U.S. Supreme Court Decisions That Shaped Department's 20th Century Responsibilities

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As part of the 150th anniversary celebration at the Department of the Interior, the Solicitor’s Office considered what it might do to bring attention to one often-overlooked aspect of the work of this Department—the role law and litigation have played over the years in carrying out our important responsibilities.

We decided that an appropriate and informative project would be to select and briefly describe a dozen Supreme Court decisions that have had fundamental impact on the work of the Department. We decided to publish four each of these in three successive editions of *People, Land & Water*.

But which twelve decisions? There was little disagreement about some—everyone’s list included such landmarks as *Winters v. United States*, which is the primary underpinning of Indian and other federal reserved water rights. But winnowing to a final dozen was not easy; there is ample room to quibble with our selections.

Our criteria were: only United States Supreme Court decisions that were handed down during the life of the Department and that had major impact on the Department and American life. The criteria thus excluded foundational Indian law decisions like the Cherokee Cases (which predate the Department) as well as seminal territorial law, the so-called Insular Cases (1901), which did not directly involve the Department. Our selection also reflects an effort to illustrate the diverse responsibilities of the Department.

Great credit goes to the volunteer committee of Solicitor’s Office lawyers who conceived of and brought this project to completion. Robin Friedman, of the Division of General Law, came up with the idea, and was rewarded with the task of committee chair.

The members of the committee include Karen Sprecher Keating, Associate Solicitor, Division of General Law; Paul Smyth, Deputy Associate Solicitor, Division of Land and Water; Tim Vollmann, Solicitor for the Southwest Region; Sharon Blackwell, formerly the Tulsa Field Solicitor who is now the Deputy Commissioner for Indian Affairs; Glenda Owens, Assistant Solicitor, Division of Mineral Resources; Pete Raynor, Assistant Solicitor, Division of Parks and Wildlife; and Maria Wiseman, Division of Indian Affairs.


Like the cases, the lawyers working on this project reflect a cross-section of this Department. They range from the most recent law school graduates to senior management, and are located in various divisions of the Washington Office as well as in regional and field offices. What they have in common is an enthusiasm for the history and mission of this Department and a desire to share their knowledge with others.

I thank all of the dedicated lawyers in the Solicitor’s Office who brought this project to completion. We hope you find our efforts worth reading. Comments are welcome, of course.

To help mark Interior’s 150th Anniversary, a volunteer committee of lawyers from the Department’s Solicitor’s Office wrote a series of articles that describe the origins and outcomes of significant U.S. Supreme Court decisions that have had an important influence on American life and the Department’s role in managing the nation’s natural resources on public land. Robin Friedman, who is with the Division of General Law, came up with the idea and led the committee that developed the series.

The authors are identified with their respective articles.

*Robin Friedman*
In the arid American West, water is life. It is no accident that most of the great cities of the West grew and flourished on the banks of rivers that flowed through their desert landscapes. While the rivers helped bring prosperity to western settlers, they also brought bitter conflict over the right to use those waters. The legal and political struggles we witness today over water use are strikingly similar to those that took place nearly 100 years ago.

One such struggle took place before the United States Supreme Court early in this century, and resulted in an important water rights victory for Indian tribes in the case *Winters v. United States*, 207 U.S. 564 (1908). This landmark case altered the contours of water law forever by creating a new type of water right, the “federal reserved water right.”

This new federal right differed significantly from the two existing state systems of water rights. The United States’ original type of water right, the “riparian doctrine,” was imported from England to the Eastern United States where water was plentiful. The riparian doctrine gives the right to use water to land owners adjacent to a waterway. This right, dependent on land ownership, cannot be lost through non-use.

As development expanded westward into areas where water was scarce, California gold miners of the 1840’s and 1850’s developed a new system for allocating water rights that was based on the miners’ custom of “first in time, first in right.” Just as the first miner to stake a claim earned the right to mine the area, so too was the first user of water considered to have the first priority over water use. In years of short supply, senior water users were entitled to their full water needs before junior users received any water at all.

Because water was too precious to waste, the right to use water under this system existed as long as the user put the water to an actual beneficial use such as mining or irrigation. This system, known as the “doctrine of prior appropriation,” was eventually adopted by the western states and incorporated into state law.

The *Winters* decision created the federal reserved water right by combining elements of the Eastern riparian doctrine and the Western doctrine of prior appropriation. Under the federal reserved water right, when the federal government reserves public land for a certain purpose, such as an Indian reservation to serve as a permanent home for a tribe, it also implicitly reserves enough water to achieve that purpose. Like the Eastern system, this right is associated with a particular piece of land, and cannot be lost through non-use. Like the Western system, this right is based on the concept of first in time, first in right.

The conflict leading to the *Winters* decision erupted between Indians living on the Fort Belknap Indian Reservation and settlers in the then Territory of Montana. The Gros Ventre and Assiniiboine Tribes had been attempting to make a living at Fort Belknap since 1888 when Congress approved an agreement with the tribes setting aside 600,000 acres bordering the Milk River in northern central Montana as a permanent home for the tribes.

This reservation was all that remained after the Federal Government negotiated with the tribes for the surrender of over 17,500,000 acres of the Great Blackfeet Reservation, reducing the tribes’ land to three smaller reservations: Fort Peck, Blackfeet, and Fort Belknap. Government officials told tribal leaders that the demand for more settlement land was increasing every day, and the time had come when Indians could not keep their vast land holdings. The tribes, who were suffering from starvation at the time, gave up their original land holdings in exchange for promises of houses, livestock, medical care, farming machinery, and financial assistance to “promote their civilization, comfort, and improvement.” Both the Federal Government and the tribes expected farming to be their primary means of support. To make the arid lands productive, large amounts of irrigation water would be required from the Milk River. The agreement was, however, silent on water.
As farmers, ranchers, and homesteaders established communities in the Milk River Valley, they increased their demands for water from the Milk River. The settlers began diverting the water upstream from the reservation, reducing the amount of water reaching Fort Belknap. Initially, there was enough water for all users. However, by 1905 the increased water use and a severe drought created a desperate situation on the Fort Belknap Reservation.

In June of 1905, the government-appointed reservation superintendent of Fort Belknap wrote to the Commissioner of Indian Affairs in Washington, DC to protest the water diversions by the settlers. “The Indians have planted large crops and a great deal of grain.” he wrote. “All this will be lost unless some radical action is taken at once to make the settlers above the reservation respect our rights. To the Indians it either means good crops this fall, or starvation this winter.” The superintendent’s recommendation was indeed radical because he sought to protect the tribes at a time when Indians were widely viewed as standing in the way of westward expansion.

Secretary of the Interior Ethan Hitchcock, a supporter of Indian development, initiated a lawsuit in federal district court to protect the tribes’ right to their share of the water from the Milk River. The lawsuit named 21 defendants, including Henry Winter (misspelled “Winters” in court documents), two irrigation companies and a cattle company. The Federal Government asked the court to stop the defendants from constructing or maintaining the dams and reservoirs on the Milk River that prevented the water from flowing to the reservation. Attorneys for the government argued that water from the Milk River was necessary to fulfill the purpose for which the Fort Belknap Reservation was created. The district court judge agreed and ruled that when the tribes negotiated the agreement with the United States establishing the reservation, they implicitly reserved the right to use the waters of the Milk River for irrigation without interference from non-Indian water users.

The local reaction to the judge’s order was swift and antagonistic. The ruling alarmed settlers who feared they would lose water necessary to support their growing communities. They called public meetings to denounce the ruling and to petition their congressmen for help in defeating the tribes’ water rights, and they appealed the case to the Supreme Court.

In the Supreme Court, the settlers acknowledged that they began using the water after the establishment of the reservation, but argued that, because they actually began using the water before the tribes did, their rights had priority. The Court dismissed the settlers’ claims in an eight-to-one decision, finding that the settlers’ demands were secondary to the rights of the tribes. In its opinion, the majority held that the 1888 agreement to establish the reservation clearly anticipated that the tribes would rely on agriculture, thus, making water from the Milk River absolutely necessary. The Court said that it was unreasonable to assume that the land would be reserved for farming without also reserving the water to make farming possible.

This decision established the principle of federal reserved water rights and came to be known as the Winters Doctrine. It states that when federal reservations are established, the United States implicitly reserves enough water to fulfill the purposes of the reservations. While Winters clearly established that this right existed, the case left several important questions unanswered, such as determining the amount of water to which the tribes were entitled, or whether uses other than irrigation were also assured. These and other questions have been the subject of continued debate and numerous lawsuits in the years since the 1908 landmark decision, as the aftermath of the decision showed.

The decision was an important victory for the tribes and for the Department’s advocacy on the tribes’ behalf, at a time when defeat was the norm. But the struggle over the waters of the Milk River continues to this day, and illustrates the sometimes conflicting missions of the Department of the Interior. Only one year after the Supreme Court’s decision, settlers in the Milk River Valley were able to convince Interior’s Reclamation Service (forerunner of the Bureau of Reclamation) to undertake major water diversion projects on the Milk River, and the tribes (and the Department on the tribes’ behalf) are still seeking to quantify, by negotiated settlement, the tribes’ water rights so that they can receive their full share of water.

In the many years since the Winters decision, the Department’s protection of tribal rights has evolved as the Bureau of Indian Affairs has gained expertise in the protection of natural resources, and has successfully advocated for tribal water rights in many cases. The role of other agencies in the Department has also evolved. They now are required to uphold their trust responsibility toward Indians in administering Departmental programs.

For many years, most observers thought Winters was exclusively an Indian water rights case. However, in 1963 the Supreme Court in Arizona v. California, 373 U.S. 600 (1963), explicitly extended the Winters Doctrine to non-Indian federal reservations such as wildlife refuges, national parks, and national forests. The Supreme Court’s ruling in Winters is truly a landmark decision that has affected, in major and positive ways, the missions of the Department of the Interior.

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The Property Clause of the U.S. Constitution, tucked away among the nation-building provisions of Article IV, says simply, “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.” Like other constitutional clauses, its succinct words belie the tremendous significance it has on the lives of so many.

The Supreme Court’s decision in Camfield v. United States, 167 U.S. 518 (1897), completely changed how courts interpret the Property Clause without actually once mentioning it. As a result of Camfield, elaborated on by subsequent decisions, courts for decades have routinely recognized Congress’s broad authority to say how public lands shall be managed, protected, disposed of, or otherwise administered, which authority no private or state interest can trump.

This means that, under the Property Clause, Congress can establish national parks, national wildlife refuges, national forests, wilderness areas, and so on. Congress can also say what can and cannot take place on federal property. Congress can establish programs for disposing of federal resources through extractive uses like mining, grazing, and timber. Congress can even set restrictions on adjoining private lands when necessary to protect the property of the United States. And finally, Congress can delegate that broad authority to the federal land management agencies, such as the Department of the Interior. The breadth of the Property Clause touches almost every major program administered by the Secretary of the Interior.

The case stemmed from a clever scheme devised in 1893 by Messrs. Camfield and Drury, a pair of Colorado cattle ranchers, to fence in 20,000 acres of public land. The pair bought all the odd-numbered sections in two townships from the Union Pacific Railroad. The even-numbered sections remained public lands. Due to the rectangular survey system in effect since the Ordinance of May 20, 1785, every even-numbered section is surrounded on all four sides by odd-numbered sections, and vice versa. See accompanying diagram.

Thus Camfield and Drury were able to build a large, square fence around 36 sections, half of which were public lands, by putting the fence slightly inside the adjoining odd-numbered sections. Their fence was completely located on private lands, and it just so happened to enclose 18 sections of the public domain. The Taylor Grazing Act was still two generations in the future, so livestock operators could send their stock out onto the unreserved, unoccupied public domain wherever there was space, food, and water for them, without having to get the Interior Department’s prior permission.

Congress had appreciated that the rectangular survey system and the checkerboarded ownership patterns of the railroad land grants could lead to the very type of monopolization Camfield and Drury had in mind when they built their notorious fence. So Congress had outlawed such schemes in the Unlawful Enclosures Act in 1885.

Camfield and Drury claimed that they were well within their rights to build a fence on their private land—the laws of Colorado allowed it, and if the federal Unlawful Enclosures Act conflicted with that, then that federal law was unconstitutional. It was beyond Congress’s power under the Property Clause to interfere with their use of their private property. As long as they did their business on their own land, Camfield and Drury maintained, the consequences of their actions affecting public lands were not their problem. Thus was born the seminal conflict between private rights and federal control and management of public lands.

By now you can probably guess how the case came out. In the conflict between the defendants’ fence and the Unlawful Enclosures Act, Camfield and Drury fought the law but the law won. Writing for the Court, Justice Brown declared that the Unlawful Enclosures Act did prohibit this type of fence, and because Congress has the power to protect federal lands, it was a constitutionally valid law.

The Court’s reasoning goes something like this: For one thing, the United States government is a landowner here too, and a longstanding
principle of common law holds that one neighbor does not have the right to use its land in a way that is a nuisance to the other. So, though the defendants may have a right to build a fence, even one with ill intent, they did not have a right to make their fence a nuisance to their government neighbors. Just as one individual need not suffer another's nuisance actions, so too the Federal Government need not suffer the nuisance actions of its neighbor. Congress was thus well within its rights to pass a law to prevent the nuisance of enclosures on the public domain.

The Court then compared Congress's power over federal lands to the police power of states. States can exercise their police power within some limits to the extent they need to do so to protect their citizens. The Federal Government, duly empowered by Congress, is the trustee for the people of the United States when it comes to protecting public lands. This special role means Congress possesses greater power than that of an ordinary landowner, the extent of which power is "measured by the exigencies of the particular case." Congress may, in other words, exercise its broad police powers over the federal lands so long as the exercise is directed toward protecting the lands for the public's benefit, even when those powers begin to conflict with the private rights of others.

Subsequent cases seized upon this notion and spelled it out more completely, especially Kleppe v. New Mexico, 426 U.S. 529 1976. In Kleppe, the Court upheld BLM's demand for the return of 19 protected wild burros that the New Mexico Livestock Board tried to remove from public lands. The Livestock Board had challenged the validity of the federal Wild Free-Roaming Horses and Burros Act, claiming Congress's power to protect, dispose, and regulate the use of public lands was narrow. Regulating wildlife was traditionally a state function, and if the Wild Horse law prevented the state from running its livestock programs, then, the state argued, the federal law must be unconstitutional.

But the Court upheld the act, saying it was not only constitutionally valid but negated any conflicting state power. This was because, with regard to public lands, Congress has the authority of both a proprietor and a legislator. Drawing on Camfield and other cases, the Kleppe court stated in blunt words that "the power over the public land thus entrusted to Congress is without limitations," and then trotted out a long list of examples and cases to convincingly illustrate the point.

This authority, the Court said, necessarily includes authority over the wildlife living on the lands, notwithstanding the state's traditional role. Thus, what Camfield did for public lands jurisprudence in the first half of this century, Kleppe repeated and extended for modern times.

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**The Camfield Decision & Interior Land Management**

Still not sure what Camfield means to you? Here are some other cases which used Camfield as a basis for sound public lands management: In 1911, when the Forest Service sought damages against a rancher grazing cattle without a permit in the Holy Cross Forest Reserve, the Supreme Court relied on Camfield to rule that the Property Clause allowed Congress to establish forest reserves and to require grazing permits, notwithstanding Colorado law.

In 1917, when the Federal Government shut down a hydropower operation built by a private utility on public lands in Utah without federal permission, the court rebuffed the operators' claim of a private right to build structures on public lands by citing Camfield. In 1927, when the Federal Government tried to enforce a statute prohibiting setting forest fires on or near a Forest Reserve and punishing anyone who did so, the Supreme Court used Camfield to uphold the resulting prosecution and the park's complete ban on hunting within the park, even on the state-owned waters running through the park.

In 1980, when the state of Minnesota objected to regulations prohibiting motor boats and snowmobiles in the Boundary Waters Canoe Area Wilderness, the Eighth Circuit relied on Camfield to uphold the regulations throughout the wilderness, even on the waters and on the 10 percent of surface land in the wilderness which the state owned.

And on it goes. The debate that began in Camfield with a challenge to an Act of Congress has extended to link the Constitution to many—if not all—of the land management programs the Interior Department employs to protect public lands. From the day Justice Brown issued his opinion, there has been little question that Congress, and the federal agencies it authorizes, have broad authority to do what it takes to properly manage and protect our nation's natural assets.

Had Messrs. Camfield and Drury known as they devised their clever fence that they were helping to prevent forest fires, save wild horses and burros, limit intrusive machines in wilderness areas, and otherwise give America's land managers the authority needed to keep public lands protected and open for all citizens, they no doubt would have taken enormous civic pride in their work.
A lasting significance of the Supreme Court’s decision in *Cameron v. United States*, 252 U.S. 450 (1920), is found in its four sentence assessment of presidential authority under the Antiquities Act of 1906 to protect extraordinary federal lands through the creation of national monuments. The case also colorfully illustrates another important chapter in the history of the federal lands: namely, the abuses of the public land and mining laws. One of the most misused of these laws is the Mining Law of 1872, and “[p]erhaps the single most spectacular abuse of the Mining Law is found in the saga of Ralph Cameron’s mining claims at the Grand Canyon.” (J. Leshy, *The Mining Law: A Study in Perpetual Motion* 1987).

Today, Grand Canyon National Park attracts about five million visitors every year. Among the first non-Indian visitors to the region were miners prospecting for copper, asbestos, silver, and lead. They arrived at the Grand Canyon in the 1880s and 1890s, staking claims under the Mining Law, which provided, as it does today, that certain public lands would be “free and open” to exploration and occupation for mining. The tourists were not far behind the prospectors, however, and by the end of the first decade of the new century, thousands were peering in awe over the rim and into the canyon’s depths.

Somewhere in between the prospectors and the tourists—in time and place—was Ralph Henry Cameron, “the most audacious and flamboyant of all the early prospectors and promoters in the Grand Canyon” ... At one time or another he promoted schemes for the development of mining claims, dams for electric power, a scenic railway along the rim and a tourist hotel.” (B. Babbitt, *Grand Canyon: An Anthology* 1978, page 8.

By no accident, his most profitable mining claims were located on the Bright Angel overlook and trail. Having “staked his claim” to the two most popular spots in the Grand Canyon, Cameron quickly traded in his pickaxe for a toll booth, hotel, and stables, mining riches not from the deposits in the ground, but from the tourists’ wallets.

But while Cameron was working the tourists at the Grand Canyon, the United States Congress, alarmed by the plunder of the archaeological ruins of the American Southwest, was crafting legislation to protect important resources on federal lands. In 1906, it unanimously passed the Antiquities Act, providing 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.” (Act of June 8, 1906, ch. 3060, § 2, 34 Stat. 225 [codified at 16 U.S.C. § 431 (1994)].)

Meanwhile, the Grand Canyon was becoming a carnival of tourist attractions. President Teddy Roosevelt looked to the new Antiquities Act in response. On January 11, 1908, Roosevelt proclaimed the area in and around the Grand Canyon—including Cameron’s fraudulent mining claims—as the Grand Canyon National Monument. Roosevelt’s proclamation, which rested upon an expansive reading of the act, was simple and to the point: “WHEREAS, the Grand Canyon of the Colorado River ... is an object of unusual scientific interest, being the greatest eroded canyon within the United States, ... it appears that the public interests would be promoted by reserving it as a National Monument, with such other land as is necessary for its proper protection.” (Proclamation No. 794 (January 11, 1908), 35 Stat. 2175.)

Unlike the previous ten sites that had been proclaimed national monuments under the Antiquities Act, which averaged just over 8,000 acres in size (and included such treasures as Devil’s Tower, the Petrified Forest, and Chaco Canyon), the Grand Canyon National Monument set aside an enormous expanse of the Arizona Territory—over 800,000 acres.
Roosevelt’s proclamation prohibited any new claims to the lands within the national monument’s boundaries and grandfathered only valid existing claims. With the Department of the Interior challenging the validity of his mining claims in court, Cameron’s business mining tourists was in permanent jeopardy. After losing in the lower courts, Cameron took his case to the Supreme Court of the United States. Throwing an array of legal defenses for his fraudulent mining claims at the Court, Cameron argued that the Grand Canyon “monument reserve should be disregarded on the ground that there was no authority for its creation.” 252 U.S., at p. 455. The Court’s response was brief and authoritative:

“To this we cannot assent. The act under which the President proceeded empowered him to establish reserves embracing “objects of historic or scientific interest.” The Grand Canyon, as stated in his proclamation, “is an object of unusual scientific interest. It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, and what landmarks, structures, and objects are of “historic or scientific interest.”

A CORNERSTONE OF AMERICAN CONSERVATION

With the exceptions of Presidents Nixon, Reagan, and Bush, every president since the Antiquities Act was passed in 1906 has exercised its authority to protect extraordinary federal lands. Presidents Wilson, Coolidge, Hoover, Carter, and Clinton each proclaimed monuments larger than Roosevelt’s prototype, with the largest monuments providing protection for over ten million acres of federal lands.

On December 1, 1978, in what one conservation organization called “the strongest and most daring conservation action by any president in American history,” President Jimmy Carter used the Antiquities Act to proclaim fifteen new national monuments in Alaska. (The Living Wilderness, vol. 44, page 36 (1981). Covering fifty-six million acres of Alaska wilderness, Carter’s proclamations protected exceptional federal lands from a filibuster-induced failure of the Congress to meet a deadline for comprehensive land-management legislation for the state. Carter’s proclamations, and every acre of national monuments they created, were upheld by the courts.

In September of 1996, President Clinton invoked the authority of the Antiquities Act to create the Grand Staircase-Escalante National Monument. The new national monument protects 1.9 million acres of the Colorado Plateau in Utah—a “high, rugged, and remote region, where bold plateaus and multi-hued cliffs run for distances that defy human perspective.” (Proclamation No. 6920 (Sept. 18, 1996; 110 Stat. 4561.)

From the Grand Canyon to the Grand Staircase, and from Denali to the Statue of Liberty, the Antiquities Act has been a cornerstone of American conservation efforts throughout the 20th Century. Cameron v. United States has played an important role in establishing the act as a valuable and flexible resource conservation tool. No court has ever overturned the creation of a national monument under the Antiquities Act. Congress, too, has usually ratified the resulting national monuments—including Roosevelt’s Grand Canyon, nearly all of Carter’s fifty-six million acres in Alaska, and Clinton’s Grand Staircase-Escalante National Monument. In many cases, Congress later redesignated the national monuments as national parks. In fact, about half of America’s national parks—which can only be created by Congress—were originally protected under the Antiquities Act.

The Antiquities Act has had a profound impact on the Department’s efforts to protect America’s natural and historic treasures for the education and enjoyment of present and future generations. Its fruits include over 100 national parks and monuments, almost all managed by the Department of the Interior’s National Park Service, although the Bureau of Land Management has jurisdiction over the Grand Staircase-Escalante. Because Cameron v. United States certified the Antiquities Act as a powerful tool for accomplishing our mission as guardians of the past and stewards of the future, it is one of the most significant court decisions in our Department’s history.

And what about Ralph Cameron? Shortly after the Supreme Court’s decision, he was elected to the United States Senate, where he spent most of his single term trying to guard his claims and foil his National Park Service adversaries. He died in 1953, and is buried at (where else?) the South Rim of the Grand Canyon.
This case concerned the endangered snail darter, *Percina (Immostoma) tanasi*, a small, perch-like fish named for its taste for snails, and the Tennessee Valley Authority’s Tellico Dam and Reservoir, located a few miles southeast of Knoxville, Tennessee.

*TVAs v. Hill*, 437 U.S. 133 (1978), primarily addressed the duties of federal agencies with respect to the Endangered Species Act of 1973. The statute contained two major mandates to federal agencies: first, that all agencies use all their authorities to conserve listed species; and second, that with respect to all agency actions, each agency was required to ensure that its actions did not jeopardize listed species or adversely modify the species’ designated critical habitat.

The Supreme Court held that even though the Tellico Project consisting of two dams, one earthen and one concrete, was substantially complete and the reservoir ready to be filled, the TVA was barred from doing so because the inundation would destroy the only known habitat of the snail darter. In a strongly-worded opinion, the Court said “the Congress intended that federal agencies use all their authorities to conserve listed species, irrespective of their primary missions . . . and . . . the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”

In 1966, Congress authorized construction of and appropriated money for the Tellico Dam and Reservoir on the Little Tennessee River. Work began promptly after authorization. Appropriated money in succeeding years until the project was complete. The TVA, of course, had been a centerpiece of the New Deal, and had transformed the landscape and economy of much of Tennessee and adjacent lands in Alabama and Kentucky in the decades since the Depression.

In 1975, the named plaintiff, Hiram G. Hill, Jr. and others petitioned the Secretary of the Interior, acting through the Fish and Wildlife Service, to place the snail darter on the list of endangered species pursuant to the 1973 Act. Over the objections of the TVA, the fish was listed as endangered in November, 1975 primarily because it was about to lose its only known habitat.

The lawsuit challenging the construction of the Tellico Project was filed in the United States District Court for the Eastern District of Tennessee on February 18, 1976. The plaintiffs asked the judge to enter an order stopping the ongoing construction of the dam and prohibiting the expected impoundment behind the dam planned for January, 1977. There were two basic allegations, first that the TVA, as an instrumentality of the United States, was violating Section 7 of the Endangered Species Act by using its authorities to jeopardize the continued existence of the species and that it was also violating Section 9 of the Endangered Species Act, which prohibited “take” of the species. The only defendant was the TVA.

After a trial, the request for an order halting the project was denied, essentially because so much of it was already built. Using what are called equitable principles, or balancing of interests and costs, the court found that the TVA had acted reasonably in trying to protect the fish, most notably by trying to relocate it. Up to that time, no case had held that a federal project that was either complete or under construction would be permanently halted because of the presence of listed (endangered or threatened) species affected or harmed by the project. The trial court’s decision is: *Hill v. Tennessee Valley Authority*, 419 F.Supp. 753 (E.D. Tenn 1976).

The plaintiffs appealed to the United States Court of Appeals for the Sixth Circuit, which included Tennessee. This time the results were far different. The appeals court found that the lower (federal district) court had “abused its discretion” by failing to issue an injunction halting the continuing construction of the dam. The appeals court reasoned that the upcoming inundation of that reach of the river would result in a statutory violation by jeopardizing as well as “taking” the fish and by adversely modifying the species critical habitat. After the suit was filed, but before it was decided, the U.S. Fish and Wildlife Service designated (effective May 3, 1976) the portion of the stream where the dam was being built as “critical habitat” as that term is used in the Endangered Species Act.
The appellate decision was somewhat critical of the lower court for its failure to find a violation of the Endangered Species Act.

The court deferred to the Fish and Wildlife Service decision designating the river as critical habitat, and that loss of the habitat meant loss of the fish. Deference by reviewing courts generally means courts accept the judgments of agencies acting in a reasonable way in the exercise of whatever their statutory duties may be. The opinion strongly rejected all the economic arguments put forth by TVA. The court sent the case back to the trial court in Tennessee, with instructions to issue “a permanent injunction halting all activities incident to the Tellico Project which may destroy or modify the critical habitat of the snail darter until Congress exempts Tellico from compliance or the snail darter has been deleted from the list of endangered species or its critical habitat materially redefined”. The Court of Appeals decision is: Hill v. Tennessee Valley Authority, 549 F.2d 1064 (6th Cir. 1977).

The TVA then sought and obtained review by the United States Supreme Court. In a David v. Goliath scenario featuring a tiny fish and a big dam, the same group of citizens continued to use the citizen suit provision of the statute to challenge a prominent and well-funded federal agency. Resources could hardly have been more disparate.

On April 18, 1978 the Attorney General of the United States, Griffin Bell of Atlanta, argued the case himself on behalf of the TVA, but to no avail. On June 15, 1978, in a 6-3 decision delivered by Chief Justice Warren Burger, the nation’s highest Court affirmed the Sixth Circuit, held that the Endangered Species Act trumped the Tellico Project authorizations, and that the fully-constructed dam could not be opened to create the planned 33-mile long reservoir. The Supreme Court recited the language in Section 7 of the Endangered Species Act, which commanded all federal agencies: “to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence of any endangered species or result in the destruction or modification of habitat of such species.” The Court stated unequivocally that this language admits of no exception. Emphasis added.)

Thus, the Supreme Court found that the judicial branch could not exempt the Tellico Project from the Endangered Species Act. Following the decision, Congress amended the act in 1978 to provide for a process to review whether or not there should be an exemption for federal agency actions which have been found to jeopardize listed species and for which there are no alternative courses of action. This process, involving several cabinet members and the governors of the affected states, launched the nickname “the God Squad” into the American legal lexicon.

The exemption application of the TVA for the Tellico Project was rejected. On January 23, 1979, the “God Squad” denied the exemption, finding that alternatives to the reservoir could be implemented. The legislative branch, however, ultimately granted relief from the Endangered Species Act. The Tellico Project was approved by Congress by means of a rider on an appropriations bill on Sept. 25, 1979, which even specified the normal summer fill level for the lake in addition to exempting the project from the Endangered Species Act.

In the years immediately following the filling of Tellico Reservoir, a few small populations of the snail darter were located in six streams near the Little Tennessee River in Tennessee, Alabama, and Georgia. On July 5, 1984 the U.S. Fish and Wildlife Service changed the listing of the species from endangered to threatened. The critical habitat designation for the species was rescinded because the habitat had been flooded by Tellico Reservoir and was no longer used by snail darters. Section 4(d) of the Endangered Species Act allows, but does not require, the application of less stringent legal protections for threatened species, which are known as special rules. There is no such rule in place for the snail darter, which means that take of this species is still prohibited, just as it was in 1975.

Over the years since the Endangered Species Act was enacted, the U.S. Fish and Wildlife Service and others in the scientific community have come to believe that the requirement to designate critical habitat at or near the listing decision has not offered additional protection for listed species. Indeed, it sometimes can have the opposite effect. In declining to designate other areas as critical habitat for the snail darter, the Fish and Wildlife Service found it would be imprudent to do so, fearing that the notoriety associated with the litigation would increase the fish’s vulnerability to illegal take and deliberate vandalism. The designation of critical habitat requires publication of the exact locations where the species has been found.

T.V.A. v. Hill has stood the test of time. All federal agencies now afford serious attention to Endangered Species Act compliance, as does anyone who is an applicant for a federal license or permit which may affect a listed species. The opinion’s broad language about the prohibition of illegal “take” reverberated throughout the country.

In 1995, the United States Supreme Court once again heard a critical Endangered Species Act case, this time involving Northwest timber interests and the U.S. Fish and Wildlife Service regulations which prohibit all unpermitted take of listed species. The industry was concerned about how the Fish and Wildlife Service was administering the regulations with respect to the Northern spotted owl, a threatened species, which lives in old-growth forests. The decision, Babbitt v. Sweet Home Communities for a Great Oregon, addressed primarily private parties and private activities while T.V.A. v. Hill addressed primarily federal activities.

Sweet Home held that the “take” prohibitions apply on private lands. Taken together, these decisions from the nation’s highest court further established the legal protections federally-listed species receive under U.S. law. T.V.A. v. Hill, and its descendant Sweet Home are landmark cases involving listed species of enduring legal and scientific importance to American society.
The Department of the Interior has frequently played an important role in the protection of Indian treaty and land rights before the Supreme Court. A major example involves the Department’s efforts in vindicating rights secured to the Oneida Indian Nation at the time the United States secured its independence.

In 1985 the United States Supreme Court ruled by a 5-4 vote that the tribe retained a viable claim to lands lost in an illegal sale to the State of New York in 1795. The Court held that to apply the statute of limitations against the Oneida would be contrary to the will of Congress regarding Indian land claims policy dating back to 1790.

The Oneida had been allies of the colonists in the War of Independence. In three treaties executed in the decade following that war, the new United States of America promised the Oneida that they would be secured in the possession of their lands in central New York. In 1790, at the urging of President George Washington, Congress passed the Indian Nonintercourse Act, which flatly prohibited conveyances of tribal land except through a treaty approved by the United States.

Only five years later, however, under pressure to open western lands for settlement, the governor of New York ignored the advice of federal commissioners and entered into a transaction with the Oneida to purchase virtually all of the tribe’s remaining 300,000 acres. The price paid to the tribe was considerably less than the value of nearby lands being sold to Revolutionary War veterans.

In 1970 the three modern tribal successors to the historical Oneida Indian Nation—the Oneida Indian Nation of New York, the Oneida Tribe of Indians of Wisconsin, and the Oneida of the Thames Band Council from Ontario, Canada—brought suit to reclaim their lands. In 1974 a unanimous U.S. Supreme Court upheld the jurisdiction of the federal court to hear the tribe’s claim in Oneida Indian Nation v. County of Oneida. This earlier decision is important for its discussion of federal jurisdiction, but it is not the focus here.

More than ten years later, the case came back before the Supreme Court to decide whether, among other things, the claim was just too old to allow the tribe to succeed. In County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226 (1985), the defendants argued that because no federal statute of limitations was applicable to Indian efforts to enforce their property rights, the courts should adopt state limitation statutes as “federal common law,” which would prevent any Indian tribe from seeking to invalidate past illegal sales of their reservation lands. Most state laws prohibit such lawsuits unless they are filed within 20 years or less after lands have been lost.

A slim five-member majority rejected this contention. It noted that Congress had on many occasions passed legislation protective of Indian lands and had never subjected Indian land claims to a statute of limitations. It also found that Indian treaty claims were uniquely federal in character. The Court thus held that “it would be a violation of Congress’s will” if it were to bar the tribes’ claim based upon a state statute of limitations.

The defendants also argued that the 1795 transaction had been ratified by Congress in later years. Congress had in fact ratified two later treaties between the Oneida and New York State and had enacted other laws specifically applicable to New York Indian reservations. But the Supreme Court held that those actions by Congress did not operate to ratify the 1795 purchase, because “congressional intent to extinguish Indian title must be plain and unambiguous.”

Before deciding this case, the Supreme Court invited the Solicitor General to present the views of the United States. Following the recommendation of the Department of the Interior, the Department of Justice filed an amicus curiae brief supporting the tribe’s pursuit of its ancient claim. The Court’s majority opinion acknowledged and relied upon the government’s brief with its emphasis on the unique obligations that Congress had assumed towards the Indians.

The decision of the Department and of the Executive Branch and ultimately, of the United States Supreme Court, to
recognize the tribal claim was controversial, as it clouded titles to thousands of acres of land held by people who had purchased them without knowledge of the invalidity of the long-forgotten transaction.

The United States’ brief acknowledged the difficulties inherent in the litigation of such claims, but referred to the Rhode Island Indian Claims Settlement Act of 1978 and the Maine Indian Land Claims Settlement Act of 1980 as examples of the power of Congress to address such claims. The majority opinion agreed with the United States that “this litigation makes abundantly clear the necessity for congressional action.”

Although Oneida was a landmark decision in vindicating the rule of law in protecting Indian rights, to this day no Act of Congress has settled the Oneida Indian land claim.

The Indian tribes in Northwest Washington have been dependent on fishing for countless generations, catching and curing salmon and steelhead. These anadromous fish spend the early part of their lives in rivers in fresh water, migrate to the ocean, and return to the rivers to spawn and die.

The once magnificent fishery has been in long decline due to pressure from many sources, including hydro power development, logging, and overfishing. In addition to the Indians, sport fishermen and commercial fishermen prize the fish, both in the rivers and ocean.

The treaties the United States negotiated with the tribes during 1854 and 1855 included provisions reserving to the Indians “the right of taking fish . . . in common with other citizens.” This language proved to be the source of lasting controversy among the United States, the Indian tribes, the States of Washington and Oregon, and their citizens. The Supreme Court had interpreted this language in no fewer than six cases between 1905 and 1979. These cases held that the Indians reserved the right to fish separate from the rules that applied under state law to non-Indians, but they did not fully define the character of the right.

The earliest of these cases, United States v. Winans, (1905) was, in many ways, a prototype of the Court’s decision almost seventy-five years later in Washington v. Fishing Vessel Ass’n.

In Winans, a private party had received a license under state law to operate a “fish wheel,” a device which straddled the banks of a river and permitted the operator to monopolize the catch of fish. The United States brought suit to protect the right of the Indians to gain access to the river to catch fish under their treaty. The lower court ruled against the United States' brief acknowledging the difficulties inherent in the litigation of such claims.
States, holding that the treaties only gave the Indians the right to fish on the same basis as other people. The Supreme Court held in essence that the fishery could not be managed to allow non-Indians a monopoly or to exclude the Indians from the opportunity to fish. It described the nature of this right in language that resounds through its later decisions interpreting the treaties:

[The lower court held] that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more. And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules."

The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted.

In 1970, litigation was brought to resolve continuing conflict about the nature of the treaty fishing right. To address the continued frustration of the Indians' right to fish that resulted from the overwhelming numbers of non-Indian sport and commercial fishermen, the United States sought to have the fishery allocated between Indian and non-Indian users, and managed to accord the Indians the opportunity to catch a specific share of the fish.

Focusing on the treaty language that reserved to the Indians the right to take fish "in common with other citizens," the United States proposed an allocation of fifty percent of the fish to the Indian tribes. Eventually 22 Indian tribes joined with the United States as plaintiffs. The State of Washington maintained that the treaties did not reserve to the Indians a right to the opportunity to catch a specific share of fish.

In 1974, after a lengthy trial, U.S. District Court Judge George Boldt issued a historic decision, commonly referred to as the "Boldt" decision, which agreed with the United States and the tribes. The judge ordered the state to promulgate appropriate regulations protecting the Indians' treaty rights. The State of Washington appealed, but the Ninth Circuit Court of Appeals affirmed the lower court in 1976, and the Supreme Court denied the State of Washington's petition for review.

In ordinary circumstances, that would have ended the matter. But the Boldt decision proved highly controversial and difficult to enforce. Private parties brought litigation in the state courts challenging the regulations the state had promulgated to implement the Boldt decision. The state Supreme Court held that the state could not legally comply with Judge Boldt's decision. Judge Boldt then issued a series of orders seeking to implement compliance with the 1974 decision, and his orders were upheld by the Ninth Circuit. This conflict between the decisions of the federal and state courts put the matter before the U.S. Supreme Court.

In 1979, by a vote of 6-3, the Supreme Court substantially agreed with Judge Boldt. The Court majority found that, at the time they negotiated the treaties, neither the United States nor the Indians contemplated the possibility that the fish might ever become scarce. With the pressure that non-Indian settlement put upon the resource, the Court found that an allocation was necessary to protect the treaty right of the Indians. It found authority for the division, as well as for the specific allocation of 50 percent, in the "in common with" language of the treaties, in the presumption that the United States and the tribes treated with each other as equals, and in the equitable powers of the federal courts to fashion a remedy to protect an underlying right.

With this Supreme Court decision, the United States attained its basic goal of defining and vindicating the Indian treaty fishing rights in the Pacific Northwest. The result was a landmark interpretation of Indian treaty rights, the result of vigorous action in their protection by the United States (and by the Office of the Solicitor, which helped represent the U.S. position throughout the litigation). Fishing Vessel was the best-known, but scarcely the only, court decision vindicating and enforcing Indian treaty rights. Other decisions have come from other states and treaties. As recently as a few months ago, a closely divided Supreme Court upheld the hunting, fishing, and gathering rights of tribes in Minnesota and Wisconsin under their treaties with the United States. (Minnesota v. Mille Lacs Band of Chippewa Indians.)

The Fishing Vessel decision vindicated the tribes' legal rights but did not by itself assure the survival of sufficient salmon to serve the needs of the Indians or the non-Indians, and the salmon runs have continued to decline. Many agencies—tribal, state, federal, and international—have an interest in restoring the once abundant salmon and steelhead runs of Northwest Washington and are attempting to work cooperatively for conservation and managerial purposes, but the outcome remains in doubt.

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The Battle of Gettysburg, a pivotal event in United States history, raged for the first three days of July 1863. The battle resulted in a Union victory for the Army of the Potomac, under the command of General George G. Meade, which successfully turned back the second invasion of the North by General Robert E. Lee’s Army of Northern Virginia. More than 51,000 soldiers were killed, wounded or captured, making the Battle of Gettysburg both the bloodiest of the Civil War and the largest ever fought in the Western Hemisphere.

In the aftermath of the battle, the community of Gettysburg was thick with wounded and dying men. Most of the dead lay in hastily dug and inadequate graves; others received no burial. Distressed by this situation, the Pennsylvania governor commissioned a local attorney to purchase land for a proper burial ground for Union dead. Within four months of the battle, reinterment began on 17 acres that became the Gettysburg National Cemetery. Dedicated on Nov. 19, 1863, the cemetery—and battle which necessitated it—inspired President Lincoln’s Gettysburg Address.

In the years following the Civil War, citizens and veterans groups took steps to preserve the Gettysburg Battlefield. In 1893, Congress became involved. It included the following paragraph in a defense appropriation act, 27 Stat. 599:

Monuments and Tablets at Gettysburg. For the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations, with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure, the sum of $25,000 to be expended under the direction of the Secretary of War.

Efforts by the Secretary of War to obtain the site of the Battle of Gettysburg for the purposes outlined in the 1893 Act did not go smoothly. Within a year of its passage, the United States court, sitting in Pennsylvania, had declared that Congress had failed to provide the War Department with the distinct authority to acquire the private lands necessary to execute the purposes declared in the 1893 Act. Congress also became aware of the imminent danger that portions of the battlefield might be irreparably defaced by the construction of a railroad over the battlefield site by the Gettysburg Electric Railway Company (Railway), thus making impracticable the execution of the provisions of the 1893 Act.

In response to these problems, the Congress enacted legislation in 1894 authorizing the Secretary of War to acquire Gettysburg Battlefield lands by purchase or by condemnation in order to carry out the 1893 act. The 1894 legislation expressly proclaimed that “the Secretary of War is authorized to acquire by purchase (or by condemnation . . . such lands, or interest in lands, upon, or in the vicinity of said battlefield, as, in the judgment of the Secretary of War may be necessary for the complete execution of the act of March 3, 1893.” 28 Stat. 584.

Despite the efforts of Congress, the attempt by the Secretary of War to obtain the site of the Gettysburg Battlefield still met
with challenge. Unable to agree upon a price with the owners of the land, the United States had moved ahead with condemnation proceedings. The lower courts ruled that the United States lacked the constitutional power to condemn land for the purposes outlined in the 1893 act, and eventually the case reached the U.S. Supreme Court.

**Defining Public Purpose**

Although phrased in the negative, the fifth amendment to the U.S. Constitution expressly acknowledges the right of the government to condemn private property for public use: “nor shall private property be taken for public use, without just compensation.” The principal issue before the Supreme Court in the Gettysburg Electric Railway case was whether the use to which the United States desired to put the land was a “public use.”

Although it seems almost incredible today, the Railway argued that the proposed use of the property by the United States was not a public purpose, and that the United States therefore lacked the constitutional authority to direct the Secretary of War to obtain the property through condemnation.

According to the Railway, the United States would leave the property bare but for tablets, monuments, and vistas; and merely preserving the lines of battle, marking the positions occupied by the various commands, opening and improving of avenues, and determining the leading tactical positions would serve no public purpose.

A unanimous Court, speaking through Justice Peckham of New York, firmly rejected this argument. “Upon the question whether the proposed use of this land is public one, we think there can be no well-founded doubt.” The Court determined that preserving the scene of a crucial moment in United States history would serve to teach future generations a love for and an understanding of the United States and its institutions.

“Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid.”

The Court’s description of the significance of the Battle of Gettysburg reached heights of eloquence rarely found in a judicial opinion:

The Battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery and, indeed, heroism displayed by both the contending forces rank with the highest exhibition of those qualities ever made by man. . . . The importance of the issue involved in the contest of which this Battle was a great part cannot be overestimated. The existence of the government itself and the perpetuity of our institutions depended upon the result. . . . Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle, in the name and for the benefit of all the citizens of the country, for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. . . . Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made.

Although the Department of the Interior was not a party to this litigation, Gettysburg Electric Railway’s interpretation of public purpose, recognizing the value of historic commemoration and, more broadly, of contemplation and imagination, has had enormous positive impacts on this Department.

The broad notion of public purpose helped lay the foundation for the establishment of the National Park Service in 1916. Its mandate is to “promote and regulate the use of Federal areas known as national parks, monuments, and reservations . . . to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”

While most parks have been established out of existing federal land holdings, a number including such crown jewels as Big Cypress, Acadia, and Redwoods have resulted from acquisitions from private ownership. Administration of the Military Parks was transferred to the National Park Service by an Executive Order in 1933. Through preservation of such important federal land areas, and building on the legacy of the Gettysburg Electric Railway decision, the Department of the Interior has nurtured historical, cultural, and environmental values for generations of Americans.

Defining Public Purpose for National Parks
When you think of the Southwest today, you think “hot” and “dry.” And you’re right. But today, Arizona, Southern California, and Nevada are far more than arid desert lands shimmering under a scorching heat. Urban areas in these states continue their relentless expansion across the landscape. Air conditioners, refrigerators, and televisions hum from power created by the generators on the Colorado River dams, managed by the Secretary of the Interior through the Bureau of Reclamation.

Droughts and floods continue to be a fact of nature, but these extremes are now tempered by the regulatory and storage capacity of the dams and reservoirs along the Lower Colorado River managed by the Secretary of the Interior. These dams also ensure that water flows in the irrigation ditches on Indian reservations along the river, in the Imperial and Coachella Valleys in California, in the Yuma Valley in Arizona, and elsewhere in the Lower Basin States.

All this happens in part as a result of decisions made by the United States Supreme Court 36 years ago in Arizona v. California. The decision was the culmination of a bitter dispute among the three Lower Basin States over the share each state would have in the waters of the Colorado River and its tributaries.

The Uncontrolled Colorado

The Colorado River rises in the mountains of Colorado and flows generally in a southwesterly direction for about 1,300 miles through Colorado, Utah, and Arizona and along the Arizona-Nevada and Arizona-California boundaries, after which it passes into Mexico and ends in the Gulf of California. The seven largely arid states through which the river passes form the Colorado River Basin States: Wyoming, Colorado, Utah, and New Mexico are the Upper Basin States, while Nevada, California, and Arizona are the Lower Basin States. A line at Lees Ferry, Arizona, divides the Upper from the Lower Basin. Utah, New Mexico, and Arizona have areas in each basin. Disagreements among these states about the management and allocation of Colorado River water are not uncommon.

Southwest Indian tribes also have a stake in the river’s management. In 1865, the United States set lands aside along the Colorado River for the Colorado River Indian Tribes. Other lands would be reserved along the river for the use of tribes in Arizona, California, and Nevada. As the Supreme Court would later note in Arizona v. California, “most of the lands were of the desert kind—hot, scorching sands—and... water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.”

In the last half of the nineteenth century, non-Indian farming communities also began to develop in Arizona and Southern California with water rights obtained under state law to the natural flow of the Colorado River. Unfortunately, the natural flow was exceedingly erratic. Droughts and floods undermined the economic stability of these agricultural communities. Nevertheless, farmers persevered and their communities and urban areas (particularly in southern California) continued to expand. This development was a matter of great concern to the Upper Basin States. Any rights to use Colorado River water developed in the lower basin had the potential to permanently reduce the water supply available for future upper basin development.

Eventually the Upper and Lower Basin states struck an agreement to divide the waters of the Colorado River. The 1922 Colorado River Compact provided that each basin would be divided to receive 7.5 million acre-feet (MAF) of water in a normal year. However, the compact did not divide the waters among the states in each basin (nor did it specifically address Indian or other federal water rights).

Lower Basin states continued to squabble over apportioning their supply, so Congress stepped into the fray, enacting the Boulder Canyon Project Act of 1928. In the act, Congress authorized a compact among the Lower Basin States to divide the lower basin’s 7.5 MAF allotment with 4.4 MAF going to California, 2.8 MAF to Arizona, and .3 MAF to Nevada.

The Boulder Canyon Project Act also authorized the Bureau of Reclamation to build Hoover Dam, a breathtaking achievement in the otherwise dishheartening days of the Great Depression.
This did not end disputes among the Lower Basin states, however. In the late 1940s, when the State of Arizona asked Congress to fund an aqueduct to carry Colorado River water across the central part of the state, Congress refused because of continuing disagreement over the extent of Arizona’s rights to the Colorado River. The State of Arizona went to the Supreme Court in 1952, seeking a definitive resolution, but it would be eleven years before the decision in Arizona v. California answered the question of Arizona’s share of the Lower Basin water.

### The Arizona v. California Decision

Under the United States Constitution, lawsuits involving disputes between states are filed directly with the Supreme Court, bypassing lower courts. When Arizona sued California over the waters of the Colorado River, the Court recognized that trying the case would be a monumental undertaking. It appointed a Special Master to hear the evidence and recommend a resolution. After an extensive two-year trial, Special Master Simon H. Rifkind submitted a 433-page Report to the Supreme Court in 1961. It is a testament to his extraordinary acumen and conscientious efforts that the Court adopted nearly all of his recommendations.

The Supreme Court’s basic conclusion was that the question of how water was to be divided among the Lower Basin States was controlled by Congress’s enactment of the Boulder Canyon Project Act in 1928. It first observed that, while that act had authorized the three states to enter into a compact to apportion the waters of the Lower Basin among themselves, they had failed to do so. In the absence of such an agreement, the Supreme Court held that Congress had authorized the Secretary of the Interior to divide the waters among the states following the guidelines of the act: 4.4 MAF to California, 2.8 MAF to Arizona, and .3 MAF to Nevada.

The Court then addressed the difficult issue of the extent to which state or federal law might control the Colorado River. Recognizing the complexities of managing interstate rivers, the Court found that federal management was essential to the success of the project envisioned by Congress in the Boulder Canyon Project Act.

“Where the Government, as here, has exercised this power and undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws,” the Court ruling stated. The federal interests had, according to the Court, led Congress to conclude that “unitary management” was essential to the success of the Boulder Canyon Project Act, because the United States “would want to make certain that the waters were effectively used.”

The Court also decided that the Boulder Canyon Project Act only divided the waters of the mainstream of the Lower Colorado River, not its tributaries. This was an enormous victory for Arizona and a blow to California, which could no longer hope to force Arizona to count its Gila River use as part of its 2.8 million acre-foot Colorado River allocation. The Court’s decision eventually led Congress to authorize the Central Arizona Project, which now brings Colorado River waters across central Arizona to water-thirsty farming, urban, and Indian communities.

Arizona v. California is also important for its recognition that Indian lands along the Colorado River were entitled to make use of the waters of that river. The Court rejected Arizona’s argument that because certain lands had been set aside for Indians by the President instead of by Congress, such lands were not entitled to water.

Instead, following its 1908 decision in Winters v. United States, the Supreme Court ruled that the United States did reserve water for Indians at the time reservations were created. The Court also rejected Arizona’s argument that the Indian rights were to be quantified based on “reasonably foreseeable needs” of the Indians, because this meant guessing as to the number of tribal members there might be at any time in the future. Instead, the Court set a general standard for quantifying Indian water rights that survives to this day: “enough water was reserved to irrigate all the practicably irrigable acreage on the reservations.”

Finally, the decision contained the first recognition by the Supreme Court that the rationale of the Winters doctrine applies to non-Indian federal reservations such as national parks, national forests, and national wildlife reservations.

Although the decision in Arizona v. California gave the Secretary of the Interior broad authority over the management of the Colorado River, this power is not exercised in a vacuum. On any given issue, the federal trust responsibility to Indians must be weighed, and further, the Secretary is likely to hear from some or all of the congressional delegations of the seven Colorado River Basin states, the major cities and farming districts in each of those states, federal and state natural resource agencies, and numerous environmental organizations.

After weighing what the Supreme Court called in Arizona v. California “the diverse, often conflicting interests of the people and communities of the Lower Basin States,” the Secretary must fashion a coordinated plan for river management that aims, the Court stated, “at the full realization of the benefits Congress intended this national project to bestowed.” The wisdom of this approach can be seen today in the healthy, multi-purpose economies of the Southwest.
Prior to 1920, access to develop all valuable mineral deposits except coal on federal lands could be obtained through the Mining Law of 1872. In this century’s first decade, President Theodore Roosevelt launched a program to withdraw certain areas of the public domain from the operation of the mining law to conserve major natural resources. He set aside areas that were thought to be valuable for petroleum and fertilizer minerals. There was concern, among other things, that the military might have to buy oil from claimants that it could otherwise obtain for free on federal lands.

In September 1909, following his predecessor’s lead, President William Howard Taft withdrew an area in Wyoming from operation of the 1872 mining law in order to protect oil and gas resources. In March 1910, Midwest Oil Company went on the land despite the withdrawal and discovered oil. The United States sued to evict Midwest Oil and to recover the value of oil produced during its trespass. Midwest Oil defended itself by arguing that Taft’s withdrawal was unlawful and therefore ineffective. Eventually, the case came before the U.S. Supreme Court.

In the meantime, because his power to make the withdrawal had been questioned, the president asked the Congress to confirm it by statute. Congress agreed, and did so in legislation known as the Pickett Act, signed into law on June 25, 1910. Because the Wyoming withdrawal preceded the Pickett Act, and the legislation was not retroactive, Midwest Oil’s case remained alive. Moreover, the Pickett Act did not permit withdrawals for metalliferous mining—the extraction of metal-bearing ore—a limitation which became important later, as explained below.

The issue before the Court in United States v. Midwest Oil Company, 236 U.S. 459 (1915), was whether the president had the power, without express statutory authority, issued at least 252 executive orders reserving public lands for such purposes as Indian reservations, military reservations, and bird reserves. Congress had not taken action to repudiate any of these executive orders and thus had, over the course of many years, acquiesced in the president’s actions. In fact, Congress had implicitly ratified the executive orders by appropriating moneys to carry out the purposes of the reservations. The Court’s explanation was frequently quoted in subsequent cases:

It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that, in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

The Midwest Oil decision, and its recognition of broad powers of the president over federal lands, became of renewed
important with the onset of World War II. Land areas could not effectively be set aside for military use, if the land remained open to exploration and location under the mining laws. Moreover, the president could not withdraw lands under the Pickett Act from metalliferous mineral activity. In 1941, then Attorney General Robert Jackson, just before he was named to the Supreme Court, issued an opinion holding that, despite passage of the Pickett Act, the president retained implied power under the Midwest Oil decision to withdraw public lands, including withdrawal from metalliferous mining activities.

In succeeding years Presidents Roosevelt and Truman issued executive orders delegating their withdrawal power to the Secretary of the Interior. Both the president and the secretary have made many significant withdrawals of public lands for public uses relying on the broad authority recognized in Midwest Oil. Some of these withdrawals are still in place.

For example, in 1916, the president withdrew Naval Petroleum Reserves in California and Wyoming (the latter commonly referred to as Teapot Dome). In 1923, a 23-million acre withdrawal for Naval Petroleum Reserve Numbered 4 was made in Alaska. In 1943, Public Land Order 82 withdrew public lands totaling more than 75 million acres in three major areas of Alaska. Most of the military reservations set aside during WW II and the Cold War were made under the implied power of the president over the public lands. In 1958, however, Congress reasserted its power by passing the Engle Act, which required the president to submit all new proposed withdrawals for military purposes over 5,000 acres in size to Congress for approval.

In section 704 of the Federal Land Policy and Management Act of 1976, Congress acted to revoke the Midwest Oil power of the president and the secretary to withdraw lands from the operation of the mining laws. In that same statute, however, Congress gave the secretary broad statutory authority to make withdrawals, and removed the limitation against withdrawals for metalliferous minerals. Thus, the secretary's broad power to withdraw public lands for public purposes continues to the present day, although it is now undergirded by statute rather than the Midwest Oil decision.

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**Ben Jesup**

In Missouri v. Holland, 252 U.S. 416 (1920), the Supreme Court rejected a challenge to the constitutionality of the Migratory Bird Treaty Act of 1918. In so doing, the Court not only secured the role of the Federal Government in protecting wildlife, but also spoke to fundamental issues of our constitutional form of government in words that reverberate to this day.

To appreciate the significance of the case, it is necessary to understand the context in which it was decided. Following the commercial slaughter in the late-1800s of species such as the bison and the passenger pigeon, wildlife preservation became an issue of increasing concern in the United States. However, in the early years of the 20th Century, it appeared that the federal role in wildlife protection was extremely limited. In 1896, the Supreme Court had, in Geer v. Connecticut, held that the state governments “owned” all wildlife within their borders. The corollary of the Court’s holding was that the Commerce Clause did not authorize federal regulation of wildlife. In fact, the first federal wildlife protection statute, known as the Lacey Act, passed in 1900, essentially reflected the “state ownership doctrine” espoused in Geer. It prohibited interstate transportation of wildlife taken in violation of state law, thus simply adding a federal dimension to state regulation.

Against this background, there was growing concern in the early 1900s that state regulation of the killing of migratory birds was not working. The states lacked a strong incentive to conserve these birds, as failure to harvest the birds while they were in one state would simply leave more birds for hunters in other states to take as the birds moved across state boundaries.

Thus, Congress enacted the Migratory Bird Act of 1913, which prohibited the killing of migratory birds except pursuant to federal regulation. Due to the questionable constitutionality of this act, enforcement was rare. Where enforcement was undertaken, it was swiftly challenged. In 1914 and 1915, two district courts held that the 1913 act was unconstitutional. The United States appealed one of these cases, United States v. Shauver, to the Supreme Court.

In the meantime, the Federal Government undertook to secure a stronger foundation for the legislation. Article 2, section 2, of the U.S. Constitution expressly delegates the power to make treaties to the Federal Government. The Supremacy
In Missouri v. Holland, the Supreme Court created a mechanism to allow the Federal Government to expand its domestic legislative power through its treaty-making power.

Clause of Article VI provides that “This Constitution, the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land.” Thus, under the Supremacy Clause, treaties (and domestic legislation implementing treaties) take precedence over conflicting state laws.

The United States entered into negotiations with Great Britain (on behalf of Canada) to draft a treaty requiring the conservation of migratory birds, many of which migrate between the United States and Canada. The result was the Convention for Protection of Migratory Birds of 1916. Congress implemented the treaty in 1918, when it passed the Migratory Bird Treaty Act and simultaneously repealed the 1913 act. During this time, the United States had managed to delay the appeal of Shauver before the Supreme Court. The appeal became moot when the 1913 act was repealed, and was eventually dismissed.

Federal enforcement of the Migratory Bird Treaty Act of 1918 was more aggressive than had been the case under the 1913 act. A federal game warden in Missouri, Ray Holland, obtained indictments of two individuals for violating the new federal regulations under the 1918 statute. The State of Missouri sought to enjoin Holland from enforcing the law. The state argued that Congress could not pass a law in furtherance of a treaty if the law would be unconstitutional in the absence of the treaty. It argued further that the Migratory Bird Treaty Act of 1918 was unconstitutional because it violated the Tenth Amendment, which reserves to the states powers not delegated to the Federal Government. The district court disagreed, and the state appealed to the Supreme Court.

The Supreme Court’s opinion was written by Justice Oliver Wendell Holmes, Jr., one of the most celebrated American jurists. Holmes first disposed of the state’s Tenth Amendment argument by pointing out that the treaty-making power was expressly delegated to the Federal Government. Holmes then held that the treaty with Canada and the Migratory Bird Treaty Act of 1918 was a valid exercise of the treaty-making power.

He stated: “It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could.” Holmes criticized application of Geer’s state ownership doctrine to migratory birds as leaning on a slender reed: “The whole foundation of the State’s rights is the presence within their jurisdiction of birds that yesterday

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had not arrived, tomorrow may be in another state and in a week a thousand miles away.” In affirming the district court’s ruling, Holmes concluded:

“Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our crops are destroyed.”

So why has Missouri v. Holland been described as “perhaps the most famous and discussed case in the constitutional law of foreign affairs?” The answer is that the Court for the first time expressly stated that the Federal Government could expand its authority to pass domestic legislation via involvement of another country (in the form of a treaty). Holmes’ failure to describe comprehensively the limits, if any, of this mechanism led to charges, that on occasion are repeated to this day, that the Court had created a loophole by which our entire constitutional system of government might be subverted. In fact, during the 1950s, an attempt to amend the Constitution to limit the treaty power, the so-called Bricker Amendment, nearly passed the Senate.

In recent years, the treaty-making power and Missouri v. Holland have been cited as authority for domestic legislation such as the Endangered Species Act and the Hostage Taking Act. Moreover, the Supreme Court’s 1995 decision in United States v. Lopez, in which the Court ruled the Gun Free School Zones Act of 1990 unconstitutional, has added renewed importance to the treaty-making power. This was the first case since the New Deal in which the Court struck down a federal law as beyond Congress’ authority under the Commerce Clause. A number of commentators have suggested that the contraction of Commerce Clause authority Lopez likely signals will lead to increased reliance on the treaty-making power and Missouri v. Holland in justifying federal legislation.

The impact of Missouri v. Holland goes beyond its discussion of the scope of the treaty power. The case is an important statement in our ongoing national debate over the proper method of interpreting the Constitution. Justice Holmes employed remarkably strong language in characterizing the Constitution as a living document:

“When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what this country has become in deciding what the Tenth Amendment has reserved.

Beyond its broader importance to constitutional jurisprudence, Missouri v. Holland opened the door to increasing federal involvement, in particular by the Department of the Interior, in wildlife regulation. With respect to the Migratory Bird Treaty Act, the Court strongly endorsed the importance of bird conservation as a “national interest of very nearly the first magnitude.” The United States signed bilateral bird conservation treaties with Mexico in 1936, Japan in 1972, and the Soviet Union now Russia in 1979, increasing bird conservation measures in those countries.

In the United States, the Migratory Bird Treaty Act has been a great success. In addition to allowing for the comprehensive and successful management of migratory game bird hunting, the act has been partially responsible for various measures that have reduced unintentional take of migratory birds. For example, most owners of power lines have modified or designed equipment so as to minimize accidental electrocutions of birds and hence potential liability under the Migratory Bird Treaty Act. Similarly, the Fish and Wildlife Service is currently engaged in identifying methods of minimizing the number of birds killed in collisions with this country’s rapidly proliferating telecommunications towers.

Perhaps more importantly, by criticizing the doctrine of state ownership of wildlife espoused in Geer, Missouri v. Holland paved the way for all future federal regulation of wildlife, including the Endangered Species Act, the Marine Mammal Protection Act, and the Bald and Golden Eagle Protection Act. Although the Supreme Court did not explicitly overrule Geer until 1979, it was Justice Holmes’ attack on Geer’s application to migratory species that irrevocably put the Court on that course.
What would our jobs at Interior be like if courts would not hear lawsuits brought by groups complaining about the effect of our decisions on the environment? The differences not only in our jobs, but also in the environment itself, might be substantial if the Supreme Court had decided Sierra Club v. Morton 1972 differently.

In this case, the Sierra Club sued the U.S. Forest Service and the National Park Service to enjoin the approval of plans by Walt Disney Enterprises to build a major year-round resort in Mineral King Valley, in what was then the Sequoia National Forest in the Sierra Nevada mountain range in California. The proposed resort would have included hotels, a ski resort, swimming pools, and stores on 1,000 acres.

The Forest Service and the National Park Service planned to grant the permits necessary for this development to Disney, and the State of California planned to construct a major highway, accommodating 1,200 vehicles per day, and a power line, to traverse Sequoia National Park to the new resort.

The plaintiffs feared the developmental impacts that the resort would have on Sequoia National Park, which surrounds and overlooks Mineral King Valley, and the Sequoia National Game Refuge (part of Sequoia National Forest) which lies in the valley. The plaintiffs filed suit in June, 1969 alleging that the Forest Service acted unlawfully by permitting the ski facility, and that the Park Service acted unlawfully in allowing the highway and power transmission lines to go through the park.

All of this sounds like a pretty run-of-the-mill lawsuit to us at Interior, but in 1969 there was ample room to doubt whether the Sierra Club could bring such a lawsuit. The doubt was based on the legal principle of “standing,” which is required for a party to bring a lawsuit. As Justice Antonin Scalia put it in a subsequent case, standing is the question, “What’s it to you?”

In other words, what entitles you to challenge the executive branch action in federal court? Courts only want to hear cases brought by plaintiffs who have a personal stake in the outcome of a case, on the theory that only then will such issues be sufficiently sharpened and adequately presented.

In this case, the Sierra Club had not alleged that “any of its property would be damaged, that its organization or members will be endangered or that its status will be threatened.” Its lawsuit was thus not based on any alleged injury to the Sierra Club or its individual members, but rather was based simply on the ideological or policy ground that the club disapproved of the Department
granting the necessary permits for the project and wanted some other action to be taken.

The Sierra Club argued that it could bring the lawsuit not because its members were personally hurt, but because it, as a public interest group with a special focus on preservation and conservation of the earth, was asserting the interests of its individual members who cared about the area. In response, the United States argued that the mere fact that a person or group may care about a particular action does not demonstrate a sufficient stake in the controversy to allow that person or group to bring a lawsuit.

The Supreme Court ruled for the United States. It said a sincere interest in a problem is not enough to show a sufficient injury to grant standing. But the Court's opinion also said that if the Sierra Club amended its complaint to allege and if necessary to show with proof that some of its members used the area in question, and would therefore suffer esthetic injury from the granting of the permits, that would be sufficient to confer standing on the Sierra Club.

The Court firmly established that an injury does not have to be economic in nature to be real, so that groups who suffer no economic loss may still sue. But having a generalized interest in an area is not enough: a group must assert that its members are harmed in some concrete way: for example, members must have actually visited the place and intend to do so again, so that their future enjoyment will be harmed by the action.

Although the Sierra Club lost the case, the Court's decision solidified the ability of public interest membership groups, organized around particular interest areas, to challenge agency decisions in court. A number of lawsuits against the Department are filed by such groups. This case confirmed the role of public interest groups in enforcing and upholding the law, and in playing a significant role in the decision making process of government agencies.

The result is not one all of the justices would have preferred. The vote in the case was 4-3 with two justices not participating. In a famous dissent, Justice William O. Douglas, joined by Justice Harry Blackmun, argued that standing should be given to the inanimate objects themselves (“trees should have standing”). They noted that although natural objects may be under the control of federal or state agencies, those agencies cannot easily represent the “public interest” because they are often controlled by powerful interests. Thus, he stated that, “the problem is to make certain that the inanimate objects, which are the very core of America’s beauty, have spokesmen before they are destroyed.” Eloquent as his argument was, it did not win the day.

The importance of the standing doctrine in environmental cases is shown by the fact that the debate over how liberal standing rules ought to be has continued to the present. In 1990, in Lujan v. National Wildlife Federation, the Supreme Court held that the fact that members of a group had used and enjoyed land “in the vicinity” of the land involved was not enough to confer standing. In 1992, in Lujan v. Defenders of Wildlife, the Court tightened up the rules somewhat, though without affecting the fundamental principle of Sierra Club v. Morton.

Most recently, in its 1997 decision in Bennet v. Spear, the Court ruled that a plaintiff has standing even if its underlying interests are adverse to the statute it seeks to enforce. All of these cases were brought against the Department of the Interior, and each highlights the fact that not everyone with any interest in what the Department does can bring us to court to defend it, but that we must be held to answer those who have a sufficient stake in the controversy.

So, whatever happened to Mineral Valley? After the Supreme Court decision, the Sierra Club amended its complaint and the litigation continued for a time. Eventually Disney abandoned its plans and the Congress, in 1978, added Mineral King Valley to the Sequoia National Park.
In 1977, Congress enacted and President Carter signed into law the Surface Mining Control and Reclamation Act of 1977. The act established environmental protection standards for the surface coal mining industry, requiring planning, permitting, bonding, and reclamation, covering the full range of potential impacts of the mining of coal. The enactment of the statute followed ten years of partisan disagreements, a pocket veto by President Nixon and a veto by President Ford.

In the previous two decades, many people in Appalachian coal fields and some western states had become increasingly concerned that “strip mining,” a form of coal mining that had developed rapidly after World War II, was ravaging their land and waters, lowering the quality of their lives, and impoverishing their communities. They called for federal regulation of strip mining, arguing that the state governments had failed to effectively regulate the industry because they were competing with one another to attract the coal companies.

The coal industry and its allies lobbied vigorously for the status quo—continuing state regulation of coal mining practices. They argued that the Federal Government had no business telling states or landowners what they could do with their coal or how it should be mined. The industry also feared that the increased costs of operations that would follow from strict reclamation requirements would drive them out of business and make many of their coal reserves worthless.

When the surface mining act became law, the stage was set for litigation that would raise fundamental constitutional issues and probe the limits of the Federal Government’s power to regulate interstate commerce under the Commerce Clause of the Constitution. Among the key issues was whether federal power under the Commerce Clause was limited by the Tenth Amendment, which states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

The case also raised important issues about the scope of the due process and takings provisions of the Fifth Amendment in the context of federal economic legislation. Several cases challenging the surface mining act on constitutional grounds were filed in various states, and eventually two cases reached the Supreme Court.

In Virginia, before any plaintiff was cited for any violations of the law by Interior’s newly created Office of Surface Mining Reclamation and Enforcement (OSM), coal operators scored a
quick victory when a U. S. District Court declared the surface mining act unconstitutional and permanently enjoined its enforcement. (Virginia Surface Mining & Reclamation Association, Inc. v. Andrus).

The law’s requirement that mined lands be returned to “approximate original contour” was a major focus of this suit. The industry considered this requirement especially onerous. For years, the states had allowed companies to push the excavated soil and rock from the mining operation known as “spoil” over the hillsides, where it could cause mudslides and massive siltation of streams.

Among other things, the District Court held that the approximate original contour provisions violated the Tenth Amendment’s limitations on the power of Congress under the Commerce Clause by invading the state’s traditional role in land-use planning and by compelling state governments to enforce a federal law, thus regulating the states directly. In addition, the District Court held that portions of the surface mining law violated the Fifth Amendment’s proscription against taking private property without just compensation.

In Indiana, in response to a similar suit filed by coal operators, the U. S. District Court addressed the surface mining law’s special protections of “prime farmlands.” The court held that these protections were beyond the power of Congress to enact under the Commerce Clause and the Tenth Amendment, and the equal protection and due process provisions of the Fifth Amendment. (Indiana v. Andrus).

Both decisions were appealed directly to the Supreme Court, which considered them simultaneously, and handed down its decision in both cases on June 15, 1981. In Hodel v. Virginia, a unanimous Court gave the Department and the Congress a sweeping victory. It held that the surface mining law did not exceed Congress’s power under the Commerce Clause, because coal mining clearly had effects on interstate commerce. Similarly, the Court held that the requirement that mines be reclaimed to approximate original contour did not violate any Tenth Amendment limitation on Commerce Clause powers because the law regulates coal mine companies, not the states, and because Congress has this authority to regulate under the Commerce Clause and the Supremacy Clause. The Court also said that the question whether the surface mining law’s prohibition of "approximate original contour" provisions of the Fifth Amendment would have to be determined on a case-by-case basis.

In a more obscure but crucial part of its decision, the Court upheld the power of government inspectors to order companies to cease mining, without a hearing in advance, when the operations presented imminent danger to the public or would cause significant, imminent environmental harm. The Court also rejected an industry challenge to a provision of the surface mining law requiring the operator to pay a proposed civil penalty before a hearing was held on whether a penalty was warranted. The Court said the issue was not ripe for review. The payment provisions of the surface mining law were subsequently upheld by several courts of appeals.

The Court’s other decision, in Hodel v. Indiana, covered much of the same ground as the Virginia case, but also held that the prime farmland protection provisions of the surface mining law neither violated the Tenth Amendment nor on their face effected a taking of any property without compensation. The Supreme Court also overturned the District Court’s decision invalidating portions of the law on the basis of violating due process and equal protection. It held that environmental legislation like the surface mining act was entitled to a strong presumption of rationality that could be overcome only by a clear showing of arbitrariness. Finding Congress had not been arbitrary, the Court upheld the surface mining law and chided the District Court for acting as a “superlegislature” double-guessing the wisdom of Congress.

The Virginia and Indiana cases reaffirmed the broad powers of Congress under the Commerce Clause to regulate private business to protect the environment in circumstances where interstate commerce is substantially affected. It reaffirmed that the Tenth Amendment and the due process and equal protection clauses generally do not inhibit the power of Congress under the Commerce Clause, and that regulatory “takings” claims have to be brought on the basis of case-specific facts.

Events since 1981 have reaffirmed the soundness of these decisions. Both cases continue to be relied upon to reject frontal assaults on major environmental legislation. After these decisions, coal mine operators began accepting the industry transformation mandated by the Surface Mining Control and Reclamation Act. Virginia and Indiana opened the way for the Department’s Office of Surface Mining and those states which have approved state programs under section 503 of the surface mining law to regulate the coal mining industry to the full extent intended by Congress.

Though interpretation and enforcement of the surface mining law remain occasionally controversial, and political battles arise as to whether the extent of regulation under the law should be expanded or contracted, the Supreme Court’s decisions in these two cases stand as landmarks in the Interior Department’s history before the Supreme Court.
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STEWARDSHIP & THE LAW
The Supreme Court Cases That Shaped Interior's Mission
1849-1999

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