

# THE GRAND STAIRCASE—ESCALANTE NATIONAL MONUMENT: BALANCING PUBLIC AND PRIVATE RIGHTS IN THE NATION'S LANDS

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## I. INTRODUCTION

On September 18, 1996, President Clinton, exercising his authority as Executive under the Antiquities Act of 1906,<sup>1</sup> issued a Presidential Proclamation that created the Grand Staircase—Escalante National Monument (Escalante) on 1.7 million acres of federal land in southern Utah.<sup>2</sup> The President's purpose was to preserve the land located within the monument for future generations.<sup>3</sup> In signing the Proclamation, the President stated that the monument status accomplished this goal in two ways.<sup>4</sup> First, it permanently withdrew the land from disposition under public land laws, preventing any future government grants of private rights in the land.<sup>5</sup> Second, it halted the plans of Andalex Resources (Andalex), a Dutch mining company, to mine coal on seventeen leases<sup>6</sup> it owns in a 650,000 acre portion of the monument known as the Kaiparowits Plateau.<sup>7</sup> The Presidential Proclamation affords Andalex the opportunity to swap these leases for coal leases in other parts of Utah, and Clinton encouraged Andalex to do just

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<sup>1</sup> 16 U.S.C. § 431 (1996).

<sup>2</sup> See Presidential Proclamation No. 6920, 61 Fed. Reg. 50,225 (1996).

<sup>3</sup> See *Remarks by the President in Making Environment Announcement*, M2 PRESSWIRE, Sept. 19, 1996, at 2, available in LEXIS, NEXIS Library, Curnws File [hereinafter *Remarks by the President*].

<sup>4</sup> See Presidential Proclamation, 61 Fed. Reg. at 50,225; *Remarks by the President*, *supra* note 3, at 3.

<sup>5</sup> See Presidential Proclamation, 61 Fed. Reg. at 50,225.

<sup>6</sup> See *BLM Serial Register Pages*, available from BLM, Utah State Office.

<sup>7</sup> See *Remarks by the President*, *supra* note 3, at 3; Ed Jahn, *Monumental Discontent? Many in Southern Utah Say Decision Threatens Their Future*, SAN DIEGO UNION-TRIB., Oct. 14, 1996,

that.<sup>8</sup> Currently Andalex and the Department of the Interior (DOI) are in discussions over the issue.<sup>9</sup>

Apparently the President and the DOI determined that Andalex was entitled to the lease swaps as a form of compensation for a government taking of Andalex's rights under the Fifth Amendment.<sup>10</sup> Given the current state of takings law, they were almost certainly correct.<sup>11</sup> This Comment attempts to provide a basic understanding of public land law, and to show how it correctly balanced the competing public and private interests in Escalante.

To properly understand the issues surrounding the creation of Escalante and Andalex's rights under its leases, a basic understanding of public land law as well as mining law is required.<sup>12</sup> Section II provides a brief history of public land law. It focuses on congressional power to regulate the public lands, and the changes in public land law policy over the course of the nineteenth and twentieth centuries. Section III provides a brief survey of the development of the law governing coal mining on public lands, and gives a detailed description

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at A1. The purpose of the Antiquities Act, as its name suggests, is to preserve objects of antiquity within the monument. *See Remarks by the President, supra* note 3, at 3. Such objects include paleontological and archeological artifacts, and in the proclamation the President cited numerous examples of the existence of such objects within the monument. *See id.* Given this objective, it is highly unlikely that the construction of the roads necessary to facilitate the mining, and the mining itself, would comply with the preservationist goals of the Act. *See Press Briefing by Secretary of Interior Babbitt, Mike McCurry and Joe Lockhart, M2 PRESSWIRE, Sept. 20 1996, available in LEXIS, NEXIS Library, Curnws File.*

<sup>8</sup> *See Remarks by the President, supra* note 3, at 3.

<sup>9</sup> *See Jim Woolf, Andalex Gives up on Kaiparowits Mine; National Monuments Creation Poses Obstacles for Project, SALT LAKE TRIB., Jan. 24, 1996, at B1.* This, however, may not have stopped fossil fuel exploration in the Kaiparowits Plateau. *See Brent Israelsen, Environmentalists Appeal BLM Ruling Allowing Conoco to Drill in Monument, SALT LAKE TRIB., Sept. 13, 1997, at D2.* Conoco, an oil company that owns 59 oil leases in the monument, has not agreed to enter negotiations for lease swaps. *See id.* In September of 1997, the Bureau of Land Management (BLM), the agency charged with the administration of the monument, approved Conoco's "request to drill a wildcat [oil] well in Reese Canyon on the Kaiparowits Plateau." *See id.* This drilling is for the limited purpose of determining if the wells hold commercial quantities of oil. *See Talk of the Nation: Mining Monuments/Mining Asteroids* (Comments of Don Banks, Chief of External Affairs, Utah State Bureau of Land Management) (NPR radio broadcast, Sept. 12, 1997). As of November 1997, the BLM had not made a determination of what it will do if Conoco actually finds "commercial quantities" of oil and wants to initiate full-scale drilling operations. *See id.*

<sup>10</sup> *See Remarks by the President, supra* note 3, at 3.

<sup>11</sup> *See generally Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Ass'n v. Debenedictis, 480 U.S. 470 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).*

<sup>12</sup> GEORGE CAMERON COGGINS & CHARLES F. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCE LAW* 34 (1980).

of the changes in the federal coal mining leasing process. In addition to providing important background information on public land and federal coal mining law, Section II and Section III reveal how fundamental principles of public land law, guided by changes in societal values, have evolved over time. Section IV, through an exposition of the 1992 United States Supreme Court Case *Lucas v. South Carolina Coastal Council*,<sup>13</sup> briefly discusses the status of current takings law, and makes an argument both for compensation for Andalex, and a proper regard for current societal and environmental interests.

## II. A BRIEF HISTORY OF PUBLIC LAND LAW

### A. Introduction

The history of the public lands and public land law in the United States is in many ways a history of the growth and development of the nation itself.<sup>14</sup> Over the past two hundred years public land law has developed to meet the needs of an ever changing and growing nation.<sup>15</sup> No one statutory scheme has governed this development, and as a result, public land law today is a hodgepodge of many different statutes, regulations, and agency mandates with varying purposes.<sup>16</sup>

To make the study of this area of the law more complex, there are multiple meanings of the term "public land."<sup>17</sup> The classic legal definition is "lands of the United States subject to disposition under the general land laws,"<sup>18</sup> i.e., federally owned lands in which the government grants rights or fee simple ownership to private individuals or states.<sup>19</sup> The current technical legal definition is "lands and interests in lands the Bureau of Land Management (BLM) manages,"<sup>20</sup> as well as lands and interests that the National Park Service, Forest Service,

<sup>13</sup> *Lucas*, 505 U.S. at 1003.

<sup>14</sup> See Marla E. Mansfield, *When "Public" Rights Meet "Private" Rights: The Problems of Labeling and Regulatory Takings*, 65 COLO. L. REV. 193, 194 (1994); see generally PAUL WALLACE GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968); COGGINS & WILKINSON, *supra* note 12, at 34-143.

<sup>15</sup> See Mansfield, *supra* note 14, at 195-201; COGGINS & WILKINSON, *supra* note 14, at 34-143; see generally GATES, *supra* note 14.

<sup>16</sup> See, e.g., Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 802 (1993); GATES, *supra* note 14; COGGINS & WILKINSON, *supra* note 12, at 34-143.

<sup>17</sup> See Mansfield, *supra* note 16, at 802.

<sup>18</sup> *Id.*

<sup>19</sup> See *id.* at 821.

<sup>20</sup> *Id.* at 802.

and Fish and Wildlife Service manage.<sup>21</sup> The change is a result of congressional enactment of the Federal Land Policy and Management Act in 1976 (FLPMA),<sup>22</sup> which fundamentally altered public land law policy.<sup>23</sup> Congress, with the enactment of the FLPMA delegated the power to manage and regulate the public lands, not already withdrawn, to the BLM.<sup>24</sup> As such, the term "public lands" has been statutorily applied to all land and interests the BLM manages.<sup>25</sup>

### B. *The Constitutional Powers of Congress*

The Property Clause of the Constitution grants Congress the exclusive power to manage and dispose of the lands of the United States.<sup>26</sup> The clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States."<sup>27</sup>

The United States Supreme Court has ruled that the Property Clause grants Congress plenary powers over the public lands.<sup>28</sup> The Court has determined that Congress is both owner and sovereign of the public lands.<sup>29</sup> As owner of the land, Congress can exercise all the rights and privileges associated with land ownership.<sup>30</sup> As sovereign or legislature, Congress has the power to make laws pertaining to every aspect of federal land management, including all wildlife living on the lands.<sup>31</sup> Through a statute, Congress can also delegate its power over the public lands to the Executive.<sup>32</sup>

States also have the power to regulate public lands within their borders.<sup>33</sup> The Constitution's Supremacy Clause,<sup>34</sup> however, requires

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<sup>21</sup> See *id.*

<sup>22</sup> 43 U.S.C. § 1701 (1994).

<sup>23</sup> See *id.* § 1702(e); see also *infra* Section II(C)(3).

<sup>24</sup> See 43 U.S.C. § 1702(e).

<sup>25</sup> Mansfield, *supra* note 16, at 832.

<sup>26</sup> U.S. CONST. art. IV, § 3, cl. 2. See David Getches, *Managing the Public Land: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 282 (1982). Some have argued that the executive branch has the power to manage the public property of the United States in emergency situations. See Getches, *supra*, at 293-300. The United States Supreme Court has never ruled on this argument, but it seems to be of very little weight. See *id.*

<sup>27</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>28</sup> See *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976); Mansfield, *supra* note 16, at 807.

<sup>29</sup> See *Kleppe*, 426 U.S. at 540.

<sup>30</sup> See Mansfield, *supra* note 16, at 806.

<sup>31</sup> See *id.* at 808-09.

<sup>32</sup> See Getches, *supra* note 26, at 279-80.

<sup>33</sup> See Mansfield, *supra* note 16, at 809.

<sup>34</sup> U.S. CONST. art. VI.

that state law give way to federal law, if the state law is inconsistent with or frustrates the purpose of a federal law.<sup>35</sup> Mining regulations are a good example of this.<sup>36</sup> Both the state and federal government are allowed to regulate mining on federal lands, but state law can never prohibit mining on federal lands where it is allowed under federal law.<sup>37</sup>

### C. *From Disposition to Retention*

#### 1. Disposition

While no comprehensive statutory scheme has governed public land law, the policy of disposition dominated and shaped public land law from the colonial period up to the second half of the twentieth century.<sup>38</sup> The fundamental idea behind the policy of disposition was "to sell or give away the public lands and resources to private owners and states in order that the Nation would be tamed, farmed and developed."<sup>39</sup>

For the first sixty or so years of the Republic, the federal government viewed the vast public domain as a tremendous resource it could use for the growth and development of the nation, as well as a primary source of revenue for the government.<sup>40</sup> Thus, under a series of Land Acts passed throughout the first half of the nineteenth century, Congress auctioned off the public lands at minimum prices ranging from two dollars an acre to as low as twelve cents an acre.<sup>41</sup> These Acts proved fairly successful in disposing of the public lands to private individuals, but administration of the Acts proved difficult, and fraud and speculation were rampant.<sup>42</sup> In the early 1850s, "an unprecedented amount of land passed out of the public domain, causing endless confusion and antagonism. States, railroads, miners, speculators, and settlers all disputed with the federal government and each other."<sup>43</sup>

<sup>35</sup> See *id.*; see also Mansfield, *supra* note 16, at 813-16, 820.

<sup>36</sup> See Mansfield, *supra* note 16, at 816-17.

<sup>37</sup> See *id.* at 820.

<sup>38</sup> See COGGINS & WILKINSON, *supra* note 12, at 34.

<sup>39</sup> *Id.*

<sup>40</sup> See *id.* at 43, 68-69.

<sup>41</sup> See *id.* at 68-69.

<sup>42</sup> See *id.* at 69.

<sup>43</sup> COGGINS & WILKINSON, *supra* note 12, at 69.

By the early 1860s, due in part to the problems of fraud and speculation, western settlement had slowed.<sup>44</sup> In addition, the "revenues from land sales as a percentage of the federal budget had declined drastically."<sup>45</sup> Given these two facts, Congress felt the best way to successfully promote increased settlement was to simply give, free of charge, large portions of the public lands to those willing to settle them.<sup>46</sup> With the Homestead Act of 1862, which granted 160 acres of federal land to each western settler for free, Congress did just that, and ushered in an era of free land grants that would endure for the next 114 years.<sup>47</sup>

In addition to simply giving away large portions of western federal lands, Congress understood that it was important for growth and development of the West to provide settlers with easy access, through rail lines, to eastern goods and supplies.<sup>48</sup> Therefore, in order to encourage and subsidize the construction of rail lines, the federal government, from the 1830s to 1871, granted to railroad companies over ninety million acres of federal lands.<sup>49</sup> It also gave another thirty-five to forty million acres to states for use in the subsidization and construction of intrastate rail lines.<sup>50</sup>

Aside from rail subsidies, the federal government granted land to each state upon its entrance into the Union.<sup>51</sup> The chief beneficiaries of these grants were the public schools.<sup>52</sup> Any revenue realized from the disposition of these lands went to a public school trust.<sup>53</sup> Over the course of the nineteenth and twentieth centuries, the federal government set aside seventy-seven million acres of land for the public schools of the western states and an additional twenty-one million acres for universities.<sup>54</sup>

In addition to land grants, the federal government granted rights to exploit the natural resources of the public domain.<sup>55</sup> Chief among

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<sup>44</sup> *See id.*

<sup>45</sup> *Id.* at 69-70.

<sup>46</sup> *See id.*

<sup>47</sup> *See id.* at 70.

<sup>48</sup> *See* *Leo Sheep Co. v. United States*, 440 U.S. 668, 668 (1979).

<sup>49</sup> *COGGINS & WILKINSON*, *supra* note 12, at 88.

<sup>50</sup> *See id.*

<sup>51</sup> *See id.* at 45.

<sup>52</sup> *See id.*

<sup>53</sup> *See id.* One of Utah's main complaints about the declaration of Escalante was that stopping the mining cost the public school trust millions of dollars in lost revenue. *See Remarks by the President*, *supra* note 3, at 2.

<sup>54</sup> *See* *COGGINS & WILKINSON*, *supra* note 12, at 45.

<sup>55</sup> *See id.* at 82.

these natural resources were hard rock minerals.<sup>56</sup> The Mining Law of 1872<sup>57</sup> was the main statutory provision Congress passed to regulate hard rock mineral mining on public lands.<sup>58</sup> Amazingly, it remains, with little alteration, the main statutory provision that governs hard rock mineral mining on the public lands today.<sup>59</sup> The Act, which was titled an act to "promote the Development of Mining Resources of the United States,"<sup>60</sup> allowed prospectors free access to any federal lands, not otherwise withdrawn from disposal, "for mineral exploration and exploitation."<sup>61</sup> Once a prospector discovered a valuable deposit of minerals, the Act provided him with exclusive right of occupancy to the tract of land.<sup>62</sup> In addition, after the prospector had expended over \$500 on labor or improvements in developing the claim, he could begin extracting the minerals from the land.<sup>63</sup> The Act also allowed the prospector to purchase the land for a fairly modest price.<sup>64</sup>

All told, in its quest to develop and expand the nation, the federal government, over the course of the nineteenth and twentieth centuries, disposed of over one billion acres of the public lands to individuals and states.<sup>65</sup> During the nineteenth century, the federal government used the nation's natural resources to spur growth and development with little thought towards the long-term conservation of any of those same resources.<sup>66</sup> While the policy of disposition was instrumental in contributing to the tremendous growth of the nation, it subjected the public domain to government-sanctioned destruction, waste, and illegal privatization.<sup>67</sup> Some have described the era of disposition of fed-

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<sup>56</sup> See *id.* at 82-83, 86-87. The government also granted timber rights through various Timber Acts. See *id.* at 118-19. The Acts provided for the purchase of an acre of timber land at anywhere between \$1.25 and \$2.50 an acre as long as the purchaser agreed not use it for speculation. See *id.* Settlers, however, largely ignored these Acts, and continued as had been the case for the previous hundred years, to assert dubious claims to title to timber lands, under the "authority" of which they plundered and stole the timber of the public domain. See *id.* In Minnesota, for example, sawmill operations were in full force eleven years before a single acre of public land was sold in the territory. See *id.* at 118.

<sup>57</sup> 30 U.S.C. § 22 (1994).

<sup>58</sup> See *id.*; COGGINS & WILKINSON, *supra* note 12, at 87.

<sup>59</sup> See 30 U.S.C. § 22; COGGINS & WILKINSON, *supra* note 12, at 87.

<sup>60</sup> JOHN LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 17 (1987) (quoting General Mining Act of May 10, 1872, 17 Stat. 91).

<sup>61</sup> *Id.*

<sup>62</sup> See *id.* at 18.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See COGGINS & WILKINSON, *supra* note 12, at 72.

<sup>66</sup> See *id.* at 70.

<sup>67</sup> See *id.*

eral lands from the Civil War on as the "Great Barbecue—a generation's unparalleled plunder of the Nation's natural resources."<sup>68</sup>

## 2. Retention

At the close of the nineteenth century the policy of disposition had met many of the federal government's goals.<sup>69</sup> The frontier had been settled and the nation, despite an extremely destructive civil war, had grown to be the most powerful and wealthy in all of the Americas.<sup>70</sup> With the close of the frontier came the birth of the conservation movement.<sup>71</sup> The movement recognized that the resources of the nation were limited and in need of preservation.<sup>72</sup> At this time, the overarching policy of public land law still remained disposition.<sup>73</sup> Congress, however, began to pay heed to the growing conservation movement, and public land law began its slow move toward the policy of retention.<sup>74</sup> The three Acts discussed below highlight the development of this law.

### a. *The Antiquities Act of 1906*

The purpose of the Antiquities Act of 1906<sup>75</sup> was to prevent the vandalism and destruction of important archeological ruins that lay on public lands.<sup>76</sup> To meet this goal section two of the Act provided in part that:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.<sup>77</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> See Getches, *supra* note 26, at 283.

<sup>70</sup> See COGGINS & WILKINSON, *supra* note 12, at 119.

<sup>71</sup> See *id.*; Getches, *supra* note 26, at 283.

<sup>72</sup> See Getches, *supra* note 26, at 281–85.

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> 16 U.S.C. § 431 (1994).

<sup>76</sup> RONALD F. LEE, *THE ANTIQUITIES ACT OF 1906* 21–28, 39 (1970).

<sup>77</sup> 16 U.S.C. § 431. As discussed above, the Constitution, in the Property Clause, grants



Almost immediately after the passage of the Act, President Theodore Roosevelt began to withdraw public lands from disposition under it.<sup>78</sup> "Although most were of small areas where ruins or some natural formation was located, some were of huge areas withdrawn for more general preservation purposes."<sup>79</sup> Of particular importance was Roosevelt's 1908 withdrawal of the Grand Canyon as "an object of unusual scientific interest, being the greatest eroded canyon within the United States."<sup>80</sup> The legality of the massive size and purpose of the withdrawal was challenged in *Cameron v. United States*.<sup>81</sup> The United States Supreme Court proved unwilling to question the Executive's discretion under the Act.<sup>82</sup> It upheld the legality of the monument designation as suitable under the "scientific interest" clause of section two, and made no mention of the size of the monument.<sup>83</sup>

Subsequent case law made clear that the courts would exercise deference to the Executive under the Act, and required Congress to remedy an executive abuse of discretion.<sup>84</sup> Such remedies have included providing the state in which the withdrawn land is located payment for lost tax revenues, and prohibiting the use of the Antiquities Act in that state.<sup>85</sup>

#### b. *The Taylor Grazing Act*

In 1934, Congress passed the Taylor Grazing Act.<sup>86</sup> The Act was Congress' response to the destruction, in the 1920s and early 1930s, of the western public lands.<sup>87</sup> Before it passed the Taylor Grazing Act, Congress had allowed free and unlimited access to unleased public lands for livestock grazing.<sup>88</sup> Since Congress had neither charged for

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plenary power to Congress over the public lands. U.S. CONST. art. IV, § 3, cl. 2; see Getches, *supra* note 26, at 279. As such, whenever the Executive withdraws land from the public domain it must be done through a delegation of power from Congress. See Richard M. Johannsen, Note, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 440-41 (1981).

<sup>78</sup> See Getches, *supra* note 26, at 302.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 303 (quoting Presidential Proclamation No. 2022, 47 Stat. 2457 (1932)).

<sup>81</sup> *Cameron v. United States*, 252 U.S. 450, 455-56 (1920).

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See *Wyoming v. Franke*, 58 F. Supp. 890, 895-96 (D. Wyo. 1945).

<sup>85</sup> See Getches, *supra* note 26, at 305-06.

<sup>86</sup> 43 U.S.C. § 315 (1994).

<sup>87</sup> See COGGINS & WILKINSON, *supra* note 12, at 132.

<sup>88</sup> See *Omaechevarria v. Idaho*, 246 U.S. 343, 343 (1918); COGGINS & WILKINSON, *supra* note 12, at 132.

the use of the land, nor limited the amount of land upon which a rancher could graze his livestock, it made economic sense for a rancher to graze his herds on as much land as possible.<sup>89</sup> This resulted in massive overgrazing on the public lands.<sup>90</sup> In combination with severe draught conditions present throughout the Midwest for much of the 1920s and 1930s, the overgrazing transformed millions of acres of the public domain into a vast wasteland on which nothing could grow.<sup>91</sup>

Under the authority of the Act, President Franklin Roosevelt, through two Executive Orders, temporarily withdrew all public lands from disposition, except for mining and mineral leasing.<sup>92</sup> The Act required the DOI to classify certain of the public lands as grazing lands, and to prohibit the activity on the rest.<sup>93</sup> With this Act then, the federal government, for the first time, mandated wide-scale land use planning of the public lands, and by so doing recognized "the exhaustion of the values which had made the public domain a dynamic force in building the country."<sup>94</sup>

### 3. Federal Land Policy and Management Act

In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA),<sup>95</sup> which ended the official government policy of disposition of the federal lands.<sup>96</sup> The Act stated in part that it would be the policy of the government to retain "the public lands . . . in Federal ownership, unless as a result of land use planning procedures provided for in this Act, it is determined that the disposal of a particular parcel will serve the national interest."<sup>97</sup>

With the FLPMA, the federal government officially recognized that it was not the job of the federal government to simply hold the public lands until the time was ripe for their disposal.<sup>98</sup> Instead it recognized that the role of the federal government was to effectively manage and preserve the public domain.<sup>99</sup> For that reason the FLPMA is consid-

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<sup>89</sup> See COGGINS & WILKINSON, *supra* note 12, at 132.

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> Exec. Order No. 6910, Nov. 26, 1934; Exec. Order No. 6964, Feb. 5, 1935; see Getches, *supra* note 26, at 309-10.

<sup>93</sup> See COGGINS & WILKINSON, *supra* note 12, at 134 (quoting E. LOUISE PEFFER, *THE CLOSING OF THE PUBLIC DOMAIN* 214-24 (1951)).

<sup>94</sup> *Id.*

<sup>95</sup> 43 U.S.C. § 1701 (1994).

<sup>96</sup> *Id.* § 1701(a)(1).

<sup>97</sup> *Id.*

<sup>98</sup> See Mansfield, *supra* note 16, at 833.

<sup>99</sup> See *id.*

ered to be the most significant law in the twentieth century, governing the management of the public lands.<sup>100</sup> The Act officially placed all public lands not already withdrawn from disposition, under the power of the BLM, a division of the DOI, to regulate and manage.<sup>101</sup> The FLPMA was not clear on exactly how the BLM was to manage the public lands to best serve the national interest, but expressed an overarching theme of "prudent conservative management."<sup>102</sup>

The slow change in public land law policy from disposition to retention is a reflection of the change in the needs of the nation as well as society's understanding of the appropriate use of the public lands.<sup>103</sup> In the nineteenth century, the public lands were one of the nation's chief resources.<sup>104</sup> The disposition of these lands to individuals, corporations, and the states was seen as essential for the growth and development of the nation.<sup>105</sup> Slowly over the course of twentieth century, as much of the public domain had been transferred into private hands, the importance of the public lands to the growth of the nation dwindled.<sup>106</sup> At the same time, a new perspective, one that recognized the public lands as a valuable limited resource and embraced the values of stewardship and preservation, emerged.<sup>107</sup> The FLPMA is a culmination of this perspective.<sup>108</sup>

### III. LAWS GOVERNING COAL MINING ON FEDERAL LANDS

#### A. Introduction

This section explores the history and development of federal law regulating coal mining on public lands. It discusses the Mineral Leasing Act of 1920 (MLA),<sup>109</sup> the Federal Coal Leasing Amendments Act of 1976 (FCLAA),<sup>110</sup> and the Surface Coal Mining Reclamation Act of

<sup>100</sup> See *id.*

<sup>101</sup> 43 U.S.C. § 1701(a)(5) (1994); Mansfield, *supra* note 16, at 833-35.

<sup>102</sup> Getches, *supra* note 26, at 315.

<sup>103</sup> See *id.* at 283-84, 309-10; see also COGGINS & WILKINSON, *supra* note 12, at 119-43.

<sup>104</sup> See COGGINS & WILKINSON, *supra* note 26, at 43.

<sup>105</sup> See *id.*

<sup>106</sup> See Getches, *supra* note 20, at 283-84, 309-10.

<sup>107</sup> See COGGINS & WILKINSON, *supra* note 26, at 43-119; Getches, *supra* note 26, 283-84, 309-10; see also Gates, *supra* note 14, at 725-26.

<sup>108</sup> See COGGINS & WILKINSON, *supra* note 26, at 43-119; Getches, *supra* note 26, 283-84, 309-10; see also Gates, *supra* note 14, at 725-26.

<sup>109</sup> 30 U.S.C. §§ 181-287 (1970) (amended 1976).

<sup>110</sup> Pub. L. No. 94-377, 90 Stat. 1083 (1976). The Act is a series of amendments to the Mineral Leasing Act.

1977 (SCMRA),<sup>111</sup> and the major changes the coal leasing process has undergone in the last twenty-five years.<sup>112</sup>

### B. *The Mineral Leasing Act of 1920*

The primary purpose of the Mineral Leasing Act of 1920 (MLA) was to facilitate, through moderate government regulation, the reasonable development of the coal and oil resources of the nation.<sup>113</sup> Prior to congressional enactment of the MLA, the Coal Acts of 1864 and 1873 governed all coal mining on the public lands.<sup>114</sup> Under these Acts, Congress auctioned off federal coal lands to private parties.<sup>115</sup> The reason it chose to auction the lands, rather than to subject them to disposition, under the Mining Law of 1872 is not clear.<sup>116</sup> One possible explanation lies in the fact that in the mid-nineteenth century, coal deposits were much more readily discoverable than mineral and precious metal deposits.<sup>117</sup> Coal lands, therefore, offered a much greater potential for raising revenue than mineral and precious metal lands.<sup>118</sup> Conservation, in all likelihood, was not a motivating factor as the federal government's perception of the United States in the 1870s was that of a nation with a seemingly endless supply of land and natural resources.<sup>119</sup>

By the early twentieth century, coal mining had become big business.<sup>120</sup> The 1864 and 1873 Coal Acts had become hopelessly outdated and encouraged fraud and waste on the part of mine operators.<sup>121</sup> These Acts contained limitations on the number of acres an operator was able to purchase, which often made it economically unfeasible to develop certain coal lands.<sup>122</sup> As a result, mine operators frequently ignored the limitations and entered onto the coal lands illegally.<sup>123</sup> To

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<sup>111</sup> *Id.* §§ 1201–1328 (1994).

<sup>112</sup> See 30 U.S.C. §§ 201–220, §§ 1201–1328; Sam Kalen, *Where Do We Go From Here?: The Federal Coal Leasing Amendments Act - Past, Present, Future*, 98 W. VA. L. REV. 1023, 1026–41 (1996); 3 Pub. Nat. Resources Law (CBC) §§ 22.02–.03 (1997).

<sup>113</sup> See Gates, *supra* note 14, at 726–30.

<sup>114</sup> See *id.* at 724; Kalen, *supra* note 112, at 1025–26.

<sup>115</sup> See Gates, *supra* note 14, at 724.

<sup>116</sup> See *id.* at 724–25.

<sup>117</sup> See *id.* at 725.

<sup>118</sup> See *id.*

<sup>119</sup> See *id.*

<sup>120</sup> See Gates, *supra* note 14, at 726.

<sup>121</sup> See *id.* at 726–30.

<sup>122</sup> See *id.* at 726.

<sup>123</sup> See *id.*

prevent this theft, in 1906 President Theodore Roosevelt in 1906 withdrew from all forms of entry approximately sixty-six million acres of federal coal lands.<sup>124</sup> In 1910, in response to what it viewed as an ever-growing possibility of private ownership of a vast majority of the nation's coal and oil lands,<sup>125</sup> Congress passed the Picket Act.<sup>126</sup> The Act granted the Executive general withdrawal authority over all federal coal and oil lands, and during the next ten years the Executive withdrew virtually all of them from disposition.<sup>127</sup>

Throughout this period, a heated debate raged in Congress concerning the best way to re-open the withdrawn lands to the public.<sup>128</sup> While some members of Congress advocated giving all the land to the states, others wanted to put it up for sale, while still others wanted to develop a scheme to lease the land.<sup>129</sup> Leasing was the manner in which the government could maintain the most control over the land, and thus was favored by the conservationists.<sup>130</sup> In 1920, the conservationists carried the day and Congress passed the MLA.<sup>131</sup> The passage of the MLA, however, was not so much a victory for the ideals of the conservation movement, as it was a recognition, on the part of the non-conservationist members of Congress, that leasing was the only way Congress could open the public lands to coal development anytime in the near future.<sup>132</sup> Under the Picket Act the Executive had withdrawn virtually all of the public domain from coal mining and oil exploration.<sup>133</sup> The nation was not in the throws of an energy crisis, and even after the Executive had closed off virtually all the public domain from coal and oil development, oil wells operating on private lands were producing more oil than the nation needed.<sup>134</sup> Thus, seeing that the nation had no immediate need for the federal coal and oil lands, the conservation-minded members of Congress were willing to wait quite some time before reopening the lands to exploration.<sup>135</sup>

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<sup>124</sup> See *id.* at 726–30.

<sup>125</sup> See Gates, *supra* note 14, at 732–37; Kalen, *supra* note 112, at 1026.

<sup>126</sup> 30 U.S.C. § 141 (1994).

<sup>127</sup> See Gates, *supra* note 14, at 736.

<sup>128</sup> See *id.* at 738.

<sup>129</sup> See *id.* at 738–41.

<sup>130</sup> See *id.* at 740–41.

<sup>131</sup> 30 U.S.C. §§ 181–287 (1970) (amended 1976).

<sup>132</sup> See Gates, *supra* note 14, at 742–43 (citing 58 CONG. REC. 4112 (1919)).

<sup>133</sup> See *id.* at 740.

<sup>134</sup> See *id.* (citing JOHN ISE, THE UNITED STATES OIL POLICY 327 (1926)).

<sup>135</sup> See Gates, *supra* note 14, at 741–43.

Under the MLA, the DOI issued two types of coal leases: (1) a competitive bidding lease,<sup>136</sup> and (2) a preference right lease.<sup>137</sup> The DOI issued competitive bidding leases on lands it knew to have workable amounts of coal.<sup>138</sup> The process for issuing these types of leases was simple. The DOI held an auction and sold the leases to the highest bidder.<sup>139</sup> "Actual competition by bidders in coal lease sales, however, was conspicuous by its absence."<sup>140</sup> Indeed, many of the "auctions" held under the MLA consisted of just one bidder.<sup>141</sup>

Under the preference right leasing system, the potential mine operator applied for a permit to prospect for coal on some portion of the federal lands.<sup>142</sup> The DOI had complete discretion on whether or not to grant the prospecting permit, but it rarely denied any applications.<sup>143</sup> The permit entitled the operator to enter the land for a specific period of time to perform those activities consistent with and attendant to prospecting for coal.<sup>144</sup> If the operator discovered coal, he could then apply to the DOI for a preference right lease.<sup>145</sup> If the DOI determined that "commercial quantities" of coal were present on the land, a right to the coal vested in the operator, and the DOI issued the operator a lease.<sup>146</sup> The MLA gave the DOI the power to condition the lease on various environmental protections, but it rarely if ever did so.<sup>147</sup>

The terms of preference right leases were very favorable to the lessees.<sup>148</sup> Under the MLA, the DOI issued preference right leases for an indefinite period of time, with a minimum royalty rate of five cents per ton.<sup>149</sup> The MLA reserved DOI's right to review the status of the preference right leases every twenty years, and to readjust the royalty rates, and other terms.<sup>150</sup> Such readjustments, however, were

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<sup>136</sup> 30 U.S.C. § 201(a) (1970) (amended 1976).

<sup>137</sup> 30 U.S.C. § 201(b) (1970) (repealed 1976).

<sup>138</sup> *See id.*

<sup>139</sup> *See id.*

<sup>140</sup> 3 Pub. Nat. Resources Law (CBC) § 22.01[1] at 22-3 (1997).

<sup>141</sup> *See* COMMISSION ON FAIR MARKET VALUE POLICY FOR FEDERAL COAL LEASING, FEDERAL COAL LEASING 152 (1984). The commission reports that 71.8% of all leases issued between 1920 and 1974 received one bid or no bids. *See id.*

<sup>142</sup> *See* Natural Resources Defense Council v. Berklund, 609 F.2d 553, 556 (D.C. Cir. 1979).

<sup>143</sup> *See id.*

<sup>144</sup> *See* 3 Pub. Nat. Resources L. § 22.01[1] at 22-3.

<sup>145</sup> *See id.*

<sup>146</sup> *See id.*

<sup>147</sup> *See Berklund*, 609 F.2d at 556.

<sup>148</sup> *See id.*

<sup>149</sup> 30 U.S.C. § 207 (1970) (amended 1976).

<sup>150</sup> *See id.*

very infrequent.<sup>151</sup> The leases carried no minimum yearly production requirements, nor did they place any time requirement on the commencement of mining operations.<sup>152</sup> In short, under the preference right leasing system the federal government conveyed to operators, free of charge, the right to mine large tracts of federal coal lands in perpetuity.<sup>153</sup> It is easy to understand why few operators participated in the competitive bidding auctions.<sup>154</sup>

As the preference right leases contained no time requirement on the commencement of mining, operators often took no steps to develop the coal.<sup>155</sup> Instead, they held the leases for speculation.<sup>156</sup> By the early 1970s speculation on the federal coal lands was rampant.<sup>157</sup> One court succinctly summarized the problem:

From 1945 to 1970, the number of acres of federal land leased for coal development increased from about 80,000 to approximately 778,000, almost a ten-fold increase. In the same period, annual coal production from these federal lands declined from about 10 million tons in 1945 to approximately 7.4 million tons in 1970. These leased areas contain[ed] an estimated 16 billion tons of coal reserves . . . .<sup>158</sup>

In the 1970s when the United States started to feel the effects of the energy crisis, Congress expressed a renewed interest in coal as an energy source.<sup>159</sup> At the time over fifty percent of the nation's recoverable coal reserves were on federal lands.<sup>160</sup> In 1971, in response to the wide spread speculation, the DOI announced a temporary moratorium on prospecting grants.<sup>161</sup> In 1973, it made the moratorium permanent while it worked on developing a new leasing process.<sup>162</sup>

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<sup>151</sup> See *id.*

<sup>152</sup> See Kalen, *supra* note 112, at 1026.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*

<sup>155</sup> See *id.* at 1028.

<sup>156</sup> See *id.*

<sup>157</sup> See Kalen, *supra* note 112, at 1028.

<sup>158</sup> *Natural Resource Defense Council v. Hughes*, 427 F. Supp. 981, 984 (D.D.C. 1977). The total tonnage of coal under lease on the federal lands in 1970 was approximately 250 billion tons. See Kalen, *supra* note 112, at 1029 n.22.

<sup>159</sup> See Kalen, *supra* note 112, at 1028.

<sup>160</sup> See *id.*

<sup>161</sup> See *id.* at 1029.

<sup>162</sup> See *id.* at 1030.

### C. *The Federal Coal Leasing Amendments Act of 1976*

In 1976, over the veto of President Ford, Congress enacted the Federal Coal Leasing Amendments Act (FCLAA).<sup>163</sup> With the FCLAA Congress sought to end speculation on the federal coal lands, to realize a fair return for the government on the coal lands, and to meet environmental concerns about coal mining.<sup>164</sup> In order to fulfill these goals, the FCLAA, which governs all coal leasing on federal lands after 1976, altered the leasing system of the MLA in many significant ways.<sup>165</sup>

First, the FCLAA replaced the prospecting permit system with the exploration license system.<sup>166</sup> The FCLAA granted the DOI the power to issue an exploration license to interested parties to explore tracts of federal lands for coal deposits.<sup>167</sup> Before the DOI could issue an exploration license, however, the BLM had to perform "an environmental assessment or environmental impact statement, if necessary, of the potential effects of the proposed exploration on the natural and socio-economic environment of the affected area."<sup>168</sup> BLM regulations required it to deny the exploration license if the agency determined that exploration "would cause significant and lasting degradation to the lands . . . ."<sup>169</sup>

Second, the FCLAA, subject to valid existing rights, that is rights that had vested before the passage of the FCLAA, ended preference right leasing.<sup>170</sup> As such, a right to mine lease did not automatically vest, as it did under the MLA, in an operator who had been successful in locating "commercial quantities" of coal.<sup>171</sup> Instead, the operator had to bid, at auction with all other interested parties, for the lease.<sup>172</sup>

Third, the FCLAA required the DOI to create a comprehensive land use plan which "consider[ed] the effects of the proposed mining upon the community and the environment."<sup>173</sup> The FCLAA prohibited

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<sup>163</sup> Pub. L. No. 94-377, 90 Stat. 1083; *see* Kalen, *supra* note 112, at 1034.

<sup>164</sup> *See* Kalen, *supra* note 112, at 1034.

<sup>165</sup> *See id.*

<sup>166</sup> *See* 30 U.S.C. § 201(b) (1994); 3 Pub. Nat. Resources L. (CBC) § 22.03[2][a] at 22-38 (1997).

<sup>167</sup> *See* 30 U.S.C. § 201(b); 3 Pub. Nat. Resources L. (CBC) § 22.03[2][a] at 22-38.

<sup>168</sup> 43 C.F.R. § 3410.2-2(a) (1996).

<sup>169</sup> *Id.* § 3410.2-2(a)(1).

<sup>170</sup> *See* Pub. L. No. 94-377, 90 Stat. 1083 (codified at 30 U.S.C. § 201(a)(1) (1994)).

<sup>171</sup> *See* 30 U.S.C. § 201(b)(1) (1994).

<sup>172</sup> *See id.*

<sup>173</sup> 3 Pub. Nat. Resources L. (CBC) § 22.03[2][b] at 22-42 (1997).



coal leasing on those areas whose land use plan was inconsistent with mining.<sup>174</sup>

Fourth, the FCLAA changed many of the standard terms of the federal coal leases.<sup>175</sup> It limited the initial duration of a federal coal lease to twenty years, and allowed for renewal as long as the land produced "commercial quantities" of coal.<sup>176</sup> In addition, the FCLAA subjected every lease to a requirement of diligent development.<sup>177</sup> Specifically, the DOI required the lessee to produce a minimum of one percent of the recoverable coal reserves within ten years of the issuance of the lease, or lose the lease.<sup>178</sup> The Act also set the minimum royalty rate for surface mining at twelve percent, and allowed for a lower rate on underground mining operations, which the DOI set at eight percent.<sup>179</sup> Finally, the Act required review of the terms of the lease and possible adjustment of the terms at the end of the initial twenty-year period of the lease and every ten years after.<sup>180</sup> In a series of federal court decisions all the changes described in this paragraph were found to apply to pre-FCLAA leases once their initial twenty-year readjustment period under the MLA had expired.<sup>181</sup>

Fifth, and perhaps most significant, the FCLAA changed the definition of "commercial quantities" of coal.<sup>182</sup> Under the MLA, the "[d]etermination of commercial quantities was based solely on whether the coal existed, its character and heat-giving quality, and whether it could be physically extracted at a profit without regard to environmental impact or costs."<sup>183</sup> The FCLAA, on the other hand, required the DOI to take into account "the environmental costs of [the coal's] . . . extraction and subsequent reclamation," when determining whether or not a deposit contained "commercial quantities."<sup>184</sup>

BLM regulations implementing the new definition included a multitude of environmental costs that the agency had to consider in

<sup>174</sup> See Pub. L. No. 94-377, 90 Stat. 1083 (codified at 30 U.S.C. § 201(a)(1) (1994)); 43 C.F.R. §§ 3420.1-4(a), 3425.2.

<sup>175</sup> See 3 Pub. Nat. Resources L. (CBC) § 22.03[1] at 22-42 (1997).

<sup>176</sup> See Pub. L. No. 94-377, 90 Stat. 1083 (codified at 30 U.S.C. § 201(a)(1) (1994)).

<sup>177</sup> See *id.*; 43 C.F.R. § 3483.1(a)(1), (2) (1996).

<sup>178</sup> See Pub. L. No. 94-377, 90 Stat. 1083 (codified at 30 U.S.C. § 201(b)); 43 C.F.R. § 3480.0-5(a)(6), (13).

<sup>179</sup> See Pub. L. No. 94-377, 90 Stat. 1083 (codified at 30 U.S.C. § 207(a)); 43 C.F.R. § 3473.3-2(2).

<sup>180</sup> See *id.*; 43 C.F.R. § 3451.1(a)(1).

<sup>181</sup> See 3 Pub. Nat. Resources L. (CBC) § 22.02[4][a] at 22-18 (1997).

<sup>182</sup> See *Utah Int'l, Inc. v. Andrus*, 488 F. Supp. 976, 982 (D.D.C. 1980).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

determining whether or not to allow mining to take place.<sup>185</sup> Such costs included surface water protection, groundwater protection, air pollution control, noise abatement, costs of mitigating impacts to wildlife species, costs of "monitoring and inspection during mining to identify archeological, historical, and other cultural resources . . . and costs of mitigating impacts to these resources as well as costs of monitoring and inspection during mining to identify paleontological, resources . . . and costs of mitigating impacts to these resources."<sup>186</sup>

The DOI has not been very successful in issuing new coal leases under the FCLAA.<sup>187</sup> For the first six years of the FCLAA's existence, coal companies, through litigation, prevented any new coal leasing under the Act.<sup>188</sup> In 1981, the DOI granted the first federal coal leases under the FCLAA.<sup>189</sup> In 1982, controversy erupted over a plan by then Secretary of the Interior James Watt to privatize the coal lands and allegations that the DOI had charged substantially less than fair market value for a large coal lease it had auctioned off in 1981.<sup>190</sup> The ensuing controversy resulted in Watt's resignation, and a congressionally imposed moratorium on coal leasing from 1983 to 1986 to allow the DOI to develop better regulations to govern the leasing process.<sup>191</sup>

In 1986, the DOI promulgated its new regulations and the coal companies once again challenged them in court.<sup>192</sup> The result was to halt coal leasing on federal lands for the rest of the 1980s.<sup>193</sup> In the early 1990s, the confusion and battling over the legal status of the FCLAA settled, and the DOI resumed federal coal leasing.<sup>194</sup> The leasing, however, has been on a fairly small scale.<sup>195</sup> According to one commentator the system "with two prominent exceptions . . . has been moribund since 1976, and without drastic change in energy markets, prospects for renewed federal coal leasing on any substantial

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<sup>185</sup> See 43 C.F.R. §§ 3404.4-4(b)(1)-(5), (7), (8) (1996).

<sup>186</sup> *Id.* (emphasis added).

<sup>187</sup> See Kalen, *supra* note 112, at 1051-61.

<sup>188</sup> See George Cameron Coggins & Doris K. Nagel, "Nothing Besides Remains:" *The Legal Legacy of James C. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 529 (1990).

<sup>189</sup> See *id.*

<sup>190</sup> See *id.* The lease was granted in the Powder River Basin. See *id.* at 529-30. Estimates put the cost of the lease at one hundred million dollars under fair market value. See *id.*

<sup>191</sup> See Coggins & Nagel, *supra* note 188, at 530-31; Kalen, *supra* note 112, at 1051.

<sup>192</sup> See Kalen, *supra* note 112, at 1051-52.

<sup>193</sup> See *id.* at 1059.

<sup>194</sup> See *id.*

<sup>195</sup> See Coggins & Nagel, *supra* note 188, at 529.

scale are dim.”<sup>196</sup> Given this current stagnation in the federal leasing program, preference right leases “will remain more important in terms of [coal] production . . . than leases issued under the FCLAA.”<sup>197</sup> Indeed, the existing leased federal coal lands contain enough coal to meet the energy needs of the nation well into the next century.<sup>198</sup>

#### IV. SURFACE MINING COAL RECLAMATION ACT

The goal of the Surface Mining Coal Reclamation Act of 1977 (SMCRA)<sup>199</sup> was “to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.”<sup>200</sup> The Act defined surface coal mining operations as those “activities conducted on the surface of lands in connection with a surface coal mine or . . . surface impacts incident to an underground coal mine . . . .”<sup>201</sup>

The SMCRA required operators to restore the land upon which they had conducted surface coal operations to “its approximate original contours.”<sup>202</sup> To meet this restoration requirement, the SMCRA required the DOI to “promulgate and implement a program for regulating surface mining on the federal lands which incorporate[d] all of the general regulatory standards of the Act and consider[ed] any unique characteristics of particular federal lands.”<sup>203</sup> The Office of Surface Mining Reclamation and Enforcement, (OSM), a division of the DOI, has promulgated these regulations.<sup>204</sup> They are known as the federal lands program regulations.<sup>205</sup> Finally, the SMCRA required all operators to have a permit, issued from the appropriate regulatory authority of the DOI, before commencing any coal mining operations on federal lands.<sup>206</sup> To receive a permit, operators had to submit a reclamation plan that set out in a detailed manner how the operator

<sup>196</sup> 3 Pub. Nat. Resources L. (CBC) § 22.03[1] at 22-37 (1997).

<sup>197</sup> *See id.* § 22.02[1] at 22-8.

<sup>198</sup> *See id.*

<sup>199</sup> 30 U.S.C. §§ 1201-1328 (1994).

<sup>200</sup> *Id.* § 1202(a).

<sup>201</sup> *Id.* § 1291 (28)(A). Specifically, such activity includes “excavation for the purpose of obtaining coal including . . . strip [mining] . . . the uses of explosives and blasting . . . [and] loading of coal for interstate commerce at or near the mine site . . . the construction of new roads or the improvement or use of existing roads to gain access to the site . . . .” *Id.*

<sup>202</sup> *Id.* § 1265.

<sup>203</sup> 3 Pub. Nat. Resources L. (CBC) § 22.04[3][a] at 22-58 (1997).

<sup>204</sup> *See id.*

<sup>205</sup> *See id.*

<sup>206</sup> *See id.* § 22.04[3][b] at 22-59; 30 C.F.R. § 740.13(a)(1) (1996). The permit will issue, depend-

intended to comply with the federal lands program regulations.<sup>207</sup> For underground mines the reclamation plan had to show the measures the operator planned to implement "to prevent [surface] subsidence . . . and maintain the value and reasonably foreseeable use of surface lands."<sup>208</sup>

In addition to its restoration requirements, the SMCRA also designated certain specific types of lands as unsuitable for surface mining and subject to valid existing rights, and prohibited the surface coal activity on those lands.<sup>209</sup> These lands include national parks, national wildlife refuges, the National System of Trails, the National Wilderness Preservation System, national forests, publicly owned parks or any other place listed in the National Register of Historic Places, land within three hundred feet of an occupied dwelling, and land within one hundred feet of a cemetery.<sup>210</sup> In addition, the SMCRA set out general unsuitability criteria, which, subject to valid existing rights, would prohibit surface coal activity on land that met any of those criteria.<sup>211</sup> The BLM has promulgated regulations implementing these criteria.<sup>212</sup>

#### IV. AN ANALYSIS OF TAKINGS LAW AND ANDALEX'S LEASE RIGHTS IN ESCALANTE

##### A. Introduction

All land is encumbered with a combination of public and private rights.<sup>213</sup> The function of property law is to strike a balance between these two competing types of rights.<sup>214</sup> Property law, indeed all law, however, changes with time to meet the changing needs of society.<sup>215</sup>

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ing on the type of mining and on the type of federal land, from the BLM, the OSM, or the Forest Service. *See id.* § 22.01[3] at 22-6 to 22-8.

<sup>207</sup> *See* 30 U.S.C. § 1258(a) (1994).

<sup>208</sup> *Id.* § 1266(a)-(b).

<sup>209</sup> *See id.* § 1272(e)(1).

<sup>210</sup> *See id.*

<sup>211</sup> *See id.* § 1272(a).

<sup>212</sup> *See* 43 C.F.R. § 3461.1(b) (1996).

<sup>213</sup> *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 1027 (1992); Robert J. Goldstein, *Greenwood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 B.C. ENVTL. AFF. L. REV. 347, 362-63, 409 (1998); Mansfield, *supra* note 14, at 194.

<sup>214</sup> *See Lucas*, 505 U.S. at 1017, 1027; Goldstein, *supra* note 213, at 362-63, 409; Mansfield, *supra* note 14, at 194.

<sup>215</sup> *See* BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 10-11 (1927).

Justice Benjamin Cardozo, in his book *The Paradoxes of Legal Science*, made this point quite eloquently:

If a body of law were in existence adequate for the civilization of today, it could not meet the demands of the civilization of tomorrow. Society is inconstant. So long as it is inconstant, and to the extent of such inconstancy, there can be no constancy in law . . . . Law defines a relation not always between fixed points, but often, indeed oftenest, between points of varying position. The acts and situations to be regulated have a motion of their own. There is change whether we will it or not.<sup>216</sup>

As property law evolves, rights within it change, and the balance it strikes between public and private rights necessarily changes as well.<sup>217</sup> One commentator has put it as follows: "[t]here may be a constitutional core to the term property but no rights are frozen. Protection of both property rights and other rights align with societal needs and understanding through a process of evolutionary . . . change."<sup>218</sup> An understanding of this point is crucial to this Comment's criticism of current takings law.

### B. *Lucas and the Supreme Court's Takings Law*

The Fifth Amendment to the United States Constitution provides in part that the federal government shall not take private property for public use without just compensation.<sup>219</sup> In *Lucas v. South Carolina Coastal Council*, the United States Supreme Court analyzed this prohibition with respect to government regulation.<sup>220</sup> In 1986, Lucas "paid \$975,000 for two residential lots on the Isle of Palms, . . . a barrier island situated eastward of the city of Charleston," South Carolina, upon which he intended to construct homes.<sup>221</sup> In 1988, the South Carolina legislature enacted the Beach Front Management Act.<sup>222</sup> The Act set out specific areas along the coast upon which "construction of occupable improvements was flatly prohibited."<sup>223</sup> Lucas' land was in one of these areas.<sup>224</sup>

<sup>216</sup> *Id.*

<sup>217</sup> *See id.* at 67–80; Mansfield, *supra* note 14 at 213.

<sup>218</sup> *See id.* at 67–80; Mansfield, *supra* note 14, at 213.

<sup>219</sup> U.S. CONST. amend. V.

<sup>220</sup> *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1006–10, 1014–19 (1992).

<sup>221</sup> *Id.* at 1006, 1008.

<sup>222</sup> *See id.* at 1007.

<sup>223</sup> *Id.* at 1008–09.

<sup>224</sup> *See id.*

Lucas brought suit in the South Carolina Court of Common Pleas, claiming that the Act's prohibition against construction on his land "effected a taking of his property without just compensation under the Fifth Amendment."<sup>225</sup> The trial court found that the Act "depriv[ed] Lucas of any reasonable economic use of the lots" and thereby "render[ed] 'them valueless,'" and as such found that the Act constituted a taking of Lucas' property.<sup>226</sup> The Supreme Court of South Carolina reversed the trial court's decision.<sup>227</sup> The Supreme Court of the United States granted certiorari, and found for Lucas.<sup>228</sup>

In the majority opinion by Justice Scalia, the Court found that any regulation that deprived land of virtually all economically beneficial use was a compensable taking. The Court, however, allowed for an exception where the legislature had identified a background principle of nuisance or state property law in enacting the legislation.<sup>229</sup>

The Court based its holding on the theory of "investment backed expectations," which posits that the law should honor land owners' reasonable economic expectations with respect to the use of their land.<sup>230</sup> The government can regulate land use, but if a regulation deprives a land owner of all reasonable economic use of his or her property, the government has effectively taken the land, and must compensate the owner.<sup>231</sup> Under this theory, however, where the government has identified a background principle of nuisance or state property law in enacting a regulation, no taking occurs because such a regulation is nothing more than a codification of the common law.<sup>232</sup> Therefore, if the common law prohibits the use, the owner at the time of purchase, could not reasonably have expected to use the property in that manner, as it was illegal.<sup>233</sup> The regulation simply prohibits a use of the land that "[was] not part of [the landowner's] title to begin with," so it "takes" nothing from the land owner.<sup>234</sup>

There should be some concern with the Court's emphasis on "investment backed expectations," as it tends to make land into an

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<sup>225</sup> *Lucas*, 505 U.S. at 1008-09.

<sup>226</sup> *Id.*

<sup>227</sup> *See id.*

<sup>228</sup> *Id.* at 1010.

<sup>229</sup> *See Lucas*, 505 U.S. at 1019 n.8, 1027 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)); Mansfield, *supra* note 14, at 214.

<sup>230</sup> *See id.* at 1019 n.8.

<sup>231</sup> *See id.* at 1017, 1027.

<sup>232</sup> *See id.* at 1027.

<sup>233</sup> *See id.*

<sup>234</sup> *Lucas*, 505 U.S. at 1027. The Court termed this "the logically antecedent inquiry into the nature of the owner's estate."

"inert, fungible thing" created solely for the profit of its owner.<sup>235</sup> As the Court stated in *Lucas*, "for what is the land but the profits thereof?"<sup>236</sup> But land of course is more than just "the profits thereof." It has a certain non-quantifiable, non-market based, intrinsic value "that transcends the ownership of an individual."<sup>237</sup> Anyone who has ever walked through a forest, or rested in a lush field of grass, or stood on the peak of a mountain surveying the world below, understands this.

The emphasis on the economic nature of property inherent in the "investment backed expectations" creates a danger that future courts will place undue importance on the rights of land owners.<sup>238</sup> If courts start seeing land as nothing more than a commodity, there is a potential for violation of the public's common law rights in the land.<sup>239</sup> The public has these common law rights to protect and preserve the land's natural, intrinsic value.<sup>240</sup> If land is just a commodity, this natural, intrinsic value is lost.<sup>241</sup> Another potential problem with the Supreme Court's takings law as enunciated in *Lucas*, is its failure to address the fact that the needs of individuals and society change over time, and as such the law, and the "background principles" that inform the law change over time as well.<sup>242</sup> *Lucas* could be read to freeze the rights of the property owner to the background principles guiding the law at the time of purchase, and to base all reasonable expectations of the property owner on those principles.<sup>243</sup> *Lucas* fails to expressly acknowledge that rights in property have traditionally not been fixed, and that property owners, in forming reasonable "investment backed

<sup>235</sup> See *id.* at 1017, 1027; Goldstein, *supra* note 213, at 384–85.

<sup>236</sup> *Lucas*, 505 U.S. at 1017 (quoting 1 E. COKE, INSTITUTES, ch. 1, § 1 (1st Am. ed. 1812)).

<sup>237</sup> Goldstein, *supra* note 213, at 404.

<sup>238</sup> See *Lucas*, 505 U.S. at 1019 n.8, 1027 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)); Mansfield, *supra* note 14, at 214. Indeed, in making its decision, the Court did not discuss any legal standard for the determination of when land has been deprived of virtually all economic value. See *Lucas*, 505 U.S. at 1020. Instead, it accepted the trial court's finding that this in fact was the case with *Lucas*' property. See *id.* at 1045 (Blackmun, J., dissenting). In his dissent Justice Blackmun pointed out that in making this determination the trial "court accepted no evidence from the State on the property's value without a home, and the petitioner's appraiser testified that he never had considered what the value would be absent a residence." *Id.* (Blackmun, J., dissenting). Justice Blackmun thought this finding was clearly erroneous and felt that the trial court "appeared to believe that the property could be considered 'valueless' if it was not available for its most profitable use." *Id.* (Blackmun, J., dissenting).

<sup>239</sup> Goldstein, *supra* note 213, at 384–85, 412.

<sup>240</sup> See *id.* at 59–60.

<sup>241</sup> See *id.*

<sup>242</sup> See *Lucas*, 505 U.S. at 1027; CARDOZO, *supra* note 215, at 10–11.

<sup>243</sup> See *Lucas*, 505 U.S. at 1017; Mansfield, *supra* note 14, at 213, 221–25.

expectations," must have an expectation that the law will change and along with it their rights under the law.<sup>244</sup>

As this Comment has shown, public land law, and the background principles that guide it, have changed over time to conform with societal values and the needs of the nation.<sup>245</sup> In the nineteenth century, the rights of the individual in the federal lands dominated over the rights of the public.<sup>246</sup> This fit well with the needs of the growing nation.<sup>247</sup> The most efficient way for the federal government to promote the growth, settlement, and development of the nation, was to get the vast public lands and their natural resources in the hands of private individuals.<sup>248</sup> As such, the federal government, with little or no restriction on its use, simply gave away much of the nation's land.<sup>249</sup> As a result, throughout the course of the nineteenth century, much of the nation's public land experienced significant economic development, but also suffered mass plundering.<sup>250</sup>

As the nation grew, its needs changed, and as the twentieth century progressed, the policy of disposition slowly gave way to the policy of retention.<sup>251</sup> During this time, Congress shifted its focus to society's non-economic interests in the public lands, and the balance of the public and private considerations in the federal lands slowly changed to reflect this shift in focus.<sup>252</sup> In the twentieth century, the people of the nation began to see the federal lands as a valuable *limited* resource, whose best and most efficient use for the nation was not unfettered disposal to private parties.<sup>253</sup> They began to recognize that the common good of the nation was best served through the retention and preservation of this valuable limited resource.<sup>254</sup> This recognition was part of a bigger change, taking place in both the United States and the world, of society's understanding of the environment and humanity's effect upon it.<sup>255</sup>

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<sup>244</sup> *Lucas*, 505 U.S. at 1017; Mansfield, *supra* note 14, at 221–25.

<sup>245</sup> See *supra* notes 38–67 and accompanying text.

<sup>246</sup> See *id.*

<sup>247</sup> See *id.*

<sup>248</sup> See *supra* notes 38–39 and accompanying text.

<sup>249</sup> See *supra* notes 44–64 and accompanying text.

<sup>250</sup> See *supra* notes 38–67 and accompanying text.

<sup>251</sup> See *supra* notes 68–106 and accompanying text.

<sup>252</sup> See *id.*

<sup>253</sup> See *id.*

<sup>254</sup> See *id.*

<sup>255</sup> See *id.*; Getches, *supra* note 26, at 283–84; Goldstein, *supra* note 213, at 390–95; Mansfield, *supra* note 14, at 195–201.



Within the last twenty-five years this change has been so profound as to effectively create a new environmental paradigm for the governance of public policy and the law.<sup>256</sup> Within this paradigm, "humans . . . [have begun] to understand the workings of the earth, and to take seriously their responsibility [of] preserving the health of the planet."<sup>257</sup> In the realm of public land law, the new paradigm has brought about substantial changes in society's understanding of the rights and responsibility of property ownership.<sup>258</sup> Society's attitude has changed from allowing a landowner discretion over how to use his or her land to recognizing a landowner's obligation of stewardship arising out of the public interest.<sup>259</sup>

### C. *Analysis of Andalex's Lease Rights*

The land upon which Andalex's leases rest and all the land in the monument is "some of the most remarkable . . . in the world."<sup>260</sup> The area is comprised of striking red rock soil on "high-elevation plateaus of the region that have been eroded into breathtaking, brilliantly colored canyons, arches, buttes and river valleys that defy description."<sup>261</sup> In addition to its aesthetic beauty, Escalante also contains a vast array of

geological, paleontological, archaeological, biological and historical features . . . [t]housand-year old pinon and junipers can be found in the region, as well as prehistoric dwellings, examples of ancient rock art, a world-class fossil trove, millions of years of geological history, and hundreds of living species of amphibians, birds, mammals and reptiles.<sup>262</sup>

<sup>256</sup> See Goldstein, *supra* note 213, at 395.

<sup>257</sup> *Id.*

<sup>258</sup> See *id.* at 390-95.

<sup>259</sup> *Id.*

<sup>260</sup> *Remarks by the President, supra* note 3, at 3.

<sup>261</sup> Jahn, *supra* note 7, at A1. The Presidential Proclamation reads in part, [t]he monument is a geological treasure trove of clearly exposed stratigraphy and structures. The sedimentary rock layers are relatively undeformed and unobscured by vegetation, offering a clear view to understanding the process of the earth's formation. . . . The monument contains a significant portion of a vast geological stairway, named the Grand Staircase by pioneering geologist Clarence Dotton, which rises 5,500 feet to the rim of Bryce Canyon in an unbroken sequence of great cliffs and plateaus. Presidential Proclamation No. 6920, 61 Fed. Reg. 50,225 (1996).

<sup>262</sup> Bureau of Land Management Homepage, Grand Staircase—Escalante National Monument: Images and Information (Feb. 1998) <<http://www.blm.gov>> [hereinafter *BLM Homepage*].

From the above description of the monument area, it seems clear that under current public land laws, the BLM could not legally issue the leases today.<sup>263</sup> The monument area is full of a vast array of priceless, archeological and paleontological artifacts, which by their very nature once destroyed Andalex could not replace.<sup>264</sup> Given this it would seem that any coal deposit in Escalante, no matter how much coal it contained, would fail the FCLAA's "commercial quantities" test which, requires the DOI to take into account the environmental costs of removing the coal.<sup>265</sup>

BLM regulations include in environmental costs, those costs associated with preventing destruction of "archeological, historical, and other cultural resources, [and] paleontological resources."<sup>266</sup> As the artifacts are spread all throughout the monument area, no practical or efficient way exists to protect them from the damage the construction and use of hundreds of miles of paved roads, and the mining itself would cause.<sup>267</sup> In addition, no way exists to properly restore the area to its pre-mining condition, as the SMCRA requires.<sup>268</sup> The fact that the President had to declare the area a national monument, to prevent the mining from happening, makes that point quite clear.<sup>269</sup>

Beyond the specific statutory prohibitions of the public land law, the BLM would not issue the leases today, simply because coal mining in an area such as Escalante is so completely out of sync with today's environmental paradigm so as to rise to the level of the absurd.<sup>270</sup> Today's environmental paradigm recognizes that "[f]ederal coal leasing [and mining] does not occur in . . . isolation."<sup>271</sup> Today we understand the potential harmful effects of mining on certain lands and we take steps to avoid such effects, even if this means not mining. Before the BLM issues a lease today, it carefully studies the nature of the land, and assesses whether or not mining on the land would conform with society's understanding, as expressed through its environmental

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<sup>263</sup> See *supra* notes 180–84, 200–10 and accompanying text.

<sup>264</sup> See *BLM Homepage supra* note 262.

<sup>265</sup> See *supra* notes 180–84 and accompanying text.

<sup>266</sup> 43 C.F.R. §§ 3404.4–4(b)(1)–(5), (7), (8) (1996).

<sup>267</sup> See *Press Briefing by Secretary of Interior, supra* note 7; *BLM Homepage, supra* note 262.

<sup>268</sup> See *supra* notes 200–10 and accompanying text.

<sup>269</sup> See *BLM Homepage, supra* note 262. The large size of the monument is necessary because many of the objects and features it seeks to protect are scattered bit by bit throughout its 1.7 million acres. See *id.* Fragmentation of the protected areas would thus make protection of the all objects and features very difficult if not impossible. See *id.*

<sup>270</sup> See Goldstein, *supra* note 213, at 390–95.

<sup>271</sup> 3 Pub. Nat. Resources L. (CBC) § 22.03[1] at 22–37 (1997).

legislation, of where and when mining is appropriate.<sup>272</sup> Today the BLM would not issue a lease on the lands of Escalante, because to allow the destructive forces of mining on its rare and delicate lands is simply not in accord with society's and the law's understanding of where and when mining is appropriate.<sup>273</sup>

The BLM first issued Andalex's leases on the Kaiparowits Plateau in 1965 under the MLA.<sup>274</sup> In 1965, the original owner had the right to mine the coal in the Kaiparowits Plateau.<sup>275</sup> Andalex acquired the leases through assignment in 1986, and the right to mine transferred to it.<sup>276</sup> To keep Andalex from mining in Escalante, *Lucas* requires that the government compensate the company.<sup>277</sup> *Lucas* focuses the Court's takings analysis on the economic expectations of the property owner at the time of acquisition.<sup>278</sup> This is an important focus.<sup>279</sup> Without an ability to rely on the stability of existing property rights, buyers would be far less likely to purchase property and to invest in its improvement. In a capitalist society, a rule of law which ignored the reasonable economic expectations of a buyer, would result in a drastic reduction in commercial transactions and investments, with a subsequent decline in the economic welfare of a nation and its people.

*Lucas*, however, does not look only at the private economic interests of the property owner.<sup>280</sup> The reasonable "investment backed expectations" of the property owner includes a realization that his or her property is subject to background principles of nuisance law.<sup>281</sup> Nuisance is a broad and flexible concept in the common law.<sup>282</sup> Nuisance law is not a set of fixed and rigid rules frozen in eighteenth century ideals,<sup>283</sup> and "[c]orrectly viewed and applied, [the *Lucas*] nuisance exception can justify significant regulation of private . . . interests in public land law."<sup>284</sup> As the Supreme Court said in *Mugler*

<sup>272</sup> See *supra* notes 180–84, 200–10 and accompanying text.

<sup>273</sup> See Goldstein, *supra* note 213, at 390–95; Remarks by the President, *supra* note 3, at 3.

<sup>274</sup> See *BLM Serial Register Pages*, *supra* note 6.

<sup>275</sup> See *Natural Resources Defense Council v. Berklund*, 609 F.2d 553, 555 (D.C. Cir. 1979).

<sup>276</sup> See *id.* at 557–58; *BLM Serial Register Pages*, *supra* note 6.

<sup>277</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8, 1027 (1992); *Penn Cent. Transp. Co. v. New York City* 438 U.S. 104, 124 (1978).

<sup>278</sup> *Lucas*, 505 U.S. at 1019 n.8, 1027.

<sup>279</sup> See *id.* at 1027.

<sup>280</sup> See *id.*

<sup>281</sup> See *id.*

<sup>282</sup> See *Mugler v. Kansas*, 123 U.S. 623, 665 (1887); Mansfield, *supra* note 14, at 222–25.

<sup>283</sup> See *Mugler*, 123 U.S. at 665; Mansfield, *supra* note 14, at 222–25.

<sup>284</sup> Mansfield, *supra* note 14, at 225.

*v. Kansas*, "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."<sup>285</sup> The application of the concept of nuisance can be seen in the development of zoning law in this country.<sup>286</sup> While there was once virtually no statutory restrictions on the use a property owner could make of his or her property, zoning laws have exacted very substantial restrictions on property use since the early part of the twentieth century.<sup>287</sup> Courts have upheld these restrictions so long as they did not deny the owner of all reasonable economic use of his or her property.<sup>288</sup>

## V. CONCLUSION

In Andalex's case, as was the case in *Lucas*, government regulation denied Andalex of all reasonable use of its property. The Presidential Proclamation establishing Escalante deprived the company of the only property right it had in the lease—the right to mine coal in the Monument. The President and the DOI were therefore obligated to provide compensation, and this they did by provision of a lease swap. At the same time, the President, by his Proclamation, acknowledged the rights of the rest of society to the preservation and protection of an irreplaceable national treasure, and correctly repudiated the *Lucas* proposition "for what is land but the profits thereof?"

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<sup>285</sup> *Mugler*, 123 U.S. at 665.

<sup>286</sup> See *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 387–89 (1926).

<sup>287</sup> See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125–28 (1978); *Euclid*, 272 U.S. at 379–84, 387–89, 395–97.

<sup>288</sup> See *Penn Cent.*, 438 U.S. at 125–28, 133–37; *Euclid*, 272 U.S. at 395–97.