  
13 sion of the property. C. C. 3375; and see below C. C. 3387.

14 Possession of personal property. A person entitled to the immediate possession of specific personal  
15 property may recover the same in the manner provided by the Code of Civil Procedure (509, post).  
16 C. C. 3379; and see below C. C. 3387. Any person having the possession or control of a particular  
17 article of personal property, of which he is not the owner, may be compelled specifically to deliver  
18 it to the person entitled to its immediate possession. C. C. 3380; and see below C. C. 3387.

19 Obligations, specific performance of. Except as otherwise provided in this article (C. C., Sees.  
20 3384-3395) the specific performance of an obligation may be compelled. C. C. 3384. A court of  
21 equity is always chary of its power to decree specific performance, and will withhold the exercise of  
22 its jurisdiction in that respect, unless there is such a degree of certainty in the terms of the contract  
23 as will enable it at one view to do complete equity. Morrison v. Rossignol, 5 Cal. 64. The jurisdic-  
24 tion of a court of equity to decree specific performance does not turn at all upon the question  
25 whether the contract relates to real or personal property, but altogether upon the question whether  
26 the breach complained of can be adequately compensated in damages; accordingly, while it is a  
27 general rule that contracts for the sale and transfer of personal property will not be specifically en-  
28 forced, yet if there are circumstances in view of which a judgment for damages would fall short of

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1 the redress which the plaintiff's situation demands, as that the thing bargained for is a curiosity, or  
2 that by non-performance he will be greatly embarrassed and impeded in his business plans, or in-  
3 volved in a loss of profits which a jury cannot estimate with any degree of certainty, equity will de-  
4 cree specific performance. Nickerson v. Challerton, 7 Cal. 572; Dufv. Fisher, 15 Cal. 375; Treas-  
5 urer v. Comrn. C, M. Co., 22 Id. 390; McLaughlin v. Piatti, 27 Id. 451; Senter v. Davis, 38 Cal.  
6 453.

7 Real property, claims to recover with damages, etc. A claim for the possession of real property,  
8 with damages for its detention, cannot be joined in the same complaint with a claim for consequen-  
9 tial damages arising from a change of a road by which a tavern-keeper may have been injured in his  
10 business. The damages in the one case arise out of the use of land claimed by the plaintiffs; the  
11 damages in the other case arise from an unauthorized diversion of a public road, by means of which  
12 the plaintiff suffered a loss of his usual business and profits. Bowles v. Sacramento Turnpike Road,  
13 5 Cal. 225. One action may be brought to recover two separate or distinct pieces or parcels of land.  
14 Soles v. Cohen, 15 CaL 152. As to alleging the damages, an allegation of the value of the "use and  
15 occupation, rents and profits," of the premises for the period during which the defendants were in  
16 the wrongful possession and excluded the plaintiffs, was held sufficient to charge the defendants  
17 without any averment that they received such rents and profits. The whole averment was held to be  
18 in effect only that the value of the use of the premises, whilst the plaintiffs were excluded from their  
19 enjoyment, was the amount stated, which was a very proper averment as the basis of the damages  
20 claimed for the wrongful detention of the property .^Patterson v. Ely, 19 Cal. 40.

21 Trustees, claims against. A claim to enforce an express or implied trust may be  
22 joined in a complaint with a claim to enforce a vendor's lien, existing without any written contract.  
23 Both such claims are founded on trusts—one lying in contract, and the other arising by act and op-  
24 eration of law. Burt v. Wilson, 28 Cal. 632-639.

25 Injuries to person. Mayo filed his complaint, praying for the recovery of possession of land in the  
26 city of S., and damages for the detention of the land, and for forcible eviction and expulsion from it,  
27 and for the value of improvements erected upon it by him. The Supreme Court sustained a demurrer  
28

1 to the complaint because a cause of action for an injury to property was improperly joined with one  
2 for an injury to person. Mayo v. Madden, 4 Cal 27.

3 Injuries to property. Plaintiff filed her complaint in the court below for trespass against defendant,  
4 and prayed a verdict for \$500, the alleged value of property destroyed, and \$500 damages. On de-  
5 murrer the court held the complaint unobjectionable. Tendesen v. Marshall, 3 Cal. 440.

6 In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the  
7 breaking away of the defendant's dam, and the consequent washing away of the pay- dirt of the  
8 plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working  
9 his claim. Fraler v. Sears Union W. Co., 12 Cal. 555.

10 Intervention, 387, Defenses must be separately stated, 441

11 In an ejectment suit it was held that the defendant need only answer the very concise allegations  
12 material to constitute a sufficient complaint in ejectment, as to which see 426, n., and that other and  
13 immaterial allegations inserted in the complaint, whether controverted or not by the answer, went  
14 for nothing. Doyle v. Franklin, 48 Cal. 539.

15 Conclusions of law should not be denied. If the answer merely denies the conclusions of law result-  
16 ing from the facts averred in the complaint, it is insufficient to raise an issue and the facts are  
17 deemed admitted. Nelson v. Murray, 23 Cal. 338; Wormouth v. Hatch, 33 Cal 128; Lightner v.  
18 Menzel, 35 Cal 452. Thus a denial of indebtedness without a denial of any of the facts from which  
19 that indebtedness follows, as a conclusion of law raises no issue. Curtis v. Richards, 9 Cal. 38;  
20 Kinney v. Osborne, 14 Cal. 112. The Supreme Court have gone so far as to hold that even where  
21 the complaint is in mdebitatus assumpsit (which complaints they hold to be good, 426, n.; thus rec-  
22 ognizing that indebtedness is a fact), a denial of the indebtedness is not sufficient, being a denial of  
23 a conclusion of law, and not of a fact. Wells v. McPike, 21 Cal. 215. Several other cases have been  
24 thought to be authorities for this proposition, but erroneously. For instance, Caulfield v. Sanders, 17  
25 Cal.571; and JJijgiat v. Wortett, 18 Cal. 330. In both these cases an answer denying indebtedness  
26 was held bad; but in the former, because the denial was as to time, amount and work, conjunctively  
27 in the very words of the complaint; in the latter (on which indeed the decision in Wells v. McPike is  
28 expressly founded), on the ground that the denial merely denied an indebtedness in the amount

1 claimed. The indebitatus counts, alleging that defendant was, at the commencement of the action,  
2 indebted to plaintiff for, etc., are not really statements of facts under 426, but of conclusions of law,  
3 and ought never to have been allowed; but if for the purpose of supporting the complaint, indebted-  
4 ness is held to be a fact, a denial of the indebtedness is a denial of that very fact. There is no escape  
5 from this. An averment in an answer that the plaintiffs debt is barred by a discharge in insolvency,  
6 is only a conclusion of law, and not the statement of a fact. *Christy v. Dana*, 42 Cal. 174.

7 Information and belief. A denial as follows: "And on information and belief he avers that no such  
8 deed or deeds were ever executed," was held to put the existence of the deeds in issue. *Thompson v.*  
9 *Lynch*, 29 Cal. 191.

10 Under a former statute, as under the Code, defendant was allowed to answer by denying "according  
11 to his information and belief." The court held that the rule was to require an answer to a verified  
12 complaint to be in a positive form in order to put in issue a material allegation of the complaint,  
13 provided the defendant was presumed to possess a knowledge respecting the fact alleged; but if he  
14 was not able to answer positively, in such a case he must by a proper statement of facts or circum-  
15 stances overcome the presumption of knowledge on his part, which being done his answer on in-  
16 formation and belief would be deemed all that the law required: *Brown y. Scott*, 25 Cal. 194; *Hum-*  
17 *phreys v. McCaU*, 9 Cal. 59; *Vassault v. Austin*, 32 Cal. 606; but they held that it did not follow  
18 that because the allegation in a complaint was that one B. obtained a judgment against defendant,  
19 the latter must be presumed to know whether such allegation was true or not, for judgment was  
20 sometimes obtained without any knowledge of defendant respecting it. If the defendant did not  
21 know that such a judgment had been obtained or the contrary, it was their duty to make the neces-  
22 sary inquiries, that they might be able to determine whether they could deny in any form the exis-  
23 tence of the judgment described in the complaint, or whether they must admit it either in terms or  
24 by implication from their silence. The natural course to be pursued in such a case would be either to  
25 calf upon the custodian of the records of the court in which it was alleged the judgment was recov-  
26 ered and inquire of him if there was such a judgment, or to employ some person more learned or  
27 competent than themselves to make the proper inquiries; and whether they might be informed by  
28 the one or the other of such persons of the truth of the matter might make no particular difference.

1 Being informed that there was no such judgment, and believing the information, they might, predi-  
2 cating their respective answers upon such information and belief, deny that any such judgment was  
3 recovered. *Vassaul v. Austin*, 32 Cal. 606. Denials "upon his information and belief," instead of  
4 the statutory language "according to his information and belief, are sufficient. *Rowsin v. Steimrt*, 33  
5 Cal. 211; *Jones v. Petaluma*, 36 Cal. 230; *Kir-tteinv. Madden*, 38 Cal. 163. Under the former law a  
6 statement that defendant had no information or belief was held bad as a denial: *Ord v. "Uncle*  
7 *.Sam*," 13 Cal. 369; and this was so even in the case of a municipal corporation, for the court said it  
8 could be informed and believed through its officers. *S. F. Gas Co. v. S. P.*, 9 Cal. 453.

9 Conclusions of law should not be denied. If the answer merely denies the conclusions of law result-  
10 ing from the facts averred in the complaint, it is insufficient to raise an issue and the facts are  
11 deemed admitted. *Nelson v. Murray*, 23 Cal. 338; *Wormouth v. Hatch*, 33 Cal. 128; *Lightner v.*  
12 *Menzel*, 35 Cal. 452. Thus a denial of indebtedness without a denial of any of the facts from which  
13 that indebtedness follows, as a conclusion of law raises no issue. *Curtis v. Richards*, 9 Cal. 38;  
14 *Kinney v. Osborne*, 14 Cal. 112. The Supreme Court have gone so far as to hold that even where  
15 the complaint is in *indebitatus assumpsit* (which complaints they hold to be good, 426, n.; thus rec-  
16 ognizing that indebtedness is a fact), a denial of the indebtedness is not sufficient, being a denial of  
17 a conclusion of law, and not of a fact. *Wells v. McPike*, 21 Cal. 215. Several other cases have been  
18 thought to be authorities for this proposition, but erroneously. For instance, *Caulfield v. Sanders*, 17  
19 Cal. 571; and *JJijiat v. Wortett*, 18 Cal. 330. In both these cases an answer denying indebtedness  
20 was held bad; but in the former, because the denial was as to time, amount and work, conjunctively  
21 in the very words of the complaint; in the latter (on which indeed the decision in *Wells v. McPike* is  
22 expressly founded), on the ground that the denial merely denied an indebtedness in the amount  
23 claimed. The *indebitatus* counts, alleging that defendant was, at the commencement of the action,  
24 indebted to plaintiff for, etc., are not really statements of facts under 426, but of conclusions of law,  
25 and ought never to have been allowed; but if for the purpose of supporting the complaint, indebted-  
26 ness is held to be a fact, a denial of the indebtedness is a denial of that very fact. There is no escape  
27 from this. An averment in an answer that the plaintiff's debt is barred by a discharge in insolvency,  
28 is only a conclusion of law, and not the statement of a fact. *Christy v. Dana*, 42 Cal. 174.



1 Information and belief. A denial as follows: "And on information and belief he avers that no such  
2 deed or deeds were ever executed," was held to put the existence of the deeds in issue. Thompson v.  
3 Lynch, 29 Cal. 191.

4 Under a former statute, as under the Code, defendant was allowed to answer by denying "according  
5 to his information and belief." The court held that the rule was to require an answer to a verified  
6 complaint to be in a positive form in order to put in issue a material allegation of the complaint,  
7 provided the defendant was presumed to possess a knowledge respecting the fact alleged; but if he  
8 was not able to answer positively, in such a case he must by a proper statement of facts or circum-  
9 stances overcome the presumption of knowledge on his part, which being done his answer on in-  
10 formation and belief would be deemed all that the law required: Brown y. Scott, 25 Cal. 194; Hum-  
11 phreys v. McCaU, 9 Cal. 59; Vassault v. Austin, 32 Cal. 606; but they held that it did not follow  
12 that because the allegation in a complaint was that one B. obtained a judgment against defendant,  
13 the latter must be presumed to know whether such allegation was true or not, for judgment was  
14 sometimes obtained without any knowledge of defendant respecting it. If the defendant did not  
15 know that such a judgment had been obtained or the contrary, it was their duty to make the neces-  
16 sary inquiries, that they might be able to determine whether they could deny in any form the exis-  
17 tence of the judgment described in the complaint, or whether they must admit it either in terms or  
18 by implication from their silence. The natural course to be pursued in such a case would be either to  
19 calf upon the custodian of the records of the court in which it was alleged the judgment was recov-  
20 ered and inquire of him if there was such a judgment, or to employ some person more learned or  
21 competent than themselves to make the proper inquiries; and whether they might be informed by  
22 the one or the other of such persons of the truth of the matter might make no particular difference.  
23 Being informed that there was no such judgment, and believing the information, they might, predi-  
24 cating their respective answers upon such information and belief, deny that any such judgment was  
25 recovered. VassauU v. Austin, 32 Cal. 606. Denials " upon his information and belief," instead of  
26 the statutory language "according to his information and belief, are sufficient. Rowsin v. Steimrt, 33  
27 Cal. 211; Jones v. Petaluma, 36 Cal. 230; Kirttein v. Madden, 38 Cal. 163. Under the former law a  
28 statement that defendant had no information or belief was held bad as a denial: Ord v."Uncle Sam,"

1 13 Cal. 369; and this was so even in the case of a municipal corporation, for the court said it could  
2 be informed and believed through its officers. *S. F. Gas Co. v. S. P.*, 9 Cal. 453.

3 In a suit on a note, an answer admitting the making of the note, but denying, "to the best of defen-  
4 dant's knowledge, information and belief, all and singular the other allegations in said complaint,"  
5 was held not to be a specific denial of the allegations of the complaint. *Stewart v. Street*, 1a Cal.  
6 372. A denial of an act being done "unlawfully" or "wrongfully" does not deny the act, but only the  
7 character of it. *Larney v. Mooney*, 50 Cal. 610; *Burke v. Table M. Co.*, 12 Cal. 407; *Busenius v.*  
8 *Coffee*, 14 Cal. 92; *Wood-worth v. Knowlton*, 22 Cal. 168; *Wood v. Richardson*, 35 Cal. 149;  
9 *Feeley y. Shirley*, 43 CaL 369.

10 If several material facts are stated conjunctively in a verified complaint, an answer which under-  
11 takes to deny these averments as a whole, conjunctively stated, is evasive, and an admission of the  
12 allegation thus attempted to be denied. The rules of pleading, under our system, are intended to pre-  
13 vent evasion, and to require a denial of every specific averment in a sworn complaint, in substance  
14 and in spirit, and not merely a denial of its literal tnitn; and whenever the defendant fails to make  
15 such denial, he admits the averment. *Doll v. Good*, 38 Cal. 287; *Smith v. Biehmond*, 15 Cal. 501;  
16 *Blankman v. Vallejo*, Id. 638; *Castro v. Wetmore*, 16 Id. 380; *ffiggins v. Wor- te.ll*, 18 Id. 333;  
17 *Woodworth v. Knowlton*, 22 Id. 169; *Landers v. Bolton*, 26 Id. 417; *MorriU v. Morrill*, Id. 292;  
18 *Camden v. Mullen*, 29 Id. 564; *Blood v. Light*, 31 Id. 115.

19 The following instances will serve to explain this: A complaint alleged that on a certain day the  
20 plaintiff was the owner and in possession of certain personal property, of the value of \$1000; and  
21 that the defendant on the same day seized upon and converted it to his own use. The answer denied  
22 that on the day specified the plaintiff was the owner, and lawfully in possession of the property; the  
23 court said the denial was open to various objections. It raised an immaterial issue as to time; and, in  
24 reference to the possession, amounted simply to a conclusion of law. There was not even the pre-  
25 tense of an issue npon this allegation, except conjunctively, with the allegation of ownership. Each  
26 of these allegations was sufficient to sustain the complaint; and an issue presented by a conjunctive  
27 denial must be regarded as irrelevant and immaterial. *Kuhland v. Sedgwick*, 17 Cal. 126.

1 A denial as follows was held bad: "And this defendant further answering, on information and belief,  
2 denies that said Daniel Richards, for a valuable consideration, assigned by a written instrument the  
3 indebtedness due upon said note, or that the said assignment was stamped with United States reve-  
4 nue stamps of the required amount and denomination, or that any written assignment was made."  
5 If this was a denial at all, it was only a denial that the assignment was in writing, and that it was  
6 made for a valuable consideration. *Randolph v. Harris*, 28 Cal. 566.

7 Where defendants met an averment that plaintiff was the owner, and in the possession of property,  
8 by denying that he was the owner and entitled to the possession of it, the court held it neither a de-  
9 nial that the plaintiff was the owner of the property, nor that he was in possession of the property  
10 when it was taken from him. The defendants also denied that they at any time wrongfully took from  
11 the possession of the plaintiff the property and chattels mentioned in the complaint, and also denied  
12 that they wrongfully detained from him such property. This was held bad as only denying the  
13 wrongfulness, t. e., the conclusion of law. *Richardson v. Smith*, 29 Cal. 531.

14 A denial that on the 4th day of February, 1865, the plaintiffs were in possession of premises, was  
15 held to amount at most to a denial that both plaintiffs were in possession, and certainly not to pre-  
16 sent the issue of the mis-joinder of either of the plaintiffs. *QiUan v. Sigman*, 29 Cal. 641; *Fosgate*  
17 *v. Herkimer Nov. & Hyd. Co.*, 12 N. Y. 582.

18 A denial in the conjunctive "that said plaintiff is seised and possessed, and is the owner in her own  
19 right, as her separate property, of the land, etc., was held not to amount to a denial of the allegation  
20 to which it professed to respond. *Filch, v. Bunch*, 30 Cal. 211. A denial that "defendant received  
21 \$3000 in gold coin, parcel of the \$65,000, to and for the use of the plaintiff," was held bad for two  
22 reasons: First. The count did not charge that the \$3000 sued for was parcel of the \$65,000, or of any  
23 other sum; but \$3000 absolutely, and without clog. The traverse was therefore pregnant with an  
24 admission that \$3000 had been received as charged—

25 that is, \$3000 disconnected from the circumstance named in the denial, and spoiling its pith. Sec-  
26 ond. The denial was, that the \$3000 was received in gold coin. That involved an admission that  
27 \$3000 was received in either one of the two other forms of lawful money, and therein it denied  
28

1 what was non- essential, and admitted all that was essential to a recovery. Leffingwdl v. Griffing,  
2 31 CaL 232.

3 Plaintiffs averred in their complaint that they "now are, and for several years last past have been,  
4 the owners in fee simple absolute, and in the possession, and rightfully entitled to the possession  
5 of," etc. Defendant in his answer denied that "plaintiffs now are, and for several vears last past have  
6 been the owners in fee simple or otherwise in the possession (except as hereinafter alleged), or enti-  
7 tled to the possession of the land and premises described in the complaint." The pleadings were  
8 verified. It was held that the averment of the plaintiffs that they were in possession at the com-  
9 mencement of the action, was not effectually denied. Reed v. Calderwood, 32 CaL 109, 110.

10 In an action of ejectment, the complaint being verified, and setting forth facts sufficient to entitle  
11 the plaintiff to recover, the defendants answered separately. One of them admitted that he was in  
12 possession of the  
13 Premises when the suit was brought, and denied generally the other allegations of the complaint.  
14 He, however, disclaimed any title to or interest in the premises in controversy. The other denied the  
15 allegations of the complaint in the following form: "And now comes N. T., one of the defendants,  
16 and makes his separate answer, and says, that he denies generally and specifically each and every  
17 material allegation in the complaint, the same as if each allegation were herein recapitulated." The  
18 court held that neither of the answers contained a specific denial of any material allegation in the  
19 complaint. Hensley v. Tartar, 14 Cal. 508. K. acquired the legal title to land under such a state of  
20 facts as made his purchase fraudulent, and made him the trustee of S. U. bought from K. S. com-  
21 menced an action against U. to have him declared trustee, and to compel him to convey the land. In  
22 his complaint he averred the facts showing K.'s fraud, and which in law made him the plaintiff's  
23 trustee. U., in his answer, admitted these facts and his knowledge of them, but denied that he be-  
24 came the trustee of S., or that there was anything unfair or fraudulent in the facts alleged. It was  
25 held that the answer admitted the trust. Scott v. Umbarger, 41 Cal. 411. A general denial of the  
26 averments of the complaint, with the qualification of "except as hereinafter admitted," is clearly in-  
27 sufficient when the pleadings are verified. Lewnson v. Schwartz, 22 Col. 231.

28

1 Where an alleged entry and ouster were controverted by the answer, it was held that the entry being  
2 denied, it could not be said that the withholding of the possession at the commencement of the ac-  
3 tion stood admitted by the pleadings, for the withholding must have been preceded by an entry.  
4 *Hawkins v. Rfichert*, 28 Cal. 538. If the complaint avers a judgment, and the issuing of an execution  
5 thereon, and a sale thereunder of land, and the answer denies the validity of the judgment, and avers  
6 that it was void for want of jurisdiction, and denies that the plaintiff acquired any title by the pre-  
7 tended sale by the sheriff, the execution and sale thereunder are not sufficiently denied to require  
8 the execution to be put in evidence. *Lee v. Figg*, 37 Cal. 328.

9 The court will not give effect to a denial when it appears from the context and other portions of the  
10 answer that the denial was intended to be hypothetical. *Aleman v. Petaluma*, 38 Cal. 557.

11 Where an answer admitted a contract with plaintiff and one Williston, and averred that this was the  
12 only contract made by defendants in relation to the matter, and denied that they made any other, this  
13 was held to be a denial in "a plain and unequivocal form of the making of any contract with plain-  
14 tiff." *Murphy v. Napa County*, 20 Cal. 503.

15 Where one material allegation in the complaint was that the plaintiffs, at the time of the alleged en-  
16 try of the defendants, were the owners and in possession of the mining claim sued for; and another  
17 was that the ownership and right of possession remained in the plaintiffs up to the commencement  
18 of the action, and the defendants denied these allegations in direct and positive terms, and then pro-  
19 ceeded and amplified those denials, by alleging previous abandonment and forfeiture, which, if  
20 true, would have sustained the general denial, the court said they could not see how plaintiff was  
21 injured by having these facts fully set forth in the answer. It advised him of the character of defen-  
22 dants' proof upon the main point in issue, and to that extent it was a benefit to him. *BeU v. Brown*,  
23 22 Cal. 681.

24 Where plaintiff alleged that he was the owner, and entitled to the possession of one undivided half  
25 of certain chattels, and defendant, in his answer, admitted that he was in possession of the chattels,  
26 and alleged that he was the owner thereof, the court held plaintiff's title was sufficiently put in is-  
27 sue. *Miller v. Brighton*, 50 Cal. 615.

1 A denial i lint plaintiff has been in possession of land adversely to the claim of defendants for  
2 longer than four months previous to filing the answer, is equivalent to a denial of an allegation in  
3 the complaint that plaintiff had been in such possession for four years, or, in fact, for a perioa ex-  
4 ceeding three months, the complaint having been filed one month before the answer. Oarvey v.  
5 Willis, 50 Cal. 620. To determine whether an allegation has been properly denied or not, the answer  
6 to the particular allegation which it is designed to controvert must be examined. If taken by itself an  
7 issue is fairly made, and there is no admission inconsistent with the answer, the denial is sufficient  
8 Each denial must be regarded as applying to the specific allegation it purports to answer, and not as  
9 forming part of an answer to some other specific and entirely independent allegation. Racouillat v.  
10 Rene, 32 Cal. 453-455.

11 Any form of denial which fairly meets and traverses the allegation is admissible. Suppose it is al-  
12 leged in a complaint that the defendant, at a certain time, made and delivered to the plaintiff his cer-  
13 tain promissory note,  
14 etc., this allegation is as directly and fairly traversed by saying, "I did not, at the time specified or at  
15 any other time, make or deliver to the plaintiff the note described in the complaint," as by saying, "I  
16 deny that on the day specified, or at any other time, I made or delivered to the plaintiff the note de-  
17 scribed in the complaint" If the denial is not evasive, but directly traverses the matter alleged, it is  
18 good, without regard to the mere form in which it is expressed. Hill v. Smilit, if] CaL 479.

19 The following form is sufficient: "The defendant, for answer, says, he denies," etc., dissenting from  
20 the New York cases. Espmom. v. Gregory, 40 Cal. 62. At the time when the practice required a rep-  
21 lication, it was held that a replication under oath in response to a material averment of the answer,  
22 saying, "It is not true, "etc., did not specifically deny the averment Venan \. McGregor, 23 Cat 339.

23 If the complaint in an action to enjoin the diversion of water alleges that the plaintiff has appropri-  
24 ated and used the water for more than five years, and the answer denies that the plaintiff ever at any  
25 time used or took up, or appropriated the water, the denial is sufficient

26 If the complaint in such action avers that from the spring there ran and flowed irn- memorially upon  
27 the plaintiff's premises a constant and never-failing stream of pure, fresh water, and the answer de-  
28 nies that the water flowing from the spring ever at any time ran or flowed to or upon the plaintiff's

premises, the denial is sufficient, *nilkim v. McCue*, 46 Cal. 656. If the answer contains a special defense which consists of an averment of facts, which, if admissible in evidence, can be proved under denials contained in the answer, an order of the court overruling a demurrer to the special defense, if erroneously made, constitutes immaterial error. *Broten v. Xentfield*, 60 Cal. 129.

Damages, denial of. Where the complaint is verified, the question of damages is not in issue, if the allegation of the complaint on that point is not specifically denied by the answer. *McLaughlin v. Kelly*, 22 Cal. 221; *Jtovx v. Bradley*, 12 Cal. 231.

A denial that the plaintiff has suffered damage in the exact sum claimed by him, is insufficient. *Button v. T. & C. C. T. R. Co.*, 45 Cal. 553.

In an action to enforce a mechanic's lien for \$76, where the answer averred that the value of the labor "was not over the sum of \$15 or \$20," it was held that it was a denial that the value of the labor was \$76, and that the answer should not be stricken out *Way v. Ogfaby*, 45 Cal. 655.

Admission, effect of on denial. The admission of the attorney of record of the correctness of the amount due for which judgment is taken, when not done in fraud of the rights of his client, must destroy the effect of a denial in the answer. *Taylor v. Randall*, 5 Cal. 80.

In ejectment, plaintiffs asserted title under a patent of the United States. The defendants, in their answer, denied generally the allegations of the complaint, and at the same time admitted the issuance of the patent, and that it embraced the premises in controversy. The court held that the admissions in the answer negated its general denials, and the latter in such case might be disregarded, and judgment asked upon the former, the complaint being verified. *Fremont v. Seals*, 18 Cal. 434. But this only applies to existing pleadings, and not to defunct pleadings for which other and amended pleadings have been substituted. *Mecham v. McKay*, 37 Cal. 165.

New matter. New matter is where defendant seeks to introduce into the case a defense not disclosed by the pleadings—something relied on by him, but not put in issue by the plaintiff. In all cases where the pleadings are verified, every matter of defense not directly responsive to the allegations of the complaint must be set up in the answer. *Terry v. Sickles*, 13 Cal. 430. *Gavin v. Annan*, 2 Cal. 494, and *McLaren v. Spalding*. *Id.* 510, were overruled by *Piercy v. Tiabin*, 10 Cal. 22, and *Glazer v. Clift*, *Id.* 303. Whatever admits that a cause of action as stated in the complaint, once ex-



1 isted, but at the same time avoids it—that is, shows that it has ceased to exist—is new matter. Such  
2 are release, and accord and satisfaction. *Coles v. Soulsby*, 21 Cal. 50. An equitable title cannot  
3 avail a defendant in an action of ejectment, unless it be pleaded as new matter. *Cadiz v. Maiors*, 33  
4 Cal. 288. Where the defendant wished to raise the point, under a denial, that a steamboat company  
5 could not be incorporated under an act of the Legislature, the court held that the want of capacity in  
6 the plaintiff to sue should have been specially set up in the answer; the denial was not sufficient.  
7 ""'. *Steam Nav. Co. v. Wright*, 8 Cal. 690; 1 Mass. 1, 159; 6 N. H. 527, 197; 7 Mon. Ky. R. 484.  
8 The want of legal capacity to sue is a personal disability, and if the defendant intends to set up such  
9 a defense he should state so distinctly. *Cal. Steam Nav. Co. v. Wright*, 8 Cal. 590. In an action by an  
10 attorney on a quantum meruit for fees, skillful or unskillful and negligent conduct of a case is an  
11 important subject of inquiry. Anything which shows the services were not of the value claimed, as  
12 the nature of the suit conducted, its little difficulty, small amount, little skill requisite, the absence  
13 of skill, and the like, is competent, under the issue of value. A trial may result successfully and yet  
14 the attorney be guilty of negligence. His want of skill, or neglect, may put the client to great ex-  
15 pense to redeem his blunders; and, on a quantum meruit, the value of services would be reduced.  
16 *fridges v. Paige*, 13 Cal. 640. Any objection that may be taken by answer may be taken by demur-  
17 rer, 433. Whether or not the objection be apparent upon the face of the complaint the objection it-  
18 self is still the same. The mode of taking advantage of the error only, is different in the two cases. It  
19 was not so in all cases, under the former system, as some matters had to be specially pleaded,  
20 though the defect was apparent upon the face of the declaration; as, for example, usury. *Jfentsch v.*  
21 *Porter*, 10 Cal. 560. In an action of ejectment to recover mining claims, an answer to the complaint  
22 which avers "that any right that plaintiffs may have ever had to the possession, etc., they forfeited  
23 by a non-compliance with the rules, customs and regulations of the miners of the diggings embrac-  
24 ing the claims in dispute, prior to the defendants' entry," is insufficient in not setting forth the rules,  
25 customs, etc. *Dutch. Flat W. Co. v. Mooney*, 12 Cal. 534 Under a denial of a contract, defendant  
26 may show anything disproving the contract as averred; as, that another party, who in fact sold  
27 goods, sold them as his own and not as agent of plaintiff, or, that defendant was not to pay until  
28

1 cattle sold were fattened and slaughtered. Such proof is not new matter. Hawkins v. Borland, 14  
2 Cal. 415.

3 The officers of a corporation have no power to authorize the execution of a note as surety for an-  
4 other, in respect to a matter having no relation to the corporate business, and in which the corpora-  
5 tion has no interest. A party receiving such note with notice cannot recover on it Hall v. Auburn T.  
6 Co., 27 Cal, 257; Parsons on Notes and Bills, 166; Bank of Genesee v. Patchm Bank, 13 N. Y. 309;  
7 Angell A Ames on Corp., Sees. 257, 258. Where a note was given to plaintiffs for a debt due them  
8 from B., one of the directors of a corporation, the court held that an answer denying the making and  
9 delivery of the note by defendant was sufficient to a flow of the introduction of evidence of the  
10 want of authority of the directors to make the note. Hall v. Auburn Turnpike Co., 27 CaL 257, 258.  
11 Ejectment. Defendant may set off against damages value of improvements made under color of ti-  
12 tle, 741. If defendant has a legal title, he need not go into equity to assert it. Chip/man v. Hastings,  
13 50 Cal. 311. A disclaimer of possession or interest in real property (739) is not a proper proceeding  
14 in an action of ejectment; it is only proper in actions brought to determine estates or interests as-  
15 serted against parties in possession by parties out of possession. A judgment in ejectment cannot be  
16 entered against a party unless he was in the possession, actual or constructive, of the property at the  
17 commencement of the suit. Noe v. Card, 14 Cal. 609; Gamer v. Marshall, 9 Cal. 268.

18 Where a complaint avers that on a particular day the plaintiffs were the owners in fee simple and in  
19 possession, etc., the defendant, under a denial, may confine himself to simply rebutting the evi-  
20 dence of the plaintiff. He need not show that he has any title whatever. It is sufficient if he make it  
21 appear that the plaintiff has no title or interest entitling him to the possession at the time of the trial.  
22 He may show this by proving that the title and right of possession is in some third person, except in  
23 the case of public lands, in which case this rule is qualified. Moore v. Tict, 22 Cal. 516; Adams on  
24 Ejectment, 337- 380 and notes; Coryell v. Cain, 16 Cal. 572.

25 The plaintiff must show a title or right of possession existing at the time of the commencement of  
26 the suit. Moore v. Tict, 22 Cal. 516; Yount v. Howdl, 14 Cal. 465; Stark v. Barrett, 15 Id. 361. But  
27 no necessity exists on the part of the defendant to show a title or right of possession existing in him  
28 at the time. He has a clear right to snow, by any proper evidence, that at the time of the trial he had

1 the title or right of possession, and this is sufficient to defeat the plaintiff's action. *Moore v. Tiee*, 22  
2 Cal. 516.

3 Where the strict legal title is not involved, and the plaintiff relies upon a right to recover founded  
4 upon a naked possession, defendant may defeat a recovery by proving that the premises were aban-  
5 doned by plaintiff before the alleged entry of defendant, and were therefore at the time of the entry  
6 *publici juris*, and he may do this under a simple denial of plaintiff's right to the possession. In such  
7 case the issue is, was plaintiff entitled to the possession at the date of defendant's entry? And any-  
8 thing which shows that he was not is but matter in rebuttal, and competent evidence for the defen-  
9 dant under the denial, upon the same principle that the defendant may defeat a recovery where the  
10 plaintiff relies upon strict title. *Wilson v. Cleaveland*, 30 Cal. 200. A defendant setting up title to  
11 only a portion of the demanded premises, must specify the part he claims, in order to apprise his  
12 adversary of it, that he may bring his proofs understandingly. *Anderson v. Fisk*, 36 Cal. 633.

13 Errors and defects to be disregarded, 475.

14 Estoppel, 1908.

15 Executor. See "Administrator," *supra*.

16 Fraud. See 426 n., p. 161.

17 In defense to an action on a promissory note, it is not sufficient to plead in general terms want of  
18 consideration, and that the note was obtained by fraud. The answer should set out the circumstances  
19 under which the note was given, and point out the facts which constitute the fraud. *Gushee v.*  
20 *Leavitt*, 5 Cal. 161.

21 Gold coin, etc., allegation as to money being payable in, should be denied, 667.

22 Husband and wife, 370, 371, and notes.

23 Judgment or other determination of a court, officer, or board, pleading, 456.

24 Judgment, foreign. In an action on a judgment obtained in a New York court, the answer did not  
25 allege that an appeal, which it alleged had been taken and perfected to the New York Court of Ap-  
26 peals from said judgment, had, by the laws of New York, the effect of suspending the judgment  
27 thus appealed from, or of staying the execution thereof, nor was it alleged that the undertaking on  
28 such appeal was to the effect that the sureties thereon were bound in double the amount named in

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ARREST of adverse claimants writ of possession and ejectment, Motion: leave to file quo Warranto

1 the judgment; that if the judgment appealed from, or any part thereof, should be annulled, the appel-  
2 lant would pay the amount directed to be paid by the judgment, or that any order was entered stay-  
3 ing proceedings upon or execution of the judgment. The court held the presumption was that the  
4 effect of the alleged appeal by the laws of New York was the same as in this State; and in this State  
5 such appeal would not stay execution or proceedings for the collection of the amount of the judg-  
6 ment appealed from, pending the appeal, nor destroy or weaken the force and effect of the record of  
7 the judgment as evidence of the facts, or matters necessarily determined thereby. Whether by an  
8 appeal from a judgment in which appellant had given an undertaking on appeal, in form and amount  
9 sufficient to stay proceedings for its enforcement, the effect of the record of the judgment as evi-  
10 dence was thereby suspended or nullified, was not decided. *Taylor v. Shew*, 39 Cal. 539.

11 Justification. An execution is sufficient justification to the sheriff for the seizure of the property of  
12 the debtor, and it is immaterial whether the property be in the actual possession of the debtor, or in  
13 the possession of parties holding it for his benefit. But if the property be in the possession of a  
14 stranger to the writ, claiming it as his own by virtue of a transfer to him of the debtor, which <>ould  
15 prevent the latter from retaking the possession, the officer must plead not only the writ but  
16 the judgment. *Bickerstaff v. Doub*, 19 Cal. 112; *Knox v. Marshall*, 19 Cal. 622; *Demick v. Chapman*,  
17 11 Johns. 131; *Pool v. Chandler*, 10 Wend. Ill; *Ely v. Ehle*, 3 Corns. 506; 1 Saund. R. 298; *Van Ellfr*  
18 *v. Hurst* <fc *Gushing*, 6 Hill, 311; *NobU & Eastman v. Holmes*, 5 Hill, 195; *Thornburgh v. Hand*, 1  
19 Cal. 554; *Glazer v. Clift*, 10 Cal. 304.

20 Where, in an action against the sheriff for taking goods, he justifies under an attachment against a  
21 third person, it is not necessary that his answer should set forth minutely every fact relating to the  
22 attachment suit. An answer which stated the time of commencement of the action, the names of par-  
23 ties, the court, and that the goods were taken by virtue of a writ of attachment issued therein, was  
24 held sufficient. *Towdy v. Ellis*, 22 Cal. 651. In trespass *quart clausum fregit*, where the complaint  
25 avers matter of aggravation after the entry, an answer justifying the aggravating matter, but admit-  
26 ting plaintiff's title and possession, does in it state facts sufficient to constitute a defense. In trespass  
27 *quare claugum freait* an answer justifying merely because the defendant has an easement on the  
28

land contains no defense. *Pico v. Colimas*, 32 Cal. 578. Process regular on its face justifies sheriff, 262, n., p. 90, ante; *Pol. C.* 4187.

Leave and license must be specially pleaded. *Alford v. Bctrnum*, 45 Cal. 485.

Libel. Defendant may justify and allege mitigating circumstances, 461.

Limitations, statute of, see 430, n.

On demurrer to a complaint which charged that the parties each recovered a judgment in rem, against the property of the other; that defendant, by giving a bond with sureties, which he knew to be worthless, deprived plaintiffs of their lien on the property, against which he recovered judgment; that defendant, as well as the sureties on his bond, were insolvent, and that a fraudulent assignment of the judgment had been executed for the purpose of defeating plaintiffs' right to set off their decree against it, the court held that it became their imperative duty to interfere to prevent the consummation of a fraud. *Runaell v. Comeay*, 11 Cal. 101; *Simson v. Hart*, 14 Johns. 74; *Gay v. Gay*, 10 Paige 376. The claim must be such that the party pleading it might obtain a several judgment against his adversary upon it, and this undoubtedly excludes a joint debt as a set-off against a separate debt *Howard v. Shore*, 20 Cal. 281. But although the parties named in the record of two judgments are not the same, and therefore a court of common-law jurisdiction could not make the set-off, a court of equity will look beyond the nominal to the real parties in interest, and adjudicate the rights of the parties accordingly. The interposition of a trustee will not prevent a court of equity from reaching the cestuis que trust, when all the parties are before it, and from compelling them and the trustee to allow a set-off, even though such relief could not be granted by a court of common law. *Walker v. Sedgwick*, 8 Cal. 405; *Russell v. Conway*, 11 Cal. 93; *Naglee v. Palmer*, 7 Cal. 543; *Howard v. Shorts*, 20 Cal. 277. Where some equity intervenes independent of the fact of mutual unconnected debts, equity will take jurisdiction and determine the matter upon principles of mutual equity. *Hobbs v. Duff*, 23 Cal. 627; see, on Set-off, 190; *Lindsay v. Jackson*, 2 Paige, 581. The set-off will be allowed as between the real parties in interest regardless of a nominal party. *Hobbs v. Duff*, 23 Cal. 627; *O'Connor v. Murphy*, 1 H. Bl. 657; see *Duff v. Hobbs*, 19 Cal. 658. Where defendant sought to avail himself of a demand by way of counter-claim, not in favor of defendant alone, nor in favor of defendant and his comaker of the note in the suit, but a joint demand

1 in favor of defendant, his co-obligor, and one Taylor, a stranger to the note and suit, and there was  
2 no allegation that either the defendant or the makers of the note had acquired Taylor's interest in  
3 this demand, it was held not available as a defense, and a judgment thereon could not be rendered in  
4 favor of defendant as demanded. *Hooky. White*, 36 Cal. 301; and see *Sterns v. Martin*, 4 Cal. 229,  
5 and *Gannon v. Dougherty*, 41 Cal. 663. Joint and separate debts cannot be set off at each other at  
6 law, and there is no good reason for the application of a different rule to a claim for damages.  
7 *Jfmgv. Wise*, 43 Cal. 635. Equity will not set off the claim of an individual creditor of one joint  
8 owner of a judgment against the judgment. And if the judgment be partnership assets, the individual  
9 creditor has no claim to any part of it until adjustment of the firm accounts. *Colling v. Butler*, 14  
10 Cal. 223.

11 Subdivisions 1 and 2, what are causes of action within. In a suit for services as agent of defendant  
12 under a contract, defendant in answer set up a violation of the contract on the part of plaintiff, and  
13 also certain other matter, amounting to a tort on his part, as conspiracy to have the property of de-  
14 fendant sold, and bought in by him, circulating false reports that defendant was a bankrupt, its af-  
15 fairs a swindle, etc. It  
16 was held that this latter portion of the answer was properly struck out on motion of plaintiff.

17 *Bates v. Sierra Nevada, etc., Co.*, 18 Cal. ni. It has been said that an unliquidated claim for damages was  
18 held not the subject of offset, either equitable or legal. *Rice v. Richardson*, 19 Cal. 354. But in  
19 a subsequent case, where the principal and cross-claim were based upon the same contract, the court  
20 held that both might be considered in the same action, though the damages might be unliquidated;  
21 and if the jury found a balance in favor of defendant, he might have judgment and , execution there-  
22 for. *Stoddard v. Treadwell*, 26 Cal. 305; *Pattison v. Richards*, 22 Barb. 146; *Glason v. Moen*, 2  
23 *Duer*, 639; *Spencer v. Babcock*, 22 Barb. 326. The Code, by enumerating tests, excludes all oth-  
24 ers by intendment. *Stoddard v. Treadwell*, 26 Cal. 305.

25 Where a breach of a contract on the defendant's part was the foundation of the plaintiff's claim for  
26 damages, and the counter-claim for damages arose on the same contract, the court held that it could  
27 be interposed by the defendant. *Dennis v. Belt*, 30 Cal. 252.

1 In replevin, the subject-matter of the litigation necessarily consists only of the property mentioned  
2 in the complaint; and it is not competent to the defendant by his answer to introduce a new and dis-  
3 tinct subject-matter of litigation, by claiming of the plaintiff the release and return of other and dis-  
4 tinct personal property, even though he present such a case as would have enabled him to recover in  
5 an independent action. *Lorensohn v. Ward*, 45 Cal. 10.

6 In an action for damages for an assault and battery, a libel published by the plaintiff of and concern-  
7 ing the defendant, does not constitute a counter-claim. *Macdougall v. Maguire*, 35 Cal. 274; *Pattison*  
8 *v. Richards*, 22 Barb. 143; *Murden v. Priment*, 1 Hilton, 76; *Barhyte v. Hughes*, 33 Barb. 320;  
9 *Schnaderbeck v. Worth*, 8 Abb. 38. The objection is not waived by the failure to demur. The ground  
10 of demurrer is not a misjoinder of defenses; but it is that the matter is not recognized by the law as a  
11 defense to the action. The party may have an independent cause of action, but it has no relation to  
12 the pending action. As it is not recognized by the law as a defense, the objection may be taken at  
13 any time. *Alacdoiuja v. Maguire*, 35 Cal. 274-281. Damages for injury to the property against  
14 which the assessment was issued cannot be set up as a counterclaim in an action to recover an as-  
15 sessment for the improvement of a street.

16 The court said this doctrine was settled in *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Emery v.*  
17 *Bradford*, 29 Cal. 75; *Nolan v. Reese*, 32 Cal. 484; and *Himmelman v. Steiner*, 38 Cal. 176, that the  
18 owners of property adjacent to a street were not in any sense parties to the contract for the im-  
19 provement of a street, entered into by a contractor with the superintendent of streets; that the as-  
20 sessment was the " transaction " within the meaning of this section out of which the cause of action  
21 must arise, out of which the defendants are authorized to set up as a counter-claim; that such a de-  
22 mand did not arise out of the assessment, nor indeed out of the proceedings upon which it is based,  
23 and therefore was not available as a counter-claim. *Himmelman v. Spanagel*, 39 Cal. 389, 392.

24 Equitable defense by way of counterclaim. Equitable defenses may be interposed to the action of  
25 ejectment, but the defendant in such cases becomes an actor, *Bruck v. Tucker*, 42 Cal. 346, with  
26 respect to the matter presented by him, and his answer must contain all the essential averments of a  
27 bill in equity. The defense to an action of ejectment must meet the present claim of the plaintiff to  
28 the possession; and in order that an equitable defense may prevail, the equity presented must be of



1 such a character that it may be ripened by the decree of the court into a legal right to the premises,  
2 or such as will estop the plaintiff from the prosecution of the action. Such defense can only be in-  
3 terposed where the parties to the action are such as would be required to a bill in equity, seeking the  
4 same relief. *Leatrade v. Earth*, 19 Cal. 671, 673. Defendant must file an answer which in matter of  
5 allegation would be a good bill in equity under the old system. *Meador v. Parson\**, 19 Cal. 299. He  
6 need not, however, conclude with a prayer for affirmative relief in order to make his defense avail-  
7 able. An equitable cause of action in favor of the defendant, in order to be available to him as a de-  
8 fense, must be one which has not been barred by the Statute of Limitations. *Carpentier v. Oakland*,  
9 30 Cal. 443; see *McCauley v. Fulton*, 44 Cal. 362.

10 Where the owner of land sold the same, and covenanted to execute a warranty-deed therefor on  
11 payment of the purchase-money, and the purchaser took and held actual possession and afterwards  
12 paid the purchase-money, it was held that such purchaser's or his grantee's equitable title was a suf-  
13 ficient defense to an action of ejectment under the legal title by the original owner, or any one hold-  
14 ing under

15 439. If the defendant omit to set up a counter-claim in the cases mentioned in the first subdivision  
16 of the last section, neither he nor his assignee can afterwards maintain an action against the plaintiff  
17 therefor. *Talbert v. Singleton*, 42 Cal. 391.

18 § 1982. Property rights of citizens

19 1. All citizens of the United States shall have the same right, in every State and Territory, as is en-  
20 joyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal  
21 property.

22 Plaintiff's Pray for Declaratory Relief, Damages according to Proof. Breach of Implied Contract.

23 Quo Warranto Incidental and Peremptory Administrative Mandamus filed under the Great Seal.

24 *Picturi; Signis; Famosus libellus sine scriptis; Bursae decrementum; Quando dominus*  
25 *conscientiae detrimentum; Breve capitalis justiciarius noster and ad placita coram nobis tenenda*  
26 *writ of unspeakable errors, divide et regnes!* **RELIEF: UNCONSTITUTIONAL LAW IN**

27 **VIOLATIONS OF FIRST, FOURTH, AND TENTH AMENDMENT PROTECTIONS.**

28 **§ 3729. FALSE CLAIMS; MISTAKE! PROHIBITION! EQUITABLE ESTOPPEL!**

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1 Categorical Rules

2 Noxious Use of land – need not pay

3 Permanent Physical Occupancy – must pay

4 100% wipe out (of reasonable investment backed expectations) – must pay

5 Multi-factored test on whether they have to pay or not – Penn Central

6 A condition on land has to have a “rational nexus” and “rough proportionality” to what the purpose  
7 of the condition is

8 Temporary taking needs to be paid for

9 Court Cases

10 HHA v. Midkiff – can take land directly to a private party and compensate mkt value

11 Causby – Easement of flying directly overhead is a taking

12 Miller v. Schoene – making them cut down cedar trees wasn’t a taking

13 Loretto v. Teleprompter – permanent physical occupation is a taking

14 Allerd – not a taking when outlaw sale of eagle feathers

15 Kaiser Aetna – taking when take away the excluendi of their private lake

16 Pruneyard – not a taking when made shopping center admit free speech activities

17 Hadacheck v. Sebastian – regulation of business operations to prevent harm to public is police power

18 Pennsylvania Coal Co. v. Mahon – If a regulation goes too far then it’s a taking

19 Penn Central v. NY – keeping historical landmarks in good repair and historic good for everyone,  
20 within police power

21 Lucas v. SC – if regulatory action denies an owner viable use of land, it’s a taking, unless it’s a

22 Common Law nuisance

23 Pallazzo v. Rhone Island – is not barred from a takings claim just because the title was acquired af-  
24 ter the effective date of the state regulation

25 Nollan v. CA Coast – A state may not condition a property use permit for something not addressing  
26 the purpose use

27 Dolan v. City of Tigard – A condition of permit needs to be proportional to the impact the change  
28 will be. (First Evangelical v. LA – temporary takings need to be compensated)

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1 **QUO WARRANTO INCIDENTAL AND PEREMPTORY ADMINISTRATIVE MANDAMUS**

2 **1.** The right to petition the government is the freedom of individuals (and sometimes groups and  
3 corporations) to petition their government for a correction or repair of some form of injustice with-  
4 out fear of punishment for the same. Although often overlooked in favour of other more famous  
5 freedoms and sometimes taken for granted, many other civil liberties are enforceable against the  
6 government only by exercising this basic right,, making it a fundamental right in both representative  
7 democracies (to protect public participation) and liberal democracies. While the prohibition of  
8 abridgment of the right to petition originally referred only to the federal legislature (the Congress)  
9 and courts, the incorporation doctrine later expanded the protection of the right to its current scope,  
10 over all state and federal courts and legislatures and the executive branches of the state and federal  
11 governments.

12 Boumediene v. Bush, 553 U.S. \_\_\_\_ (2008), was a writ of habeas corpus submission made in a civil-  
13 ian court of the United States on behalf of Lakhdar Boumediene, a naturalized citizen of Bosnia and  
14 Herzegovina, held in military detention by the United States at the Guantanamo Bay detention  
15 camps.[1][2][3] The case was consolidated with habeas petition Al Odah v. United States. The case  
16 challenged the legality of Boumediene's detention at the Guantanamo Bay military base as well as  
17 the constitutionality of the Military Commissions Act (MCA) of 2006. Oral arguments on the com-  
18 bined case were heard by the Supreme Court on December 5, 2007. On June 12, 2008, Justice  
19 Kennedy wrote the opinion for the 5-4 majority holding that the prisoners had a right to the habeas  
20 corpus under the United States Constitution and that the MCA was an unconstitutional suspension of  
21 that right.

22 Grantees can have no less right as a citizen than these.

23 **2.** Habeas petitioner Iron Mountain Mines, Inc. et al v. United States challenges the legitimacy of  
24 Iron Mountain Mines, Inc. invasion and occupation by the Environmental Protection Agency and  
25 particularly contests the illegitimate animus and vindictiveness of the EPA actions, the defamations,  
26 libel and slander, loss of enjoyment, value, and livelihood; injury to reputation, credit, honor, dignity

27 **THE UNITED STATES HAS NO RIGHT TO ABROGATE PATENT TITLE! TRESPASS!**

28  

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1 3. Grantees challenge the constitutionality of the Comprehensive Environmental Response, Cleanup,  
2 and Liability Act “CERCLA” 42 U.S.C. 9601-9659 et seq. for violation of the establishment clause.

3 4. Petitioners claim quo Warranto with incidental and preemptory administrative mandamus by right  
4 because they contest the Environmental Protection Agencies actions and will rectify the abuse of  
5 discretion and imbalance of government authority, and because petitioners demand equal protection  
6 and due process of law, because the EPA actions are implicitly an assertion of unquestionable and  
7 unchallengeable authority to bury the petitioners property, and by extension to bury the entire State  
8 of California and even the entire United States under unquantified and unlimited amounts of acutely  
9 toxic hazardous waste sludge, solely for the benefit of fishes, all the while claiming such authorities  
10 are scientifically justified as somehow protecting the “environment”, in disregard and breach of duty  
11 to implement remedies that are fully protective of human health and the environment. Petitioners  
12 allege that EPA claims that such actions have any scientific merit are false claims, and petitioners  
13 further allege that these EPA actions are unscientific, unreasonable, unfair and unjust, and are un-  
14 supportable by scientific or economic accountability.

15 5. Petitioners allege that such an absurd and illogical result of executive mismanagement, facili-  
16 tated by unfair and unjust Congressional legislation, and coddled in Judicial swaddling and Judicial  
17 deference, without any timely means of recourse or for redress of grievances, is an abomination of  
18 unbounded executive authority, and petitioners raise these allegations to a constitutional question  
19 with claims of unconstitutional jurisdiction by the EPA and DOJ; hence the petitioners claim by an-  
20 cient writ “*Breve Soke*”, and convene by right of the “Warden of the Stannaries” and the “Warden of  
21 the Forest” a “Miner’s Court” for a determination of franchise jurisdiction according to the Constitu-  
22 tions of the United States and of the State of California, and according to the codes of California, the  
23 laws of the United States of America, and the common law of England, and petitioners motion for  
24 writ of *certiorari* to resolve these questions and the allegations of abuse of executive authority and  
25 unconstitutional jurisdiction by the EPA and DOJ. Jurisdiction is also properly reserved to the Dis-  
26 trict Courts by the covenants of patent title and Federal law.

27 “The English practice . . . [is] more necessary to be observed here than there” \*John Jay, 1793

28 Petitioners claim violation and usurpation of a franchise granted by patent title and mineral rights.

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1           **ABSOLUTE ORIGINAL ORDER TO CEASE, DESIST, VOID, AND VACATE!**

2           **ABSOLUTE ORDER FOR REMISSION, REVERSION, AND DETINUE SUR BAILMENT.**

3           quo Avarranto: de Quibis Commote Alodium & Alodarii, Quia tria sequunturdefamatorem;

4           Knowingly reckless disregard of the truth, deliberate ignorance of actual information; trespass:

5           Praecipe quod reddat & detinue sur bailment; subpoena ad testificandum; subpoena duces tecum;

6           impunity; miscarriage of justice; prohibition; illegitimate animus;

7           Differing court interpretations of a statute “is evidence that the statute is ambiguous and unclear.”

8           U.S. v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1557 (E.D. Cal. 1993).

9           Courts frequently interpret an ambiguous contract term against the interests of the party who pre-  
10          pared the contract and created the ambiguity. This is common in cases of adhesion contracts and in-  
11          surance contracts. A drafter of a document should not benefit at the expense of an innocent party be-  
12          cause the drafter was careless in drafting the agreement.

13          In Constitutional Law, statutes that contain ambiguous language are void for vagueness. The lan-  
14          guage of such laws is considered so obscure and uncertain that a reasonable person cannot determine  
15          from a reading what the law purports to command or prohibit. This statutory ambiguity deprives a  
16          person of the notice requirement of Due Process of Law, and, therefore, renders the statute unconsti-  
17          tutional. West’s Encyclopedia of American Law, edition 2.

18          Clearfield Doctrine

19          "Governments descend to the Level of a mere private corporation, and take on the characteristics of  
20          a mere private citizen...where private corporate commercial paper [Federal Reserve Notes] and se-  
21          curities [checks] is concerned. ... For purposes of suit, such corporations and individuals are re-  
22          garded as entities entirely separate from government." - Clearfield Trust Co. v. United States 318  
23          U.S. 363-371

24          What the Clearfield Doctrine is saying is that when private commercial paper is used by corporate  
25          government, then Government loses its sovereignty status and becomes no different than a mere  
26          private corporation and takes on the character of a mere private citizen. As such, government then  
27          becomes bound by the rules and laws that govern private corporations which means that if they in-  
28          tend to compel an individual to some specific performance based upon its corporate statutes or cor-

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poration rules, then the government, like any private corporation, must be the holder in due course of a contract or other commercial agreement between it and the one upon whom demands for specific performance are made and further, the government must be willing to enter the contract or commercial agreement into evidence before trying to get to the court to enforce its demands, called statutes.

“Republic. n. A system of government in which the people hold sovereign power and elect representatives who exercise that power. It contrasts on the one hand with a pure democracy, in which the people or community as an organized whole wield the sovereign power of government, and on the other with the rule of one person (such as a king, emperor, czar, or sultan).” - Blacks Law Dictionary (seventh edition)

Disputed facts.

1. The site encompasses about 8000 acres of land. See consent decree of Dec. 2000.

4. The site encompasses one mine, Iron Mountain mine. There are about 76 mining patents.

5. The inactive mine and tailings are mostly located on 360 acres of land, an agricultural college land patent purchased with military scrip bounty land warrants and with preemption rights paid for with gold, signed by President Abraham Lincoln May 1, 1862 and granted by California Governor Booth January 4<sup>th</sup> 1875.

6. The mine is located on approximately 4400 acres, of which 2744 acres is owned by T.W. Arman since Oct. 27, 2009, T.W. Arman had an option to purchase remaining property after the initial purchase in 1976 to complete the acquisition of the entire 4400 acres offered, but was interfered with by EPA.

The property has been officially mined since April 8, 1880, when the “Lost Confidence” mine was located by William Magee; the property was mined until the EPA terminated lawful mining activities in 1986.

The “Lost Confidence Mine”

“This property, better known as the Iron Mountain Mine, is situated in the Flat Creek Mining District, seven and one half miles north from the town of Shasta. The location was made April 8, 1880.

1 The claim is one thousand five hundred feet by six hundred feet. Course of vein, north-east and  
2 southwest; dip, 45 degrees to the east; average width, one hundred thirty feet. The ore shoot is con-  
3 tinuous the entire length of the claim, and can be traced as far as the Windy Camp District, a dis-  
4 tance of eight miles—the same character of ore showing in explorations made in the latter camp.”  
5 California Journal of Mines #8, 1888

6 9. Past mining, including the use of explosives for stope mining, mine fires, and the abandonment  
7 of mining by the cartel mine owner to maintain high metal prices resulted in the deterioration of the  
8 mine to a condition where only an open pit mine above the ore bodies was feasible to continue min-  
9 ing. Copper prices below \$0.23/lb. caused the open pit mine to be closed in 1963. Stauffer Chemi-  
10 cal, a long time partner of Mountain Copper Co. Ltd., purchased Mountain Copper Co. in 1967 to  
11 obtain the vast phosphorus reserves in Utah and Florida owned by Mountain Copper Co. Mountain  
12 Copper Co. was fully liquidated by 1969.

13 The California State geologist reported that copper cementation was being practiced almost as soon  
14 as mining began, suggesting that Acid Rock Drainage (ARD, the more appropriate term now used  
15 by experts around the world) was occurring prior to any of the man made activities that may or may  
16 not have affected the natural biological activity of organisms now known to inhabit the ore and  
17 cause the reactions that result in ARD.

18 10. No Acid Rock Drainage is occurring in tailings or waste rock.

19 11. Biological organisms such as *ferroplasma acidarmanus* create biological processes that are now  
20 known to be the cause of and the only way that the ARD is perpetuated.

21 18. EPA actions at the Site were mistaken and the EPA misconduct was not in accordance with the  
22 NCP.

23 “Each remedial action shall utilize permanent solutions and alternative treatment technologies or  
24 resource recovery technologies to the maximum extent practicable.” (NCP §300.430(f)(5)(ii))

25  
26 19. The EPA interfered with the lawful regulatory authorities of the State of California to impose  
27 itself at Iron Mountain mine, and there are declarations of incompetence, perjury, and false claims  
28



1 against the State agent James Pedri of the Water Board, Rick Sugarek, EPA Project Manager, and  
2 Richard Anderson, EPA Judicial Officer. .

3 20. The EPA ignored the RI, (from the (Record of Decision) ROD 1)

4 “Among the remedial action alternatives that could be implemented by EPA, the total removal of  
5 the source and sediments in the receiving waters (Alternative CA-10) is considered the only remedy  
6 which is capable of meeting project cleanup objectives and the full requirements of the clean water  
7 act (CWA). This alternative would effectively eliminate discharges and restore all tributaries to  
8 pristine condition.”

9 The EPA abused its discretion and breached its duty to implement a remedy fully protective of  
10 human health and the environment and instead embarked upon a 3000 year removal action that can-  
11 not be assured of either and is obviously an unnecessary arbitrary and capricious reckless negligent  
12 endangerment to the property, the property owner, to the miners, to the public, and to the environ-  
13 ment.

14 38. The EPA ROD1 remedy was to plug the mine with LDCC concrete. Since that plan was aban-  
15 doned, none of the proposed actions fall within the ambit of a CERCLA “remedy”, and therefore  
16 must be denoted as a removal action. The EPA has claimed to have undertaken “time-critical re-  
17 moval actions” for conditions that have existed for over 80 years according to the mine records and  
18 the State, and there is ample evidence to suggest that these are geologic and biological phenomena  
19 which have been occurring for hundreds of thousands and perhaps millions or even billions of  
20 years.

21 The 80 year old bridge to Iron Mountain Rd. was worn out and needed to be replaced. This is not a  
22 time-critical removal action; it is a public works project.

23 39. The costs incurred by EPA through 1996 for removal actions were above and beyond the one  
24 year, \$2 million dollar limitation on removal actions.

25 40. The removal actions were not to protect human health or the environment, they were contrived  
26 to make a scapegoat of mining and Iron Mountain mine in particular for the destroyed fishery and  
27 habitat of fishes from dams, ranching, farming, urbanization, untreated sewage, and other human  
28 impacts. The domesticated anadramous fish populations hatched and planted in the manmade reser-

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voirs would have been fine without the completely unnecessary interference with the Iron Mountain Mines, Inc. proper remedy The 1985 final report on remedial investigation by contractor CH2MHill reported fish kills in Table 7-1 and states that the last verified report of dead fish in Keswick lake was on Jan. 14, 1969, almost 8 years before T.W. Arman purchased the property.

52. The EPA contractor PRC would have had no qualifications to perform a technical review of an *in situ* leaching mining proposal, and the ROD1 refers to a technical review by a firm calling itself the “Colorado School of Mines Research Institute” (no relation to the “Colorado School of Mines” the preeminent mine engineering college), that was operated by an individual named Gregory F. Chlumsky, who was latter sued by the college for using its name. The report indicated that the proposal was viable, but intimated that it would be difficult to find investors. The EPA referred to this confidential enforcement analysis as justifying their refusal to permit the *in situ* mining proposal to proceed. SFUND records 54084.

64. In 1986 the EPA issued ROD 1, implementing interim measures such as partial capping and filling the mine with Low Density Cellular Concrete (LDCC). Interim measures are removal actions unless they are permanent. None of the EPA actions are permanent or remedial in nature.

78. EPA did not provide a review of the business plan for *in situ* mining. EPA referred to the CSMRI review as an enforcement analysis, disregarded the substance of the report which stated that the plan was viable, disregarded the obvious fact that EPA interference had made Iron Mountain Mines, Inc. ineligible for conventional financing or that no prudent mining company would consider subjecting itself to unlimited and perpetual CERCLA liability or to association with the stigma of endangering or exterminating salmon and trout.

91. The EPA abandoned the ROD 2 remedy proposal of plugging the mine portals and connecting adits, and resigned itself to another removal action, more AMD treatment.

94. The selection of HDS over ordinary sludge resulted in a sludge that does not effectively retain the metals in the sludge matrix, and metals, particularly cadmium, leach from the sludge at unsafe levels. (Cadmium, a bio-accumulative acutely hazardous toxin, leaches in excess of 110 ppb. in violation of RCRA, EPCRA, (the community right to know act), and California health and safety codes.)

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1 The RP (Rhone-Polenc) objected to the added expense of the HDS, for which the only justification  
2 was extending the duration of the disposal in the open pit, but was dismissed by EPA, an unreason-  
3 able, illogical, and tyrannical decision that lead to their decision to refuse to operate the facility af-  
4 ter 2000.

5 96. The “treated water” discharged into Spring Creek does not meet the requirements of the CWA.

6 97. Burying waste piles in temporary dumps is a removal action.

7 99. Despite IMMI and T.W. Arman’s insistence that mining was a preferred remedial approach, the  
8 EPA never investigated in any meaningful way this obvious remedy for which they had expert tes-  
9 timony and information in support of.

10 104. In the last 5 year review, the EPA acknowledged that the liner or draining system built in the  
11 Brick Flat pit had failed, that the leachate no longer enters the drain system for treatment, and that  
12 they do not know where it goes. The Brick Flat is crossed by known active Holocene faults, so the  
13 dump is in violation of CERCLA, RCRA, the California toxic pits act and California health and  
14 safety codes.

15 105. Arman and IMMI participation in the ROD process has been in making objections to EPA  
16 conduct.

17 106. Enlargement of the dam was another interim removal action, not a remedy, since the LDCC  
18 was abandoned.

19 149. All work performed by the EPA at Iron Mountain has been inconsistent with the NCP. As to  
20 whether the EPA can recover costs, or costs in excess of the \$2 million, 12-month statutory cap on  
21 removal actions. (See 40 C.F.R. § 300.415(b)(5)) We disagree and hold that, considering the unnec-  
22 essary and wasteful disposal of recyclable hazardous waste materials in an illegal dump, and that  
23 the EPA still cannot even meet Clean Water Act limits and the removal action was neither timely or  
24 in accordance with the NCP, the EPA should recover nothing.

25 Violations of RCRA, CERCLA, EPCRA, NCP, CWA, California Toxic Pits Act

26 6. Violations of the California Health and Safety Code, the California Public Resource Code, the  
27 California Water Code, and the California Toxic Pits Recovery Act, the Resource Conservation and  
28 Recovery Act, and the National Environmental Policy Act.

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1 We begin with the language of 42 U.S.C. § 9604(c)(1):

2 Unless (A) [the EPA] finds that (i) continued response actions are immediately required to prevent,  
3 limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the en-  
4 vironment, and (iii) such assistance will not otherwise be provided on a timely basis, . . . obligations  
5 from the Fund . . . shall not continue after \$2,000,000 has been obligated for response actions or 12  
6 months has elapsed from the date of initial response to a release or threatened release of hazardous  
7 substances.

8 See also 40 C.F.R. § 300.415(b)(5) (limiting actions to \$2 million and 12 months "unless the lead  
9 agency determines that" one of the exemptions applies). Despite an assertion that the decision to  
10 exceed the cap is not subject to arbitrary and capricious review, the fact that the statute allows the  
11 EPA to invoke the exemptions when it "finds" certain conditions counsels otherwise. See 5 U.S.C. §  
12 706(2) (courts should set aside agency conclusions and findings where "arbitrary, capricious, an  
13 abuse of discretion, or otherwise not in accordance with law"). The EPA's determinations in this  
14 case that there was an emergency, that the risk to the environment was immediate, and that the as-  
15 sistance would not otherwise be forthcoming are inherently fact-based. The owner had a better plan  
16 with an actual remedy, the engineering was significantly more developed than the EPA plan, and  
17 the owner was prepared to proceed without EPA financing or assistance. The EPA usurped the  
18 owners authority to implement a remedy and embarked upon a 3000 year removal plan.

19 The EPA determined that the removal action was a remedial action because of the plan to fill the  
20 mine with concrete. Although this plan was abandoned, the EPA has never acknowledged that the  
21 EPA actions no longer constitute a remedial action. We hold that the EPA "failed to articulate a ra-  
22 tional connection between the facts found and the conclusions made." *Env'tl. Def. Ctr.*, 344 F.3d at  
23 858 n. 36.

24 Given these daunting realities and the EPA's careless documentation of its reasons for invoking the  
25 emergency and consistency exemptions, we hold that the EPA's decision to exceed the statutory cap  
26 was based on the irrelevant factors, there has been a clear error of judgment, and the decision was  
27 arbitrary and capricious. See *Marsh v. Or. Nat'l Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851,  
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1 104 L.Ed.2d 377 (1989); Env'tl. Def. Ctr., 344 F.3d at 858 n. 36. Therefore, the EPA is not entitled  
2 to recover any costs of its removal action in Iron Mountain Mines as found by the district court.  
3 The EPA plans to put another 2 million tons of sludge in the Brick Flat Pit, and then it will need to  
4 build another 25 or more multi-million ton disposal pits somewhere else to store all the sludge it  
5 plans to make at Iron Mountain. This sludge is not legal to dispose in the manner EPA allows be-  
6 cause it contains toxic levels of cadmium, arsenic, lead, uranium, and other toxic metals, the sludge  
7 also forms acid mine drainage itself at a pH of <2. This sludge disposal is not legal because the acid  
8 mine drainage that the EPA treats to produce the sludge was being recycled by the mine owner be-  
9 fore the EPA declared Iron Mountain Mines a Superfund site, and the technology has always ex-  
10 isted to recycle the metals in the acid mine drainage and not make sludge for disposal. The EPA  
11 selected remedy is not the best available technology, and the water discharged by the treatment does  
12 not meet Clean Water Act standards, which is another negligent endangerment.

#### 13 14 DELIBERATE IGNORANCE OF ACTUAL INFORMATION!

15  
16 The metals in the sludge were always known by the EPA to be recyclable at a profit, and the EPA  
17 chose to defy the protests of the property owner and the responsible parties (the previous owners),  
18 as well as interested citizens and public servants who's input was ignored by the EPA. The sludge  
19 disposal is also in violation of California health, safety, environmental, recycling, and disposal  
20 laws. The State of California has permitted these violations in deference to the EPA's "interim au-  
21 thority" (3000 years?), while continuously recommending that the EPA implement resource recov-  
22 ery technologies.

#### 23 24 § 6973. Imminent hazard

25  
26 The EPA's engineering firm, CH2MHill, informed the EPA that all the sludge could be recycled  
27 when they started making it and could be easily worth well over \$25,000 per day or over \$136 mil-  
28 lion dollars so far. These same metals have been imported, primarily from China, during the EPA

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1 treatment. The EPA has also prevented any recycling or reclamation of the millions of tons of waste  
2 rock that was left from hardrock mining. This has caused the loss of many millions more in reve-  
3 nue. The mine owner's proposal, known as insitu mining, would have solved the pollution problem  
4 by now, and the mine owners could have made another \$350 million in recycling those wastes, thus  
5 the EPA has recklessly and negligently cost the mine owner over \$500 million in lost revenues.  
6 This is the very definition of despotism and tyranny, and EPA fraud and trespass.

#### 7 A HARD BARGAIN WITH FRAUD, ACCIDENT, TRUST & HARDSHIP

8 “ for making your iron into materials good for catalyzing FTS, which can be used after methane and  
9 CO2 are converted to syngas using Ni catalysts at 900 C. We need to test to see if the iron catalysts  
10 from your waste is good for this purpose. Mixing them with carbon paste is an option. Because the  
11 reaction temperature is relatively low, we may not need to use nanotubes to anchor the catalysts.”  
12 Iron Mountain Mines, Inc. correspondence with Professor Ting Guo, U.C. Davis, November 21,  
13 2008

14 169. The EPA violation of NCP caused the State of California to be burdened with 10% of the  
15 costs, which it should be reimbursed.

16 172. The EPA must reimburse the special account for the \$6,115,609.00 expended from the special  
17 account, plus interest. Iron Mountain Mines, Inc. claims this reimbursement and the \$4,201,349.96  
18 as of June 30, 2009 in the special account.

19 208. Iron Mountain Mines, Inc. claims that CERCLA was violated and the \$17,943,891.00 plus in-  
20 terest from the consent decree including the \$10 million for natural resource damages (2 million to  
21 the Natural Resources Trustees and 8 million to the Dept. of Interior for Natural Resource trustees.

22 b. Iron Mountain Mines, Inc. claims Trust 1, said to have been funded with \$141,901,277.00, plus  
23 interest.

24 c. Iron Mountain Mines, Inc. claims Trust 2, said to have been funded with \$62,476,445.00, plus  
25 interest.

26 e. The trusts must be commutated and Iron Mountain Mines, Inc. made patentee as trustee.

27 213. Since ROD 5 is an interim removal action, no funds from the special account may be ex-  
28 pended. The only purpose for the dredging was to increase powerhouse output.

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215 After 25 years, the EPA has not completed or remedied anything, and still has no remedial action plan. Forget a ROD 6, just get out.

## Orders

### Full docket text for document 436:

ORDER by Magistrate Judge John F. Moulds ORDERED that the motion of Rhone-Poulenc, Inc to compel the US to produce documents previously retrieved from the National Archives [387-1] and Request for attorneys' fee is DENIED; the motion to compel the United States to produce documents stored electronically [386-1] is GRANTED; the motion of the US regarding the deposition of Mr Kent [385-1] is GRANTED; the US may have an additional 1/2 day on Tuesday, 8/20/96 to complete the deposition of Mr Kent; the court notes that the presence of Mr McDermott was required in Sacramento on 8/15/96 in order to argue the instant motions; the motion of the US regarding the deposition of Mr Sugarek is DENIED; the US has failed to demonstrate that Rhone-Poulenc Inc has engaged in abusive tactics with respect to this deposition; the motion of US for an order shortening time to hear its motion for protective order regarding Rhone-Poulenc Inc's notices of deposition pursuant to FRCP 30 (b)(6) is granted; the US shall file its opposition on 8/20/96; Rhone-Poulenc's reply to US's opposition due 8/23/96; the US's reply due 8/26/96; the 8/26/96, the motion of the US and of Rhone Poulenc for protective order shall be submitted to the court for decision (cc: all counsel) (nnd) Modified on 08/20/1996

9/27/96

ORDER by Magistrate Judge John F. Moulds ORDERED: With regard to the motion of USA to compel Rhone-Poulenc, Inc's further responses to outstanding discovery [433-1], the US shall submit to the court for in camera review all mining-related information contained in gov't files for which the US Bureau of Mines requires a letter from the information donor to the effect that it has no objection to the release of the information; the documents shall be submitted within 10 days from the date of this order; the motion to compel further answers to the US' third set of interrogatories [433-1] is DENIED; Rhone-Poulenc is reminded, however, of its duty to supplement discovery responses under appropriate circumstances; The motion of the US to compel further responses from dft Rhone-Poulenc, Inc to the US' 6th set of interrogatories [433-1] is GRANTED; further re-

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1 sponses shall be filed within 10 days from the date of this order; Rhone-Poulenc Inc is also ordered  
2 to answer the US' request for production No 1 within 10 days; With regard to the motion of the US  
3 to compel production of withheld sampling data, production of Mountain Copper Co documents  
4 over which Rhone-Poulenc has asserted privilege, and responses to interrogatories concerning the  
5 San Francisco Chemical Co, Rhone-Poulenc, Inc shall submit to the court for in camera review all  
6 data and test results (sampling data) for which a privilege is claimed; the documents shall be sub-  
7 mitted within 10 days from the date of this order; the motion to compel production of Mountain  
8 Copper Co documents as to which Rhone-Poulenc has asserted privilege [431-1] is GRANTED; the  
9 motion to compel responses to interrogatories concerning the SF Chemical Co is granted; Rhone-  
10 Poulenc, Inc shall produce the requested documents within 10 days from the date of this order; The  
11 motion of State of CA to compel further responses from Rhone-Poulenc to the State's Second set of  
12 interrogatories [417-1] is granted in part and denied in part; Rhone-Poulenc is ordered to provide,  
13 within 10 days, further answers to interrogatories numbered  
14 275,276,277,278,283,284,285,286,287,289,290, and 291; the motion is denied as to interrogatories  
15 numbered 298,311,313,322,325, and 326; with respect to interrogatories numbered 280 and 297,  
16 Rhone-Poulenc shall insure that all appendices have been provided to the State of CA; The motion  
17 of State of CA to compel Rhone-Poulenc Inc to respond to requests for production of documents  
18 (set No 1) [412-1] is GRANTED; Rhone-Poulenc, Inc shall provide the documents related to the  
19 Iron Mountain Mines site, described on page 3 of the joint stipulation, at lines 16 through 19, with-  
20 out redaction; the documents shall be subject to a protective order that they be used only in connec-  
21 tion with this litigation and that they not be referred to in the trial of this matter without further or-  
22 der of court; With regard to the motion of Rhone-Poulenc, Inc to compel the USA to provide further  
23 responses to Rhone-Poulenc's 3rd and 4th sets of interrogatories [398-1], the US states on page 19  
24 of the joint stipulation that it has served supplemental responses to the 4th set of interrogatories and  
25 is in the process of finishing its supplemental responses to the 3rd set of interrogatories; the US is  
26 ordered to file supplemental responses to Rhone-Poulenc's 3rd and 4th sets of interrogatories, as it  
27 has agreed to do, to the extent that those supplemental responses have not already been provided by  
28 the date of this order; the supplemental responses shall be provided within 10 days from the date of

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1 this order; The motion of Rhone-Poulenc Inc to compel the US to produce documents maintained  
2 by the Dept of Health, Education and Welfare [426-1] is DENIED; The motion of Rhone-Poulenc  
3 Inc to compel the USA to respond to interrogatories and produce documents responsive to Rhone-  
4 Poulen's 6th Request for production of documents and 2nd Set of Interrogatories regarding the US'  
5 costs documentation [423-1] is DENIED, based on the representations of the US that it has pro-  
6 duced all requested documents in its possession, custody, or control and that it will supplement is  
7 responses as appropriate; With regard to the motion of Rhone-Poulenc, Inc to compel the US to  
8 produce documents improperly withheld as privileged [422-1], the US shall submit to the court for  
9 in camera review all documents as to which a privilege is claimed; the documents shall be submit-  
10 ted within 10 days from the date of this order (cc: all counsel) (ndd)

11 4-22-97

12 ORDER by Magistrate Judge John F. Moulds ORDERING that the mining documents submitted  
13 for in camera review be released to all parties in this litigation [764-1] [715-2] (cc: all counsel)  
14 (ndd)

15 5-01-97

16 ORDER by Honorable David F. Levi ORDERING that US' motion to modify the briefing schedule  
17 [806-1] [807-1] is GRANTED; the 4/97 scheduling order is hereby modified as follows: US re-  
18 sponse due 5/30/97; RP's brief due 7/11/97; US reply 8/8/97; motion for partial summary judgment  
19 to establish the US' liability based on the US' ownership and operation of certain CVP facilities,  
20 Iron Mountain Parcels and the Golinsky Mine by dft Rhone-Poulenc Basic [691-1] HEARING  
21 RESET FOR 9:00 (cc: all counsel) (ndd)

22 5-09-97

23 ORDER by Magistrate Judge John F. Moulds ORDERING the motion to extend the discovery cut-  
24 off is DENIED [715-1] ; the motion to compel compliance with the court's prior order compelling  
25 production of electronically stored documents is GRANTED in part and DEFERRED in part pend-  
26 ing in camera review; documents from the Fish and Wildlife Service shall be submitted for in cam-  
27 era review no later than 5/19/97; the documents which have been withheld solely on the basis oof  
28 the beliberative process privilege shall be produced for inspection and copying no later than 6/9/97;

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as to all remaining documents at issue, the US shall produce for inspection and copying no later than 6/9/97; dft State of CA's belated request to brief issues of privilege is DENIED; pursuant to FRCP 37, reasonable expenses in the amount of \$3500.00 are awarded to dft Rhone-Poulenc, Inc against the United States (cc: all counsel) (ch)

5-27-97

ORDER by Honorable David F. Levi ORDERING that based on the representations by Rhone-Poulenc, and the United States, it is hereby ordered that the deadline for submitting the parties' respective reply brief on World War II issues originally set forth in the Court's 1/24/97 Order are modified in accordance with the foregoing stipulation GRANTED; RP Reply Brief due 6/3/97; US Reply Brief due 6/30/97 (cc: all counsel) (old)

7-15-97

ORDER by Honorable David F. Levi REGARDING hearing on motions scheduled for 7/18/97 at 9:00 a.m.; the parties are advized to BE PREPARED to discuss five sets of motions pertaining to successor liability, naturally occurring substances, judicial review limitations, amendment of complaint and ruling re: waiver of privileged material (cc: all counsel) (old)

8-19-97

ORDER by Magistrate Judge John F. Moulds ORDERING that the documents submitted by the Gov't for in camera review, shall be made available for inspection and copying; the Gov't may withhold from disclosure log No 2091595.1, document #133; log No 2091949.01, document #9; log No g:shared/gen/brief docs, documents # 106,197,354; log No 2091944.01, documents # 40,181,284,292,293,305,306,318,319,327,328,359,360,364,365, 3 67,368,413,423,424,425,437,443,444; log No 2091572.01, document #5; the couments submitted by Rhone-Poulenc, Inc need not be produced (cc: all counsel) (ch)

9-29-98

ORDER by Honorable David F. Levi ORDERING out of the several pending reconsideration motions, 2 will merit further attention if the case does not settle: government's motion for reconsideration of magistrate's ruling on the discovery of Rhone-Poulenc's sampling data and Rhone-Poulenc's motion for reconsideration of its earlier order on successor liability due to a change in 9th Circuit

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1 law; all other pending reconsideration motions are DENIED; the court declines to address the dis-  
2 covery and successor liability motions because of settlement possibilities, those motions being  
3 DENIED without prejudice to their renewal at the conclusion of the settlement process (cc: all  
4 counsel) (old)

5 12-08-2000

6 ORDER by Honorable David F. Levi motion to dismiss crs-clms with prejudice by dft Aventis  
7 CropScience [1174-1] GRANTED, [289-1]; ACCORDINGLY final judgment will be entered in  
8 accordance with FRCP 54(b); dismissing w/prejudice the crs-clms of Iron Mtn Mines Inc and TW  
9 Arman against Aventis CropScience USA Inc; and dismissing w/prejudice the crs-clms of Aventis  
10 CropScience USA Inc against Iron Mtn Mines Inc and TW Arm (cc: all counsel) (ljr)

11 12-08-2000

12 CONSENT JUDGEMENT

13 2-21-2002

14 ORDER by Honorable David F Levi ORDERING lifting stay of proceedings entered in this case on  
15 11/13/00 GRANTED; pltf's Opening Brief re Motion for Default Judgment as to deft Iron Mountain  
16 Mines due 4/5/02, Opposition if any due 4/19/02, pltf's reply if any due 5/3/02; pltf's Opening Brief  
17 re Motion for Partial Summary JUDgment on Liability as to deft T W Arman due 4/5/02, Opposi-  
18 tion due 5/3/02, pltf's Reply due 5/10/02; pltf's Opening Brief re Motion for Partial Summary  
19 Judgment on Liability as to deft Iron Mountain due 4/5/02, Opposition due 5/3/02, pltf's Reply due  
20 5/10/02; if deft Iron Mountain files a Motion to Confirm Credit from good faith settlement and ex-  
21 punge EPA's Admin Lien, Opening Brief is due 4/5/02, Opposition due 5/3/02, deft's reply due  
22 5/10/02; hearing on all motions is scheduled for 5/17/02 at 9:00am (cc: all counsel) (mm1)

23  
24 Is the consent decree fair? The answer is no. And does the consent decree fulfill the requirements of  
25 the NCP? Again the answer is no. We comment briefly upon three such facets. The first is obvious:  
26 the decree's likely efficaciousness as a vehicle for cleansing the environment is of cardinal impor-  
27 tance. See Cannons, 720 F.Supp. at 1038; Conservation Chemical, 628 F.Supp. at 402; Seymour,  
28 554 F.Supp. at 1339. Except in cases which involve only recoupment of cleanup costs already

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1 spent, the reasonableness of the consent decree, for this purpose, will be basically a question of  
2 technical adequacy, primarily concerned with the probable effectiveness of proposed remedial re-  
3 sponses. As this is only a case for recoupment, the additional scope of judicial review is applied  
4 46. The efficaciousness of the remedial actions has not been fully protective of human health and  
5 the environment, and may be reasonably observed to have been arbitrary and capricious, and other-  
6 wise not in accordance with public law. In fact the treatment facility which reported that it was  
7 treating on average 372 lbs. of copper per day when the plant began operations in 1995, reported in  
8 2003 that the plant was now treating approximately 650 lbs. per day, or almost twice the amount of  
9 “hazardous substance”. It is therefore apparent that no remedy yet exists for the AMD, and that the  
10 problem is now much more severe. Furthermore, no provision for the minimum of 20 acres of off-  
11 site storage for the hazardous waste treatment sludge is provided by the State as required by law.  
12 No provision is made or suggested for where the 50 million tons of hazardous waste sludge will be  
13 disposed. No financial assurances are provided for this disposal.

14 47. A second important facet of reasonableness will depend upon whether the settlement satisfacto-  
15 rily compensates the public for the actual (and anticipated) costs of remedial and response meas-  
16 ures. Like the question of technical adequacy, this aspect of the problem can be enormously com-  
17 plex. The actual past response costs of remedial measures were known at the time this consent de-  
18 cree was proposed. Since the settlement's bottom line is definite, the proportion of settlement dol-  
19 lars to total needed dollars is not debatable. The agency must be held to a standard of mathematical  
20 precision. If the figures relied upon do not derive in a sensible way from a plausible interpretation  
21 of the record, the court should not defer to the agency's expertise. The agency effectively waived  
22 collection of \$51 million in unrecovered past response costs from the responsible party, transferred  
23 this obligation to Counterclaimants with a statutory lien, and transferred unquantified and unlimited  
24 future liability to the innocent landowners.

25 48. A third integer in the reasonableness equation relates to the relative strength of the parties' liti-  
26 gating positions. If the government's case is strong and solid, it should typically be expected to  
27 drive a harder bargain. On the other hand, if the case is less than robust, or the outcome problem-  
28 atic, a reasonable settlement will ordinarily mirror such factors. In a nutshell, the reasonableness of

1 a proposed settlement must take into account foreseeable risks of loss. See Rohm & Haas, 721  
2 F.Supp. at 680; Kelley, 717 F.Supp. at 517; Acushnet, 712 F.Supp. at 1028; Exxon, 697 F.Supp. at  
3 692; Hooker, 540 F.Supp. at 1072. The same variable, we suggest, has a further dimension: when  
4 the government's case is fundamentally defective because of the innocent landowner defense, and it  
5 then by definition is a takings for the public benefit claim, and it will take time and money to pay  
6 damages and pay to implement private remedial measures through the litigatory failure. So it is bet-  
7 ter for the plaintiffs to deny the named defendant in the suit the status of innocent landowner so as  
8 to delay justice while swaddled in judicial deference to the EPA. To the extent that time is not of  
9 the essence or that the perpetual transaction costs loom large, a settlement which nets less than full  
10 recovery of cleanup costs is not necessarily reasonable. See Rohm & Haas, 721 F.Supp. at 680 (in-  
11 terpreting "reasonableness" in light of congressional goal of expediting effective remedial action  
12 and minimizing litigation); United States v. McGraw-Edison Co., 718 F.Supp. 154, 159  
13 (W.D.N.Y.1989) (settlement reasonable in light of prospect of protracted litigation as contrasted to  
14 expeditious reimbursement and remedy); Acushnet, 712 F.Supp. at 1030 (emphasizing that trial  
15 would likely be "complex, lengthy, expensive and uncertain"); Exxon, 697 F.Supp. at 693 (noting  
16 benefit of immediate payment to environmental cleanup effort); Seymour, 554 F.Supp. at 1340 (ur-  
17 gency of abating danger to public must be considered). The reality is that, all too often, litigation is  
18 a cost-ineffective alternative which can squander valuable resources, public as well as private. Nev-  
19 ertheless, with these allegations of conflict of interest, and the allegation of compromise and collu-  
20 sion of the parties to the trust funds secured by the consent decree, the settlement must be subject to  
21 judicial review.

22 49. In this case, the district court wrongfully found the consent decrees to be reasonable. Cannons,  
23 720 F.Supp. at 1038-39. Counterclaimants have also seriously questioned the technological efficacy  
24 of the cleanup measures to be implemented at the Site. They also contend that the settlement was  
25 not designed to assure adequate compensation to the public for harms caused. Given the totality of  
26 the record-reflected circumstances, and the probability of fraud upon the court, the lower court's  
27 finding of reasonableness should be vacated and remanded.

28 50. D. Fidelity to the Statute?

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1 51. Of necessity, consideration of the extent to which consent decrees are consistent with Congress'  
2 discerned intent involves matters implicating fairness and reasonableness. The three broad approval  
3 criteria were not meant to be mutually exclusive and cannot be viewed in majestic isolation. Recogn-  
4 nizing the inevitable imbrication, we turn to the final criterion.

5 52. We describe the two major policy concerns underlying CERCLA:

6 53. First, Congress intended that the federal government be immediately given the tools necessary  
7 for a prompt and effective response to the problems of national magnitude resulting from hazardous  
8 waste disposal. Second, Congress intended that those responsible for problems caused by the dis-  
9 posal of chemical poisons bear the costs and responsibility for remedying the harmful conditions  
10 they created.

11 54. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir.1986) (quot-  
12 ing *United States v. Reilly Tar & Chemical Corp.*, 546 F.Supp. 1100, 1112 (D.Minn.1982)). The  
13 district court thought that these concerns were addressed, and assuaged, by the proposed settlement.  
14 Counterclaimants do not.

15 55. It is crystal clear that the broad settlement authority conferred upon the EPA must be exercised  
16 with deference to the statute's overarching principles: accountability, the desirability of an unsullied  
17 environment, and promptness of response activities.

18 56. The bases do not appear to have been touched in this instance. The questions of accountability  
19 invite a proper investigation; in this case virtually none of the damaged environment is being re-  
20 stored to any beneficial use or to a condition where it can safely be returned to nature; and the  
21 promptness of the response activities and the intention of the response are still open to question.

22 57. Judicial discretion is necessarily broad--but it is not absolute. Abuse occurs when a material fac-  
23 tor deserving significant weight is ignored, when an improper factor is relied upon, or when all  
24 proper and no improper factors are assessed, but the court makes a serious mistake in weighing  
25 them.

26 58. *Independent Oil & Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co.*, 864 F.2d  
27 927, 929 (1st Cir.1988).



59. The objectors can demonstrate that the trier made a harmful error of law or has lapsed into "a meaningful error in judgment," *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir.1988), a reviewing tribunal must not stay its hand. While the doubly required deference--district court to agency and appellate court to district court--places a heavy burden on those who purpose to upset a trial judge's approval of a consent decree, an unfair and unjust verdict as a result of fraud upon the court must be overturned.

60. Even accepting substantive fairness as linked to comparative fault, an important issue still remains as to how comparative fault is to be measured. There is no universally correct approach. It appears very clear that what constitutes the best measure of comparative fault at a particular Superfund site under particular factual circumstances is usually left to the EPA's discretion. Whatever formula or scheme EPA advances for measuring comparative fault and allocating liability is upheld so long as the agency supplies a plausible explanation for it, welding some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling PRPs. See *United States v. Akzo Coatings*, 719 F.Supp. 571, 586-87 (E.D.Mich.1989); *Acushnet*, 712 F.Supp. at 1031; cf. *Gardner & Greenberger*, *Judicial Review of Administrative Action and Responsible Government*, 63 Geo.L.J. 7, 33 (1974) (courts must know why an agency has taken an action if they are to perform their review function adequately). Put in slightly different terms, the chosen measure of comparative fault should be upheld unless it is arbitrary, capricious, and devoid of a rational basis.<sup>4</sup> See 42 U.S.C. Sec. 9613(j) (1987); *Rohm & Haas*, 721 F.Supp. at 681. No such formula exists in the present case. While no measure of comparative fault exists in the Consent Decree, the Memorandum in support of entry of the Consent Decree from the agencies and Aventis discusses allocation based upon years of ownership. This formula of allocation, besides for purposes of preliminary assessment, has been found invalid by the Courts. Counsel for plaintiffs acknowledge that the innocent landowner defense is the only defense available, and suggest that allegation of a lack of "due care" would deny defendants the benefit of the innocent landowner defense. The Courts have found this premise lacking in previous CERCLA cases.

61. Counterclaimants submit that by a preponderance of the evidence, the EPA selected remedies were arbitrary, capricious, and devoid of a rational basis. Counterclaimants further submit that by a

1 preponderance of the evidence, that deprivations of due process and equal protection were facili-  
2 tated by a conspiracy of officers of the court to systematically and under color of law deprive the  
3 defendants of their civil and constitutional rights.

4 62. 4. Notice. The Counterclaimants also contend that the government's negotiating strategy must  
5 be fair. Congress did send the EPA into the toxic waste ring with the obligation to protect the civil  
6 rights of those it governs. The EPA may not mislead any of the parties, discriminate unfairly, or en-  
7 gage in deceptive practices.

8 63. Counterclaimants allege that by a preponderance of the evidence, the plaintiffs have deceived  
9 and misled and discriminated against the remaining Defendants in this case.

10 64. In this CERCLA context, the government is under an obligation to determine liability in its set-  
11 tlement offers, and innocent landowners must be eligible to join ensuing major party settlements or  
12 otherwise resolve their liability for pollution that they did not cause or create. Therefore, and be-  
13 cause of the unreasonable extent of the differential, and the graduation of comparative fault uncon-  
14 scionably and unduly coercive in the present case, that defendants were discriminated against, mis-  
15 led, and deceived.

16 65. 5. Exclusions from Settlements. Under the SARA Amendments, the right to the protections of  
17 the innocent landowner defense, and settlement to suit, is a fundamental right. The tyranny of "di-  
18 vide and conquer" as was applied in the present case, and in the contravention and defiance of a  
19 congressional directive, requires denial to the EPA the use of so reprobated an axiom of tyranny. So  
20 long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it  
21 chooses. In the present case however, the EPA did not operate in good faith, and the consent decree  
22 must be vacated, the trust funds commutated, and a decree of dismissal or acquittal and resolution  
23 of liability for the innocent landowner must be entered in this case.

24 This appeal stems from the environmental cleanup of Iron Mountain Mine, the largest mine in Cali-  
25 fornia, which is within a few miles of the Sacramento River.

26 The allegation of polluting the navigable waterways of the United States was brought by State Wa-  
27 ter Board officer James Pedri who was dissatisfied with State action at the site. The site was ac-  
28

1 tively mined from 1895 to 1920, then kept on maintenance until WWII. Open pit mining began in  
2 the early 50's but ceased in 1963.

3 The United States and California brought suit principally under the Comprehensive Environmental  
4 Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., for reimburse-  
5 ment of costs associated with the cleanup. You are called upon to determine whether, as a matter of  
6 law, those cleanup costs were "necessary" and whether certain of the defendants are "responsible  
7 parties" ("RPs") under CERCLA § 107(a), 42 U.S.C. § 9607(a).

8 The touchstone for determining the necessity of response costs is whether there is an actual threat to  
9 human health or the environment; that necessity is not obviated when a party also has a religious,  
10 moral, business, or government reason for interfering in the cleanup. Because the district court erred  
11 in ignoring the ulterior business motive that caused the pollution and because there are genuine is-  
12 sues of material fact regarding whether Iron Mountain Mines response costs were, in fact, "neces-  
13 sary," you cannot uphold even a partial summary judgment on this ground.

14 Even if you assume that those costs were necessary, you still must decide whether plaintiffs are li-  
15 able, and the extent of the takings in this per se takings case, and if the governments are PRPs. Pars-  
16 ing the meaning of the term "disposal" in § 9607(a)(2) lies at the heart of this question. You con-  
17 cluded in Carson Harbor that the migration of contaminants on the property did not fall within the  
18 statutory definition of "disposal." Thus, on the CERCLA claim, you should reverse the district  
19 court's grant of partial summary judgment and find for T. W. Arman and Iron Mountain Mines, Inc.

20 There is no evidence that the minerals from Iron Mountain Mine ever hurt anyone, and any remain-  
21 ing hazard to fish after 105 years (or was that 105 million years?) was insignificant in the face of  
22 the complete loss of spawning habitat from United States dams, ranching, farming and urban pesti-  
23 cide, and the complete reliance of the fishery on artificial reproductive techniques and human inter-  
24 vention. Compound these facts with the EPA's joint and several strict liabilities under FIFRA and  
25 ESA and it is apparent why a scapegoat was so essential to trying to preserve the EPA franchise.

26 There was never any intention of trying to introduce migratory fish for breeding into any waters  
27 above Keswick Lake, so there was never an actual threat to any fisheries. The navigable waterway  
28 of the United States is over 100 miles downstream, and fish spawning habitat 30 miles away.

1 Without evidence of legally significant contamination, the government was unjustified in filing suit  
2 to gain access to private property for a response action under the Superfund law, see U.S. v.  
3 Tarkowski , No. 99 C 7308, N.D.Ill., Nov. 26, 2001]

4 Consequently, the victorious property owner can recoup his litigation costs.

5 John Tarkowski is an elderly, indigent resident of a 16-acre tract situated in Wauconda, Ill., an af-  
6 fluent community northwest of Chicago. Until he was disabled, he worked as a building contractor.  
7 Using surplus materials, he built his house many years ago when the area was a rural backwater.  
8 His yard is filled with what his upscale neighbors regard as junk — wooden pallets, tires, empty  
9 drums, batteries, paint cans and other construction materials.

10 For more than 20 years, Tarkowski's neighbors had harassed him and had complained to environ-  
11 mental officials. The U.S. Environmental Protection Agency (EPA) inspected his property in 1979,  
12 but concluded that it did not pose any environmental hazard. In 1995, EPA rated the property zero  
13 on its hazard rating scale. Two years later, state authorities took soil and water samples and found  
14 no noteworthy contamination.

15 In 1998, EPA took additional samples of soil and materials on his property, finding only trace  
16 amounts of contaminants that, in fact, were comparable to levels found in surrounding properties  
17 and did not indicate any release. Nevertheless, EPA filed suit against Tarkowski alleging an “immi-  
18 nent and substantial endangerment to ... public health ... and the environment” based on an actual  
19 or possible release of hazardous substances. EPA sought an order to gain access to the site for in-  
20 vestigative and remedial purposes. After hearing the evidence, a federal district court dismissed  
21 EPA's suit. An appeals court upheld the ruling, castigating the agency's conduct and judgment. [248  
22 F.3d 596 (7th Cir. 2001)]

23 Tarkowski petitioned the district court for an award of attorney's fees and expenses under the Equal  
24 Access to Justice Act. The law allows certain parties who prevail against the federal government in  
25 a lawsuit to recover their litigation expenses unless the government's position was reasonable.  
26 Finding EPA's stance totally unjustified, the district judge said, “There was no evidence of legally  
27 significant contamination and ... the government's claim of an imminent and substantial endanger-

1 ment was factually baseless.” EPA cannot reasonably insist that “if a hazard was found, no matter  
2 how small, it had the right to do whatever it wanted on Tarkowski's property,” he added.

3 “It is to protect citizens against ... overreaching actions by government bureaucrats that courts are  
4 empowered to prevent arbitrary and capricious interference with property rights,” said the judge,  
5 again citing the appeals court. “The government's position ... ‘would give the agency in effect an  
6 unlimited power of warrantless searches and seizures [which the Superfund law] does not contem-  
7 plate and the Fourth Amendment would almost certainly forbid,’” he concluded with yet another  
8 reference to the appellate opinion.

9 You must also address the remaining issues. there are genuine issues of material fact regarding the  
10 necessity of EPA Iron Mountain Mine CERCLA response costs, you must reverse the grant of  
11 summary judgment.

12 The district court granted the United States and California’s motions on all claims, and refused to  
13 hear pro se plaintiffs intervention, exceptions, positive law claims, and state-law nuisance and tres-  
14 pass claims asserted by T. W. Arman, John F. Hutchens, and on behalf of Iron Mountain Mines,  
15 Inc.

16 . See Carson Harbor Vill., Ltd. v. Unocal Corp., 990 F. Supp. 1188, 1199 (C.D. Cal. 1997). The  
17 court first held that Carson Harbor's CERCLA claim fails because it did not show that its remedial  
18 action was "necessary" under 42 U.S.C. § 9607(a)(4)(B) because there was no evidence of an "ac-  
19 tual and real threat" to human health or the environment. Id. at 1193-94. In so holding, the district  
20 court disregarded certain evidence to the contrary as inadmissible hearsay. See id. at 1193 n.4. In  
21 the alternative, with respect to the Partnership Defendants, the district court held that they were not  
22 PRPs within the meaning of 42 U.S.C. § 9607(a)(2) because "disposal warranting CERCLA  
23 liability requires a showing that hazardous substances were affirmatively introduced into the envi-  
24 ronment. " Id. At 1195. And, with respect to the storm water runoff, there was no direct evidence  
25 that any lead-contaminated storm water entered the property at any time prior to 1983, when Carson  
26 Harbor purchased the property. Id.

27 The district court granted summary judgment on the RCRA claim because the "evidence shows that  
28 there was no imminent danger" to human health or the environment--a required element for a

1 RCRA claim. Id. at 1196 (emphasis added). On the CWA claim, the court concluded that there was  
2 no evidence that the defendants violated a National Pollutant Discharge  
3 Elimination System ("NPDES") permit, as required for a CWA violation. Id. at 1197. With respect  
4 to the common law claims for nuisance, trespass, and injury to easement against the Government  
5 Defendants, the district court would hold that CAL. CIV. CODE § 3482, which provides that noth-  
6 ing done pursuant to express statutory authorization can be deemed a nuisance, provides a complete  
7 defense. Iron Mountain Mines demonstrates that illegitimate animus, malice, and false claims are  
8 grounds for piercing the governments veil. **YOU SHOULD GRANT INJUNCTIVE RELIEF!**  
9 Because Carson Harbor failed to show that the Government Defendants violated the NPDES per-  
10 mits, the court concluded, any pollutants discharged into the storm water were permissible. Id. Fi-  
11 nally, the district court rejected Carson Harbor's claim for express indemnity against the Partnership  
12 Defendants, because the Water Quality Board did not require the cleanup. See id. At 1198-99.  
13 Following the issuance of a panel opinion, you should agree to hear this case en banc.

14 Direct the Superior Court and the Eastern District Court to void and vacate the liens. Enjoin EPA  
15 for: Conflicts of interest, fraud upon the courts, joint and several trespassers unlawful detainer.  
16 Manifest injustice, prohibition, misfeasance, certiorari, abuse, mandamus, intervention, & arrest.  
17 **"Full relief and restore possession to the party entitled thereto" for absence of jurisdiction.**

18 **WRIT OF EQUITABLE ESTOPPEL! WRIT OF POSSESSION & EJECTMENT!**  
19 **JUDGEMENT OF THE COURTS ENJOINED, VACATED, AND SET ASIDE**

20 January 4, 2010 Signature: \_\_\_\_\_

21 /s/ John F. Hutchens, *grantees' agent*; Warden of the Gales, Forests, & Stannaries expert

22 **Verification affidavit:**

23 I, John F. Hutchens, hereby state that the same is true of my own knowledge, except  
24 as to matters which are herein stated on my own information or belief, and as to those  
25 matters, I believe them to be true. Affirmed this day: January 4, 2010

26 Signature: \_\_\_\_\_

27 s/ John F. Hutchens; Joint Venturer, Warden of the Gales, Forests, and Stannaries.

28 CITIZEN & AGENT OF RECORD for: T.W. Arman & Iron Mountain Mines, Inc.

ARREST of adverse claimants writ of possession and ejectment, Motion: leave to file quo Warranto