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INTERVENTION COMPLAINT & CITIZEN'S ARREST OF JUDICIAL TAKING

INTERLOCUTORY APPEAL IN THE UNITED STATES OF AMERICA

COURT OF APPEALS FOR THE NINTH CIRCUIT

CITIZENS, EX REL. HUTCHENS,	
TWO MINERS & 8000 ACRES OF LAND)	**related cases USDC-CES -91-0768 DFL/JFM,**
T.W. ARMAN and JOHN F. HUTCHENS,)	**2:10-cv-232 FCD CMK PS, USCFC No. 09-207 L**
IRON MOUNTAIN MINES, INC. ET AL)	**CIRCUIT Nos. 09-17411, 09-70047, 09-71150**
Grantees, Patentees, Owners & Operators.)	**ABSOLUTE *SUPERSEDEAS* BY RIGHT**
v.	
USDC-CES respondent	**)WRIT *DE EJECTIONE FIRMAE*; WASTE**
UNITED STATES OF AMERICA	**)PETITION FOR ADVERSE CLAIMS WRITS**
STATE OF CALIFORNIA; Grantors	**)OF POSSESSION & EJECTMENT; FRAUD &**
UNCONSTITUTIONAL DETAINER	**) DECLARED DETRIMENT & CONTINUING**
WRONGFUL TAKING UNDER A FALSE	**)NEGLECT & FAILURE: TREBLE DAMAGES**
PRETENSE OF OFFICIAL RIGHT.	**)JOINT AND SEVERAL TRESPASSERS VOID**
DETINUE SUR BAILMENT	**) AND VACATE, REMISSION & REVERSION.**

RIGHT OF PRESENT POSSESSION COMPELLED ON FACTS PLEAD IN EVIDENCE

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

381. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest 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.

***BREVE SOKE* "IRON MOUNTAIN MINE"**

REVERSIONER LETTERS PATENT

Eritis insuperabiles, si fueritis inseparabiles. Explosum est illud diverbium: Divide, & impera, cum radix & vertex imperii in obedientium consensus rata sunt.

***Qui tam*: wrongful taking under a false pretense of official right.**

It is a familiar "maxim that a statutory term is generally presumed to have its common law meaning." Taylor v. United States, 495 U.S. 575, 592 (1990). As we have explained, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." Morissette v. United States, 342 U.S. 246, 263 (1952). [n.3]

At common law, extortion was an offense committed by a public official who took "by colour of his office" [n.4] money that was not due to him for the performance of his official duties. [n.5] A demand, or request, by the public official was not an element of the offense. [n.6] Extortion by the public official was the rough equivalent of what we would now describe as "taking a bribe." It is clear that petitioner committed that offense. [n.7] The question is whether the federal statute, insofar as it applies to official extortion, has narrowed the common law definition.

Congress has unquestionably expanded the common law definition of extortion to include acts by private individuals pursuant to which property is obtained by means of force, fear, or threats. It did

so by implication in the Travel Act, 18 U.S.C. § 1952 see United States v. Nardello, 393 U.S. 286, 289-296 (1969), and expressly in the Hobbs Act. The portion of the Hobbs Act that is relevant to our decision today provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section-

"(2) The term `extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951.

The present form of the statute is a codification of a 1946 enactment, the Hobbs Act, [n.8] which amended the federal Anti Racketeering Act. [n.9] In crafting the 1934 Act, Congress was careful not to interfere with legitimate activities between employers and employees. See H. R. Rep. No. 1833, 73rd Cong., 2d Sess., 2 (1934). The 1946 Amendment was intended to encompass the conduct held to be beyond the reach of the 1934 Act by our decision in United States v. Teamsters, 315 U.S. 521 (1942). [n.10] The Amendment did not make any significant change in the section referring to obtaining property "under color of official right" that had been prohibited by the 1934 Act. Rather, Congress intended to broaden the scope of the Anti Racketeering Act and was concerned primarily with distinguishing between "legitimate" labor activity and labor "racketeering," so as to prohibit the latter while permitting the former. See 91 Cong. Rec. 11899-11922 (1945).

Many of those who supported the Amendment argued that its purpose was to end the robbery and extortion that some union members had engaged in, to the detriment of all labor and the American citizenry. They urged that the Amendment was not, as their opponents charged, an anti labor measure, but rather, it was a necessary measure in the wake of this Court's decision in United States v. Teamsters. [n.11] In their view, the Supreme Court had mistakenly exempted labor from laws prohibiting robbery and extortion, whereas Congress had intended to extend such laws to all American

citizens. See, e. g., 91 Cong. Rec. 11910 (1945) (remarks of Rep. Springer) ("To my mind this is a bill that protects the honest laboring people in our country. There is nothing contained in this bill that relates to labor. This measure, if passed, will relate to every American citizen"); id., at 11912 (remarks of Rep. Jennings) ("The bill is one to protect the right of citizens of this country to market their products without any interference from lawless bandits").

Although the present statutory text is much broader [n.12] than the common law definition of extortion because it encompasses conduct by a private individual as well as conduct by a public official, [n.13] the portion of the statute that refers to official misconduct continues to mirror the common law definition. There is nothing in either the statutory text or the legislative history that could fairly be described as a "contrary direction," Morissette v. United States, 342 U. S., at 263, from Congress to narrow the scope of the offense.

The legislative history is sparse and unilluminating with respect to the offense of extortion. There is a reference to the fact that the terms "robbery and extortion" had been construed many times by the courts and to the fact that the definitions of those terms were "based on the New York law." 89 Cong. Rec. 3227 (1943) (statement of Rep. Hobbs); see 91 Cong. Rec. 11906 (1945) (statement of Rep. Robsion). In view of the fact that the New York statute applied to a public officer "who asks, or receives, or agrees to receive" unauthorized compensation, N. Y. Penal Code § 557 (1881), the reference to New York law is consistent with an intent to apply the common law definition. The language of the New York statute quoted above makes clear that extortion could be committed by one who merely received an unauthorized payment. [n.14] This was the statute that was in force in New York when the Hobbs Act was enacted.

The two courts that have disagreed with the decision to apply the common law definition have interpreted the word "induced" as requiring a wrongful use of official power that "begins with the public official, not with the gratuitous actions of another." United States v. O'Grady, 742 F. 2d, at 691; see United States v. Aguon, 851 F. 2d, at 1166 (" `inducement' can be in the overt form of a `demand,' or in a more subtle form such as `custom' or `expectation' "). If we had no common law history to guide our interpretation of the statutory text, that reading would be plausible. For two reasons, however, we are convinced that it is incorrect.

First, we think the word "induced" is a part of the definition of the offense by the private individual, but not the offense by the public official. In the case of the private individual, the victim's consent must be "induced by wrongful use of actual or threatened force, violence or fear." In the case of the public official, however, there is no such requirement. The statute merely requires of the public official that he obtain "property from another, with his consent, . . . under color of official right." The use of the word "or" before "under color of official right" supports this reading. [n.15]

Second, even if the statute were parsed so that the word "induced" applied to the public office-holder, we do not believe the word "induced" necessarily indicates that the transaction must be initiated by the recipient of the bribe. Many of the cases applying the majority rule have concluded that the wrongful acceptance of a bribe establishes all the inducement that the statute requires. [n.16] They conclude that the coercive element is provided by the public office itself. And even the two courts that have adopted an inducement requirement for extortion under color of official right do not require proof that the inducement took the form of a threat or demand. See United States v. O'Grady, 742 F. 2d, at 687; United States v. Aguon, 851 F. 2d, at 1166. [n.17]

(This case satisfies the quid pro quo requirement of McCormick v. United States, 500 U. S. -- (1991), because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the quid pro quo is not an element of the offense. our construction of the statute is informed by the common law tradition from which the term of art was drawn and understood. We hold today that the Government & public official has obtained a payment to which [they] he was not entitled, knowing that the payment was made in return for official acts.)

Our conclusion is buttressed by the fact that so many other courts that have considered the issue over the last 20 years have interpreted the statute in the same way. [n.21] Moreover, given the number of appellate court decisions, together with the fact that many of them have involved prosecutions of important officials well known in the political community, [n.22] it is obvious that Congress is aware of the prevailing view that common law extortion is proscribed by the Hobbs Act. The silence of the body that is empowered to give us a "contrary direction" if it does not want the

common law rule to survive is consistent with an application of the normal presumption identified in Taylor and Morissette, supra.

By a preponderance of the evidence, petitioner contends that common law extortion wrongful takings under a false pretense of official right. Post, at 2-3; see post, at 4 (offense of extortion "was understood ... [as] a wrongful taking under a false pretense of official right") (emphasis in original); post, at 5. It is perfectly clear, [however,] that although extortion accomplished by fraud was [is] a well recognized type of extortion, there were [are] other types as well. As the court explained in Commonwealth v. Wilson, 30 Pa. Super. 26 (1906), an extortion case involving a payment by a would be brothel owner to a police captain to ensure the opening of her house:

"The form of extortion most commonly dealt with in the decisions is the corrupt taking by a person in office of a fee for services which should be rendered gratuitously; or when compensation is permissible, of a larger fee than the law justifies, or a fee not yet due; but this is not a complete definition of the offense, by which I mean that it does not include every form of common law extortion." Id., at 30.

See also Commonwealth v. Brown, 23 Pa. Super. 470, 488-489 (1903) (defendants charged with and convicted of conspiracy to extort because they accepted pay for obtaining and procuring the election of certain persons to the position of school teachers); State v. Sweeney, 180 Minn. 450, 456, 231 N.W. 225, 228 (1930) (alderman's acceptance of money for the erection of a barn, the running of a gambling house, and the opening of a filling station would constitute extortion) (dicta); State v. Barts, 132 N.J.L. 74, 76, 83, 38 A.2d 838, 841, 844 (Sup. Ct. 1944) (police officer, who received $1,000 for not arresting someone who had stolen money, was properly convicted of extortion because "generically extortion is an abuse of public justice and a misuse by oppression of the power with which the law clothes a public officer"); White v. State, 56 Ga. 385, 389 (1876) (If a ministerial officer used his position "for the purpose of awing or seducing" a person to pay him a bribe that would be extortion).

The dissent's theory notwithstanding, not one of the cases it cites, see post, at 4-5, and n. 3, holds that the public official is innocent unless he has deceived the payor by representing that the payment was proper. Indeed, none makes any reference to the state of mind of the payor, and none

states that a "false pretense" is an element of the offense. Instead, those cases merely support the proposition that the services for which the fee is paid must be official and that the official must not be entitled to the fee that he collected--both elements of the offense that are clearly satisfied in this case. The complete absence of support for the dissent's thesis presumably explains why it was not advanced by petitioner in the District Court or the Court of Appeals, is not recognized by any Court of Appeals, and is not advanced in any scholarly commentary. [n.23]

In affirming [Agency] conviction, the Court of Appeals should note that the instruction should not require the jury to find that [Agency] had demanded or requested the money, or that he had conditioned the performance of any official act upon its receipt. 910 F. 2d 790, 796 (CA11 1990). The Court of Appeals held, however, that "passive acceptance of a benefit by a public official is sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The official need not take any specific action to induce the offering of the benefit." Ibid. (emphasis in original). [n.1] This statement of the law by the Court of Appeals for the Eleventh Circuit is consistent with holdings in eight other Circuits. [n.2] Two Circuits, however, have held that an affirmative act of inducement by the public official is required to support a conviction of extortion under color of official right. United States v. O'Grady, 742 F. 2d 682, 687 (CA2 1984) (en banc) ("Although receipt of benefits by a public official is a necessary element of the crime, there must also be proof that the public official did something, under color of his public office, to cause the giving of benefits"); United States v. Aguon, 851 F. 2d 1158, 1166 (CA9 1988) (en banc) ("We find ourselves in accord with the Second Circuit's conclusion that inducement is an element required for conviction under the Hobbs Act"). Because the majority view is consistent with the common law definition of extortion, which we believe Congress intended to adopt, we endorse that position.

See: Evans v. United States (90-6105), 504 U.S. 255 (1992).

The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court 'to have the Assistance of Counsel for his defence'. 'This is one of the safeguards ... deemed necessary to insure fundamental human rights of life and liberty'

and a [315 U.S. 60, 70] federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel. Johnson v. Zerbst, 304 U.S. 458, 462 , 463 S., 58 S.Ct. 1019, 1022. Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, Powell v. Alabama, 287 U.S. 45 , 53 S.Ct. 55, 84 A.L.R. 527, so are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.

To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. Aetna Insurance Co. v. Kennedy, 301 U.S. 389 , 57 S.Ct. 809; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 , 57 S.Ct. 724

See: GLASSER v. U.S., 315 U.S. 60 (1942) 315 U.S. 60

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

Several U.S. statutes directly confer the right to interlocutory appeals, including appeals from orders denying arbitration, 9 U.S.C. § 16, and some judicial actions against the debtor upon filing bankruptcy proceedings, 11 U.S.C. § 362(a). There is a major split in the United States courts of appeals as to whether a stay of proceedings should issue in the district court while interlocutory appeals on the arbitrability of disputes are decided. Compare Bradford-Scott Data Corp., Inc. v. Physician Computer Network, 128 F.3d 504 (7th Cir. 1997), and Britton v. Co-op Banking Group, 916 F.2d 1405 (9th Cir. 1990). An interlocutory appeal under the collateral order doctrine usually merits a stay of proceedings while the appeal is being decided. Currently, the Second and Ninth Circuits

have refused to stay proceedings in the district court while an arbitration issue is pending [See, Motorola Credit Corp. v. Uzan, 388, F.3d 39, 53-4 (2d Cir. 2004; Britton v. Co-Op Banking Group, 916 F.2d 1405, 1412 (9th Cir. 1990)]. The Seventh, Tenth and Eleventh Circuit courts conversely hold that a non-frivolous appeal warrants a stay of proceedings. See, Bradford-Scott Data Corp. v. Physician Computer Network, Inc., 128 F.3d, 504, 506 (7th Cir. 1997); Blinco v. Green Tree Servicing, LLC, 366 F.3d 1249, 1251-2 (11th Cir. 2004); McCauley et al. v. Halliburton Energy Services, Inc., (citation unavailable, but see: http://ca10.washburnlaw.edu/cases/2005/06/05-6011.htm).

1) State courts

In California, interlocutory appeals are usually sought by filing a petition for writ of mandate with the Court of Appeal. If granted, the writ directs the appropriate superior court to vacate a particular 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.

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

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

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.

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 point source discharges because a discernible conveyance is used. Section 401 puts section 404 within its scope when it discusses "use of spoil disposal areas."(48) In addition, Congress made it abundantly clear during the legislative work on the CWA in 1972 that section 401 was to cover 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)

3. FERC Permits

The last traditional use of section 401 is for FERC permits for hydroelectric projects.(51) The controversy surrounding hydroelectric projects centered around dams. In National Wildlife Federation v. Gorsuch, (52) EPA maintained that dams fell under their definition of nonpoint source pollution. Environmentalists disagreed with this interpretation and argued that a dam was a point source. The D.C. Circuit held that the statute would support defining hydroelectric projects as either a point or nonpoint source. The court deferred to the agency's position because it was not unreasonable.(53) Although Gorsuch dealt with a section 402 permit, not section 401 certification, the question the court was deciding was whether a dam was a point source. The court deferred to the agency's interpretation that a dam was a nonpoint source. However, most people would

probably agree with the environmentalists' interpretation that a dam is a point source. A dam falls under the definition of a point source(54) because it is a single structure that has observable effects 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.

C. The States' Power Under Section 401

The use of section 401 is left up to the states. Each state may decide whether to waive certification for an activity.(59) Sometimes, waivers result simply from a state's inaction. If the state does not act on the request for certification within a year, the federal permitting agency will consider 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.

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

PUD No. 1(62) and ONDA I(63) represent a growing interest in applying section 401 to nonpoint source pollution. As the previous section discussed, states have been applying section 401 only to point source discharges. However, many say that states can, and should, apply section 401 to nonpoint source pollution, arguing that PUD No. I 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.

A. PUD No. 1

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

1. The Court's Holding

PUD No. I was not about whether a section 401 certification was needed for the project. Washington state was using its section 401 power in a traditional manner to certify a hydroelectric project prior to FERC granting a permit.(67) Although the need for a section 401 certification was not in question,(68) the Court did touch briefly on this issue. The Court used the traditional two-part analysis to determine if a section 401 permit could be required by the state.(69) This analysis is relatively simple. A court must first determine if a federal permit or license is necessary for the project. Then it must determine if some kind of discharge may result from the project. Here, the

Court found that the project would need a FERC license and that at least two discharges would result from the project, so Washington could require a section 401 certification.(70)

The question for the Court was not whether a section 401 certification was required, but exactly what the state could consider in granting it. In PUD No. I the state wanted to impose a minimum stream flow between one hundred and two hundred cubic feet per second (cfs).(71) The Court allowed the condition under section 401, recognizing that a state may condition its permit not only on the specific provisions of the CWA outlined in section 401(a), but also on "any effluent limitations and other limitations" needed to meet state water quality standards.(72) The Court interpreted this provision of section 401 to mean that the state could consider the effect that the entire project or activity would have on water quality, not just effects from specific discharges.(73) But, in order for the state to consider the effects of the activity as a whole, the activity must first be one that would fall under section 401, as the building of PUD No. 1 did in this case. This interpretation by the Court to allow the state to look at the effects of the activity as a whole does not 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. I holding. Rather, they are interested in the Court's brief mention of the two discharges that would result from dam construction: "the release of dredged and fill material during the construction of the project and the discharge of water at the end of the tailrace after the water has been used to generate electricity."(75) Some commentators believe the second of these two discharges can be interpreted to include nonpoint source pollution,(76) even though the case did not hold that and the Court never specifically addressed point source versus nonpoint source pollution.

a. Discharge from a Tailrace Is Not Nonpoint Source Pollution

Water coming out of a tailrace has a changed temperature, and this can affect the ability of the water to support certain fish. A tailrace is defined as "a race for conveying water away from a point of industrial application (as a waterwheel or turbine) after use."(77) A race is defined as "a strong or rapid current of water flowing through a narrow channel."(78) The narrow channel created to carry the water away from a hydroelectric project is normally a tunnel, some kind of pipe, or a ditch. Each of these items is a "discernible, confined and discrete conveyance" within the definition of a point source in the CWA.(79) Therefore, a tailrace is a point source. In fact, in one PUD No. I brief, tailrace is defined as a conveyance for "[w]ater that has passed through the turbine."(80) And if a tailrace is a point source, then the water coming out of it is discharged from a point source, and is

not a nonpoint source. So, the Court's mention of discharge from the tailrace does not indicate an expansion of section 401 to nonpoint source pollution.

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

At least one commentator asserts that most courts would hold that water coming out of a tailrace is nonpoint source pollution because water temperature has been changed and temperature is not an identifiable pollutant.(81) This assertion is based on Power Authority of New York v. Williams(82) in which the court addressed the denial of a section 401 permit for a hydroelectric project. One of the reasons for the denial was the Power Authority of New York's failure to assure the state that water temperatures in the affected waters would be kept at a satisfactory level.(83) The Power Authority of New York argued that water temperatures could not be considered under state water quality standards because a section 401 permit required that the discharge involved contain an identifiable pollutant.(84) The court rejected this argument holding that "a transfer of water from 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 does not support the contention that water from a tailrace would be viewed as nonpoint source pollution.

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

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

In Idaho Conservation League v. Caswell,(94) a group of environmentalists who tried to use PUD No. I to support a claim that section 401 applies to nonpoint source pollution lost their case on summary judgment. The environmentalists sued the United States Forest Service (Forest Service) because it did not require a timber company to obtain section 401 certification prior to building two logging roads on Forest Service land. The discharge in question was nonpoint source pollution.(95)

First, the court looked at the language of section 401 and found that it was "evident that section 401 was only intended to encompass those projects which resulted in a `point source discharge.'"(96) Then, the court dismissed the environmentalists' reliance on PUD No. I because it "does not stand for the proposition that all nonpoint sources are subject to section 401 certification."(97) This is supported by the ONDA I court, which did not rely on PUD No. 1 to decide that section 401 does apply to nonpoint source pollution.(98)

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

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

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

Lastly, the court looked at the legislative history of the CWA.(109) The court first said that the Water Quality Improvement Act of 1970 did not make any distinctions between point sources and nonpoint sources.(110) Then, the court looked at the history of the 1972 Amendments and found 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 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)

Therefore, based on the plain meaning of the statutory language and the legislative history of the CWA, the court held that section 401 applies to nonpoint source pollution and, specifically, to 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 that may cause pollution solely from nonpoint sources."(114) The next section will examine this

holding and then illustrate why this was the correct result based on the statutory language and legislative history of section 401.

IV. ONDA II: THE CORRECT INTERPRETATION OF SECTION 401

In section 401, the nonpoint source pollution dispute centers on the meaning of the word "discharge."(115) In concluding that discharge in section 401 does not apply to releases from nonpoint sources, the Ninth Circuit examined "the language of the governing statute, guided not by 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 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 legislative history of section 401 mandate the same conclusion.

A. The Ninth Circuit Decision

In some respects, the Ninth Circuit's analysis was as cursory as the lower court's. The court 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, 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 adopt nonpoint source pollution management programs.(119) This consistently separate treatment of point and nonpoint sources in the CWA led the court to conclude that the term "discharge" does not include nonpoint sources.

The court rejected the environmentalists' argument that nonpoint sources were somehow swept into the scope of section 401 by the section's reference to section 303. The court noted that before 1972 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 licensed activity complies with the applicable provisions of sections 301, 302, 303,306, and 307. The change was made "to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants."(121) The change, according to the court, was not made to bring nonpoint sources into the scope of section 401, especially in light of the Ninth Circuit's holding in Oregon Natural Resources Council v. United States Forest Service.(122) In that case, the Ninth Circuit held that reference to water quality standards in section 301 "did not sweep nonpoint sources into the scope of [sections] 1311."(123) Similarly, the court held that the mention of water quality standards in section 303 did not include nonpoint source pollution. Thus, all the sections cross-referenced in section 401 deal with point source regulation, not nonpoint source pollution.

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

The Ninth Circuit also found support for its conclusion in the CWA's use of the term "runoff" as compared to the term "discharge".(125) According to the Ninth Circuit, when Congress meant point source pollution it used discharge, and when it meant nonpoint source pollution it used runoff.(126) Therefore, if Congress had intended section 401 to include nonpoint sources as well as point sources, it would have used language similar to section 313.(127) In that provision, federal agencies "engaged in any activity which may result in the discharge or runoff of pollutants" are required to comply with applicable water quality standards.(128) Had section 401 used such language, then it would include nonpoint sources. But use of the term discharge alone limits its application to point sources. Lastly, the Ninth Circuit rejected the plaintiffs' argument that discharge is defined more broadly than the discharge of pollutants from point sources. The court flatly stated that this view "is incorrect."(129) According to the court, the broader meaning of discharge concerns whether releases from point sources are polluting or nonpolluting. Discharge includes both polluting and nonpolluting releases from point sources but cannot be read to include nonpoint sources. Any other 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.

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

"The term `discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."(132) That is all the definition section of the CWA says about discharge. Yet, the meaning of discharge is important to understanding section 401 because the section does not mention the source of the discharge, only the discharge itself. As the Ninth Circuit noted, the meaning of discharge literally holds the key to understanding the type of source to which Congress 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 definition came about sheds considerable light on what it means. The Committee on Public Works in the Senate wrote that the definition of discharge was added to define the scope of the control that would be required under the CWA.(134) It then discussed pollutants added by any point source, outfall or other pipeline, and publicly owned treatment works.(135) Discharge was said to be a term of art in the legislation(136) that "refers to the actual discharge from a point source into the navigable waters, territorial seas, or the oceans."(137) The report seems to limit the meaning of discharge to point sources only.

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

These definitions, along with the legislative history concerning the actual definition of discharge, would seem to end the inquiry as to whether or not discharge applies to nonpoint source pollution.

However, the definition of discharge "includes" the discharge of a pollutant and the discharge of pollutants. And, "[t]he use of the word `includes' rather than `means' in a definition indicates that what follows is a nonexclusive list which may be enlarged upon."(139) So, the term "discharge" is not limited to the meaning given to "discharge of pollutant" and "discharge of pollutants."

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

While the absence of nonpoint source pollution from this list is not conclusive evidence that it was meant to be excluded, it does not mean that nonpoint source pollution was included in the definition of discharge. After all, noscitur a sociis, a traditional canon of statutory construction, provides that words in a list should be interpreted in light of the surrounding words.(143) The words in the list of 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.

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

C. Legislative History of Section 401

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

1. 1970 Amendments

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

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

bill into the CWA seems hard to believe, especially because the focus of the bill was not nonpoint source pollution.

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

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

1. Current Certification Process in Oregon

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

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

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

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

> (i) Vegetative cover and plant soil conditions that promote water infiltration, conserve soil moisture and maintain soil stability in upland areas;
>
> (ii) Vegetative cover and plant community structure to promote streambank stability, debris and sediment capture, shade to moderate water temperature, and floodwater energy dissipation in riparian areas;
>
> (iii) Diverse riparian plant populations and communities that enhance soil 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

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

Not only does proper range management increase the grazing productivity of the riparian areas by increasing vegetation and decreasing erosion, but the habitats necessary to support the fish and wildlife that depend on riparian areas improve as well. Grazing has been blamed for the loss of fish habitats in many western states.(220) The loss of vegetation and increased erosion that may result

from grazing can raise the water temperature of streams, affecting the ability of fish to live and reproduce.(221) Animal-waste runoff from grazing may contribute to the negative impact of grazing on fish habitats. Runoff can introduce excessive nutrients such as nitrogen, phosphorus, and organic matter into the water. Excessive nutrient loading can overstimulate the growth of algae, which is harmful for fish habitats.(222) Further, the decomposition of organic matter requires oxygen that would otherwise be used by fish.(223)

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

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

According to the environmentalists, damage to riparian areas from grazing extends beyond loss of fish and wildlife habitats. Not surprisingly, one of the impacts often mentioned is the loss of recreational use of the riparian areas. Recreational use and grazing are just two of the many 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 Association has advised hikers and backpackers to avoid the area due to problems from grazing.(232) In addition to these specific examples, some environmentalists argue that the grazing-induced degradation of the waters on public lands will prevent future generations from ever fishing or picnicking along shady streams.(233) This last argument is perhaps extreme and seems to suggest that grazing should.

Reducing grazing damage to riparian areas does not require keeping cattle off public lands entirely. Adding another layer of regulation by requiring a section 401 certification will not solve the problem either. The solution is proper grazing management. Proper grazing management centers around seasons of use for an allotment and the number of livestock allowed to graze on an allotment. Regulating seasonal use may mean not turning cattle out on an allotment in the spring so that vegetation in a riparian area has a better chance to grow and develop. This will then provide cattle with better forage later in the grazing season. Reducing the number of cattle grazing on an allotment can also make a significant difference to the health of a riparian area.(234) Examples of proper management abound all over the West. Using funds and programs that were set up under section 319 of the CWA (the provision of the CWA meant to deal with nonpoint source pollution), riparian areas in Arizona, Idaho, Oregon, Nevada, South Dakota, Utah, and Wyoming have been

restored or significantly improved.(235) Techniques used to accomplish the improvements include resting the land, building fences, reducing numbers, and changing turnout times.(236) In almost all cases, permittees cooperated with the federal land management agency involved.(237) In most cases, the productivity of the allotments increased, and permittees saw a long-term benefit even though, in some cases, they reduced numbers or rested land in the short term.(238)

3. Existing Regulations

Participation in section 319 programs is voluntary. Grazing permittees chose to participate to help minimize the possible adverse environmental effects of grazing. However, federal legislation other than the CWA already regulates much of what grazing permittees can do on their allotments. In particular, the Federal Land Policy and Management Act of 1976 (FLPMA)(239) and the Public Rangelands Improvement Act of 1978 (PRIA)(240) require BLM and the Forest Service to consider 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)

This act allows BLM and the Forest Service to incorporate allotment management plans in grazing permits and leases.(242) Allotment management plans are site-specific plans intended to improve range conditions.(243) While such plans are not mandatory, if either agency decided not to 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)

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

Pursuant to FLPMA and PRIA, BLM and the Forest Service promulgated regulations designed to improve the overall condition of public rangelands. The Forest Service regulations concentrate on allotment management plans. Allotment management plans establish what livestock operations must do to meet "the multiple-use, sustained yield, economic, and other needs and objectives as

determined for the lands, involved."(250) The Forest Service prepares the allotment plan in cooperation with the permittee, consistent with the Forest Service's land use planning method.(251) This strategy allows the Forest Service to manage grazing on the federal forests under their existing laws. Additionally, the Forest Service must consider damage to the surrounding waters when developing a more general land management plan for any use of National Forest lands, including grazing.(252)

In contrast, BLM promulgated extensive new rules "to promote healthy sustainable rangeland ecosystems."(253) The regulations called for grazing management to ensure that watersheds were in properly functioning physical condition, or at least moving in that direction.(254) The riparian area of the watershed, as well as uplands, are included in range management, and water quality must comply with state water quality standards.(255) Under the regulations, each state develops its own standards to meet these requirements, thus ensuring that states control their own water quality.(256) 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)

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

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

4. Cost of Regulating Grazing Through Section 401

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

Environmentalists contend that requiring section 401 certification for grazing permits is cost effective.(269) They argue that it is cheaper for states to deal with nonpoint source pollution up front, rather than undertaking enforcement actions after the damage is done.(270) Yet, the initial concern for Oregon following ONDA I was how to pay for the costs of issuing additional section 401 certifications. At that time, DEQ had one full-time staff person to handle approximately one thousand section 401 applications received each year.(271) Certifying every grazing permit would add substantially to administrative costs for the department because half of the land in the state is public land and grazing occurs on much of it.(272) DEQ, in fact, estimates between one thousand and fifteen hundred grazing permits would require certification.(273) Add this to the cost of 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.

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

B. Implications for Irrigation

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

Importantly, water for irrigation is not free. Reclamation water for irrigation is delivered pursuant to contracts. These contracts are between an organization, usually an irrigation district, and the United States.(287) Two types of contracts exist: repayment contracts and water service contracts.(288) Repayment contracts require the irrigation district to make scheduled payments on a portion of the costs of a specific project in return for irrigation water.(289) These contracts resemble a mortgage 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 return flows and drainage can introduce trace elements, nitrogen, salts, pesticides, and herbicides into waterways.(296) Environmental impacts from irrigation are not limited to return flows and drainage. Other impacts include erosion and sedimentation,(297) lowering of stream flows,(298) and lowering of water temperatures.(299) All of these, along with discharges from return flows and drainage, may greatly affect the ability of the waters to support fish habitats.(300)

Even if section 401 is construed to apply to nonpoint source pollution, it may be difficult to apply it to irrigation. The language of section 401 requires that "[a]ny applicant for a Federal license or permit" obtain state certification if the activity to be conducted may result in a discharge.(301) As noted above, irrigation with federal reclamation water may result in a discharge. But does it require a federal license or permit? It does require a contract with the United States, but a contract is not a license or a permit. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."(302) A

permit is a "document which grants a person the right to do something."(303) A license may be defined as a "certificate or the document itself which gives permission" to do some activity.(304) A license or a permit is not usually thought to create a contract with the grantor.(305) A contract between the United States and an irrigation district creates property rights to the water such that if the Bureau decides to take away the water, the landowners may have a valid takings claim.(306) This is vastly different from what a grazing permit does. A grazing permit gives a rancher permission to graze on public lands for a fee. It creates no property right for the rancher.(307) The contract by which irrigation districts and, hence, individual farmers get federal irrigation water cannot be construed as a "permit or license." Therefore, irrigation should be safe from further regulation if section 401 is applied to nonpoint source pollution.

VI. OTHER WAYS TO CONTROL AGRICULTURAL NONPOINT SOURCE POLLUTION

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

A. Nonpoint Source Pollution Provisions of the CWA

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

1. Section 208 of the CWA

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

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

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

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

Doubts about the ability of section 208 to help control nonpoint source pollution continued. In 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

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

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

B. Other Federal Regulatory Tools

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)

Likewise, Forest Service regulations state that a permit can be modified by seasons of use and numbers, kind, and class of livestock, due to resource condition.(337) Furthermore, Forest Service regulations provide for the cancellation or suspension of a grazing permit if "the permit holder is convicted for failing to comply with Federal laws or regulations or State law relating to protection of air, water, soil and vegetation, fish and wildlife, and other environmental values when exercising the grazing use authorized by the permit.(338) Therefore, a permittee cannot ignore environmental laws on his grazing allotment. If he does, he is subject to losing his permit. BLM regulations subject a permittee to civil penalties for the violation of federal and state laws pertaining to "pollution of water sources," among other things.(339) Once again, a permittee cannot do whatever he wants on

his allotment without being mindful of the impact his activity may have on the water. Quite simply, the powers that BLM and the Forest Service have to enforce the terms and conditions of the grazing permits they grant are adequate to achieve the purpose behind the CWA. As discussed previously, BLM and the Forest Service may need to be encouraged to truly enforce the terms and conditions of grazing permits, but another layer of regulation is not needed.

2. Irrigation

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

C. Other Ways to Reduce Agricultural Nonpoint Source Pollution

The answer to agricultural nonpoint source pollution is not necessarily further regulation. Contrary to what some environmentalists may believe, the agricultural community is concerned about nonpoint source pollution and is looking for ways to control it. Federal watershed projects represent one significant effort to reduce agricultural nonpoint source pollution.(346) In 1995 there were 618 watershed projects specifically aimed at agricultural nonpoint source pollution across the 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)

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

Unfortunately, the program is voluntary, and getting farmers and ranchers to participate may be difficult. Even though the Coos Bay program was successful, far too few landowners participated.

The answer may lie in educating farmers and ranchers about the benefits of improving water quality. To be effective the benefits need to be couched in terms of economic benefits to the farmers and ranchers. As businessmen, farmers and ranchers will be more willing to participate in programs that will help their businesses. An argument that they need to preserve a streambank so future generations can picnic along it will not be as persuasive to them as an argument about preserving a streambank so their cows will have something to eat ten years from now.

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

VII. CONCLUSION

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

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

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

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

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

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

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

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

(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).

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

(20) Id.

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

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

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

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

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

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

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

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

(29) Id. [sections] 1362.

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

(31) Id. [sections] 1316.

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

(33) Id. [sections] 1317.

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

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

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

(37) Id. [sections] 1313.

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

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

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

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

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

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

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

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

(46) Id.

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

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

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

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

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

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

(53) Id. at 175; see also United States v. Tennessee Water Quality Control Bd., 717 F.2d 992, 999 (6th Cir. 1983) (holding that Tennessee could not require the Tennessee Valley Authority to acquire

a 402 permit for the reconstruction and operation of a dam). But see WILLAM H. RODGERS, ENVIRONMENTAL LAW 315.16 1994 (casting doubt on the determination made in Gorsuch that a dam is not a point source).

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

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

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

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

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

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

(60) Id.

(61) For example, Oregon issues a [sections] 401 certification when the federal agency requires the permittee to obtain one. Interview with Debra Sturdevant, Oregon Department of Environmental Quality (DEQ), Nonpoint Source Pollution-Agriculture Division, Portland, Or. (Nov. 12, 1997). Oregon's certification procedures specifically mention hydroelectric projects, Army Corps projects ([sections] 404 permits), and Coast Guard projects (construction of dams and dikes). OR. ADMIN. R. 340-048-0020 (1998). Montana's permit procedures specifically mention 404 permits. MONT. ADMIN. R. 17.30.108 (1995). Colorado spells out procedures to follow for an Army Corps [sections] 404 permit, [sections] 402 permits issued by EPA, and FERC permits. 5 COLO. CODE REGs. [sections] 2.4.5 (1994). Colorado's procedures include "all other federal licenses or permits" in the same subsection as FERC permits. Id. Washington's procedures mention only [sections] 404 permits. WASH. Al)MIN. CODE [sections] 173-204-410 (1995). California also mentions only [sections] 404 permits specifically. CAL. CODE REGS. tit. 13, [sections] 13396 (1997); see also 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.

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

(66) Id. at 703.

(67) Id. at 709.

(68) Id. at 711.

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

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

(71) Id. at 709.

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

(73) Id.

(74) Id. at 722.

(75) Id. at 711.

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

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

(78) Id. at 1869.

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

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

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

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

(83) Id. at 903.

(84) Id. at 904.

(85) Id.

(86) Id. at 905.

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

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

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

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

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

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

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

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

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

(96) Id. at 16.

(97) Id. at 18.

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

(99) Id. at 1537.

(100) Id.

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

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

(103) Id. at 1539.

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

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

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

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

(108) Id. at 1540. The environmentalists asserted that EPA agreed with them that [sections] 401 applies to nonpoint source pollution. A memo to this effect was stricken from the record by the judge in the district court. Response Brief of Plaintiffs/Appellees at 25, Oregon Natural Desert Ass'n v. Dombeck, 940 F. Supp. 1534 (D. Or. 1996)(No. 95065, 97-35112, 97-35115). However, the environmentalists hoped to get the memo in on appeal. Id. The Department of Justice (DO J) flied a motion with the Ninth Circuit to keep out the memo. Reply Brief of Federal Appellants at; 3, Oregon Natural Desert Ass'n v. Dombeck, 940 F. Supp. 1534 (D. Or. 1996) (Nos. 95065, 97-35112, 97-35115). Also, the environmentalists included quotes from a letter EPA wrote to DOJ following the ONDA I decision. According to this letter, EPA wanted the Forest Service to go along with the 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.

(113) Id.

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

(115) Id. at *3.

(116) Id.

(117) Id. at *4.

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

(120) Id. at *5.

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

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

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

(124) Id. at *6.

(125) Id. at *7.

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

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

(128) Id.

(129) Id. at *7.

(130) Id.

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

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

(133) Water Quality Improvement Act, Pub. L. No. 91-224, [sections] 11(a), 80 Stat. 91 (1970) (codified as amended at 33 U.S.C. [sections] 1163 (1994)). The government argued in ONDA II that the term "discharge" as used in the 1970 Act meant discharges only from point sources. The

government asserted that the statute was concerned with developing controls for oil and hazardous waste discharges from vessels and from on- and off-shore facilities. The statute also dealt with sewage discharges from vessels: In this context, vessels would be considered point sources. So, when using "discharge" in [sections] 21(b), which became [sections] 401, Congress was only concerned with discharges from point sources. Reply Brief of Federal Appellants at 8, Oregon Natural Desert Ass'n v. Dombeck, 940 F. Supp. 1534 (D. Or. 1996) (Nos. 97-35065, 97-35112, 97-35115).

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

(135) Id.

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

(137) Id.

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

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

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

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

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

(145) S. REP. No. 92-414, at 76 (1971), reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF 1972, at 1494 (1973). The reason the

term was defined was to prevent litigation over its meaning. Based on the abundance of litigation over the CWA, this definition probably did not meet its goal. See National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 173 (D.C. Cir. 1982).

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

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

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

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

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

(151) Id.

(152) Id.

(153) Id.

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

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

(156) Id.

(157) Id. at 235.

(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.

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

(161) Hearings on H.R. 11896, Comm. on Public Works, 93d Cong. 306 (1973), reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL AMENDMENTS OF 1972, at 1204 (1973). Section 306 established national standards of performance for point sources.

33 U.S.C. [sections] 1316 (1994). Section 307 established effluent limitations for toxic pollutants based on the category or class of point source from which it was discharged. Id. [sections] 1317.

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

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

(164) Id.

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

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

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

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

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

(170) 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). Section 303 established water quality standards and implementation standards for the states. 33 U.S.C. [sections] 1313 (1994).

(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.

(175) Id. at 706.

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

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

(178) Id.

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

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

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

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

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

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

(186) OR. ADMIN. R. 603-076-0010 (1996). The rules were to only be in effect for 180 days and 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).

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

(189) OR. ADMIN. R. 340-048-0110(1) (1998). It is worth noting that the rule does not require someone to seek a state certification; it only provides that someone may seek certification. This may be because the ONDA I case was considered to apply only to Forest Service permits and not

BLM permits. By keeping the language permissive, Oregon would not be required to change the rules if BLM permits were later determined to require certification as well. At the time the rules were adopted, however, a similar case had been filed concerning grazing permits on BLM lands. Oregon: DEQ Sets Hearings for Certifying that Grazing Will Not Harm Water Quality, DAILY ENV'T REP. (BNA), Jan. 8, 1998, at A-2.

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

(191) Id.

(192) Id.

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

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

(195) Id.

(196) Id.

(197) Id.

(198) Id.

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

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

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

(202) Id.

(203) Id.

(204) Id.

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

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

(207) See Sturdevant, supra note 61.

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

(209) See 36 C.F.R. [sections] 222.1 (1998) (defining an allotment management plan to prescribe the manner in which livestock operations will be conducted in order to sustain multiple-use, sustained yields, and other objectives); 43 C.F.R. [sections] 4180.2 (1997) (setting grazing guidelines that consider watershed functions, nutrient cycling and energy flow, water quality, habitat for endangered and threatened species, and habitat quality for native plant and animal 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 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).

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

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

(212) Id.

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

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

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

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

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

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

(219) Id.

(220) Id. at 5.

(221) Id. at 2.

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

(223) Id.

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

(225) Id.

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

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

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

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

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

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

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

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

(236) Id.

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

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

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

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

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

(242) Id. [sections] 1752.

(243) Id.

(244) Id.

(245) Id.

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

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

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

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

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

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

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

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

(252) Id. [sections] 219.1. Little has been written about the Forest Service's allotment management plans because they are usually part of a larger forest plan. These larger plans tend to deal with 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.

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

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

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

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

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

(262) Id.

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

(264) Id.

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

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

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

(268) See Why Is the `Forage Improvement Act of 1997' Needed?: Hearings on the Forage Improvement Act of 1997 Before the Subcomm. on Livestock, Dairy, and Poultry of the House Comm. on Agric. 105th Cong. (1997) (statement of Frederick W. Obermiller, Professor of Agriculture and Resource Economics at Oregon State University). Obermiller testified that because of the geography of federal grazing lands and the excessive federal regulations imposed to use that 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 million. Friends of the Earth, Recreational Fees (visited April 1, 1999) <http://www.essential.org/orgs/FOE/eco/scissors97/ recfees.html>.

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

(270) Id.

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

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

(273) Sturdevant, supra note 61.

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

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

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

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

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

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

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

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

(282) Id. at 1.

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

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

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

(286) Id. at 364.

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

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

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

(290) Id.

(291) Id.

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

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

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

(295) Id. at 73.

(296) Id.

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

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

(300) Id.

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

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

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

(304) Id. at 920.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(320) Id.

(321) See Natural Resources Defense Council v. United States Envtl. 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 Envtl. 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 managed consistently with State program objectives. 9. A feedback loop whereby the State reviews, evaluates, and revises its nonpoint source assessment and its management program at least every five years.

Id.

(334) Id.

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

(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).

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

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

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

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

(341) Id.

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

(343) Id.

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

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

(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.

(347) Id.

(348) Id.

(349) Id.

(350) Id.

(351) Id.

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

(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

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

--Senator Jake Garn (R-Utah)

I. INTRODUCTION

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

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

Section 4 instructs the Secretaries of the Interior and Commerce to list species as either threatened or endangered "solely on the basis of the best scientific and commercial data available.(11) The Secretary of the Interior, responsible for avian, terrestrial, and freshwater species, has delegated this power to the Fish and Wildlife Service (FWS), while the Secretary of Commerce, responsible for marine and anadromous species, has delegated the power to the National Marine Fisheries Service.(12) The ESA defines the term "species" to include subspecies of fish or wildlife or plants, 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, however, but from the judiciary. In Tennessee Valley Authority v. Hill,(19) decided in 1978, the U.S. Supreme Court interpreted section 7 as an absolute bar against any federal action that might 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)

Section 9 prohibits the taking of endangered species.(22) The term "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."(23) In 1975 the Secretary of the Interior promulgated a regulation interpreting "harm" to

include activities that result in "significant environmental modification or degradation."(24) Under this definition, the ESA may limit land use activities on private property that might indirectly harm a listed species, making the ESA "perhaps the most powerful regulatory provision in all of environmental law."(25) The courts consistently have upheld this broad interpretation of section 9.(26)

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

This Note, however, does not analyze the current debate over the ESA or propose ways to improve the Act. Instead, it examines the Act's past, particularly its legislative history, in an attempt to demonstrate what Congress intended when it passed the Act in 1973. This Note concludes that the Act has had unanticipated consequences. Specifically, it argues that Congress did not intend to pass a law that would protect seemingly insignificant species irrespective of economic considerations, halt federal development projects, and regulate private property. Instead, most in Congress believed the Act to be a largely symbolic effort to protect charismatic megafauna representative of our 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 7 to save critical habitat. In 1973 it would have been difficult, if not impossible, for Congress to anticipate such a fundamental change in circumstances.

Despite its conclusions, this Note does not argue that the ESA should be weakened or repealed. Nor does it advocate that the courts should adhere to the original intent of the legislators who enacted the ESA. Instead, it merely attempts to provide a historical context for discussion about the future of endangered species policy. This story of unanticipated consequences, while not new, typifies much legislation, and Congress should occasionally be reminded of it. Finally, this Note will

demonstrate the important role that Congress, the administration, and the courts played in shaping the modern environmental movement.

II. PROTECTING SPECIES BEFORE THE ESA

A. Saving Individual Species

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

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

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

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

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

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

In 1914, the last passenger pigeon, a species that had once covered the skies in flocks numbering in the millions, died in a zoo in Cincinnati.(51) Partly in response to this tragedy, the United States signed the Migratory Bird Treaty of 1916(52) with Canada, recognizing for the first time the international scope of the extinction crisis.(53) Two years later, Congress ratified this treaty with the Migratory Bird Treaty Act of 1918.(54) The state of Missouri, however, promptly challenged the constitutionality of the law under the Tenth Amendment, invoking the state ownership doctrine 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)

New Deal conservationists took more indirect--but potentially more effective--steps to slow extinctions. In 1934, Congress passed the Fish and Wildlife Coordination Act.(58) It directed the Secretary of the Interior to investigate the effects of "domestic sewage, trade wastes, and other polluting substances on wild life."(59) It also encouraged dam-building agencies to consult with the Bureau of Fisheries about the potential impact on fish before a dam would be built.(60) The voluntary nature of these two provisions doomed them to failure, but they were nonetheless significant because they recognized the connection between habitat degradation and wildlife health. The Fish and Wildlife Coordination Act also called for federal and state cooperation to conserve and rehabilitate wildlife and proposed that federal lands be set aside to protect wildlife habitat.(61) This third provision realized some success through the expansion of national forest reserves, national wildlife refuges, and the national, park system. In 1940 Congress passed the Bald Eagle Protection Act(62) to save the nation's symbol from extinction.

While Presidents and Congress made tentative steps to protect wildlife during the first half of the twentieth century, ecology emerged as an independent discipline. Aldo Leopold helped popularize this knowledge, teaching Americans to care about the land and the "wild things" that live on it.(63) About the passenger pigeon, he eulogized: "Our grandfathers were less well-housed, well-fed, well-clothed than we are. The strivings by which they bettered their lot are also those which deprived us of pigeons. Perhaps we now grieve because we are not sure, in out hearts, that we have gained by

the exchange."(64) Leopold, known as the father of modern wildlife management, merged science, philosophy, and plain writing into his classic bestseller, A Sand County Almanac, published posthumously in 1949.(65)

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

B. Toward Comprehensive Species Protection

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

In 1966 Congress passed the Endangered Species Preservation Act (1966 Act),(74) the first comprehensive legislative response to the modern extinction crisis. The 1966 Act directed the Departments of Interior, Agriculture, and Defense to protect threatened species "insofar as is practicable and consistent" with the primary purposes of the services, bureaus, and agencies within their departments.(75) It also charged the Department of the Interior with the duty to consult with 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 population segments.(80) Second, the language of the Act made agency cooperation explicitly voluntary, and thus contrasted with the present interpretation of section 7 under the ESA.(81) Most important, the restriction against the taking of a species applied only within the National Wildlife Refuges.(82) Moreover, this meager prohibition did not extend to activities that indirectly harmed a listed species. Nevertheless, the 1966 Act directed the Department of the Interior to better identify endangered species and provided funding to acquire wildlife habitat.(83)

Three years later, Congress supplemented the 1966 Act with the Endangered Species Conservation Act of 1969 (1969 Act).(84) The 1969 Act explicitly recognized the international scope of the

extinction crisis, authorizing the expansion of the Redbook to include those species threatened worldwide.(85) Most importantly, it banned the importation of any product of a species listed as endangered,(86) which, for example, curtailed the market in leopard, jaguar, and ocelot fur coats that, between 1968 and 1970, accounted for 18,456 leopard skins, 31,105 jaguar skins, and 249,680 ocelot skins,(87) Furthermore, the 1969 Act extended the Lacey Act by prohibiting the selling or transporting of any listed species or its product taken illegally to include reptiles, amphibians, mollusks, and crustaceans.(88) Finally, the 1969 Act expanded the definition of "fish or wildlife" to include amphibians, reptiles, and invertebrates, and called for an international convention to protect endangered species from extinction.(89)

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

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

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

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

Proponents of the ESA successfully assuaged concerns over federal preemption. Representative James Grover (R-N.Y.) observed, "we have adequately protected legitimate State interests, powers, 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-Kan.), Jesse Helms (R-N.C.), Howard Baker (R-Tenn.), Bob Packwood (R-Or.), and Mark Hatfield (R-Or.).(115) On July 24, 1973, the Senate approved S. 1983 unanimously, ninety-two to zero, with eight Senators not voting.(116)

House support for H.R. 37 was also strong. Representative Grover observed, "I know of no opposition to H.R. 37 and urge its immediate passage."(117) Representative Dingell remarked that in the month since the committee report on the House bill(118) had been available for review, he had "yet to hear a whisper of opposition to its passage at the earliest opportunity."(119) On September 18, 1973, the House of Representative passed H.R. 37 by a vote of 390 to 12, with 31

not voting.(120) None of the twelve who voted against the bill voiced their opposition during congressional deliberations just prior to the vote.(121)

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

The ESA emerged from the conference committee even more popular than it had been before. On December 19, the Senate agreed to the conference report, again unanimously.(125) The next day, while the House considered the conference report Representative Dingell observed, "It would be no exaggeration to say that scarcely a voice has been heard in dissent."(126) The House agreed to the conference report by a vote of 345 to 4, with 73 representatives not voting.(127) Those four who 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 Garrett, wildlife conservation director for Friends of the Earth, noted that environmental legislation, particularly wildlife protection, was "a richly rewarded political issue."(132) The Washington Post editorialized that there was strong public sentiment supporting increased protection for endangered species.(133)

Many politicians sought to capitalize on this popularity. Some hoped that by doing so they could unite a country divided by civil rights, women's liberation, and the Vietnam War.(134) Nixon himself declared, "The quality of life on this good land is a cause to unite all Americans."(135) Nixon, sinking ever deeper into the morass of Watergate, probably yearned for a little unity by the

end of 1973, while the Republicans in Congress may have hoped to rehabilitate their party.(136) Nixon, and perhaps conservatives generally, supported the ESA not so much out of sincere commitment to species preservation, but for self-serving reasons.(137) To many politicians, the ESA seemed to be a win-win situation.

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

Few at the time opposed the ESA because no one anticipated how the Act might significantly interfere with economic development or personal property interests,(143) One leading advocate of the ESA observed, "since someone does not necessarily have to combat vested economic interests, some politicians use the issue to parade themselves as environmentalists knowing they will not seriously offend corporate interests."(144) The timber industry, other natural resource industries, 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.

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

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

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

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

Congress's failure to recognize that the ESA would protect plants almost as much as wildlife can perhaps be explained by other reasons, too. When Congress considered the ESA in 1973, the status of plant species was poorly understood. To remedy this problem, Congress included a provision in the ESA, section 12, directing the Smithsonian Institute to study and report on endangered and threatened plant species in the United States.(159) Congress indicated that the results of the study would provide a basis for amending the ESA or writing new legislation, although in the meantime plants would continue to be listed under section 4 according to the same criteria as wildlife.(160) 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.

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

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

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

> [A]s I understand it, after the consultation process took place ... the Corps of Engineers would not be prohibited from building such a road if 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. Furthermore, there is little evidence that environmental organizations believed that section 9 extended to land use regulation. Only one reference by a representative of an environmental organization supported the position that section 9 applied to habitat degradation.(178) No member of Congress questioned him on this point or raised the issue elsewhere.

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

the ESA's emphasis on identifying and protecting individual species as scientifically anachronistic.(181)

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

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

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

Finally, despite the rhetoric over the ESA, most people in and outside of Congress thought the Act relatively insignificant. With the exception of The Washington Post, the national press all but ignored congressional consideration of the ESA during 1973. Moreover, the press barely even mentioned the ESA's enactment. The day after the ESA became law, The New York Times noted its passage as an afterthought in an unrelated article on an act transferring federal job-training funds to the states.(190) The New York Times sandwiched the one-sentence byline about the passage of the ESA between descriptions of an act to build a Lyndon Baines Johnson Memorial grove of trees on the banks of the Potomac and an act to insure mortgage insurance for fire safety equipment in nursing homes. Despite earlier editorials about protecting endangered species, The Washington Post gave no more coverage to the passage of the ESA than did The New York Times.(191) The Los Angeles Times, too, covered the signing of the ESA in one sentence, while The Chicago Tribune ignored the Act altogether.(192)

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

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

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

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

The Supreme Court's ruling also contributed to a popular perception of the Act as inflexible and antidevelopmental. To many, the fact that an almost unknown, unimportant fish could stop a hundred-million-dollar dam in the midst of an energy crisis and rampant inflation seemed ridiculous. The industrial lobby, too, proved to be a growing counter-weight to the environmental lobby, pressuring many in Congress to revise the Act.(208) Ultimately, the Senate voted to amend the ESA 94 to 3, while the House approved the amendments with a vote of 384 to 12.(209) This lopsided vote indicates that most in Congress in 1978 believed that the Supreme Court was wrong and that economic considerations should limit the ESA. Congress designed the 1978 amendments to counteract the Court's expansive interpretation of section 7.(210) The amendments created the

Endangered Species Committee (ESC), dubbed the "God Squad," and gave it the power to grant exemptions to federal projects halted by the Act if the economic benefits of those projects 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)

Exasperated, Congress then sought a way around the God Squad's decision. Senator John Chafee (R-R.I.), for example, exclaimed, "We who voted for the Endangered Species Act with the honest intention of protecting such glories of nature as the wolf, the eagle, and other natural treasures have found that others with wholly different motive are using this noble act ... for merely obstructive ends."(215) Senator James Sasser (D-Tenn.) remarked, "I do not believe that most of the Members who voted for that bill ever intended it to be used to halt water resources development."(216) In 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)

The snail darter controversy had several consequences. First, FWS became more cautious about listing species, using its discretion to avoid the mandate of section 4. Section 4 instructs the Secretary of the Interior to list species based solely upon the best scientific knowledge available,(219) but the 1978 amendments that created the God Squad also increased the agency's discretionary power over the Act's implementation.(220) For example, the 1978 amendments required the Secretary of the Interior to designate critical habitat, but the Secretary could delay or 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)

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

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

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

V. CONCLUSION

The ESA is a political response to the modern extinction crisis, which is itself part of a much larger history of evolution. Since life began on this planet about four billion years ago, the number of species has grown steadily, perhaps reaching as many as one hundred million.(230) Our species, Homo sapiens, emerged only about one hundred thousand years ago, at the time of the greatest biodiversity in the history of life.(231) Since then, however, the number of species on this planet has plummeted--especially over the last few centuries--chiefly as a result of human activity.(232) We destroy species in three ways: 1) overhunting or harvesting, 2) introduction of nonnative 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.

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

The precise rate of modern extinctions, however, is difficult to estimate. Currently, FWS has listed over 1000 animals and more than 600 plants worldwide as either endangered or threatened.(241) In the United States, FWS has listed 924 species as endangered and 255 as threatened.(242) One

estimate places the current global extinction rate somewhere between one hundred to one thousand times the prehuman level.(243)

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

Biodiversity also preserves genetic diversity, essential for protecting and improving our food supply. Only about 130 plant species supply virtually all of the world's food crops and feed grains.(246) Modern agriculture has achieved unprecedented productivity among these crops, in part because of the uniformity of crop strains.(247) But this uniformity has left modern crops vulnerable to quickly evolving pests and blights.(248) Genetic diversity supplied by the wild cousins of commercial crops helps protect these crops, thus safeguarding our food supply.(249) To 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 "recreational" value.(253) Even for those who do not take direct pleasure from contact with endangered species, just knowing that wild things thrive in faraway places can provide sufficient reason for preservation.

Finally, many simply believe that species should be protected for their own sake, that life has inherent value. Hindus, for example, hold all life sacred, while Judeo-Christians believe that humans are to be stewards for the Earth and the living things upon it. A1 Gore, for example, interprets the Old Testament story of Noah's Ark as a modern commandment: "Thou shalt preserve biodiversity."(254) For deep ecologists and many environmentalists, the human-caused loss of a species is both incalculable and immoral.(255)

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

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

If success means the ESA has halted the global flood of modern extinctions, however, then the Act has failed. FWS claims that between 1968 and 1993, it removed seven species from the list because of extinction, while another eight still listed are probably extinct, awaiting final confirmation of their fate.(259) Yet, since the ESA's passage in 1973, an average of eighty-five species have been 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 near future, many species will be flying, splashing and leaping off the list. They made it. They're graduating."(264) The twenty-nine species to be upgraded from endangered to threatened, or removed from the list altogether, include the gray wolf, the Columbian white-tailed deer, and the bald eagle. The graduating class, however, included few species that could not fly, splash, or leap.(265) The ESA may not have halted the flood of global extinctions, but it has helped save those species most representative of our national heritage and dearest to the American people. Despite the Act's unanticipated consequences, perhaps it has achieved what Congress intended it to after all.

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

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

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

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

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

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

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

(8) Id.

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

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

(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).

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

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

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

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

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

(20) Id. at 173.

(21) Id. at 195.

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

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

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

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

(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.

(29) Id.

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

(31) See John H. Cushman, Linking Endangered Species Act to Spending, N.Y. TIMES, Oct. 10, 1998, at Al0 (reporting on the most recent attempts to amend the ESA).

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

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

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

(35) Id.

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

(37) See id.

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

(39) See PETULLA, supra note 5.

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

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

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

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

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

(45) Id. at 523.

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

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

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

(50) See id. at 107.

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

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

(53) Id.

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

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

(56) Id. at 434-35.

(57) Migratory Bird Conservation Act of 1929, ch. 257, 45 Stat. 1222 (codified at 16 U.S.C. [sections]8 715-715s (1994)).

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

(59) Id. [sections] 2.

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

(61) Id. 88 1-3.

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

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

(64) Id. at 109.

(65) See id. at xv.

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

(67) Id.

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

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

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

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

(72) Id. at 35.

(73) Id.

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

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

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

(77) Id. [sections] l(c).

(78) Id. [sections]4.

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

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

(81) Id. [sections] l(b).

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

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

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

(85) Id. 8 3(a).

(86) Id. 82.

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

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

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

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

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

(92) Id.

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

(94) Id.

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

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

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

(98) Id. at 182-83.

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

(100) Id.

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

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

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

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

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

(106) See Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Subcomm. on Env't. of the Senate Comm. on Commerce, 93d Cong. 108-11 (1973) [hereinafter 1973 Senate Hearings] (statement of Lawrence Jahn, Vice-President of the Wildlife Management Institute); see

also George Wilson, Hill Vote Set on Bill to Save Animals from Extinction, WASH. POST, Sept. 16, 1973, at A2.

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

(108) Id.

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

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

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

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

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

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

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

(116) Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(160) Id.

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

(162) One major difference between the protection offered to plants and the protection offered to 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).

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

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

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

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

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

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

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

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

(171) Id.

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

(173) Id.

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

(175) The language referred to in this Senate bill was the identical language adopted in the ESA. 119 CONG. REC. 25,689-90 (July 24, 1973) (statement of Sen. Tunney), reprinted in 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).

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

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

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

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

(180) Id. at 251.

(181) Id.

(182) Id.

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

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

(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.

(202) Id. at 173.

(203) Id. at 174-87.

(204) Id. at 173.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(228) Id.

(229) Id.

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

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

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

(233) Id. at 35.

(234) Wilson, supra note 167.

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

(236) Id. at 25.

(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>.

(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>.

(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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Special Thanks to:

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 nation's wetlands.

The Supreme Court also concluded that the use of migratory birds to assert jurisdiction over the site exceeded the authority that Congress had granted the Corps under the CWA. The Court interpreted that Corps jurisdiction is restricted to navigable waters, their tributaries, and wetlands that are adjacent to these navigable waterways and tributaries. The decision leaves "isolated" wetlands unpro-

tected by the CWA. These wetlands are very significant to many wildlife populations, especially migratory waterfowl. This report examines the possible implications to wetlands that are important to waterfowl across the Nation.

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

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

In general, isolated wetlands play a minor role in meeting the needs of waterfowl in areas that are important for migration and wintering. In contrast, the SWANCC decision could have significant consequences for breeding waterfowl, especially in the PPR and migrating waterfowl, especially in 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 drainage, including any adjacent wetlands that form the border of, or are in reasonable proximity to, other waters of the United States. These include sloughs, cutoffs, and oxbows which are on active floodplains, or wetlands which are within high water elevations of large interstate lakes, such as the Great Lakes, or large intrastate lakes, such as the Great Salt Lake. Other isolated, intrastate waters, such as prairie potholes and vernal pools, may become excluded from jurisdiction, however, these

ecosystems are wetlands by ecological definition and are subject to requirements of Executive Order 11990.

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

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

Divisions should contact the local Corps of Engineers field offices to determine how the new jurisdictional limits under SWANCC may be specifically interpreted on a local basis. If issues on the jurisdictional status of isolated wetlands arise, please contact Paul Garrett, 303-969-5772x332 (pgarrett@fhwa.dot.gov) , Fred Bank, 202-366-5004, (fbank@fhwa.dot.gov) , or Fred Skaer, (202) 366-2058, (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 1st, 1862, President Abraham Lincoln.

United States of America State of California Patent: January 4th, 1875, Governor Newton Booth.

April 8th, 1880 Location of the "Lost Confidence" lode mining claim (Iron Mountain mine, apex of the Shasta Copper belt, Flat Creek mining district). 1895 to present: Largest mine in California. Discoveries & Junior Locations. Battery storage & hydropower pump-storage reclamation and special uses.

T.W. Arman, owner; John F. Hutchens, administrator, grantees agent and expert.
In performance of the complete development of Iron Mountain mine, remission and prosecution of same under the General Mining Law and by Patent Title.
Relocation of the Camden and Magee Agricultural College Land Patent of 1862.

Discoveries §336: Assays of diamond drill cores to 1700 ft by USGS in 1952; horizons of recoverable metals, junior locations recoverable by modern methods.
Remediation of copper, cadmium, and zinc in the Flat Creek mining district.

Relocation by amendment; the Scott & Noble lode renamed Arman & Hutchens
lode, i.e. the "Arman Consolidated lode mining claim".
Relocation of the Home Stake, Homestake Fraction, and Home Stake Extension No. 1 lode mining claims.

Relocation of the Fine Gold, Oversight, Foresight, Backsight, Red Star, Gold Bar, Owl, Grey Squirrel, Crown Point, Pershing. Mountain Copper, Shasta Copper, Trinity Copper, Tehama Copper, and the Congress lode mining claims.
Date:_____Signature:_____
s/ T.W. Arman; owner - operator, Iron Mountain Mines, Inc.

Where an agent commits an active trespass on behalf of his principal, such principal is a "joint trespassers" with the agent. Williams v. Inman, 57 S.E. 1000, 1010, 1 Ca.App. 321.

Joint and Several Trespassers damages & ejectment;
coram nobis incidental and peremptory mandamus

Including an accounting of the damages. Leave for quo Warranto
administrative and judicial mandamus.

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

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

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

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 au-

thorities, 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.

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 right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Where the plaintiff sued on behalf of himself and others, residents and property-holders of the city of Oakland, to set aside certain conveyances operating as a cloud upon the title to a tract of land occupied by the city, and to obtain an injunction, etc., and the court below entered a judgment declaring the conveyances fraudulent and void, and enjoining the defendants from future alienations in respect to the land of the plaintiff, the relief in this particular being confined to the plaintiff alone, the Supreme Court held that there was no such community of interest between the plaintiff and those whom he represented in the action as entitled him to an injunction in their favor. Gibbons v. Peralta, 21 Cal. 632, 633.

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

Sureties, 1059.

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

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

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,

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

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

1161. A tenant of real property, for a term less than life, or the executor or administrator of his or her estate heretofore qualified and now acting or hereafter to be qualified and act, is guilty of unlawful detainer:

"It has been justly thought a matter of importance to determine from what source the United States derives its authority... The question here proposed is whether our bond of union is a compact entered into by the states, or whether the Constitution is an organic law established by the People. To this we answer: 'We the People... ordain and establish this Constitution'...

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

Therefore, to "establish certain limits not to be transcended by the government."

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

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

"One Co-tenant may recover the whole estate in ejectment against strangers."
King Solomon Co. v. Mary Verna Co. 22 Cal . App. 528, 127 P 129, 130

"The owner is not liable for pollution of stream incidental to placer mining, or to washing iron ore. It is classed among non-actionable injuries. Nor will such use of the stream be enjoined even if an action lies, except in willful or extreme cases. Clifton Co. v. Pye 87 Ala. 468 6So 192. Hill v. King 4 M.R. 533. 8 Cal. 337, Atchison v. Peterson 1 M.R. 583 20 Wall 501.
California Statute Sec. 1426 7/1/09

In the absence of clearly expressed legislative intent, retrospective operation will not be given to statutes, nor, in absence of such intent, will a statute be construed as impairing rights relied upon in past conduct when other legislation was in force. Union Pacific R. Co. v. Laramie Stock Yards, ante, p. 231 U. S. 190 .

.. In all applications therefore, pending at the date of the passage of the Act of 1872, although the patents were not issued till afterward, they conveyed the surface-ground embrace by the interior boundaries of the survey, and the right to follow the vein as above indicated, and also all other veins, lodes, or ledges, throughout their entire depth, the top or apex of which lay inside of such surface-lines extended downward vertically, although such other veins, lodes, or ledges, might so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of the surface-location *provided,* that their right of possession to such outside parts of such other veins, lodes, or ledges was confined to such portions thereof as lay between vertical planes drawn downward through the end-lines of their locations, so continued in their direction that such planes would intersect such exterior parts of such veins, lodes, or ledges; no right being granted, however, to the claimant of a vein or lode which extended in its downward course beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another.

U.S. Supreme Court Revives Citizen Suit Standing

The U.S. Supreme Court has overturned a lower court's decision that had dismissed a Clean Water Act (CWA) citizen suit on the ground that the suit was "moot"

In the case, Laidlaw Environmental Services (TOC), Inc. (Laidlaw), began to discharge treated wastewater from a treatment plant in 1987 under authority of a National Pollutant Discharge Elimination System (NPDES) permit issued by the South Carolina Department of Health and Environmental Control (DEHC). The facility repeatedly discharged higher concentrations of mercury than the permit allowed. In 1992, Friends of the Earth and others (FOE) notified Laidlaw of their intention 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 court held, the action was moot. The court vacated the district court's order and remanded with instructions to dismiss the action.

The U.S. Supreme Court (Court) reversed the Fourth Circuit's decision. The Court first observed that, although the Fourth Circuit had assumed that FOE had standing, the Court had an obligation to assure itself that FOE had standing at the outset of the litigation. The Court noted that, to have "standing" to bring an action in federal court, a plaintiff must show that: (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or

hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Laidlaw contended that no "injury in fact" existed because there was no proof of harm to the environment from the violations – a claim that had been accepted by the district court. The Court, however, held that the relevant inquiry is not injury to the environment, but injury to the plaintiff. The Court held that "environmental plaintiffs adequately allege injury in fact when they [allege] that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." The Court found that FOE members had demonstrated sufficient injury by claiming that they lived near Laidlaw's facility and avoided recreating in or near the waters to which Laidlaw discharged and, that, in some cases, home values were lowered, because of concerns about pollution from the facility. The Court distinguished its 1990 holding in *Lujan v. National Wildlife Federation*, in which the Court had denied citizen suit standing to an environmental group that challenged a government decision that would open public lands to mining activities. The Court stated that the plaintiff in that case did not survive the government's motion for judgment before trial "merely by offering '[claims] which state only that one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." Similarly, in *Lujan v. Defenders of Wildlife* (1992), the plaintiffs lacked standing because their claim of injury rested on "'some day' intentions" to visit endangered species in foreign countries. In the case at hand, in contrast, the Court found "nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." Because of the FOE members' "reasonable concerns" about the effects of Laidlaw's discharges, the Court held they had demonstrated an injury in fact.

Laidlaw next argued that, even if FOE had standing to seek injunctive relief, it lacked standing to seek civil penalties. Civil penalties offer no redress to private plaintiffs, Laidlaw argued, because they are paid to the government and, therefore, a citizen plaintiff can never have standing to seek them.

Although the Court agreed that a plaintiff must demonstrate standing separately for each form of relief sought, the Court disagreed with the argument "that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties" because payment of penalties to the government cannot redress the plaintiffs' injuries. Rather, the Court stated, "[t]o the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct." The Court deflected Laidlaw's argument that its 1998 *Steel Co*. decision requires a different result by limiting that case to its particular facts: *Steel Co*., the Court held, denies standing only where the citizen plaintiffs are seeking civil penalties for violations that have ended by the time of suit. The Court did allow that, in some cases, the deterrent effect of a claim for civil penalties may be so insubstantial that it cannot support citizen standing, but, it held, that was not the case here.

Having found that FOE had standing to bring its action, the Court turned to the question of mootness. Laidlaw argued that the case was moot because it had achieved substantial compliance in 1992 and later shut down the facility in question. The Court observed that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." The Court was not satisfied with Laidlaw's claim that the closure of the facility permanently prevented future violations, noting that Laidlaw still retained its NPDES permit. Because "[t]he effect of both Laidlaw's compliance and the facility closure on the prospect of future violations is a disputed factual matter," the Court sent the case back to the district court for further consideration.

In a scathing dissent, Justice Scalia, joined by Justice Thomas, charged that the Court had created new standing law that will "place the immense power of suing to enforce the public laws in private hands." Scalia's dissent leaves no doubt that, in his view, at least, *Laidlaw* represents a significant rollback of the standing principles enunciated by the Court only a few years ago in the *Lujan* and *Steel Co*. cases discussed above. *Laidlaw* represents an ideological setback for Scalia, who authored those earlier cases. Implications: It appears that the pendulum has swung back in the direction of the Court's support of citizen standing to enforce environmental laws. If, as the Court held, citizens

may have standing without proving environmental injury, "injury in fact" may no longer be a meaningful hurdle for citizen plaintiffs. As Scalia stated in his dissent, under the Court's "lenient standard," purely "subjective apprehensions" of environmental harm now may be sufficient to demonstrate injury in fact.

Further, *Steel Co*. no longer seems to be good law. As Scalia noted, the Court, "by approving the novel theory that public penalties can redress anticipated private wrongs, . . . has come close to 'mak[ing] the redressability requirement vanish.'"

Importantly, *Laidlaw* was decided by a solid 7-2 majority of the Court. It seems clear, therefore, that the Court is re-thinking the significant limitations on citizen standing imposed by the two *Lujan* cases and *Steel Co*. Whether *Laidlaw* harkens a complete return to the easystanding days of the pre-1990s remains to be seen.

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 2000 U.S. Lexis 501, 2000 WL 16307 (Jan. 12, 2000).

RCRA Citizen Suit for Injunctive Relief

1) Introduction

The Citizen Suit provisions of the Resource Conservation and Recovery Act are important. Through it a party can obtain injunctive relief to address contamination and can recover attorney fees and expert costs.

2) RCRA Citizen Suits for Injunctive Relief

The Citizen Suit provisions are set forth in Section 7002 and 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. Section 6972, where in subpart (a)(1)(B), it states that any person may commence a civil action on his own behalf or:[A]gainst any person … and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

Thus, where an entity "may" present an "imminent and substantial endangerment" to "health or the environment" as a result of the disposal of any "solid or hazardous waste," such a claim is permit-

ted. These terms have been liberally interpreted. *Maine People's Alliance v. Mallinckrodt, Inc*., 471 F. 3d 277 (1st Cir. 2006) (after first noting that at least four of its sister circuits have also construed the terms liberally, the court did so as well holding that "reasonable prospect of future harm" is adequate so long as the threat, as opposed to the harm, is near-term, and involves potentially serious harm, but not need be an emergency situation and does not require a showing an immediate threat of grave harm); *United States v. Conservation Chemical Co*., 619 F. Supp. 162 (D.C. Mo. 1985) (endangerment need not be immediate to be imminent; specific quantification of the endangerment not required, rather a consideration of all factors is proper based on the unique facts of each case; and, if an error is to be made in applying the endangerment standard, it must be made in favor of protecting the environment); *Paper Recycling, Inc. v. Amoco Oil Co*., 856 F. Supp. 671, 678 (N.D. Ga. 1993) ("imminent and substantial endangerment " to "health or the environment" requires only a showing that a risk of threatened harm is present, not that actual harm will immediately occur);[ii] *Lincoln Props., Ltd. v. Higgins*, 1993 WL 217429 (E.D. Cal. 1993) (merely need show a risk of threatened harm, not actual injury; remedy is not limited to emergency situations)[iii]. The fact that the disposal that created the endangerment happened years ago is of no matter—a claim can still be brought if the endangerment exists. *Main People's Alliance, supra.; City of Toledo v. Beazer Materials & Services, Inc.,* 833 F. Supp. 646 (N.D. Ohio 1993); *Gache v. Town of Harrison*, 813 F. Supp. 1037 (S.D.N.Y. 1993); *Nuckols v. National Heat Exchange Cleaning Corporation*, Case No. 4:00CV1698 (N.D. Ohio 2000) (case prosecuted by the author in which Judge Economus held that former tenant's contamination of leased property can be the basis of an endangerment claim).

The types of waste covered under the Citizen Suit provisions are not confined to "hazardous waste"; rather, it includes "solid waste", which is very broadly defined. 42 U.S.C. Section 6803 (5) defines "hazardous waste" to include solid hazardous waste which may cause or significantly contribute to an increase in mortality or serious irreversible or incapacitating reversible illness or pose a substantial present or potential hazard to human health or the environment. 42 U.S.C. Section 6803 (27) defines "solid waste" to include "discarded material, including solid, liquid, semi-solid, or contaminated gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities". *Connecticut Costal Fisherman's Ass'n. v. Rem-*

ington Arms Co. Inc., 989 F. 2d 1305 (2nd Cir. 1993) (discussion of hazardous and solid waste under the Citizen Suit provisions); *Zands v. Nelson*, 779 F.Supp. 1254 (S.D. Cal. 1991); *Paper Recycling*, *supra*. (gasoline included as solid waste); *Southern Fuel Co. v. Amoco Oil Co.,* 1994 U.S. Dist. LEXIS 15769 (D.Md. 8/23/94) (analysis of interplay between hazardous and solid waste provisions); *Lincoln*, *supra*.

Causation must, ultimately, be established between the endangerment and the defendant's acts. *Agricultural Excess v. ABD Tank & Pump Co*., 878 F. Supp. 1091 (N. Ill 1995) (claim against a UST manufacturer); *First San Diego Properties v. Exxon Co*., 859 F. Supp. 1313 (S.D. Cal. 1994) (no liability for mere "passive" owner of contaminated property). Liability is joint and several unless the defendant can establish that the damages are divisible and that there is a reasonable basis for an apportionment. *Maine People's Alliance, supra.*; *Waste, Inc. Cost Recovery Group v. Allis Chalmers Corp*., 51 F. Supp. 2d 936 (N.D. Ind. 1999); *United States v. Conservation Chem. Co., supra*. Liability is strict, as is true under CERCLA, though there is legislative language that can be cited to the contrary. *United States v. Northeastern Pharm. & Chem. Co*., 810 F. 2d 726 (8th Cir. 1986); *Cox v. City of Dallas*, 256 F. 3d 281 (5th Cir. 2001) (court cites case law and legislative history supportive of strict liability and cites contrary legislative history)[iv]. Jurisdiction over such action is granted to the United States District Court pursuant to that same subpart:

Any action under paragraph (a)(1) … shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. *Sauers v. Pfiffner*, 29 Env't Rep. Cas (BNA) 1716 (D. Minn. March 23, 1991) (venue proper where violation or endangerment occurs).

The grant of jurisdiction extends to all parties, regardless of the amount at issue and in controversy and regardless of the citizenship of the parties; and, the court's power is broad, including the power to grant injunctive relief: The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has

contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

The nature of the remedy, under a Citizen Suit, is injunctive in nature, which can include an order that the defendant is responsible for site investigation, monitoring and testing costs as well as an order barring further endangerment; however, such a claim cannot be brought for money damages, such as plaintiff's past cleanup costs. *Mehrig v. KFC Western, Inc*., 516 U.S. 479 (1996) (CERCLA, not RCRA, provides the framework for recovery of past cleanup costs)[v]; *Interfaith Community Organization v. Honeywell Inc.*, 399 F. 3d 248 (3rd Cir. 2005) (defendant ordered to abate the endangerment by removal of the contamination); *Tanglewood E. Homeowner v. Charles-Thomas, Inc*., 849 F. 2d 1568 (5th Cir. 1988) (the remedy package includes civil penalties, injunctive relief and attorney fees); *Walls v. Waste Resource Corp*., 761 F. 2d 311 (6th Cir. 1985) (there is no private cause of action for economic compensation or punitive damage s); *Express Car Wash Corp. v. Irinaga Brothers, Inc.*, 967 F. Supp. 1188 (D. Or. 1997) (while declining to issue an injunction requiring plaintiff to pay response costs that may be incurred in the future, the court noted that a request to require defendant to take additional action to address the contamination, including that it take over responsibility for the remediation, would be viable)[vi]; *cf. Southern Fuel Co.*, *supra*. (cannot transform a claim for damages into one for equitable relief by requesting an injunction that orders the performance of future abatement work because RCRA does not provide for the payment nt of restoration costs); *Fallowfield Dev. Corp. v. Strunk*, 1993 WL 157723 (E. D. Pa.) (order to remediate the site not permitted under RCRA, where CERCLA remedy was available). Damage claims can be asserted as separate counts with a request that the federal court exercise supplemental jurisdiction, pursuant to 28 U.S.C. Section 1367 (a) and (c), over such claims (such as state common law claims for trespass, nuisance, etc.).

Murray v. Bath Iron Works, 867 F.Supp. 33 (D.Maine 1994)(claims under state law can be filed in federal court with Citizen Suit claim, as the state claims do not "substantially predominate"); *City of*

Toledo v. Beazer, supra.; *Nuckols, supra*. (assertion of state common law claims for nuisance and trespass addressed)**;** *but see Avondale Federal Savings Bank v. Amoco Oil Company*, 997 F. Supp. 1073 (N.D. Ill., E. Div. 1998) (court declines exercise of supplemental jurisdiction after barring a RCRA Citizen Suit).

Costs, including attorney and expert fees, may be awarded to the prevailing or substantially prevailing party pursuant to 42 U.S.C. Section 6972 (e):

The court may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.

Browder v. Moab, 2005 LEXIS 22200 (10th Cir. 10/14/05) (court, after noting the dearth of case law construing the statute, reversed the trial court's denial of attorney fees, noting, on remand, that while such award is discretionary, where a party has prevailed on at least one count, thereby changing the legal relationship between the parties, that party qualifies for consideration of an award of fees); *Environmental Defense Fund v. EPA*, 1 F. 3rd 1254 (D.C. Cir. 1993) (fees granted to "prevailing" party, with an excellent discussion of that term and how request for fees should be analyzed); *Fallowfield Dev. Corp.*, *supra*. (fee request denied, noting court's granting of such claims have done so where, unlike here, the suit was brought to benefit a community, rather than an individual property).

Before a Citizen Suit can be filed, notice to potential defendants and the government (state and US EPA) must be provided, pursuant to subpart (b). The notice must be provided 60 days before suits brought pursuant to (a)(1)(A) and 90 days for suits brought pursuant to (a)(1)(B). *Hallstrom v. Tillamook County,* 493 U.S. 20 (1988) (promotes goal of resolving disputes without court involvement by providing both potentially responsible defendants and the government an opportunity to address the problem)[vii]; *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 973 F. 2d 1320 (7th Cir. 1992) (en banc); *Portsmouth Redevelopment & Housing Auth.v. BMI Apartments Assocs*., 857 F. Supp. 1427 (D. Or. 1994). Interestingly, the filing of an amended complaint after the 90 day period may cure an original violation of the 90 day requirement). *Buggsi v. Chevron*, supra. (court retains jurisdiction because amended complaint was filed after expiration of 90 day period). Specifics

about the notice (content, service of copies on the appropriate public officials, etc.) are set forth in 40 C.F.R., Part 254.

Once the notice period has expired, the United States Attorney General and Director of the EPA must be served with the Complaint, where the claim is asserted pursuant to subsection (a)(1)(B). 42 U.S.C. Section 6972 (b) (2) (F). *Murray v. Bath Iron Works Corp*., supra. (no deadline for such service); *Petropoulos v. Columbia Gas of Ohio, Inc*., 840 F. Supp. 511 (S.D. Ohio 1993).

A Citizen Suit claim cannot duplicate government action, provided such action is already commenced and is being diligently prosecuted to resolve the endangerment. 42 U.S.C. Section 6972 (b) (1) (B), (b) (2) (B) and (b) (2) (C); *Meghrig*, *supra*.; *Supporters to Oppose Pollution*, *supra*. (EPA's actions precluded private RCRA claim; despite claim that such action had not, in fact, been successful in resolving the risk; collateral attack on the agency's strategy or tactics is not permitted); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.,* 889 F. 2d 1146 (1st Cir. 00000.00000.936287.1 1989); *City of Heath v. Ashland Oil, Inc*., 834 F. Supp. 971 (S.D. Ohio 1993); *Paper Recycling*, *supra*. (no bar to RCRA Citizen Suit where neither the federal nor state government had acted to remedy the contamination).

There is no statute of limitations set forth in the Citizen Suit provisions for claims by one private party against another; however, at least two circuit courts have held the five year statute of limitations set forth in 28 U.S.C. Section 2462[viii] applies. *See Public Interest Research Group of N.J. v. Powell Duffryn Terminals, Inc*., 913 F. 2d 64 (3d Cir. 1990), *cert. denied* [ix]; *Sierra Club v. Chevron U.S.A., Inc*., 834 F. 2d 1517 (9th Cir. 1987); *But see Public Interest Research Group of New Jersey v. U.S. Metals Refining Co*., 681 F. Supp. 237 (D.N.J. 1987) (no applicable statute of limitations).

There is no right to a jury trial of the RCRA Citizen Suit claims; however, a jury can be requested for pendant and other claims. *Southern Fuel*, *supra*. (RCRA claims can be tried to judge and others to a jury).

3) Conclusion

A RCRA Citizen Suit can be an effective tool in addressing contamination of property, particularly in light of the broad nature of the injunctive relief that can be granted and the potential for recovery of attorney fees and expert costs. Due notice was given and has expired in this case.

[i] The court held that proof of a violation of an EPA standard or regulation is not required.

[ii] In *Paper Recycling*, the passage of six years of remediation efforts did not bar plaintiff's case because thousands of gallons of gasoline were still contaminating the ground.

[iii] A threat, the court noted, can be established even without proof of endangerment to human or other life forms. *Id*., fn. 30.

[iv] *Cox* also presents an excellent overview of the RCRA Citizen provisions.

[v] The court held that a RCRA Citizen Suit authorizes issuance of a mandatory injunction requiring the responsible party to "take action" by attending to the cleanup and disposal or a prohibitory injunction that restrains that party from any further violations of RCRA.

[vi] The court provides a comprehensive analysis of the limits to the injunctive relief that may be granted under the RCRA Citizen Suit provisions.

[vii] The court held that unlike a statue of limitations, RCRA's 60 day notice provision is not triggered by the violation giving rise to the action. Rather, plaintiff has full control as to when to send the notice. The court further discussed the limited exceptions to notice requirements.

[viii] The five year period in 28 U.S.C. Section 2462 utilizes an "accrual" trigger for commencement.

[ix] The court also held that the statute of limitations is tolled during the notice period.

Pollution is legally defined as the wrongful contamination of the atmosphere, water or soil to the material injury of the right of an individual. Air pollutants may be either particles or gases. They are also classified as primary, meaning they are created at a particular source, or secondary, meaning they result from tranformation and reaction in the air. Air pollution may take the form of smoke, fumes, dust, gas or vapors, mist and odors. Noise is unwanted sound that produces unwanted effects. It is generally considered a form of pollution and, due to major expansions of airport facilities, industrial activities, traffic arterials and the like, is recognized as a social problem, which may be the basis of a nuisance claim. Remedies include several generally accepted methods: (1) reducing noise at its source; (2) keeping it at a distance; and (3) absorbing it between its source and the receiver

http://definitions.uslegal.com/p/pollution/

Without healthy water for drinking, cooking, fishing, and farming, the human race would perish. Clean water is also necessary for recreational interests such as swimming, boating, and water skiing. Yet, when Congress began assessing national water quality during the early 1970s, it found that much of the country's groundwater and surface water was contaminated or severely compromised. Studies revealed that the nation's three primary sources of water pollution—industry, agriculture, and municipalities—had been regularly discharging harmful materials into water supplies throughout the country over a number of years.

These harmful materials included organic wastes, sediments, minerals, nutrients, thermal pollutants, toxic chemicals, and other hazardous substances. Organic wastes are produced by animals and humans, and include such things as fecal matter, crop debris, yard clippings, food wastes, rubber, plastic, wood, and disposable diapers. Such wastes require oxygen to decompose. When they are dumped into streams and lakes and begin to break down, they can deprive aquatic life of the oxygen it needs to survive.

Sediments may be deposited into lakes and streams through soil erosion caused by the clearing, excavating, grading, transporting, and filling of land. Minerals, such as iron, copper, chromium, platinum, nickel, zinc, and tin, can be discharged into streams and lakes as a result of various mining activities. Excessive levels of sediments and minerals in water can inhibit the penetration of sunlight, which reduces the production of photosynthetic organisms.

Nutrients, like phosphorus and nitrogen, support the growth of algae and other plants forming the lower levels of the food chain. However, excessive levels of nutrients from sources such as fertilizer can cause eutrophication, which is the overgrowth of aquatic vegetation. This overgrowth clouds the water and smothers some plants. Over time, excessive nutrient levels can accelerate the natural process by which bodies of water evolve into dry land.

Thermal pollution results from the release of heated water into lakes and streams. Most thermal pollution is generated by power plant cooling systems. Power plants use water to cool their reactors and turbines, and discharge it into lakes and tributaries after it has become heated. Higher water temperatures accelerate biological and chemical processes in rivers and streams, reducing the wa-

ter's ability to retain dissolved oxygen. This can hasten the growth of algae and disrupt the reproduction of fish.

Toxic chemicals and other hazardous materials present the most imminent threat to water quality. The Environmental Protection Agency (EPA) has identified 582 highly toxic chemicals, which are produced, manufactured, and stored in locations across the United States. Some chemical plants incinerate toxic waste, which produces dangerous by-products like furans and chlorinated dioxins, two of the most deadly carcinogens known to the human race. Other hazardous materials are produced or stored by households (motor oil, antifreeze, paints, and pesticides), dry cleaners (chlorinated solvents), farms (insecticides, fungicides, rodenticides, and herbicides), and gas stations and airports (fuel).

Water pollution regulation consists of a labyrinth of state and federal statutes, administrative rules, and common-law principles.

Statutory Law

Federal statutory regulation of water pollution has been governed primarily by three pieces of legislation: the Refuse Act, the Federal Water Pollution Control Act, and the Clean Water Act. The Rivers and Harbors Appropriations Act of 1899, 33 U.S.C.A. § 401 et seq., commonly known as the Refuse Act, was the first major piece of federal legislation regulating water pollution. The Refuse Act set effluent standards for the discharge of pollutants into bodies of water. An effluent standard limits the amount of pollutant that can be released from a specific point or source, such as a smokestack or sewage pipe. The Refuse Act flatly prohibited pollution discharged from ship and shore installations.

The Refuse Act was followed by the Federal Water Pollution Control Act of 1948 (FWPCA), 33 U.S.C.A. § 1251 et seq. Instead of focusing on sources of pollution through effluent standards, the FWPCA created water quality standards, which prescribed the levels of pollutants permitted in a given body of water. Where the Refuse Act concentrated on deterring specific types of polluters, the FWPCA concentrated on reducing specific types of pollution.

Since 1972, federal regulation of water pollution has been primarily governed by the Clean Water Act (CWA) 33 U.S.C.A. § 1251 et seq., which overhauled FWCPA. The CWA forbids any person

to discharge pollutants into U.S. waters unless the discharge conforms with certain provisions of the act. Among those provisions are several that call upon the EPA to promulgate effluent standards for particular categories of water polluters.

To implement these standards, the CWA requires each polluter to obtain a discharge permit issued by the EPA through the National Pollutant Discharge Elimination System (NPDES). Although the EPA closely monitors water pollution dischargers through the NPDES, primary responsibility for enforcement of the CWA rests with the states. Most states have also drafted permit systems similar to the NPDES. These systems are designed to protect local supplies of groundwater, surface water, and drinking water. Persons who violate either the federal or state permit system face civil fines, criminal penalties, and suspension of their discharge privileges.

The CWA also relies on modern technology to curb water pollution. It requires many polluters to implement the best practicable control technology, the best available technology economically achievable, or the best practicable waste treatment technology. The development of such technology for nontoxic polluters is based on a cost-benefit analysis in which the feasibility and expense of the technology is balanced against the expected benefits to the environment.

The CWA was amended in 1977 to address the nation's increasing concern about toxic pollutants. Pursuant to the 1977 amendments, the EPA increased the number of pollutants it deemed toxic from nine to 65, and set effluent limitations for the 21 industries that discharge them. These limitations are based on measures of the danger these pollutants pose to the public health rather than on cost-benefit analyses.

Many states have enacted their own water pollution legislation regulating the discharge of toxic and other pollutants into their streams and lakes.

The mining industry presents persistent water pollution problems for state and federal governments. It has polluted over a thousand miles of streams in Appalachia with acid drainage. In response, the affected state governments now require strip miners to obtain licenses before commencing activity. Many states also require miners to post bonds in an amount sufficient to repair potential damage to surrounding lakes and streams. Similarly, the federal government, under the Mineral Leasing Act, 30 U.S.C.A. § 201 et seq., requires each mining applicant to "submit a plan of construction,

operation and rehabilitation" for the affected area, that takes into account the need for "restoration, revegetation and curtailment of erosion."

The commercial timber industry also presents persistent water pollution problems. Tree harvesting, yarding (the collection of felled trees), and road building can all deposit soil sediments into watercourses, thereby reducing the water quality for aquatic life. State governments have offered similar responses to these problems. For instance, clear-cutting (the removal of substantially all the trees from a given area) has been prohibited by most states. Other states have created buffer zones around particularly vulnerable watercourses, and banned unusually harmful activities in certain areas. Enforcement of these water pollution measures has been frustrated by vaguely worded legislation and a scarcity of inspectors in several states.

Common Law

State and federal water pollution statutes provide one avenue of legal recourse for those harmed by water pollution. The common-law doctrines of Nuisance, Trespass, Negligence, Strict Liability, and riparian ownership provide alternative remedies.

Nuisances can be public or private. Private nuisances interfere with the rights and interests of private citizens, whereas public nuisances interfere with the common rights and interests of the people at large. Both types of nuisance must result from the "unreasonable" activities of a polluter, and inflict "substantial" harm on neighboring landowners. An injury that is minor or inconsequential will not result in liability under common-law nuisance. For example, dumping trace amounts of fertilizer into a stream abutting neighboring property will not amount to a public or private nuisance.

The oil and agricultural industries are frequently involved in state nuisance actions. Oil companies often run afoul of nuisance principles for improperly storing, transporting, and disposing of hazardous materials. Farmers represent a unique class of persons who fall prey to water pollution nuisances almost as often as they create them. Their abundant use of fungicides, herbicides, insecticides, and rodenticides makes them frequent creators of nuisances, and their use of streams, rivers, and groundwater for irrigation systems makes them frequent victims.

Nuisance actions deal primarily with continuing or repetitive injuries. Trespass actions provide relief even when an injury results from a single event. A polluter who spills oil, dumps chemicals, or

otherwise contaminates a neighboring water supply on one occasion might avoid liability under nuisance law but not under the law of trespass. Trespass does not require proof of a substantial injury. However, only nominal damages will be awarded to a landowner whose water supply suffers little harm from the trespass of a polluter.

Trespass requires proof that a polluter intentionally or knowingly contaminated a particular course of water. Yet, water contamination often results from unintentional behavior, such as industrial accidents. In such instances, the polluter may be liable under common-law principles of negligence. Negligence occurs when a polluter fails to exercise the degree of care that would be reasonable under the circumstances. Thus, a landowner whose water supply was inadvertently contaminated might bring a successful lawsuit against the polluter for common-law negligence where a lawsuit for nuisance or trespass would fail.

Even when a polluter exercises the utmost diligence to prevent water contamination, an injured landowner may still have recourse under the doctrine of strict liability. Under this doctrine, polluters who engage in "abnormally dangerous" activities are held responsible for any water contamination that results. Courts consider six factors when determining whether a particular activity is abnormally dangerous: the probability that the activity will cause harm to another, the likelihood that the harm will be great, the ability to eliminate the risk by exercising reasonable care, the extent to which the activity is uncommon or unusual, the activity's appropriateness for a particular location, and the activity's value or danger to the community.

The doctrine of strict liability arose out of a national conflict between competing values during the industrial revolution. This conflict pitted those who believed it was necessary to create an environment that promoted commerce against those who believed it was necessary to preserve a healthy and clean environment. For many years, courts were reluctant to impose strict liability on U.S. businesses, out of concern over retarding industrial growth.

Since the early 1970s, courts have placed greater emphasis on preserving a healthy and clean environment. In Cities Service Co. v. State, 312 So. 2d 799 (Fla. App. 1975), the court explained that "though many hazardous activities … are socially desirable, it now seems reasonable that they pay their own way." Cities Service involved a situation in which a dam burst during a phosphate mining

operation, releasing a billion gallons of phosphate slime into adjacent waterways, where fish and other aquatic life were killed. The court concluded that this mining activity was abnormally dangerous.

Some activities inherently create abnormally dangerous risks to abutting waterways. In such cases, courts do not employ a Balancing test to determine whether an activity is abnormally dangerous. Instead, they consider these activities to be dangerous in and of themselves. The transportation and storage of high explosives and the operation of oil and gas wells are activities courts have held to create inherent risks of abnormally dangerous proportions.

The doctrine of riparian ownership forms the final prong of common-law recovery. A riparian proprietor is the owner of land abutting a stream of water, and has the right to divert the water for any useful purpose. Some courts define the term useful purpose broadly to include almost any purpose whatsoever, whereas other courts define it more narrowly to include only purposes that are reasonable or profitable.

In any event, downstream riparian proprietors are often placed at a disadvantage because the law protects upstream owners' initial use of the water. For example, an upstream proprietor may construct a dam to appropriate a reasonable amount of water without compensating a downstream proprietor. However, cases involving thermal pollution provide an exception to this rule. For example, downstream owners who use river water to make ice can seek injunctive relief to prevent upstream owners from engaging in any activities that raise the water temperature by even one degree Fahrenheit.

Further readings

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Cross-references

Environmental Law; Fish and Fishing; Law of the Sea; Mine and Mineral Law; Pollution; Riparian Rights; Solid Wastes, Hazardous Substances, and Toxic Pollutants; Tort Law; Water Rights.

Water Pollution

Federal pollution definition gets court challenge

"The National Center for Conservation Science & Policy has joined five other environmental groups in filing a lawsuit against the Environmental Protection Agency over a change in the Clean Water Act."

By Paul Fattig

Medford Mail Tribune

January 01, 2007

ASHLAND — The National Center for Conservation Science & Policy has joined five other environmental groups in filing a lawsuit against the Environmental Protection Agency over a change in the Clean Water Act.

Filed earlier this month, the lawsuit in the 9th Circuit Court of Appeals in San Francisco seeks to reverse the EPA's decision made earlier this year to redefine the word "pollutant" to exclude pesticides, explained Chad Woodward, water quality project manager for the Ashland-based center.

"If the rule is not contested, the Clean Water Act will allow pesticide applications directly to our drinking water sources," Woodward said in a prepared statement. "This would create unacceptable ecological and human health risks."

The center believes the EPA's decision could result in aerial spraying and other direct applications of pesticides into wetlands, streams and rivers, Woodward said.

The EPA had concluded that pesticide applications are not covered by the act because the Federal Insecticide Fungicide & Rodenticide Act label on the pesticides provided adequate protection

But woodward countered that the warning labels on pesticides do not provide adequate regulatory safeguards.

"For the EPA to say that pesticides are not pollutants is like saying poison is good for you," said Charlie Tebbutt, an attorney for the Western Environmental Law Center and lead counsel for the petitioners. "The EPA is ignoring the requirements of the Clean Water Act and cannot go unchallenged."

If the decision is not changed, it would place fresh water, fish, wildlife and human populations at risk, according to the plaintiffs.

"This is not what the Clean Water Act intended," Tebbutt concluded.

Joining the center in the legal challenge are Oregon Wild, Californians for Alternatives to Toxics, California Sportfishing Protection Alliance, Baykeeper and Saint John's Organic Farm. The groups represent a farm in Idaho and a cross section of environmental groups from California and Oregon.

Alert: Ninth Circuit Rules Unaltered Groundwater Is a "Pollutant" Under the Clean Water Act

April 18, 2003

Last week, the Ninth Circuit Court of Appeals ruled in Northern Plains Resource Council v. Fidelity Exploration and Development Company that unaltered groundwater produced in extracting coal bed methane ("CBM") and discharged into surface waters is a "pollutant" within the meaning of the Clean Water Act (the "Act"). While the factual context of the court's ruling is narrowly confined to CBM producers, the court's emphasis on the overall goals of the Act may have far-reaching impacts

for discharge of unaltered groundwater by developers, excavation and trenching contractors, quarry operators, energy production facilities and mining companies.

Section 402 of the Act prohibits the discharge of any "pollutant" from a point source into "navigable waters of the United States" without a National Pollution Discharge Elimination System ("NPDES") permit. 33 U.S.C. §§ 1311(a); 1342. The Act includes "industrial . . . waste discharged into water" as a "pollutant" and defines "pollution" as "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(6) and (19). Unpermitted discharges of such "pollutants" may result in civil or criminal liability under the Act. 33 U.S.C. § 1319.

In Northern Plains Resource Council, an energy company, Fidelity Exploration & Development Company ("Fidelity"), extracted methane gas from coal seams located deep below the Powder River Basin in Montana. In extracting coal bed methane, Fidelity pumped groundwater to the surface and discharged itÑunalteredÑinto the Tongue River without obtaining an NPDES permit. Although unaltered, the extracted groundwater had a "salty" chemical composition different from the chemistry of the river to which it was discharged.

The Montana Department of Environmental Quality took the position that Montana's program implementing the federal Clean Water Act exempted such unaltered groundwater from the Act's permit requirements. Nevertheless, an environmental group called the Northern Plains Resource Council filed a "citizen suit," alleging that the unaltered groundwater constituted a "pollutant," and that the unpermitted discharge subjected Fidelity to liability. The district court ruled in favor of Fidelity, concluding that the water discharged from the CBM extraction did not fall with the Act's definition of "pollutant" since the water was not altered in any fashion and that Montana state law exempted the discharge of unaltered groundwater.

The Ninth Circuit reversed, addressing two issues on appeal: (1) whether the unaltered groundwater produced from the CBM extraction process was a "pollutant" within the meaning of the Act; and, if so, (2) whether Montana state law could exempt Fidelity from federal permitting requirements for discharge of a pollutant under the Act.

As to the first issue, the court concluded that the CBM water was a "pollutant" regulated by the Act. First, the court examined the plain language of the statute and reasoned that CBM water was a "pollutant" because it was an "industrial waste" even though it was unaltered groundwater with a naturally occurring salty chemical composition. The court observed that industrial waste includes "any useless byproduct derived from the commercial production and sale of goods and services." Second, the court found that the CBM water was a "pollutant" even without the addition of chemicals under EPA regulations governing "produced water" from gas extraction. The court rejected Fidelity's argument that the unaltered groundwater was within the Act's limited exception for reinjection into a well isolated from other water bodies.

Most significantly, the court went beyond the actual definition of "pollutant," and examined the Act's policy goals and the definition of "pollution" to support its conclusion that CBM water was a "pollutant." Specifically, the court focused on the effect of the discharge on the receiving water, citing the Act's "antidegradation policy" requiring state water quality standards to prevent further degradation of the nation's waters and the overall objective to "restore and maintain the chemical, physical and biological integrity of the nation's waters." The court found that Fidelity's discharge caused "pollution" under the Act because it altered the water quality of the Tongue River. In other words, a "man-induced" alteration "refers to the effect of the discharge on the receiving water; it does not require the discharged water be altered by man."

Having concluded that Fidelity's discharge of unaltered groundwater was subject to the Act, the court considered whether Montana state law provided an exemption. The court concluded that neither EPA nor the State of Montana had the authority to create exemptions to federal statutory requirements for discharge of pollutants, such as the CBM water discharge, otherwise subject to permitting under the Act.

The Ninth Circuit's ruling in Northern Plains Resource Council has potential significance for developers, excavation and trenching contractors, quarry operators, energy production facilities and mining companies with operations involving infiltrated or extracted groundwater. Unaltered groundwater with "naturally occurring" constituents may still be considered a "pollutant," requiring NPDES

permitting under the Act, if the discharge affects the chemical, physical or biological integrity of the receiving waters.

The Environmental Law Department of Farella Braun + Martel LLP is among the largest and most experienced in the nation, with attorneys specializing in Clean Water Act compliance counseling, regulatory representation and enforcement defense, including defense of "citizen suits." Please contact the attorneys listed below, or any of our environmental attorneys, for more information.

October 23, 2006

FEDERAL DISTRICT COURT CREATES THREE PRONG POLLUTION EXCLUSION TEST

Recently, a Federal District Court Judge in the Northern District of Texas, in *Evanston Insurance Company v. Adkins*, 2006 WL 2848054 (Oct. 04, 2006), enunciated a three prong test to be used in the interpretation of the ISO CGL Pollution Exclusion. In *Adkins*, TXI owned and operated a cement plant. TXI hired Adkins, a welding and fabrication company, as an independent contractor for welding services at the cement plant. TXI sued Adkins in Texas state court for allegedly causing a fire at the cement plant. Evanston, Adkins' insurer, sought declaratory relief that its CGL policy issued to Adkins precluded coverage for TXI's claims.

As the basis of its coverage position and motion for summary judgment, Evanston asserted that the underlying lawsuit and TXI's claims for damages alleged merely economic damages not covered by the policy, or, alternatively, that four exclusions precluded coverage under the policy.

First, the Court addressed Evanston's argument that TXI's claims for "economic damages in the form of a gross business interruption loss" did not comprise "property damage." Essentially, Evanston argued that business interruption losses were not property damages, but rather economic losses not covered by the policy. The Court noted that the policy's definition of "property damage" included "loss of use of tangible property that is not physically injured." The Court observed that while TXI did indeed use the term "economic damages" in its pleadings, the Court stated that it must focus its analysis on the factual allegations that show the origin of the damages, rather than on

the legal theories asserted. Finding that the underlying lawsuit alleged that Adkins' negligence caused the fire that resulted in physical damage to the plant where production of materials necessary for the manufacture of cement resulted in the loss of use of that property for 27 days constituted covered "property damage" for loss of use of that property.

Next, the Court addressed Evanston's reliance upon the Pollution Exclusion. Evanston argued that the welding slag which caused the fire was a pollutant which triggered the Pollution Exclusion. The Court first examined precedent which defines what constitutes a "pollutant." Noting that the terms "irritant" and "contaminant" are overly broad, the Court stated that, without some limiting principle, the Pollution Exclusion would extend far beyond its intended scope. The *Adkins* Court noted the Fifth and Seventh Circuits' "common sense" approach when interpreting the Pollution Exclusion. From the Fifth Circuit's opinion in *Certain Underwriters at Lloyd's London v. C.A. Turner Construction Company*, 112 F.3d 184 (1997), the *Adkins*' Court advocates a three prong test to analyze pollution claims.

 "First, the court should determine whether the substance at issue falls within the insurance policy's literal definition of pollutant. If it does not, then no pollutant exclusion would apply, and no analysis is necessary. If, however, the substance falls within the policy's literal definition of pollutant," then the analysis proceeds to the second prong; "then, the court must next determine whether it caused the damages in the underlying insurance claim."

"The clause excludes coverage for expenses 'arising out of' or 'as a result of' the 'discharge, dispersal, seepage, migration, release, escape or placement of pollutants.' . . . If the substance did not cause the damages in the underlying claim, then no pollution exclusion applies, despite the substance meeting the literal definition of pollutant. . . . If the substance at issue falls within the literal definition of pollutant, and it caused the damages in the underlying claim, the court should make a third inquiry: . . ."; and "[W]hether common sense and the 'reasonable, objective expectations of the insured' at the time of contracting make it reasonable to trigger the pollutant exclusion."

Notably, the Northern District takes the *C.A. Turner* Court's common sense analysis and boot straps the Massachusetts' "reasonable expectations" test from *Western Alliance Insurance Company v. Gill*, 686 N.E.2d 997 (Mass. 1997), a test not adopted by any other Texas court.

In reliance upon this "reasonable expectations" test, the Northern District determined that the Evanston Pollution Exclusion did not apply to the welding slag which purportedly started the fire and loss at issue.

Although the Northern District did indeed find that welding slag was a pollutant and that the welding slag/pollutant did cause the fire and loss made the basis of the claim, the Court noted that the insured's reasonable expectation when purchasing the policy should be considered.

[W]elding slag, which is present whenever one welds, or the molten metal particles produced during welding, qualifies as a "pollutant" under this policy, since such an interpretation would lead to clearly absurd results. Evanston issued a commercial general liability policy to Adkins, a welder. It would defy common sense and all reasonable expectations to interpret a welder's general liability insurance policy as negated by its pollutant exclusion any time welding slag causes damage or injury. Such an interpretation would reduce the contractual promise of coverage to a dead letter. Accordingly, this court finds that even though welding slag falls within the policy's literal definition of a pollutant, and even though the slag is the alleged cause of the damages in the underlying suit, the pollutant exclusion does not apply to bar coverage based on the presence of welding slag.

PROFESSIONAL SERVICES EXCLUSION RE-VISITED

In *Mid-Continent Casualty Company v. Davis-Ruiz Corporation*, 2006 WL 2850067 (Oct. 03, 2006), the Southern District of Texas had the opportunity to again review and construe the ISO Professional Services Exclusion. The Court noted that the Professional Services Exclusion failed to define "professional services" which are excluded under the Professional Services Exclusion. Thus, the Court examined established precedent which defined "professional services" as:

A professional must perform more than an ordinary task to perform a professional service. To qualify as a professional service, the task must arise out of acts particular to the individual's specialized vocation. We do not deem an act a professional service merely because it is performed by a professional. Rather, it must be necessary for the professional to use his specialized knowledge or training.

The Court expressly found that the term "professional services" was not ambiguous. While the term is not specifically defined in the policy, the term is not ambiguous as it has been defined by the courts of Texas and is not reasonably subject to multiple interpretations.

In applying the definition of "professional services," the Court examined the relevant pleadings. It is noteworthy that the Court examined the pleadings under which the insured had been brought into the underlying lawsuit: the insured had been third-partied in under theories of contribution and indemnity. The Court did not examine or review the claimant/plaintiff's petition against the defendant as providing the factual basis and allegations to be construed against the policy under an eight corners' analysis. The Court examined and expressly addressed the factual claims and allegations made the basis of the defendant's third-party petition against the insured. This analysis is noteworthy because of the practical implications and often used practice that many third-party claims for indemnity and contribution fail to include or assert any express or specific factual allegations – instead, common practice merely provides that a third-party plaintiff will simply assert that, in the off chance that the third-party plaintiff is found liable, that it is the fault and liability of the third party defendant and that the third-party defendant is liable for contribution and/or indemnity to the third-party plaintiff. Thus, the common practice of factually-sparse and broad allegations in a third-party petition for contribution and/or indemnity may lack the factual predicate to implicate coverage under 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 plain-

tiff'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 the Probate Court. 1581 et seq.; Meeks v. Hahn, 20 Cal. 620; Toucliard v. Keyes, 21 CaL 208; Jie.t/noMs v. Jfottmcr, 45 Cal. 631. If an estate should be sold in lots to different persons, the purchaser could not join in exhibiting one bill against the vendor for specific performance; but where there was a contract to convey with but one person, under which the purchaser conveyed his equitable interest of a moiety to each one of two persons, it was held that "these two persons might sue the original vendor for specific performance. The general rule used to be that unconnected parties may join in bringing a bill in equity, where there is one connected interest among them all, centering in the point in issue in the cause. Owen v. Frink, 24 Cal. 177.

Parties numerous, one suing for all. In March term, 1850, it was held that a suit ought not to be dismissed for defect of parties, where, although the complaint did not expressly allege that it was filed on behalf of the plaintiffs, and all others interested, etc., its scope was to protect the rights not only of the plaintiffs, but also of a numerous class, and from the nature of the enterprise, the condition of the country, and the ever-changing locations of the people engaged in mining, it was, if not utterly impracticable, productive of manifest inconvenience and oppressive delays, to require that all parties should be brought into court. Von Schmidt v. Huntingdon, 1 Cal. 68.

But the Supreme Court have held that this section in the former Practice Act was intended to applv to suits in equity, and not to actions at law. Andrews v. Mokelumne Hill Co., 7 Cal. 333.

In equity the strict rule, that all persons materially interested must be parties, was always dispensed with, where it was impracticable or very inconvenient, as in case of a very numerous association in a joint concern— in effect a partnership. Cockburn v. Thompson, 16 Ves.321; Slo. &/. PI., Sec. 135. Oormanv. RusuM, 14 Cal. 540.

California Code of Civil Procedure.

5. 1085. (a) A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.

THE COURT IS COMPELLED TO ISSUE THE WRIT OF POSSESSION EX PARTE

THE COURT IS COMPELLED TO FILE THE DECLARATION FOR EX PARTE WRIT

THE COURT IS COMPELLED TO ORDER A WRIT OF EJECTMENT

THE COURT IS COMPELLED TO DIRECT THE CLERK TO ISSUE THE WRIT IMMEDIATELY

6. 1086. The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

7. 1087. The writ may be either alternative or peremptory. The alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified

time, to do the act required to be performed, or to show cause before the court at a time and place then or thereafter specified by court order why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted.

8. 1088. When the application to the court is made without notice to the adverse party, and the writ is allowed, the alternative must be first issued; but if the application is upon due notice and the writ is allowed, the peremptory may be issued in the first instance. With the alternative writ and also with any notice of an intention to apply for the writ, there must be served on each person against whom the writ is sought a copy of the petition. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appears or not.

9. 1088.5. In a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for a writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court.

10. 1089. On the date for return of the alternative writ, or on which the application for the writ is noticed, or, if the Judicial Council shall adopt rules relating to the return and answer, then at the time provided by those rules, the party upon whom the writ or notice has been served may make a return by demurrer, verified answer or both. If the return is by demurrer alone, the court may allow an answer to be filed within such time as it may designate. Nothing in this section affects rules of the Judicial Council governing original writ proceedings in reviewing courts.

PETITION FOR ADJUDICATION AND JUDGMENT ON THE MERITS

11. 1094. If no return be made, the case may be heard on the papers of the applicant. If the return raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case. If a petition for a writ of mandate filed pursuant to Section 1088.5 presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ.

PETITION FOR REVIEW OF ABUSE OF PROCESS AND ABUSE OF DISCRETION

FALSE AND MALICIOUS PROSECUTION FOR CRIME OF INFAMY EX POST FACTO

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.

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 right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Where the plaintiff sued on behalf of himself and others, residents and property-holders of the city of Oakland, to set aside certain conveyances operating as a cloud upon the title to a tract of land occupied by the city, and to obtain an injunction, etc., and the court below entered a judgment declaring the conveyances fraudulent and void, and enjoining the defendants from future alienations in

respect to the land of the plaintiff, the relief in this particular being confined to the plaintiff alone, the Supreme Court held that there was no such community of interest between the plaintiff and those whom he represented in the action as entitled him to an injunction in their favor. Gibbons v. Peralta, 21 Cal. 632, 633.

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

Sureties, 1059.

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

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

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,

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

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

1161. A tenant of real property, for a term less than life, or the executor or administrator of his or her estate heretofore qualified and now acting or hereafter to be qualified and act, is guilty of unlawful detainer:

1. When he or she continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him or her; provided the expiration is of a nondefault nature however brought about without the permission of his or her landlord, or the successor in estate of his or her landlord, if applicable; including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, or employer and employee, or principal and agent, or licensor and licensee, has been lawfully terminated or the time fixed for occupancy by the agreement between the parties has expired; but nothing in this subdivision shall be construed as preventing the removal of the occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

2. When he or she continues in possession, in person or by subtenant, without the permission of his or her landlord, or the successor in estate of his or her landlord, if applicable, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, the name, telephone number, and address of the person to whom the rent payment shall be made, and, if payment may be made personally, the usual days and hours that person will be available to receive the payment (provided that, if the address does not allow for personal delivery, then it shall be conclusively presumed that upon the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed received by the owner on the date posted, if the tenant can show proof of mailing to the name and address provided by the owner), or the number of an account in a financial institution into which the rental payment may be made, and the name and street address of the

institution (provided that the institution is located within five miles of the rental property), or if an electronic funds transfer procedure has been previously established, that payment may be made pursuant to that procedure, or possession of the property, shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant.

The notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than 60 days after the expiration of the term without any demand of possession or notice to quit by the landlord or the successor in estate of his or her landlord, if applicable, he or she shall be deemed to be holding by permission of the landlord or successor in estate of his or her landlord, if applicable, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during that year, and the holding over for that period shall be taken and construed as a consent on the part of a tenant to hold for another year.

3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of

the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.

A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant or held by a servant, employee, agent, or licensee, in case of his or her unlawful detention of the premises underlet to him or her or held by him or her.

4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter.

5. When he or she gives written notice as provided in Section 1946 of the Civil Code of his or her intention to terminate the hiring of the real property, or makes a written offer to surrender which is accepted in writing by the landlord, but fails to deliver possession at the time specified in that written notice, without the permission of his or her landlord, or the successor in estate of the landlord, if applicable.

As used in this section, tenant includes any person who hires real property except those persons whose occupancy is described in subdivision (b) of Section 1940 of the Civil Code. This section shall remain in effect only until January 1, 2012, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2012, deletes or extends that date.

1161. A tenant of real property, for a term less than life, or the executor or administrator of his or her estate heretofore qualified and now acting or hereafter to be qualified and act, is guilty of unlawful detainer:

1. When he or she continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him or her; provided the expiration is of a nondefault nature however brought about without the permission of his or her landlord, or the successor in estate of his or her landlord, if applicable; including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, or employer and employee, or principal and agent, or licensor and licensee, has been lawfully terminated or the time fixed for occupancy by the agreement between the parties has expired; but nothing in this subdivision shall be construed as preventing the removal of the occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

2. When he or she continues in possession, in person or by subtenant, without the permission of his or her landlord, or the successor in estate of his or her landlord, if applicable, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment, stating the amount which is due, the name, telephone number, and address of the person to whom the rent payment shall be made, and, if payment may be made personally, the usual days and hours that person will be available to receive the payment (provided that, if the address does not allow for personal delivery, then it shall be conclusively presumed that upon the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed received by the owner on the date posted, if the tenant can show proof of mailing to the name and address provided by the owner), or the number of an account in a financial institution into which the rental payment may be made, and the name and street address of the

institution (provided that the institution is located within five miles of the rental property), or if an electronic funds transfer procedure has been previously established, that payment may be made pursuant to that procedure, or possession of the property, shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant.

The notice may be served at any time within one year after the rent becomes due.

4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter.

As used in this section, tenant includes any person who hires real property except those persons whose occupancy is described in subdivision (b) of Section 1940 of the Civil Code.

1161.1. With respect to application of Section 1161 in cases of possession of commercial real property after default in the payment of rent:

(a) If the amount stated in the notice provided to the tenant pursuant to subdivision (2) of Section 1161 is clearly identified by the notice as an estimate and the amount claimed is not in fact correct, but it is determined upon the trial or other judicial determination that rent was owing, and the amount claimed in the notice was reasonably estimated, the tenant shall be subject to judgment for possession and the actual amount of rent and other sums found to be due. However, if (1) upon receipt of such a notice claiming an amount identified by the notice as an estimate, the

tenant tenders to the landlord within the time for payment required by the notice, the amount which the tenant has reasonably estimated to be due and (2) if at trial it is determined that the amount of rent then due was the amount tendered by the tenant or a lesser amount, the tenant shall be deemed the prevailing party for all purposes. If the court determines that the amount so tendered by the tenant was less than the amount due, but was reasonably estimated, the tenant shall retain the right to possession if the tenant pays to the landlord within five days of the effective date of the judgment (1) the amount previously tendered if it had not been previously accepted, (2) the difference between the amount tendered and the amount determined by the court to be due, and (3) any other sums as ordered by the court.

(b) If the landlord accepts a partial payment of rent, including any payment pursuant to subdivision (a), after serving notice pursuant to Section 1161, the landlord, without any further notice to the tenant, may commence and pursue an action under this chapter to recover the difference between the amount demanded in that notice and the payment actually received, and this shall be specified in the complaint.

(c) If the landlord accepts a partial payment of rent after filing the complaint pursuant to Section 1166, the landlord's acceptance of the partial payment is evidence only of that payment, without waiver of any rights or defenses of any of the parties. The landlord shall be entitled to amend the complaint to reflect the partial payment without creating a necessity for the filing of an additional answer or other responsive pleading by the tenant, and without prior leave of court, and such an amendment shall not delay the matter from proceeding. However, this subdivision shall apply only if the landlord provides actual notice to the tenant that acceptance of the partial rent payment does not constitute a waiver of any rights, including any right the landlord may have to recover possession of the property.

(d) "Commercial real property" as used in this section, means all real property in this state except dwelling units made subject to Chapter 2 (commencing with Section 1940) of Title 5 of Part 4 of Division 3 of the Civil Code, mobilehomes as defined in

Section 798.3 of the Civil Code, or recreational vehicles as defined in Section 799.24 of the Civil Code.

(e) For the purposes of this section, there is a presumption affecting the burden of proof that the amount of rent claimed or tendered is reasonably estimated if, in relation to the amount determined to be due upon the trial or other judicial determination of that issue, the amount claimed or tendered was no more than 20 percent more or less than the amount determined to be due. However, if the rent due is contingent upon information primarily within the knowledge of the one party to the lease and that information has not been furnished to, or has not accurately been furnished to, the other party, the court shall consider that fact in determining the reasonableness of the amount of rent claimed or tendered pursuant to subdivision (a).

1161.2. (a) The clerk may allow access to limited civil case records filed under this chapter, including the court file, index, and register of actions, only as follows:

(1) To a party to the action, including a party's attorney.

(2) To any person who provides the clerk with the names of at least one plaintiff and one defendant and the address of the premises, including the apartment or unit number, if any.

(3) To a resident of the premises who provides the clerk with the name of one of the parties or the case number and shows proof of residency.

(4) To any person by order of the court, which may be granted ex parte, on a showing of good cause.

(5) To any other person 60 days after the complaint has been filed, unless a defendant prevails in the action within 60 days of the filing of the complaint, in which case the clerk may not allow access to any court records in the action, except as provided in paragraphs (1) to (4), inclusive.

(b) For purposes of this section, "good cause" includes, but is not limited to, the gathering of newsworthy facts by a person described in Section 1070 of the Evidence Code.

It is the intent of the Legislature that a simple procedure be established to request the ex parte order described in subdivision (a).

(c) Upon the filing of any case so restricted, the court clerk shall mail notice to each defendant named in the action. The notice shall be mailed to the address provided in the complaint. The notice shall contain a statement that an unlawful detainer complaint (eviction action) has been filed naming that party as a defendant, and that access to the court file will be delayed for 60 days except to a party, an attorney for one of the parties, or any other person who (1) provides to the clerk the names of at least one plaintiff and one defendant in the action and provides to the clerk the address, including any applicable apartment, unit, or space number, of the subject premises, or (2) provides to the clerk the name of one of the parties in the action or the case number and can establish through proper identification that he or she lives at the subject premises.

The notice shall also contain a statement that access to the court index, register of actions, or other records is not permitted until 60 days after the complaint is filed, except pursuant to an order upon a showing of good cause therefor. The notice shall contain on its face the name and telephone number of the county bar association and the name and telephone number of an office or offices funded by the federal Legal Services Corporation or qualified legal services projects that receive funds distributed pursuant to Section 6216 of the Business and Professions Code, that provide legal services to low-income persons in the county in which the action is filed. The notice shall state that these numbers may be called for legal advice regarding the case. The notice shall be issued between 24 and 48 hours of the filing of the complaint, excluding weekends and holidays. One copy of the notice shall be addressed to "all occupants" and mailed separately to the subject premises. The notice shall not constitute service of the summons and complaint.

(d) Notwithstanding any other provision of law, the court shall charge an additional fee of fifteen dollars ($15) for filing a first appearance by the plaintiff. This fee shall be added to the uniform filing fee for actions filed under this chapter.

(e) This section does not apply to a case that seeks to terminate a mobilehome park tenancy if the statement of the character of the proceeding in the caption of the complaint clearly indicates that the complaint seeks termination of a mobilehome park tenancy.

1161.5. When the notice required by Section 1161 states that the lessor or the landlord may elect to declare the forfeiture of the lease or rental agreement, that declaration shall be nullified and the lease or rental agreement shall remain in effect if the lessee or tenant performs within three days after service of the notice or if the breach is waived by the lessor or the landlord after service of the notice.

1162a. In any case in which service or exhibition of a receiver's or levying officer's deed is required, in lieu thereof service of a copy or copies of the deed may be made as provided in Section 1162.

1164. No person other than the tenant of the premises and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be nonsuited for the nonjoinder of any person who might have been made party defendant, but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him or her. In case a defendant has become a subtenant of the premises in controversy, after the service of the notice provided for by subdivision 2 of Section 1161 of this code, upon the tenant of the premises, the fact that such notice was not served on each subtenant shall constitute no defense to the action. All persons who enter the premises under the tenant, after the commencement of the suit, shall be bound by the judgment, the same as if he or they had been made party to the action.

1165. Except as provided in the preceding section, the provisions of Part II of this Code, relating to parties to civil actions, are applicable to this proceeding.

1166. (a) The complaint shall:

(1) Be verified and include the typed or printed name of the person verifying the complaint.

(2) Set forth the facts on which the plaintiff seeks to recover.

(3) Describe the premises with reasonable certainty.

(4) If the action is based on paragraph (2) of Section 1161, state the amount of rent in default.

(5) State specifically the method used to serve the defendant with the notice or notices of termination upon which the complaint is based. This requirement may be satisfied by using and completing all items relating to service of the notice or notices in an appropriate Judicial Council form complaint, or by attaching a proof of service of the notice or notices of termination served on the defendant.

(b) The complaint may set forth any circumstances of fraud, force, or violence that may have accompanied the alleged forcible entry or forcible or unlawful detainer, and claim damages therefor.

(c) (1) In an action regarding residential property, the plaintiff shall attach to the complaint the following:

(A) A copy of the notice or notices of termination served on the defendant upon which the complaint is based.

(B) A copy of any written lease or rental agreement regarding the premises. Any addenda or attachments to the lease or written agreement that form the basis of the complaint shall also be attached. The documents required by this subparagraph are not required to be attached if the complaint alleges any of the following:

(i) The lease or rental agreement is oral.

(ii) A written lease or rental agreement regarding the premises is not in the possession of the landlord or any agent or employee of the landlord.

(iii) An action based solely on subdivision (2) of Section 1161.

(2) If the plaintiff fails to attach the documents required by this subdivision, the court shall grant leave to amend the complaint for a 5-day period in order to include the required attachments.

(d) Upon filing the complaint, a summons shall be issued thereon.

1166a. (a) Upon filing the complaint, the plaintiff may, upon motion, have immediate possession of the premises by a writ of possession of a manufactured home, mobilehome, or real property issued by the court and directed to the sheriff of the county or marshal, for execution, where it appears to the satisfaction of the court, after a hearing on the motion, from the verified complaint and from any affidavits filed or oral testimony given by or on behalf of the parties, that the defendant resides out of state, has departed from the state, cannot, after due diligence, be found within the state, or has concealed himself or herself to avoid the service of summons. The motion shall indicate that the writ applies to all tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises.

(b) Written notice of the hearing on the motion shall be served on the defendant by the plaintiff in accordance with the provisions of Section 1011, and shall inform the defendant as follows: "You may file affidavits on your own behalf with the court and may appear and present testimony on your own behalf. However, if you fail to appear, the plaintiff will apply to the court for a writ of possession of a manufactured home, mobilehome, or real property."

(c) The plaintiff shall file an undertaking in a sum that shall be fixed and determined by the judge, to the effect that, if the plaintiff fails to recover judgment against the defendant for the possession of the premises or if the suit is dismissed, the plaintiff will pay to the defendant those damages, not to exceed the amount fixed in the undertaking, as may be sustained by the defendant by reason of that dispossession under the writ of possession of a manufactured home, mobilehome, or real property.

(d) If, at the hearing on the motion, the findings of the court are in favor of the plaintiff and against the defendant, an order shall be entered for the immediate possession of the premises.

(e) The order for the immediate possession of the premises may be enforced as provided in Division 3 (commencing with Section 712.010) of Title 9 of Part 2.

(f) For the purposes of this section, references in Division 3 (commencing with Section 712.010) of Title 9 of Part 2 and in subdivisions (e) to (m), inclusive, of Section 1174, to the "judgment debtor" shall be deemed references to the defendant, to the "judgment creditor" shall be deemed references to the plaintiff, and to the "judgment of possession or sale of property" shall be deemed references to an order for the immediate possession of the premises.

1167. The summons shall be in the form specified in Section 412.20 except that when the defendant is served, the defendant's response shall be filed within five days, including Saturdays and Sundays but excluding all other judicial holidays, after the complaint is served upon him or her. If the last day for filing the response falls on a Saturday or Sunday, the response period shall be extended to and including the next court day.

In all other respects the summons shall be issued and served and returned in the same manner as a summons in a civil action.

1167.3. In any action under this chapter, unless otherwise ordered by the court for good cause shown, the time allowed the defendant to answer the complaint, answer the complaint, if amended, or amend the answer under paragraph (2), (3), (5), (6), or (7) of subdivision (a) of Section 586 shall not exceed five days.

1167.4. Notwithstanding any other provision of law, in any action under this chapter:

(a) Where the defendant files a notice of motion as provided for in subdivision (a) of Section 418.10, the time for making the motion shall be not less than three days nor more than seven days after the filing of the notice.

(b) The service and filing of a notice of motion under subdivision

(a) shall extend the defendant's time to plead until five days after service upon him of the written notice of entry of an order denying his motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 15 days.

1167.5. Unless otherwise ordered by the court for good cause shown, no extension of time allowed in any action under this chapter for the causes specified in Section 1054 shall exceed 10 days without the consent of the adverse party.

1169. If, at the time appointed, any defendant served with a summons does not appear and defend, the clerk, upon written application of the plaintiff and proof of the service of summons and complaint, shall enter the default of any defendant so served, and, if requested by the plaintiff, immediately shall enter judgment for restitution of the premises and shall issue a writ of execution thereon. The application for default judgment and the default judgment shall include a place to indicate that the judgment includes tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises. Thereafter, the plaintiff may apply to the court for any other relief demanded in the complaint, including the costs, against the defendant, or defendants, or against one or more of the defendants.

1170. On or before the day fixed for his appearance, the defendantmay appear and answer or demur.

1170.5. (a) If the defendant appears pursuant to Section 1170, trial of the proceeding shall be held not later than the 20th day following the date that the request to set the time of the trial is made. Judgment shall be entered thereon and, if the plaintiff prevails, a writ of execution shall be issued immediately by the court upon the request of the plaintiff.

(b) The court may extend the period for trial upon the agreement of all of the parties. No other extension of the time for trial of an action under this chapter may be granted unless the court, upon its own motion or on motion of any party, holds a hearing and renders a decision thereon as specified in subdivision (c).

(c) If trial is not held within the time specified in this section, the court, upon finding that there is a reasonable probability that the plaintiff will prevail in the action, shall determine the amount of damages, if any, to be suffered by the plaintiff by reason of the extension, and shall issue an order requiring the defendant to pay that amount into court as the rent would have otherwise become due and payable or into an escrow designated by the court for so long as the defendant remains in possession pending the termination of the action.

The determination of the amount of the payment shall be based on the plaintiff's verified statement of the contract rent for rental payment, any verified objection thereto filed by the defendant, and the oral or demonstrative evidence presented at the hearing. The court's determination of the amount of damages shall include consideration of any evidence, presented by the parties, embracing the issue of diminution of value or any set off permitted by law.

(d) If the defendant fails to make a payment ordered by the court, trial of the action shall be held within 15 days of the date payment was due.

(e) Any cost for administration of an escrow account pursuant to this section shall be recoverable by the prevailing party as part of any recoverable cost in the action.

(f) After trial of the action, the court shall determine the distribution of the payment made into court or the escrow designated by the court.

(g) Where payments into court or the escrow designated by the court are made pursuant to this section, the court may order that the payments be invested in an insured interest-bearing account.

Interest on the account shall be allocated to the parties in the same proportions as the original funds are allocated.

(h) If any provision of this section or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

(i) Nothing in this section shall be construed to abrogate or interfere with the precedence given to the trial of criminal cases over the trial of civil matters by Section 1050 of the Penal Code.

1170.7. A motion for summary judgment may be made at any time after the answer is filed upon giving five days notice.

Summary judgment shall be granted or denied on the same basis as a motion under Section 437c.

1170.8. In any action under this chapter, a discovery motion may be made at any time upon giving five days' notice.

1170.9. The Judicial Council shall adopt rules, not inconsistent with statute, prescribing the time for filing and serving opposition and reply papers, if any, relating to a motion under Section 1167.4, 1170.7, or 1170.8.

1171. Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in an action of the same jurisdictional classification in the Court in which the action is pending.

1172. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings.

1173. When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the Judge

must order that such complaint be forthwith amended to conform to such proofs; such amendment must be made without any imposition of terms. No continuance shall be permitted upon account of such amendment unless the defendant, by affidavit filed, shows to the satisfaction of the Court good cause therefor.

1174. (a) If upon the trial, the verdict of the jury, or, if the case be tried without a jury, the findings of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the possession of the premises; and if the proceedings be for an unlawful detainer after neglect, or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of that lease or agreement if the notice required by Section 1161 states the election of the landlord to declare the forfeiture thereof, but if that notice does not so state that election, the lease or agreement shall not be forfeited.

(b) The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. If the defendant is found guilty of forcible entry, or forcible or unlawful detainer, and malice is shown, the plaintiff may be awarded statutory damages of up to six hundred dollars ($600), in addition to actual damages, including rent found due. The trier of fact shall determine whether actual damages, statutory damages, or both, shall be awarded, and judgment shall be entered accordingly.

(c) When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, and the notice required by Section 1161 has not stated the election of the landlord to declare the forfeiture thereof, the court may, and, if the lease or agreement is in writing, is for a term of more than one year, and does not contain a forfeiture clause, shall order that a writ shall not be issued to enforce the judgment until the ex-

piration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into the court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceedings, and thereupon
the judgment shall be satisfied and the tenant be restored to the tenant's estate. If payment as provided in this subdivision is not made within five days, the judgment may be enforced for its full amount and for the possession of the premises. In all other cases the judgment may be enforced immediately.

(d) Subject to subdivision (c), the judgment for possession of the premises may be enforced as provided in Division 3 (commencing with Section 712.010) of Title 9 of Part 2.

(e) Personal property remaining on the premises which the landlord reasonably believes to have been lost shall be disposed of pursuant to Article 1 (commencing with Section 2080) of Chapter 4 of Title 6 of Part 4 of Division 3 of the Civil Code. The landlord is not liable to the owner of any property which is disposed of in this manner. If the appropriate police or sheriff's department refuses to accept that property, it shall be deemed not to have been lost for the purposes of this subdivision.

(f) The landlord shall give notice pursuant to Section 1983 of the Civil Code to any person (other than the tenant) reasonably believed by the landlord to be the owner of personal property remaining on the premises unless the procedure for surrender of property under Section 1965 of the Civil Code has been initiated or completed.

(g) The landlord shall store the personal property in a place of safekeeping until it is either released pursuant to subdivision (h) or disposed of pursuant to subdivision (i).

(h) The landlord shall release the personal property pursuant to Section 1965 of the Civil Code or shall release it to the tenant or, at the landlord's option, to a person reasonably believed by the landlord to be its owner if the tenant or other person pays the costs of storage as provided in Section 1990 of the Civil Code and claims the property not later than the date specified in the writ of possession before which the tenant must

make his or her claim or the date specified in the notice before which a person other than the tenant must make his or her claim.

(i) Personal property not released pursuant to subdivision (h) shall be disposed of pursuant to Section 1988 of the Civil Code.

(j) Where the landlord releases personal property to the tenant pursuant to subdivision (h), the landlord is not liable with respect to that property to any person.

(k) Where the landlord releases personal property pursuant to subdivision (h) to a person (other than the tenant) reasonably believed by the landlord to be its owner, the landlord is not liable with respect to that property to:

(1) The tenant or to any person to whom notice was given pursuant to subdivision (f); or

(2) Any other person, unless that person proves that, prior to releasing the property, the landlord believed or reasonably should have believed that the person had an interest in the property and also that the landlord knew or should have known upon reasonable investigation the address of that person.

(l) Where personal property is disposed of pursuant to Section 1988 of the Civil Code, the landlord is not liable with respect to that property to:

(1) The tenant or to any person to whom notice was given pursuant to subdivision (f); or

(2) Any other person, unless that person proves that, prior to disposing of the property pursuant to Section 1988 of the Civil Code, the landlord believed or reasonably should have believed that the person had an interest in the property and also that the landlord knew or should have known upon reasonable investigation the address of that person.

(m) For the purposes of subdivisions (e), (f), (h), (k), and (l), the terms "owner," "premises," and "reasonable belief" have the same meaning as provided in Section 1980 of the Civil Code.

1174.2. (a) In an unlawful detainer proceeding involving residential premises after default in payment of rent and in which the tenant has raised as an affirmative defense a breach of the landlord's obligations under Section 1941 of the Civil Code or of any warranty of habitability, the court shall determine whether a substantial breach of these obligations has occurred. If the court finds that a substantial breach has occurred, the court (1) shall determine the reasonable rental value of the premises in its untenantable state to the date of trial, (2) shall deny possession to the landlord and adjudge the tenant to be the prevailing party, conditioned upon the payment by the tenant of the rent that has accrued to the date of the trial as adjusted pursuant to this subdivision within a reasonable period of time not exceeding five days, from the date of the court's judgment or, if service of the court's judgment is made by mail, the payment shall be made within the time set forth in Section 1013, (3) may order the landlord to make repairs and correct the conditions which constitute a breach of the landlord's obligations, (4) shall order that the monthly rent be limited to the reasonable rental value of the premises as determined pursuant to this subdivision until repairs are completed, and (5) except as otherwise provided in subdivision (b), shall award the tenant costs and attorneys' fees if provided by, and pursuant to, any statute or the contract of the parties. If the court orders repairs or corrections, or both, pursuant to paragraph (3), the court's jurisdiction continues over the matter for the purpose of ensuring compliance. The court shall, however, award possession of the premises to the landlord if the tenant fails to pay all rent accrued to the date of trial, as determined due in the judgment, within the period prescribed by the court pursuant to this subdivision. The tenant shall, however, retain any rights conferred by Section 1174.

(b) If the court determines that there has been no substantial breach of Section 1941 of the Civil Code or of any warranty of habitability by the landlord or if the tenant fails to pay all rent accrued to the date of trial, as required by the court pursuant to subdivision (a), then judgment shall be entered in favor of the landlord, and the land-

lord shall be the prevailing party for the purposes of awarding costs or attorneys' fees pursuant to any statute or the contract of the parties.

(c) As used in this section, "substantial breach" means the failure of the landlord to comply with applicable building and housing code standards which materially affect health and safety.

(d) Nothing in this section is intended to deny the tenant the right to a trial by jury. Nothing in this section shall limit or supersede any provision of Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1 of the Government Code.

1174.21. A landlord who institutes an unlawful detainer proceeding based upon a tenant's nonpayment of rent, and who is liable for a violation of Section 1942.4 of the Civil Code, shall be liable to the tenant or lessee for reasonable attorneys' fees and costs of the suit, in an amount to be fixed by the court.

1174.25. (a) Any occupant who is served with a prejudgment claim of right to possession in accordance with Section 415.46 may file a claim as prescribed in Section 415.46, with the court within 10 days of the date of service of the prejudgment claim to right of possession as shown on the return of service, which period shall include Saturday and Sunday but excluding all other judicial holidays. If the last day for filing the claim falls on a Saturday or Sunday, the filing period shall be extended to and including the next court day. Filing the prejudgment claim of right to possession shall constitute a general appearance for which a fee shall be collected as provided in Section 70614 of the Government Code.

Section 68511.3 of the Government Code applies to the prejudgment claim of right to possession.

(b) At the time of filing, the claimant shall be added as a defendant in the action for unlawful detainer and the clerk shall notify the plaintiff that the claimant has been added as a defendant in the action by mailing a copy of the claim filed with the court to the plaintiff with a notation so indicating. The claimant shall answer or otherwise respond to the summons and complaint within five days, including Saturdays and

Sundays but excluding all other judicial holidays, after filing the prejudgment claim of possession.Thereafter, the name of the claimant shall be added to any pleading, filing or form filed in the action for unlawful detainer.

1174.3. (a) Unless a prejudgment claim of right to possession has been served upon occupants in accordance with Section 415.46, any occupant not named in the judgment for possession who occupied the premises on the date of the filing of the action may object to enforcement of the judgment against that occupant by filing a claim of right to possession as prescribed in this section. A claim of right to possession may be filed at any time after service or posting of the writ of possession pursuant to subdivision (a) or (b) of Section 715.020, up to and including the time at which the levying officer returns to effect the eviction of those named in the judgment of possession. Filing the claim of right to possession shall constitute a general appearance for which a fee shall be collected as provided in Section 70614 of the Government Code. Section 68511.3 of the Government Code applies to the claim of right to possession. An occupant or tenant who is named in the action shall not be required to file a claim of right to possession to protect that occupant's right to possession of the premises.

(b) The court issuing the writ of possession of real property shall set a date or dates when the court will hold a hearing to determine the validity of objections to enforcement of the judgment specified in subdivision (a). An occupant of the real property for which the writ is issued may make an objection to eviction to the levying officer at the office of the levying officer or at the premises at the time of the eviction.

If a claim of right to possession is completed and presented to the sheriff, marshal, or other levying officer, the officer shall forthwith (1) stop the eviction of occupants at the premises, and (2) provide a receipt or copy of the completed claim of right of possession to the claimant indicating the date and time the completed form was received, and (3) deliver the original completed claim of right to possession to the court issuing the writ of possession of real property.

(c) A claim of right to possession is effected by any of the following:

(1) Presenting a completed claim form in person with identification to the sheriff, marshal, or other levying officer as prescribed in this section, and delivering to the court within two court days after its presentation, an amount equal to 15 days' rent together with the appropriate fee or form for proceeding in forma pauperis. Upon receipt of a claim of right to possession, the sheriff, marshal, or other levying officer shall indicate thereon the date and time of its receipt and forthwith deliver the original to the issuing court and a receipt or copy of the claim to the claimant and notify the plaintiff of that fact. Immediately upon receipt of an amount equal to 15 days' rent and the appropriate fee or form for proceeding in forma pauperis, the court shall file the claim of right to possession and serve an endorsed copy with the notice of the hearing date on the plaintiff and the claimant by first-class mail.

The court issuing the writ of possession shall set and hold a hearing on the claim not less than five nor more than 15 days after the claim is filed with the court.

(2) Presenting a completed claim form in person with identification to the sheriff, marshal, or other levying officer as prescribed in this section, and delivering to the court within two court days after its presentation, the appropriate fee or form for proceeding in forma pauperis without delivering the amount equivalent to 15 days' rent. In this case, the court shall immediately set a hearing on the claim to be held on the fifth day after the filing is completed. The court shall notify the claimant of the hearing date at the time the claimant completes the filing by delivering to the court the appropriate fee or form for proceeding in forma pauperis, and shall notify the plaintiff of the hearing date by first-class mail. Upon receipt of a claim of right to possession, the sheriff, marshal, or other levying officer shall indicate thereon the date and time of its receipt and forthwith deliver the original to the issuing court and a receipt or copy of the claim to the claimant and notify the plaintiff of that fact.

(d) At the hearing, the court shall determine whether there is a valid claim of possession by the claimant who filed the claim, and the court shall consider all evidence produced at the hearing, including, but not limited to, the information set forth in the

claim. The court may determine the claim to be valid or invalid based upon the evidence presented at the hearing. The court shall determine the claim to be invalid if the court determines that the claimant is an invitee, licensee, guest, or trespasser. If the court determines the claim is invalid, the court shall order the return to the claimant of the amount of the 15 days' rent paid by the claimant, if that amount was paid pursuant to paragraph (1) or (3) of subdivision (c), less a pro rata amount for each day that enforcement of the judgment was delayed by reason of making the claim of right to possession, which pro rata amount shall be paid to the landlord.

If the court determines the claim is valid, the amount equal to 15 days' rent paid by the claimant shall be returned immediately to the claimant.

(e) If, upon hearing, the court determines that the claim is valid, then the court shall order further proceedings as follows:

(1) If the unlawful detainer is based upon a curable breach, and the claimant was not previously served with a proper notice, if any notice is required, then the required notice may at the plaintiff's discretion be served on the claimant at the hearing or thereafter. If the claimant does not cure the breach within the required time, then a supplemental complaint may be filed and served on the claimant as defendant if the plaintiff proceeds against the claimant in the same action. For the purposes of this section only, service of the required notice, if any notice is required, and of the supplemental complaint may be made by first-class mail addressed to the claimant at the subject premises or upon his or her attorney of record and, in either case, Section 1013 shall otherwise apply. Further proceedings on the merits of the claimant's continued right to possession after service of the Summons and Supplemental Complaint as prescribed by this subdivision shall be conducted pursuant to this chapter.

(2) In all other cases, the court shall deem the unlawful detainer Summons and Complaint to be amended on their faces to include the claimant as defendant, service of the Summons and Complaint, as thus amended, may at the plaintiff's discretion be

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.

If the stay is denied by the trial court, the defendant may forthwith file a petition for an extraordinary writ with the appropriate appeals court. If the trial or appellate court stays enforcement of the judgment, the court may condition the stay on whatever conditions the court deems just, but in any case it shall order the payment of the reasonable monthly rental value to the court monthly in advance as rent would otherwise become due as a condition of issuing the stay of enforcement. As used in this subdivision, "reasonable rental value" means the contract rent unless the rental value has been modified by the trial court in which case that modified rental value shall be used.

(b) A new cause of action on the same agreement for the rental of real property shall not be barred because of an appeal by any party.

1177. Except as otherwise provided in this Chapter the provisions of Part II of this Code are applicable to, and constitute the rules of practice in the proceedings mentioned in this Chapter.

1178. The provisions of Part 2 of this code, relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this chapter or with rules adopted by the Judicial Council, apply to the proceedings mentioned in this chapter.

1179. The court may relieve a tenant against a forfeiture of a lease or rental agreement, whether written or oral, and whether or not the tenancy has terminated, and restore him or her to his or her former estate or tenancy, in case of hardship, as provided in Section 1174. The court has the discretion to relieve any person against forfeiture on its own motion.

An application for relief against forfeiture may be made at any time prior to restoration of the premises to the landlord. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served at least five days prior to the hearing on the plaintiff in

the judgment, who may appear and contest the application. Alternatively, a person appearing without an attorney may make the application orally, if the plaintiff either is present and has an opportunity to contest the application, or has been given ex parte notice of the hearing and the purpose of the oral application. In no case shall the application or motion be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, be made.

1179a. In all proceedings brought to recover the possession of real property pursuant to the provisions of this chapter all courts, wherein such actions are or may hereafter be pending, shall give such actions precedence over all other civil actions therein, except actions to which special precedence is given by law, in the matter of the setting the same for hearing or trial, and in hearing the same, to the end that all such actions shall be quickly heard and determined.

Where, in a suit to quiet title, Hager, the original defendant, filed his answer in the court below, in the nature of a disclaimer, denying that he had any interest in the property in controversy, and alleging that he had sold the same to Lent, and Lent sought to intervene and defend, which was refused by the court.from which order an appeal was brought, the Supreme Court said it would be truly hard, if in such a suit Lent, who brought pendente lite, and who would be bound by the decree, was not allowed to be heard; that the only objection was that such transfers might be "made ad infinitum, and justice entirely frustrated or delayed; but the court did not think such consequences need reasonably be apprehended; no one would willfully thrust himself into a controversy where he was sure to lie much in costs for his mendacity. Brooks v. Hayer, 5 Cal. 283. Where a suit of plaintiff had been pending for some time to foreclose a mortgage, and a creditor of defendant holding a mechanic's lien moved to intervene at the time of trial, just as the plaintiff was about asking judgment, the Supreme Court thought the application was too late, and that the court below was not bound to allow it when so interposed. Hotker v. Kellry, 14 Cal. 165. In a suit on a note or mortgage where creditors of the defendant intervene, alleging the note and mortgage to be fraudulent as against them, the interveners

cannot prevent a judgment for plaintiff against defendant. The most they can claim is protection against enforcement of the judgment to their prejudice.

The interest which entitles a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character, that the intervener will either gain or lose by the direct legal operation and effect of the judgment. It must be that created by a claim to the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation. A simple contract creditor of a common debtor cannot intervene in a foreclosure suit. But judgment creditors, being as such subsequent encumbrancers, may intervene. And a court may order them to be made parties. Horn v. Volcano W. Co., 13 Cal. 62.

Where an action is brought to foreclose a mortgage upon property claimed as a homestead, the wife of a mortgagor is a necessary party to a full adjustment of the controversy, and should be allowed to intervene. Sargent v. Wilson, 5 CaL 505; McDonald v. Badger, 23 Cal. 396.

On the tenth of January, 1861, plaintiff caused an attachment to be levied upon the property of Ihmels & Co.; on the same day Eggers & Co. caused an attachment to be levied upon the same property, but subsequent to the plaintiffs levy, and in due course obtained judgment. On the day previous E. L. Goldstein had caused an attachment to be levied upon the same property, but also subsequent to the plaintiffs levy. Before a default was entered against the defendants in this action, E. L. Goldstein and Eggers & Co. severally filed interventions setting forth these facts, and also averring that the property attached was only sufficient to satisfy the plaintiffs claim, and also charging that the plaintiffs demand was not due at the time he commenced his action; and also that he had no valid demand against the defendants, and that his action was prosecuted for the purpose of hindering and defrauding creditors of the defendants. A general demurrer was interposed to these complaints of intervention; that is, that the facts set forth did not constitute a cause of intervention. The two main points presented were: 1st, whether the facts showed a case for a proceeding by intervention; and 2d, whether the onus prooandi was on the plaintiff to prove his cause of action as between him and the interveners, or on the interveners to prove their cause of action against the plaintiff. The court said that before the introduction of these provisions, and as doubtless might still be done, the

proceedings would have been by bill in chancery: see Heyneman v. Dannen- bfrg, 6 Cal. 376; or by motion to the court: see Dizey v. Pollock, 8 Id. 570. But in Davis v. Eppingfr, 18 Id. 378, where the facts were similar to the above, it was decided to be a proper case for intervention. Although the interveners had not a claim to or hen upon any property which was the direct subject of litigation, they had a lien upon property which was held subject to the results of the litigation, and which would be lost to the interveners if the original action should proceed to judgment and execution. If the case did not fall within the precise definition of the cases in which intervention takes place, as explained in the case of Horn v. Volcano Water Works, 13 Cal. 62, it was substantially within the object; and as the law was only regulating modes of procedure, and not affecting rights of property, the interpretation given to it in the case of Davin v. Eppinger, ought not to be changed. As to the second point, the interveners were interested in preventing the plaintiff recovering a judgment. They were for this purpose defendants in the action, and after they had proved the facts alleged to show their right to intervene, he was required to prove his cause of action. Although in the case of Davis v. Eppinger, and in the case of ffornv. The Volcano Water Works Co., 13 Cal. 70, it was decided that judgment might be rendered against the original defendants; it was because under our system the court by its judgment could make various depositions to meet all the exigencies of the case. Speyer v. Ihmels, 21 Cal. 286-288.

If the court finds that a portion only of the debt on which a prior attachment issued was fraudulent, the lien of the prior attachment should be postponed only as to that portion of the debt which was fraudulent. If the debt on which an attachment was issued was not due when the suit was commenced, a subsequent attaching creditor cannot by intervention postpone the lien of the first attachment to his own, unless the plaintiffs in the first action fraudulently commenced their action. Coghill <fc Co. v. Marks, 29 Cal. 673.

In a suit upon a promissory note and mortgage by the holder against the maker, a third person, who claims to be the rightful owner of the securities, has the right to intervene. The court thought that although the intervener certainly had no interest in common either with the plaintiff or the defendant, he had an interest in the matter in litigation adverse to both, within the meaning of the section. He had an interest against the pretension of the plaintiff to be owner of the note and mortgage, and

to have a decree of foreclosure for his benefit, and against, the defendant for the collection of the debt. Stick v. OoUlner, 38 Cal. 608. After having gone to trial without any objection, it was too late to raise an objection for the first time to the intervention for the first time in the appellate court. McKenty v. Gladwin, 10 Cal. 228; Smith v. Penney, 44 CaL 164. One who indemnifies the sheriff for an act done by virtue of his office, may, and should, intervene, 1055. DutU v. Pacheto, 21 Cal. 442.

An ex parte order may be made allowing an intervention to be filed. Spanagel v. Reay, 47 Cal. 608.Demurrer, 430. Answer, 437.

388. (656.) When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants and had been sued upon their joint liability.

Where the title of the action, as given at the head of the complaint, was Martin Walsh v. M. Walsh et al., composing the Red Star Mining Company, and in the body of the complaint it was stated that "said Red Star Company," omitting the word "Mining," was a mining association, composed of a great number of persons who were so numerous and so much scattered over the country, that plaintiff could not serve them with process without much delay and great expense, and he therefore sued them by the company name, and then the complaint proceeded and set out a cause of action for the recovery of money, and concluded with a prayer for judgment for the amount alleged to owe due and owing against the "Red Star Mining Company, and in his return to the summons, the sheriff certified that he served the same by delivering a copy thereof to M. Walsh, personally, one of the members of the "Red Star Mining Co.," defendant, etc., and the time for answering having expired without any appearance, the clerk entered the default, and immediately thereafter entered a judgment against the "Red Star Mining Co.," without naming Walsh, for the amount sued for, to be enforced against the joint property of the members of the company; the court held in a collateral proceeding that this was substantially within the section, and that there was certainly not an entire absence of averment on the subject, and nothing short of that would justify the court in holding the

judgment absolutely void in a collateral proceeding. Moreover it might be doubted whether a question whether the defendants had been sued by the proper name, was anything more than matter in abatement, and to say the least, was analogous to the case of a misnomer, which never rendered the judgment void. If the defendant does not choose to appear and plead matter in abatement, such matter is waived and cannot be assigned for error, if he has been actually served, and much less is a judgment by default against him, though by the wrong name, void. Wtlah v. Kirkpatrick, 30 Cal. 204; Ex parte Kellogg, 6 Vt. 509; Guinard \: Heyfinger, 15 111. 288; Hammond v. The People, 32 111. 446. On the ground that the statute was in derogation of the common law (as to which see 4, ante), the court held it must be strictly construed, and that the record in an action commenced not against the " Independent Tunnel Co.," but against the "Independent Co.," which was certainly a different name, and in which the summons was addressed to the Independent Tunnel Co., failed to show, in a collateral proceeding, a valid judgment against the Independent Tunnel Co. King v. Randlet, 33 Cal. 321.

(17.) The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

Adding parties. A plaintiff who moved on 19th April to add a party defendant, and stipulated on 13th May that the answer should be filed on that day as of 19th April, could not, it was held, be heard to say that the added party was not a party on the last-named day. Lawrence v. Ballou, 50 Cal. 263. An instance where a party should be added is a case where defendants and one Brodie had a claim to a mine, and the possession of land, each holding an equal share, also some sort of an agreement to explore and develop it. A subcontract was then entered into between defendants and plaintiff, by which plaintiff was to devote his skill, time and labor to the enterprise; and in consideration thereof, they were to furnish provisions and coals, and share their interests equally. Brodie had nothing to do with this sub-contract. The court held that if Brodie still had an interest, and an

account was to be taken, the association dissolved, and the interests severed as prayed for, Brodie was a necessary party, and might be added. If, however, the plaintiff was content with a judgment establishing his right, and for a conveyance of the interest to which he was entitled, the court saw no reason why he might not waive any relief which required the presence of other parties. Settembre v. Putnam, 30 Cal. 497. Landlord, admitting to defend in ejectment, 379. Adding or striking out the names of parties, 473.

409. (27.) In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only, shall a purchaser or incumbrance of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency' against parties designated by their real names. [Approved March 24; effect July 1, 1874.]

Attorney-General, information by. The court considered the attorney-general had power to file an information in the name of the people, and in the nature of a bill in chancery, to annul a patent of lands granted by the State, but the suit was dismissed on other grounds, and the court said the party in interest in such cases might maintain an action in his own name, and thereby could attain to the same end in effect that could be accomplished by a proceeding in the name of the people of the State, upon his relation; and that course better accorded with the system of procedure provided in the State. People v. Straton, 25 Cal. 246-252.

As to the use of the name of the people generally, 367 n., p. 123.

Cloud on title, action to remove, 738,1050, and notes.

Waiver of tort, and action on implied contract. Plaintiff may waive a tort, and sue on the implied contract created by the facts. Perhaps the better way of stating the proposition is, that plaintiff should allege the exact facts, and if they are such that an implied contract arises upon them, he is

entitled to introduce evidence accordingly. Frattv. Clark, 12 Cal. 90; Sheldon v. " Uncle Sam," 18 Cal. 526; Mills v. Barney, 22 Cal. 246.

If plaintiff is a tenant in common with persons other than defendant, and defendant tortiously enters and ousts him, he mav recover the whole premises as against defendant, and he is not precluded from doing so by the fact that the defendant has acquired by adverse possession the title of the other tenants in common. Chipman v. Hastings, 50 Cal. 310. Landlord against Tenant, see" Lessor and Lessee," infra. Tenants in common, etc., mav unite as plaintiffs, 381; also see "Demand. A complaint by an executor in ejectment is not necessarily defective because it fails to allege any title in the testator, as neither the legal title nor the right of possession may have been in him at his death, and yet both may have been afterwards acquired by the executor as such. Where a complaint in ejectment by an executrix, after setting forth the will, its probate and issuance of letters, averred that by virtue thereof, she, as executrix, possessed herself of the real estate of the testator, and that she ever since had been and was the owner, seised in fee of an estate of inheritance therein, both as such executrix and heir at law, and was entitled to the possession thereof, it was held a sufficient averment of seisin and right of possession in her capacity of executrix. Salmon v. Wilson, 41 Cal. 595. Where the husband sold the homestead to plaintiffs, who brought ejectment, and being defeated on the ground that it was " homestead," plaintiffs contended that they were entitled to the excess of the value of the premises over 85000, the amount exempted by homestead law, the court said if the plaintiffs had any rights they must establish them in a different action. They could take nothing by a suit in ejectment. Cook v. McChristian, 4 Cal. 27. The property must be described so as to enable the officer, upon execution, to identify it, 455. In ejectment it need only be alleged that the plaintiff is seised of the premises, or some estate therein, as, in fee, or for life, or for years, and that the defendant was in possession at the commencement of the action. The seisin is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyances from a paramount source of title, or by evidence of prior possession. It is the ultimate fact upon which the claim to recover depends, and it is facts of this character which must be alleged, and not the prior or probative facts which go to establish them. It is the ultimate facts, which could not be struck out of a pleading without leaving it insufficient, and not the evidence of those facts, which must be stated. The right of the possession follows as a conclusion of law from the

seisin, and need not be alleged. The possession of the defendant is of course a pleadable and issuable fact, and the only question of difficulty arises from the supposed necessity of negativing its possible rightful character. If the defendant's holding rests upon any existing right, he should be compelled to show it affirmatively, in defense. The right of possession accompanies the ownership; and from the allegation of the fact of ownership, which is the allegation of seisin in "ordinary language," the right of present possession is presumed. Payne «£, Dewey v. Treadwell, 16 Cal. 243; Haight v. Oreen, 19 Cal. 118; Salmon v. Xymonds, 24 Cal. 266; McCarthy \. Yale, 39 Cal. 586; Keller v. Suiz de Ocana, 48 Cal. 638. Aa to allegation that plaintiff is the "owner" being sufficient. Qarwood v. Hatting*, 38 Cal. 218.

If plaintiff attempt to set forth in his complaint a specific deraignment of his title, he must aver every fact that he could be required to prove. Where one of the links of his chain of title set out in the complaint is a will, the complaint must aver that the will has been admitted to probate. Castro v. Richardson, 18 Cal. 478. If he allege his title and fails to establish it, he must fail. Talbfrt v. Hopper, 42 Cal. 402. If he allege seisin generally as above suggested he may offer to prove a documentary title; and if he rail, may rely on prior possession. Morton v. Folger, 15 Cal. 283.

Where plaintiff relied upon the adverse possession of the demanded premises by himself and his grantor for the period of five years prior to the commencement of the suit, but only averred his ownership in fee and right to the possession of the land at the date of the commencement of the suit, it was held he might prove any facts which would entitle him to possession at that time. The averment that the plaintiffs grantor had been in possession for more than five years would have been superfluous. Gillespif. v. Jones, 47 Cal. 263. If plaintiff alleges that defendant is in possession he cannot say that defendant was not in possession, if defendant relies on adverse possession as a defense. Lawrence v. Ballou, 50 Cal. 258.

An allegation in a complaint that the plaintiff "assumed to and did exercise acts of control over and possession of portions " of a tract of land, is not equivalent to an averment that the plaintiff had actual possession of the tract of land or any part of it. Brennan v. Ford, 46 Cal. 8.

The possession to be shown in the defendant in an action of ejectment need not be actual, as contradistinguished 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.

LlbeL Extrinsic facts need not he 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 libel-ous 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 mav 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

existed or not, is simply a question of fact; and conceding their existence, whether or not they constitute probable cause is a question of law. Where the circumstances are admitted, or clearly proved bv uncontradicted testimony, it is the province of the court to determine the question of probable cause, and the court may order a nonsuit But if there be a conflict of testimony, or the credibility of witnesses is to be estimated, the canse must go to a jury. As the question of probable cause is a mixed question of both law and fact, it is error to submit to the jury to say whether there was probable cause. The jury have solely the right to decide, in cases of reasonable doubt, whether the alleged circumstances really existed. Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. 2 Oreenl, Ev., Sees. 453-7; 6 Barhour S. C. K. 86, and the authorities there cited. Where defendant laid his case fully before his counsel, and before instituting proceedings the counsel demanded the return of certain notes which were the foundation of the charge of fraud on which defendant prosecuted plaintiff, from the plaintiff, and neard from him the alleged ground upon which he refused to return them; and counsel being then in possession of all the material facts 01 the case, the arrest was made under his advice, and by his professional assistance, the court held that the question, whether the defendant acted bona fcle under the advice of his counsel, was a question to be determined by the jury in all cases where there was any legitimate evidence to show a want of good faith in following professional advice, but there being no such evidence in the case, there was probable cause. Potter v. Stale, 8 Cal. 220. An action for malicious prosecution will lie against several defendants; a conspiracy need not be averred. An action lies for a conspiracy unjustly to prosecute a person, but the gist of this action is the malicious prosecution; that of the other is the combining of two or more to do an unlawful and injurious act. In the first case, the cause of action is complete before an acquittal; in the other, the acquittal or termination of the prosecution is necessary to enable the plaintiff to maintain the suit. Drtux v. Domec, 18 Cal. 88. As to necessity for acquittal, see HilMng v. Hyde, 50 Cal. 206.

Mistake. A complaint claiming relief on the ground of mistake, must not only distinctly aver the fact of the mistake, but also set forth the circumstances under which it occurred, in so far as those

circumstances may be necessary to present a case within the rule of equity, upon which relief is granted. *Wirth v. Shafler*, 48 Cal. 276; see 1856, post.

Owners of steamers who purchased stamps from the defendant, as treasurer of the city and county of San Francisco, to be placed on passage tickets, were held not entitled to recover back the money on the ground that the act of 1857, as amended by the act of 1858, declared that such tickets should not be admitted in evidence in any court unless stamped as required; and hence that the tickets could not be sold without stamps. The influence exerted by these provisions of the statute did not constitute that kind of compulsion or coercion which the law recognizes as sufficient to render the payment in a legal sense involuntary. There was no compulsion or coercion on the part of the defendant. The stamps were by the law deposited with him to be sold to applicants. The compulsion or coercion which is sufficient in law to render a payment involuntary, must come from the party to whom or by whose direction the payment is made, and arise from the exercise of some power, possessed, or supposed to be possessed, by him, over the person or property of the party making the payment. Whether the provisions of the stamp act were constitutional or not, did not affect the question of plaintiffs' right to recover. If they were constitutional, there was no basis for the action; if unconstitutional, and plaintiffs were ignorant of this at the time, the case became one when a recovery was sought, because made under a mistake of law, a ground which could not avail (but see C. C. 1578, 1712, 1713); but if the plaintiffs knew the act to be unconstitutional, as they protested it was, then the case was only an attempt to recover an illegal demand, voluntarily paid, knowing it to be illegal at the time, and was not entitled to any consideration. Garrison v. Tilinghast, 18 Cal. 404; Brummagim v. Tillinghast, 18 Cal 270. The mere fact that a party made an unjust claim, and supported it by unjust practices, is not enough to authorize the interposition of equity. Terrill v. Groves, 18 Cal. 149. It was held, in Hayes v. ffogan, 5 Cal. 243; McMillan \. Pichards, 9 Cal. 417; Falkner v. Hunt, 16 Cal. 170, and Guy y. Washbum, 23 Cal 113, that if money which in not legally due is exacted by means of duress or coercion, it may, if paid under protest, be recovered back. The court said the purpose and effect of the protest had not been satisfactorily defined in any of these cases. In most of the cases the payment was made to a public officer; and the only purpose of the protest was to give the officer notice that the money was not legally due, and thus to enable the officer to pro-

tect himself. The officer was thereby put on inquiry; and if he found that the demand was illegal, he might protect himself by refusing to receive the money; or, if he found that it was of doubtful legality, he might take the proper steps to protect himself against responsibility. If the officer has notice of the matter which renders the demand illegal, another notice in the form of a protest is useless; but if he has no knowledge of such matter, he ought not to be subjected to the costs and consequences of an action to recover the money from him—and that, too, perhaps, after he has paid over the money in the usual course of official business—without notice from the party paying the money of the grounds upon which he claims, that the demand is not legally due. Whenever a protest is essential, it is therefore necessary to state the grounds upon which the party paying the money claims that the demand ia illegal. The statement of the precise amount which is claimed to be illegal, when a part of the demand is legal, is of but little moment, for that can be readily ascertained by the official to whom the money is paid, upon being informed of the ground, upon which payment would be refused, except for the coercion or duress. Sieth v. McClare, 49 Cal. 627.

Where the complaint charges that A., being indebted to plaintiff in a sum of money, it was agreed between A., plaintiff, and defendant, that A. should pay the same to defendant, who should pay the same to plaintiff on the request of plaintiff; that thereafter A. paid to defendant said sum, in gold coin of the United States, to and for the use and benefit of plaintiff; that defendant refused to pay the same to plaintiff upon said request duly made; an action to recover said sum in said coin is an action for money had and received, and therein defendant is not charged, nor, upon said facts, chargeable as a bailee. Wendt y. Ross, 33 Cal. 650.

Money paid. A surety who pays may maintain an action for contribution, against the other sureties, and the executor of a deceased surety. Dytsol v. Bruguiere, 50 CaL 456. Money paid by husband for wife. 370 n.

Multiplicity of actions. If a claim is founded upon one entire contract, where the breaches are not recurring, or upon one single or continuous tortuous act, it cannot be divided up into distinct demands, and made the subject of separate actions; and if this is attempted, a judgment in one action will be a conclusive bar to any other action, upon the principle that if a plaintiff bring an action for a part only of an entire and indivisible demand, the verdict and judgment in that action will be a

conclusive bar to any subsequent suit for another part of the same demand. fferriter v. Porter, 23 Cal. 387; Phillips v. Berit, 16 Johns. 136; Farrington v. Payne, 15 J. K. 432; Cunningham v. Harris, 5 CaL 81.

Mortgage, 726 n.

Recognizance. In an action upon a recognizance, the complaint must aver that the recognizance was filed in court, or that it became a matter of record. A recognizance is an obligation of record. Without record, there is no recognizance; and in an action on such obligation it should be alleged that the same was a record. Mendocino Co. v. Lamar, 30 Cal. 629; People v. Ihiygins, 10 Wend. 465; Bidye. v. Ford, 4 Mass. 641; Tarbell v. Oray, 4 Gray, 445.

Right, statutory, infringement of. See "Franchise," supra. In the cases of the creation of a power or duty by statute, the statute giving the power or casting the duty is alone looked to to determine the power given or duty cast, and has provided its own exclusive remedy for the execution of the power or the enforcement of the duty. The statute is complete in itself, giving a power or imposing a duty on its own terms; the remedy to be taken in connection with and as a part of the right. But this is a matter of legal inference from the statute, and this inference may be repelled by its express language or the general scope. State v. Poulterer, 16 Cal. 531.

Slander. Extrinsic facts need not be stated, 460.

In an action by a tenant in common against his co-tenant, who is in the sole possession of the premises, to recover a share of the profits of the estate, a complaint which avers a tenancy in common between the parties; the sole and exclusive possession of the premises by the defendant; the receipt by him of the rents, issues and profits thereof; a demand bv the plaintiff of an account of the same, and the payment of his share; the defendant's refusal; and that the rents, issues, and profits amount to $84,000—is insufficient to support the action.

In such complaint the court held there were no special circumstances alleged which withdrew the case from the ordinary remedies at law, and required the interposition of equity. They said the action was a common-law action of account; and, viewed in this light, the complaint was fatally defective in not averring that the defendant occupied the premises upon any agreement with the plain-

tiff as receiver or bailiff of his share of the rents and profits; that it was essential to a recovery that this circumstance should exist, and equally essential to the complaint that it be alleged; that at common law one tenant in common had no remedy against the other who exclusively occupied the premises, and received the entire profits, unless he was ousted of possession, when ejectment might be brought, or unless the other was acting as bailiff of his interest by agreement, when the action of account would lie. The occupation by him, so long as he did not exclude his co- tenant, was but the exercise of a legal right. His cultivation and improvements were made at his own risk; if they resulted in loss, he could not call upon his co-tenant for contribution; and if they produced a profit his co- tenant was not entitled to a share of them. The co-tenant could at any moment enter into equal enjoyment of his possession; his neglect to do so might be regarded as an assent to the sole occupation of the other. There was no equity in the claim asserted by the tenant to snare in the profits resulting from the labor and money of his co-tenant, when he had expended neither and had never claimed possession, and never been liable for contribution in cases of loss. There would be no equity in giving to a tenant who would neither work himself nor subject himself to any expenditures or risks, a share in the fruits of another's labor, investments and risks. The statute of 4 and 5 Anne, 16, gave a right of action to one joint tenant in common against the other as bailiff, who received more than his proportional share of the profits; at common law the bailiff was answerable, not only for his actual receipts, but for what he might have made from the property without willful neglect: Co. Litt. 172 a; Willis, 210; but it was never adopted in this State, nor have we any similar statute. Pico v. Columbet, 12 Cal. 414. Where plaintiff was employed by special agreement as the agent of defendant and others, to render services in respect to land, the fact that he was himself an owner in the tract did not prevent his enforcing his claim for compensation under his agreement. Thompson v. Salmon, 18 Cal. 634.

If several persons are the owners, as tenants in common, of a mining claim, and one of them is also a tenant in common with several other persons in the ownership of an adjoining claim, and the first-named owners lease their claim to the second-named owners, to be mined for a given term, and the one of the lessees who is a tenant in common in both claims, and superintendent of the lessees' claim, after the term of the lease has expired, as superintendent of the lessees and a member of their

company, sells the tailings of the claim leased, and accounts to the lessees for the proceeds, the other lessors cannot maintain an action against him as a tenant in common in their company for their proportion of the proceeds. Clark v. Jones, 49 Cal. 618. Demand, when necessary, supra; Partners, supra; Replevin, supra.

Trust, enforcement of A complaint averring that defendant agreed to buy in, as agent of plaintiff, plaintiff's property, about to be sold under process, and pay for it and allow plaintiff to redeem it, and that defendant purchased the property, and in violation of his agreement and of the trust had sold the property, and that plaintiff had sustained damages, etc., was held a good complaint in equity. Wingate v. Ferris, 50 Cal. 107.

Use and occupation. No action for use and occupation will lie when possession has been adverse and tortious, for such excludes the idea of a contract, which in all cases of this action must be express or implied. The Supreme Court said this was undoubtedly the correct as well as the general rule, and was fully supported by the case of Birch v. Wright, I Term Rep.; Durnford and East, 378; Smith v. Stewart, 6 Johns. Rep. 46; Wharton v. Fitzgerald, 3 Dal I., and innumerable cases cited by these authorities. See Sampson v. Shaeffer, 3 Cal. 201, 203; followed, O'Connor v. Corbett, 3 Cal. 373.

If a lease or agreement is invalid under 1973, subd. 5, post, Stat. of Frauds, it would seem that if the tenant has been in possession, plaintiff may recover for use and occupation. folsom v. .Pen-in, 2 Cal. 603.

Verification of pleadings, 446.

Averments necessary to sustain claim. If damages are claimed, the fact that they have been sustained must be alleged, or plaintiff will not be entitled to any judgment for damages: BohaU v. Ditter, 41 Cal. 535; and it must be borne in mind, that, if there is no answer, the relief granted to plaintiff cannot exceed that claimed in the complaint. 580, post. Where plaintiffs laid their damages at $1000, and judgment was rendered in their favor for $1500, it was reversed on appeal; and though by 580, post, if an answer is put in, the court may grant any relief consistent with the case made by the complaint, the relief must be embraced within the.issue, as specified in that section, and the court cannot render a judgment, to base which the averments in the complaint are not sufficient.

Sterling v. Hanson, 1 Cal. 479. Justice requires that parties should be confined to that to which they are entitled within their pleadings. Benedict v. Bray, 2 Cal. 256. Where the judgment was for a larger sum than was claimed at the commencement of the action, but the complaint was amended by leave of the District Court, before the commencement of the trial, and the amount claimed by the amended complaint was in excess of the sum for which judgment was given, it was held that the judgment was good. Tally v. Harlot, 35 Cal 306.

There is no rule of pleading which requires a party to aver the precise amount he claims; but he may recover an amount less than that which is stated in the complaint. Meek v. McClure, 49 Cal. 627. If the complaint contains two independent counts, each complete within itself, and concluding with its own appropriate prayer for relief and separately signed by counsel, the prayer to the second count wifl not be deemed to have any reference to the first; and on a verdict on the first count only the relief granted will follow the prayer of that count. N. C. A S. C. Coy v. KM, 37 Cal. 283. The amount of the damages sustained should also be alleged, for if the allegation is not denied by the answer no issue is raised upon it. McLaughlin v. Kelly, 22 CaL 221. From this decision it would seem that in such a case the jury do not assess the damages, for there is no issue on that point; but it was said in Patterson v. Ely, 19 Cal. 28, that the allegation being deemed admitted was conclusive evidence of the extent of the damages, and authorized the jury to assess them to the extent claimed. See also 437 n., post.

Kinds of relief, etc. As a general rule compensation is the relief or remedy provided by the law of this State for the violation of private rights and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in C. C., Div. IV, Part I (t. e., C. C. 3274-3423, for which sections see infra). C. C. 3274.

Forfeiture. Whenever by the terms of an obligation a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty. C. C. 3275 Damages, persons suffering detriment may recover reasonable. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages. C. C.

3281. Damages must, in all cases, be reasonable; and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered. C. C. 3359.

Damages on revoking submission, 1290. Damages are exclusive of exemplary damages and interest, except where those are expressly mentioned. C. C. 3357. No person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on Exemplary Damages and Penal Damages, and in U. C., sections 3319, 3339 and 3340. C. G. 3358.

The Supreme Court approved the rule stated by Mr. Justice Wilde, in Wooster v. Proprietors of Canal Bridge, 16 Pick. 547: " In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury and not the opinion of the court is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case." Boyce v. California Stage Co., 25 Cal. 473. As to new trial for excessive damages, etc., 657, and notes. The fact that the plaintiffs claim damages beyond the just measure of their right, is not a ground for reversing the judgment. If plaintiffs at the trial offer testimony to prove damages which they had no right to claim, defendant can object to its introduction. Aitleen v. Mendenhall, 25 Cal. 213. As by Pol. C. 3274 in judgments and executions the amount thereof must be stated as near as may be, in dollars and cents, rejecting fractions, it is no doubt proper to apply the same rule to the claim for damages in the complaint.

Nominal damages. When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages. C. C. 3360.

In actions for a breach of a contract, nominal damages are presumed to follow as a conclusion of law, from proof of the breach. Browner \. Davis, 15 Cal. 11. Also from a trespass. Attwood v. Fricott, 17 Cal. 43.

Special damages. Inasmuch as the object of the rules of pleading is, to have the pleading so framed as to apprise the parties of the facts to be proved by them: Piercy v. Sabin, 10 CaL 28; the rule laid down in Cole v. Swan- ttoa, 1 Cal. 54; Stevenson v. Smith, 28 Cal. 102; Gay v. Winter, 34 Cal.

153; Lewiston, etc., Co. v. tiltasta, etc., Co., 41 Cal. 565, and Potter v. Froment, 47 Cal. 165, that where the damages are special (that is, such as do not necessarily arise or are not implied by law), the facts out of which such special damages arise must be averred, must be adhered to. In an action against a carrier of passengers for damages for detention of a passenger, an instruction to the jury that, " It being shown in evidence that the plaintiff was a good bookkeeper, and his servant an able-bodied man, the measure of damages would be the wages at the then rate in San Francisco, of a good bookkeeper and able-bodied workingman, during the period of detention of the plaintiff and his servant at New Orleans and Panama," was held to depend on too many contingencies (probability of plaintiffs procuring employment immediately on his arrival, and of such employment being continued, etc.) to admit of its being applied as an absolute and fixed criterion by which the damages could be measured, range v. P. M. S. 6'. Co., 1 Cal. 354. Where an award showed that the arbitrator had based his calculation of damages for breach of covenants of a lease on the fact that the product of twenty acres of land was worth $9000, from which he inferred that the product of two hundred acres would have been worth $96,000, it was held that the damages thus estimated were too remote and speculative, and involved too many contingencies. Muldrow v. Norrii, 2 Cal. 78, citing Sedgwick, p. 98; and Yonge v. P. M. S. S. Co., supra.

In an action against surgeons for negligence, per quod amputation became necessary, where there was no allegation as to bodily pain, suffering, etc., it was held that the court erred in directing the jury that if they believed that the defendants were guilty of negligence, etc., by which plaintiff was caused great bodily pain and suffering, the plaintiff was entitled to a verdict. The court said the defendants were not sued for causing bodily pain and suffering by their negligence or carelessness; they were sued for alleged malpractice, by which amputation became necessary. Moor v. Teed, 3 Cal. 190.

In an action for slander of a person as a clerk or tradesman, it is unnecessary to allege special damage. Butler v. Howes, 1 Cal. 89. Plaintiff sued for the balance of the agreed price of a steam engine. By the contract the engine was to be delivered by 5th April, under a penalty of $20 for every day's delay. The engine was not delivered until the 6th May. Defendants claimed damage for loss of time, services, and wages of employed at defendant's mill, and the profits which defendants would have

realized during the delay. The referee omitted to find damages for any of these, considering them too remote. But the court held that the loss of time, value of services, and wages of employee's, caused by the failure of the respondents to perform their contract, were damages by no means remote, but, on the contrary, strictly proximate and immediate, and they ought to have been considered and allowed. Kenyan v. Goodall, 3 Cal. 259.

Where a plaintiff sued in respect to the destruction by the defendants of a book of plaintiff's, and offered to prove that the book contained the names of subscribers to his newspaper, and that it cost him two dollars to obtain each subscriber, and the evidence was excluded, the Supreme Court held that the plaintiff was entitled to recover the value of his subscription book, but not the amount that the subscriptions cost him, for that he had not alleged in his complaint that he sustained, by the destruction of the book, any special damage. Nimian v. City <k Co. of S. F., 38 Cal. 690. But if the plaintiff mistake his measure of damages, his allegations are surplusage; and if a cause of action and general damages are alleged, this is sufficient on demurrer. Barber v. Cazalis, 30 Cal. 97.

General damages are the immediate and necessary loss caused by defendant's act. Special damages comprise the loss which follows as its natural and proximate consequence beyond its necessary and immediate effect; and special damages must come within this latter definition, or they will be too remote.

Where a master suffers a loss of profits in his business, owing to his servant's breach of his contract to faithfully serve, the master may recover from the servant for the loss of profits involved in the diminution of business caused hy the servant's neglect. Loss of profits as an element of damage is usually too remote, hut not in such a case as this. It is the natural and first effect of the neglect alleged. Stoddard v. Treadwell, 26 Cal. 307; Sedgicick on Dam. 72; Ma«terton\. Mayor of Brooklyn, 7 Hill, 62; Laurence v. Wardwell, 6 Barb. S. C. 423; Bracket v. McNair, 14 Johns. 170; Sedg. 337-338.

Detriment, definition of Detriment is a loss or harm suffered in person or property. C. C. 3282.

Prospective damages. Damages may he awarded in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future. C. C. 3283. In an action for waste pending an action of forcible entry and detainer, the Supreme Court held the rule to be that the

proof of damages might extend to all matters up to verdict, which were the natural result of the previous injury. Hicks v. Herring, 17 Cal. 569. But prospective damages can be allowed only when it appears that the party will be subjected to the particular loss or injury for which he demands compensation. De Costa v. Mass. M. Co., 17 CaL 613.

Peculiar value, property ot Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer. C. C. 3355.

Writing, value of. For the purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles its owner. C. C. 3356. Where a check had been lost and paid by a banker upon a forged indorsement, it was held that upon a suit for the same, after a refusal by the banker to deliver the check to the owner, in the absence of rebutting evidence, the measure of damages was the full value of the amount for which it was drawn. Survey v. Wells, Fargo «fc Co., 5 Cal. 125.

Interest in actions not ex contract!!. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury. O. C. 3288.

Where the jury rendered a verdict for the value of the property, with "legal interest" thereon from the time of the seizure by the sheriff to the date of the verdict, and damages in the sum of $50, the court said that section 200 of the Practice Act, which was in force when the action was brought, authorized the recovery of damages for the detention of personal property. But a party was not entitled to a gross sum for such damages, and to interest upon the value of the property from the time it was taken. Interest in such case was given for damages; and if allowed in addition to a gross sum for damages, it would amount to double damages. Freeborn v. Norcross, 49 CaL 314. If the plaintiff in replevin takes possession of the property when the suit is commenced, and the jury, on the trial, find for the defendant, and assess the value of the property at a time subsequent to the taking, they cannot add to this value interest from the time of the taking, up to about the time the value was assessed. Atherton v. Fowler, 46 Cal. 323.

Exemplary Damages. In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and bv way of punishing the defendant. C. C. §294. For wrongful injuries to animals being subjects of property, committed willfully or by gross negligence, in disregard of humanity, exemplars- damages may be given. C, C. 3340. It was held that exemplary damages might be given for a wanton, malicious, and unprovoked assault upon the person, in Wade. v. Thayer, 40 Cal. 585. But in an action for taking plaintiff's goods in a former action, the judgment under which they were seized being invalid, the court held that the fact of the invalidity of the judgment was not sufficient to warrant the conclusion that the seizure was malicious, the defendants acted in the matter under the advice of counsel, and there was no reason for supposing that they cither knew or suspected that the judgment was invalid. The seizure was undoubtedly a hardship upon the plaintiff, but the court below acted properly in refusing to allow exemplar)' damages. Selden v. Caghman, 20 Cal. 67. Where in an action on a contract for conveyance of a passenger, the carrier was guilty of acts of willful oppression, the court said it would be a reproach to the law if nothing could be recovered but the mere pecuniary loss resulting from the breach of contract. Janet v. "Cortes," 17 Cal. 495. If the proprietor of a stage-coach should wantonly and maliciously overturn it, with the intent to kill or inflict bodily injury upon a passenger, in an action by the passenger the jury might give punitive damages. In like manner, if a family picture, having no appreciable market value, be delivered to a common carrier to be transported for hire, and if he wantonly destroy it, the damages would not be confined to the mere money value of the picture. But though the principal is liable for the actual damage caused by the act of his agent done in the usual course of his employment, he is not responsible for wanton and malicious damage done by the agent without the consent, approval, or subsequent ratification of the principal. Turner v. The N. B. & N. R. K. Co., 34 Cal. 594; Mendelsohn v. Anaheim Lighter Co., 40 Cal. 661.

In an action for breaking and entering the plaintiff's rooms, and injuring and destroying his property, the jury were instructed that,

in awarding exemplary damages, they might take into consideration the expenses which the plaintiff had incurred about the business in and about the litigation; that the amount had not been proved, but

that their knowledge of such matters would enable them to arrive at something like a just calculation as to what should be allowed as counsel fees, legal expenses, and other expenses. It was held that the instruction was erroneous. Falk v. Waterman, 49 Cal. 225.

An officer acting in the discharge of his official duties, is no less responsible for the consequences of a malicious act than a private person, and the effect of a different rule would be to turn loose upon every community a set of licensed wrongdoers. San Joaquin v. Jones, 18 Cal. 327; see, also, "Carriers, damages for omitting to curry," infra.

Torts, damages for. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. C. C. 3333; see "Exemplary Damages," ante. Where a part-owner sues ex dtlieto, and the objection of defect of parties is not get up in the answer, the damages should be apportioned at the trial. Whitney v. Stark, 8 Cal. 514. In an action by a reversioner for injury done to the freehold, the duration of the term of the tenant in possession is material in evidence as affecting the measure of damages. Uttendorffer v. Saegerg, 50 Cal. 496. In an action for nuisance, by obstructing a street opposite plaintiff's residence, defendant is liable only for damages actually sustained prior to the commencement of the action. . Hopkins v. W. P. R. R. Co., 50 Cal. 191.

If a person having a good cause of action against another, willfully sue for a much greater amount than is due, and attach the property of the other, and put him to charges, he is liable. The jury are not confined to the actual pecuniary loss sustained by the plaintiff, but may take into consideration the character and position of the parties, and all the circumstances attending the transaction. In such a case the court would not disturb a verdict, unless it clearly appeared that injustice has been done. Weaver v. Pagt, 6 Cal. 685; 16 Pick. 453. In an action for personal torts, the law does not fix any precise rule of damages, but leaves their assessment to the unbiased judgment of the jury. Wheaton v. N. B. Jc M. JR. R. Co., 36 Cal. 590.

In cases of simple negligence, the rule governing the measure of damages is to allow the . actual damages. The allowance of "smart money" in such cases is improper. Moody v. McDonald, 4 CaL 297. Proximate, or immediate and direct damages, are the ordinary and natural results of the negli-

gence. Therefore a spreading of a fire from one field to another is, in our dry season, the natural, direct, and proximate consequence of a firing by sparks from a locomotive. Henry v. 8. P. B. S., 50 Cal. 183.

In an action for trespass, where plaintiff complained of the destruction of his fences, and trampling of grain, etc., it was held that plaintiff could not recover for injury to the grain by cattle of others. Berry v. S. F. <fc N. P. R. R. Co., 50 Cal. 437.

Libel or slander, damages on. In actions for libel or slander, defendant may justify and allege mitigating circumstances, and whether he prove justification or not he may give in evidence the mitigating circumstances, 461.

Mesne profits. The detriment caused by the wrongful occupation of real property, in cases not embraced in sections 3335, 3344 and 3345 of this Code (C. C.), or section 1174 of the Code of Civil Procedure, is deemed to be the value of the use of the property for the time of such occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession. C. C. 3334.

Ejectment, damages on, 427 and notes. Where plaintiff's right terminates during pendency of action, plaintiff may recover damages for withholding the property, 740. Defendant may set off value of improvements where made' under color of title, 741. Damages can never be recovered in the action of ejectment for use and occupation anterior to the existence of the plaintiff's right of possession. Clark v. Boyreau, 14 Cal. 637. Where the plaintiff, at the time the action was brought, was himself in possession of 180 acres, parcel of the 500 acres demanded, and the possession continued in him thereafter to the day of the trial, and defendants in their answers denied the plaintiff's title to the whole or tiny part of the 500 acres, it was held that plaintiff could not recover damages for the use of the land of which the defendants had never dispossessed him. Ellis v. Jeans, 26 Cal. 278.

In an action to recover lands, the plaintiff can recover the rents and profits only for the period prior to the commencement of the action allowed by the Statute of Limitations, if the defendant pleads the statute. A party ousted by his co-tenant can recover the dam- aces resulting from such ouster, as well as when ousted by a stranger. His injury is no less because it was done by a co-tenant. Carpentier v. Mitchell, 29 Cal. 330; Ad. on £jert., Waterman'scd.449; Ooodtitley. Tombs, 3 Wilson, 118;

Lanyendyck v. Burhans, 11 John. 461; Campy, ffometley, 11 Ircdell, 212; Hare v. Fury, 3 Yeates, 13.

Holding over real property, damages for. For willfully holding over real property, by a person who" entered upon the same, as guardian or trustee for an infant, or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination, the measure of the damages is the value of the profits received during such holding over. C. C. 3335; see "Penal Damages," infra.

Conversion of goods, damages for. The detriment caused by the wrongful conversion of personal property is presumed to be: 1. The value of the property at the time of the conversion, with the interest from that time; and 2. A fair compensation for the time and money properlv expended in pursuit of the property. C. 6. 3336.

If plaintiff docs not exercise his option, damages may be awarded under either rule. Barraide v. Garrall, 60 Cal. 115.

The presumption declared by the last section cannot be repelled in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his con- Bent. C. C. 3337. Where, in an action to recover possession of personal property, the person making any affidavit did not truly state the value, and the officer or his sureties are sued for taking the same, they may set up the true value of the same in their answer. 473, post. Where the property is delivered and accepted pending the suit, that is, before verdict, the damages should be merely nominal; but where the goods are only delivered after verdict, it must be presumed that the delivery was in pursuance of the verdict which had already determined the rights of the parties. A referee found as part or damages the difference in value of certain iron at the time of detention and delivery, and judgment was entered on the report. The Supreme Court held that there*was no

principle of law which recognized such a measure of damages. The most liberal rule would allow the highest value of the goods at any time between the conversion and the judgment, and interest thereupon. But that where the plaintiff accepts the goods, he makes his election to take the goods in lieu of their value, and the only damage he can recover is the interest upon their highest value, ex-

cept in cases where some special damage is specifically averred in the complaint. C'cmroy 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 plaintiffs goods under attachment, without any improper motive. Nightingale v. fieanndl, 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 relv 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

cannot complain. Antoine Co. v. Ridge Co., 23 Cal. 221. In such a case, the right of plaintiffs to recover damages which they have actually sustained is not affected by the fact that the trespass was not willful in its character. The true measure of damages is the value of the gold-bearing earth at the time it is separated from the surrounding soil, and becomes a chattel In estimating the damages, the expense of separating the earth from the gold after it is moved to the place of washing, is to be deducted from the value of the gold. Unless a demand is made for the posseasioii of the gold after it is separated from the earth, and an action is then brought for the conversion of the chattel, the measure of damages would be the value of the gold detained. Maye v. Tappan, 23 Cal. 306. The measure of damages depends, in some instances, on the way in which plaintiff puts his case. Thus, where defendant broke down and removed plaintiff's fence, the court held that if plaintiff had sued for the damage to the freehold, he might have recovered the value of the fence as it stood, if it was a part of the realty. But having elected to sue in replevin for the materials as personal property, he could only recover their value as such. Pennybecker v. 'McDougal, 48 Cal 164. One having a mere lien on personal property, cannot recover greater damages for its conversion from one having a right thereto superior to his, after his lieu is discharged, than the amount secured by the lien, and the compensation allowed by section 3336 for loss of time and expenses. C. C. 3338. It was said that in an action by the pledgee against a stranger for the conversion of goods, the plaintiff is entitled to recover the full value of the goods, because he is answerable over to the pledgor for the surplus. But if the goods be converted by the owner or by any one acting in privity with him, the pledgee can recover only the value of his special interest in the pledge. Treadmtl v. Davig, 34 Cal. 606; Story on Bail, sec. 352; Lyle v. Barker, 5 Bin. 457; Heydan tt Smith's Case, 3 Coke, 7; fngergoll v. Van Bokktkn, 7 Cow. 670; Pomeroy v. Smith, 17Pick. 85

Penal damages. Waste by guardians, tenants for life or years, joint tenants, or tenants in common, 731, post. Wasting or embezzling estate of deceased, 1458-1460. Executor fraudulently selling real property, 1572. In an action for waste, upon the authority of the rule laid down in Bacon's Abridgment, that " where treble damages are given by a statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute, or conclude to the damage of the plaintiff against the form of a statute:" Rees v. Enteric, 6 S. and R. 288; jfetccomb v. Butterfield,

8 Johns. 342; Livingston v. Plainer, 1 Cow. 175; Benton v. Dale, Id. 160; the Supreme Court held that where treble damages were not claimed, judgment should have been entered in favor of the plaintiff for single damages only, and reversed a judgment for treble damages. Chipman v. Emeric, 5 Cal. 239. This decision never seems to have been overruled; but as to forcible entry and detainer cases, the rule is otherwise; see 1174, and notes. Forcible or unlawful entry upon, or detention of any building or cultivated real property, 735; see also as to forcible entry, or forcible or unlawful detainer, 1174. If any tenant give notice of his intention to quit the premises, and does not deliver up the possession at the time specified in the notice, he must pay to the landlord treble rent during the time he continues in possession after such notice. C. C. 3344. If any tenant, or any person in collusion with the tenant, holds over any lands or tenements after demand made and one month's notice, in writing given, requiring the possession thereof, such person holding over must pay to the landlord treble rent during the time he continues in possession after such notice. C. C. 3345.

For wrongful injuries to timber, trees, or underwood, upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which case the damages are a sum equal to the actual detriment. C. C. 3346. For cutting down or carrying off wood, underwood, trees, or timber, or girdling or otherwise injuring trees or timber, or on the street or highway in front of any person's house, village or city lot or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, 733; see note "Waste," supra. The wording of 733 more resembles the wording of 735, 1174, the sections as to forcible entry, etc., than that as to waste, 732.

The measure of damages for cutting trees, etc., is not the actual value of the trees for firewood, but the damage done to the land by reason of destroying them. This damage should be estimated by all the circumstances and the purposes for which the trees are used or designed, and not according to the speculative or fancied ideas that the jury or plaintiff may draw of their worth. Chipman v. Hibbtrd, 6 Cal. 162.

SPECIFIC AND PREVENTIVE RELIEF.

Specific or preventive relief may be given in cases specified in this title («'. e., C. C. 3366- 3423) and, in no others. C. C. 3366.

Specific relief is given: 1. By taking possession of a thing, and delivering it to a claimant; 2. By compelling a party himself to do that which ought to be done; or 3. By declaring and determining the rights of parties, otherwise than by an award of damages. C. C. 3367. Preventive relief is given by prohibiting a party from doing that which ought not to be done. C. C. 3368. Preventive relief, see 526 and notes. Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case. C. C. 3369.

Possession of real property. A person entitled to specific real property, by reason either of a perfected title, or of a claim to title which ought to be perfected, may recover the same in the manner prescribed by the Code Of Civil Procedure, either by a judgment for its possession, to be executed by the sheriff, or by a judgment requiring the other party to perfect the title and to deliver possession of the property. C. C. 3375; and see below C. C. 3387.

Possession of personal property. A person entitled to the immediate possession of specific personal property may recover the same in the manner provided by the Code of Civil Procedure (509, post). C. C. 3379; and see below C. C. 3387. Any person having the possession or control of a particular article of personal property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession. C. C. 3380; and see below C. C. 3387.

Obligations, specific performance of. Except as otherwise provided in this article (C. C., Sees. 3384-3395) the specific performance of an obligation may be compelled. C. C. 3384. A court of equity is always chary of its power to decree specific performance, and will withhold the exercise of its jurisdiction in that respect, unless there is such a degree of certainty in the terms of the contract as will enable it at one view to do complete equity. Morrison v. Rossignol, 5 Cal. 64. The jurisdiction of a court of equity to decree specific performance does not turn at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of can be adequately compensated in damages; accordingly, while it is a general rule that contracts for the sale and transfer of personal property will not be specifically enforced, yet if there are circumstances in view of which a judgment for damages would fall short of

the redress which the plaintiff's situation demands, as that the thing bargained for is a curiosity, or that by non-performance he will be greatly embarrassed and impeded in his business plans, or involved in a loss of profits which a jury cannot estimate with any degree of certainty, equity will decree specific performance. Nickerson v. Challerton, 7 Cal. 572; Dufv. Fisher, 15 Cal. 375; Treasurer v. Comrn. C, M. Co., 22 Id. 390; McLaughlin v. Piatti, 27 Id. 451; Senter v. Davis, 38 Cal. 453.

Real property, claims to recover with damages, etc. A claim for the possession of real property, with damages for its detention, cannot be joined in the same complaint with a claim for consequential damages arising from a change of a road by which a tavern-keeper may have been injured in his business. The damages in the one case arise out of the use of land claimed by the plaintiffs; the damages in the other case arise from an unauthorized diversion of a public road, by means of which the plaintiff suffered a loss of his usual business and profits. Bowles v. Sacramento Turnpike Road, 5 Cal. 225. One action may be brought to recover two separate or distinct pieces or parcels of land. Soles v. Cohen, 15 CaL 152. As to alleging the damages, an allegation of the value of the "use and occupation, rents and profits," of the premises for the period during which the defendants were in the wrongful possession and excluded the plaintiffs, was held sufficient to charge the defendants without any averment that they received such rents and profits. The whole averment was held to be in effect only that the value of the use of the premises, whilst the plaintiffs were excluded from their enjoyment, was the amount stated, which was a very proper averment as the basis of the damages claimed for the wrongful detention of the property .^Patterson v. Ely, 19 Cal. 40.

Trustees, claims against. A claim to enforce an express or implied trust may be joined in a complaint with a claim to enforce a vendor's lien, existing without any written contract. Both such claims are founded on trusts—one lying in contract, and the other arising by act and operation of law. Burt v. Wilson, 28 Cal. 632-639.

Injuries to person. Mayo filed his complaint, praying for the recovery of possession of land in the city of S., and damages for the detention of the land, and for forcible eviction and expulsion from it, and for the value of improvements erected upon it by him. The Supreme Court sustained a demurrer

to the complaint because a cause of action for an injury to property was improperly joined with one for an injury to person. Mayo v. Madden, 4 Cal 27.

Injuries to property. Plaintiff filed her complaint in the court below for trespass against defendant, and prayed a verdict for $500, the alleged value of property destroyed, and $500 damages. On demurrer the court held the complaint unobjectionable. Tendesen v. Marshall, 3 Cal. 440.

In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam, and the consequent washing away of the pay- dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. Fraler v. Sears Union W. Co., 12 Cal. 555.

Intervention, 387, Defenses must be separately stated, 441

In an ejectment suit it was held that the defendant need only answer the very concise allegations material to constitute a sufficient complaint in ejectment, as to which see 426, n., and that other and immaterial allegations inserted in the complaint, whether controverted or not by the answer, went for nothing. Doyle v. Franklin, 48 Cal. 539.

Conclusions of law should not be denied. If the answer merely denies the conclusions of law resulting from the facts averred in the complaint, it is insufficient to raise an issue and the facts are deemed admitted. Nelson v. Murray, 23 Cal. 338; Wormouth v. Hatch, 33 CaL 128; Lightner v. Menzel, 35 CaL 452. Thus a denial of indebtedness without a denial of any of the facts from which that indebtedness follows, as a conclusion of law raises no issue. Curtis v. Richards, 9 Cal. 38; Kinney v. Osborne, 14 Cal. 112. The Supreme Court have gone so far as to hold that even where the complaint is in mdebitatus assumpsit (which complaints they hold to be good, 426, n.; thus recognizing that indebtedness is a fact), a denial of the indebtedness is not sufficient, being a denial of a conclusion of law, and not of a fact. Wells v. McPike, 21 Cal. 215. Several other cases have been thought to be authorities for this proposition, but erroneously. For instance, Caulfield v. Sanders, 17 Cal.571; and JJiijgiat v. Wortett, 18 Cal. 330. In both these cases an answer denying indebtedness was held bad; but in the former, because the denial was as to time, amount and work, conjunctively in the very words of the complaint; in the hitter (on which indeed the decision in Wells v. McPike is expressly founded), on the ground that the denial merely denied an indebtedness in the amount

claimed. The indebitatus counts, alleging that defendant was, at the commencement of the action, indebted to plaintiff for, etc., are not really statements of facts under 426, but of conclusions of law, and ought never to have been allowed; but if for the purpose of supporting the complaint, indebtedness is held to be a fact, a denial of the indebtedness is a denial of that very fact. There is no escape from this. An averment in an answer that the plaintiffs debt is barred by a discharge in insolvency, is only a conclusion of law, and not the statement of a fact. Christy v. Dana, 42 Cal. 174.

Information and belief. A denial as follows: "And on information and belief he avers that no such deed or deeds were ever executed," was held to put the existence of the deeds in issue. Thompson v. Lynch, 29 Cal. 191.

Under a former statute, as under the Code, defendant was allowed to answer by denying "according to his information and belief." The court held that the rule was to require an answer to a verified complaint to be in a positive form in order to put in issue a material allegation of the complaint, provided the defendant was presumed to possess a knowledge respecting the fact alleged; but if he was not able to answer positively, in such a case he must by a proper statement of facts or circumstances overcome the presumption of knowledge on his part, which being done his answer on information and belief would be deemed all that the law required: Brown y. Scott, 25 Cal. 194; Humphreys v. McCaU, 9 Cal. 59; Vassault v. Austin, 32 Cal. 606; but they held that it did not follow that because the allegation in a complaint was that one B. obtained a judgment against defendant, the latter must be presumed to know whether such allegation was true or not, for judgment was sometimes obtained without any knowledge of defendant respecting it. If the defendant did not know that such a judgment had been obtained or the contrary, it was their duty to make the necessary inquiries, that they might be able to determine whether they could deny in any form the existence of the judgment described in the complaint, or whether they must admit it either in terms or by implication from their silence. The natural course to be pursued in such a case would be either to calf upon the custodian of the records of the court in which it was alleged the judgment was recovered and inquire of him if there was such a judgment, or to employ some person more learned or competent than themselves to make the proper inquiries; and whether they might be informed by the one or the other of such persons of the truth of the matter might make no particular difference.

Being informed that there was no such judgment, and believing the information, they might, predicating their respective answers upon such information and belief, deny that any such judgment was recovered. Vassaull v. Austin, 32 Cal. 606. Denials " upon his information and belief," instead of the statutory language "according to his information and belief, are sufficient. Rowsin v. Steimrt, 33 Cal. 211; Jones v. Petaluma, 36 Cal. 230; Kir- tteinv. Madden, 38 Cal. 163. Under the former law a statement that defendant had no information or belief was held bad as a denial: Ord v. " Uncle .Sam," 13 Cal. 369; and this was so even in the case of a municipal corporation, for the court said it could be informed and believed through its officers. S. F. Gas Co. v. S. P., 9 Cal. 453.

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13 Cal. 369; and this was so even in the case of a municipal corporation, for the court said it could be informed and believed through its officers. S. F. Gas Co. v. S. P., 9 Cal. 453.

In a suit on a note, an answer admitting the making of the note, but denying, "to the best of defendant's knowledge, information and belief, all and singular the other allegations in said complaint," was held not to be a specific denial of the allegations of the complaint. Stewart v. Street, la Cal. 372. A denial of an act being done "unlawfully" or "wrongfully" does not deny the act, but only the character of it. Larney v. Mooney, 50 Cal. 610; Burke.v. Table M. Co., 12 Cal. 407; Busenius v. Coffee, 14 Cal. 92; Wood-worth v. Knowlton, 22 Cal. 168; Wood v. Richardson, 35 Cal. 149; Feeley y. Shirley, 43 CaL 369.

If several material facts are stated conjunctively in a verified complaint, an answer which undertakes to deny these averments as a whole, conjunctively stated, is evasive, and an admission of the allegation thus attempted to be denied. The rules of pleading, under our system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn complaint, in substance and in spirit, and not merely a denial of its literal tnitn; and whenever the defendant fails to make such denial, he admits the averment. Doll v. Good, 38 Cal. 287; Smith v. Biehmond, 15 Cal. 501; Blankman v. Vallejo, Id. 638; Castro v. Wetmore, 16 Id. 380; ffiggins v. Wor- te.ll, 18 Id. 333; Woodworth v. Knowlton, 22 Id. 169; Landers v. Bolton, 26 Id. 417; MorriU v. Morrill, Id. 292; Camden v. Mullen, 29 Id. 564; Blood v. Light, 31 Id. 115.

The following instances will serve to explain this: A complaint alleged that on a certain day the plaintiff was the owner and in possession of certain personal property, of the value of $1000; and that the defendant on the same day seized upon and converted it to his own use. The answer denied that on the day specified the plaintiff was the owner, and lawfully in possession of the property; the court said the denial was open to various objections. It raised an immaterial issue as to time; and, in reference to the possession, amounted simply to a conclusion of law. There was not even the pretense of an issue npon this allegation, except conjunctively, with the allegation of ownership. Each of these allegations was sufficient to sustain the complaint; and an issue presented by a conjunctive denial must be regarded as irrelevant and immaterial. Kuhland v. Sedgwick, 17 Cal. 126.

A denial as follows was held bad: "And this defendant further answering, on information and belief, denies that said Daniel Richards, for a valuable consideration, assigned by a written instrument the indebtedness due upon said note, or that the said assignment was stamped with United States revenue stamps of the required amount and denomination, or that any written assignment was made." If this was a denial at all, it was only a denial that the assignment was in writing, and that it was made for a valuable consideration. Randolph v. Harris, 28 Cal. 566.

Where defendants met an averment that plaintiff was the owner, and in the possession of property, by denying that he was the owner and entitled to the possession of it, the court held it neither a denial that the plaintiff was the owner of the property, nor tnat he was in possession of the property when it was taken from him. The defendants also denied that they at any time wrongfully took from the possession of the plaintiff the property and chattels mentioned in the complaint, and also denied that they wrongfully detained from him such property. This was held bad as only denying the wrongfulness, t. e., the conclusion of law. Richardson v. Smith, 29 CaL 531.

A denial that on the 4th day of February, 1865, the plaintiffs were in possession of premises, was held to amount at most to a denial that both plaintiffs were in possession, and certainly not to present the issue of the mis- joinder of either of the plaintiffs. QiUan v. Sigman, 29 CaL 641; Fosgate v. Herkimer Nov. &Hyd. Co., 12 N. Y. 582.

A denial in the conjunctive "that said plaintiff is seised and possessed, and is the owner in her own right, as her separate property, of the land, etc., was held not to amount to a denial of the allegation to which it professed to respond. Filch, v. Bunch, 30 Caf. 211. A denial that "defendant received $3000 in gold coin, parcel of the $65,000, to and for the use of the plaintiff," was held bad for two reasons: First. The count did not charge that the $3000 sued for was parcel of the $65,000, or of any other sum; but 83000 absolutely, and without clog. The traverse was therefore pregnant with an admission that $3000 had been received as charged—

that is, $3000 disconnected from the circumstance named in the denial, and spoiling its pith. Second. The denial was, that the $3000 was received in gold coin. That involved an admission that $3000 was received in either one of the two other forms of lawful money, and therein it denied

what was non- essential, and admitted all that was essential to a recovery. Leffingwdl v. Griffing, 31 CaL 232.

Plaintiffs averred in their complaint that they "now are, and for several years last past have been, the owners in fee simple absolute, and in the possession, and rightfully entitled to the possession of," etc. Defendant in his answer denied that "plaintiffs now are, and for several vears last past have been the owners in fee simple or otherwise in the possession (except as hereinafter alleged), or entitled to the possession of the land and premises described in the complaint." The pleadings were verified. It was held that the averment of the plaintiffs that they were in possession at the commencement of the action, was not effectually denied. Reed v. Calderwood, 32 CaL 109, 110.

In an action of ejectment, the complaint being verified, and setting forth facts sufficient to entitle the plaintiff to recover, the defendants answered separately. One of them admitted that he was in possession of the

Premises when the suit was brought, and denied generally the other allegations of the complaint. He, however, disclaimed any title to or interest in the premises in controversy. The other denied the allegations of the complaint in the following form: "And now comes N. T., one of the defendants, and makes his separate answer, and says, that he denies generally and specifically each and every material allegation in the complaint, the same as if each allegation were herein recapitulated." The court held that neither of the answers contained a specific denial of any material allegation in the complaint. Hensley v. Tartar, 14 Cal. 508. K. acquired the legal title to land under such a state of facts as made his purchase fraudulent, and made him the trustee of S. U. bought from K. S. commenced an action against U. to have him declared trustee, and to compel him to convey the land. In his complaint he averred the facts showing K.'s fraud, and which in law made him the plaintiff's trustee. U., in his answer, admitted these facts and his knowledge of them, but denied that he became the trustee of S., or that there was anything unfair or fraudulent in the facts alleged. It was held that the answer admitted the trust. Scott v. Umbarger, 41 Cal. 411. A general denial of the averments of the complaint, with the qualification of "except as hereinafter admitted," is clearly insufficient when the pleadings are verified. Lewnson v. Schwartz, 22 Col. 231.

Where an alleged entry and ouster were controverted by the answer, it was held that the entry being denied, it could not be said that the withholding of the possession at the commencement of the action stood admitted by the pleadings, for the withholding must have been preceded by an entry. Hawkins v. Rfichert, 28 Cal. 538. If the complaint avers a judgment, and the issuing of an execution thereon, and a sale thereunder of land, and the answer denies the validity of the judgment, and avers that it was void for want of jurisdiction, and denies that the plaintiff acquired any title by the pretended sale by the sheriff, the execution and sale thereunder are not sufficiently denied to require the execution to be put in evidence. Lee v. Figg, 37 Cal. 328.

The court will not give effect to a denial when it appears from the context and other portions of the answer that the denial was intended to be hypothetical. Alemany v. Petaluma, 38 CaL 557.

Where an answer admitted a contract with plaintiff and one Williston, and averred that this was the only contract made by defendants in relation to the matter, and denied that they made any other, this was held to be a denial in "a plain and unequivocal form of the making of any contract with plaintiff." Murphy v. Napa County, 20 Cal. 503.

Where one material allegation in the complaint was that the plaintiffs, at the time of the alleged entry of the defendants, were the owners and in possession of the mining claim sued for; and another was that the ownership and right of possession remained in the plaintiffs up to the commencement of the action, and the defendants denied these allegations in direct and positive terms, and then proceeded and amplified those denials, by alleging previous abandonment and forfeiture, which, if true, would have sustained the general denial, the court said they could not see how plaintiff was injured by having these facts fully set forth in the answer. It advised him of the character of defendants' proof upon the main point in issue, and to that extent it was a benefit to him. BeU v. Brown, 22 Cal. 681.

Where plaintiff alleged that he was the owner, and entitled to the possession of one undivided half of certain chattels, and defendant, in his answer, admitted that he was in possession of the chattels, and alleged that he was the owner thereof, the court held plaintiff's title was sufficiently put in issue. Miller v. Brighton, 50 Cal. 615.

A denial i lint plaintiff has been in possession of land adversely to the claim of defendants for longer than four months previous to filing the answer, is equivalent to a denial of an allegation in the complaint that plaintiff had been in such possession for four years, or, in fact, for a perioa exceeding three months, the complaint having been filed one month before the answer. Oarvey v. Willis, 50 Cal. 620. To determine whether an allegation has been properly denied or not, the answer to the particular allegation which it is designed to controvert must be examined. If taken by itself an issue is fairly made, and there is no admission inconsistent with the answer, the denial is sufficient Each denial must be regarded as applying to the specific allegation it purports to answer, and not as forming part of an answer to some other specific and entirely independent allegation. Racouillat v. Rene, 32 Cal. 453-455.

Any form of denial which fairly meets and traverses the allegation is admissible. Suppose it is alleged in a complaint that the defendant, at a certain time, made and delivered to the plaintiff his certain promissory note,

etc., this allegation is as directly and fairly traversed by saying, "I did not, at the time specified or at any other time, make or deliver to the plaintiff the note described in the complaint," as by saying, "I deny that on the day specified, or at any other time, I made or delivered to the plaintiff the note described in the complaint" If the denial is not evasive, but directly traverses the matter alleged, it is good, without regard to the mere form in which it is expressed. Hill v. Smilit, if] CaL 479.

The following form is sufficient: "The defendant, for answer, says, he denies," etc., dissenting from the New York cases. Espmom. v. Gregory, 40 Cal. 62. At the time when the practice required a replication, it was held that a replication under oath in response to a material averment of the answer, saying, "It is not true, "etc., did not specifically deny the averment Venan \. McGregor, 23 Cat 339.

If the complaint in an action to enjoin the diversion of water alleges that the plaintiff has appropriated and used the water for more than five years, and the answer denies that the plaintiff ever at any time used or took up, or appropriated the water, the denial is sufficient

If the complaint in such action avers that from the spring there ran and flowed irn- memorially upon the plaintiff's premises a constant and never-failing stream of pure, fresh water, and the answer denies 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. <fc 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 f 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, m 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 negatived 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 Cat 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 de- fendaiit 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 Cat 430. Gavin v. Annan, 2 Cal. 494, and McLaren v. Spalding. Id. 510, were overruled by Piercy v. tiabin, 10 Id. 22, and Glazer v. Cltf, Id. 303. Whatever admits that a cause of action as stated in the complaint, once ex-

isted, but at the same time avoids it—that is, shows that it has ceased to exist—is new matter. Such are release, and accord and satisfaction. Coles v. Soulsby, 21 Cal. 50. An equitable title cannot avail a defendant in an action of ejectment, unless it be pleaded as new matter. Cadiz v. Maiors, 33 CaL 288. Where the defendant wished to raise the point, under a denial, that a steamboat company could not be incorporated under an act of the Legislature, the court held that the want of capacity in the plaintiff to sue should have been specially set up in the answer; the denial was not sufficient. """. Steam Nav. Co. v. Wright, 8 Cal. 690; 1 Mass. 1, 159; 6 N. H. 527, 197; 7 Mon. Ky. R. 484. The want of legal capacity to sue is a personal disability, and if the defendant intends to set up such a defense he should state so distinctly. Cal. Steam Nav. Co. v. Wright, 8 Cal 590. In an action by an attorney on a quantum meruit for fees, skillful or unskillful and negligent conduct of a case is an important subject of inquiry. Anything which shows the services were not of the value claimed, as the nature of the suit conducted, its little difficulty, small amount, little skill requisite, the absence of skill, and the like, is competent, under the issue of value. A trial may result successfully and yet the attorney be guilty of negligence. His want of skill, or neglect, may put the client to great expense to redeem his blunders; and, on a quantum meruit, the value of services would be reduced. fridges v. Paige, 13 CaL 640. Any objection that may be taken by answer may be taken by demurrer, 433. Whether or not the objection be apparent upon the face of the complaint the objection itself is still the same. The mode of taking advantage of the error only, is different in the two cases. It was not so in all cases, under the former system, as some matters had to be specially pleaded, though the defect was apparent upon the face of the declaration; as, for example, usury. Jfentsch v. Porter, 10 Cal. 560. In an action of ejectment to recover mining claims, an answer to the complaint which avers "that any right that plaintiffs may have ever had to the possession, etc., they forfeited by a non-compliance with the rules, customs and regulations of the miners of the diggings embracing the claims in dispute, prior to the defendants' entry," is insufficient in not setting forth the rules, customs, etc. Dutch. Flat W. Co. v. Mooney, 12 Cal. 534 Under a denial of a contract, defendant may show anything disproving the contract as averred; as, that another party, who in fact sold goods, sold them as his own and not as agent of plaintiff, or, that defendant was not to pay until

cattle sold were fattened and slaughtered. Such proof is not new matter. Hawkins v. Borland, 14 Cal. 415.

The officers of a corporation have no power to authorize the execution of a note as surety for another, in respect to a matter having no relation to the corporate business, and in which the corporation has no interest. A party receiving such note with notice cannot recover on it Hall v. Auburn T. Co., 27 Cal, 257; Parsons on Notes and Bills, 166; Bank of Genesee v. Patchm Bank, 13 N. Y. 309; Angell A Ames on Corp., Sees. 257, 258. Where a note was given to plaintiffs for a debt due them from B., one of the directors of a corporation, the court held that an answer denying the making and delivery of the note by defendant was sufficient to a flow of the introduction of evidence of the want of authority of the directors to make the note. Hall v. Auburn Turnpike Co., 27 CaL 257, 258.

Ejectment. Defendant may set off against damages value of improvements made under color of title, 741. If defendant has a legal title, he need not go into equity to assert it. Chip/man v. Hastings, 50 Cal. 311. A disclaimer of possession or interest in real property (739) is not a proper proceeding in an action of ejectment; it is only proper in actions brought to determine estates or interests asserted against parties in possession by parties out of possession. A judgment in ejectment cannot be entered against a party unless he was in the possession, actual or constructive, of the property at the commencement of the suit. Noe v. Card, 14 Cal. 609; Gamer v. Marshall, 9 Cal. 268.

Where a complaint avers that on a particular day the plaintiffs were the owners in fee simple and in possession, etc., the defendant, under a denial, may confine himself to simply rebutting the evidence of the plaintiff. He need not show that he has any title whatever. It is sufficient if he make it appear that the plaintiff has no title or interest entitling him to the possession at the time of the trial. He may show this by proving that the title and right of possession is in some third person, except in the case of public lands, in which case this rule is qualified. Moore v. Tict, 22 Cal. 516; Adams on Ejectment, 337- 380 and notes; Coryell v. Cain, 16 Cal. 572.

The plaintiff must show a title or right of possession existing at the time of the commencement of the suit. Moore v. Tict, 22 Cal. 516; Yount v. Howdl, 14 Cal. 465; Stark v. Barrett, 15 Id. 361. But no necessity exists on the part of the defendant to show a title or right of possession existing in him at the time. He has a clear right to snow, by any proper evidence, that at the time of the trial he had

the title or right of possession, and this is sufficient to defeat the plaintiff's action. Moore v. Tiee, 22 Cal. 516.

Where the strict legal title is not involved, and the plaintiff relies upon a right to recover founded upon a naked possession, defendant may defeat a recovery by proving that the premises were abandoned by plaintiff before the alleged entry of defendant, and were therefore at the time of the entry publici juris, and he may do this under a simple denial of plaintiff's right to the possession. In such case the issue is, was plaintiff entitled to the possession at the date of defendant's entry? And anything which shows that he was not is but matter in rebuttal, and competent evidence for the defendant under the denial, upon the same principle that the defendant may defeat a recovery where the plaintiff relies upon strict title. Wilson \. Cleaveland, 30 Cal. 200. A defendant setting up title to only a portion of the demanded premises, must specify the part he claims, in order to apprise his adversary of it, that he may bring his proofs understandingly. Anderson v. Fisk, 36 Cal. 633.

Errors and defects to be disregarded, 475.

Estoppel, 1908.

Executor. See "Administrator," supra.

Fraud. See 426 n., p. 161.

In defense to an action on a promissory note, it is not sufficient to plead in general terms want of consideration, and that the note was obtained by fraud. The answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud. Gushee v. Leavitt, 5 Cal. 161.

Gold coin, etc., allegation as to money being payable in, should be denied, 667.

Husband and wife, 370, 371, and notes.

Judgment or other determination of a court, officer, or board, pleading, 456.

Judgment, foreign. In an action on a judgment obtained in a New York court, the answer did not allege that an appeal, which it alleged had been taken and perfected to the New York Court of Appeals from said judgment, had, by the laws or New York, the effect of suspending the judgment thus appealed from, or of staying tne execution thereof, nor was it alleged that the undertaking on such appeal was to the effect that the sureties thereon were bound in double the amount named in

the judgment; that if the judgment appealed from, or any part thereof, should be arnnned, the appellant would pay the amount directed to be paid by the judgment, or that any order was entered staying proceedings upon or execution of the judgment. The court held the presumption was that the effect of the alleged appeal by the laws of New York was the same as in this State; and in this State such appeal would not stay execution or proceedings for the collection of the amount of the judgment appealed from, pending the appeal, nor destroy or weaken the force and effect of the record of the judgment as evidence of the facts, or matters necessarily determined thereby. Whether by an appeal from a judgment in which appellant had given an undertaking on appeal, in form and amount sufficient to stay proceedings for its enforcement, the effect of the record of the judgment as evidence was thereby suspended or nullified, was not decided. Taylor v. Shew, 39 Col. 539.

Justification. An execution is sufficient justification to the sheriff for the seizure of the property of the debtor, and it is immaterial whether the property be in the actual possession of the debtor, or in the possession of parties holding it for his benefit. But if the property be in the possession of a stranger to the writ, claiming it as his own by virtue of a transfer to him of the debtor, which «>ould prevent the latter htmse{f/rom retaking the possession, the officer must plead not only the writ but the judgment. Bickerstaff \. Doub, 19 Cal. 112; Knoxv. Marshall, 19 Cal. 622; Demiek v. Chapman, 11 Johns. 131; Pool v. Chandler, 10 Wend. Ill; Elyv. Ehle, 3 Corns. 506; 1 Saund. R. 298; Van Ellfn v. Hurst <fc Gushing, 6 Hill, 311; NobU & Eastman v. Holmes, 5 Hill, 195; Thornburgh v. Hand, 1 Cal. 554; Glazer v. Clift, 10 Cal. 304.

Where, in an action against the sheriff for taking goods, he justifies under an attachment against a third person, it is not necesgary that his answer should set forth minutely every fact relating to the attachment suit. An answer which stated the time of commencement of the action, the names of parties, the court, and that the goods were taken by virtue of a writ of attachment issued therein, was held sufficient. Towdy v. Ellis, 22 Cal. 651. In trespass quart clausumfregit, where the complaint avers matter of aggravation after the entry, an answer justifying the aggravating matter, but admitting plaintiffs title and possession, does in it state facts sufficient to constitute a defense. In trespass quare claugum freait an answer justifying merely because the defendant hag an easement on the

land contains no defense. Pico v. Colimas, 32 Col. 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 tliut 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 \. Gay, 10 Paige 376. The claim must be such that the party pleading it might obtain a several judgment against nis 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-oft, 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; Na- glee 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. Jfobbs v. Duff, 23 Cal. 627; /;='.. 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 Du/v. Hobbs, 19CaL 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, hut a joint demand

in favor of defendant, his co-obligor, and one Taylor, a stranger to the note and suit, and there was no allegation that either the defendant or the makers of the note had acquired Taylor's interest in this demand, it was held not available as a defense, and a judgment thereon could not be rendered in favor of defendant as demanded. Hooky. White, 36 Cal. 301; and see Sterns v. Martin, 4 Cal. 229, and Gannon v. Dougherty, 41 Cal. 663. Joint and separate debts cannot be set off at each other at law, and there is no good reason for the application of a different rule to a claim for damages. Jfmgv. Wise, 43 Cal. 635. Equity will not set off the claim of an individual creditor of one joint owner of a judgment against the judgment. And it the judgment be partnership assets, the individual creditor has no claim to any part of it until adjustment of the firm accounts. Colling v. Butler, 14 CaL 223.

Subdivisions 1 and 2, what are causes of action within. In a suit for services as agent of defendant under a contract, defendant in answer set up a violation of the contract on the part of plaintiff, and also certain other matter, amounting to a tort on his part, as conspiracy to have the property of defendant sold, and bought in by him, circulating false reports that defendant was a bankrupt, its affairs a swindle, etc. It

was held that this latter portion of the answer was properly struck out on motion of plaintiff. Batesv.SierraNevada,etc.,Co.,18Cal.ni. It has been said that an unliquidated claim for damages was held not the subject of offset, either equitable or legal. Riclceison v. Richardson, 19 Cal. 354. But in a subsequent case, where the principal and cross-claim were based upon the same contract, the court held that both, might be considered in the same action, though the damages might be unliquidated; and if the jury found a balance in favor of defendant, he might have judgment and , execution therefor. Stoddard v. Treadwell, 26 I Cal. 305; Pattison v. Richards, 22 Barb. 146; I Glason v. Moen, 2 Duer, 639; Spencer v. Bab- { cock, 22 Barb. 326. The Code, by enumerating tests, excludes all others by intendment. Stoddard v. TreadweU, 26 Cal. 305.

Where a breach of a contract on the defendant's part was the foundation of the plaintiff's claim for damages, and the counter-claim for damages arose on the same contract, the court held that it could be interposed by the defendant. Dennis v. Belt, 30 Cat. 252.

In replevin, the subject-matter of the litigation necessarily consists only of the property mentioned in the complaint; and it is not competent to the defendant by his answer to introduce a newand distinct subject-matter of litigation, by claiming of the plaintiff the release and return of other and distinct personal property, even though he present such a case as would have enabled him to recover in an independent action. Lorensohn v. Ward, 45 Cal. 10.

In an action for damages for an assault and battery, a libel published by the plaintiff of and concerning the defendant, docs not constitute a counter-claim. Macdougallv. Maguire, 35 CaL 274; Pattison v. Richards, 22 Barb. 143; Murden v. Priment, 1 Hilton, 76; Barhyte v. Hughes, 33 Barb. 320; Schnaderbeck v. Worth, 8 Abb. 38. The objection is not waived by the failure to demur. The ground of demurrer is not a misjoinder of defenses; but it is that the matter is not recognized by the law as a defense to the action. The party may have an independent cause of action, but it has no relation to the pending action. As it is not recognized by the law as a defense, the objection may be taken at any time. Alacdoiujall y. Maguire, 35 Cal. 274-281. Damages for injury to the property against which the assessment was issued cannot be set up as a counterclaim in an action to recover an assessment for the improvement of a street.

The court said this doctrine was settled in Emery v. San Francisco Gas Co., 28 Cal. 345; Emery v. Bradford, 29 Cal. 75; Nolan v. Reese, 32 Cal. 484; and Himmelman v. Steiner, 38 Cal. 176, that the owners of property adjacent to a street were not in any sense parties to the contract for the improvement of a street, entered into by a contractor with the superintendent of streets; that the assessment was the " transaction " within the meaning of this section out of which the cause of action must arise, out of which the defendants are authorized to set up as a counter-claim; that such a demand did not arise out of the assessment, nor indeed out of the proceedings upon which it is based, and therefore was not available as a counter-claim. Himmelmann v. Spanagel, 39 Cal. 389, 392.

Equitable defense by way of counterclaim. Equitable defenses may be interposed to the action of ejectment, but the defendant in auch cases becomes an actor, Bruck v. Tucker, 42 Cal. 346, with respect to the matter presented by him, and his answer must contain all the essential averments of a bill in equity. The defense to an action of ejectment must meet the present claim of the plaintiff to the possession; and in order that an equitable defense may prevail, the equity presented must be of

such a character that it may be ripened by the decree of the court into a legal right to the premises, or such as will estop the plaintiff from the prosecution of the action. Such defense can only be interposed where the parties to the action are such as would be required to a bill in equity, seeking the same relief. Leatrade v. Earth, 19 Cal. 671, 673. Defendant must file an answer which in matter of allegation would be a good bill in equity under the old system. Meador v. Parson*, 19 Cal. 299. He need not, however, conclude with a prayer for affirmative relief in order to make nis defense available. An equitable cause of action in favor of .the defendant, in order to be available to him as a defense, must be one which has not been barred by the Statute of Limitations. Carpentier v. Oakland, 30 CaL 443; see McCauley v. Fulton, 44 Cal. 362.

Where the owner of land sold the same, and covenanted to execute a warranty-deed therefor on payment of the purchase-money, and the purchaser took and held actual possession and afterwards paid the purchase-money, it was held that such purchaser's or his grantee's equitable title was a sufficient defense to an action of ejectment under the legal title by the original owner, or any one holding under

439. If the defendant omit to set up a counter-claim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor. them with notice. Talbert v. Singleton, 42 Cal. 391.

§ 1982. Property rights of citizens

1. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Plaintiff's Pray for Declaratory Relief, Damages according to Proof. Breach of Implied Contract. Quo Warranto Incidental and Peremptory Administrative Mandamus filed under the Great Seal. *Picturi; Signis; Famosus libellus sine scriptis; Bursae decrementum; Quando dominus conscientiae detrimentum; Breve capitalis justiciarius noster and ad placita coram nobis tenenda* ***writ of unspeakable errors, divide et regnes!*** **RELIEF: UNCONSTITUTIONAL LAW IN VIOLATIONS OF FIRST, FOURTH, AND TENTH AMENDMENT PROTECTIONS.**

§ 3729. FALSE CLAIMS; MISTAKE! PROHIBITION! EQUITABLE ESTOPPEL!

Categorical Rules

Noxious Use of land – need not pay

Permanent Physical Occupancy – must pay

100% wipe out (of reasonable investment backed expectations) – must pay

Multi-factored test on whether they have to pay or not – Penn Central

A condition on land has to have a "rational nexus" and "rough proportionality" to what the purpose of the condition is

Temporary taking needs to be paid for

Court Cases

HHA v. Midkiff – can take land directly to a private party and compensate mkt value

Causby – Easment of flying directly overhead is a taking

Miller v. Schoene – making them cut down ceder trees wasn't a taking

Loretto v. Teleprompter – permanent physical occupation is a taking

Allerd – not a taking when outlaw sale of eagle feathers

Kaiser Aetna – taking when take away the excluendi of their private lake

Pruneyard – not a taking when made shopping center admit free speech activities

Hadacheck v. Sebastian – regulation of business operations to prevent harm to public is police power

Pennsylvania Coal Co. v. Mahon – If a regulation goes too far then it's a taking

Penn Central v. NY – keeping historical landmarks in good repair and historic good for everyone, within police power

Lucas v. SC – if regulatory action denies an owner viable use of land, it's a taking, unless it's a Common Law nuisance

Pallazzo v. Rhone Island – is not barred from a takings claim just because the title was acquired after the effective date of the state regulation

Nollan v. CA Coast – A state may not condition a property use permit for something not addressing the purpose use

Dolan v. City of Tigard – A condition of permit needs to be proportional to the impact the change will be. (First Evangelical v. LA – temporary takings need to be compensated)

QUO WARRANTO INCIDENTAL AND PEREMPTORY ADMINISTRATIVE MANDAMUS

1. The right to petition the government is the freedom of individuals (and sometimes groups and corporations) to petition their government for a correction or repair of some form of injustice without fear of punishment for the same. Although often overlooked in favour of other more famous freedoms and sometimes taken for granted, many other civil liberties are enforceable against the government only by exercising this basic right,, making it a fundamental right in both representative democracies (to protect public participation) and liberal democracies. While the prohibition of abridgment of the right to petition originally referred only to the federal legislature (the Congress) and courts, the incorporation doctrine later expanded the protection of the right to its current scope, over all state and federal courts and legislatures and the executive branches of the state and federal governments.

Boumediene v. Bush, 553 U.S. ___ (2008), was a writ of habeas corpus submission made in a civilian court of the United States on behalf of Lakhdar Boumediene, a naturalized citizen of Bosnia and Herzegovina, held in military detention by the United States at the Guantanamo Bay detention camps.[1][2][3] The case was consolidated with habeas petition Al Odah v. United States. The case challenged the legality of Boumediene's detention at the Guantanamo Bay military base as well as the constitutionality of the Military Commissions Act (MCA) of 2006. Oral arguments on the combined case were heard by the Supreme Court on December 5, 2007. On June 12, 2008, Justice Kennedy wrote the opinion for the 5-4 majority holding that the prisoners had a right to the habeas corpus under the United States Constitution and that the MCA was an unconstitutional suspension of that right.

Grantees can have no less right as a citizen than these.

2. Habeas petitioner Iron Mountain Mines, Inc. et al v. United States challenges the legitimacy of Iron Mountain Mines, Inc. invasion and occupation by the Environmental Protection Agency and particularly contests the illegitimate animus and vindictiveness of the EPA actions, the defamations, libel and slander, loss of enjoyment, value, and livelihood; injury to reputation, credit, honor, dignity

THE UNITED STATES HAS NO RIGHT TO ABROGATE PATENT TITLE! TRESPASS!

3. Grantees challenge the constitutionality of the Comprehensive Environmental Response, Cleanup, and Liability Act "CERCLA" 42 U.S.C. 9601-9659 et seq. for violation of the establishment clause.

4. Petitioners claim quo Warranto with incidental and preemptory administrative mandamus by right because they contest the Environmental Protection Agencies actions and will rectify the abuse of discretion and imbalance of government authority, and because petitioners demand equal protection and due process of law, because the EPA actions are implicitly an assertion of unquestionable and unchallengeable authority to bury the petitioners property, and by extension to bury the entire State of California and even the entire United States under unquantified and unlimited amounts of acutely toxic hazardous waste sludge, solely for the benefit of fishes, all the while claiming such authorities are scientifically justified as somehow protecting the "environment", in disregard and breach of duty to implement remedies that are fully protective of human health and the environment. Petitioners allege that EPA claims that such actions have any scientific merit are false claims, and petitioners further allege that these EPA actions are unscientific, unreasonable, unfair and unjust, and are unsupportable by scientific or economic accountability.

5. Petitioners allege that such an absurd and illogical result of executive mismanagement, facilitated by unfair and unjust Congressional legislation, and coddled in Judicial swaddling and Judicial deference, without any timely means of recourse or for redress of grievances, is an abomination of unbounded executive authority, and petitioners raise these allegations to a constitutional question with claims of unconstitutional jurisdiction by the EPA and DOJ; hence the petitioners claim by ancient writ "*Breve Soke",* and convene by right of the "Warden of the Stannaries" and the "Warden of the Forest" a "Miner's Court" for a determination of franchise jurisdiction according to the Constitutions of the United States and of the State of California, and according to the codes of California, the laws of the United States of America, and the common law of England, and petitioners motion for writ of *certiorari* to resolve these questions and the allegations of abuse of executive authority and unconstitutional jurisdiction by the EPA and DOJ. Jurisdiction is also properly reserved to the District Courts by the covenants of patent title and Federal law.

"The English practice . . . [is] more necessary to be observed here than there" *John Jay, 1793

Petitioners claim violation and usurpation of a franchise granted by patent title and mineral rights.

ABSOLUTE ORIGINAL ORDER TO CEASE, DESIST, VOID, AND VACATE!

ABSOLUTE ORDER FOR REMISSION, REVERSION, AND DETINUE SUR BAILMENT.

quo Avarranto: de Quibis Commote Alodium & Alodarii, Quia tria sequunturdefamatorem; Knowingly reckless disregard of the truth, deliberate ignorance of actual information; trespass: Praecipe quod reddat & detinue sur bailment; subpoena ad testificandum; subpoena duces tecum; impunity; miscarriage of justice; prohibition; illegitimate animus;

Differing court interpretations of a statute "is evidence that the statute is ambiguous and unclear." U.S. v. Iron Mountain Mines, Inc., 812 F. Supp. 1528, 1557 (E.D. Cal. 1993).

Courts frequently interpret an ambiguous contract term against the interests of the party who prepared the contract and created the ambiguity. This is common in cases of adhesion contracts and insurance contracts. A drafter of a document should not benefit at the expense of an innocent party because the drafter was careless in drafting the agreement.

In Constitutional Law, statutes that contain ambiguous language are void for vagueness. The language of such laws is considered so obscure and uncertain that a reasonable person cannot determine from a reading what the law purports to command or prohibit. This statutory ambiguity deprives a person of the notice requirement of Due Process of Law, and, therefore, renders the statute unconstitutional. West's Encyclopedia of American Law, edition 2.

Clearfield Doctrine

"Governments descend to the Level of a mere private corporation, and take on the characteristics of a mere private citizen...where private corporate commercial paper [Federal Reserve Notes] and securities [checks] is concerned. ... For purposes of suit, such corporations and individuals are regarded as entities entirely separate from government." - Clearfield Trust Co. v. United States 318 U.S. 363-371

What the Clearfield Doctrine is saying is that when private commercial paper is used by corporate government, then Government loses its sovereignty status and becomes no different than a mere private corporation and takes on the character of a mere private citizen. As such, government then becomes bound by the rules and laws that govern private corporations which means that if they intend to compel an individual to some specific performance based upon its corporate statutes or cor-

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 4th 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.

The claim is one thousand five hundred feet by six hundred feet. Course of vein, north-east and southwest; dip, 45 degrees to the east; average width, one hundred thirty feet. The ore shoot is continuous the entire length of the claim, and can be traced as far as the Windy Camp District, a distance of eight miles—the same character of ore showing in explorations made in the latter camp." California Journal of Mines #8, 1888

9. Past mining, including the use of explosives for stope mining, mine fires, and the abandonment of mining by the cartel mine owner to maintain high metal prices resulted in the deterioration of the mine to a condition where only an open pit mine above the ore bodies was feasible to continue mining. Copper prices below $0.23/lb. caused the open pit mine to be closed in 1963. Stauffer Chemical, a long time partner of Mountain Copper Co. Ltd., purchased Mountain Copper Co. in 1967 to obtain the vast phosphorus reserves in Utah and Florida owned by Mountain Copper Co. Mountain Copper Co. was fully liquidated by 1969.

The California State geologist reported that copper cementation was being practiced almost as soon as mining began, suggesting that Acid Rock Drainage (ARD, the more appropriate term now used by experts around the world) was occurring prior to any of the man made activities that may or may not have affected the natural biological activity of organisms now known to inhabit the ore and cause the reactions that result in ARD.

10. No Acid Rock Drainage is occuring in tailings or waste rock.

11. Biological organisms such as *ferroplasma acidarmanus* create biological processes that are now known to be the cause of and the only way that the ARD is perpetuated.

18. EPA actions at the Site were mistaken and the EPA misconduct was not in accordance with the NCP.

"Each remedial action shall utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable." (NCP §300.430(f)(5)(ii))

19. The EPA interfered with the lawful regulatory authorities of the State of California to impose itself at Iron Mountain mine, and there are declarations of incompetence, perjury, and false claims

against the State agent James Pedri of the Water Board, Rick Sugarek, EPA Project Manager, and Richard Anderson, EPA Judicial Officer. .

20. The EPA ignored the RI, (from the (Record of Decision) ROD 1)

"Among the remedial action alternatives that could be implemented by EPA, the total removal of the source and sediments in the receiving waters (Alternative CA-10) is considered the only remedy which is capable of meeting project cleanup objectives and the full requirements of the clean water act (CWA). This alternative would effectively eliminate discharges and restore all tributaries to pristine condition."

The EPA abused its discretion and breached its duty to implement a remedy fully protective of human health and the environment and instead embarked upon a 3000 year removal action that cannot be assured of either and is obviously an unnecessary arbitrary and capricious reckless negligent endangerment to the property, the property owner, to the miners, to the public, and to the environment.

38. The EPA ROD1 remedy was to plug the mine with LDCC concrete. Since that plan was abandoned, none of the proposed actions fall within the ambit of a CERCLA "remedy", and therefore must be denoted as a removal action. The EPA has claimed to have undertaken "time-critical removal actions" for conditions that have existed for over 80 years according to the mine records and the State, and there is ample evidence to suggest that these are geologic and biological phenomena which have been occurring for hundreds of thousands and perhaps millions or even billions of years.

The 80 year old bridge to Iron Mountain Rd. was worn out and needed to be replaced. This is not a time-critical removal action; it is a public works project.

39. The costs incurred by EPA through 1996 for removal actions were above and beyond the one year, $2 million dollar limitation on removal actions.

40. The removal actions were not to protect human health or the environment, they were contrived to make a scapegoat of mining and Iron Mountain mine in particular for the destroyed fishery and habitat of fishes from dams, ranching, farming, urbanization, untreated sewage, and other human impacts. The domesticated anadramous fish populations hatched and planted in the manmade reser-

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.)

The RP (Rhone-Polenc) objected to the added expense of the HDS, for which the only justification was extending the duration of the disposal in the open pit, but was dismissed by EPA, an unreasonable, illogical, and tyrannical decision that lead to their decision to refuse to operate the facility after 2000.

96. The "treated water" discharged into Spring Creek does not meet the requirements of the CWA.

97. Burying waste piles in temporary dumps is a removal action.

99. Despite IMMI and T.W. Arman's insistence that mining was a preferred remedial approach, the EPA never investigated in any meaningful way this obvious remedy for which they had expert testimony and information in support of.

104. In the last 5 year review, the EPA acknowledged that the liner or draining system built in the Brick Flat pit had failed, that the leachate no longer enters the drain system for treatment, and that they do not know where it goes. The Brick Flat is crossed by known active Holocene faults, so the dump is in violation of CERCLA, RCRA, the California toxic pits act and California health and safety codes.

105. Arman and IMMI participation in the ROD process has been in making objections to EPA conduct.

106. Enlargement of the dam was another interim removal action, not a remedy, since the LDCC was abandoned.

149. All work performed by the EPA at Iron Mountain has been inconsistent with the NCP. As to whether the EPA can recover costs, or costs in excess of the $2 million, 12-month statutory cap on removal actions. (See 40 C.F.R. § 300.415(b)(5)) We disagree and hold that, considering the unnecessary and wasteful disposal of recyclable hazardous waste materials in an illegal dump, and that the EPA still cannot even meet Clean Water Act limits and the removal action was neither timely or in accordance with the NCP, the EPA should recover nothing.

Violations of RCRA, CERCLA, EPCRA, NCP, CWA, California Toxic Pits Act

6. Violations of the California Health and Safety Code, the California Public Resource Code, the California Water Code, and the California Toxic Pits Recovery Act, the Resource Conservation and Recovery Act, and the National Environmental Policy Act.

We begin with the language of 42 U.S.C. § 9604(c)(1):

Unless (A) [the EPA] finds that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis, . . . obligations from the Fund . . . shall not continue after $2,000,000 has been obligated for response actions or 12 months has elapsed from the date of initial response to a release or threatened release of hazardous substances.

See also 40 C.F.R. § 300.415(b)(5) (limiting actions to $2 million and 12 months "unless the lead agency determines that" one of the exemptions applies). Despite an assertion that the decision to exceed the cap is not subject to arbitrary and capricious review, the fact that the statute allows the EPA to invoke the exemptions when it "finds" certain conditions counsels otherwise. See 5 U.S.C. § 706(2) (courts should set aside agency conclusions and findings where "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). The EPA's determinations in this case that there was an emergency, that the risk to the environment was immediate, and that the assistance would not otherwise be forthcoming are inherently fact-based. The owner had a better plan with an actual remedy, the engineering was significantly more developed than the EPA plan, and the owner was prepared to proceed without EPA financing or assistance. The EPA usurped the owners authority to implement a remedy and embarked upon a 3000 year removal plan.

The EPA determined that the removal action was a remedial action because of the plan to fill the mine with concrete. Although this plan was abandoned, the EPA has never acknowledged that the EPA actions no longer constitute a remedial action. We hold that the EPA "failed to articulate a rational connection between the facts found and the conclusions made." Envtl. Def. Ctr., 344 F.3d at 858 n. 36.

Given these daunting realities and the EPA's careless documentation of its reasons for invoking the emergency and consistency exemptions, we hold that the EPA's decision to exceed the statutory cap was based on the irrelevant factors, there has been a clear error of judgment, and the decision was arbitrary and capricious. See Marsh v. Or. Nat'l Res. Council, 490 U.S. 360, 378, 109 S.Ct. 1851,

104 L.Ed.2d 377 (1989); Envtl. Def. Ctr., 344 F.3d at 858 n. 36. Therefore, the EPA is not entitled to recover any costs of its removal action in Iron Mountain Mines as found by the district court. The EPA plans to put another 2 million tons of sludge in the Brick Flat Pit, and then it will need to build another 25 or more multi-million ton disposal pits somewhere else to store all the sludge it plans to make at Iron Mountain. This sludge is not legal to dispose in the manner EPA allows because it contains toxic levels of cadmium, arsenic, lead, uranium, and other toxic metals, the sludge also forms acid mine drainage itself at a pH of <2. This sludge disposal is not legal because the acid mine drainage that the EPA treats to produce the sludge was being recycled by the mine owner before the EPA declared Iron Mountain Mines a Superfund site, and the technology has always existed to recycle the metals in the acid mine drainage and not make sludge for disposal. The EPA selected remedy is not the best available technology, and the water discharged by the treatment does not meet Clean Water Act standards, which is another negligent endangerment.

DELIBERATE IGNORANCE OF ACTUAL INFORMATION!

The metals in the sludge were always known by the EPA to be recyclable at a profit, and the EPA chose to defy the protests of the property owner and the responsible parties (the previous owners), as well as interested citizens and public servants who's input was ignored by the EPA. The sludge disposal is also in violation of California health, safety, environmental, recycling, and disposal laws. The State of California has permitted these violations in deference to the EPA's "interim authority" (3000 years?), while continuously recommending that the EPA implement resource recovery technologies.

§ 6973. Imminent hazard

The EPA's engineering firm, CH2MHill, informed the EPA that all the sludge could be recycled when they started making it and could be easily worth well over $25,000 per day or over $136 million dollars so far. These same metals have been imported, primarily from China, during the EPA

treatment. The EPA has also prevented any recycling or reclamation of the millions of tons of waste rock that was left from hardrock mining. This has caused the loss of many millions more in revenue. The mine owner's proposal, known as insitu mining, would have solved the pollution problem by now, and the mine owners could have made another $350 million in recycling those wastes, thus the EPA has recklessly and negligently cost the mine owner over $500 million in lost revenues. This is the very definition of despotism and tyranny, and EPA fraud and trespass.

A HARD BARGAIN WITH FRAUD, ACCIDENT, TRUST & HARDSHIP

“ for making your iron into materials good for catalyzing FTS, which can be used after methane and CO2 are converted to syngas using Ni catalysts at 900 C. We need to test to see if the iron catalysts from your waste is good for this purpose. Mixing them with carbon paste is an option. Because the reaction temperature is relatively low, we may not need to use nanotubes to anchor the catalysts.” Iron Mountain Mines, Inc. correspondence with Professor Ting Guo, U.C. Davis, November 21, 2008

169. The EPA violation of NCP caused the State of California to be burdened with 10% of the costs, which it should be reimbursed.

172. The EPA must reimburse the special account for the $6,115,609.00 expended from the special account, plus interest. Iron Mountain Mines, Inc. claims this reimbursement and the $4,201,349.96 as of June 30, 2009 in the special account.

208. Iron Mountain Mines, Inc. claims that CERCLA was violated and the $17,943,891.00 plus interest from the consent decree including the $10 million for natural resource damages (2 million to the Natural Resources Trustees and 8 million to the Dept. of Interior for Natural Resource trustees.

b. Iron Mountain Mines, Inc. claims Trust 1, said to have been funded with $141,901,277.00, plus interest.

c. Iron Mountain Mines, Inc. claims Trust 2, said to have been funded with $62,476,445.00, plus interest.

e. The trusts must be commutated and Iron Mountain Mines, Inc. made patentee as trustee.

213. Since ROD 5 is an interim removal action, no funds from the special account may be expended. The only purpose for the dredging was to increase powerhouse output.

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) (ndd) 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-

sponses shall be filed within 10 days from the date of this order; Rhone-Poulenc Inc is also ordered to answer the US' request for production No 1 within 10 days; With regard to the motion of the US to compel production of withheld sampling data, production of Mountain Copper Co documents over which Rhone-Poulenc has asserted privilege, and responses to interrogatories concerning the San Francisco Chemical Co, Rhone-Poulenc, Inc shall submit to the court for in camera review all data and test results (sampling data) for which a privilege is claimed; the documents shall be submitted within 10 days from the date of this order; the motion to compel production of Mountain Copper Co documents as to which Rhone-Poulenc has asserted privilege [431-1] is GRANTED; the motion to compel respones to interrogatories concerning the SF Chemical Co is granted; Rhone-Poulenc, Inc shall produce the requested documents within 10 days from the date of this order; The motion of State of CA to compel further respones from Rhone-Poulenc to the State's Second set of interrogatories [417-1] is granted in part and denied in part; Rhone-Poulenc is ordered to provide, within 10 days, further answers to interrogatories numbered 275,276,277,278,283,284,285,286,287,289,290, and 291; the motion is denied as to interrogatories numbered 298,311,313,322,325, and 326; with respect to interrogatories numbered 280 and 297, Rhone-Poulenc shall insure that all appendices have been provided to the State of CA; The motion of State of CA to compel Rhone-Poulenc Inc to respond to requests for production of documents (set No 1) [412-1] is GRANTED; Rhone-Poulenc, Inc shall provide the documents related to the Iron Mountain Mines site, described on page 3 of the joint stipulation, at lines 16 through 19, without redaction; the documents shall be subject to a protective order that they be used only in connection with this litigation and that they not be referred to in the trial of this matter without further order of court; With regard to the motion of Rhone-Poulenc, Inc to compel the USA to provide further responses to Rhone-Poulenc's 3rd and 4th sets of interrogatories [398-1], the US states on page 19 of the joint stipulation that it has served supplemental respones to the 4th set of interrogatories and is in the process of finishing its supplemental responses to the 3rd set of interrogatories; the US is ordered to file supplemental responses to Rhone-Poulenc's 3rd and 4th sets of interrogatories, as it has agreed to do, to the extent that those supplemental responses have not already been provided by the date of this order; the supplemental responses shall be provided within 10 days from the date of

this order; The motion of Rhone-Poulenc Inc to compel the US to produce documents maintained by the Dept of Health, Education and Welfare [426-1] is DENIED; The motion of Rhone-Poulenc Inc to compel the USA to respond to interrogatories and produce documents responsive to Rhone-Poulen's 6th Request for production of documents and 2nd Set of Interrogatories regarding the US' costs documentation [423-1] is DENIED, based on the representations of the US that it has produced all requested documents in its possession, custody, or control and that it will supplement is responses as appropriate; With regard to the motion of Rhone-Poulenc, Inc to compel the US to produce documents improperly withheld as privileged [422-1], the US shall submit to the court for in camera review all documents as to which a privilege is claimed; the documents shall be submitted within 10 days from the date of this order (cc: all counsel) (ndd)

4-22-97

ORDER by Magistrate Judge John F. Moulds ORDERING that the mining documents submitted for in camera review be released to all parties in this litigation [764-1] [715-2] (cc: all counsel) (ndd)

5-01-97

ORDER by Honorable David F. Levi ORDERING that US' motion to modify the briefing schedule [806-1] [807-1] is GRANTED; the 4/97 scheduling order is hereby modified as follows: US response due 5/30/97; RP's brief due 7/11/97; US reply 8/8/97; motion for partial summary judgment to establish the US' liability based on the US' ownership and operation of certain CVP facilities, Iron Mountain Parcels and the Golinsky Mine by dft Rhone-Poulenc Basic [691-1] HEARING RESET FOR 9:00 (cc: all counsel) (ndd)

5-09-97

ORDER by Magistrate Judge John F. Moulds ORDERING the motion to extend the discovery cutoff is DENIED [715-1] ; the motion to compel compliance with the court's prior order complelling production of electronically stored documents is GRANTED in part and DEFERRED in part pending in camera review; documents from the Fish and Wildlife Service shall be submitted for in camera review no later than 5/19/97; the documents which have been withheld solely on the basis oof the beliberative process privilege shall be produced for inspection and copying no later than 6/9/97;

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 orginally 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, doucments # 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

law; all other pending reconsideration motions are DENIED; the court declines to address the discovery and successor liability motions because of settlement possibilities, those motions being DENIED without prejudice to their renewal at the conclusion of the settlement process (cc: all counsel) (old)

12-08-2000

ORDER by Honorable David F. Levi motion to dismiss crs-clms with prejudice by dft Aventis CropScience [1174-1] GRANTED, [289-1]; ACCORDINGLY final judgment will be entered in accordance with FRCP 54(b); dismissing w/prejudice the crs-clms of Iron Mtn Mines Inc and TW Arman against Aventis CropScience USA Inc; and dismissing w/prejudice the crs-clms of Aventis CropScience USA Inc against Iron Mtn Mines Inc and TW Arm (cc: all counsel) (ljr)

12-08-2000

CONSENT JUDGEMENT

2-21-2002

ORDER by Honorable David F Levi ORDERING lifting stay of proceedings entered in this case on 11/13/00 GRANTED; pltf's Opening Brief re Motion for Default Judgment as to deft Iron Mountain 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 re Motion for Partial Summary JUdgment on Liability as to deft T W Arman due 4/5/02, Opposition due 5/3/02, pltf's Reply due 5/10/02; pltf's Opening Brief re Motion for Partial Summary Judgment on Liability as to deft Iron Mountain due 4/5/02, Opposition due 5/3/02, pltf's Reply due 5/10/02; if deft Iron Mountain files a Motion to Confirm Credit from good faith settlement and expunge EPA's Admin Lien, Opening Brief is due 4/5/02, Opposition due 5/3/02, deft's reply due 5/10/02; hearing on all motions is scheduled for 5/17/02 at 9:00am (cc: all counsel) (mm1)

Is the consent decree fair? The answer is no. And does the consent decree fulfill the requirements of the NCP? Again the answer is no. We comment briefly upon three such facets. The first is obvious: the decree's likely efficaciousness as a vehicle for cleansing the environment is of cardinal importance. See Cannons, 720 F.Supp. at 1038; Conservation Chemical, 628 F.Supp. at 402; Seymour, 554 F.Supp. at 1339. Except in cases which involve only recoupment of cleanup costs already

spent, the reasonableness of the consent decree, for this purpose, will be basically a question of technical adequacy, primarily concerned with the probable effectiveness of proposed remedial responses. As this is only a case for recoupment, the additional scope of judicial review is applied

46. The efficaciousness of the remedial actions has not been fully protective of human health and the environment, and may be reasonably observed to have been arbitrary and capricious, and otherwise not in accordance with public law. In fact the treatment facility which reported that it was treating on average 372 lbs. of copper per day when the plant began operations in 1995, reported in 2003 that the plant was now treating approximately 650 lbs. per day, or almost twice the amount of "hazardous substance". It is therefore apparent that no remedy yet exists for the AMD, and that the problem is now much more severe. Furthermore, no provision for the minimum of 20 acres of off-site storage for the hazardous waste treatment sludge is provided by the State as required by law. No provision is made or suggested for where the 50 million tons of hazardous waste sludge will be disposed. No financial assurances are provided for this disposal.

47. A second important facet of reasonableness will depend upon whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures. Like the question of technical adequacy, this aspect of the problem can be enormously complex. The actual past response costs of remedial measures were known at the time this consent decree was proposed. Since the settlement's bottom line is definite, the proportion of settlement dollars to total needed dollars is not debatable. The agency must be held to a standard of mathematical precision. If the figures relied upon do not derive in a sensible way from a plausible interpretation of the record, the court should not defer to the agency's expertise. The agency effectively waived collection of $51 million in unrecovered past response costs from the responsible party, transferred this obligation to Counterclaimants with a statutory lien, and transferred unquantified and unlimited future liability to the innocent landowners.

48. A third integer in the reasonableness equation relates to the relative strength of the parties' litigating positions. If the government's case is strong and solid, it should typically be expected to drive a harder bargain. On the other hand, if the case is less than robust, or the outcome problematic, a reasonable settlement will ordinarily mirror such factors. In a nutshell, the reasonableness of

a proposed settlement must take into account foreseeable risks of loss. See Rohm & Haas, 721 F.Supp. at 680; Kelley, 717 F.Supp. at 517; Acushnet, 712 F.Supp. at 1028; Exxon, 697 F.Supp. at 692; Hooker, 540 F.Supp. at 1072. The same variable, we suggest, has a further dimension: when the government's case is fundamentally defective because of the innocent landowner defense, and it then by definition is a takings for the public benefit claim, and it will take time and money to pay damages and pay to implement private remedial measures through the litigatory failure. So it is better for the plaintiffs to deny the named defendant in the suit the status of innocent landowner so as to delay justice while swaddled in judicial deference to the EPA. To the extent that time is not of the essence or that the perpetual transaction costs loom large, a settlement which nets less than full recovery of cleanup costs is not necessarily reasonable. See Rohm & Haas, 721 F.Supp. at 680 (interpreting "reasonableness" in light of congressional goal of expediting effective remedial action and minimizing litigation); United States v. McGraw-Edison Co., 718 F.Supp. 154, 159 (W.D.N.Y.1989) (settlement reasonable in light of prospect of protracted litigation as contrasted to expeditious reimbursement and remedy); Acushnet, 712 F.Supp. at 1030 (emphasizing that trial would likely be "complex, lengthy, expensive and uncertain"); Exxon, 697 F.Supp. at 693 (noting benefit of immediate payment to environmental cleanup effort); Seymour, 554 F.Supp. at 1340 (urgency of abating danger to public must be considered). The reality is that, all too often, litigation is a cost-ineffective alternative which can squander valuable resources, public as well as private. Nevertheless, with these allegations of conflict of interest, and the allegation of compromise and collusion of the parties to the trust funds secured by the consent decree, the settlement must be subject to judicial review.

49.In this case, the district court wrongfully found the consent decrees to be reasonable. Cannons, 720 F.Supp. at 1038-39. Counterclaimants have also seriously questioned the technological efficacy of the cleanup measures to be implemented at the Site. They also contend that the settlement was not designed to assure adequate compensation to the public for harms caused. Given the totality of the record-reflected circumstances, and the probability of fraud upon the court, the lower court's finding of reasonableness should be vacated and remanded.

50. D. Fidelity to the Statute?

51. Of necessity, consideration of the extent to which consent decrees are consistent with Congress' discerned intent involves matters implicating fairness and reasonableness. The three broad approval criteria were not meant to be mutually exclusive and cannot be viewed in majestic isolation. Recognizing the inevitable imbrication, we turn to the final criterion.

52. We describe the two major policy concerns underlying CERCLA:

53. First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

54.Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir.1986) (quoting United States v. Reilly Tar & Chemical Corp., 546 F.Supp. 1100, 1112 (D.Minn.1982)). The district court thought that these concerns were addressed, and assuaged, by the proposed settlement. Counterclaimants do not.

55. It is crystal clear that the broad settlement authority conferred upon the EPA must be exercised with deference to the statute's overarching principles: accountability, the desirability of an unsullied environment, and promptness of response activities.

56. The bases do not appear to have been touched in this instance. The questions of accountability invite a proper investigation; in this case virtually none of the damaged environment is being restored to any beneficial use or to a condition where it can safely be returned to nature; and the promptness of the response activities and the intention of the response are still open to question.

57. Judicial discretion is necessarily broad--but it is not absolute. Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

58.Independent Oil & Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 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.4 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

preponderance of the evidence, that deprivations of due process and equal protection were facilitated by a conspiracy of officers of the court to systematically and under color of law deprive the defendants of their civil and constitutional rights.

62. 4. Notice. The Counterclaimants also contend that the government's negotiating strategy must be fair. Congress did send the EPA into the toxic waste ring with the obligation to protect the civil rights of those it governs. The EPA may not mislead any of the parties, discriminate unfairly, or engage in deceptive practices.

63. Counterclaimants allege that by a preponderance of the evidence, the plaintiffs have deceived and misled and discriminated against the remaining Defendants in this case.

64. In this CERCLA context, the government is under an obligation to determine liability in its settlement offers, and innocent landowners must be eligible to join ensuing major party settlements or otherwise resolve their liability for pollution that they did not cause or create. Therefore, and because of the unreasonable extent of the differential, and the graduation of comparative fault unconscionably and unduly coercive in the present case, that defendants were discriminated against, misled, and deceived.

65. 5. Exclusions from Settlements. Under the SARA Amendments, the right to the protections of the innocent landowner defense, and settlement to suit, is a fundamental right. The tyranny of “divide and conquer" as was applied in the present case, and in the contravention and defiance of a congressional directive, requires denial to the EPA the use of so reprobated an axiom of tyranny. So long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it chooses. In the present case however, the EPA did not operate in good faith, and the consent decree must be vacated, the trust funds commutated, and a decree of dismissal or acquittal and resolution of liability for the innocent landowner must be entered in this case.

This appeal stems from the environmental cleanup of Iron Mountain Mine, the largest mine in California, which is within a few miles of the Sacramento River.

The allegation of polluting the navigable waterways of the United States was brought by State Water Board officer James Pedri who was dissatisfied with State action at the site. The site was ac-

tively mined from 1895 to 1920, then kept on maintenance until WWII. Open pit mining began in the early 50's but ceased in 1963.

The United States and California brought suit principally under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., for reimbursement of costs associated with the cleanup. You are called upon to determine whether, as a matter of law, those cleanup costs were "necessary" and whether certain of the defendants are" responsible parties" ("RPs") under CERCLA § 107(a), 42 U.S.C. § 9607(a).

The touchstone for determining the necessity of response costs is whether there is an actual threat to human health or the environment; that necessity is not obviated when a party also has a religious, moral, business, or government reason for interfering in the cleanup. Because the district court erred in ignoring the ulterior business motive that caused the pollution and because there are genuine issues of material fact regarding whether Iron Mountain Mines response costs were, in fact, "necessary," you cannot uphold even a partial summary judgment on this ground.

Even if you assume that those costs were necessary, you still must decide whether plaintiffs are liable, and the extent of the takings in this per se takings case, and if the governments are PRPs. Parsing the meaning of the term "disposal" in § 9607(a)(2) lies at the heart of this question. You concluded in Carson Harbor that the migration of contaminants on the property did not fall within the statutory definition of "disposal." Thus, on the CERCLA claim, you should reverse the district court's grant of partial summary judgment and find for T. W. Arman and Iron Mountain Mines, Inc. There is no evidence that the minerals from Iron Mountain Mine ever hurt anyone, and any remaining hazard to fish after 105 years (or was that 105 million years?) was insignificant in the face of the complete loss of spawning habitat from United States dams, ranching, farming and urban pesticide, and the complete reliance of the fishery on artificial reproductive techniques and human intervention. Compound these facts with the EPA's joint and several strict liabilities under FIFRA and ESA and it is apparent why a scapegoat was so essential to trying to preserve the EPA franchise. There was never any intention of trying to introduce migratory fish for breeding into any waters above Keswick Lake, so there was never an actual threat to any fisheries. The navigable waterway of the United States is over 100 miles downstream, and fish spawning habitat 30 miles away.

Without evidence of legally significant contamination, the government was unjustified in filing suit to gain access to private property for a response action under the Superfund law, see U.S. v. Tarkowski , No. 99 C 7308, N.D.Ill., Nov. 26, 2001]

Consequently, the victorious property owner can recoup his litigation costs.

John Tarkowski is an elderly, indigent resident of a 16-acre tract situated in Wauconda, Ill., an affluent community northwest of Chicago. Until he was disabled, he worked as a building contractor. Using surplus materials, he built his house many years ago when the area was a rural backwater. His yard is filled with what his upscale neighbors regard as junk — wooden pallets, tires, empty drums, batteries, paint cans and other construction materials.

For more than 20 years, Tarkowski's neighbors had harassed him and had complained to environmental officials. The U.S. Environmental Protection Agency (EPA) inspected his property in 1979, but concluded that it did not pose any environmental hazard. In 1995, EPA rated the property zero on its hazard rating scale. Two years later, state authorities took soil and water samples and found no noteworthy contamination.

In 1998, EPA took additional samples of soil and materials on his property, finding only trace amounts of contaminants that, in fact, were comparable to levels found in surrounding properties and did not indicate any release. Nevertheless, EPA filed suit against Tarkowski alleging an “imminent and substantial endangerment to … public health … and the environment” based on an actual or possible release of hazardous substances. EPA sought an order to gain access to the site for investigative and remedial purposes. After hearing the evidence, a federal district court dismissed EPA's suit. An appeals court upheld the ruling, castigating the agency's conduct and judgment. [248 F.3d 596 (7th Cir. 2001)]

Tarkowski petitioned the district court for an award of attorney's fees and expenses under the Equal Access to Justice Act. The law allows certain parties who prevail against the federal government in a lawsuit to recover their litigation expenses unless the government's position was reasonable. Finding EPA's stance totally unjustified, the district judge said, “There was no evidence of legally significant contamination and … the government's claim of an imminent and substantial endanger-

ment was factually baseless.” EPA cannot reasonably insist that “if a hazard was found, no matter how small, it had the right to do whatever it wanted on Tarkowski's property,” he added.

“It is to protect citizens against … overreaching actions by government bureaucrats that courts are empowered to prevent arbitrary and capricious interference with property rights,” said the judge, again citing the appeals court. “The government's position … ‘would give the agency in effect an unlimited power of warrantless searches and seizures [which the Superfund law] does not contemplate and the Fourth Amendment would almost certainly forbid,'” he concluded with yet another reference to the appellate opinion.

You must also address the remaining issues. there are genuine issues of material fact regarding the necessity of EPA Iron Mountain Mine CERCLA response costs, you must reverse the grant of summary judgment.

The district court granted the United States and California’s motions on all claims, and refused to hear pro se plaintiffs intervention, exceptions, positive law claims, and state-law nuisance and trespass claims asserted by T. W. Arman, John F. Hutchens, and on behalf of Iron Mountain Mines, Inc.

. See Carson Harbor Vill., Ltd. v. Unocal Corp., 990 F. Supp. 1188, 1199 (C.D. Cal. 1997). The court first held that Carson Harbor's CERCLA claim fails because it did not show that its remedial action was "necessary" under 42 U.S.C. § 9607(a)(4)(B) because there was no evidence of an "actual and real threat" to human health or the environment. Id. at 1193-94. In so holding, the district court disregarded certain evidence to the contrary as inadmissible hearsay. See id. at 1193 n.4. In the alternative, with respect to the Partnership Defendants, the district court held that they were not PRPs within the meaning of 42 U.S.C. § 9607(a)(2) because "disposal warranting CERCLA liability requires a showing that hazardous substances were affirmatively introduced into the environment. " Id. At 1195. And, with respect to the storm water runoff, there was no direct evidence that any lead-contaminated storm water entered the property at any time prior to 1983, when Carson Harbor purchased the property. Id.

The district court granted summary judgment on the RCRA claim because the "evidence shows that there was no imminent danger" to human health or the environment--a required element for a

RCRA claim. Id. at 1196 (emphasis added). On the CWA claim, the court concluded that there was no evidence that the defendants violated a National Pollutant Discharge Elimination System ("NPDES") permit, as required for a CWA violation. Id. at 1197. With respect to the common law claims for nuisance, trespass, and injury to easement against the Government Defendants, the district court would hold that CAL. CIV. CODE § 3482, which provides that nothing done pursuant to express statutory authorization can be deemed a nuisance, provides a complete defense. Iron Mountain Mines demonstrates that illegitimate animus, malice, and false claims are grounds for piercing the governments veil**. YOU SHOULD GRANT INJUNCTIVE RELIEF!**

Because Carson Harbor failed to show that the Government Defendants violated the NPDES permits, the court concluded, any pollutants discharged into the storm water were permissible. Id. Finally, the district court rejected Carson Harbor's claim for express indemnity against the Partnership Defendants, because the Water Quality Board did not require the cleanup. See id. At 1198-99.

Following the issuance of a panel opinion, you should agree to hear this case en banc.

Direct the Superior Court and the Eastern District Court to void and vacate the liens. Enjoin EPA for: Conflicts of interest, fraud upon the courts, joint and several trespassers unlawful detainer. Manifest injustice, prohibition, misfeasance, certiorari, abuse, mandamus, intervention, & arrest.

"Full relief and restore possession to the party entitled thereto" for absence of jurisdiction.

WRIT OF EQUITABLE *ESTOPPEL*! WRIT OF POSSESSION & EJECTMENT!

JUDGEMENT OF THE COURTS ENJOINED, VACATED, AND SET ASIDE

February 3, 2010 Signature:_____

/s/ John F. Hutchens, *grantees' agent;* Warden of the Gales, Forests, & Stannaries expert

Verification affidavit:

I, John F. Hutchens, hereby state that the same is true of my own knowledge, except as to matters which are herein stated on my own information or belief, and as to those matters, I believe them to be true. Affirmed this day: February 3, 2010

Signature:_____

s/ John F. Hutchens; Joint Venturer, Warden of the Gales, Forests, and Stannaries.

CITIZEN & AGENT OF RECORD for: T.W. Arman & Iron Mountain Mines, Inc.