THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT: A CASE STUDY IN WESTERN LAND MANAGEMENT

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I. INTRODUCTION

On September 18, 1996, President Clinton issued a Proclamation which established the Grand Staircase-Escalante National Monument in the State of Utah.1 The Monument encompasses 1.7 million acres (2,700 square miles) of federal land within Utah and includes the Grand Staircase, the Escalante Natural Bridge and Canyons, and the Kaiparowits Plateau.2 The Monument creates a

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2 See Frederick Turner, Oh, Wilderness, OUTSIDE, Apr. 1997, at 66, 68. The landscape of Grand Staircase-Escalante includes "natural arches, slot canyons, hoodoos, faults, folds, lava beds, sandy washes, and Anasazi and Fremont cultural sites and artifacts. There are
dent Clinton in effigy.¹⁰

The President explained that the purpose of the withdrawal was to protect the Kaiparowits Plateau from a pending large coal mining operation by the Andalex Mining Company.¹¹ Environmentalists applauded the creation of the Monument.¹² Critics claimed it was an election-year political maneuver to make President Clinton appear more environmentally friendly since he was not going to get Utah's five electoral votes anyway.¹³

The uproar over the creation of the Grand Staircase-Escalante National Monument and the impossibility of designing a future management plan that pleases all interested parties illustrate the problems associated with managing public lands in the West today. The analysis of this paper falls into four sections. First, it will explain the lengthy conflict over federal land management in Utah.

¹⁰See Turner, supra note 2, at 152.
¹¹See President's Remarks Announcing Establishment of Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona, 32 WEEKLY COMPILATION PRESIDENTIAL DOCUMENTS 1785, 1787 (Sept. 18, 1996) [hereinafter President's Remarks] ("I am concerned about a large coal mine proposed for the area.").
¹³See Paul Roberts, New Political Winds Give Rise to Utah National Monument, NEWS & VIEWS: CONGRESS WATCH (visited Oct. 10, 1996) <http://www.starwave.com/news/congress/960925Utah.html> (no archive at website, on file with Virginia Journal of Environmental Law). After the election, Rush Limbaugh and Sarah Foster of the Associated Press alleged that the monument designation was part of an international conspiracy which, by halting the proposed coal mine, would save the Lippo Group, generous democratic backers from the Pacific Rim, from having to compete with future coal production from the Kaiparowits Plateau. See Paul Craig Roberts, What Does a Park in Utah Have to Do with the Price of Coal in Indonesia, THE SUN HERALD, Jan. 4, 1997, at A12 ("With the stroke of [President Clinton's] pen he wiped out the only significant competition to Indonesian coal interests in the world market.") (statement of Sarah Foster). Representative Gibbons referred to the monument designation as "Coalgate." 143 CONG. REC. H10,425-26 (daily ed. Nov. 9, 1997) ("It is a sad day when the President would deny schoolchildren in Utah the tax revenue of $1.5 billion in coal ... to protect foreign interests and promote his own self-serving ambition.") (statement of Rep. Gibbons).

The House of Representative's Committee on Resources conducted an investigation on the establishment of the monument under the investigatory authority of, inter alia, Article I of the Constitution of the United States. See Letter from Jim Hansen, Chairman, Subcomm. on Parks and Public Lands, and Don Young, Chairman, Comm. on Resources, to Bruce Babbit, Secretary, Dep't of the Interior (Mar. 18, 1996) (on file with author). After reviewing subpoenaed documents from the Clinton Administration, the Committee concluded that the Monument withdrawal was politically motivated, was purposely kept secret from the general public and Congress, and was completed although administration officials in the Department of the Interior and the Council on Environmental Quality did not consider that the lands in question were in danger. In addition, the Committee determined that the Antiquities Act was used to make the designation so that the large land withdrawal circumvented both congressional oversight and NEPA requirements. See 143 CONG. REC. E2259 (daily ed. Nov. 9, 1997).
In 1995, the newly elected Republican majority in Congress launched a legislative agenda that would have shifted federal laws in favor of private property owners. Some members of the 104th Congress unsuccessfully attempted to pass bills that would have privatized federal lands by giving away or selling them. One bill, which would have enacted a strict compensatory regime for regulatory takings of private property, was passed in the House of Representatives, though it did not survive the Senate. In addition, Congress passed a comprehensive bill for regulatory reform within federal agencies, which added another layer of bureaucracy to the administration of federal lands.

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18 See 142 CONG. REC. S2768 (daily ed. Mar. 25, 1996) (statement of Sen. Bradley); Jahn, supra note 17, at A1 ("Since the 1960s, tourism has boomed [sic] and farming has declined.").


20 See H.R. 2032, 104th Cong. (1995); S. 1031, 104th Cong. (1995). This legislation, introduced by Congressman James Hansen and Senator Craig Thomas, offered each state with BLM lands the opportunity to take title to every acre within their boundaries including mineral and water rights. Other legislation proposed to sell three public areas in Oklahoma covering approximately 57,000 acres. See H.R. 2766, 104th Cong. (1995).

21 See H.R. 925, 104th Cong. (1995). The Private Property Protection Act of 1995 would have granted a statutory right of compensation for regulatory takings. The Act would have created a cause of action for private property owners that allowed them to obtain compensation from the government for any governmental action under "specified regulatory law" which diminished the fair market value of any portion of private property by more than 20 percent. In addition, if the diminution in value of the property was more than 50 percent, the federal government would have been required to buy that portion of the property.

22 See Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 868-73. Section 801 requires that every "major rule" promulgated by any federal agency be submitted to each house of Congress prior to implementation. Id. § 801(a)(1)(A). A "major rule" is defined as any rule that has an annual effect on the economy of $100 million or more, causes a major increase in costs or prices for consumers, individual industries, geographic unions, or federal, state, or local government agencies, or has significant adverse effects on competition or employment. See id. § 804(2). If Congress disapproves of a major rule through a process called "joint resolution," then it is void. See id. § 805. Furthermore, any action taken under this legislation is not subject to judicial review. See id. § 801(b)(1).

The provision requiring congressional assent for implementation of a "major rule" may be unconstitutional under Immigration & Naturalization Serv. v. Chadha. 462 U.S. 919
Management Act ("FLPMA"). FLPM required the BLM to protect the WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness." In 1978, the BLM adopted the Wilderness Inventory Handbook ("Handbook"). The Handbook established the criteria and procedures for completing the wilderness inventory. FLPMA section 603 and the Handbook mandate thorough public participation, including close coordination with state and local governments in all stages of this process.

Between 1978 and 1991, the BLM Utah Wilderness Review examined nearly twenty-two million acres of public land at a cost of over ten million dollars. Environmental interests sued the Department of the Interior for reducing wilderness acreage at different stages of the review. The specific statutory authority given to the Department of the Interior to conduct the review expired in 1991, at which time the BLM recommended to President Bush

29 See 43 U.S.C. § 1782 (1994). The BLM was to review all roadless areas of 5 thousand acres or more within 15 years of October 21, 1976, and report to the President its findings. The wilderness characteristics in FLPMA § 1782 are identical to the Wilderness Act. See id.

30 Id. § 1782(c). The BLM must also "take any action required to prevent unnecessary or undue degradation of the [WSAs] and their resources ...." Id.

31 See U.S. DEPT OF INTERIOR, WILDERNESS INVENTORY HANDBOOK (1978). The Handbook uses a three-part framework for identifying appropriate wilderness areas: inventory, study, and reporting. Id. at 3.

32 See id. at 5 ("The wilderness inventory process requires full public involvement ... at all stages of the process"). There were "more than 75 formal public meetings" and more than 16 thousand written comments "incorporated into the decision process." Utah Public Lands Management Act of 1995: Hearings on S. 884 Before the Subcomm. on Forests & Public Land Management of the Senate Comm. On Energy and Natural Resources, 104th Cong., S3 (1995) (statement of James M. Parker, former Director, Utah State BLM Office). The Environmental Impact Statement alone contained over 5 thousand written comments. See id.


34 The decision not to include several areas within WSAs was appealed by the Utah Wilderness Association to the Interior Board of Land Appeals ("IBLA"). See, e.g., Southern Wilderness Alliance, 127 I.B.L.A. 331 (1993) (drilling permit set aside and remanded); Southern Wilderness Alliance, 125 I.B.L.A. 175 (1993) (approval of mining plan reversed and remanded). The IBLA remanded most of the WSA decisions to the BLM for reconsideration. See id. The BLM's new WSA determination was also appealed to the IBLA and the courts. See Order at 3-4, Utah v. Babbitt, Civ. No. 96-CV-870B (D. Utah Nov. 18, 1996).

extractable minerals or potential commercial development. The Kaiparowits Plateau, for example, was excluded from wilderness designation in the proposed legislation because of its substantial mineral deposits. The Utah Act specifically would have denied any future federal reserved water rights and provided for management according to FLPMA, with explicit provisions guaranteeing continued livestock grazing, state jurisdiction over fish and wildlife, prohibition of buffer zones, and other exceptions to the standards established in the Wilderness Act. The Utah Act also contained release language preventing further consideration of any additional Utah public lands for wilderness designation.

In 1995, the Utah Act faced a competing bill from the House. America’s Red Rock Wilderness Act, H.R. 1500, would have granted wilderness status to 5.7 million acres of Utah public land, including the Escalante Canyon, Grand Staircase, and Kaiparowits Plateau wilderness areas. Neither the Utah Act nor America’s Red Rock Wilderness Act was successful in the 104th Congress. Although Senator Hatch was able to place S. 884 in its entirety in the Presidio Omnibus Parks Bill introduced on October 3, 1996, it was removed from the bill after a filibuster led by Senator Bill Bradley. On March 21, 1997, Representative Cannon asked for a two-year moratorium from introducing any further Utah wilderness legislation in Congress.

In 1995, the Clinton administration notified Congress that it was not bound by the Bush administration’s wilderness recom-

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44 See S. 884, 104th Cong., §§ 8-9 (1995). The Act also included a proposal for a large tar sands mining development on the edge of the Glen Canyon National Recreation Area and the Book Cliffs and a petroleum and carbon dioxide gas extraction field in the headwaters of the Escalante River. See id.
45 See id. The Utah Act also allowed motorized vehicles and possible future dams and pipelines to be constructed in the wilderness area. Id. §§ 3-4. “[N]o single wilderness statute has contained as many special management provisions.” ROSS W. GORTE, CONG. RES. SERV. REPORT FOR CONGRESS, NO. 1191, UTAH WILDERNESS LEGISLATION IN THE 104TH CONGRESS 4 (1995).
48 See id.
49 See 142 CONG. REC. S12,344, 12,347 (1996).
50 See 95 OIL & GAS J. 43 (Feb. 3, 1997).
51 See 143 CONG. REC. H1283 (daily ed. Mar. 21, 1997).
pressed for changes to both the Escalante Monument itself and the president's power to create such monuments.\(^59\) The Grand Staircase-Escalante National Monument Minor Boundary Adjustment Act, for example, besides removing numerous lands located within the Monument from its boundaries, provides that the contents of the bill shall not be construed as congressional approval of the establishment of the Escalante Monument.\(^60\) Furthermore, section 5 of the bill states that if a court subsequently finds that the President exceeded his authority under the Antiquities Act in establishing the Monument, it is the "intent of Congress" that it be abolished.\(^61\)

Congress could also influence management of the Escalante Monument through the appropriations process. After a monument is established, the President must go to Congress for funds to operate the new monument.\(^62\) Following the designation of Jackson Hole National Monument, Congress attached riders to every appropriation bill for the Interior Department from 1944 to 1948, forbidding spending any federal monies for management or upkeep of the monument.\(^63\) Similarly, Congress could withhold funds or prevent any monies from being spent to manage the Grand Staircase-Escalante National Monument in the Interior Department's future appropriations.

In Utah, the people living in the small towns surrounding the Monument are almost unanimous in their disapproval of the

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\(^59\) See, e.g., H.R. 3909, 105th Cong. (1998) (proposing changes to the monument's boundaries); S. 477, 105th Cong. (1998) (same); H.R. 1127, 105th Cong. (1997) ("National Monument Fairness Act"). The National Monument Fairness Act, H.R. 1127, would have amended the Antiquities Act to require consultation with the governor and state legislature before designation of a new national monument exceeding 5,000 acres. See id. Furthermore, any land withdrawal exceeding 5,000 acres would require an act of congress within two years of creation or be automatically invalidated. See id. Though the bill passed the House on October 7, 1997 by a margin of 229-197, it did not survive the Senate. See 143 CONG. REC. 138 H8500-502 (daily ed. Oct. 7, 1997) (vote in House).

Undaunted, Rep. Hansen introduced H.R. 4570 on September 15, 1998, an omnibus bill containing almost every pending Republican public lands bill from the 105th Congress, including several pending measures pertaining to the Escalante Monument. H.R. 4570, 105th Congress (1998). The Omnibus Bill contained, in substantial part, the entirety of the former Utah Act from the 104th Congress. See id. The competing legislation, America's Red Rock Wilderness Act, was also reintroduced in the 105th Congress. H.R. 1500, 105th Cong. (1997). Ultimately, neither bill was passed by the 105th Congress.

\(^60\) See H.R. 3909 § 5.

\(^61\) See id.


\(^63\) See id. at 137. Congress also refused to provide funds for the C & O Canal after its establishment as a monument. See id. at 175.
Monument designation did not terminate the historical users' legal rights to the land. In effect, creation of the Monument simply shifted the burden of defending their interests from wilderness advocates to traditional users.

III. NON-FEDERAL INTERESTS WITHIN THE MONUMENT

President Clinton made clear in his remarks following the Escalante designation that Monument status only applies to federal lands. However, many non-federal interests and federal land subject to leases and permits exist within the Monument. There are 111 mineral leases, 70 mining claims, 74 grazing allotments, 80 right-of-ways, and other land use allotments. Livestock grazing is authorized for most of the 1.7 million acres of the Monument.

The oil, natural gas, and coal reserves within the Monument are thought to contain "62 billion tons of high-Btu, clean burning, low-sulfur coal, between 3 and 5 billion barrels of oil, and 2 to 4 trillion cubic feet of natural gas." The estimated value of these deposits ranges from tens to hundreds of billions of dollars. Some geologists estimate that the southwestern edge of the Kaiparowits Plateau alone has sixty-two billion acres of low-sulfur coal.

There are twenty-two coal leases encompassing 59,100 acres within the Monument. The Andalex Mining Co., a Dutch firm, holds seventeen of these coal leases totaling 34,619 acres, located primarily within the Kaiparowits Plateau. Andalex has owned these leases for over a decade but only recently has it become economically feasible to mine the coal because of the inaccessibility of

72 See President's Remarks, supra note 11, at 1787.
73 See U.S. GAO, NO. 141019, FEDERAL LAND MANAGEMENT: AUTHORIZED USES IN THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT 2 (Apr. 17, 1997) [hereinafter GAO]. Other land uses include special and commercial recreation permits for outfitters, guides and wilderness training. See id. at 4.
74 See id. at 2-3.
75 Satchell, supra note 8, at 42.
76 See id.
78 See GAO, supra note 73, at 2. Eighteen of these leases are currently suspended pending wilderness review, and four leases, totaling six thousand acres, were cancelled because of non-payment of rental fees or failure to develop. See id. at 3. Before the monument designation, PacifiCorp, another mining company, agreed to trade 18,000 acres of coal leases within the monument for federal bidding rights. See President's Remarks, supra note 11, at 1787.
79 See GAO, supra note 73, at 2; Mike Gorrell, Monumental Questions; Preserve Might Bury Mining Plans; Would a Preserve Outlaw Mining?, SALT LAKE TRIB., Sept. 10, 1996, at A1.
are located within the Reese Canyon area of the Monument on lands to which the state holds mineral rights. Company spokes-
men claimed that the reserves “could be as high as 4 billion bar-
rels.”

On September 8, 1997, the BLM approved Conoco’s request to drill the exploratory oil and gas wells above Reese Canyon in Escalan
e Monument. Permission was also granted to produce at the site following any discovery of oil or gas. Conoco was unable to locate significant quantities of oil and capped the wells in December 1997.

In June 1998, Conoco applied for permits to drill three additional exploratory wells within the Monument. These three proposed wells are also located on state inholdings. This action followed congressional hearings on the Utah Schools and Lands Exchange Act which was then under consideration in Congress. Critics of Conoco’s renewed attempts to drill maintain that Conoco is attempting to scare the federal government into buying its leases by continuing to drill for oil despite the fact that it has found no significant oil reserves; “Conoco doesn’t smell oil. Conoco smells a hostage situation.” By continuing to apply for drilling permits, Conoco may hope to force the government to buy out its leases or, should the government eventually deny an application, provide the basis for a takings claim. Conoco may be positioning itself for a land exchange.

92 Conoco Announcement (Feb. 11, 1997) (statement of R.E. Irelan, manager of Conoco’s mid-continent exploration and production region) (on file with author).
94 See id. The Interior Board of Land Appeals upheld this decision in an appeal by the environmental group, the Southern Utah Wilderness Alliance. See Southern Utah Wilderness Alliance, 141 I.B.L.A. 85 (1997).
96 See Heather May, Conoco Applies for Permits to Drill Three Wells In Escalante Monument Despite Previous Failure, SALT LAKE TRIB., June 27, 1998, at D2.
97 See id.
99 See Oil Company Stakes Leases for Drilling at Monument, LAS VEGAS REV.-J., June 27, 1998, at 3B. H.R. 3830 was passed by the 105th Congress and, at the date of this Article’s publication, awaited presidential signature.
100 May, supra note 96 (quoting Scott Groene, Southern Utah Wilderness Alliance) (“Conoco doesn’t want to drill oil, they want to drill the federal treasury.”).
101 See discussion infra sections IV.B and V.C.
102 See Oil Company Stakes Leases for Drilling at Monument, supra note 99, at 3B.
Congress passed Public Law Number 103-93 in order to facilitate the exchange of Utah school trust lands with the United States.\(^{113}\) Despite the existence of this law designed specifically to facilitate Utah land exchanges, by the time of the Monument designation in 1996, no lands had been exchanged. Consequently, possibly prompted in part by the fear that the Monument would make the contemplated land exchanges yet more difficult, one month after the Monument designation the Utah School and Institutional Trust Lands Association ("SITLA") filed a lawsuit against President Clinton asserting that the Monument designation violated the Antiquities Act and FLPMA.\(^{114}\)

On May 8, 1998, Secretary of the Interior Bruce Babbitt and Utah Governor Mike Leavitt announced an agreement between the United States and the State of Utah to exchange the Utah school trust land inholdings within the Monument.\(^{115}\) If consummated, it would be one of the largest land exchanges in the continental United States.\(^{116}\) Utah would receive $50 million dollars and 138,647 acres of federal land in exchange for relinquishing 410,718 acres of land owned by the State of Utah and located within units of the national park system, national forest system and the Escalante Monument.\(^{117}\) Utah also agreed to dismiss two pending lawsuits against the federal government challenging the creation of the Escalante Monument and the valuation of state school trust land within federal boundaries.\(^{118}\)

The Utah Schools and Lands Exchange Act, a bill executing the


\(^{115}\) See Brent Israelsen, Leavitt to Sign Pact Today for Land Swap, SALT LAKE TRIB., May 9, 1998, at D1, available in 1998 WL 4052202. For a comprehensive discussion of land exchanges, see infra Part IV.B.

\(^{116}\) See id.

\(^{117}\) See 144 CONG. REC. H5072 (daily ed. June 24, 1998) (statement of Rep. Hansey). See also, Israelsen, supra note 115. The federal land Utah will receive includes 160 million tons of coal, 185 billion cubic feet of natural gas, and other minerals such as limestone and tar sands. The United States will receive 80,000 acres located in Utah national parks and recreation areas, 47,480 acres in Navajo and Goshute Indian reservations, and 70,000 acres in Utah's national forests. For a complete rendering of the lands and minerals to be exchanged, see id.

\(^{118}\) See Israelsen, supra note 115. The Association of Counties and the SITLA lawsuits were stayed pending approval of the exchange.
1998, Grand Staircase-Escalante National Monument

1977, and the General Mining Act of 1872. Furthermore, activities performed on public land must comply with numerous environmental compliance schemes, including the Clean Air Act, the Federal Water Pollution Control Act, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

A. Bureau of Land Management

Traditionally, the public domain refers to land which is not reserved for any specific purpose. Most of this land, which is administered by the BLM, is located in the western United States and totals about 268 million acres, or twenty-one percent of the land owned by the United States. The BLM manages more of the United States's land than any other single agency. These lands are primarily located in dry, inhospitable parts of the country and lack the spectacular vistas, natural wonders, and lush foliage located in the National Park and National Forest systems.

Congress specifically created the General Land Office in 1812 to dispose of federal public land in the western United States. To encourage settlement in this vast, barren part of the country, the government distributed the land cheaply through homestead laws and government sales. The United States also gave right-of-way grants and loans to railroad companies to encourage construction.

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133 See PUBLIC LAND STATISTICS, supra note 14, at 5-6, 10.
136 See David H. Getches, Managing the Public Lands: The Authority of the Executive to Withdraw Lands, 22 NAT. RESOURCES J. 279, 282 (1982). The Homestead Act of 1862 disposed of nearly 100 million acres of western lands. See COGGINS ET AL., supra note 134, at 83-85. Over 10 million acres were patented under the Desert Land Act of 1877, which allowed individuals to purchase federal desert lands for 25 cents an acre. See id.
minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.” However, FLPMA also states that the “principal or major uses” of BLM land “includes, and is limited to, domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.” Thus, the stated “principle or major uses” of the land directly conflicts with the definition of “multiple use” provided in the statute. Listed “major uses” reflect the traditional uses of BLM land, i.e., development and resource extraction. This definition also does not mention watershed or natural scenic, scientific, and historic values as principle or major uses, although these land uses are named in the definition of “multiple use.” Thus, courts have commented that FLPMA appears “internally inconsistent, reflecting different concerns of environmentalists, miners and ranchers,” which provides the BLM with considerable leeway in management decisions.

While designation of the Escalante Monument using the Antiquities Act permitted the President to circumvent NEPA, any future change in land use or land disposition at the Grand Staircase-Escalante National Monument will require NEPA compliance. NEPA mandates the preparation of a statement by federal agencies for all proposed major federal actions that significantly affect the “quality of the human environment.” NEPA does not impose any substantive demands on a federal agency. Its purpose is to give notice and provide public participation, and it is primarily procedural in nature.

NEPA requires that, for any change in the status quo, an agency must prepare an Environmental Assessment (“EA”), an Environmental Impact Statement (“EIS”), and a Categorical Exclusion or a Finding of No Significant Impact (“FONSI”).

148 Id. § 1702(l) (emphasis added).
150 See 40 C.F.R. § 1508.12 (1997) (Federal Agency means all agencies of the federal government, but not the Congress, the Judiciary, or the President in his Executive Office.).
152 See Robertson v. Methow Valley Citizens Council, 490 U.S. 330, 335 (1989) (“NEPA itself does not mandate particular results, but simply prescribes the necessary process.”).
153 See Trustees for Alaska v. Hodel, 806 F.2d 1378, 1382 (9th Cir. 1986); Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1056 (9th Cir. 1985).
154 See 40 C.F.R. § 1508.9 (1997) (an “EA” is a brief document that determines whether it is necessary to prepare an EIS or a FONSI).
155 See 40 C.F.R. § 6.100.
156 See 40 C.F.R. § 1508.4 ("categorical exclusion" means a category of actions that do
mining leases for oil, gas, and coal, existing mining claims under the 1896 Mining Law, and other privately held land.

The Proclamation ordered the Secretary of the Interior to promulgate a management plan for the Monument within three years. The Monument planning team is comprised of both state and federal members. The Planning process includes a scoping or information-gathering phase, a planning-issues phase (which defines the issues arising from the scoping comments), a management-strategies phase (which provides options for addressing the planning issues), and a management-scenarios phase (which describes the various management approaches being considered). A Draft Management Plan, accompanied by a Draft EIS, is scheduled to be released in October, 1998, and a period of public comment will follow.

On November 8, 1996, the BLM issued interim guidelines for the management of the Monument until the final management plan is completed in 1999. These guidelines direct BLM field-managers to make decisions based on valid existing rights ("VER"), renewal of existing use authorizations, new-use authorizations, and BLM activities. The guidelines allow existing and new uses that do not conflict with the purposes of the Monument and provides specific guidance for each activity permitted within the boundaries of the Monument. Overall, the management guidelines reflect the intention to maintain existing management policies unless the policies conflict with the preservation of the Monument.

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See Brent Israelen, Utahns, Nevadans Land Spot on Monument Team: They Can Leave Their Imprint on Grand Staircase's Future, SALT LAKE TRIB., March 19, 1997, at D2. The management team will not address possible land exchanges, wilderness designation, or the economic development of Kane and Garfield counties. See id.


See id. at 1, 3-6.
future management plan for the Monument.178

Land exchanges are very complicated land transactions that require conformity with numerous federal, state, and local laws, as well as cooperation with several federal agencies and departments. Exchanges are a practical way to consolidate federal, state, and private land, while providing more effective management of public land in these days of dwindling public resources and lower government spending. Further, exchanges can improve public access, resolve boundary disputes, protect endangered and threatened species' habitat, reduce land management costs, increase recreational opportunities, and protect riparian and wetland areas.179

If the Department of the Interior and the Andalex Mining Co., or any other privately held interest within the Monument, cannot agree on suitable land within Utah for an exchange, then an interstate exchange will be necessary. Individual acts of Congress are required to authorize land exchanges between sovereign entities within the United States.180 Thus, land exchanges between states, between a state and the United States, and exchanges including Indian land must all be approved by the full federal legislative process. Additionally, Congress traditionally passes exchange acts for complicated or politically sensitive intrastate exchanges.181 These exchanges may not serve the public interest because they bypass the environmental laws and the public land laws.182 Exchanges authorized by Congress also may reflect lobbying and other forms of political pressure exerted by private interest groups. The proposed exchange between Utah and the United States, which also involves Indian lands, must be passed by Congress.183

178 See President's Remarks, supra note 11, at 1787.
180 See Scott E. Matheson & Ralph E. Becker, Jr., Improving Public Land Management Through Land Exchange: Opportunities and Pitfalls of the Utah Experience, 33 ROCKY MTN. MIN. L. INST. § 4.08 (1987). For an example of the procedure involved in an intrastate exchange which involved sovereign Indian lands, in 1984 the State of Utah and the United States attempted to consolidate their respective land ownership through a land exchange. After hundreds of hours of work, including committee hearings, the proposal was dropped after the election of a new governor in Utah. See id.
181 See id.
182 See 40 C.F.R. § 1508.12 (1997) (NEPA not applicable to Congressional actions); Keystone Center, Land Exchange Process Meeting, app. B-5 (Draft Dec. 21, 1994) (“Congressional exchanges may not serve the public interest.”). The lands to be exchanged in Utah under the Utah Wilderness Act were not subject to NEPA or the Endangered Species Act. See generally S. 884, 104th Cong. § 10 (1995).
183 For a discussion of the Utah—United States land exchange, see supra notes 103-121 and accompanying text.
The BLM exchange regulations and the BLM Manual describe in detail the procedures required to complete a FLPMA land exchange, as well as the personnel within the Interior Department responsible for completing each procedure.\textsuperscript{[95]} For an exchange to be complete, it must consist of three separate components: a scoping section, an exchange analysis section, and a title transfer section.\textsuperscript{[94]}

The scoping section has two steps. First, the BLM must review the exchange proposal according to current land-use plans, natural resource values, land status, land values, funding capabilities, and manageability of acquired lands.\textsuperscript{[95]} Next, the BLM must prepare a feasibility report that determines the “public interest” component of the land exchange and the feasibility of completing the exchange.\textsuperscript{[96]}

All exchanges must be in the “public interest” pursuant to section 206.\textsuperscript{[97]} The phrase “public interest” takes its specific meaning from the regulatory purposes of the legislation.\textsuperscript{[98]} The BLM has three objectives for land exchanges: 1) to increase management efficiency of the public lands; 2) to sustain local communities; and 3) to create ownership patterns that allow for local community development while protecting resources.\textsuperscript{[99]}

Section 206 enumerates that the Secretary of the Interior’s public interest determination must provide for “better Federal land management and the needs of State and local people,” while assuring that the values and objectives to be realized through the conveyance are greater as a result of the exchange than they would be if the lands were retained by the federal government.\textsuperscript{[200]} Factors to consider when identifying public interest include “needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife.”\textsuperscript{[201]} Covered in the as-
veys and engineering reports prepared to determine the legal boundaries of the properties involved are authenticated.211

After entering into the agreement to initiate an exchange, a Notice of Exchange Proposal ("NOEP") is published in the local newspaper.212 The NOEP provides public notice of the proposed exchange, identifying both the federal and non-federal lands,213 and solicits public comments.214 In addition, all parties with property interests in the lands must be individually notified of the exchange.215 This includes grazing permit holders, who must be given reasonable compensation and, except in cases of emergency, two-years advance notice of the cancellation of a grazing permit resulting from an exchange.216

Next, an appraisal determines the relative values of the lands involved in the exchange.217 Exchanges must be for equal value unless the lands exchanged are of "approximately equal value," and the value of the lands exchanged is less than $150,000.218 If lands are not of equal or approximately equal value, the exchange can be equalized by payment of money so long as such payment does not exceed twenty-five percent of the total value of the federal land.219

The value of the federal and non-federal lands are set at market value as determined by the appraisal.220 If the parties disagree on the adequacy of the appraisal value, then binding arbitration, or other bargaining processes, may be used to determine the value of the land.221 The exchange-working group, developed to facilitate

211 See id. § 2200.0-6(k).
212 See 43 C.F.R. § 2201.2.
214 See 43 C.F.R. § 2201.2.
215 See id. Interested parties include all authorized users of the land, the Governor of the state, the local governmental body with jurisdiction over the lands, and the appropriate United States Representative(s) and Senator(s). See id.
218 See 43 U.S.C. § 1716(h). Approximately equal value is defined at 43 C.F.R. § 2200.0-5(d) (factors include "location, size, use, physical characteristics, and other [physical] amenities"). See also 43 C.F.R. § 2201.5(a)(2).
219 See 43 U.S.C. § 1716(b). The Secretary can waive cash equalization upon a determination that the "public interest will be better served ... [and] the amount to be waived is no more than 3 per centum of the value of the lands being transferred out of federal ownership, or $15,000, whichever is less ...." Id.
220 See 43 C.F.R. §§ 2200.0-6(c), 2201.3-2.
221 See 43 C.F.R. § 2201.4. The binding arbitration provision has not been enforced because of concerns regarding its constitutionality under the Appointments Clause, U.S. CONST. art. II, § 1, cl. 2. See Administrative Dispute Resolution Act of 1999: Hearings
complex transactions involving numerous processes and compliance with several statutes. The process entails prolonged negotiations and the potential for interested parties to challenge or delay proposed land exchanges. Thus, land exchange procedures, as well as other BLM management actions, provide numerous opportunities for interested companies, governmental bodies, or other organizations to assert their political causes and legal rights.

The preceding section focused on the challenges to the Monument's administration which may be mounted within the current management structure. The following section examines potential legal challenges to the designation and existence of the Monument itself.

V. POTENTIAL LEGAL CHALLENGES TO CREATION OF THE MONUMENT

There are at least three potential challenges to the designation of Grand Staircase-Escalante National Monument under the Antiquities Act. First, critics may challenge the authority of the BLM to manage the Monument under its constituent statutes. Second, critics may contend that the President's designation did not conform with his authority under the Antiquities Act. Finally, the designation and operation of the Monument may provide existing land users with a basis for the claim that they have fallen victim to uncompensated takings of private property interests under the Fifth Amendment. This section will consider each argument in turn.

A. BLM Authority to Manage Grand Staircase-Escalante National Monument

Escalante is the first national monument managed by the BLM. The key issue is whether the President, as opposed to Congress, can properly grant authority to an entity other than the Park Service to manage a national monument.299

Section 2 of the Antiquities Act, as enacted in 1906, did not specifically authorize any one executive department to manage newly created monuments.300 The Department of Interior was author-

299 Congress has plenary authority under the Property Clause of the United States Constitution to specify whatever management authority it desires for the public lands. See U.S. CONST. art. IV § 3, cl. 2.
300 See 36 Op. Att'y Gen. 75, 76 (1929) (advising that section 2 "contains no language expressly designating the executive departments which are to have jurisdiction over the
the Park Service exclusive management authority for national monuments. The Committee Report from the park legislation specifically noted that monuments managed by the Department of Agriculture should become part of the National Park system. However, any reference to management of the Department of Agriculture's monuments by the Park Service was dropped from the final park legislation.

After the passage of the 1916 Parks Act, Congress continued to grant monument jurisdiction in departments besides the Park Service. In addition, management of national monuments continued in the Departments of Agriculture and of War, and new monuments were created by presidential action in both departments after the 1916 Park Act's passage.

Since the 1916 Parks Act did not grant exclusive management jurisdiction for executively created national monuments to the Park Service, the President retained authority to place this jurisdiction in other agencies and departments through executive orders. In 1929, President Hoover explored consolidating management of the national monuments into the Park Service through the executive's power to reorganize the government. However, an attorney general opinion advised him that the President lacked authority to transfer national monuments from one agency to another.

In 1933, Congress passed a statute that authorized the President to reorganize the executive agencies of the government. Under

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239 See H.R. REP. NO. 64-700, at 3 (1916).
240 See id. at 4.
241 See Appropriation Act of April 15, 1926, ch. 146, 44 Stat. 254, 290 (1926) (containing an appropriation "[f]or maintaining and improving national monuments established by [the Antiquities Act]... and administered by the Secretary of War").
242 See LEE, supra note 6, at 94-95. The Department of War monuments were all historical areas. President Wilson designated Old Kasaan, Alaska on Oct. 25, 1916; President Harding designated Mound City, Ohio on March 2, 1923; President Coolidge designated Castillo de San Marcos, Florida, Fort Matanzas, Florida, Fort Pulaski, Georgia, the Statue of Liberty, New York, and Castle Pinckney, South Carolina on Oct. 15, 1924, and Father Millet Cross, New York on Sept. 5, 1925. See id.
Department of Agriculture designations were all scientific areas. President Harding designated Lehman Caves, Nevada on Jan. 24, 1922 and Timpanogos Cave, Utah on Oct. 14, 1922; President Coolidge designated Chiricahua, Arizona on Apr. 18, 1924; President Hoover designated Holy Cross, Colorado on May 11, 1929, Sunset Crater, Arizona on May 26, 1930, and Saguaro, Arizona on March 1, 1933. See id.
244 See id. at 79.
245 See Act of March 3, 1933, ch. 212, § 403, 47 Stat. 1489, 1518 (1933). Section 403 gave the President the power to transfer, consolidate, or eliminate the whole or any part of an
which agency should manage them.\textsuperscript{252}

The Secretary of the Interior sought an opinion from the Office of Legal Counsel as to whether the Forest Service monuments needed to be transferred to the Park Service pursuant to Executive Order 6166.\textsuperscript{253} The 1980 Opinion found that the executive order “vest[ed] additional management responsibilities in the Department of the Interior for national monuments created on forest lands, thus permitting the two departments to share responsibility” for managing the monuments.\textsuperscript{254} The opinion concluded that Executive Order 6166 did not affect the status of reservations on monument land or “confer additional substantive rights with respect to public lands.”\textsuperscript{255}

In 1984, Congress passed an act that ratified and affirmed earlier reorganization plans and any actions carried out under them.\textsuperscript{256} While this 1984 Act may have conferred statutory status to Executive Order 6166, the 1933 Act allowing the reorganization did not require congressional assent to ratify the executive order. The 1933 Act provided that an executive order issued pursuant to the act became effective sixty calendar days after issuance, unless Congress provided an earlier effective date.\textsuperscript{257}

If the 1984 Act effectively codified the 1933 Executive Order, management of a national monument by an agency other than the Park Service may require congressional assent. However, Congress has approved or failed to contest reorganization plans that permitted transfer of functions within particular departments of the same agency.\textsuperscript{258} Though not legally binding, it is likely that a


\textsuperscript{254} 48 Op. Off. Legal Counsel 396, 399 (1980) (“W[hether the authority is exclusive, additional, delegable, or forfeitable depends on the terms of the order and other authorities that may exist with respect to the lands.”).

\textsuperscript{255} Id. at 398 (The Executive Order “does not expressly expunge nonmonument reservations on national monument lands, and no expungment appears by implication.”).


\textsuperscript{257} See Act of March 3, 1933, tit. IV, ch. 212, § 407, 47 Stat. 1489, 1519 (1933) (establishing the effective date of executive order).

consultation between agencies for disposal of federal land. However, NEPA only applies to actions taken by federal agencies, not to actions taken by the President.

In Wyoming v. Franke, the state of Wyoming challenged the 1943 designation of Jackson Hole National Monument by claiming that the stated purpose of the Monument was insufficient. The Proclamation asserted, without elaboration, that the area "contains historic landmarks and other objects of historic and scientific interest." It was not until trial that the United States introduced specific evidence of items of historic and scientific interest within the Monument.

The court found that its role was limited because of the discretion given to the President by the Antiquities Act. A President's proclamation under the Antiquities Act will be upheld if there is evidence of a "substantial character upon which the President may have acted." The scope of judicial review of this evidence is narrow; otherwise, it would invade the purview of the executive and congressional branches and thus violate the separation of powers doctrine. The court reasoned that, under the rules of statutory construction, "whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, . . . the statute constitutes him the sole and exclusive judge of the existence of those facts.

Despite the deference given to Presidential decisions by the
ary power to declare national monument status, which includes determining the size, objects of historic and scientific interest, and location of the monument. Recognizing this fact, courts have deferred to a President’s opinion as to the necessary area and what constitutes objects of scientific and historical value in the creation of a national monument.

Critics of the creation of Grand Staircase-Escalante National Monument complain that President Clinton’s Monument designation was motivated by political purposes, not the preservation of objects of natural and scientific beauty. The creation of both Jackson Hole National Monument and the Alaskan monuments also created huge political storms. In 1943, after the establishment of Jackson Hole National Monument by President Franklin D. Roosevelt, members of Congress declared it was “a subterfuge to thwart the will of Congress by Executive action.” President Carter’s 1978 Alaska withdrawal of fifty-six million acres under the authority of the Antiquities Act was called the “Screw Alaska Bill” in Congress and in Alaska. However, the court in Wyoming v. Franke noted that the motives of the President were not important in determining the validity of an Antiquities Act monument designation.

An alternative legal challenge to the creation of Grand Staircase-Escalante National Moment is that the Antiquities Act was an unlawful delegation of congressional power to the executive branch. When Congress delegates its inherent authority to the executive branch, it must provide sufficient standards. However, Congress has acquiesced to presidential declarations of national monuments under the Antiquities Act for over ninety years. Because the 1906 Act has been in effect for so long, and since courts have upheld other statutes that have granted broad delega-

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284 See EVERHART, supra note 62, at 137; LEE, supra note 6, at 98.
285 EVERHART, supra note 62, at 137. Following the Designation of Jackson Hole National Monument, Congress introduced five bills to modify or abolish the Antiquities Act, none of which were successful. See 1945 DEPT OF INTERIOR ANN. REP. 221.
286 See Johannsen, supra note 261, at 454.
287 See Franke, 58 F. Supp. at 896.
289 Cf. United States v. Midwest Oil, 236 U.S. 459, 468 (1915). The Supreme Court found that the “long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the withdrawals had been made in pursuance of its consent or of a recognized administrative power of the Executive in the management of the public lands.” Id. at 474.
withdraws under the Antiquities Act must be located on lands owned by the United States.295 Pursuant to the Property Clause of the Constitution, Congress exclusively manages the public lands.296 This management power is “without limitation,” and federal power over such lands is plenary and preemptive.297 “[T]he land is property of the United States, and... the land laws are not of a legislative character in the highest sense of the term (art. 4, § 3), ‘but savor somewhat of mere rules prescribed by an owner of property for its disposal.”298 Consequently, the nature of Congress's authority over the public lands suggests that its power to delegate the management of public lands should be absolute.299

A court likely would find that the Proclamation establishing the Grand Staircase-Escalante National Monument conforms to the requirements of the Antiquities Act. Congress delegated to the President the discretion to determine the size and what objects must be contained within an executively created monument, and a successful challenge to that delegation appears unlikely. Further, the courts have broadly interpreted the President’s discretion in designating national monuments. Therefore, the proper forum to challenge such withdrawals lies in Congress, not the courts.

C. Takings of Private Property

The Proclamation establishing the Escalante Monument specifically states that the designation is subject to valid existing rights.300 Accordingly, a company such as Andalex, which holds valid mineral leases within the Monument, will be allowed to proceed with its mining operations after obtaining the necessary permits. However, if the federal government impedes Andalex’s mining activity,

296 See U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have the Power to dispose of and make all needful Rules and regulations respecting the... property belonging to the United States...”).
299 See Alaska v. Carter, 462 F. Supp. 1155, 1165 (1978) (“The ultimate decision on public lands has been delegated to the Congress... and the public interest lies in allowing the Congress to make the ultimate decision.”); Wyoming v. Franke, 58 F. Supp. 890, 896 (“[T]he burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in its Legislative branch.”).
private property is derived from English law and is embodied in the Fifth Amendment of the United States Constitution. The just compensation clause of the Fifth Amendment states, "nor shall private property be taken for public use, without just compensation."

Modern Fifth Amendment jurisprudence recognizes two distinct categories of Fifth Amendment takings: physical and regulatory. A physical taking occurs with the government's actual physical possession of private property or the "functional equivalent of a 'practical ouster of [the owner's] possession.'"

In contrast, a regulatory taking occurs when government regulations impose restrictions that prohibit or limit the owner's use of his property. A regulatory taking claim was first recognized in Pennsylvania Coal Co. v. Mahon. Justice Oliver Wendell Holmes wrote for the majority that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Such a rule prevents the government from forcing private parties to bear costs imposed for the benefit of the general public.

Whether a regulation "goes too far" under the Fifth Amendment has traditionally been an unpredictable ad hoc factual inquiry. In Lucas v. South Carolina Coastal Council, the Supreme Court attempted to establish a more consistent and predictable test for analyzing Fifth Amendment claims. According to Justice

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305 U.S. CONST. amend. V.
308 See, e.g., Store Safe Redlands Ass'n, 35 Fed. Cl. at 729.
309 260 U.S. 393 (1922) (Pennsylvania legislation to prevent subsidence from mining went too far since it was passed to protect private property rights).
310 Id. at 415.
313 See Preseault v. United States, 27 Fed. Cl. 69, 87 (Fed. Cir. 1992) (discussing effects of Lucas); Store Safe Redlands Ass'n, 35 Fed. Cl. at 730 (same).
One of the underlying justifications for this rule is that the loss of all beneficial use raises a “heightened risk that private property is being pressured into some form of public service under the guise of mitigating serious public harm.”

If the purported taking involves either of the above two situations, courts automatically find a taking. However, the majority of situations require a case-specific factual inquiry using the three-part balancing test derived from *Pennsylvania Central Transportation Co. v. New York.* This test determines when a regulation goes “too far” by balancing competing interests. A court must evaluate the following factors: (1) the economic impact of the regulation; (2) the character of the governmental action; and (3) the extent the regulation interferes with the claimant’s legitimate investment-backed expectations. In practice, the weight given to each factor when balancing the interests at issue determines the decision of the court.

Recently, the Court of Federal Claims has recognized a subset of physical takings claims for takings challenges involving public lands. Because “legal takings” involve federally owned, public lands, at issue is whether the government’s regulation of these lands can amount to a taking of private, vested rights to use the land. Consequently, a “legal taking” analysis begins by asking whether the government’s or the private party’s interest in the contested use of the land vested first. For the determination of whose right to a given use is superior, a court will look to the applicable state law. Only then will a court determine whether, according to *Lucas,* “the government action interfer[ed] with that ownership right[.]”

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321 *Lucas,* 505 U.S. at 1015 (citing *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980)).
322 *Lucas,* 505 U.S. at 1018.
324 See *M & J Coal,* 47 F.3d at 1153.
326 See id.
327 See id.
328 See id.
329 Id.
vents Andalex from constructing the roads necessary to ship coal to Los Angeles. Any circumstance that makes it impossible for Andalex to create the necessary infrastructure will arguably constitute a categorical taking because the coal has no value if it cannot reach its market.

On the other hand, ranchers who traditionally have used federal land in Utah for grazing should not be able to raise successful takings claims. The term of a grazing permit is limited to ten years.338 While the Proclamation states that existing grazing permits are protected within Grand Staircase-Escalante National Monument, it does not guarantee renewal of any grazing permit after expiration.339 Grazing permits are a lesser type of property interest, with the characteristics of a revocable license, rather than the vested property rights arising from a contract.340 A grazing permit does not create affirmative obligations on the part of the United States, it is not alienable, and the United States can limit and/or cancel a permit at any time it determines that grazing is incompatible with the public purpose of the particular land parcel.341 Furthermore, the Court of Claims has determined that a grazing permit is not a legally compensable property interest for Fifth Amendment purposes.342 Therefore, ranchers have no legal recourse if the BLM decides to alter or to deny renewal of any grazing permits for lands within the Monument.

Unlike grazing permits, however, mining interests may have a sound basis for takings claims. The Mountain States Legal Foundation lawsuit asserted a Fifth Amendment takings violation arising from the creation of the Escalante Monument.343 The basis for this claim was that the plaintiffs owned “mining claims in the monument.”344 Federal mining claims are “private property.”345 However, state law traditionally determines the valid existing rights of the mineral estate holder, including permissible mining

339 See Memorandum from the Director of BLM to the Utah State Director 1-2 (Nov. 8, 1996) (on file with author).
341 See Hage, 35 Fed. Cl. at 166-67.
342 See id. at 171.
344 Id.
345 Swanson v. Babbitt, 3 F.3d 1348, 1353 (9th Cir. 1993) (citing Freese v. United States, 639 F.2d 754, 757 (Ct. Cl. 1981)).
the water demands of the state or other existing property users.

Water rights are a type of property defined under state law. State common law and the federal reserved rights doctrine determine water rights on public lands. Government withdrawal of land from the public domain includes an implied reservation of appropriated appurtenant water superior to future rights, a reservation which vests at the date of reservation. Consequently, Fifth Amendment takings issues involving water rights may arise in several contexts. For example, a takings challenge could be based on either the claim that protected wildlife has consumed water which is otherwise needed for grazing stock or that federal land managers have diverted water flows to protect the public lands. The instance and complexity of water issues in the western United States is further exacerbated by the checkerboard pattern of private and federal land ownership coupled with the scarcity of available water.

To set these issues in context, there are two basic water rights systems in the United States: the riparian doctrine and the prior appropriation doctrine. In the eastern United States, water rights are determined according to the common law riparian doctrine, which permits a reasonable use of water. Determining what is a reasonable quantity of water among competing users is largely a balancing test of the competing interests, historical use, duration and necessity of use, size of the water sources, and the extent of the injury that would otherwise result.

Water rights in the western United States are generally determined under the prior appropriation doctrine. Prior appropriation is a “first in time, first in right” allocation of water, under which the user with the earlier date of appropriation of the water has superior rights. The quantity of water available to the prior user is determined by the amount necessary for his beneficial use, with some modifications. The ability to have sufficient water is especially important in the western United States, which is mostly arid desert land and where “water means the difference between farm

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333 See International Paper Co. v. United States, 282 U.S. 399 (1931) (taking of company’s property rights in water from the Niagara Falls).
335 See id. (citing U.S. Const. art I, § 8; art. IV, §3).
336 See COGGINS ET AL., supra note 134, at 365.
337 See id. at 364-65.
339 See, e.g., UTAH CODE ANN. §§ 73-1-3, 73-3-21 (1996) (“Beneficial use shall be the basis, the measure and limit of all rights to the use of water in this state.”).
whose ranches extended over both public and private lands in Nye County, Nevada, alleged that they were due compensation for the cost of producing the water which the horses consumed. The crux of their argument was that their property interest in the grazing permits entitled them to the use of all of the water necessary to achieve the "permitted purpose," that of grazing livestock. The court found that the plaintiffs did not have a compensable expectancy in the exclusion of wild horses from the land because their grazing permits specifically allowed wildlife use of the water, and therefore did not create a property interest in the exclusive use of the water.

Similarly, in Hage v. United States, the rancher-plaintiffs claimed that the Forest Service had diverted and used their water in violation of the takings clause and that non-indigenous wildlife from the forest drank water belonging to them. The court, employing a legal takings analysis, first established that the right to appropriate water can be a compensable property interest and affirmed that private parties can obtain rights to water on federal land. Though the court did not reach the issue of whether the government's appropriation of the water constituted a taking, it held that it would be inappropriate to grant summary judgment without allowing the plaintiffs the opportunity to demonstrate that they did have a property interest in the water rights. Under the Act of 1866, water rights which "have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the court," shall be protected. Thus, the operative decision became whether the plaintiffs' property rights in the water sources had vested and accrued under the laws of Utah before the United States acquired its water rights with the creation of the Toiyabe National Forest. By this reasoning, the potential for

wells, and ditches. See id. at 58.
370 See id. at 54-56.
371 See id. at 57-58.
372 See id. at 58.
373 See Hage v. United States, 35 Fed. Cl. 147, 156 (1996) (The plaintiffs' complaint also requested compensation for their property interests in ditch rights-of-way, forage on the rangeland, grazing permit, and cattle.).
374 See id. at 172-73 (holding water rights are not "lesser" or "diminished" property rights and are thus entitled to full Constitutional protection).
375 See id. at 172-73.
377 Id.
378 See Hage, 35 Fed. Cl. at 172-73 (noting that Utah utilized a prior appropriation doctrine for allocating water rights which affords the earliest user superior rights).
complex statutory rules of BLM management and land exchanges, as well as potential Fifth Amendment takings claims, offer a variety of channels through which affected parties may participate in or challenge both management decisions and the creation of the Monument itself. Given the value of the mineral deposits within the Monument's borders, companies such as Andalex and Conoco, as well as state and local governments in Utah, are certain to take advantage of their opportunities to assert their rights in both the administrative process and the courts. Thus, the foreseeable future of Grand Staircase-Escalante Monument is likely to be defined by continuing political and legal controversy.