Federal Recreational Land Policy: The Rise and Decline of the Land and Water Conservation Fund*

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Congress created the Land and Water Conservation Fund ("LWCF" or "Fund") in 1965 to serve as the main funding mechanism for federal and state acquisition of recreational lands.[1] The Fund is financed by special taxes and earmarked receipts, and the amounts authorized for appropriation into the Fund have grown rapidly over the years. With LWCF moneys, federal agencies have been able to purchase over 2.8 million acres for new recreational areas and enlargement of existing national parks, refuges and forests.[2] The Fund has also enabled states to enhance their recreational lands systems by more than two million acres.[3]

But the Fund is experiencing hard times. Shortly after taking office in early 1981, then Secretary of the Interior James G. Watt declared a moratorium on spending moneys appropriated from the LWCF for further acquisitions, despite a large backlog of tracts to

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1. The LWCF was created by the Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 460*l*-4 to 460*l*-11 (1982). Appropriations from the LWCF are limited to no more than 60% for states, to be allocated according to a complex formula, *id.* § 460*l*-8(b) (1982), and the remainder goes to federal agencies for purchase of land for national parks, wildlife refuges and forests. *Id.* §§ 460*l*-7, 460*l*-9(a) (1982).

2. *See Amending the Land and Water Conservation Fund Act of 1965: Hearings on S. 910 Before the Subcomm. on Public Lands and Reserved Water of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 46 (1981) [hereinafter cited as *Hearings on S. 910*].

3. *Id.*

be acquired pursuant to congressional authorization.[4] At the same time, the Reagan Administration unsuccessfully proposed legislation to divert LWCF receipts into rehabilitation of park facilities.[5] During 1983, the Administration continued its attempts to bar the states from using any Land and Water Conservation funds,[6] and the moratorium confined federal agencies' use of appropriated moneys to a limited range of energency-like situations.[7] In fiscal year 1983, the Department of the Interior failed to use $34.4 million that Congress had appropriated for purchase of national park lands alone.[8] The Department's actions apparently fit a pattern of Reagan Administration hostility to federal land ownership for public purposes.[9]

Shortly after James G. Watt resigned as Secretary of the Interior in November 1983, his successor, William P. Clark, announced that he was altering the moratorium on acquisitions with LWCF money, but he did not repudiate it.[10] Secretary Clark stated that he would request Congress to authorize spending $100 million to ac-

4. By the end of fiscal year 1981, the acquisition backlog of the National Park Service alone included at least 67 tracts, comprising approximately 475,000 acres; estimates of the value of these tracts ranged from $881 million to $1.6 billion. *See infra* notes 256-57 and accompanying text.

5. S. 910, 97th Cong., 1st Sess. (1981). *See Hearings on S. 910, supra* note 2.

6. Congress adopted the Administration budget proposal to cut off state funding from the LWCF entirely in fiscal year 1982 but refused to do so in fiscal year 1983.

7. The only exceptions to the spending moratorium in fiscal year 1983 were instances in which actual condemnation was in process, emergency acquisitions were required to avoid irreparable harm to land or unreasonable financial hardship would have otherwise been imposed on the landowner.

8. Telephone conversations with Interior Department officials. At the end of the first seven months of the fiscal year, $92.8 million remained unappropriated. Letter from G. Ray Arnett, Assistant Secretary for Fish and Wildlife and Parks, to John F. Seiberling, Chairman, Subcommittee on Public Lands and National Parks of the House Committee on Interior and Insular Affairs (undated). *See also* letter from R.E. Dickinson, National Park Service Director, to John F. Seiberling, Chairman, Subcommittee on Public Lands and National Parks of the House Committee on Interior and Insular Affairs (Apr. 21, 1983).

9. This contention is explained *infra* at notes 266-88 and accompanying text.

10. N.Y. Times, Dec. 29, 1983, at A16, col. 1. In a speech to the National Association of Manufacturers in January 1984, Secretary Clark stated:

> We, effectively, had a moratorium on acquisition of parkland for the past three years. However, it now appears that we can well spend about a hundred million dollars to acquire no new units of park, but rather round out the old ones—to acquire some private properties, so-called inholder interests, within existing units. And another $57 million is planned in the area of wildlife and wetlands acquisition.

Remarks of Secretary of the Interior William Clark to the National Association of Manufacturers Issue Breakfast, Washington, D.C. (Jan. 10, 1984).

quire national park inholdings and $57 million for national wildlife refuges and wetlands.[11] The Secretary's brief announcement notwithstanding, the available evidence indicates that the moratorium remains substantially in effect. Most notably, Secretary Clark has announced renewed acquisition activity for only two of the four federal land systems that qualify for funds under the LWCF Act,[12] and then only for inholdings,[13] although the LWCF can be used for additions to existing units and for new units.[14] Moreover, the Secretary made no mention of matching LWCF grants to the states, a major function of the LWCF program before 1981.[15]

Congress, in past years, has consistently appropriated more money than Secretary Clark has indicated he will ask for.[16] That the new Secretary may intend to withhold any money from use for fund purposes beyond the amount he will request is more than idle speculation; Secretary Clark has given no indication that he will in fact spend more than the requested budget amount. Piecemeal fund impoundments may, of course, have the same effect as a "moratorium," even if that term were to be officially dropped. In spite of ample opportunity to do so, Administration officials have refused to concede that the executive branch lacks power to withhold or impound appropriated funds.[17]

Secretary Clark's announcement was made at the beginning of an election year. There can be no guarantee that the moratorium will not be wholly reimposed after November 1984, or at any time when political opinion dictates another attempt to curb swelling federal deficits.

For the above reasons, the authors have proceeded on the assumption that the moratorium is, for all practical purposes, still alive and effective, and that the continuing threat of its total reim-

11. *Id. See also* 14 ENV'T REP.—CUR. DEV. (BNA) 1529 (Jan. 6, 1984).

12. *See infra* note 110 and accompanying text.

13. In his recent announcement, Secretary Clark specified that NPS acquisitions would be limited to inholdings, but did not indicate whether wildlife and wetlands acquisitions would also be so limited. *See supra* note 10.

14. *See infra* notes 128, 134-36, 220-21, 353 and accompanying text.

15. *See infra* notes 137-42, 191-93, 202, 320, 322 and accompanying text.

16. *See infra* notes 324-40 and accompanying text.

17. *The Supreme Court Decision in INS v. Chadha and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 108-12, 157-58, 163-64 (1983).

position justifies a careful inquiry into its origins, its justifications, and its legality. To the extent that the present Administration has used or will use the moratorium approach to reduce or dismantle other government programs, this inquiry has relevance beyond the confines of the LWCF Act.[18]

This article contends that the moratorium on acquiring federal recreation lands with LWCF moneys is arbitrary and unlawful. The writers argue that such unilateral withholding of appropriated funds violates the letter and the spirit of the Land and Water Conservation Fund Act, the federal anti-impoundment law[19] and the Secretary's common-law duty as a trustee of the public lands. Section I of this article briefly outlines historical developments in federal land ownership patterns to show that federal reacquisition of land with LWCF moneys is the logical culmination of longstanding directions in public land law. The second section describes the creation of the Fund and the course of its implementation from 1965 to 1981. Section III investigates the departures in public land policy that the Reagan Administration has made or sought since January 1981. The fourth section assesses the arguments for and against the legality of the LWCF moratorium, and finds the authorities for illegality persuasive.

I. HISTORIC CHANGES IN FEDERAL LAND OWNERSHIP PATTERNS

Preserving land for recreational use was not accepted as a legitimate federal function until the United States was nearly a century old.[20] Only gradually did a policy of federal land retention, characterized by conservation-oriented management, overcome the contrary, longstanding policy to dispose of all federal lands.[21] The retention policy has now prevailed for over half a century.

18. *See infra* note 565.

19. Impoundment Control Act of 1974, 2 U.S.C. §§ 681-688 (1982).

20. Congressional creation of Yellowstone National Park in 1872 was the turning point, even though parts of present Yosemite National Park were earlier made federal reservations for recreational purposes. *See generally* A. HAINES, YELLOWSTONE NATIONAL PARK—ITS EXPLORATION AND ESTABLISHMENT (1974); W. EVERHART, THE NATIONAL PARK SERVICE (1972). The Act designating Yellowstone as a perpetual "pleasuring ground" is now codified at 16 U.S.C. §§ 21-24 (1982). Judicial acceptance of recreation as a legitimate federal purpose is evident in cases such as Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938).

21. For a discussion of public land reservation policies, *see generally* P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968); G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW chs. 2, 3 (1981).

A. *Closing The Public Domain*

Notwithstanding Fredrick Jackson Turner's famous thesis,[22] the American Frontier had not disappeared by 1890. Homesteading continued for another forty-odd years, and homesteaders still claimed enormous acreage in the early 1900's.[23] Although the national legislature continued to encourage free settlement long past the time when it was economically feasible,[24] congresses and presidents also withdrew much of the public domain, making it unavailable for homesteading and reserving it instead for recreation, preservation and conservation.[25] Two statutes enacted in 1916 exemplified the conflicting disposition and conservation policies.

Beginning with Yellowstone National Park in 1872, Congress had established national parks at irregular intervals;[26] in 1906 it had authorized the President to reserve other valuable parcels as national monuments.[27] In 1916 Congress chartered the National Park Service ("NPS") to manage these natural "crown jewels" of the American landscape according to the preservation-oriented mandate of the National Park Service Act.[28]

In the same year that it created the NPS, Congress also attempted to facilitate disposition of federal land as a means of dealing with the growing scarcity of agricultural land suitable for settlement. After the successive waves of homesteading and other dispositions during the nineteenth century,[29] the only tracts remaining available

22. F. TURNER, THE FRONTIER IN AMERICAN HISTORY (1920).

23. *See, e.g.*, G. COGGINS & C. WILKINSON, *supra* note 21, at 69-74, 73 chart (more land entered in 1910 than in any other year).

24. *See* E. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN 338-41 (1951).

25. By 1916 Congress had reserved millions of acres as national parks and wildlife refuges, and presidents, pursuant to delegated authority, had reserved nearly 200 million acres as national forests and national monuments. Asserting inherent powers, presidents had also reserved areas as Indian reservations and bird sanctuaries, and had withdrawn several million acres from oil and gas location. The Supreme Court upheld the latter presidential actions because Congress had acquiesced in them. United States v. Midwest Oil Co., 236 U.S. 459 (1915). *See also* C. WHEATLEY, JR., STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS (1969); Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279 (1982).

26. *See* W. EVERHART, *supra* note 20, at 8-21.

27. Antiquities Act of 1906, ch. 3060, § 2, 34 Stat. 225 (current version at 16 U.S.C. §§ 431-432 (1982)). *See* Getches, *supra* note 25, at 285-89.

28. National Park Service Act, ch. 408, § 1, 39 Stat. 535 (current version at 16 U.S.C. §§ 1-20 (1982)).

29. *See generally* P. GATES, *supra* note 21.

to the landless were in the arid and semi-arid intermountain West.[30] The epochal Homestead Act of 1862[31] and other disposition laws[32] limited the size of legal claims to acreage far below the size needed for successful livestock operations,[33] the only profitable land use available in many parts of the West.[34] Although there was growing sentiment for a system to lease the remaining public domain lands to adjacent ranchers,[35] Congress instead chose to liberalize disposition terms: the Stock-Raising Homestead Act of 1916 (SRHA)[36] authorized entry on 640 acres by prospective ranchers.[37] Although over thirty million acres were patented under the SRHA during its short effective life,[38] most of the land subject to its terms remained unclaimed, and this form of settlement ended for the most part in 1934.[39]

The SRHA proved to be the last gasp in a national effort over a century and a half to give away or sell the two billion plus acres acquired by the United States from other nations and Indian

30. *See* E. PEFFER, *supra* note 24, at 134-68; P. FOSS, POLITICS AND GRASS 33-38 (1960).

31. 43 U.S.C. §§ 161-302 (repealed 1976). *See* G. COGGINS & C. WILKINSON, *supra* note 21, at 69-70.

32. Prominent among the dozens of disposition authorities were: the Graduation Act of 1854, ch. 244, 10 Stat. 574 (repealed 1862); the Timber Culture Act of 1873, ch. 277, 17 Stat. 605 (repealed 1891); the Desert Lands Act of 1877, 43 U.S.C. §§ 321-323 (1976); and the Timber and Stone Act of 1878, 43 U.S.C. §§ 311-313 (repealed 1955).

33. Most such laws limited legal claims to 160 acres. The legal limitations were often surmounted by various means, but Congress remained firmly in favor of anti-monopoly and anti-speculation policies. In special situations, the acreage restrictions were liberalized. The Desert Lands Act, for example, allowed entry on 640 acres at 25 cents per acre in order to encourage irrigation of barren lands in the Southwest. *See, e.g.*, G. COGGINS & C. WILKINSON, *supra* note 21, at 71-73.

34. Even 640 acres were inadequate for an economic livestock operation because a single cow-calf unit sometimes required as many as 500 acres for adequate forage in areas of sparse vegetation. Nelson, The New Range Wars: Environmentalists versus Cattlemen for the Public Rangelands (Office of Policy Analysis, Dep't of the Interior, 1980 (unpublished manuscript)).

35. *See* E. PEFFER, *supra* note 24, at 28 (leasing bills often introduced between 1899 and 1934).

36. 43 U.S.C. §§ 291-301 (repealed 1976).

37. *Id.* § 292. The Act reserved subsurface mineral rights. *Id.* § 299. *See* Watt v. Western Nuclear, Inc., ___ U.S. ___, 103 S.Ct. 2218 (1983) (gravel reserved under SRHA); United States v. Union Oil Co. of Calif., 549 F.2d 1271 (9th Cir. 1977), *cert. denied*, 439 U.S. 912 (1978) (geothermal resources are reserved as "other minerals" under SRHA).

38. G. COGGINS & C. WILKINSON, *supra* note 21, at 74.

39. *See* E. PEFFER, *supra* note 24, at 221; P. FOSS, *supra* note 30, at 27.

tribes.[40] Little settlement was taking place when Congress closed the public domain by passing the Taylor Grazing Act in 1934.[41] Congress' subsequent efforts focused on consolidation and preservation of existing federal holdings and on the expansion of the federal land systems used for recreational and similar purposes.

B. *Post-1934 Disposition*

Passage of the Taylor Grazing Act of 1934 consolidated existing federal land holdings. Except for the parcels needed for standard governmental purposes (such as forts, courthouses or post offices), the federal lands have been roughly divided into four main categories since 1934. The National Park System includes the areas designated by Congress as national parks, battlefields, seashores, lakeshores, recreation areas, parkways, etc., and also includes the national monuments reserved by executive order.[42] The National Forest System comprises the vast areas which were reserved between 1891 and 1907[43] for timber protection and production by several presidents pursuant to the 1891 Forest Reserve Amendment.[44] The national forests were long managed custodially by the Forest Service, an agency within the Department of Agriculture.[45] The third category consists of wildlife refuges: beginning in 1903, presidents and congresses had reserved various parcels as wildlife sanctuaries,[46] but not until 1966 were these miscellaneous tracts consolidated into the National Wildlife Refuge System.[47] The fourth category includes "all the rest": these unappropriated, unre-

40. *See generally* P. GATES, *supra* note 21, at 516-23; E. PEFFER, *supra* note 24, at 160-63.

41. 43 U.S.C. §§ 315-315r (1976 & Supp. V 1981). *See generally* E. PEFFER, *supra* note 24; P. Foss, *supra* note 30; Coggins & Lindeberg-Johnson, *The Law of Public Rangeland II: The Commons and the Taylor Act*, 13 ENVTL. L. 1 (1982). Homesteading ended for all practical purposes when the remaining public domain was withdrawn into grazing districts pursuant to the Taylor Grazing Act of 1934, *id.*

42. *See* R. LEE, FAMILY TREE OF THE NATIONAL PARK SYSTEM (1972).

43. *See, e.g.*, Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239, 258-72 (1978).

44. 16 U.S.C. § 471 (repealed 1976).

45. *See generally* H. STEEN, THE UNITED STATES FOREST SERVICE: A HISTORY (1976); G. ROBINSON, THE FOREST SERVICE (1975); Huffman, *supra* note 43.

46. *See* Greenwalt, *The National Wildlife Refuge System*, in WILDLIFE AND AMERICA 399 (H. Brokaw ed. 1978) [hereinafter cited as WILDLIFE AND AMERICA].

47. National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee (1982). *See* M. BEAN, EVOLUTION OF NATIONAL WILDLIFE LAW 126-41 (1977).

served lands withdrawn by the Taylor Act did not become an official "system" under the aegis of the Bureau of Land Management until 1976,[48] but they came under federal management as a de facto federal lands category in 1934.[49]

Even though the general shape of the federal landed estate was clear a half century ago, changes within the overall outlines of federal ownership have continued ever since. Sales, exchanges and reclassifications of federal parcels are still occurring, although Congress has narrowed the circumstances in which such dispositions are permitted.[50] From 1934 to 1981, the federal government neither sold outright, nor gave away much of its real estate.[51]

Land exchanges and the related mechanism of "in lieu selections" are now the most important methods for changing title to federal land, especially to solve "inholdings" problems. When Congress or the President reserved areas as national parks or forests, they typically drew lines around the desired area, often encompassing private and state land as well as federal land.[52] Inholdings are the private or state parcels remaining within the federal boundaries.[53] The ownership situation is worse on the BLM-managed public lands, where, as a legacy of the railroad land grants, millions of

48. The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1976 & Supp. V 1981) provided the Bureau of Land Management with organic authority to manage the former public domain, now called the public lands. *See, e.g.*, Landstrom, *An Operational View of the BLM Organic Act*, 54 DEN. L.J. 455 (1977).

49. *See, e.g.*, Coggins & Lindeberg-Johnson, *supra* note 41, at 40-55.

50. The Taylor Act authorized sales of reclassified parcels, 43 U.S.C. § 315p (repealed 1976), and a little homesteading went on even during the 1960's. *See, e.g.*, Stewart v. Penny, 238 F. Supp. 821 (D. Nev. 1965). The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1976 & Supp. V. 1981), also authorizes some land disposition under various conditions. *Id.* at §§ 1714-1721. Other means of disposition are authorized by the Federal Property and Administrative Services Act of 1949, 40 U.S.C. §§ 471-544 (1976 & Supp. V 1981); *see* Rhode Island Comm'n on Energy v. GSA, 397 F. Supp. 41 (D.R.I. 1975), 411 F. Supp. 323 (D.R.I. 1976), *aff'd*, 561 F.2d 397 (1st Cir. 1977), and the General Mining Act of 1872, 30 U.S.C. §§ 21-54 (1976); *see* United States v. Coleman, 390 U.S. 599 (1968); Anderson, *Federal Mineral Policy: The General Mining Act of 1872*, 16 NAT. RESOURCES J. 601, 604 (1976).

51. A notable exception is Alaska, where, pursuant to various laws, millions of acres have been given to the state and to native corporations. *See, e.g.*, G. COGGINS & C. WILKINSON, SUPPLEMENT TO FEDERAL PUBLIC LAND AND RESOURCES LAW 42-44 (1983).

52. *See, e.g.*, Redwood National Park Act of 1968, 16 U.S.C. §§ 79b, 79c (1982). Even though Rocky Mountain National Park has been established for more than half a century, some privately-owned cabins still remain inside the Park boundaries.

53. *See* Lambert, *Private Landholdings in the National Parks: Examples from Yosemite National Park and Indiana Dunes National Lakeshore*, 6 HARV. ENVTL. L. REV. 35 (1982).

federal acres remain checkerboarded, section-by-section, with private parcels.[54] To consolidate federal ownership, Congress has long empowered the federal land management agencies to exchange other federal lands for the private lands within reservation borders.[55] The ad hoc exchange programs have often been controversial but seldom very successful,[56] at least on a large scale.[57]

The necessity for in lieu selections arose because many sections of land that would have devolved upon states at statehood for educational and other purposes[58] were unavailable due to prior federal reservations;[59] the United States therefore gave states the right to select other federal sections in lieu of the lands earlier foregone.[60] States are still exercising those in lieu selection rights,[61] although similar rights held by railroads have been extinguished.[62]

The Federal Land Policy and Management Act of 1976 ("FLPMA")[63] consolidated most existing exchange and sale authori-

54. *See generally* Leo Sheep Co. v. United States, 440 U.S. 668 (1979) (construing Union Pacific Act of 1862). The transcontinental railroads received about 100 million acres selected from alternate odd-numbered sections in ten-mile-wide swaths on either side of the right-of-way. The Supreme Court stated that its holding on the question of access rights to checkerboarded land "affects property rights in 150 million acres of land in the Western United States." *Id.* at 678. *See* G. COGGINS & C. WILKINSON, *supra* note 21, at 88-105; P. GATES, *supra* note 21, at 341-86.

55. In 1922, Congress consolidated the existing authorities into the General Exchange Act, ch. 105, § 1, 42 Stat. 465 (current version at 16 U.S.C. § 485 (1982)). *See* National Forest Preservation Group v. Butz, 485 F.2d 408 (9th Cir. 1973).

56. *See* National Forest Preservation Group v. Butz, 485 F.2d 408 (9th Cir. 1973); Sierra Club v. Hickel, 467 F.2d 1048 (6th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); Lewis v. Hickel, 427 F.2d 673 (9th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971); La Rue v. Udall, 324 F.2d 428 (D.C. Cir. 1963); Red Canyon Sheep Co. v. Ickes, 98 F.2d 308 (D.C. Cir. 1938).

57. To correct the problem of interspersed lands, Utah has proposed massive, statewide exchanges in a proposal termed "Project Bold." *See Utah Seeking to Exchange Federal Lands*, Wall St. J., June 20, 1983, at 19, col. 3.

58. Since 1803, the federal government granted new states varying amounts of land within their borders to support various public purposes, notably education. *See* P. GATES, *supra* note 21, at 22-27; G. COGGINS & C. WILKINSON, *supra* note 21, at 45-56.

59. *See generally* Dragoo, *The Impact of the Federal Land Policy and Management Act upon Statehood Grants and Indemnity Land Selections*, 21 ARIZ. L. REV. 395 (1979).

60. Seven western states hold indemnity rights to more than one-half million acres. Andrus v. Utah, 446 U.S. 500, 506 n.6 (1980).

61. *See id.* The Court decided that Utah could not choose lands with values "grossly disparate" to the value of those originally lost to the state.

62. *See* Neuhoff v. Secretary of the Interior, 578 F.2d 810 (9th Cir. 1978) (holding that in lieu rights of railroads under the Forest Lieu Exchange Act of 1897 were extinguished by the Transportation Act of 1940).

63. 43 U.S.C. §§ 1701-1782 (1976 & Supp. V 1981).

ties,[64] narrowly limiting administrative discretion to dispose of lands.[65] In FLPMA, Congress declared that, as a general rule, public land should remain in federal ownership,[66] placed stringent conditions on future disposition[67] and retained for itself a continuing oversight responsibility.[68]

C. *Federal Reacquisition*

Most lands now owned by the federal government have never been in private ownership, but the federal government has reacquired some lands for various purposes[69] almost since the beginning of nationhood. The "Jurisdiction" or "Enclave" Clause of the Constitution[70] contemplates federal ownership of certain kinds of facilities and specifies how exclusive federal jurisdiction can be acquired.[71] The United States is not confined to those facilities or those methods in its reacquisition programs.[72] The Property Clause empowers Congress to make "needful" rules for federal land management.[73] Under it, Congress has plenary, unlimited power to control all activities on all federal lands, and such congressional dictates override any conflicting state laws.[74] The Fifth Amendment impliedly authorizes the United States to use the power of eminent domain by requiring just compensation when property is

64. *Id.* §§ 1713, 1716 (1976).

65. Before 1976, courts had not even agreed on whether land exchanges were reviewable. *Compare* National Forest Preservation Group v. Butz, 485 F.2d 408 (9th Cir. 1973), *with* Sierra Club v. Hickel, 467 F.2d 1048 (6th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973). FLPMA states a policy in favor of judicial review. 43 U.S.C. § 1701(a)(6) (1976).

66. 43 U.S.C. § 1701(a)(1) (1976).

67. *Id.* § 1713 (1976 & Supp. V 1981).

68. *Id.* § 1714(c) (1976 & Supp. V 1981). *See* Pacific Legal Found. v. Watt, 529 F. Supp. 982 (D. Mont. 1981), *clarified*, 539 F. Supp. 1194 (D. Mont. 1982).

69. *E.g.*, post offices, military camps, customs facilities and similar purposes.

70. U.S. CONST. art I, § 8, cl. 17.

71. The clause applies to "Forts, Magazines, Arsenals, dock-yards, and other needful buildings," and such facilities must be "purchased by the Consent of the [state] Legislature." *Id.* Such purchased areas become federal "enclaves" over which Congress exercises "exclusive Legislation," or jurisdiction. *Id. See* G. COGGINS & C. WILKINSON, *supra* note 21, at 144-60.

72. Fort Leavenworth R. Co. v. Lowe, 114 U.S. 525 (1885); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938).

73. U.S. CONST. art. IV, § 3, cl. 2.

74. Kleppe v. New Mexico, 426 U.S. 529 (1976).

taken for public purposes.[75] Public purposes are whatever Congress says they are.[76]

Initially, creation of parks and forests did not require federal reacquisition because the federal government already owned the land it reserved. Early efforts to reacquire land for other uses were sporadic and limited in scale. Reacquisition of lands for general public purposes such as post offices and courthouses apparently occasioned little controversy in the nineteenth century. The Supreme Court in 1896 upheld federal use of the eminent domain power to obtain parts of the Gettysburg Battlefield by finding a tenuous connection between the acquisition and the war powers.[77]

Modern reacquisition trends probably originated in the Reclamation Act of 1902[78] and the Weeks Act of 1911.[79] Congress in the Reclamation Act recognized that federal sponsorship and financing were necessary for any large-scale water resources development in relatively arid western states.[80] At the time, such federal dam-building was a departure thought to be of doubtful constitutionality;[81] it has since become the norm. More importantly, the federal reclamation program marked the start of a movement for long-term federal natural resources control and management.[82] The Weeks Act was the first in a series of statutes enacted over a quarter century that authorized the Forest Service to reacquire cutover tracts and marginal farmlands in the East[83] and failed, wind-

75. U.S. CONST. amend. V.

76. United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896); Buffalo River Conservation & Recreation Council v. National Park Serv., 558 F.2d 1342 (8th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978).

77. United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896).

78. 43 U.S.C. §§ 371-600e (1976 & Supp. V 1981).

79. Act of Mar. 1, 1911, ch. 186, 36 Stat. 961.

80. *E.g.*, Taylor, *California Water Project: Law and Politics*, 5 ECOLOGY L.Q. 1, 2-6 (1975).

81. The doubts were not completely dispelled until the decision in United States v. Gerlach Livestock Co., 339 U.S. 725, 738 (1950).

82. The Reclamation Act envisioned long-term contracts with project beneficiaries who, in consideration of subsidized water deliveries, promised to repay construction and operation costs attributable to irrigation and to limit lands so irrigated to 160 acres per local farmer. 43 U.S.C. § 431 (1976). It never worked out quite that way. *See, e.g.*, Sax, *Selling Reclamation Water Rights: A Case Study in Federal Subsidy Policy*, 64 MICH. L. REV. 13 (1965).

83. Act of Mar. 1, 1911, ch. 186, 36 Stat. 961. The Weeks Act was later broadened by the Clarke-McNary Act of 1924, 43 Stat. 653. *See* P.GATES, *supra* note 21, at 593-600.

eroded grasslands on the high plains.[84] Lands purchased through these argicultural relief programs are now the eastern national forests and the national grasslands. Altogether, the Forest Service purchased over four million acres under those authorities by 1980.[85]

Another federal reacquisition program was initiated in the 1920's and 1930's. To assist propagation of ducks and geese, Congress created a special fund from receipts under the Migratory Bird Hunting Stamp Act of 1934[86] to purchase wetlands and refuges for waterfowl and other migratory bird habitat.[87] Similar in effect were other special funds from earmarked federal tax receipts that allowed grantee states to purchase wildlife habitat areas.[88] Congress later authorized purchase of less-than-fee interests for similar purposes.[89]

From 1940 to 1960, disposition and reacquisition took place simultaneously but desultorily, and reduction of inholdings dominated the remaining limited federal reacquisition efforts.[90] Public land management was seldom a matter of public importance.[91] Not

84. Bankhead-Jones Act of 1937, ch. 517, tit. III, 50 Stat. 525 (current version at 7 U.S.C. §§ 1010-1012 (1982)). *See* U. S. DEPARTMENT OF AGRICULTURE, THE NATIONAL GRASSLANDS STORY (1965).

85. U. S. FOREST SERVICE, LAND AREAS OF THE NATIONAL FOREST SYSTEM AS OF SEPT. 30, 1980, at 1.

86. 16 U.S.C. §§ 718-718h (1982). Earlier acquisition authority in the Migratory Bird Conservation Act ("MBCA") of 1929, 16 U.S.C. §§ 715-715r (1982) was unavailing for lack of appropriations. Under the MBCA, consent of the state governor was necessary before purchase. On the issue of gubernatorial consent, *see* United States v. North Dakota, 650 F.2d 911 (8th Cir. 1981), *aff'd*, ___ U.S. ___, 103 S. Ct. 1095 (1983).

87. From 1934 to 1978, the U.S. Fish and Wildlife Service ("FWS") estimated that the $188 million in duck stamp receipts had financed purchase of 2.3 million acres of habitat. U.S. Fish & Wildlife Service, Press Release of Mar. 14, 1978, at 4.

88. Federal Aid in Wildlife Restoration (Pittman-Robertson) Act of 1937, 16 U.S.C. §§ 669-669i (1982); Federal Aid in Fish Restoration (Dingell-Johnson) Act, 16 U.S.C. §§777-777k (1982). *See* Poole & Trefethen, *The Maintenance of Wildlife Populations*, in WILDLIFE AND AMERICA, *supra* note 46, at 339, 342-43.

89. Wetlands Loan Act, 16 U.S.C. §§ 715k-3 to 715k-5 (1982).

90. The Park Service seldom exercises its full eminent domain powers, preferring instead to offer inholders their option of full payment or sale of a future interest with a life estate in the landowner. NATIONAL PARK SERVICE, MANAGEMENT POLICIES IX-2 (1975). *See* Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709.

91. There were prominent, if isolated, exceptions to this general trend. *See, e.g.*, W. VOIGT, JR., THE PUBLIC GRAZING LANDS: USE AND MISUSE BY INDUSTRY AND GOVERNMENT 203-15 (1976) (recounting the abrasive and abortive dispute over retention of public land ownership in the 1940's); DeVoto, *Let's Close the National Parks*, HARPER'S MAGAZINE, Oct. 1953, at 49 (contending that the national parks were in disrepair because of inadequate funding and suggesting that several parks be closed until sufficient funds became available).

until the early 1960's did the beginnings of a new wave of reacquisition programs become evident. With President Kennedy evincing interest in public land policy, sentiment for a wilderness bill grew, and prominent congressmen sought thorough reexamination of existing authorities and policies.[92] A legislative package consisting of the Muliple-Use, Sustained-Yield Act of 1960,[93] the Wilderness Act of 1964,[94] the Classification and Multiple Use Act of 1964[95] and authorization for the Public Land Law Review Commission[96] ultimately resulted.

These developments heralded a surge of legislation under President Johnson between 1963 and 1969 which greatly accelerated the pace of federal land reacquisition. Congress in that span created new federal lands systems and added to existing systems; in both cases, federal purchase or condemnation of private lands was necessary.[97] Notable in the spate of legislation were bills creating national wild and scenic rivers,[98] national trails[99] and Redwood National Park.[100] Congresses of the 1970's would continue in this direction by enlarging parks,[101] establishing urban parks[102] and creating national preserves.[103] The primary funding mechanism for

92. *See* McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 298-301 (1966).

93. 16 U.S.C. §§ 528-531 (1982).

94. 16 U.S.C. §§ 1131-1136 (1982).

95. Pub. L. No. 88-607, 78 Stat. 986 (1964) (expired 1969).

96. *See* McCloskey, *supra* note 92, at 299. The Commission produced a landmark report entitled ONE THIRD OF THE NATION'S LAND—A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION (1970).

97. *See generally* Futtrell, *Parks to the People: New Directions for the National Park System*, 25 EMORY L.J. 255 (1976) (focusing on urban park systems).

98. Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542, 82 Stat. 906 (current version at 16 U.S.C. §§ 1271-1287 (1982)). *See generally* Tarlock & Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 CORNELL L. REV. 707 (1970).

99. National Trails System Act of 1968, Pub. L. No. 90-543, 82 Stat. 919 (current version at 16 U.S.C. §§ 1241-1249 (1982)).

100. Redwood National Park Act of 1968, Pub. L. No. 90-545, 82 Stat. 931 (current version at 16 U.S.C. §§ 79a-79j (1982)).

101. The best example is the expansion of Redwood National Park after the NPS was unsuccessful in controlling harmful activities on adjacent lands. *See* 16 U.S.C. § 79b(a) (1982).

102. *E.g.*, Golden Gate and Gateway National Recreation Acts, Pub. L. No. 93-544, 88 Stat. 1741 (current version at 16 U.S.C. §§ 460bb to 460cc-4 (1982)).

103. Big Cypress and Big Thicket National Preserve Acts of 1974, Pub. L. No. 93-439, 88 Stat. 1256 (current version at 16 U.S.C. §§ 698-698m (1982)).

the acquisition of new and expanded federal recreation lands was the Land and Water Conservation Fund.

II. ESTABLISHMENT AND OPERATION OF THE LAND AND WATER CONSERVATION FUND

The Land and Water Conservation Fund Act of 1965 ("LWCF Act")[104] established the Land and Water Conservation Fund ("LWCF" or the "Fund"). Congress adopted the Act in order to

> assist in preserving, developing, and assuring accessibility to all citizens of the United States of America of present and future generations . . . such quality and quantity of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States . . .[105]

The Fund would promote these goals by enabling the federal government to acquire land and water resources and by assisting state acquisition and development of such resources for outdoor recreational uses.[106]

A. *Operation of the Land and Water Conservation Fund*

The process of acquiring resources with money from the Fund involves several stages. First, Congress must authorize the appropriation of money to be used for acquisition purposes. This authorization is contained in the Land and Water Conservation Fund Act itself, and the annual authorization of appropriations has grown steadily, since the Act was first promulgated, to its current level of $900 million.[107] The LWCF is maintained as a separate account in the Treasury of the United States.[108] Each year moneys are deposited into this account from several sources specified in the Act, up to the limit contained in the Act's annual authorization of appropriations.[109] Second, Congress must enact separate legislation authoriz-

104. Pub. L. No. 88-578, 78 Stat. 897 (1964) (current version at 16 U.S.C. §§ 460*l*-4 to 460*l*-11 (1982)).

105. 16 U.S.C. § 460*l*-4 (1982).

106. *Id.* *See also id.* §§ 460*l*-9(a), 460*l*-8(a) (1982).

107. *Id.* § 460*l*-5(c)(1) (1982).

108. *Id.* § 460*l*-5 (1982).

109. *Id.*

ing the acquisition of designated parcels of land for incorporation into the federal land systems.[110] Third, Congress must appropriate money out of the Fund to acquire the designated parcels. The LWCF Act also authorizes the Secretary of Interior to provide financial assistance to the states, pursuant to a matching grant program, from appropriations not made available for federal acquisitions.[111] Of the amounts appropriated by Congress, not less than forty percent "shall be available for federal purposes."[112]

Thus, no money deposited in the Fund is available for expenditure until separately appropriated by Congress.[113] If Congress fails to appropriate money in the Fund within two years of the time it is deposited there, the unappropriated amounts are automatically transferred to the miscellaneous receipts account of the Treasury.[114]

B. *Genesis of the Land and Water Conservation Fund*

The Land and Water Conservation Fund stemmed from the studies and suggestions of the Outdoor Recreation Resources Review Commission ("ORRRC," or "Commission"), a body created by Congress in 1958.[115] The bipartisan Commission was composed of members of both Houses of Congress and individuals appointed by the President as representatives of the business, education and environmental communities, among others. Congress authorized the ORRRC

> to inventory and evaluate the outdoor recreation resources and opportunities of the Nation, to determine the types and location of such resources and opportunities which will be required by present and future generations, and . . . to make comprehensive information and recommendations . . . available to the President, the Congress, and the individual states . . . .[116]

110. *See id.* § 460*l*-9(a). These agencies include the National Park Service, the Fish and Wildlife Service, the Bureau of Land Management and the National Forest Service.

111. *Id.* §§ 460*l*-7, 460*l*-8 (1982).

112. *Id.* § 460*l*-7 (1982).

113. *Id.* § 460*l*-6 (1982). *See also id.* § 460*l*-9(b) (1982).

114. *Id.* § 460*l*-6 (1982). Money derived from offshore oil and gas leases, however, remains in the Fund until appropriated by Congress to carry out the purpose of the Act. *Id.* § 460*l*-5(c) (1982).

115. *See generally* Futrell, *supra* note 97, at 260-61 (discussing the Commission's findings and recommendations).

116. H. R. REP. No. 900, 88th Cong., 1st Sess. 8 (1963) [hereinafter cited as H.R. REP. No. 900]; S. REP. No. 1364, 88th Cong., 2d Sess. 5 (1964), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 3633, 3637 [hereinafter cited as S. REP. No. 1364].

Responding to that charge, the Commission issued its final report in January, 1962. Deeming adequate provision for outdoor recreation "a national concern," and noting that state performance in outdoor recreation had been "uneven," the ORRRC urged creation of a grant-in-aid program by which federal funds would stimulate the expansion of state outdoor recreation resources and programs.[117] The Commission stated that "[t]he interest of the Federal Government can no longer be limited to preserving sites of national significance and exercising stewardship over its own lands."[118]

To implement the ORRRC findings and suggestions, President Kennedy in February, 1963, sent to Congress draft legislation for the establishment of a land and water conservation fund.[119] The President endorsed the Commission's findings that "the demand for outdoor recreation is growing dramatically" and that available recreation resources were inadequate to serve existing needs, much less the far greater level of demand that could be expected by the turn of the century.[120] "The need for an aggressive program to provide for outdoor recreation needs," the President stated, "is both real and immediate . . . ."[121] Wayne Aspinall, Chairman of the House Committee on Interior and Insular Affairs, introduced the legislation proposed by President Kennedy as H.R. 3846;[122] the bill eventually was enacted as the Land and Water Conservation Fund Act of 1965.

The Eighty-eighth Congress, like the Commission, was troubled by the increasing disparity between the amount of public land needed for recreational uses and the amount of public land available for those uses. Since the end of World War II, the country's 27% increase in population had been far outstripped by the 221% increase of use on three classes of federal and state recreation lands.[123] Compared to such dramatic increases, the growth in the

117. H.R. REP. No. 900, *supra* note 116, at 8-9; S. REP. No. 1364, *supra* note 116, at 5-6.

118. H.R. REP. No. 900, *supra* note 116, at 8; S. REP. No. 1364, *supra* note 116, at 5.

119. H.R. REP. No. 900, *supra* note 116, at 29-31; S. REP. No. 1364, *supra* note 116, at 18-20.

120. H.R. REP. No. 900, *supra* note 116, at 29-30; S. REP. No. 1364, *supra* note 116, at 19.

121. H.R. REP. No. 900, *supra* note 116, at 29; S. REP. No. 1364, *supra* note 116, at 18.

122. H.R. 3846, 88th Cong., 1st Sess. (1963).

123. According to the House Report, attendance at units of the National Park System had increased by 232%, while the National Forest System and state parks had experienced increases of 416% and 180%, respectively, between 1946 and 1960. H.R. REP. No. 900, *supra* note 116, at 7-8. *See also* S. REP. No. 1364, *supra* note 116, at 4.

acreage devoted to outdoor recreation was "far from comparable."[124] The legislature thus created the Land and Water Conservation Fund to narrow the gap between the rate of expansion of population and recreational facility use on the one hand, and the rate of expansion of acreage devoted to outdoor recreation on the other. The "main purpose" of the Act was to provide "a base for the improvement and extension of outdoor recreation opportunities for a healthy America."[125]

1. Federal Land Acquisition

Congress intended the Fund to address three problems of federal land acquisition. First, extensive private ownership still existed within the boundaries of federally-owned recreation areas. The

124. Between 1946 and 1960, the acreage in the National Park System increased by only about 15%. Acreage within state park systems increased by the same percentage between 1951 and 1960. H.R. REP. No. 900, *supra* note 116, at 8. *See also* S. REP. No. 1364, *supra* note 116, at 5.

125. H.R. REP. No. 900, *supra* note 116, at 22. This Report stated that the bill was founded on seven principal propositions:

> First, that opportunities for outdoor recreation are becoming increasingly important as our population becomes more and more urbanized.
>
> Second, that our usable outdoor recreation resources are lagging behind the growth in the population of the Nation and in that population's leisure time.
>
> Third, that it is important that presently available lands which are suitable for outdoor recreation purposes be preserved or acquired for public use within the very near future before they become either completely unavailable or prohibitively costly.
>
> Fourth, that (without prejudice to the good work that many Federal agencies are now doing and will continue to do) a major portion of the work to be done in preserving and acquiring such resources and making them available for public use lies with the States.
>
> Fifth, that it is proper to create a special continuing fund from which appropriations can be made to assist the States in this work and to supplement appropriations presently available to the Federal agencies for this type of activity.
>
> Sixth, that it is proper that a portion of the cost of providing such resources should be borne directly by their users and that it is equally proper that other portions be borne from specified sources; viz., Federal taxes on motorboat fuels and proceeds from the sale of surplus Federal real property.
>
> Seventh, that no hard and fast apportionment of the fund among the various uses to which it can be put is possible at this time, that a measure of flexibility in making such apportionments is necessary, and that the best way of assuring such flexibility is for the Congress to exercise its appropriating authority year by year on the basis of an informed discretion supported by Budget submissions and in the light of certain guidelines furnished by the legislation.

Id. at 26-27.

committees of both Houses agreed that these inholdings "ought to be acquired for either their recreational value or in order to improve administration."[126] Of the moneys accumulated in the Fund for federal acquisition, "a substantial part" would be used for the purchase of such inholdings.[127] Second, the Fund would respond to the "urgent" need to finance the creation of recreation areas of national significance within easy distance of large population centers, particularly in the East and Midwest.[128] Finally Congress was troubled by the difficulty of reimbursing costs incurred by water development agencies, such as the Corps of Engineers and the Bureau of Reclamation, in constructing reservoirs.[129] Since one of the main benefits of many reservoir projects was the availability of new recreation facilities, the Fund would be used to finance at least a portion of these reservoir projects.[130]

The House and Senate initially disagreed over whether funds appropriated for and allotted to federal agencies would be available not only for land acquisition but also for development. The House bill did not permit the Fund to be used for the latter purpose. The House Committee explained that, at least initially, it would be better "to concentrate on land acquisition and to depend on the established procedure of appropriations from the general fund of the Treasury to meet development needs."[131] The Senate, however, amended the House bill to permit use of funds for development purposes on specified federal lands.[132] The conferees resolved this disagreement in favor of the House version, declaring that

> the basic purpose of the bill, notwithstanding the provision that States may be allowed to use part of their share of appropriations from the fund for development, is to provide a means for catching up with the lag in land acquisition which . . . has developed over the years.[133]

126. *Id.* at 12; S. REP. No. 1364, *supra* note 116, at 7. As of January 1, 1963, there were approximately 462,000 acres of land within the outer boundaries of NPS areas which were not in federal ownership. *Id.*; H.R. REP. No. 900, *supra* note 116, at 12.

127. H.R. REP. No. 900, *supra* note 116, at 12; S. REP. No. 1364, *supra* note 116, at 7.

128. H.R. REP. No. 900, *supra* note 116, at 12; S. REP. No. 1364, *supra* note 116, at 7-8. *See generally* Futtrell, *supra* note 97.

129. H.R. REP. No. 900, *supra* note 116, at 12; S. REP. No. 1364, *supra* note 116, at 8.

130. H.R. REP. No. 900, *supra* note 116, at 12; S. REP. No. 1364, *supra* note 116, at 8.

131. H.R. REP. No. 900, *supra* note 116, at 13. Several members of the House Committee dissented from the Report, protesting that the bill discriminated in favor of land acquisition and against development programs. *Id.* at 49.

132. S. REP. No. 1364, *supra* note 116, at 9.

133. H.R. REP. No. 1847, 88th Cong., 2d Sess. 5 (1964), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 3660, 3662 [hereinafter cited as H.R. REP. No. 1847]. *Compare* Land and

Legislators also disagreed over the kinds of areas that could be purchased from the Fund for inclusion within the national forests.[134] In the version of the bill that was ultimately adopted, Congress specified that only 15% of the land purchased by the Forest Service be located west of the hundredth meridian,[135] and Congress limited the agencies to recreational purposes in their acquisitions.[136]

2. State Land Acquisition

The state acquisition provisions of the Act occasioned far less controversy than did the federal acquisition provisions. The ORRRC report had stressed that "the State governments have [the] dominant public responsibility and should play the pivotal role" in providing expanded outdoor recreation opportunities.[137] Therefore,

Water Conservation Fund Act of 1965, Pub. L. No. 88-578, § 6(a), 78 Stat. 897, 903 (1964) (concerning federal acquisitions) *with id.* at § 5(a), 78 Stat. 897, 900 (1964) (concerning state use of Fund moneys). The conferees perceived much less reluctance in Congress to make appropriations from conventional sources for development of existing recreation areas than for land acquisition. The conferees also doubted that if the Senate version of H.R. 3846 were adopted, the Fund would yield enough money to keep up with, let alone expand, the present level of expenditure for acquisition. H.R. REP. No. 1847, *supra* at 5. *See also* S. REP. No. 1071, 90th Cong., 2d Sess. 3 (1968), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2613, 2615 [hereinafter cited as S. REP. No. 1071]; H.R. REP. No. 1313, 90th Cong., 2d Sess. 3 (1968) [hereinafter cited as H.R. REP. No. 1313].

134. *See* H.R. REP. No. 900, *supra* note 116, at 13; S. REP. No. 1364, *supra* note 116, at 3.

135. This requirement was intended to reflect and, to a limited extent, to counteract the "predominance of federally owned lands in the West." S. REP. No. 1364, *supra* note 116, at 3.

136. The House Report stated:

> It is the intent of the committee that appropriations from the Fund will be available for the acquisition of lands within the national forest system which have outdoor recreation as a key value even though they may also have other key values. The legislative history and the language of the amendment alike makes it clear that such appropriations will not be available for acquisition of land which has little or no relation to outdoor recreation.

H.R. REP. No. 900, *supra* note 116, at 14. The bill as enacted (1) allowed acquisition of inholdings within the boundaries of wilderness areas of the national forest system as those boundaries are established at the time of acquisition, (2) limited acquisition in other forest areas (areas primarily of value for outdoor recreation purposes) to inholdings within the boundaries of the national forests at the time of enactment of the Act, but (3) notwithstanding this last restriction, allowed for the acquisition of land outside the boundaries of a forest at the time of acquisition, and which would "comprise an integral part of a forest recreational management area," up to a maximum of 500 acres per forest. *See* H.R. REP. No. 1847, *supra* note 133, at 4.

137. H.R. REP. No. 900, *supra* note 116, at 9; S. REP. No. 1364, *supra* note 116, at 5-6.

the Commission concluded, "it is extremely important to stimulate State activity."[138]

Congress agreed[139] and characterized the state matching fund provisions as "probably the most significant series of provisions in the bill."[140] It set forth three justifications for federal assistance to the states. First, such assistance would benefit the health and welfare of all American citizens by making more outdoor recreation opportunities available. Second, federal assistance would relieve the increasing pressure on the federal government to acquire and develop, on its own, "areas of less than national significance."[141] Third, since the U.S. population was becoming more and more mobile, citizens would be able to take advantage of state and local park systems all over the country regardless of their state of origin.[142] As enacted, the LWCF Act provides that the Secretary may make payments to the states, "subject to such terms and conditions as he considers appropriate and in the public interest to carry out the purposes of [the Act]," for outdoor recreation planning, acquisitions, or development by states.[143] Payments from the Fund to a state cannot cover more than fifty percent of the cost of planning, acquisition or development projects undertaken by the state, with the remainder to be borne by the state.[144]

Before the Secretary can provide financial assistance for state acquisition or development projects, the state must prepare and

138. H.R. REP. No. 900, *supra* note 116, at 9; S. REP. No. 1364, *supra* note 116, at 6.

139. H.R. REP. No. 900, *supra* note 116, at 9; S. REP. No. 1364, *supra* note 116, at 6.

140. H.R. REP. No. 900, *supra* note 116, at 9.

141. *Id.*

142. *Id.*

143. 16 U.S.C. § 460*l*-8(a) (1982).

144. *Id.* § 460*l*-8(c) (1982). The sums appropriated from the Fund for state planning, acquisitions or development are apportioned by the Secretary in accordance with the following formula: 40% of the first $255,000,000, 30% of the next $275,000,000 and 20% of all additional appropriations are apportioned equally among the states. *Id.* § 460*l*-8(b)(1) (1982). The Secretary must apportion the remaining appropriation on the basis of need in the manner which, in his judgment, will best accomplish the objectives of the Act. *Id.* § 460*l*-8(b)(2) (1982).

> The determination of need shall include among other things a consideration of the proportion which the population of each State bears to the total population of the United States and of the use of outdoor recreation resources of individual States by persons from outside the State as well as a consideration of the Federal resources and programs in the particular States.

Id.

submit to the Secretary a "comprehensive statewide outdoor recreation plan."[145] Funds may be provided to the state to assist in the preparation and maintenance of the comprehensive plan itself,[146] but Congress wanted the bulk of the state money from the Fund to be used by states, in accordance with their comprehensive plans, either for acquisition of land and waters[147] or for development of outdoor recreation facilities to serve the general public.[148] Before a state is entitled to receive any money from the Fund, it must agree to provide reports to the Secretary,[149] to establish accounting procedures[150] and to keep financial records[151] so the Secretary can insure that the money has been used in a manner consistent with the Act.[152] In addition, each state must submit to the Secretary an annual evaluation of programs assisted by money from the Fund.[153]

145. *Id.* § 460*l*-8(d) (1982). The plan is deemed adequate "if, in the judgment of the Secretary, it encompasses and will promote the purposes of" the Act, and if the governor of the state has certified that ample opportunity for public participation (as determined in accordance with criteria for public participation developed by the Secretary in consultation with others) in plan development and revision has been accorded. *Id.*

146. *Id.*

147. The Act prohibits the Secretary from providing financial assistance to states for the acquisition of land, waters or interests in land or waters from the United States for less than fair market value. *Id.* § 460*l*-8(e)(1) (1982). In addition, money from the Fund may not be used to cover "incidental costs relating to acquisition." *Id.*

148. *Id.* § 460*l*-8(e)(2) (1982).

149. *Id.* § 460*l*-8(f)(4)(1) (1982).

150. *Id.* § 460*l*-8(f)(4)(2) (1982).

151. Each recipient of assistance from the Fund must keep

> such records as the Secretary shall prescribe, including records which fully disclose the amount and the disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the costs of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

Id. § 460*l*-8(f)(5) (1982).

152. A state cannot convert any property acquired or developed with assistance received from the Fund to uses other than public outdoor recreation unless the Secretary finds the proposed conversion to be consistent with the state's comprehensive plan, and then only upon such conditions as the Secretary deems necessary to assure the substitution of reasonably equivalent recreation properties. *Id.* § 460*l*-8(f)(3) (1982).

153. The annual evaluation must include, among other things, a description of each project funded during the year, the source of other funds and the estimated cost of completion of the project. *Id.* § 460*l*-8(f)(7) (1982).

3. Funding Sources

The method of financing the Fund triggered relatively little disagreement in Congress.[154] In choosing the various sources of revenues to be collected into the Fund, Congress apparently relied on two basic principles: that those who use outdoor recreation facilities should be expected to pay their own way, at least in part,[155] and that if the federal government sells publicly-held resources to private owners, the revenues derived from such sales should be devoted to the purchase of new resources which will be of at least equal benefit to the public.[156]

The first theme justified the use of admission and user fees collected by various federal agencies (such as the National Park Service, the Bureau of Sport Fisheries and Wildlife, the Forest Service and the Bureau of Land Management) as revenue sources for the Fund. The House Committee asserted that

> those who directly benefit from . . . federal recreation installations [such as national parks, forests, and recreation areas] can reasonably be expected to pay a fraction of what it costs to provide them, particularly when the revenues in question will be devoted, as the bill proposes, to the furtherance of other such areas under state or federal auspices.[157]

The Senate Committee echoed this sentiment.[158] Congress used a similar rationale to justify the collection of motorboat fuel tax revenues into the Fund.[159]

154. The Senate Report noted that "[t]he method provided in H.R. 3846 of setting aside certain revenues from particular sources is neither unprecedented nor novel in any way." S. REP. No. 1364, *supra* note 116, at 17 (citing examples).

155. H.R. REP. No. 900, *supra* note 116, at 30; S. REP. No. 1364, *supra* note 116, at 20.

156. H.R. REP. No. 900, *supra* note 116, at 18.

157. *Id.* at 19.

158. The Senate Report stated that

> the principle of charging fees for recreation use of Federal areas is neither new nor inequitable. It is in complete accord with the American tradition of full and fair payment for value received. . . . People who use these areas receive special benefits which do not accrue to the public at large. In fairness to the general taxpayer, who carries the major burden of support for these areas, the recipient of these special benefits—the people who use the areas for recreation purposes—should pay a modest fee for the resources used.

S. REP. No. 1364, *supra* note 116, at 14. *See also* H.R. REP. No. 742, 92d Cong., 1st Sess. 4, 7 (1971), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2824, 2827 [hereinafter cited as H.R.

Congress implemented the second theme—to offset, at least in part, the disposition of federally-owned resources by the acquisition of replacement resources with the revenues received from the initial sale—by financing the Fund with net proceeds from the sale of federal surplus real property (and related personal property).[160] By directing these revenues into the Fund, Congress intended to

> provid[e] for an indirect land-for-land exchange—a conversion of one capital asset which is no longer needed by the Government into another which is needed and may otherwise be lost or, to put it otherwise, a permanent resource for the Nation that will steadily appreciate in value with the passage of time.[161]

C. *Amendments to the Land and Water Conservation Fund Act, 1965-1981*

1. 1968 Amendments

In the course of amending the Act in 1968,[162] Congress again applied the principle that disposition of federal resources should be offset by acquisition of new resources. The purpose of the 1968 amendment was "to strengthen the [Act] by providing new sources of gravely needed revenue for the fund."[163] The Senate Committee on Interior and Insular Affairs considered the fund to be, "on the whole . . . a success during the first three years of operation," but

REP. No. 742]; S. REP. No. 395, 91st Cong., 1st Sess. 3 (1969), *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 3402, 3403-04.

159. *See, e.g.*, H.R. REP. No. 900, *supra* note 116, at 17; S. REP. No. 1364, *supra* note 116, at 14, 20.

160. The Act, as initially adopted, authorized a fourth revenue source for the Fund, in addition to revenues from sales of surplus property, admission and user fees, and motorboat fuel taxes. Beginning in the third year after the Fund was established, the Act authorized the advance appropriation of an average of up to $60 million a year for eight years. Pub. L. No. 88-578, § 4(b), 78 Stat. 900 (1964). *See also* H.R. REP. No. 900, *supra* note 116, at 21. Any amounts so appropriated would be repaid from the Fund's other sources of revenue without interest, "beginning in the 11th full year of operations. . . ." *Id.* at 22; *see id.* at 24, 41.

161. H.R. REP. No. 900, *supra* note 116, at 18. *See also* S. REP. No. 1364, *supra* note 116, at 10.

162. The Act was amended by Pub. L. No. 90-401, 82 Stat. 354 (1968). The 1968 amendments were derived from S. 1401, sponsored by Senator Henry M. Jackson, and from H.R. 8578 and similar bills introduced by Congressmen Foley, Saylor, Morton, Dingell and Teague. *See* S. REP. No. 1071, *supra* note 133, at 2; H.R. REP. No. 1313, *supra* note 133, at 3.

163. S. REP. No. 1071, *supra* note 133, at 1.

added that "the money has not been sufficient to fulfill the objectives of the law, and unless new revenues are provided, the State and the Federal recreation programs are in jeopardy."[164] The Senate Committee therefore viewed the 1968 amendment as "an emergency measure to aid the State and Federal agencies in maintaining and developing their authorized outdoor recreation programs."[165]

During the first three calendar years of its existence, the Fund had received more than $289 million in revenue.[166] These receipts were not only much less than had been expected at the time the Fund was created,[167] but they also fell substantially short of the amounts appropriated by Congress from the Fund.[168] In particular, receipts from the admission and user fee program were only 15 to 18% of what had been hoped for.[169] Further, both state and federal demands upon the fund far outstripped what was expected when the Fund was created.[170]

Congress attributed these shortfalls to several factors. Perhaps most important was "the skyrocketing rise in land prices."[171] Average land prices had increased at a rate of ten percent annually; the cost of land for recreation was increasing at a "considerably higher rate."[172] Moreover, prices tended to rise still higher when it became

164. *Id.* at 3.

165. *Id.* at 10.

166. Between January 1, 1965, and December 31, 1967, the Fund received revenues of $289,239,336, and $53,650,087 had been appropriated for the remainder of fiscal year 1968. Of this amount, $214,314,808 was transferred or obligated to the States, the National Park Service ("NPS") received $78,625,460 and the Forest Service ("FS") and the Bureau of Sport Fisheries and Wildlife ("BSFW") were allocated smaller amounts ($48,459,457 and $2,047,915 respectively). During this initial three-year period, the NPS acquired 86,143 acres with funds made available to it under the Act. The FS purchased 219,515 acres, and the BSFW 2,239 acres. S. REP. No. 1071, *supra* note 133, at 3, 6 (1968). *See also* H.R. REP. No. 1313, *supra* note 133, at 3.

167. Receipts during the first three years of the Fund's operation amounted to only 63% of what had been expected during the House Committee's consideration of H.R. 3846. *See* H.R. REP. No. 1313, *supra* note 133, at 4.

168. By the end of 1967, Congressional appropriations exceeded Fund receipts by $152 million. *See* S. REP. No. 1071, *supra* note 133, at 6.

169. H.R. REP. No. 1313, *supra* note 133, at 4, 6.

170. *Id.* at 5.

171. S. REP. No. 1071, *supra* note 133, at 3.

172. *Id.* at 11, quoting a letter from Stewart Udall, Secretary of the Interior, to Senator Jackson, Chairman of the Senate Committee on Interior and Insular Affairs. In a study entitled "Recreation Land Price Escalation," the Bureau of Outdoor Recreation estimated that average land prices were increasing in 1968 at rates varying between 5% and 10%. *See* H.R. REP. No. 1313, *supra* note 133, at 4. *See also* S. REP. No. 1071, *supra* note 133, at 4.

known that the federal government was considering the acquisition of an area for recreation purposes.[173]

The failure of Fund revenues to meet expected levels caused an early acquisition backlog. By 1966, the value of projects authorized but not yet funded totalled $318 million for the NPS alone.[174] Congress projected that, absent a change in the funding mechanisms of the Act, a backlog of up to $2.6 billion could develop by 1978.[175] The Department of the Interior suggested that unless the Fund were strengthened, there would not be adequate funds to purchase parks and other recreational resources "before they are priced out of reach or committed irretrievably to other uses . . . "[176]

Congress responded in 1968 by adding a portion of the receipts from federal mineral leases of lands on the Other Continental Shelf ("OCS") to the Fund's revenue sources.[177] That decision was based on

> the fully tenable proposition that the revenues from one natural resource which belongs to all the people of the United States—in this instance a depleting resource—should be reinvested in outdoor recreation areas and developments which become a part of the permanent estate of the Nation for the use, benefit, and enjoyment of all its citizens of this and future generations.[178]

173. S. REP. No. 1071, *supra* note 133, at 3.

174. *Id.* at 4. This figure included authorizations for the acquisition of property for the NPS for which funds had not yet been appropriated from the Fund, estimated increases in existing statutory appropriation authorizations and appropriations for areas where there were no statutory limitations on the amount authorized to be appropriated. *Id.* at 12-13.

175. *Id.* at 4.

176. *Id.* at 11-12.

177. Such leases are governed by the Outer Continental Shelf Lands Act ("OCSLA"), Pub. L. No. 83-212, ch. 345, 67 Stat. 462 (1953) (current version at 43 U.S.C. §§ 1331-1356 (1976 & Supp.V 1981)). As introduced in 1968, S. 1401 would have provided three new sources of LWCF funding: revenues received by the federal government under the OCSLA, the federal share of receipts under the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1976 & Supp. V 1981), and revenues from the lease or sale of national forest land products pursuant to 16 U.S.C. § 499 (1982). *See* S. REP. No. 1071, *supra* note 133, at 4. The House Committee struck the provisions relating to the latter two sources. *See* H.R. REP. No. 1313, *supra* note 133, at 8.

178. S. REP. No. 1071, *supra* note 133, at 2. The House Committee expressed a similar sentiment. *See* H.R. REP. No. 1313, *supra* note 133, at 5. *See also* S. REP. No. 367, 94th Cong., 1st Sess. 5 (1975), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2442, 2443 [hereinafter cited as S. REP. No. 367]; H.R. REP. No. 1021, 94th Cong., 2d Sess. 3 (1976) [hereinafter cited as H.R. REP. No. 1021].

By 1968, revenues from the three sources already in the law amounted to approximately $100 million a year.[179] The 1968 amendments authorized appropriations from unobligated revenues in the general fund of the Treasury sufficient to bring the total receipts of the fund up to $200 million a year through fiscal year 1973; if these appropriations failed to raise receipts to the $200 million ceiling, sufficient receipts from OCS activities would be covered into the Fund to make up the deficit.[180]

The 1968 amendments included several mechanisms for alleviating rapid land price escalation. Congress gave the Secretary of the Interior limited authority to purchase land, or binding options to purchase land, in advance of congressional appropriations.[181] The Secretary was authorized to spend up to $30 million per year in contracting for the acquisition of property within areas that Congress had authorized for acquisition but for which no money had yet been appropriated from the Fund.[182] In addition, Congress permitted the Secretary to spend not more than $500,000 annually in acquiring options on lands and waters within the exterior boundaries of any area authorized by law to be included in the NPS.[183] Thus, both provisions authorized the Secretary to take speedy administrative action following congressional authorization to pur-

179. S. REP. No. 1071, *supra* note 133, at 7.

180. *See* Pub. L. No. 90-401, § 2, 82 Stat. 354, 355 (1968) (current version at 16 U.S.C. § 460*l*-5(c) (1982)). *See also* S. REP. No. 1071, *supra* note 133, at 7. The House version of S. 1401 authorized the appropriation into the Fund of receipts from OCSLA activities to the extent that revenues from the Fund's original three sources fell below $200 million annually. S. 1401, 90th Cong., 2d Sess., § 2, 114 CONG. REC. 14,655, 14,656 (1968) [hereinafter cited as S. 1401]. The Senate version authorized appropriations from the general fund of the Treasury of amounts sufficient to bring total annual Fund receipts to $200 million. *Id.* The conferees combined the two versions. *See* H.R. REP. No. 1598, 90th Cong., 2d Sess. 4 (1968), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2631, 2632 [hereinafter cited as H.R. REP. No. 1598]. The Senate Committee doubted that even the addition of this new source of revenues would be enough to meet the recreational needs of the states and the federal program. *See* S. REP. No. 1071, *supra* note 133, at 7 ("substantially greater revenues are required").

181. Pub. L. No. 90-401, § 4, 82 Stat. 354, 355 (1968) (current version at 16 U.S.C. §§ 460*l*-10a and 460*l*-10b (1982)).

182. *Id. See also* S. REP. No. 1071, *supra* note 133, at 7, 12.

183. Pub. L. No. 90-401, § 4, 82 Stat. 354, 355 (1968) (current version at 16 U.S.C. § 460*l*-10b (1982)). The minimum length for any such option was set at two years, and the sums expended for the purchase of the option would be credited to the purchase price of the land or water. *See also* S. REP. No. 1071, *supra* note 133, at 7-8; H.R. REP. No. 1598, *supra* note 180, at 5; H.R. REP. No. 1313, *supra* note 133, at 7.

chase a particular area, before the cost of the targeted area escalated sharply.[184]

Congress in 1968 also added two other provisions intended to increase Fund revenues and minimize land price escalation. The Secretary of the Interior was authorized to sell or lease interests in tracts of land acquired for outdoor recreational purposes but which are not immediately required for that purpose.[185] Such transactions would enable the federal government to recoup funds initially spent for land acquisition and reinvest them in the Fund.[186] The amendments also permitted the Secretary to acquire privately held lands within the exterior boundaries of the NPS in exchange for federal

184. S. REP. No. 1071, *supra* note 133, at 1. Congress perceived two periods during which the delay in acquisition by the federal government contributes to escalating acquisition costs. First, land prices in new parks and recreation areas tend to escalate between the time that a bill to create such an area is introduced and the time it becomes law. Second, additional escalation occurs between the time the bill authorizing acquisition is enacted and the time appropriations become available to fund the project. *See* H.R. REP. No. 1313, *supra* note 133, at 7. The advance contract and option authorization focused on the second stage of escalation.

Both the House and Senate Committees expressed some reservations about the advance contract authority. The House Committee "frankly regards this provision as experimental—and it therefore intends to watch its progress quite closely." *Id.* The Senate Committee stressed

> its intent that the authorization for advance contract authority should be exercised with due care and under adequate review procedures. It should be utilized only in connection with the acquisition of land, water, or interests therein within newly authorized recreation areas, or in other authorized areas where there is need to move swiftly.

S. REP. No.1071, *supra* note 133, at 7. *But see* S. REP. No. 395, 91st Cong., 1st Sess. 4 (1969); H.R. REP. No. 1000, 91st Cong., 2d Sess. 5 (1970), *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 3402, 3405.

185. Pub. L. No. 90-401, § 5(a), 82 Stat. 354, 356 (1968) (current version at 16 U.S.C. § 460*l*-22(a) (1982)). This authority was limited. For example, the Secretary was not permitted to dispose of areas in constituted national parks or in national monuments of scientific significance. In addition, it was Congress' intent that the Secretary could not sell or lease for the purpose of permitting new commercial developments, such as residential subdivisions, within national parks, seashores and recreation areas. Leases and sales could only be made if the resulting uses of the land were compatible with the administration of adjacent federal areas. *See* S. REP. No. 1071, *supra* note 133, at 1-2, 8, 15; H.R. REP. No. 1598, *supra* note 180, at 5. *See also* H.R. REP. No. 1225, 91st Cong., 2d Sess. 10 (1970) [hereinafter cited as H.R. REP. No. 1225].

186. *See* S. REP. No. 1071, *supra* note 133, at 8. The House Committee considered but rejected another technique for achieving the same end as the sale and lease-back authorization—the purchase by the government of scenic easements and other less-than-fee interests in land as a substitute for full fee acquisition. The Committee concluded that often the cost of a scenic easement is so close to that of the fee that there is no substantial advantage in using this device when its disadvantages are taken into account. H.R. REP. No. 1313, *supra* note 133, at 7-8.

lands under his jurisdiction on an approximately equal value basis.[187] Although exchanges would not lessen the economic cost of acquisition, they would reduce the amounts Congress had to appropriate for acquisition, and they could be effected in advance of appropriations for the project.[188] Thus, the exchange authority, like the advance contract and option authority, could be used to mitigate land price escalation.[189]

2. 1970 Amendments

The operation of the Fund in the two years following adoption of the 1968 amendments apparently convinced Congress that it had been wise to provide a guaranteed annual authorization of appropriations of $200 million. In 1970, the House Committee on Interior and Insular Affairs stated that "[t]his guaranteed annual income to the Land and Water Conservation Fund has transformed it from an unpredictable recreation program into the useful and reliable tool which it was always intended to be."[190] The states' response to the availability of federal matching funds was particularly heartening. By 1970, more than $300 million had been distributed to the states for use in connection with outdoor recreation programs.[191] During each fiscal year from 1965 through 1970, a greater percentage of the cumulative funds appropriated for state use was actually obligated for state projects.[192]

187. Pub. L. No. 90-401, § 5(b), 82 Stat. 356 (1968) (current version at 16 U.S.C. § 460*l*-22(b) (1982)). Timber lands subject to a harvest under a sustained yield program could not be used for exchange purposes. *See* H.R. REP. No. 1598, *supra* note 180, at 5.

188. *See* S. REP. No. 1071, *supra* note 133, at 16.

189. One final change included in the 1968 amendments related to the collection into the Fund of admission and user fees at national parks and other federal recreation areas. Effective March 31, 1970, Congress repealed the provisions of the original Act relating to the establishment of a system of admission and user fees, thereby returning to the individual agencies the power to fix such fees. Fees collected by the agencies would still be covered into the Fund, but would be credited to the collecting agency and would be available for appropriation for the use of the collecting agency. Pub. L. No. 90-401, §§ 1(a), 1(d), 82 Stat. 354, 354-55 (1968) (current version at 16 U.S.C. § 460*l*-10c (1982)). *See also* historical notes to 16 U.S.C. § 460*l*-5(a) (1982); H.R. REP. No. 1598, *supra* note 180, at 4; H.R. REP. No. 1313, *supra* note 133, at 3, 6. The effective date of the repeal was later changed to December 31, 1971. Pub. L. No. 91-308, § 1, 84 Stat. 410 (1970).

190. H.R. REP. No. 1225, *supra* note 185, at 5. *See also id.* at 7 (the guaranteed annual income to the Fund "has produced a stable program allowing a reasonable rate of progress").

191. *See id.* at 4, 27-28.

192. *See id.* at 7-8.

Because the state matching grant program had been so successful, Congress decided to increase the guaranteed annual appropriations into the Fund from $200 million to $300 million, beginning with fiscal year 1971.[193] By increasing the level of the Fund, Congress also intended to enable the federal agencies with outdoor recreation responsibilities to acquire the resources necessary to meet those responsibilities.[194] The funding increase would not only help to reduce the backlog of congressionally authorized but as yet unacquired recreation areas,[195] it would also help to meet the growing demand for new urban-oriented recreation areas.[196] Funding at the newly authorized level until 1989, the House committee concluded, "should be adequate to enable the nationwide effort to expand outdoor recreation opportunities to make reasonable progress."[197]

In addition to increasing annually authorized appropriations to $300 million, Congress took further steps in 1970 to facilitate state and local development of outdoor recreation facilities. It expanded the opportunities of state and local governments to purchase surplus federal property for parks and recreation purposes at discounted prices or at no cost.[198] Congress intended to accelerate "the develop-

193. Pub. L. No. 91-485, § 1, 84 Stat. 1084 (1970).

194. H.R. REP. No. 1225, *supra* note 185, at 8.

195. The House Committee estimated that more than $165 million was needed to complete the land acquisition programs in authorized areas of the NPS and an additional $320 million would be needed for the FS and the BSFW over the next five years. *Id.* "This, of course, does not include any funds which will be needed if new areas are authorized by the Congress. . . . [I]t is still in the public interest to accelerate the program while the areas worthy of national recognition remain available for purchase at a relatively reasonable price." *Id.*

196. The Committee stated that the Fund should be used only to purchase "nationally significant areas." *Id.* Each proposed urban-oriented recreation area "must be reviewed on its individual merits, but possible authorization by Congress should not be foreclosed by the inability of the Land and Water Conservation Fund to underwrite the land acquisition costs which will be incurred." *Id.*

197. *Id.* at 10.

198. Prior to the 1970 legislation, surplus federal property could be purchased by states and their political subdivisions for park and recreation purposes at 50% of fair market value, under § 13(h) of the Surplus Property Act of 1944, 50 U.S.C. app. § 1622(h) (1976), as continued in effect by the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 484 (1976). *See* S. REP. No. 227, 91st Cong., 1st Sess. 3 (1969) [hereinafter cited as S. REP. No. 227]. According to the Senate Committee on Interior and Insular Affairs, however, these surplus property laws had not been effective—the need for state-owned outdoor recreation areas was not being met, "particularly in urban areas where the need is the greatest." *Id.* at 4. Even the state matching grant program under the Act was

ment of sorely needed recreation opportunities in urban areas"[199] without requiring the appropriation of new funds or the use of condemnation authority.[200]

3. 1976 Amendments

By 1976, it was clear that even the $300 million level of guaranteed appropriations could not fully carry out the purposes of the Act.[201] Both state and federal agencies had taken advantage of the

not generating enough revenue to keep up with the growing needs for outdoor recreation at the state and local levels. *Id.* at 6.

The 1970 legislation, in attempting to encourage the sale of surplus federal property to the states at little or no cost, authorized the Administrator of the General Services Administration ("GSA") to assign to the Secretary of the Interior for disposal such surplus federal property as the Secretary recommends for use as a public park or recreation area. The Secretary was then authorized, subject to the approval of the GSA Administrator, to sell or lease such surplus property for public park or public recreational purposes to any state or political subdivision thereof. In fixing the sale or lease value of the property to be disposed of, the Secretary was directed to take into consideration any benefit which has accrued or may accrue to the United States from the use of the property by the purchaser. The deed for any disposition of surplus federal property was required to include a provision that the property would revert to the United States in the event it ceased to be used and maintained for the purpose for which it was conveyed. *See* Pub. L. No. 91-485, § 2, 84 Stat. 1084 (1970).

199. S. REP. No. 227, *supra* note 198, at 9, quoting letter from Russell E. Train, Under Secretary of the Interior, to Senator Jackson, Chairman of the Senate Committee on Interior and Insular Affairs. *See also* H.R. REP. No. 1225, *supra* note 185, at 12.

200. S. REP. No. 227, *supra* note 198, at 6.

201. The Act had been amended three times in the interim, each time in connection with changes in the scope of the programs for collection by federal agencies of admission and user fees. In 1972, Congress prohibited the charging of admission fees except at designated units of the NPS and at National Recreation Areas administered by the Department of Agriculture. Fees collected at these areas were routed to a special account of the U.S. Treasury, to be administered separately from but in conjunction with revenues in the Fund. Revenues from fee collections would be available for appropriation in connection with any authorized outdoor recreation function of the collecting agency. Pub. L. No. 92-347, § 2, 86 Stat. 459 (1972). In enacting these provisions, Congress intended to limit collection of admission fees to those areas where admission could be uniformly controlled at established and staffed entrances where fees could be collected and explained. *See* H.R. REP. No. 1164, 92d Cong., 2d Sess. 6 (1972), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2843, 2844. *See generally* H.R. REP. No. 742, *supra* note 158; S. REP. No. 490, 92d Cong., 1st Sess. (1971).

In 1973, the Act was again amended to limit the authority of the Army Corps of Engineers to charge recreation use fees. Pub. L. No. 93-81, 87 Stat. 178 (1973). *See* S. REP. No. 312, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 1685; S. REP. No. 250, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 1683; H.R. REP. No. 212, 93d Cong., 1st Sess. (1973). One year later, Congress reinstated the authority of federal agencies to charge reasonable fees for the use of campgrounds and other special facilities at federally-owned and operated recreation sites. Pub. L. No. 93-303, 88 Stat. 192 (1974). *See* H.R. REP. No. 1076, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3258; S. REP. No. 745, 93d Cong., 2d Sess. (1974).

increased funds made available since 1970.[202] Appropriations from the Fund were still not sufficient, however, to meet the burgeoning demand for outdoor recreation facilities at either the state or federal level. The shortfall was aggravated by inflation, which had actually caused a decrease in the real purchasing power of the Fund as compared to pre-1970 levels.[203] As a result, there was continued growth in the backlog of lands authorized by Congress for federal acquisition but for which no appropriations had been made.[204] The House Committee on Interior and Insular Affairs deemed the need for an increase in federal money "urgent," since the Fund had become "the only source of the appropriations used for the recreation land acquisition programs of the affected federal land managing agencies."[205]

Similarly, on the state side, an increasing emphasis on land acquisition and development programs near urban areas intensified the need for matching funds.[206] But many desired state projects could not be undertaken because sufficient grant money was un-

In 1980, Congress eliminated the special account established in 1972 to receive admission fee revenues. Henceforth, collections from federal agencies would be paid directly into the Fund, "to be available for appropriation for any or all purposes authorized by the Land and Water Conservation Act of 1965, as amended, without regard to the source of such revenues." Pub. L. No. 96-514, tit. I, 94 Stat. 2960 (1980).

202. The Senate Committee on Interior and Insular Affairs noted that the Fund "has met with enthusiastic response at all levels of government." S. REP. No. 367, *supra* note 178, at 5. The House Committee on Interior and Insular Affairs was even more complimentary: "In any consideration of efforts to improve the quality of life of our nation, the Land and Water Conservation Fund must rank as a major positive influence." H.R. REP. No. 1021, *supra* note 178, at 4. On the state side, according to the Senate Committee, "the Fund has brought forth a massive response"—the matching grant program had provided more than $1.2 billion since 1965 for state outdoor recreation projects. *See* S. REP. No. 367, *supra* note 178, at 5, 30-32; H.R. REP. No. 1021, *supra* note 178, at 3.

203. The House Committee on Interior and Insular Affairs estimated that by 1976, the $300 million level of the Fund initially authorized in 1970 was worth only $184 million in 1970 dollars. *See* H.R. REP. No. 1021, *supra* note 178, at 4.

204. During hearings in 1975 before the Senate Subcommittee on Parks and Recreation, the Administration estimated that federal recreation land acquisition backlogs exceeded $2.9 billion. *See* S. REP. No. 367, *supra* note 178, at 5. By mid-1975, the NPS alone had developed a backlog of approximately $573 million worth of authorized but unacquired land. *Id.* at 24. *But see id.* at 13 (estimating NPS backlog at more than $700 million). By early 1976, recreation land acquisition needs within the FS were estimated to exceed $1 billion. *See* H.R. REP. No. 1021, *supra* note 178, at 4.

205. H.R. REP. No. 1021, *supra* note 178, at 6-7. "In the case of the National Park Service, the fund has become the sole federal funding source for land purchases within the system administered by the agency." *Id.* at 4.

206. *Id.* at 6-7.

available.[207] In short, "[t]he identified needs for park and recreation purposes have apparently far exceeded the authorized capacity of the fund at its current level."[208]

Congress was inclined to take prompt remedial action for another reason. The House Committee on Interior and Insular Affairs noted that

> the increasing rate of allocation and development of lands for other purposes across the Nation is rapidly depleting, for all time, the land resources available for preservation and outdoor recreation use. Once gone, with particular regard to unique resource areas, they are usually gone forever.[209]

To prevent such irreparable losses, the guaranteed level of appropriations to the Fund had to be increased. Congress turned again to OCS oil leasing receipts as the source of the additional Fund revenues. When OCS revenues were first channelled into the Fund in 1968, "it was anticipated that a substantial percentage of the revenues from this sale of a non-renewable national asset would be returned to public and facilities ownership through the Fund."[210] But the acceleration of the OCS leasing program[211] had greatly increased revenues without a concomitant increase in the amount of these revenues allocated to the Fund.[212] Therefore, a substantial increase in the level of the Fund, to be derived from OCS receipts, was needed to again achieve the transfer of a substantial percentage of those receipts into "the lasting investments" made by the Fund.[213]

207. The House Committee on Interior and Insular Affairs cited a survey which found that the states would be able to activate some $600 million worth of projects in fiscal year 1977 if matching grants were available. State administrators testified before the Committee that state and local governments had both the identified needs and the funding capabilities to effectively utilize a matching program at a much higher level. *Id.* at 4.

208. *Id.*

209. *Id.* With respect to lands authorized for acquisition but not yet acquired due to a shortfall in appropriations, "in some cases, there may even be irreparable damage done by adverse use or development on lands pending acquisition." *Id.* at 7.

210. *Id.* at 4.

211. By 1976, OCS leasing revenues totalled over $4 billion annually. *Id.* at 11.

212. During the first four years that OCS leasing revenues were covered into the Fund, about 34% of total OCS receipts were transferred to the Fund. In the next three years, by contrast, only 5% of the receipts were committed to the Fund. *Id.* at 4.

213. *Id.* The Senate Committee on Interior and Insular Affairs described its version of the 1976 amendments to the Act as follows: "Title I of S. 327 makes the policy statement that to the extent possible Federal expenditures for recreation land acquisition and the preservation

The 1976 amendments to the Act increased the funding level by stages, from the existing guaranteed level of $300 million per year to $600 million in fiscal year 1978, $750 million in fiscal year 1979, and $900 million during each of the fiscal years 1980 through 1989.[214] The increased revenues would again be derived from unappropriated funds in the general treasury account. If the guaranteed ceiling was not reached from such appropriations, coupled with receipts from other sources of the Fund, OCS leasing revenues would provide the remainder of each year's funds.[215] The level of the Fund was increased incrementally in response to the Administration's concern that an immediate and dramatic increase in the authorized level of the Fund would increase inflationary pressures,[216] and in order to provide for "an orderly transition to a higher level of funding" for both the federal and state programs.[217]

of our national heritage should be paid for out of revenues generated by the depletion of our natural resources." S. REP. No. 367, *supra* note 178, at 13.

214. Pub. L. No. 94-422, § 101(1), 90 Stat. 1313 (1976). The Senate Committee had recommended an immediate increase in annually authorized appropriations from $300 million to $1 billion. *See* S. REP. No. 367, *supra* note 178, at 8. The House version of the bill would have raised the annual authorization to $450 million in fiscal year 1978, $625 million in fiscal year 1979, and $800 million annually for the remaining life of the Fund. *See* H.R. REP. No. 1021, *supra* note 178, at 2, 7. The measure enacted was a compromise arrived at in conference. *See* H.R. REP. No. 1468, 94th Cong., 2d Sess. 14 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2462, 2462 [hereinafter cited as H.R. REP. No. 1468].

215. Pub. L. No. 94-422, § 101(1), 90 Stat. 1313 (1976).

216. *See* H.R. REP. No. 1021, *supra* note 178, at 6. The Interior Department opposed the enactment of the increased funding provision "because we believe that such an increase in the authorized level of the Fund at this time would jeopardize the Administration's efforts to hold down Federal spending." *Id.* at 15, quoting letter from Nathaniel P. Reed, Assistant Secretary of the Interior, to James A. Haley, Chairman, House Committee on Interior and Insular Affairs. *See also id.* at 16-17 (Department of Agriculture opposition to the bill); S. REP. No. 367, *supra* note 178, at 23-24 (Interior Department opposition expressed to the Senate Committee on Interior and Insular Affairs); S. REP. No. 162, 95th Cong., 1st Sess. 3 (1977), *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 322, 323 [hereinafter cited as S. REP. No. 162].

The House Committee disagreed with the Administration's claim that an increase in the level of the Fund would have an inflationary impact on the economy:

> Analyses of the increasing costs of these unacquired lands [*i.e.*, those authorized but not yet acquired] indicate that their purchase prices are generally increasing at a rate exceeding that of inflation. Thus, an increase in the fund which would result in expeditious federal land acquisition could well mean a decreased long-term effective cost to the federal government. Land acquisition programs should also have minimal inflationary impact on the local economies where the purchases occur.

H.R. REP. No. 1021, *supra* note 178, at 13.

217. *Id.* at 6.

The 1976 amendments also affected the provisions of the Act governing the allocation of funds between the federal and state programs. Henceforth, if the states were unable to provide matching funds for the full 60% of annual appropriations allocated for state use, then the unmatched money in effect could be distributed to the federal agencies which were guaranteed at least a 40% share.[218] This change was prompted by congressional concern over the continuing accumulation of unappropriated funds, despite the large backlog of lands authorized for purchase by federal agencies but not yet acquired.[219]

Congress in 1976 also altered the manner in which funds could be spent under both the federal and state programs. The amendments clarified the extent to which the Fund could be used to acquire land for the protection of endangered species or for use as a wildlife refuge.[220] The class of national forest areas which could be pur-

218. *See* Pub. L. No. 94-422, § 101(2), 90 Stat. 1313 (1976) (current version at 16 U.S.C. § 460*l*-7 (1982)). Prior to the 1976 amendments, appropriations were allocated 40% for federal purposes and 60% for state purposes, in the absence of a provision to the contrary in an appropriations act. *See* H.R. REP. No. 1021, *supra* note 178, at 22. The 1976 amendments also eliminated an outdated provision which had given the President the power, during the first five years in which appropriations were made from the Fund, to vary the 40 to 60% allocation by not more than 15% to meet the current relative needs of the states and the federal government. *Compare* Pub. L. No. 88-578, § 4(a), 78 Stat. 900 (1964), *with* Pub. L. No. 94-422, § 101(2), 90 Stat. 1314 (1976). *See also* H.R. REP. No. 1021, *supra* note 178, at 7, 22.

219. *See* H.R. REP. No. 1468, *supra* note 214, at 16. The conferees committee attributed the backlog of unappropriated funds to "the result of past years when the Federal portion was reduced drastically." *Id.* The conferees expressed their strong belief

> that the present unappropriated moneys in the fund should be immediately released and that no backlog should be permitted to occur again. The ability of the Congress to control the activities of the Federal agencies should insure that any portion of the normal 60 percent available to the state which could not be matched is in fact spent by the federal agencies to preserve and protect those areas which the Congress and the President have agreed should be preserved for future generations.

Id.

220. *See* Pub. L. No. 94-422, § 101(4), 90 Stat. 1317 (1976) (current version at 16 U.S.C. § 460*l*-9(a)(1) (1982)). As originally adopted, the Act permitted the Fund to be used to purchase any "national areas which may be authorized for the preservation of species of fish or wildlife that are threatened with extinction." Pub. L. No. 88-578, § 6(a)(1), 78 Stat. 903 (1964). The Act was amended in 1973 to authorize acquisitions with Fund moneys of lands, waters, or interests therein whose acquisition was authorized under § 5(a) of the Endangered Species Act of 1973, (Pub. L. No. 93-205, § 5, 87 Stat. 889 (current version at 16 U.S.C. § 1534(a) (1982))), and which were needed for the purpose of conserving endangered or threatened species of fish, wildlife or plants. *See* Pub. L. No. 93-205, § 13(c), 87 Stat. 902 (1973). The 1976 conference committee explained that acquisitions of resources for these purposes were

chased with Fund money was also expanded.[221] On the state side, several amendments were aimed at assisting the development of additional recreation opportunities in urban and highly populated areas. The maximum grant allocation percentage to which any one state is eligible was raised from 7 to 10%.[222] The formula for allocating matching grants among the states was modified,[223] and a new provision permitted a limited amount of federal grant money to be used for sheltered outdoor recreation facilities.[224]

4. 1977 Amendments

Despite the substantial increase in revenues covered into the Fund as a result of the 1976 amendments, Congress was still con-

appropriate even if no recreational facilities were developed on the purchased land. *See* H.R. REP. No. 1468, *supra* note 214, at 9-10.

221. Appropriations from the Fund could now be used to purchase inholdings not only within wilderness areas of the FS and other areas of national forests as the boundaries of those forests existed on the effective date of the original Act (January 1, 1965), but also within purchase units approved by the National Forest Recreation Commission subsequent to January 1, 1965. The limitation on the acquisition of lands adjacent to but outside of a national forest boundary was raised from 500 to 3000 acres, provided such lands comprise an integral part of a forest recreational management area. Finally, the limitation on the addition of lands west of the hundredth meridian to not more than 15% of the national forest lands purchased through the Fund was eliminated with respect to areas authorized by specific Acts of Congress. *See* Pub. L. No. 94-422, § 101(4), 90 Stat. 1318 (1976) (current version at 16 U.S.C. § 460*l*-9(a)(1) (1982)). *See also* H.R. REP. No. 1021, *supra* note 178, at 10.

222. *See* Pub. L. No. 94-422, § 101(3), 90 Stat. 1314 (1976) (current version at 16 U.S.C. § 460*l*-8(b)(3) (1982)). This amendment was meant to allow the larger urban states to receive a slightly larger allocation of funds. *See* S. REP. No. 367, *supra* note 178, at 6; H.R. REP. No. 1021, *supra* note 178, at 8.

223. Prior to the 1976 amendments, state matching funds were apportioned on the following basis: 40% of annual appropriations was apportioned equally among the states, with the remainder distributed on the basis of need to individual states by the Secretary of the Interior in such amounts as in his judgment would best accomplish the purposes of the Act. *See* Pub. L. No. 88-578, § 5(b), 78 Stat. 900 (1964). The modified formula provided that 40% of the first $225 million in annual appropriations, 30% of the next $275 million and 20% of all additional appropriations would be apportioned equally among the states. The remainder would again be distributed by the Secretary on the basis of need. *See* Pub. L. No. 94-422, § 101(3), 90 Stat. 1314 (1976) (current version at 16 U.S.C. § 460*l*-8(b)(1)-(2) (1982)).

224. The states are permitted under this provision to use not more than 10% of the total amount allocated to a state in any one year for the development of sheltered facilities for swimming pools and ice skating rinks in areas where the Secretary determines that the severity of climatic conditions and the increased public use thereby made possible justifies the construction of such facilities. *See* Pub. L. No. 94-422, § 101(3), 90 Stat. 1316 (1976) (current version at 16 U.S.C. §460*l*-8(e)(2) (1982)). For the purpose of computing the 10% of a state's allocation, the entire cost of a sheltered facility is to be used, not just the cost attributable to the shelter. *See* H.R. REP. No. 1468, *supra* note 214, at 17. This provision was not intended to

cerned that it had not taken sufficient steps to reduce the huge backlog of lands authorized for federal acquisition but not yet acquired. As a result, the very next year Congress set up a special account the purpose of which was to permit the prompt reduction of this backlog.[225] In order to achieve this goal, the guaranteed annual income of the Fund was again increased, from $600 to $900 million in fiscal year 1978, and from $750 million to $900 million in fiscal year 1979.[226] In those two years, Fund expenditures up to the levels authorized by the 1976 amendments would continue to be allocated on the basis of approximately 40% for federal acquisitions and 60% for state matching grants.[227] The additional $450 million authorized by the 1977 legislation ($300 million for fiscal year 1978 and $150 million for fiscal year 1979) would be credited to a special account established within the Fund.[228] Appropriations from this special account would be available only to purchase areas whose acquisition had been authorized prior to the convening of the Ninety-fifth Congress.[229]

The establishment of the special account in 1977 was merely the latest in a succession of attempts by Congress to insure that the Fund was used promptly and effectively to acquire the backlog of lands previously authorized for inclusion in the NPS and other federal recreation areas.[230] The Senate Committee on Energy and Natural Resources "clearly recognize[d] that the intent of Congress is to eventually acquire *all* inholdings located in the NPS."[231] In view of the rapid escalation of land prices,[232] "any delay in acquir-

alter the basic concept of the Fund as a source of financial assistance for *outdoor* recreation. *See id.*; H.R. REP. No. 1021, *supra* note 178, at 5.

225. *See* Pub. L. No. 95-42, § 1(2), 91 Stat. 210 (1977); S. REP. No. 162, *supra* note 216.

226. *See* Pub. L. No. 95-42, § 1(1), 91 Stat. 210 (1977).

227. *See id.* at § 1(2), 91 Stat. 210 (1977). *See also* S. REP. No. 162, *supra* note 216, at 4.

228. *See* Pub. L. No. 95-42, § 1(2), 91 Stat. 210 (1977). *See also* S. REP. No. 162, *supra* note 216, at 4.

229. *See* Pub. L. No. 95-42, § 1(2), 91 Stat. 210 (1977).

230. *See* S. REP. No. 162, *supra* note 216, at 2. The Senate Committee on Energy and Natural Resources stated that

> [w]hile the enactment of [the increase in the level of the Fund in 1976] represents a much-needed commitment to the programs which benefit from the fund, the deferred increase to the $900 million level detracts from the ability of the fund to rapidly and effectively retire the backlog of authorized Federal commitments to land acquisition.

Id. at 3.

231. *Id.* at 6 (emphasis added).

232. The Committee noted that rural land prices often escalated at a rate of 19% or more per year. *Id.*

ing these authorized lands is false economy indeed."[233] Moreover, "long delays in acquisition may often mean that resources which were deemed of sufficient importance to merit this federal protection are altered or degraded before they are [ac]quired."[234] The creation of the special account would help to avoid these problems and insure "a more effective, cost-efficient land acquisition program and an enhanced ability to fully protect these priceless resources."[235]

D. *Summary*

From this relatively brief history of the Land and Water Conservation Fund, several conclusions can be drawn. The national appetite for recreation since World War II has been nearly insatiable, and the LWCF has been the primary mechanism for funding the growth of recreational land systems to meet that demand.

233. *Id.*

234. *Id.*

235. *Id.* at 4. The 1977 amendments contained several other provisions which increased the range of circumstances in which the Fund could be used for federal acquisitions. First, the amendments authorized the annual appropriation of funds to acquire lands in NPS recreation areas or in FS areas, even if such appropriations exceeded the statutory ceilings enacted prior to the 95th Congress, provided the excess was not more than 10% of the ceiling or $1 million, whichever was greater. *See* Pub. L. No. 95-42, § 1(3), 91 Stat. 210 (1977) (current version at 16 U.S.C. § 460*l*-9(a)(3) (1982)). This provision was "designed to help the land management agencies move expeditiously to protect our federal recreation estate." S. REP. No. 162, *supra* note 216, at 3, 5. Second, the amendments permitted Fund appropriations to be used for preacquisition work (such as title searches and mapping) where authorization of an area which would be acquired through the Fund "is imminent and where substantial monetary savings could be realized." Pub. L. No. 95-42, § 1(4), 91 Stat. 211 (1977). Like the amendment concerning exceeding statutory appropriation ceilings, this change was expected to "result in an ability to acquire lands more expeditiously once authorized, thus enhancing the ability of the acquiring agency to better protect the area's resources, as well as minimizing the increase in land costs which any delay in acquisition is certain to produce." S. REP. No. 162, *supra* note 216, at 5. Third, the Secretary of the Interior was authorized to make certain minor boundary revisions in order to contribute to, and if necessary for, the proper preservation, protection, interpretation or management of an area of the NPS. Money from the Fund could then be used to acquire any lands, waters or interests therein added to the area by the boundary revision. The authority to make boundary revisions would expire 10 years from the date of enactment of the authorizing legislation establishing the boundaries of the NPS area. *See* Pub. L. No. 95-42, § 1(5), 91 Stat. 211 (1977) (current version at 16 U.S.C. § 460*l*-9(c) (1982)). In a subsequent amendment, Congress deleted the 10-year expiration provision and substituted for it a provision limiting the Secretary's authority under this provision to make revisions to boundaries established subsequent to January 1, 1965. *See* Pub. L. No. 96-203, § 2, 94 Stat. 81 (1980) (current version at 16 U.S.C. § 460*l*-9(c) (1982)).

Throughout the history of the LWCF, Congress has adhered fairly consistently to the principle that receipts from sales of federal resources should be used to purchase new and permanent recreational resources. Despite several substantial increases in the size of the LWCF, funding never kept up with demand; backlogs of areas to be purchased waxed and waned but never disappeared. Congress feared that unless available properties were acquired for public recreational use quickly, they would be developed in a manner that would preclude such use. In addition, the price of potential recreational land continued to escalate at a rapid rate. Congress therefore emphasized, perhaps above all else, the need for prompt acquisition of available recreation resources, since delay would only serve to increase the ultimate price tag, if not to destroy altogether the potential for recreational use.

All in all, the LWCF has been a magnificent and successful experiment. Its fruits will be enjoyed by millions of people now and in the future. But, under the Reagan Administration, use of the Fund has declined drastically, and its future remains in jeopardy.

III. THE MORATORIUM: EXECUTIVE JUSTIFICATION AND CONGRESSIONAL REACTION

A. *The Moratorium*

During his Senate confirmation hearings in January, 1981, then Secretary-designate Watt testified that "the land and water conservation fund was, and is, one of the most effective preservation and conservation programs in America."[236] He also stated that he had "a soft spot in [his] heart" for the fund and that the Senate "can be sure that I will do what I can to carry out that program as effectively as it has been carried out in the past."[237] Despite these strong and

236. *James G. Watt Nomination: Hearings on the Proposed Nomination of James G. Watt to be Secretary of the Interior Before the Senate Comm. on Energy and Natural Resources*, 97th Cong. 1st Sess. pt. 1, at 28 (1981) [hereinafter cited as *Watt Nomination Hearings*]. In early 1982, former Secretary Watt called the LWCF "a marvelous program . . . that has never had a scandal, has never had bad investments—it a good program." *Department of Interior and Related Agencies Appropriations for Fiscal Year 1983: Hearings Before A Subcomm. of the Senate Comm. on Appropriations*, 97th Cong., 2d Sess., pt. 1, at 591 (1982) [hereinafter cited as *FY 1983 Senate Interior Appropriations Hearings*].

237. *Watt Nomination Hearings, supra* note 236, pt. 1, at 56. Mr. Watt flatly asserted in a written post-hearing response: "As you know, during my tenure at [the Department of the

unequivocal endorsements of the Fund, less than four months later the new Secretary declared that he had placed a moratorium on further land acquisitions with money from the Fund,[238] except in cases of "emergency."[239]

When he testified the following year in support of the President's fiscal year 1983 budget proposals, Mr. Watt again indicated that

> "[i]n our national park system, *we have . . . instituted a near moratorium* on adding new units to the park system until needed work in existing parks can be accomplished and previous acquisitions paid for . . . ."[240]

Interior], I supported funding of the Land and Water Conservation Fund and will continue to do so." *Id.* at 479.

238. *Hearings on S. 910, supra* note 2, at 16, 28-29. *See also Public Land Management Policy: Oversight Hearings on Public Land Management Policy Before the Subcomm. on Public Lands and National Parks of the House Comm. on Interior and Insular Affairs*, 97th Cong., 1st Sess., pt. 1, at 9 (1981) [hereinafter cited as *1981 Oversight Hearings*]. *See also Proposed Fiscal Year 1983 Budget Request: Hearings Before the Senate Comm. on Energy and Natural Resources*, 97th Cong., 2d Sess. 220 (1982) [hereinafter cited as *FY 1983 Senate Budget Hearings*]. Writing on May 7, 1981, in support of S. 910, former Secretary Watt stated that "[i]n the face of the need for a major redirection, I *have placed* a moratorium on land acquisition" from the Fund. *Hearings on S. 910, supra* note 2, at 16 (emphasis added). After the hearings on S. 910, Mr. Watt wrote to Senator Goldwater that "it is our intention to halt land acquisition except in cases of emergency or extreme hardship." *Id.* at 232.

239. *Hearings on S. 910, supra* note 2, at 232. *See also 1981 Oversight Hearings, supra* note 238, pt. 1, at 29. According to G. Ray Arnett, Assistant Secretary for Fish and Wildlife and Parks, "emergency" acquisitions are those which "will have as their primary objective the avoidance of imminent action resulting from irreparable harm to the land resources in question. Irreparable harm will include, at a minimum, adverse use contrary to specific purposes delineated in the congressional authorizations." *Id.* at 160. Mr. Arnett defined "hardship cases" as

> those instances where failure to proceed with acquisition would result in the loss of a significant and unreasonable amount of financial outlay by the proposed seller or unreasonable deprivation resulting from financial hardship associated with the seller's reasonable expectation regarding the acquisition.
>
> Hardship is defined here as being similar to motions associated with zoning statutes, defining grounds for variances, and would generally mean actions that are unduly oppressive, arbitrary or confiscatory.

Id. at 159-60.

240. *FY 1983 Senate Budget Hearings, supra* note 238, at 7 (emphasis added). *See also id.* at 15; *FY 1983 Senate Interior Appropriations Hearings, supra* note 236, pt. 1, at 565; H.R. REP. No. 881, 97th Cong., 2d Sess. 20 (1982) (letter from Donald Paul Hodel, Acting Secretary of the Interior, to Morris K. Udall, Chairman, House Committee on Interior and Insular Affairs (Sept. 27, 1982); *id.* at 27; 128 CONG. REC. H7882 (daily ed. Sept. 29, 1982) (statement of Rep. Young); 128 CONG. REC. H7886 (daily ed. Sept. 29, 1982) (statement of Rep. Fish); 129 CONG. REC. H4099 (daily ed. June 16, 1983) (statement of Rep. Seiberling). *See also* PRESIDENT'S COUNCIL ON ENVIRONMENTAL QUALITY, TWELFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY: ENVIRONMENTAL QUALITY 1981, at 141 [herein-

Spending for national parkland acquisition alone had averaged $284 million in the last three years of the Carter Administration; park spending dropped to $76 million in the first full fiscal year of the Reagan Administration.[241] During those same years, the percentage of available funds actually obligated dropped from 88 to 51% in fiscal year 1982.[242]

The Reagan Administration justified its public recreation land acquisition policy, including the moratorium, as a response to three principal problems. First, the Administration placed a high priority on restoring deteriorated facilities administered by the NPS, and implemented a Park Restoration and Improvement Program ("PRIP") as the mechanism for achieving this objective. Second, the Administration claimed that excessive purchase of new recreation lands caused that deterioration; "good stewardship" required repairs of facilities at existing federal parks and forests before more lands are added to the federal recreational systems. Third, the administration was unwilling to simultaneously finance the repair of existing facilities and the purchase of new resources because such expenditures would impair its attempt to reduce federal spending, the federal deficit and the rate of inflation. While each proferred justification has some basis, the Administration may also be motivated by an unarticulated hostility to federal land ownership.

1. Deterioration of NPS and NFS Facilities

The Reagan Administration has emphasized the need to remedy the deterioration of NPS and FS facilities.[243] The Interior Secretary promised to bring about "quick" and "dramatic" changes in this situation, because "[f]or one to call himself a steward or conservationist or an environmentalist and not to take care of what he has been given is irresponsible."[244]

after cited as TWELFTH ANNUAL REPORT OF THE COUNCIL ON ENVTL. QUALITY]. *See also 1981 Oversight Hearings*, *supra* note 238, pt. 1, at 27-28; *Hearings on S. 910*, *supra* note 2, at 12.

241. *See* Arnett Letter, *supra* note 8.

242. *Id.*

243. *See, e.g.*, *Hearings on S. 910*, *supra* note 2, at 11; *Watt Nomination Hearings*, *supra* note 236, pt. 1, at 59.

244. *Hearings on S. 910*, *supra* note 2, at 11.

Relying upon a report issued by the Comptroller General,[245] the Secretary informed Congress that

> the fundamental infrastructure of the parks has deteriorated, buildings and sidewalks are crumbling, sewer systems are failing, tunnels are in danger of collapse. In short, the physical foundation of park facilities throughout America is the victim of poor and shortsighted stewardship.[246]

Secretary Watt estimated in May, 1981, that it would cost from $1 billion[247] to $1.6 billion[248] merely to upgrade the state of the parks to the level of "decency" necessary to ensure minimal compliance with federal and state health and safety standards.[249] It would cost an additional $1.088 billion to meet the facility restoration and improvement needs of the NFS.[250]

2. The Excessive Pace of Past Acquisitions

Secretary Watt attributed the "deplorable" condition of the national parks and forests, which were "quite literally falling apart," to "past administrations and past Congresses [which] have been so intent on grabbing more land that proper concern for stewardship has been neglected."[251] The Administration's aim was to restore the balance between acquisition of new resources and restoration and improvement of existing facilities.[252]

245. REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, FACILITIES IN MANY NATIONAL PARKS AND FORESTS DO NOT MEET HEALTH AND SAFETY STANDARDS, CED-80-115 (1980) [hereinafter cited as FACILITIES DO NOT MEET HEALTH & SAFETY STANDARDS].

246. *1981 Oversight Hearings*, *supra* note 238, at 7.

247. *Hearings on S. 910*, *supra* note 2, at 14-15.

248. *Id.* at 24. *See also 1981 Oversight Hearings*, *supra* note 238, pt. 1, at 6; TWELFTH ANNUAL REPORT OF THE COUNCIL ON ENVTL. QUALITY, *supra* note 240, at 139.

249. *Hearings on S. 910*, *supra* note 2, at 24; *1981 Oversight Hearings*, *supra* note 238, pt. 1, at 6.

250. *Hearings on S. 910*, *supra* note 2, at 234. According to R. Max Peterson, Chief of the Forest Service, this amount was necessary to provide fully for the recreation users' health and safety on U.S. Forest Service lands. Another $480 million would be needed to restore and improve support facilities (e.g. barracks, housing, work centers and water systems). *Id.* at 234-37.

251. *1981 Oversight Hearings*, *supra* note 238, at 6. *See also FY 1983 Senate Interior Appropriations Hearings*, *supra* note 236, pt. 1, at 592. *See also* REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, THE FEDERAL DRIVE TO ACQUIRE PRIVATE LANDS SHOULD BE REASSESSED, CED-80-14 (1979).

252. *See Hearings on S. 910*, *supra* note 2, at 18. Part of the problem, according to Mr. Watt, is that "the appetite of many Federal agencies for acquiring land seems to be unlimited." *Watt Nomination Hearings*, *supra* note 236, pt. 1, at 185.

The former Secretary leveled particular criticism at the kinds of acquisitions recently authorized by Congress. "Because of a relatively assured source of funding," he argued, "lands whose national significance is questionable have been acquired while parks whose significance is unquestioned have deteriorated badly."[253] He called it "bad public policy" to require acquisition of new parks, regardless of their merits.[254] The Administration was therefore committed to the termination of "the so-called park-a-month program" and of "park barrel politics."[255]

The drive to expand federally-owned recreation lands had resulted in the accumulation of a large backlog of lands authorized by Congress for federal acquisition with money from the Fund but not yet acquired. In May, 1981, Secretary Watt noted that the backlog had been estimated at $881 million,[256] although he termed this figure "misleading" and suggested that much more would have to be spent to purchase all of the authorized acreage.[257] The Administration denied, however, that it either had a plan for deauthorizing any parks,[258] or that it had compiled a "hit list" of national parks or

253. *Hearings on S. 910, supra* note 2, at 17. *See also id.* at 29; *1981 Oversight Hearings, supra* note 238, pt. 1, at 6, 9. Former Secretary Watt's criticism of recent acquisitions appears at times, however, to reflect hostility to federal land acquisitions of any kind. He stated, for example, in prepared testimony during congressional hearings: "*Unfortunately,* as you know, we have in the last few years experienced a period of expanded federal acquisition bankrolled by the Land and Water Conservation Fund." *Hearings on S. 910, supra* note 2, at 14 (emphasis added).

254. *Hearings on S. 910, supra* note 2, at 39. The Secretary referred to the requirement that the Interior Secretary submit to Congress an annual list of at least 12 areas which may have potential for inclusion in the NPS. *Id.* at 14.

255. *1981 Oversight Hearings, supra* note 238, pt. 1, at 6; *Hearings on S. 910, supra* note 2, at 30.

256. *Hearings on S. 910, supra* note 2, at 26. In testimony submitted to Congress at the same time, Gaylord Nelson, Chairman of the Wilderness Society, provided an itemized list accounting for the $881 million on a park-by-park basis. *Id.* at 59-60.

257. *Id.* at 26. After the May, 1981, hearings on S. 910, however, the Legislative Counsel for the Department of the Interior submitted information for insertion in the hearing record which indicated that the NPS backlog amounted only to $649.4 million. *Id.* at 223. In addition, the FWS had a backlog of $61.9 million, while the BLM claims against the Fund for specifically authorized areas were $17.5 million. *Id.*

There is evidence to support the former Secretary's assertion that the total federal backlog was well in excess of $1 billion in early 1981. *See Watt Nomination Hearings, supra* note 236, pt. 1, at 495; *Hearings on S. 910, supra* note 2, at 9, 67, 232; *FY 1983 Senate Interior Appropriations Hearings, supra* note 236, pt. 1, at 652.

258. *See 1981 Oversight Hearings, supra* note 238, pt. 1, at 14, 31; *Hearings on S. 910, supra* note 2, at 34.

other areas for deauthorization.[259] Secretary Watt suggested instead that Congress focus on the following question:

> Does Congress believe we should take care of that which we have or does it believe we should grab for more lands to take off the tax rolls? That is a simple statement of the issue, but I am satisfied it cannot do both simultaneously and our recommendation is we take care of what we have because that's being a good steward and a good conservationist.[260]

3. The Budgetary and Inflationary Considerations

The Adminstration's conclusion that restoration of deteriorated NPS and FS facilities could not be undertaken simultaneously with the continuing expenditure of Fund moneys for recreation land acquisitions is intimately associated with its program for economic recovery. Unwilling to finance both a park restoration and a recreation land acquisition program, it chose to emphasize the former at the expense of the latter. In May, 1981, for example, Secretary Watt declared that the imbalance between acquiring new parks and maintaining those already in the NPS

> must not be allowed to continue. The paramount need addressed in the President's Economic Recovery Package to reduce inflation and develop a healthier economy will not permit us to continue even the present budget levels for the combination of acquisition and stewardship activities. Continuation on the present course of preponderant stress on acquisition would be fiscally irresponsible and would ensure a further degradation of our present National Park System and other land management areas. We should seek to become good stewards of the lands and facilities we own before we acquire more. Accordingly, I have recommended for fiscal year 1982 a decreased emphasis on land acquisition and an increased emphasis on restoring and improving park facilities and resources. . . .[261]

259. *See 1981 Oversight Hearings*, *supra* note 238, pt. 1, at 5, 153, 180.

260. *Hearings on S. 910*, *supra* note 2, at 24.

261. *Hearings on S. 910*, *supra* note 2, at 17. *See also 1981 Oversight Hearings*, *supra* note 238, pt. 1, at 9-10, 27, 33; TWELFTH ANNUAL REPORT OF THE COUNCIL ON ENVTL. QUALITY, *supra* note 240, at 141. In his testimony before a House subcommittee holding oversight hearings on public land management policy, then Secretary Watt asserted that

> [w]e think we need to change the economic situation in America and bring about recovery. I would urge you to vote for tax cuts as well as budget cuts to help that to come into being sooner. But in the meantime, the question is definition of stewardship of the

The Administration has continued to justify its desire to limit Fund acquisitions on budgetary grounds.[262] Similarly, the Administration repeatedly justified its requests that Congress grant no funds for the state matching grant program on the basis of "the overall need to reduce Federal spending and decrease the size of the Federal deficit."[263]

In short, it has always been the position of the Reagan Administration that "[t]he acquisition of park land generates funding requirements for development and operations which is [*sic*] not consistent with this Administration's firm commitment to reduce Federal spending."[264] The recent announcement by Secretary Clark relaxes but does not abandon this position.[265]

4. The Reagan Administration and the Federal Public Lands

The Administration's reasons for the moratorium are plausible, and it has unsuccessfully attempted to cure the identified deficien-

recreation base of America. . . . It is my recommendation to Congress that we should take care of what we have before we go out and acquire more.

1981 Oversight Hearings, *supra* note 238, at 27-28.

Senator Cranston of California responded that Secretary Watt "recently told the national park concessionaires that he wants 'to eliminate those areas which are degrading to the national park system' and that he would 'use the budget system to be the excuse to make major policy decisions.' " *Hearings on S. 910*, *supra* note 2, at 9.

262. *See, e.g.*, *FY 1983 Senate Interior Appropriations Hearings*, *supra* note 236, pt. 1, at 592, 651; *FY 1983 Senate Budget Hearings*, *supra* note 238, at 25-26.

263. *FY 1983 Senate Interior Appropriations Hearings*, *supra* note 236, pt. 1, at 610. The Interior Department has also furnished Congress with the following explanation for its zero funding request for fiscal year 1983:

> The Department recognizes the value of the Land and Water Conservation Fund State Assistance Program and the many public outdoor recreation areas and facilities acquired or developed throughout the country. However, due to the efforts underway to control inflation and guide the Nation's economic recovery, no appropriation for the Senate program has been requested for FY 1983. When the economic situation improves and the Federal deficit is thereby substantially reduced, the Administration would propose to resume the LWCF state assistance program

Id., pt. 2, at 690. *See also id.* pt. 2, at 380, 585, 599, 676.

264. *FY 1983 Senate Budget Hearings*, *supra* note 238, at 261. The Administration's budgetary concerns extend to purchase of land for the FS as well as for the NPS. According to testimony submitted by John B. Crowell, Jr., Assistant Secretary for Natural Resources and Environment, U.S. Department of Agriculture, during the 1981 Oversight Hearings, "[l]and acquisition through purchase will be significantly reduced both under the President's economic recovery program and because of the Administration's belief that only in cases of clear demonstrable public need or public benefit should additional land pass from private to public ownership." *1981 Oversight Hearings*, *supra* note 238, pt. 1, at 245.

265. *See* remarks of Secretary Clark, *supra* note 10.

cies in ways other than the de facto destruction of the LWCF. But the asserted reasons may merely supplement the real rationale that underlies the moratorium: the Administration apparently believes that federal land ownership, especially for noneconomic purposes, is inappropriate and unproductive, if not unconstitutional. The hostility of the Reagan Administration to public ownership is evidenced by its strong desire to transfer federal lands and resources to private interests.[266] The LWCF moratorium fits a pattern of Administrative actions aimed at returning public land policy to its status of a century or more ago.

President Reagan and former Secretary Watt were avowed "Sagebrush Rebels" before the 1980 election. The main goal of the Sagebrush Rebellion was wholesale disposition of federal lands to the states where located—for free.[267] As a legal matter, some Rebels claimed that federal ownership was unconstitutional because it violated an alleged public trust to dispose of "non-enclave" lands[268] and deprived the western states of equal footing.[269] Legally, the bases of the Sagebrush Rebellion are insubstantial.[270] Disposition remains a matter of controversy in the political arena,[271] but western fervor dissipated rapidly after 1980 when many Rebels realized

266. *See infra* notes 267-88 and accompanying text.

267. For an analysis of the purposes and goals of the Rebels, *see* Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C.D.L. REV. 317, 354 (1980); Comment, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505.

268. The theory proceeded from confused dicta in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). *See* Coggins, Evans & Lindeberg-Johnson, *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 571-77 (1982).

269. On the equal footing doctrine, see Oregon State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977); United States v. Texas, 339 U.S. 707 (1950); Coyle v. Oklahoma, 221 U.S. 559 (1911); Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519 (1951).

270. *See* Coggins, Evans & Lindeberg-Johnson, *supra* note 268, at 575-76; Leshy, *supra* note 267. In the only decision concerning the matter, the Nevada district court rejected all arguments advanced in favor of the Sagebrush position. The substantive disposition of Sagebrush claims in Nevada *ex rel.* Nevada State Bd. of Agriculture v. United States, 512 F. Supp. 166, 171 (D. Nev. 1981), *aff'd as moot*, 699 F.2d 486 (9th Cir. 1983), is inconclusive, however, because the Ninth Circuit decided that the controversy was moot. The Supreme Court's procedural ruling in North Dakota v. Block, ___ U.S. ___, 103 S. Ct. 1811 (1983), effectively precludes further state lawsuits challenging federal ownership, but such state claims had no chance of success in any event.

271. The "Sagebrush" bill introduced by Senator Hatch of Utah in 1979 to divest federal lands was never reported out of committee.

that disposition would necessarily involve many economic detriments to western interests.[272]

The United States ceased large-scale land giveaways a half century ago. Federal land policy has gradually shifted emphasis from land disposition to controlled resource disposition to amenity protection.[273] By the beginning of 1981, the direction of the law and policy was clear: the United States intended to retain its lands;[274] it would sell some of its renewable resources, but only on a sustained yield basis and only so long as resource exploitation did not unduly interfere with noncommodity uses of the federal lands;[275] it would sell its nonrenewable energy resources for an approximation of fair market value in an orderly, conservation-minded fashion;[276] and it would expand and refine its recreational lands.[277]

The Reagan Administration apparently wishes to transfer much of the federal lands and most of the public resources to private interests to be developed for private profit. The Sagebrush Rebellion divestiture notion reemerged in 1982 as the Administration's "privatization" program.[278] Although former Secretary Watt disclaimed any large-scale disposition intentions in his confirmation hearings, stating instead that his "good neighbor" policy would obviate the need,[279] the Administration later announced plans to sell about 35 million "surplus" federal acres.[280] Although unlikely to

272. While Sagebrush emotions apparently have cooled, the possibility of future congressional action cannot be discounted. *See generally* Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982).

273. Coggins, *The Public Interest in Public Land Law: A Commentary on the Policies of Secretary Watt*, 4 PUB. LAND L. REV. 1, 4-10 (1983).

274. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(1) (1976).

275. *See id.* §§ 1702(c), 1702(h), 1732(a); Multiple-Use, Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-31 (1976). *See generally* Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. COLO. L. REV. 229 (1982).

276. *See*, e.g., Kleppe v. Sierra Club, 427 U.S. 390 (1976) (coal); Natural Resources Defense Council v. Berklund, 609 F.2d 553 (D.C. Cir. 1979) (coal); Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978) (geothermal); Sierra Club v. Peterson, 705 F.2d 1475 (D.C. Cir. 1983) (oil and gas). *But see* Andrus v. Shell Oil Corp., 446 U.S. 657 (1980) (oil shale).

277. That, of course, is the main purpose of the LWCF Act.

278. *See* Hooper, *Privatization—The Reagan Administration's Master Plan for Government Giveaways*, 67 SIERRA (No. 6) Nov.-Dec. 1982, at 32. *See also* Russakoff, *Interior Keeps Moves Veiled Till After the Voting*, Washington Post, Oct. 25, 1982, at A1, A8.

279. *Watt Nomination Hearings*, *supra* note 236, pt. 1, at 72.

280. *See* authorities cited in note 278 *supra*. *See also* 13 ENV'T REP.—CUR. DEVS. (BNA) 1752 (Feb. 4, 1983). A coalition of environmental groups filed suit seeking to enjoin the sale

succeed on any large scale,[281] the program and the enthusiastic responses to it by Reagan Administration appointees in the Interior Department and the Forest Service are strong indicia of a commitment to diminishing federal land ownership.

The trend is even more pronounced in the area of federal resource disposition: the Interior Department under Secretary Watt planned to lease the entire outer continental shelf for oil and gas exploitation;[282] and, until stopped by Congress, Secretary Watt was willing to open wilderness areas to mineral leasing.[283] The Interior Department recently sold enormous reserves of coal and plans more sales in spite of a coal glut, failure to receive fair market value and allegations of fraud.[284] The Forest Service has agitated for a doubling of the allowable cut in spite of a huge backlog of sold, uncut timber;[285] grazing regulation is being abandoned in favor of user control of the public rangelands;[286] and recreation policy in the parks is increasingly being delegated to private concessionaires.[287] Noncommodity uses, including undeveloped recreation, have been given short shift since 1980, and highly developed and motorized forms of recreation seem to top the list of the Administration's recreational priorities.

For the most part, Administration personnel do not publicly articulate hostility to federal land and resources ownership. Occasionally, however, candor prevails, as when BLM Director Robert

program, alleging violations of five different statutes. Conservation Law Found. of New England, Inc. v. Harper, No. 82-2899-C (D. Mass. filed Sept. 30, 1982) ENVTL. L. REP., PENDING LIT. 65,765 (1982).

281. In fact, by the middle of 1983, former Secretary Watt was in full retreat on the issue:

> There will not be a massive land sell-off, there was never intended to be a massive land sell-off. Last year we sold 1,312 acres. This year we've offered [approximately] 5,500 acres for sale . . . and sold 3,500 acres. People don't even want some of the land. . . It's totally a political, partisan issue.

NEWSWEEK, July 25, 1983, at 25.

282. *See* 12 ENV'T REP.—CUR. DEVS. (BNA) 73, 371, 452, 466, 474 (1982). The ostensible purpose is national security. New York Times, April 29, 1981, at A16, col. 3.

283. See Pacific Legal Found. v. Watt, 529 F. Supp. 982 (D. Mont. 1981), *clarified*, 539 F. Supp. 1194 (D. Mont. 1982).

284. *E.g.*, 14 ENV'T REP.—CUR. DEVS. (BNA) 59, 74 (1983); 13 ENV'T REP.—CUR. DEVS. (BNA) 107, 1796-97 (1982).

285. *E.g.*, NEWSWEEK, *supra* note 281, at 30.

286. *See generally* Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. LAW 1 (1983).

287. *E.g.*, N.Y. Times, June 19, 1981, at A15, col. 4.

Burford stated: "the Secretary has made it very clear that the position of this entire administration is to limit the acquisition of Federal land."[288] The Administration's actions in support of federal divestiture and private commodity use of public resources speak louder than its denials of such goals.

B. *The Administration's Proposals and Actions*

1. The Park Restoration and Improvement Program

In early 1981, the Administration proposed to address the problem of the deterioration of NPS facilities through a "new initiative" called the Park Restoration and Improvement Program ("PRIP").[289] Then Secretary Watt indicated that although FS, BLM and FWS facilities also required rehabilitation, he intended to begin the PRIP by focusing on NPS facilities, particularly in the popular older parks, since those were "crying out most dramatically for attention."[290]

The Interior Department conceived the PRIP as a five-year program which would require a total expenditure of $525 million for restoration and improvement.[291] The Administration requested a $105 million budget for the PRIP in fiscal year 1982.[292] This money would be allocated to four categories of projects. First, NPS would spend $18 million on relatively small-scale repair and rehabilitation projects which address health and safety deficiencies in park areas.[293] Second, $29 million would be devoted to cyclic maintenance

288. *1981 Oversight Hearings, supra* note 238, pt. 1, at 61.

289. *See Hearings on S. 910, supra* note 2, at 116; *Watt Nomination Hearings, supra* note 236, pt. 1, at 503.

290. *Hearings on S. 910, supra* note 2, at 22. The former Secretary noted that "over time we fully intend to address similar problems in all agencies benefitting from the land and water conservation fund." *1981 Oversight Hearings, supra* note 238, pt. 1, at 9. *See also id.* at 10-11; *Hearings on S. 910, supra* note 2, at 115.

291. *Hearings on S. 910, supra* note 2, at 19; *1981 Oversight Hearings, supra* note 238, pt. 1, at 10.

292. *Hearings on S. 910, supra* note 2, at 18, 22, 114, 116; *1981 Oversight Hearings, supra* note 238, pt. 1, at 10. The $105 million requested by the Reagan Administration was in addition to $87.3 million requested by the Carter Administration for NPS restoration and improvement activities during fiscal year 1982. *See FY 1983 Senate Interior Appropriations Hearings, supra* note 236, pt. 1, at 567.

293. *Hearings on S. 910, supra* note 2, at 18, 22, 114, 120-39. The work covered by this category would be composed of work on nonrecurring projects which could be accomplished under the direction of existing park personnel. *Id.* at 119. The projects would involve work

and repair and rehabilitation projects to prevent hazardous conditions from occurring due to substandard maintenance.[294] Third, $10 million would be spent on cultural resource preservation projects such as painting historic properties, reshingling roofs and cleaning and preserving objects in park museum collections.[295] Finally, NPS would commit $48 million to twenty-four capital improvement projects.[296]

2. S. 910: A Proposal for Diversion of LWCF Funds to the PRIP

On April 2, 1981, Secretary Watt sent to the Senate a draft bill to amend the LWCF Act [297] by adding a new category of uses for the federal side of the Fund.[298] Senate Bill 910, if enacted, would have permitted money appropriated from the Fund for federal purposes to be used:

> (4) For the restoration and improvement of units of the National Park System, the National Forest System, the National Wildlife

such as fire protection, installation of roadside guardrails and rehabilitation of drinking water and waste treatment facilities. *Id.* at 18, 22.

294. *Id.* at 18-19, 22, 114, 116-17, 140-56. Cyclic maintenance projects are those done on an established cycle longer than one year such as painting, reshingling, road ship and seal, and sign maintenance. *Id.* at 116. Repair and rehabilitation projects are undertaken to repair facilities that have deteriorated or been damaged, often as a result of unanticipated events such as storms. *Id.* at 116-17.

295. *Id.* at 19, 22, 114, 117, 157-58.

296. *Id.* at 19, 22, 114, 117, 179-206. These projects would be more costly and would require more design and planning work than would projects in the other three categories. *Id.* at 117.

The Administration initially requested an additional $105 million for fiscal year 1983 as the second installment of the PRIP. *See Department of the Interior and Related Agencies Appropriations for 1983: Hearings Before the Subcomm. on the Department of the Interior and Related Agencies of the House Comm. on Appropriations*, 97th Cong., 2d Sess., pt. 1, at 683 (1982) [hereinafter cited as *FY 1983 House Budget Hearings*]. When added to other types of NPS maintenance funds requested for fiscal year 1983, the request for the PRIP totalled $191 million. *See FY 1983 Senate Budget Hearings*, *supra* note 238, at 10, 18, 89; *FY 1983 Senate Interior Appropriations Hearings*, *supra* note 236, pt. 1, at 567, and pt. 2, at 91-92. For fiscal year 1984, the Administration requested $253.3 million for the PRIP. This money would be used to construct 36 projects, upgrade water and sewer systems and improve fire protection and electrical systems and concession facilities. 13 ENV'T REP.—CUR. DEVS. (BNA) 1750 (1983).

297. *See Hearings on S. 910*, *supra* note 2, at 6.

298. S. 910 would have added a new, fourth subsection to § 7(a) of the Act, 16 U.S.C. § 460*l*-9(a) (1982), which currently provides in part that "[m]oneys appropriated from the fund for Federal purposes shall . . . be alloted by the President to the following purposes and subpurposes . . . ."

> Refuge System, and authorized areas administered by the Bureau of Land Management including construction and rehabilitation of physical facilities within such units or areas; however, no funds are authorized for direct operations for any such unit or area.[299]

Secretary Watt explained that the bill would permit LWCF money to be used to fund the PRIP.[300] Referring to the recent period of expanded federal acquisition funded from the LWCF, the Secretary stated the Administration's belief

> that the Federal government must reorient its priorities to protect and manage better the lands already acquired. Accordingly, we have recommended for fiscal year 1982 a decreased emphasis on land acquisition and an increased emphasis on restoration [,] rehabilitation and capital improvements which will enhance the experience of visitors to the National Park System.[301]

Although "no specific authority is presently provided for restoration and improvement of Federal lands,"[302] the Secretary felt that a significant commitment of Fund money to restoration and improvement of federal lands "can quite easily be reconciled with the fundamental purposes of the land and water conservation fund."[303] The Administration believed that:

> it is appropriate for park restoration and improvement needs to be covered by the fund because park acquisition and development are complementary activities . . . . Budgeting for both these activities within the land and water conservation fund will insure a conscious balancing of our stewardship responsibilities with the desire to acquire additional lands.[304]

299. *See Hearings on S. 910*, *supra* note 2, at 4-5.

300. *Id.* at 6.

301. *Id.*

302. *1981 Oversight Hearings*, *supra* note 238, pt. 1, at 8.

303. *Id.* Then Secretary Watt noted that § 1 of the Act, 16 U.S.C. § 460*l*-4 (1982), "indicates that a major purpose of the fund is to provide funds for development of certain lands and other areas, as well as development of needed land and water areas and facilities." *1981 Oversight Hearings*, *supra* note 238, pt. 1, at 7-8. Despite the former Secretary's claim, the legislative history makes it perfectly clear that on the federal side, Fund money could only be used for acquisition, not for development.

304. *1981 Oversight Hearings*, *supra* note 238, pt. 1, at 10. The Administration renewed its request that the PRIP be funded from the LWCF when it submitted its fiscal year 1983 budget requests for the Interior Department. *See FY 1983 Senate Budget Hearings*, *supra* note 238, at 89.

Undaunted by Congress' refusal for three straight years to fund the PRIP from the LWCF, former Secretary Watt proposed such rerouting of funds for the fourth time in submitting the

C. *Congressional Reaction to the PRIP, S. 910 and the Moratorium*

Congress responded enthusiastically to the campaign to rehabilitate deteriorated NPS facilities.[305] The Administration's proposal to divert LWCF money to the PRIP, however, has provoked a largely negative reaction. Both the Senate Committee on the Budget and the House Committee on Appropriations flatly rejected the assertion that the use of Fund money for restoration and improvement of federally-owned facilities would be consistent with the LWCF Act without enactment of S. 910.[306] The House Committee refused to recommend that appropriations for the PRIP be taken from the Fund "because the LWCF cannot be used legally for this purpose."[307] The Senate Committee expressed the same view,[308] and the bill was never reported out of committee.[309]

Department's budget recommendations for fiscal year 1984. The House Committee on Appropriations "again reject[ed] the proposal of the Secretary to fund construction projects with LWCF receipts. Such a proposal requires legislation. The authorizing Committee has rejected such a proposal for three years. This Committee has joined in that rejection for each of those three years." H.R. REP. No. 253, 98th Cong., 1st Sess. 28 (1983) [hereinafter cited as H.R. REP. No. 253].

305. *See, e.g., Hearings on S. 910, supra* note 2, at 21. In fiscal year 1982, Congress appropriated $155 million for restoration and improvement of NPS facilities. *See FY 1983 Senate Interior Appropriations Hearings, supra* note 236, pt. 1, at 567.

Although Congress has supported the PRIP, it has differed with the Administration concerning the method of implementing that program. The House Committee on Interior and Insular Affairs, for example, disagreed with the Administration's emphasis on the repair of physical facilities rather than on solving natural and cultural resources problems. *See* HOUSE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, VIEWS AND ESTIMATES ON THE PROPOSED BUDGET FOR FISCAL YEAR 1983, 97th Cong., 2d Sess., 34, 36-37 (Comm. Print No. 4 (1983)) [hereinafter cited as VIEWS ON FY 1983 BUDGET].

306. *Compare* Secretary Watt's views, discussed *supra* at notes 302-303 and accompanying text.

307. H.R. REP. No. 163, 97th Cong., 1st Sess. 26-27 (1981). *See also* H.R. REP. No. 253, *supra* note 304, at 28. *Compare* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 192 (1978) ("When voting on appropriation measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden.").

308. *See* S. REP. No. 139, 97th Cong., 1st Sess. 356, 386 (1981). *See also Hearings on S. 910, supra* note 2, at 9 (quoting Senator Cranston), 10 (quoting Senator Jackson of Washington); S. REP. No. 163, 97th Cong., 1st Sess. 20, 27 (1981).

309. S. 910 apparently never came to a vote on the Senate floor prior to the expiration of the 97th Congress. *Cf.* H.R. REP. No. 253, *supra* note 304, at 28 (noting the House's consistent refusal to adopt a bill funding NPS construction projects from the LWCF).

Secretary Watt's moratorium on acquisitions also met with a frosty reception.[310] Some congressmen pointed out the discrepancy between the Administration's concession that prompt acquisition was necessary to minimize land acquisition cost escalation[311] and its moratorium, which would significantly increase acquisition costs by delaying purchases.[312] Congressman Phillip Burton, Democrat from California, for example, stated that the moratorium was "pennywise and poundfoolish."[313]

The House Committee also denounced the moratorium as unfair to private owners of land within authorized park boundaries.[314] Such landowners would find it virtually impossible to sell to third parties any land which the federal government has designated for future recreational use. If the federal government does not promptly acquire the inholdings, "the landowner is 'locked in' with no opportunity to sell his property to any other buyer, so he can then move onward to reestablish elsewhere. This situation is clearly unfair to landowners."[315]

But Congressional criticism went beyond objections to specific adverse impacts of the moratorium. Some lawmakers objected to

310. For example, in hearings before the House Interior Committee on January 26, 1983, Interior Committee Chairman Morris Udall echoed this sentiment, stating that the LWCF had been "bloodied but not bowed over the past two years," and that "it is clear that Congress had rejected [arguments] that we should stop buying new parkland." 13 ENV'T REP.—CUR. DEVS. (BNA) 1669 (1983).

311. The NPS estimated in 1982 that land costs in areas which it considers as high priority acquisition areas (*e.g.*, those covered by court awards) are escalating by as much as 10 to 15% annually. *See FY 1983 Senate Interior Appropriations Hearings*, *supra* note 236, pt. 2, at 687. G. Ray Arnett, the Assistant Secretary for Fish and Wildlife and Parks, conceded that such land price escalation would occur. *See 1981 Oversight Hearings*, *supra* note 238, pt. 1, at 169. Indeed, the Administration's budget submissions for fiscal year 1983 stated that "[t]imely acquisition also reduces the impact of price escalation that continues to affect land values." *FY 1983 Senate Budget Hearings*, *supra* note 238, at 923.

312. *See, e.g., 1981 Oversight Hearings*, *supra* note 238, pt. 1, at 22, 26-27, 167. Because a delay in acquisition would increase the prices that the government would ultimately have to pay for new recreation land, the moratorium would make it more difficult to reduce the backlog of authorized but unacquired land. The House Committee on Interior and Insular Affairs considered this scenario to be inconsistent with congressional intent that Fund money be used to decrease the backlog expeditiously. *See* VIEWS ON FY 1983 BUDGET, *supra* note 305, at 37-38.

313. 1981 *Oversight Hearings*, *supra* note 238, pt. 1, at 168.

314. *See* VIEWS ON FY 1983 BUDGET, *supra* note 305, at 37.

315. *Id.* at 38. *See also* H.R. REP. No. 163, 97th Cong., 1st Sess. 26 (1981) [hereinafter cited as H.R. REP. No. 163].

both S. 910 and the moratorium as an attempt by the Administration to camouflage significant, long-range policy decisions concerning federal land ownership practices and to implement those decisions through the budgetary process.[316] Indeed, members of the House Committee on Interior and Insular Affairs warned the Administration more than once that if Congress refused to enact S. 910 and appropriated money into the Fund for land acquisition, Congress expected to see the law implemented through expenditure of the appropriated sums for acquisition.[317]

D. *Budget Requests and Congressional Appropriations*

From the creation of the LWCF through the end of fiscal year 1980, Congress appropriated approximately $5 billion into the Fund.[318] Federal land agencies received 40% of this amount, 59% was distributed to the states on a matching grant basis, and the remaining 1% covered the costs of program administration.[319] During this period, the federal government purchased more than 2.8 million acres of land with Fund money, and the states acquired another 2 million acres for recreational use.[320]

During the Carter Administration, Congress appropriated substantial amounts into the Fund. In fiscal years 1978 through 1980, Congress allocated an average of $350 million per year to federal land acquisition programs.[321] Similarly, the state matching grant

316. For example, Senator Bumpers, Democrat from Arkansas, expressed his concern about the long-range implications of this program.

> It [seems] to me that this is the beginning of another attempt by the Administration to use the budgetary process to implement major policy changes. Coupled with the land acquisition moratorium and the Administration's request for little or no money in fiscal year 1982 for the LWCF in excess of this program, it is clear to me that this legislation [*i.e.*, S. 910] is intended to do more than just restore and rehabilitate park facilities. It represents another effort to "lock in" the Administration's avowed intentions to stop acquiring lands within the boundaries of park units already authorized by the Congress.

Hearings on S. 910, *supra* note 2, at 22. *See also id.* at 10 (statement of Senator Jackson).

317. *See 1981 Oversight Hearings*, *supra* note 238, pt. 1, at 170. *See also id.* at 175. *Cf.* VIEWS ON FY 1983 BUDGET, *supra* note 305, at 338 (expressing the Committee's opposition to the moratorium and its opinion that the Administration's proposed budget for the Fund "circumvents the authorizations enacted by the Congress. . . .").

318. *See Hearings on S. 910*, *supra* note 2, at 46.

319. *Id.*

320. *Id. See also 1981 Oversight Hearings*, *supra* note 238, pt. 1, at 8.

321. VIEWS ON FY 1983 BUDGET, *supra* note 305, at 37. Appropriations for NPS acquisitions alone consistently exceeded $100 million from 1977 to 1980. In 1977, Congress appro-

program was amply funded from 1978 through 1980.[322] For fiscal year 1981, the Carter Administration requested $233 million and Congress actually appropriated more than $378 million for all LWCF acquisitions.[323]

The Reagan Administration has consistently requested funds for recreation land acquisitions far below the amounts appropriated by Congress into the LWCF in the previous several years. Shortly after taking office, the new Administration requested that Congress rescind $250 million of the amounts already appropriated for fiscal year 1981.[324] Congress compromised by agreeing to a rescission of

priated $126,738,000 for NPS acquisitions. The amounts requested by the Carter Administration and appropriated by Congress for NPS purchases during the next three years were as follows:

Fiscal Year	Carter Administration Request	Amount Appropriated
1978	$142,589,000	$144,368,000
1979	$165,124,000	$167,573,000
1980	$155,704,000	$159,166,000

129 CONG. REC. H912 (daily ed. Mar. 8, 1983) (statement of Rep. Yates).

322. Allocations for state recreation grants from the LWCF were $305,700,000 in fiscal year 1978, $369,600,000 in fiscal year 1979, and $299,700,000 in fiscal year 1980. VIEWS ON FY 1983 BUDGET, *supra* note 305, at 38.

323. The amounts requested by the Carter Administration and appropriated by Congress for fiscal year 1981 were as follows:

Purpose	Carter Administration Request	Amount Appropriated
Total LWCF	$233,000,000	$378,593,000
NPS	59,906,000	80,211,000
FWS	11,420,000	21,520,000
BLM	700,000	1,135,000
FS	9,266,000	39,416,000
State Assistance	156,560,000	228,145,000
Administrative Expense	1,142,000	1,142,000

H.R. REP. No. 1147, 96th Cong., 2d Sess. 17-18 (1980); Pub. L. No. 96-514, 94 Stat. 2957, 2960 (1980).

324. *See* H.R. REP. No. 29, 97th Cong., 1st Sess. 184 (1981) [hereinafter cited as H.R. REP. No. 29]. A rescission of funds makes unavailable for expenditure amounts previously appropriated. The Reagan Administration suggested rescinding $145 million from the state matching grant program and $105 million slated for federal acquisition. *Id.*

$90 million—slightly more than a third of the amount requested by the Administration.[325]

Reagan Administration budget requests for LWCF appropriations have been drastically lower than Carter Administration requests. For fiscal year 1982, it requested only $45 million total for LWCF acquisition purposes.[326] Of the $34,954,000 requested for use by the NPS, virtually none would have been available for new parkland purchases other than those required by emergencies, hardship and court orders.[327] Congress ultimately appropriated a total of more than $149 million, more than three times the amount requested by the Administration.[328]

For fiscal year 1983, the Administration requested $69 million.[329] The bulk of this money, nearly $60 million, was to be devoted to the NPS.[330] The categories of lands that would be acquired, how-

325. Pub. L. No. 97-12, 95 Stat. 14, 44 (1981). The $90 million rescission was allocated among the federal recreation agencies and the states as follows: NPS—$14,782,000, FWS—$12,217,000, BLM—$133,000, FS—$4,918,000, and state assistance—$55,000,000. *Id.*

The House and Senate were divided on the issue of the magnitude of the rescission. The House Committee on Appropriations opposed any rescission, but stated that a rescission of the magnitude requested by the Reagan Administration "would play havoc with the entire acquisition program." H.R. REP. No. 29, *supra* note 324, at 184. *Compare* S. REP. No. 67, 97th Cong., 1st Sess. 170 (1981) (recommending a $15 million rescission).

326. *See* H.R. REP. No. 163, *supra* note 315, at 11, 19, 25-26, 58.

327. Eight and one-half million dollars would have been devoted to federal acquisition management, more than $4 million would have been committed to administration of the state matching grant program and $20 million would have been used for purchases required by emergencies, hardships and court awards. *Id.* at 26. The Administration also requested $307,000 for use by BLM, $1,139,000 for use by FWS (of which all but $100,000 would be for acquisition management) and $8,600,000 for FS use ($4,611,000 for emergency and hardship acquisitions and deficiencies, and $3,989,000 for acquisition management). *Id.* at 11, 19, 58.

328. In Pub. L. No. 97-100, 95 Stat. 1391 (1981), Congress provided appropriations of $155,644,000 for the LWCF. That amount was allocated as follows: BLM—$3,137,000, FWS—$17,178,000, NPS—$107,773,000, and FS—$27,356,000. *Id.* at 1391, 1394, 1396, 1406. In the same act, however, Congress provided for a 4% reduction in all Interior Department accounts, resulting in a total LWCF appropriation of approximately $149 million. *See id.* at § 112, 95 Stat. 1404 (1981). Senator Johnston suggested that a "significant" amount of money was cut from the Interior Department's LWCF appropriation in conference "in part due to the Department's failure to write a letter of appeal to the House on the lower House number." *FY 1983 Senate Interior Appropriations Hearings, supra* note 236, pt. 1, at 627.

329. *FY 1983 Senate Budget Hearings, supra* note 238, at 12.

330. *Id.* at 12, 682, 924. Of the remaining amount requested, $1,567,000 would be used by the FWS, and $7,563,000 by the FS. H.R. REP. No. 942, 97th Cong., 2d Sess. 6, 26, 89 (1982).

ever, were again very narrow: Secretary Watt explained that the $60 million "will be used for Park Service land acquisition to pay court awards on lands already taken or condemned by the Federal Government, and for emergency purposes."[331] Just as it did in fiscal year 1982, Congress appropriated for fiscal year 1983 more than three times as much money into the Fund as the Administration requested.[332] In supplemental bills, Congress provided additional LWCF appropriations of $108 million.[333]

The Administration's budget request for fiscal year 1984 reflected the same concerns and priorities as did its recommendations for the previous two years. The total LWCF appropriation requested was approximately $65 million, of which $54.6 million would be allocated to the NPS.[334] The NPS money would be used to purchase land in six designated areas, to acquire inholdings on an emergency basis and to pay relocation expenses.[335] Congress appropriated $230 million for fiscal year 1984.[336]

In all three fiscal years, the Administration requested no funding for state matching grant programs.[337] According to Secretary Watt, the state programs produce "primarily . . . local benefits and should, therefore, be the responsibility of local governments."[338] Congress agreed for fiscal year 1982, but appropriated $75 million for each of fiscal years 1983 and 1984.[339] The House Committee on

331. *FY 1983 Senate Budget Hearings*, *supra* note 238, at 12. *See also id.* at 19, 49, 91, 685, 924; *FY 1983 Senate Interior Appropriations Hearings*, *supra* note 236, pt. 2, at 58, 584.

332. *See* Pub. L. No. 97-394, 96 Stat. 1966 (1982).

333. Pub. L. No. 98-8, 97 Stat. 13, 19 (1983); Pub. L. No. 98-163, 97 Stat. 301, 325 (1983).

334. H.R. Doc. No. 3, 98th Cong., 1st Sess. 8-108 (1983) [hereinafter cited as H.R. Doc. No. 3]. The Administration asked for $130,000 for the BLM and $10,070,000 for the FS. *Id.* at 8-104, 8-84.

335. 13 ENV'T REP.—CUR. DEVS. (BNA) 1750 (1983).

336. *See* Pub. L. No. 98-146, 97 Stat. 923 (1983). The NPS received $64 million, and the FWS, for which the Administration requested no funds, received more than $42 million. *Id.*

337. *See* S. REP. No. 166, 97th Cong., 1st Sess. 26 (1981); H.R. Doc. No. 3, *supra* note 334, at 8-108.

338. *FY 1983 Senate Budget Hearings*, *supra* note 238, at 11. *See also id.* at 18; *FY 1983 Senate Interior Appropriations Hearings*, *supra* note 236, pt. 1, at 568. Former Secretary Watt had also expressed the Administration's belief that "self-sufficiency in the development of and management for a State's recreation and cultural assets is an important piece of the President's federalism concept. The Administration also feels that we can continue to play a role in meeting this goal while moving toward reduced Federal spending." *Id.* at 653.

339. *See* Pub. L. No. 97-394, 96 Stat. 1966, 1971 (1982); Pub. L. No. 98-146, 97 Stat. 919 (1983).

Interior and Insular Affairs believed "that 2 fiscal years of no funding for State grants would severely jeopardize or eliminate programs for state and local park acquisition development."[340]

At the same time that the Administration was requesting minimal appropriations for the Fund, it was attempting to cut back on the money available for acquisition through another route. The President sent several messages to Congress proposing that the expenditure of money already appropriated be deferred.[341] The President first proposed the deferral of the $30 million in contract authority[342] which becomes available each fiscal year under the LWCF.[343] Congress rescinded that amount in its 1982 Supplemental Appropriations Act.[344] At the same time, however, Congress provided an offsetting supplemental appropriation of $30 million for land acquisitions at four specified units of the National Park System.[345]

The President was less successful in his attempts to defer additional LWCF budget authority. In March 1982, the President requested the deferral of $2,821,000 in state matching grant funds from unobligated prior-year balances to cover administrative ex-

340. VIEWS ON FY 1983 BUDGET, *supra* note 305, at 39. *See also* 128 CONG. REC. H8850 (daily ed. Dec. 3, 1982) (statement of Rep. Yates); 128 CONG. REC. H8854 (daily ed. Dec. 3, 1982) (statement of Rep. McDade).

341. Under the Impoundment Control Act of 1974, 2 U.S.C. §§ 681-688 (1982), the President is authorized to propose to Congress the deferral of certain budget authority. A deferral takes effect unless disapproved by either House of Congress in the form of an impoundment resolution disapproving the proposed deferral. *Id.* at § 684(b). The Impoundment Control Act of 1974 is discussed in greater detail *infra* at notes 435-500 and accompanying text.

342. H.R. Doc. No. 140, 97th Cong., 2d Sess. 3 (1982) [hereinafter cited as H.R. Doc. No. 140].

343. *See* 16 U.S.C. § 460*l*-10a (1982).

344. Pub. L. No. 97-257, 96 Stat. 818, 838 (1982). The $30 million in advance contract authority lapses at the end of each fiscal year if not spent by that time. *See* 16 U.S.C. § 460*l*-10a (1982). Congress had permitted the advance contract authority to lapse in every fiscal year from 1971 through 1981. *See* H.R. Doc. No. 140, *supra* note 342, at 43.

345. Pub. L. No. 97-257, 96 Stat. 818, 838 (1982). On October 1, 1982, the President requested an additional deferral of $30 million in advance contract authority for fiscal year 1983. 48 Fed. Reg. 6950 (1983). *See also* H.R. Doc. No. 15, 98th Cong., 1st Sess. 80 (1983). Both the House and Senate Appropriations Committees endorsed a rescission of $30 million in advance contract authority, the House Committee noting that "[t]his authority has not been used for several years and there are no plans to use it in fiscal year 1983." H.R. REP. No. 207, 98th Cong., 1st Sess. 61 (1983) [hereinafter cited as H.R. REP. No. 207]. *See also* S. REP. No. 148, 98th Cong., 1st Sess. 74 (1983) [hereinafter cited as S. REP. No. 148].

penses for prior-year grants to states.[346] The Comptroller General concluded that the Impoundment Control Act precluded the President from lawfully withholding the funds.[347] The House agreed and passed a resolution disapproving the rescission.[348] The House also disapproved a proposed deferral of $400,000[349] in appropriations for FWS land acquisitions.[350]

Congress has also expressed its disapproval of the Administration's foot-dragging in spending money which had already been appropriated. The 1983 conference committee on appropriations stated:

> The managers recognize the potential value of the land protection plans[351] being developed and encourage the Secretary to

346. H.R. Doc. No. 155, 97th Cong., 2d Sess. 9 (1982) [hereinafter cited as H.R. Doc. No. 155]. According to the NPS, this deferral was proposed by the Office of Management and Budget "as the most cost effective means of funding administrative costs in order to aid in reducing the overall budget deficit." *FY 1983 Senate Interior Appropriations Hearings*, *supra* note 236, pt. 1, at 691.

347. H.R. Doc. No. 186, 97th Cong., 2d Sess. 2-3 (1982) [hereinafter cited as H.R. Doc. No. 186]. The Comptroller General's opinion is discussed in greater detail *infra* at notes 449-53 and accompanying text.

348. 128 CONG. REC. H4887 (daily ed. July 29, 1982). *See also* H.R. REP. No. 654, 97th Cong., 2d Sess. 2 (1982) [hereinafter cited as H.R. REP. No. 654].

349. H.R. Doc. No. 193, 97th Cong., 2d Sess. (1982) [hereinafter cited as H.R. Doc. No. 193].

350. 128 CONG. REC. H4887 (daily ed. July 29, 1982).

351. In 1982, the Interior Department announced that land acquisition plans previously prepared by the NPS for approximately 120 acres would be revised or replaced by land protection plans by September 30, 1985. *See* 47 Fed. Reg. 19,784 (1982). The plans will be prepared for each unit in the NPS containing non-federal land or interest in land within its authorized boundary. 48 Fed. Reg. 6676 (1983) (proposed interpretive rule). Among the purposes of the land protection plan is the desire to "[d]etermine what land or interest in land needs to be in public ownership, and what means of protection other than acquisition are available to achieve unit purpose as established by Congress." *Id.* at 6677. Assistant Secretary Arnett has explained that the policy behind the development of land protection plans

> is to use, to the maximum extent practical, cost effective alternatives to direct Federal purchase of private lands, and when acquisition is necessary, to acquire or retain only the minimum necessary to meet management objectives. . . . In other words, the whole thrust is to acquire only those lands that have great public interest, public need and public use, and to acquire those interests in a manner other than fee when at all possible, such as land exchanges and zoning or easements, things of that nature.

FY 1983 Senate Interior Appropriations Hearings, *supra* note 236, pt. 2, at 588. *See also id.* at 103, 580, 584-85, 659.

Mr. Arnett stated that the Administration has "held off requesting funds for new land acquisition in fiscal 1982 and fiscal 1983 so that the new land protection policy would be established and implemented through the recrafting of existing land acquisition plans and the retraining of planning, land acquisition and management staff." *Id.* at 602.

> pursue every reasonable opportunity to accelerate their development. The managers regret that the lack of land protection plans, coupled with a realignment of approval authority, has impeded the expenditure of funds appropriated by the Congress for land acquisition project[s], thereby deflecteing [sic] congressional intent that acquisitions proceed in a timely fashion.[352]

The Reagan Administration's aversion to the LWCF program has been unmistakable. Notwithstanding Secretary Clark's apparent partial relaxation of Secretary Watt's moratorium, the Administration has drastically reduced the size of the federal acquisition program and tried to eliminate entirely the state matching grant program. But Congress has refused to accede to the Administration's desire to downgrade the Fund as the main mechanism for purchasing new recreational resources, and has consistently appropriated far more money than that requested by the Administration. Yet, the moratorium continues to circumvent the Congress's intent: it has slowed acquisitions for the Appalachian Trail, Biscayne National Park, Bogue Chitto National Wildlife Refuge, Buffalo River National Scenic River, Channel Islands National Park, Cuyahoga Valley National Park, Golden Gate National Recreation Areas, Great Smoky Mountains National Park, Indiana Dunes National Landmark, Jean Lafitte National Historic Park, Olympic National Park and Redwood National Park.[353] Unless the moratorium is com-

352. H.R. REP. No. 978, 97th Cong., 2d Sess. 15 (1982). *See also* Press Release, House Comm. on Interior and Insular Affairs (July 13, 1983) (quoting Rep. Seiberling's concern "about the many problems caused by the Interior Department's attempt to delay purchasing lands within existing parks. In general, the Department has not been spending funds for park acquisition as Congress intended." According to Rep. Seiberling, this spending "not only hurts the property owners who want and need to sell their land, but it also threatens the resources of the parks themselves, which face damaging activities such as mining, timbercutting and commercial and residential development if the lands are not acquired."); 129 CONG. REC. H4099 (daily ed. June 16, 1983), where Rep. Seiberling stated: "The authority of the Park Service to decide which properties to buy has been withdrawn; now each tract regardless of how small, must be reviewed by the Assistant Secretary of the Interior. Acquisitions are routinely being turned down because the parks have not prepared so-called land protection plans." Rep. Seiberling also noted that "development threats remain" because of "the [Interior] Department's failure to purchase certain park lands for which Congress has specifically appropriated funds." *Id.* at H4100. *Cf.* Press Release, House Comm. on Interior and Insular Affairs (July 13, 1983); Arnett letter, *supra* note 8.

353. *See* SENATE COMM. ON APPROPRIATIONS, EXPLANATORY STATEMENT ON THE DEPARTMENT OF THE INTERIOR AND RELATED AGENCIES APPROPRIATION BILL, 1983, 97th Cong., 2d Sess. 30 (1982); *FY 1983 Senate Interior Appropriations Hearings, supra* note 236, pt. 1, at 628; *id.*, pt. 2, at 92-93, 668-71, 678, 694; *FY 1983 Senate Budget Hearings, supra* note 238, at 249-51; H.R. REP. No. 207, *supra* note 345, at 61; S. REP. No. 148, *supra* note 345, at 75.

pletely disavowed and abandoned, some authorized acquisitions might become too expensive or impossible.[354]

IV. THE ILLEGALITY OF THE MORATORIUM

Actions taken to implement an outdated ideology are not for that reason necessarily harmful or unlawful. In the case of the moratorium, however, the Interior Department's actions are clearly illegal. The writers contend that the Department's willful failure to spend appropriated LWCF funds is enjoinable on at least five grounds. First, the Executive Branch lacks constitutional power to withhold appropriated funds. Second, the moratorium directly violates the clear mandate of the LWCF Act. Third, it is an abuse of whatever discretion that act affords. Fourth, the moratorium contravenes, procedurally as well as substantively, the Impoundment Control Act of 1974.[355] Finally, the action may breach the duty of the Secretary of the Interior to act as a trustee for the public in the management of the public lands.

A. *The President Lacks Inherent Powers to Impound*

The Executive Branch is required to spend all funds appropriated by Congress whenever Congress mandates such expenditure in an appropriations act. The Executive has no power, either explicit or implicit, constitutional or inherent, to refuse to spend or to defer spending appropriated monies contrary to congressional direction.

Nearly 150 years ago, in *Kendall v. United States*,[356] the Supreme Court addressed the scope of the Executive Branch's authority to impound congressionally-mandated appropriations. Congress had directed the Postmaster General to pay specified sums to certain private government contractors.[357] The Postmaster General refused

354. *See infra* notes 405-11 and accompanying text.

355. 2 U.S.C. §§ 681-688 (1982).

356. 37 U.S. (12 Pet.) 524 (1838).

357. The plaintiffs had contracted with the former Postmaster General to transport mail for the government. The plaintiffs claimed certain credits based on their performance, and the former Postmaster General agreed that the credited amounts should be paid by the government. The new Postmaster General, however, directed that the credits be withdrawn. At plaintiffs' request, Congress passed a law directing the Solicitor General to settle and adjust plaintiffs' claims for services performed and directing that the Postmaster General credit to plaintiffs whatever amounts the Solicitor General decided were due them. The

to pay the entire amount specified in the legislation, claiming that Article II of the Constitution conferred authority on the Executive to withhold payment.[358] The Court held that the Postmaster General had no discretion to refuse to carry out Congress' order to pay the full amount.[359] It firmly rejected the Executive's constitutional argument: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."[360]

A series of presidential impoundment cases, decided in the 1970's, reinforces the conclusion that the President lacks inherent or constitutional authority to refuse to spend funds appropriated by Congress. These cases made it clear that "the President's power, if any, to spend or not to spend appropriated funds derives from legislatively delegated powers and is not inherent in Article II of the Constitution itself."[361] One court reasoned that a presidential attempt to impound congressionally appropriated funds

> is by far the most dangerous abdication of legislative power in an age of Congressional acquiescence, for it vests in the executive

Postmaster General then credited plaintiffs with only a part of the amount awarded by the Solicitor General. 37 U.S. at 608-09.

358. U.S. CONST. art. II, § 1, provides that "the executive Power shall be vested in a President of the United States of America," and art. II, § 3, requires that the President "take Care that the Laws be faithfully executed."

359. 37 U.S. at 611.

360. *Id.* at 613. *See also* Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319, 1324-25 (D.D.C. 1975); Louisiana v. Weinberger, 369 F. Supp. 856, 864 (E.D. La. 1973).

361. Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 697 (D.S.D. 1973), *aff'd*, 504 F.2d 168 (8th Cir. 1974). In support of this conclusion, the district court quoted from a memorandum, relating to presidential authority to impound funds appropriated for assistance to federally impacted schools, prepared by then Assistant Attorney General William H. Rehnquist. In language reminiscent of the Supreme Court's decision in Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838), the memorandum stated:

> It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is by definition an executive function and it seems an anomalous proposition that because the Executive branch is bound to execute the laws it is free to decline to execute them.

367 F. Supp. at 697-98, *aff'd*, 504 F.2d 168 (8th Cir. 1974) (quoting Memorandum Regarding Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969), *reprinted in Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm.*, 92d Cong., 1st Sess. 283 (1971) [hereinafter cited as Rehnquist Memorandum]).

> the very essence of legislative power . . . . Should the power be conceded to the President, the very nucleus of Congressional power would pass to the Executive sphere. The system of checks and balances would be emasculated.[362]

Thus, "[t]here is no longer any doubt that in the absence of express Congressional authorization to withhold funds appropriated for implementation of a legislative program the executive branch *must* spend all funds."[363]

As there is no constitutional authority to impound funds appropriated from the LWCF, the Administration can defer spending of or refuse to spend such appropriations only if Congress has delegated to the President discretion to decide whether and when to spend Fund appropriations. In determining whether such discretion exists, the starting point is an analysis of the statute which authorizes the appropriations;[364] the authority to control the rate and amount of expenditures, "if it exists at all, must be gleaned from the language of the Act itself."[365]

The leading recent decision is *Train v. City of New York.*[366] In that case, the Supreme Court concluded that the Federal Water Pollution Control Act ("FWPCA") Amendments of 1972[367] did not

362. Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 698 (D.S.D. 1973), *aff'd*, 504 F.2d 168 (8th Cir. 1974). Similarly, the court in Local 2677, American Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973), stated that if the courts recognized an inherent presidential power to impound, "no barrier would remain to the executive ignoring any and all Congressional authorization if he deemed them, no matter how conscientiously, to be contrary to the needs of the nation. . . . The Constitution cannot support such a gloss and still remain a viable instrument." *Id.* at 77. *Accord* Guadamuz v. Ash, 368 F. Supp. 1233, 1243-44 (D.D.C. 1973).

363. Kennedy v. Mathews, 413 F. Supp. 1240, 1245 (D.D.C. 1976) (emphasis added). *See also* Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1360-61 (D.N.J. 1973); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 901 (D.D.C. 1973). In Illinois *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721 (N.D. Ill. 1973), the court reached the same conclusion, relying on U.S. CONST. art I, § 7, which gives the President the authority to veto bills, including appropriations bills, enacted by Congress. The court stated that by signing or failing to veto an appropriations act, the President thereby constitutionally approves that act. At that point, "[h]is legislative power over [the] appropriation . . . has come to an end." *Id.* at 726. *Compare* Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974) (expressly refusing to decide whether the executive power vested in the President by U.S. CONST. art. II authorizes his refusal to execute various housing assistance legislation by ordering the withholding of appropriated funds).

364. *See* State Highway Comm'n v. Volpe, 479 F.2d 1099, 1109 (8th Cir. 1973).

365. *Id.* at 1111.

366. 420 U.S. 35 (1975).

367. 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981).

permit the Administrator of the Environmental Protection Agency ("EPA") to allot to the states less than the entire amounts authorized to be appropriated by the FWPCA to assist states in funding municipal sewers and sewage treatment works construction projects.[368] Section 205(a) of the FWPCA provided that the "[s]ums authorized to be appropriated pursuant to [§ 207 of the FWPCA][369] . . . *shall* be allotted by the Administrator."[370] Focusing principally on the meaning of that language, the Court reasoned that "[i]f a sum of money is 'authorized' to be appropriated in the future by § 207,—then § 205(a) directs that an amount equal to that sum be allotted."[371] The EPA therefore had no discretionary authority to

368. 420 U.S. at 41.

369. Section 207 of the FWPCA at that time stated: "There is authorized to be appropriated to carry out this subchapter" for the fiscal years ending June 30, 1973, 1974 and 1975 "not to exceed" certain specified amounts. 33 U.S.C. § 1287 (1970 & Supp. III 1972). *See also Train*, 420 U.S. at 37 n.1.

370. 420 U.S. at 37 n. 1 (emphasis added).

371. *Id.* at 44. The Court rejected the Administrator's contention that the use of the words "not to exceed" in § 207 reflected Congress' intent to impose a maximum, but no minimum, on the amounts that must be allotted under § 205(a). The Court concluded that this language in § 207 merely referred to the possibility that the states would fail to submit projects sufficient to require obligation, and hence the appropriation, of the entire amounts authorized, or that the Administrator of EPA, exercising whatever authority the FWPCA might have given him to deny grants, would refuse to obligate these total amounts. In these circumstances, § 207 would permit appropriation of less than the full amounts authorized to be appropriated. If the full amount authorized for a particular year was obligated by the Administrator in the course of approving plans and making grants for municipal contracts, however, then the entire appropriated amount had to be alloted to the States. *Id.* at 42-44. *See also* Dabney v. Reagan, 524 F. Supp. 756, 765 (S.D.N.Y. 1982).

The Court in *Train* was also unconvinced by EPA's claim that by deleting the word "all" before the word "sums" at the beginning of § 205, Congress intended to confer discretion on the Executive to withhold funds at the allotment stage. The Court refused to accept such a construction of § 205(a), which would alter "the entire complexion and thrust of the [FWPCA]," on such scanty evidence. "We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation." 420 U.S. at 45-46.

See also United States v. Price, 116 U.S. 43 (1885), where the Court refused to permit a suit by the government to recover sums paid to a private individual pursuant to a statute (18 Stat. 637 (1875)) under which the Secretary of the Treasury "is hereby authorized and required to pay" to certain individuals specified sums. The Court deemed the case indistinguishable from United States v. Jordan, 113 U.S. 418 (1885), "in which it was held that, when an act of Congress directed the Secretary of the Treasury to pay out to a certain person a specific sum of money, the amount of taxes assessed upon and collected from him . . . 'no discretion was vested in the Secretary, or in any court' " to determine whether the entire sum should in fact be paid. 116 U.S. at 44 (quoting United States v. Jordan, 113 U.S. 418, 418 (1885)). In *Price*, "[t]he act under consideration 'required' the Secretary of the Treasury to pay Price the money

allot less than the full amounts authorized to be appropriated.[372] Similar decisions in lower courts anticipated, followed and expanded upon the *Train* rationale.[373]

B. *The Moratorium Violates the LWCF Act*

Assuming that administrative withholding or deferred expenditure of appropriated funds is legal only when Congress has delegated to the Executive the discretion to control expenditures, the question becomes whether any such delegation was made in the LWCF Act. The compelling conclusion is that the Act commands the prompt expenditure of appropriated funds and vests no discretion whatsoever to refuse to spend appropriated amounts. That conclusion is supported by the language of the Act, its legislative history, the congressional desire to retain control over the program and the purposes to be served by the Fund.

1. The Language of the Act

Not surprisingly, the drafters of the LWCF Act did not foresee or deal with future attempts by the executive branch to repeal their creation by refusing to follow its directions. The language of the Act therefore does not specifically address future fund impoundments and is, on its face, slightly ambiguous. Section 3 provides that "[m]onies covered into the Fund shall be available for expenditure for the purposes of this part only when appropriated therefor."[374] While this language is not responsive to the main question, as its

he got. . . . The Secretary of the Treasury could not refuse to pay it, and no authority has been given any one to sue to recover it back." 116 U.S. at 44.

372. 420 U.S. at 41. *Accord* Train v. Campaign Clean Water, Inc., 420 U.S. 136 (1975); Minnesota v. EPA, 512 F.2d 913 (8th Cir. 1975).

373. *See* cases cited *infra* notes 379-84.

374. 16 U.S.C. § 460*l*-6 (1982). This provision has remained unchanged since its adoption in 1964. A draft bill transmitted to Congress by the Administration in January, 1963, which was not adopted, would have vested considerably more discretion in the President to determine whether to spend amounts covered into the Fund. Section 3 of the Administration bill stated that "[t]he President shall determine from time to time a division of the total amount in the separate account [created pursuant to § 2] between those amounts to be transferred to a land and water conservation fund and those amounts to be credited to the miscellaneous receipts of the Treasury. . . ." H.R. REP. No. 900, *supra* note 116, at 34. Section 3(a) of the Administration bill would have authorized the transfer to the Fund of "such monies . . . as the President deems appropriate to assist the State and Federal agencies as hereafter prescribed." *Id.*

thrust is to state the obvious, the use of the mandatory "shall be available" is nevertheless strong evidence of a congressional intention to deny the Executive any spending discretion. More, significantly, section 5 commands that "[n]ot less than 40 per centum [of annual fund appropriations] shall be available for Federal purposes."[375] Section 6, relating to state acquisition programs, is phrased differently: while the Secretary is given power to impose on state grantees "such terms and conditions as he considers appropriate,"[376] the "[s]ums appropriated and available for state purposes for each fiscal year shall be apportioned among the several states by the Secretary" pursuant to the specified criteria.[377] Although "shall be available" and "shall be apportioned" are not precisely the same as "shall be spent," the overwhelming weight of authority holds that the former phrases mean just that.

If a court were called upon to decide the legality of the LWCF moratorium, it would not be writing on a clean slate. The Nixon impoundments of the early 1970's gave rise to a series of cases interpreting similar language. With but one aberrant exception,[378] the federal courts held that phraseology the same as or similar to that contained in the LWCF Act constituted a command to spend that the administration had no discretion to override. One district court began with the interpretative canon that "[t]o the extent that Congress intends to give the President impoundment authority, it is only reasonable to require that it unambiguously state that intention."[379] Nothing in the LWCF Act even hints at such a delegation. More to the point, the federal District Court for South Dakota concluded that "where a statute provides that a certain amount of

375. 16 U.S.C. § 460*l*-7 (1982). As originally adopted, the Act authorized the President, during the first five years of the Fund's operation, to vary the normal 60%-40% allocation of appropriated funds between state and federal purposes by not more than 15%. Pub. L. No. 88-578, § 4(a)(ii), 78 Stat. 900 (1964). This discretionary authority expired after five years and was removed from the statute in 1976. *See* Pub. L. No. 94-422, § 101(2), 90 Stat. 1314 (1976).

376. 16 U.S.C. § 460*l*-8(a) (1982).

377. *Id.* § 460*l*-8(b) (emphasis added). *See also id.* § 460*l*-8(b)(4), providing that certain apportioned but unobligated funds "shall be reapportioned by the Secretary" in accordance with § 6(b)(2) of the Act, 16 U.S.C. § 460*l*-8(b)(2) (1982).

378. Guadamuz v. Ash, 368 F. Supp. 1233, 1240 (D.D.C. 1973), holding that appropriations language that "necessary amounts shall be available" did not preclude some secretarial discretion to limit the size of the assistance program, is discussed *infra* at note 433.

379. Arkansas v. Goldschmidt, 492 F. Supp. 621, 627-28 (E.D. Ark. 1980), *vacated as moot*, 627 F. Supp. 839 (8th Cir. 1980).

money 'shall be available' to states or to certain parties, the money must be spent to the extent of the qualified applicants. The [Executive] discretion is limited to the determination of qualifications."[380] In a case concerning the expenditure of funds apportioned to states for highway construction, the Eighth Circuit concurred, holding that "shall be available for expenditure" and "shall continue to be available for expenditure" created a mandatory duty prohibiting secretarial withholding.[381] Other courts have decided similarly;[382] the Minnesota District Court held that a statement in a bill's legislative history that loans "would be available" supported the conclusion that the official had no discretion to refuse to consider loan applications.[383] The judicial treatment of the phrases "shall be ap-

380. Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 694 (D.S.D. 1973), *aff'd*, 504 F.2d 168 (1974).

381. In State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973), the court decided that the Secretary of Transportation did not have the authority to defer obligation of highway funds previously apportioned to the State of Missouri under the Federal-Aid Highway Act of 1956, 23 U.S.C. §§ 101-156 (1970). Section 118(a) of that statute, 23 U.S.C. § 118(a) (1970), provided that once appropriated sums were apportioned to the states under a specified formula, "such sums shall be available for expenditure under the provisions of this title." The court concluded, in dictum, that once authorization for apportionment was given, Congress intended to prevent the Secretary from imposing any controls on the use of the apportioned sums which would prevent full obligation by the states. 479 F.2d at 1110 n.15. Similarly, the court held that § 118(b), 23 U.S.C. § 118(b) (1970), which provided that sums apportioned to a state "shall continue to be available for expenditure in that state . . . for a period of two years," prohibited the Secretary from withholding obligational authority to a time within the two-year period that the Secretary chose as the appropriate time for release. 479 F.2d at 1114-15.

382. *See, e.g.*, Dabney v. Reagan, 542 F. Supp. 756, 764-65 (S.D.N.Y. 1982); Maine v. Goldschmidt, 494 F. Supp. 93 (D. Me. 1980); Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319, 1323 (D.D.C. 1975) (and cases cited therein, *id.* at 1321 n.1); Montana v. Brinegar, 380 F. Supp. 861, 862 (D. Mont. 1974) (noting the "growing body of precedent" and citing cases in support of the conclusion that the Secretary lacked authority to defer obligation of apportioned funds).

In National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897 (D.D.C. 1973), the court construed § 601 of the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, as amended, 42 U.S.C. § 201 note and § 2661 note (1976 & Supp. V 1981). That section provided that appropriated funds "shall remain available for obligation and expenditure until the end of [the] fiscal year [in which they were appropriated]." The court concluded that "this provision makes mandatory the spending of funds appropriated under the Act for fiscal 1973." 361 F. Supp. at 902. *Cf.* National Treasury Employees Union v. Reagan, 663 F.2d 239 (D.C. Cir. 1981) (statute providing that specified appropriations "shall be provided" to the Veterans Administration prohibits the Office of Management and Budget from withholding any of such appropriations).

383. Berends v. Butz, 357 F. Supp. 143 (D. Minn. 1973) (where Congress in legislative history stated that Farmers Home Administration loans "would be available," and agency's

portioned" and "shall be allotted" is identical: courts have consistently interpreted similar statutory provisions to require full apportionment of the appropriated funds to state and other recipients.[384] Finally, the Comptroller General, construing section 6(b) of the LWCF Act, concluded that it indicates Congress' intent "to mandate the spending of amounts for state grants."[385]

2. The Legislative History

The language of the LWCF Act thus means that once moneys are appropriated from the Fund, the Act provides the Executive with no authority to delay expenditure of such moneys or to divert them to different uses. But the statutory language is not necessarily determinative of the scope of the discretion, if any, which Congress

own regulations provided that such loans "will be available" in specified circumstances, the Secretary of Agriculture had no discretion to refuse to consider loan applications).

384. Section 205(a) of the FWPCA, which was construed by the Supreme Court in Train v. City of New York, 420 U.S. 35 (1975), provided that "sums authorized to be appropriated . . . shall be allotted" by the EPA Administrator. *Id.* at 42. The Court held that § 205(a) prohibited the Administrator from allotting to the states less than the entire amounts authorized to be appropriated by § 207 of the FWPCA. *Id.* at 41.

Similarly, § 703(a)(1) of the Older Americans Act, 42 U.S.C. § 3045(a) (1976) (repealed 1978) provided that "[f]rom the sums appropriated for any fiscal year under [this Act] each State shall be allotted" an amount computed pursuant to a specified formula. Section 703(a), *id.* at § 3045b(a), provided that the amount of a state's allotment which the Department of Health, Education and Welfare ("HEW") determined would not be required for that year "shall be reallotted" to other states. In Kennedy v. Mathews, 413 F. Supp. 1240 (D.D.C. 1976), the court held that the statute "places a mandatory obligation on [HEW] to reallocate funds from states not spending their entire yearly share to states willing to spend in excess of their entire share, thereby insuring that all funds appropriated for a given fiscal year will be spent during that year." *Id.* at 1244. The court added that "[t]here is no longer any doubt that in the absence of express Congressional authorization to withhold funds appropriated for implementation of a legislative program the executive branch must spend all funds." *Id.* at 1245.

See also Louisiana v. Weinberger, 369 F. Supp. 856 (E.D. La. 1973) ("We agree . . . that '[b]y use of the word "shall" . . . with respect to the minimum allotment to each State as well as to allotment of the remainder of the sums appropriated, it is clear that Congress intended that such allotment be mandatory.' " *Id.* at 862 (quoting Oklahoma v. Weinberger, 360 F. Supp. 724, 726 (W.D. Okl. 1973))); Illinois *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 726 (N.D. Ill. 1973) (under statute providing that the Commissioner of Education "shall allot to each state" specified sums, "the allotment to the states is a ministerial, mechanical, nondiscretionary act").

385. H.R. Doc. No. 186, *supra* note 347, at 2-3. The Comptroller General's opinion is discussed in greater detail in connection with the application of the Impoundment Control Act of 1974 to the moratorium on expenditure of Fund appropriations. *See infra* notes 449-57 and accompanying text.

intended to delegate to the Executive branch to control Fund expenditures.[386] Other indicia of legislative intent—including the legislative history and the relationship of authorization provisions to the statutory program as a whole—must also be examined to determine whether the spending duty is mandatory or discretionary.[387]

The legislative history of the LWCF Act negates any congressional intention to delegate executive discretion for deferral of expenditures or withholding of appropriated funds. The House Committee, in initially recommending the creation of the Fund in 1963, stressed the importance of maintaining congressional control over the rate and manner of Fund expenditures:

> The Committee has kept in mind throughout its consideration of H.R. 3846 not only the desirability of its main purpose of providing a base for the improvement and extension of outdoor recreation opportunities for a healthy America but also the necessity of sound fiscal controls over the development of the program. In marking up the bill, it has taken care to preserve for the Congress all of its usual appropriating authority. It has done so by eliminating provisions authorizing the President to divide the amounts received from the three principal sources named in the bill between miscellaneous receipts of the Treasury and the land and water conservation fund.[388]

The resulting legislation accordingly limited the President's control over expenditure of Fund appropriations to his ability to apportion

386. "But discerning Congress' intent to bestow or withhold discretion to suspend the programs in their entirety is not a simple matter of tallying the 'shalls' and 'mays' and finding that the 'mays' have it. Logic, and precedent . . . require more. . . ." Pennsylvania v. Lynn, 501 F.2d 848, 854 (D.C. Cir. 1974). Then Assistant Attorney General William H. Rehnquist expressed the same sentiment:

> On the question of trying to find a mandatory intent on the part of Congress [that funds appropriated by Congress be spent in full by the Executive branch], it is not a question of looking for the word 'shall' as opposed to 'may.'. . . Congress had indicated [a mandate to spend in] the overall language of the authorization bill, the enabling statute, if there was one (and) the particular appropriation language, and construing them together to try to find on a reasonable basis what intent Congress manifested.

Rehnquist Memorandum, *supra* note 361, *quoted in* Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 694-95 (D.S.D. 1973), *aff'd*, 504 F.2d 168 (8th Cir. 1974). *See also* International Union, UAW v. Donovan, 570 F. Supp. 210, 214 (D.D.C. 1983); Rocky Ford Housing Auth. v. Department of Agriculture, 427 F. Supp. 118, 127 (D.D.C. 1977).

387. Rocky Ford Housing Auth. v. Department of Agriculture, 427 F. Supp. 118, 128 (D.D.C. 1977). *See also* State Highway Comm'n v. Volpe, 479 F.2d 1099, 1111-12, 1114-15 (8th Cir. 1973); Illinois *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 726 (N.D. Ill. 1973).

388. H.R. REP. No. 900, *supra* note 116, at 22.

such expenditures between federal and state programs.[389] Even that authority, however, was limited: the President's reapportionment power only applied to the first five years of the Fund's operation;[390] the President could vary the normal 40 to 60% distribution by not more than fifteen percentage points;[391] and Congress could remove even this limited reapportionment authority by a contrary provision in an appropriation act.[392]

Congress often reiterated its intention to retain ultimate control over the rate of appropriated Fund expenditures when periodically amending the Act. In 1976, the Conference Committee stated that if the full amounts appropriated for state purposes are not spent because states could not provide their matching share, the excess state money should be spent by federal agencies.[393] The conferees apparently wanted to prevent the President from defeating the basic congressional intent to spend all appropriated funds by failing to reallocate unspent state matching funds to federal acquisition programs.

Congress indicated in other ways that it had no intention of allowing the President to defer expenditure of appropriated funds for either federal or state purposes. The initial 1963 committee

389. The House Committee, "without destroying the necessary *flexibility in the apportionment* of moneys derived from the fund, . . . established ground rules under which these moneys *will be allocated* between the States and the Federal agencies. . . ." *Id.* at 15 (emphasis added). One of the "seven principal propositions" upon which the House Committee based its recommendation to create the Fund was the following:

> [N]o hard and fast apportionment of the fund among the various uses to which it can be put is possible at this time, that a measure of flexibility in making such apportionments is necessary, and that the best way of assuring such flexibility is for *the Congress* to exercise its appropriating authority year by year on the basis of an informed discretion supported by Budget submissions and in the light of certain guidelines furnished by the legislation.

Id. at 27 (emphasis added). The Executive's role in deciding when and where Fund moneys should be spent (aside from the President's limited reapportionment authority during the first five years of the Fund's operation, discussed *infra* at notes 390-92 and accompanying text) apparently was to begin and end with the submission of the annual budget to the appropriations committee of Congress and with the signing of the appropriations legislation. The ultimate decision on how much to appropriate from the Fund and spend on outdoor recreation is vested in the "informed discretion" of *Congress*, not the President. H.R. REP. No. 900, *supra* note 116, at 27.

390. Pub. L. No. 88-578, § 4(a), 78 Stat. 900 (1964). *See also supra* note 375.

391. Pub. L. No. 88-578, § 4(a), 78 Stat. 900 (1964).

392. H.R. REP. No. 900, *supra* note 116, at 22.

393. S. REP. No. 1468, 94th Cong., 2d Sess. 16 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2462, 2463.

reports on both the House[394] and Senate[395] side support that conclusion by using mandatory language. In creating the Fund, Congress viewed the role of the states in the outdoor recreation field as "dominant" and "pivotal."[396] But the states could not take the lead in the development of outdoor recreational opportunities if the President had the authority to decide whether, and if so how rapidly, appropriated funds devoted to state use would be spent. For this reason, "[c]ontrol of the rapidity with which state recreational facilities are developed will . . . rest primarily with the states and their legislatures."[397] The Secretary of the Interior may approve or reject state planning, state acquisitions or state development projects,[398] but he has no power to refuse to spend funds appropriated and apportioned to the states.[399]

3. The Purposes of the LWCF

Overshadowing narrow technical and semantic points are the purposes of the LWCF program and the consistent congressional intent to fulfill them expeditiously. The courts have found that a congressional desire for prompt implementation of a particular statutory program negates any implied presidential authority to defer spending of or impound appropriated funds. In *Train v. City of New York*,[400] for example, the Supreme Court based its holding

394. The House Committee Report contains the same mandatory language ultimately included in § 5 of the Act, 16 U.S.C. § 460*l*-7 (1982). *See* H.R. REP. No. 900, *supra* note 116, at 13 ("40 percent of all the appropriations made under the act *shall be available* for distribution among the Federal agencies for land acquisitions. . . . This 40 percent *will*, unless otherwise allotted in the appropriation acts, *be distributed* [to the appropriate Federal agencies]. . . . They *will be available* . . . for land acquisition as authorized by law. . . .") (emphasis added).

395. *See* S. REP. No. 1364, *supra* note 116, at 8.

396. H.R. REP. No. 900, *supra* note 116, at 9; S. REP. No. 1364, *supra* note 116, at 5-6. *See also* H.R. REP. No. 1225, *supra* note 185, at 7; H.R. REP. No. 900, *supra* note 116, at 26.

397. H.R. REP. No. 900, *supra* note 116, at 11.

398. *See* 16 U.S.C. § 460*l*-8(f)(1) (1982). The Secretary also has discretion at the apportionment stage in assessing the relative "need" of the individual states. *See id.* at § 460*l*-8(b)(2) (1982). *See also* H.R. REP. No. 900, *supra* note 116, at 51.

399. Several congressmen, in dissenting from the initial House Committee Report, described the State's right to receive appropriated funds as "a 60 percent vested interest in the proceeds from all Government surplus sales with the provision that the President may vary said percentage by not more than 15 points during the first 5 years." H.R. REP. No. 900, *supra* note 116, at 52.

400. 420 U.S. 35 (1975).

in part on Congress' desire to implement the state sewage contruction grant program rapidly:

> As conceived and passed in both Houses, the legislation was intended to provide a firm commitment of substantial sums within a relatively limited period of time in an effort to achieve an early solution of what was deemed an urgent problem. We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation.[401]

Similarly, in *Louisiana ex rel. Guste v. Brinegar*,[402] the court ruled that Congress' objective of early completion of the Interstate Highway System "is at odds with a claim of discretion to withhold funds for a period of months or even years."[403]

Throughout the history of the Fund, Congress repeatedly has stressed its desire for the expeditious acquisition of recreation resources with Fund moneys.[404] One of the House Committee's "seven principal propositions" in recommending the creation of the Fund was the belief "that it is important that presently available lands which are suitable for outdoor recreation purposes be preserved or acquired for public use within the very near future before they become either completely unavailable or prohibitively costly."[405]

401. *Id.* at 45-46 (footnote omitted).

402. 388 F. Supp. 1319 (D.D.C. 1975).

403. *Id.* at 1323-24. *Accord* State Highway Comm'n v. Volpe, 479 F.2d 1099, 1115 (8th Cir. 1973) (the government's claim of discretion to withhold funds appropriated for state grants was "weakened by reference to Section 101(b) of the [Federal Aid Highway Act of 1954, 23 U.S.C. § 101(b) (1970)] where it is declared to be in the national interest to accelerate the construction of the highway system"). *See also* Kennedy v. Mathews, 413 F. Supp. 1240, 1242-43 (D.D.C. 1976).

404. Indeed, the need to act promptly was pointed out by President Kennedy even before the Fund was created when he first transmitted to Congress his proposal for creation of the Fund. The President noted that expenditures for acquisition and preservation of recreational resources "are a sound financial investment. Public acquisition costs can become multiplied and even prohibitive with the passage of time." Letter from President John F. Kennedy to John W. McCormack, Speaker of the House of Representatives (Feb. 14, 1963), *reprinted in* H.R. REP. No. 900, *supra* note 116, at 30; S. REP. No. 1364, *supra* note 116, at 19.

President Kennedy's Secretary of the Interior, Stewart L. Udall, expressed the same sentiment: "[T]he most urgent requirement today is to set aside valuable outdoor recreation resources in public ownership, before escalating land prices and rapid diversion to other purposes put them out of reach . . . ." Letter from Stewart L. Udall, Secretary of the Interior, to President John F. Kennedy (Jan. 28, 1963), *reprinted in* H.R. REP. No. 900, *supra* note 116, at 32; S. REP. No. 1364, *supra* note 116, at 21.

405. H.R. REP. No. 900, *supra* note 116, at 26. In the same report, the Committee stated that "[i]t is important that acquisition be undertaken before the land becomes unavailable

Each time it expanded the revenue base of the Fund, Congress enunciated the need for quick action to minimize the impact of escalating recreational land costs. Thus, the purpose of adding OCS revenues to the Fund in 1968 was primarily to accelerate the pace and expand the scope of acquisitions.[406] Congress noted with dismay that "[d]elay has resulted in increased costs to the Government and has resulted further in a reduction of acquisition of vital recreation areas."[407] The 1968 Amendments also broadened the authority of the Secretary of the Interior "to take speedy administrative action for dealing, in part, with the increasingly serious problem of land-cost escalation."[408]

The same considerations impelled Congress to increase the authorized level for Fund appropriations in 1976 and 1977. It deemed prompt action necessary to reduce the growing backlog of unacquired land and to minimize the impact of both land cost escalation[409] and further development which would be inconsistent with future recreational use.[410] Significantly, the backlog of unacquired land in 1983 is even greater than that which prompted the 1976-77 amendments to the LWCF Act.[411]

either because of skyrocketing prices or because it has been preempted for other uses." *Id.* at 10.

406. *See* S. REP. No. 1071, *supra* note 133, at 1, 3.

407. *Id.* at 4.

408. *Id.* at 1.

409. The House Committee, referring to the $500 million backlog of authorized but unacquired land that had developed by 1976, noted that "[w]ithout sufficient funding to acquire these lands in a reasonable amount of time, land prices tend to increase enormously." H.R. REP. No. 1021, *supra* note 178, at 7. The same argument was made by the Senate Committee in 1977, when a special account was set up to reduce the backlog: "Any delay in acquiring these authorized lands is false economy indeed." S. REP. No. 162, *supra* note 216, at 3.

410. "[T]he increasing rate of allocation and development of lands for other purposes across the Nation is rapidly depleting, for all time, the land resources available for preservation and outdoor recreation use. Once gone, with particular regard to unique resource areas, they are usually gone forever." H.R. REP. No. 1021, *supra* note 178, at 4. *See also id.* at 7; S. REP. No. 162, *supra* note 216, at 3.

411. In 1975, the Ford Administration estimated that the federal land acquisition backlog exceeded $2.4 billion. *See* sources cited at note 204 *supra*. In early 1983, the Outdoor Recreation Policy Review Group, headed by Laurance S. Rockefeller, stated in a report called "Outdoor Recreation Policy for America—1983": "There is a growing gap—now estimated at more than $3 billion—between the cost of lands Congress has authorized for purchase and funds available for their acquisition." 129 CONG. REC. S4863 (daily ed. Apr. 19, 1983).

At least one additional characteristic of the funding program created by the Act demonstrates Congress' intent to require expenditure by the Executive branch of all appropriated funds.[412] Congress has consistently expressed a desire to facilitate long-range planning by state and federal recipients of appropriated moneys by providing those recipients with assurances that appropriated funds would in fact be obligated by the Executive.[413] In recommending the crea-

412. The failure of Congress to enact a statute explicitly forbidding the Secretary of the Interior from impounding moneys appropriated from the Fund by Congress does not support the argument that Congress intended to vest the Secretary with discretion to withhold such moneys. A similar claim was firmly rejected in Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 696 (D.S.D. 1973), *aff'd*, 504 F.2d 168 (8th Cir. 1974):

> The Government points to the repeated failure of Congress, in the face of Presidential impoundment, to assert its mandatory intent by amending the Act as indicative of an intent to confer the discretion upon the Secretary [of Agriculture] . . . . [O]ne walks on dangerously thin ice when trying to glean an affirmative intent from a Congressional failure to act . . . . [I]t is a slim argument which equates that failure with a manifestation of Congressional intent to delegate to the Administrator [of the Rural Electrification Administration] the power to terminate a Congressional program.

Accord State Highway Comm'n v. Volpe, 479 F.2d 1099, 1116-17 (8th Cir. 1973) (rejecting the claim that congressional silence in the face of impoundments manifested assent to such impoundments as "another straw in the wind"). *See also* text accompanying note 490, *infra*. *Compare* Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974), where the court emphasized

> that Congress's failure to enact mandatory spending legislation in response to the Executive's decision to withhold authorized funds is not and cannot be the basis, in any degree, for an inference that it did not intend in the first instance to preclude executive discretion to suspend the programs. Congress . . . cannot be put to the necessity of acting twice before it is taken to mean what it said in duly enacted legislation.

Id. at 861. In holding that the Secretary of Housing and Urban Development had authority to suspend certain low income housing projects, the court in *Lynn* did infer congressional assent to such a course of action from Congress' failure to protest. The court stressed "the unusual extent to which Congress has clarified its intent," *id.* at 858 n.34, noting, for example, that during the course of hearings concerning the suspension of the projects, "not a single member drew in question its legality, even inferentially." *Id.* at 858. In addition, various congressional committees provided detailed responses to the suspension, "each of which regarded the suspension as at most unwise and some of which did so at the time that they rejected outright executive initiatives to suspend, terminate, or phase out other programs." *Id.* at 861.

Congress's reponse to the LWCF moratorium, on the other hand, has consistently reflected the view that the executive branch has no authority to withhold appropriated funds. *See, e.g.*, Resolution Disapproving Deferral of Budget Authority (Dep't of the Interior), H.R. REP. No. 654, *supra* note 348.

413. In City of Los Angeles v. Coleman, 397 F. Supp. 547 (D.D.C. 1975), the court held that the Secretary of Transportation could not, through the establishment of a "priority system" for approving grants under the Airport and Airway Development Act of 1970, 49 U.S.C. §§ 1701-1743 (1976 & Supp. V 1981), withhold from the city funds which had been apportioned to the city under the statute's apportionment formula. The court relied in part

tion of the Fund, both Houses of Congress stressed the need for certainty that moneys covered into the Fund would be spent for acquisition of recreational resources:

> The existence of such a single fund, the committee believes, is necessary for the program to move forward in an orderly manner. It will furnish reasonable assurance both to the States and to the Federal agencies, even though it will not be available for expenditure until appropriations are made from it, that their approved programs will not depend on a stop-and-go system. It will furnish the Congress a means by which it can keep track of progress and can evaluate the uses to which the financial resources which will be available for the program are being put.[414]

The House Committee repeated the necessity for assured funding as a justification for adding OCS lease revenues to the Fund in 1968: "[T]he program for which the land and water conservation fund was originally set up is not the sort of program that can be effective if it is subject to being turned on and off like a water tap."[415] The

upon the fact that one important goal of the statute "was the facilitation of long-term planning by airport sponsors. The mandatory apportionment formula . . . was intended to remedy the uncertainty of funding which had existed under the Federal Airport Act of 1946." 397 F. Supp. at 554 (footnote omitted). The Secretary's priority system, by denying the city the funds to which it was entitled under the statutory apportionment formula, "would subvert the primary purpose of the Act's funding mechanism which was to provide minimum levels of assistance so that airport sponsors could make their plans with the assurance that their federal entitlement would be forthcoming." *Id.*

Significantly, the court also concluded in *Coleman* that the diversion of money from a trust fund set up under the statute in order to facilitate airport capital development projects, to Federal Aviation Administration operational and maintenance expenses, would subvert the congressional design underlying the statute. *Id.* at 555-56. Similarly, the diversion of Fund moneys into the Park Restoration and Improvement Program would conflict sharply with the goals reflected in the establishment and expansion of the Land and Water Conservation Fund.

414. H.R. REP. No. 900, *supra* note 116, at 14-15. *See also* S. REP. No. 1364, *supra* note 116, at 10.

415. H.R. REP. No. 1313, 90th Cong., *supra* note 133, at 5-6. In 1970, the House Committee again expanded the revenue base of the Fund. *See supra* notes 190-97 and accompanying text. One of the reasons for doing so was the success of the 1968 amendments in stablizing the program by providing an assured source of funding (OCS revenues):

> Compared to the earlier years of the program, the guaranteed annual income to the Land and Water Conservation Fund has produced a stable program allowing a reasonable rate of progress. Unlike the initial years of the Fund, when it was impossible to project precisely how much money would be available for the program from year to year, the $200 million program has enabled all levels of government to develop their plans with some degree of assurance that the funds to make them a reality will be available for appropriation.

H.R. REP. No. 1225, *supra* note 185, at 7.

claim that the Executive has discretion to withhold moneys appropriated from the Fund is thus clearly inconsistent with Congress' goals in shaping the Fund.[416]

C. *The Administration's Moratorium Abuses Whatever Discretion the Act Delegates*

Assuming arguendo that Congress delegated some discretion to the Executive to control expenditures from the Fund, the current Administration abuses that discretion to the extent it imposes a total or partial moratorium on land acquisitions.[417]

416. The use of multiple-year authorization in § 2 of the Act, 16 U.S.C. § 460*l*-5 (1982), is itself indicative of Congress' intent to mandate the expenditure of appropriated funds, and particularly to prohibit the Executive from refusing to spend appropriated funds for a major part of the legislative program (*i.e.*, the state matching grant program). *See* Local 2677, American Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60 (D.D.C. 1973): "The multiple year authorization enables the Congress to evidence its intent to continue to fund a program (with the option to terminate it if it so pleases) without being forced to make that intent known by appropriating funds before the end of the fiscal year." *Id.* at 75.

417. When the imposition of the moratorium is challenged in court, the reviewing court must determine the scope of review as to whether the Secretary of the Interior has abused any discretion delegated to him under the Act. In Rocky Ford Housing Auth. v. Department of Agriculture, 427 F. Supp. 118 (D.D.C. 1977), the court, facing a similar challenge, applied the scope of review test enunciated in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, (1971). The court in *Rocky Ford* first asked whether the Secretary of Agriculture, who had withheld funding from a "rural rent supplement program" created by Congress, properly construed the scope of his authority. This question involved determining whether the Secretary based his decision to implement an alternative program on the belief that this course of action would actually promote the goals of the statute that established the rent supplement program. Assuming an affirmative answer to this inquiry, the court then asked whether the Secretary's determination was sustainable on the administrative record made; the Secretary must have based his decision on a "consideration of the relevant factors." 427 F. Supp. at 131-32. The Secretary's decision would only be upheld if he had taken a "hard look" at these factors and "genuinely engaged in reasoned decision-making." *Id.* at 132, quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (1970), *cert.denied*, 403 U.S. 923 (1971).

In Pennsylvania v. Lynn, 501 F.2d 848, (D.C. Cir. 1974), the court approached the scope of review issue in a somewhat different manner:

> Since the discretion [to withhold appropriated funds] vested in the Secretary [of Housing and Urban Development] is a narrow one, and the potential for mischief in the event of its abuse great, it is natural for a court to extend its inquiry somewhat beyond the 'rational basis' that elsewhere suffices to support an administrative decision under [the Administrative Procedure Act,] 5 U.S.C. §706 . . . '[t]he ultimate test is reasonableness.' . . . Our inquiry, therefore, is not merely into whether the Secretary had a rational basis for believing that the programs were disserving Congress's purposes and policies, but whether, having those policies in mind and considering the consequences to be expected from continuing the programs, it was reasonable to discontinue them.

Id. at 862 (citation omitted).

An administrative agency of the federal government that disagrees with a congressional policy may not merely refuse to implement it.

> An administrative agency is required to effectuate, not ignore, Congressional intent, whether the agency agrees with Congress or not. The judicial branch has the function of requiring the executive (or administrative) branch to comply with the requirements set up by the legislative branch.[418]

When Congress vests the Executive with discretion to decide whether and how to spend appropriated funds, the Executive must exercise that discretion in accordance with any criteria for decision-making set forth in the statute making the delegation.[419] Even if the statute is devoid of clear limiting criteria, the legislative history of the enactment may define the parameters of the agency decision-maker's discretion.[420] In the final analysis, the agency must act in a manner that will "render the statutory design effective in terms of the policies behind its enactment . . . ."[421] The imposition of a

418. Ross v. Community Services, Inc., 396 F. Supp. 278, 286 (D. Md. 1975), *aff'd per curiam*, 544 F.2d 514 (4th Cir. 1976), *citing* National Automatic Laundry & Cleaning Council v. Schultz, 443 F.2d 689, 695 (D.C. Cir. 1971). *Accord* Rocky Ford Housing Auth. v. Department of Agriculture, 427 F. Supp. 118, 129 (D.D.C. 1977); Berends v. Butz, 357 F. Supp. 143, 156 (D. Minn. 1973). *See also* Kennedy v. Mathews, 413 F. Supp. 1240 (D.D.C. 1976), where the court enjoined the Secretary of Health, Education, and Welfare from impounding funds appropriated for use in connection with the Nutrition Program for the Elderly. The court held that the Secretary's withholding of appropriated funds was inconsistent with Congress' desire that the program be funded and "obviously reflects the President's hostility to the nutrition program." *Id.* at 1244.

419. *See* Minnesota v. Coleman, 391 F. Supp. 330, 332 (D. Minn. 1975). The Act provides such criteria in § 1, 16 U.S.C. § 460*l*-4 (1982), which enunciates Congress' purpose in creating the Fund.

420. *See* Rocky Ford Housing Auth. v. Department of Agriculture, 427 F. Supp. 118, 129-30 (D.D.C. 1977).

421. National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 689 (1973), *cert. denied*, 415 U.S. 951 (1974), *cited in* Rocky Ford Housing Auth. v. Department of Agriculture, 427 F. Supp. 118, 131 (D.D.C. 1977). In Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974), the court explained why the legislative history may not be helpful in defining the scope of the Executive's discretion to withhold the expenditure of funds appropriated by Congress in aid of a particular legislative program:

> When Congress establishes a new program, however novel or untested, it does not normally express itself on the question of what the executive officer charged with its administration should do if and when he has reason to believe that it is frustrating the policies he is obliged to serve. In such unanticipated circumstances, it becomes the duty of a court to construe the relevant statutes in a manner that most fully effectuates the policies to which Congress was committed.

moratorium on further acquisition with moneys appropriated from the Fund is directly contrary to Congress's goals in creating the Fund.[422] The implementation of the moratorium can only subvert the policies which Congress has consistently expressed in expanding the scope of the Fund and in appropriating moneys for both federal and state acquisitions—most recently in the face of direct Administration opposition.

The Interior Secretary would clearly abuse his discretion if, for purposes unrelated to achieving the goals of the Act, he refused to spend appropriated funds.[423]

> To reason that there is implicit authority within [an] Act to defer approval [of federal grants to states] for reasons totally collateral and remote to the Act itself requires a strained construction which we refuse to make . . . . [W]hen the impoundment of funds impedes the orderly progress of the [statutory] program, this hardly can be said to be favorable to such a program. In fact, it is in derogation of it. It is difficult to perceive that Congress intended such a result.[424]

Just as clearly, the Secretary could not properly premise his decision to impose an acquisition moratorium on a desire to control inflation or reduce the federal deficit, or on similar budgetary considerations.[425] One court has held that

Id. at 857. *Compare* Housing Auth. of San Francisco v. HUD, 340 F. Supp. 654 (N.D. Cal. 1972) (concluding that there were no justiciable standards or guidelines to determine whether an agency official had abused his discretion in impounding appropriated funds).

422. *See* 16 U.S.C. § 460*l*-4 (1982).

423. *See* Sioux Valley Empire Electric Ass'n v. Butz, 504 F.2d 168, 173, 178 (8th Cir. 1974); State Highway Comm'n v. Volpe, 479 F.2d 1099, 1114, 1116 (8th Cir. 1973); Maine v. Goldschmidt, 494 F. Supp. 93, 99 (D. Me. 1980); Minnesota v. Coleman, 391 F. Supp. 330, 332 (D. Minn. 1975); Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319, 1323 (D.D.C. 1975); Guadamuz v. Ash, 368 F. Supp. 1233, 1240-41 (D.D.C. 1973); Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1381-82 (D.D.C. 1973). *But see* Sioux Valley Empire Elec. Ass'n v. Butz, 504 F.2d 168, 175 n.16 (8th Cir. 1974) (after holding that the agency official had no discretion to *terminate* a legislative program by withholding appropriated funds, the court found it unnecessary "to decide . . . whether the Administrator, in administering a program, may within the range of his discretion consider political or economic factors not expressly set forth in the statute itself.") *Compare* Pennsylvania v. Lynn, 501 F.2d 848, 852 (D.C. Cir. 1974) (upholding the Secretary of Housing and Urban Development's refusal to process applications for federal subsidies under various housing programs where it was "undisputed that, when the Secretary suspended the programs, he did so for 'program-related' reasons").

424. State Highway Comm'n v. Volpe, 479 F.2d 1099, 1114 (8th Cir. 1973).

425. The court in State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973), found it "apparent that the Secretary [of Transportation] does not have the authority to withhold

> in this Court's view, Congress has not yet gone so far, at least with respect to the legislation with which we presently deal, to confer upon the President the power to reassess and reorder Congressional priorities in an attempt to effect Executive economic policies.[426]

The legislative history of the Act demonstrates that Congress did not intend to authorize the Secretary to withhold moneys appropriated from the Fund for fiscal policy reasons. When Congress expanded the revenue base of the Fund in 1968, 1976 and 1977, it was advised that expenditures for federal and state acquisitions could increase inflation and the federal deficit.[427] Congress was aware of and considered these economic matters, and it amended the Act in a manner it believed consistent with the fiscal concerns raised by the Administration and others in the course of debate.[428] In 1976

funds for anti-inflationary purposes." *Id.* at 1115. The court's conclusion was supported by the legislative history of a recent amendment to the Federal-Aid Highway Act:

> The withholding of highway trust funds as an anti-inflationary measure is a clear violation of the intent of the Congress as expressed in section 15 of the Federal-Aid Highway Act of 1968. We again wish to emphasize the clear legislative intent that funds apportioned shall not be impounded or withheld from obligation . . . .

H.R. REP. NO. 1554, 91st Cong., 2d Sess. 13 (1970), *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5392, 5401, *cited* in 479 F.2d at 1116. *Accord* Iowa *ex rel.* State Highway Comm'n v. Brinegar, 512 F.2d 722, 722 (8th Cir. 1975); Maine v. Goldschmidt, 494 F. Supp. 93, 97 (D. Me. 1980); Minnesota v. Coleman, 391 F. Supp. 330, 332 (D. Minn. 1975); Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319, 1323 (D.D.C. 1975).

Even absent such an explicit prohibition in the legislative history, the courts have held that impoundment for fiscal policy reasons constitutes an abuse of discretion unless there is an express grant of statutory authority. *See, e.g.*, Rocky Ford Housing Auth. v. Department of Agriculture, 427 F. Supp. 118, 132-33 (D.D.C. 1977); Louisiana v. Weinberger, 369 F. Supp. 856, 864 (E.D. La. 1973); Guadamuz v. Ash, 368 F. Supp. 1233, 1240-41 (D.D.C. 1973); Oklahoma v. Weinberger, 360 F. Supp. 724, 728 (W.D. Okla. 1973).

426. Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 697 (D.S.D. 1973), *aff'd*, 504 F.2d 168 (8th Cir. 1974). *See also* Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1360 (D.N.J. 1973): "The Executive Branch has no authority, even for motives such as the control of inflation, to decide for itself whether to obey a law after the President has signed a bill into law, or after Congress has overridden a Presidential veto."

427. *See, e.g.*, the legislative materials cited *supra* at note 216 and accompanying text.

428. For example, in recommending the addition of OCS revenues to the Fund in 1968, the Senate Committee stated that it "is cognizant of the budgetary situation, and the current demands for the tax dollar for other purposes." The Committee nevertheless endorsed the addition of OCS revenues to the Fund in part because it felt that acquisitions funded by these revenues, instead of from general Treasury funds, would have a minimal impact on budgetary problems. S. REP. NO. 1071, *supra* note 133, at 4, 7. The Administration raised the issue of the impact of Fund expenditures on the budgetary situation when it recommended the adoption of the 1968 amendments. The Administration suggested a $200 million annual level of appropriation, "[c]onsidering the needs for recreation lands and waters, and other de-

and 1977, Congress accommodated those concerns by agreeing to increase the funding level in stages.[429] Thus, Congress considered the conflict between increasing recreational opportunities and immediate budgetary problems; the choice to balance these conflicting goals in one fashion strongly indicates that Congress had no intention to let the President choose another balance. The Executive is not free to disregard congressional priorities by simply refusing to spend appropriated funds.

If the executive branch has failed to spend money appropriated for LWCF acquisitions in order to further its economic policy objectives, it has therefore acted in an arbitrary and capricious manner and has abused whatever discretion Congress has granted to the Executive to control Fund expenditures. The Reagan Administration has consistently objected to proposed LWCF appropriations on budgetary and fiscal grounds.[430] To the extent that these same concerns form the basis for the moratorium,[431] the Administration's deferral of Fund expenditures is unlawful.

Finally, the magnitude of the cuts in Fund expenditures which has resulted from the moratorium on acquisitions compels the conclusion that Secretary Watt abused any discretion delegated to him under the LWCF Act. The former Secretary's refusal to spend appropriated funds for any acquisitions other than those mandated by court decree or those attributable to an ill-defined set of "emer-

mands on our national budget for defense and domestic programs . . . ." *Id.* at 13, quoting letter from Stewart Udall, Secretary of Interior, to Henry M. Jackson, Chairman, Senate Committee on Interior and Insular Affairs (Jan. 4, 1968). The Secretary of the Interior deemed such an expansion of the Fund to be "an approach [which] is consonant with our current budgetary situation." *Id.* at 14. The Secretary noted "that current budgetary constraints are likely to preclude, for the present, *appropriation requests* at the $200 million level." *Id.* (emphasis added). This statement appears to indicate that if fiscal policy considerations were to require a reduction in Fund expenditures, control over such expenditures would be exercised by Congress at the appropriation stage. Once funds were appropriated by Congress, there is no indication that the Executive could then refuse to spend all or part of those funds on the grounds of budgetary or other fiscal constraints.

429. *See* H.R. REP. No. 1021, *supra* note 178, at 6. The House Committee did not fully share the Administration's prediction that increases in the level of the Fund would exacerbate inflation. *See id.* at 13 (suggesting that expeditious acquisition could decrease the long-term effective cost to the federal government).

430. *See, e.g.*, *supra* notes 261-64, 338 and accompanying text.

431. *See, e.g.*, TWELFTH ANNUAL REPORT OF THE COUNCIL ON ENVT'L QUALITY, *supra* note 240, at 141: "Today, the ability of government agencies to acquire new lands for parks and recreation is affected by budgetary constraints and by rising land prices." *See also 1981 Oversight Hearings*, *supra* note 238, pt. 1, at 27-28.

gency" circumstances is tantamount to a termination of the Fund acquisition program, and the present Secretary's relaxation does not amount to a reinstatement. The courts have refused to sanction termination of legislative programs through Executive withholding of appropriated funds absent a clear congressional authorization to do so.[432]

> To accept the . . . position, that absent a mandatory statement that a program be continued or operated at a certain level the Executive may terminate the program, would be to place a burden on the Congress not contemplated by our Constitution. The Constitution vests in the Congress '[a]ll legislative powers.' The Executive may not alter that power and force the legislature to act to preserve a legislative program from extinction prior to the time that Congress had declared it shall terminate.[433]

By continuing to appropriate money from the Fund for acquisition of recreational resources, Congress has ordered the Executive to continue to pursue the goals of the Act through prompt acquisition of available properties. To permit the Administration to ignore that mandate by refusing to spend appropriated funds would be to "place administrative fiat above the law."[434]

432. *See, e.g.*, International Union, UAW v. Donovan, 570 F. Supp. 210, 217-19, 221-22 (D.D.C. 1983); Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 692 (D.S.D. 1973), *aff'd*, 504 F.2d 168 (8th Cir. 1974); Guadamuz v. Ash, 368 F. Supp. 1233, 1240-42 (D.D.C. 1973); Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1381 (D.D.C. 1973); Local 2816, Office of Econ. Opportunity Employees Union v. Phillips, 360 F. Supp. 1092, 1099-1100 (N.D. Ill. 1973); Local 2677, American Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 75 (D.D.C. 1973). *Compare* Pennsylvania v. Lynn, 501 F.2d 848, 855-59 (D.C. Cir. 1974) (concluding that Congress had vested the Secretary of Housing and Urban Development with the discretion to suspend certain low-income housing programs when he had adequate reason to believe that they were not serving Congress' purposes in establishing the programs and were frustrating the national housing policies applicable to all housing programs).

433. Guadamuz v. Ash, 368 F. Supp. 1233, 1241 (D.D.C. 1973). The court reasoned that although Congress had vested the administrative officer with the discretion to determine which applicants were qualified to receive federal grants, that officer could not, by impounding funds and refusing to issue further grants "decline to exercise this discretion." *Id.* at 1242. The same conclusion was reached in Pennsylvania v. Weinberger, 367 F. Supp. 1378 (D.D.C. 1973), where the court held "that in providing the [administrative official] with some discretion as to granted awards the Congress did not intend to allow him the opportunity to completely suspend *or severely limit*, for reasons unrelated to the program, the operations of an ongoing program reviewed, approved and fully funded by the Congress with Presidential approval." *Id.* at 1381 (emphasis added) (footnote omitted). *See also* cases cited *id.* at 1381 n. 22; Local 2677, American Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 75 (D.D.C. 1973).

434. Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1381 (D.D.C. 1973).

D. *The Administration's Moratorium Violates the Impoundment Control Act of 1974*

The Impoundment Control Act ("ICA") of 1974[435] authorizes the President, in certain limited situations and in accordance with specified procedures, to rescind or defer the obligation or expenditure of budget authority. Under the ICA, if the President determines that "all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons,"[436] he may transmit a special message to Congress proposing the rescission of a specified amount of budget authority.[437] The budget authority specified is then rescinded only if Congress enacts a rescission bill[438] within forty-five days after it receives the President's message.[439] The President may also propose to defer any budget authority.[440] To do so, the President must transmit to both Houses of Congress a special message of the pro-

435. 2 U.S.C. §§ 681-688 (1982).

436. *Id.* § 683(a) (1982).

437. The special message must specify:

(1) the amount of budget authority which the President proposes to rescind;

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific project or governmental functions involved;

(3) the reasons why the budget authority should be rescinded;

(4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed rescission; and

(5) all facts, circumstances, and considerations relating to or bearing upon the proposed rescission and the decision to effect the proposed rescission, and to the maximum extent practicable, the estimated effect of the proposed rescission upon the objects, purposes, and programs for which the budget authority is provided.

Id.

438. A "rescission bill" is defined as a bill or joint resolution which only rescinds, in whole or in part, budget authority proposed to be rescinded in a special message transmitted by the President under section 683 of this title, and upon which Congress completes action before the end of the first period of 45 calendar days of continuous session of the Congress after the date on which the President's message is received by the Congress. *Id.* § 682(3) (1982).

439. *Id.* § 683(b) (1982).

440. "Deferral of budget authority" is defined to include

(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law.

Id. § 682(1) (1982).

posed deferral.[441] The President's approval takes effect unless either House of Congress passes an impoundment resolution[442] disapproving the proposed deferral.[443]

In June 1983, the Supreme Court issued its decision in *Immigration and Naturalization Service v. Chadha*,[444] declaring a one-House veto unconstitutional.[445] The decision probably invalidates the entire deferral mechanism of the ICA.[446]

1. The ICA Before *Chadha*.

The Administration's moratorium on acquisitions with Fund appropriations is not justified by the ICA. First, although no court has definitively resolved the issue,[447] the conclusion is inescapable that the ICA does not independently authorize presidential impoundments where Congress has not already delegated to the President

441. *Id.* § 684(a) (1982). The President's special message must include the following information:

(1) the amount of the budget authority proposed to be deferred;

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific projects or governmental functions involved;

(3) the period of time during which the budget authority is proposed to be deferred;

(4) the reasons for the proposed deferral, including any legal authority invoked by him to justify the proposed deferral;

(5) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed deferral; and

(6) all facts, circumstances, and considerations relating to or bearing upon the proposed deferral and the decision to effect the proposed deferral, including an analysis of such facts, circumstances, and considerations in terms of their application to any legal authority and specific elements of legal authority invoked by him to justify such proposed deferral, and to the maximum extent practicable, the estimated effect of the proposed deferral upon the objects, purposes, and programs for which the budget authority is provided.

Id.

442. An "impoundment resolution" is "a resolution of the House of Representatives or the Senate which only expresses its disapproval of a proposed deferral of budget authority set forth in a special message transmitted by the President under section 684 of this title." *Id.* § 682(4) (1982).

443. *Id.* § 684(b) (1982).

444. _____ U.S. _____, 103 S. Ct. 2764 (1983).

445. At issue in *Chadha* was § 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1982). *See infra* notes 463-68 and accompanying text.

446. *See infra* notes 463-500 and accompanying text.

447. The ICA was enacted while Train v. City of New York, 420 U.S. 35 (1975), was pending before the Supreme Court. Accordingly, the Court did not reach any issues raised by the ICA. *See id.* at 41 n.8.

impoundment authority under another statute.[448] The moratorium thus would be justified only if Congress, in the LWCF Act, had delegated to the President discretion to withhold appropriated funds. As indicated previously, the LWCF contains no such delegation.

Second, even if the ICA does independently authorize impoundments in certain situations, such authorization would not apply to attempted rescission or deferral of budget authority under the LWCF Act. The Comptroller General of the United States reached this conclusion in his response to a proposed deferral of budget authority under the LWCF Act transmitted to Congress by President Reagan.[449] The Comptroller General concluded that

> [b]ecause Congress intended to mandate the spending of amounts appropriated for State grants under the Land and Water Conservation Fund (LWCF) Act (16 U.S.C. §§ 460*l*-4 to 460*l*-11), the fourth disclaimer of the Impoundment Control Act (31 U.S.C. § 1400(4)), precludes the Administration from lawfully withholding the funds.[450]

That disclaimer provides that nothing in the ICA shall be construed as "superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder."[451] Since

448. Arkansas *ex rel.* Arkansas State Highway Comm'n v. Goldschmidt, 492 F. Supp. 621 (E.D. Ark. 1980), *vacated as moot*, 627 F.2d 839 (8th Cir. 1980). The court in this case discusses a conflicting opinion of the Comptroller General. *See* 492 F. Supp. at 626-27. The Comptroller General, however, has apparently reversed his view as to whether the ICA in itself authorizes presidential impoundments. *See infra* notes 449-53 and accompanying text.

449. President Reagan, on March 18, 1982, proposed the deferral of $2,821,000 for fiscal year 1983 from the state matching grant funds authorized by § 6 of the LWCF Act, 16 U.S.C. § 460*l*-8 (1982), to pay administrative expenses for prior-year grants to states. H.R. Doc. No. 155, *supra* note 346, at 9. Previously, the President had submitted a proposal to defer until the end of fiscal year 1982 (at which point the budget authority lapses) the entire $30 million authorized as advance contract authority under § 9 of the Act, 16 U.S.C. § 460*l*-10a (1982). *See* H.R. Doc. No. 140, *supra* note 342. Congress subsequently rescinded that $30 million in advance contract authority in a supplemental appropriations act for 1982. Pub. L. No. 97-257, 96 Stat. 818, 838 (1982).

450. H.R. Doc. No. 186, *supra* note 347, at 2. *Compare* Dabney v. Reagan, 542 F. Supp. 756, 767 n.3 (S.D.N.Y. 1982) (discussing an opinion of the Comptroller General which concluded that the disclaimer in 2 U.S.C. § 681(4) (1982) precludes application of the ICA to funds appropriated for the solar energy conservation bank under the Solar Energy and Energy Conservation Bank Act, 12 U.S.C. §§ 3601-3620 (1982).

451. 2 U.S.C. § 681(4) (1982). The disclaimer section provides in full:

Nothing contained in this Act, or in any amendments made by this Act, shall be construed as—

the LWCF Act is mandatory,[452] and requires the expenditure of sums appropriated for state acquisitions, the Comptroller General concluded that the ICA disclaimer prohibits the Administration from deferring moneys appropriated from the Fund for the state grant program.[453] Relying upon this opinion, the House Committee on Appropriations recommended the passage of a resolution disapproving the President's proposed deferral.[454] The full House subsequently passed the resolution, thereby prohibiting the deferral of state matching grant funds.[455] The mandatory language and the legislative history of the provisions of the Act authorizing federal acquisitions apparently dictate the conclusion that the ICA also precludes rescissions or deferrals[456] of funds appropriated for such acquisitions.[457]

(1) asserting or conceding the constitutional powers or limitations of either the Congress or the President;

(2) ratifying or approving any impoundment heretofore or hereafter executed or approved by the President or any other Federal officer or employee except insofar as pursuant to statutory authorization then in effect;

(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment; or

(4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder.

Id. at § 681.

452. The Comptroller General relied on § 6(b), 16 U.S.C. § 460*l*-8(b) (1982), § 6(d), *id.* § 460*l*-8(d) and § 6(b)(4), *id.* § 460*l*-8(b)(4). These provisions, according to the Comptroller, "sufficiently evidence a congressional mandate that the funds be made available to the States." H.R. Doc. No. 186, *supra* note 347, at 3.

453. H.R. Doc. No. 186, *supra* note 347, at 3.

454. *See* H.R. Doc. No. 654, 97th Cong., 2d Sess. (1982). The Committee, agreeing with the Comptroller General, stated that "the funds were appropriated to be used by the States, not to pay Federal administrative expenses. Administrative expenses have been specifically provided for in previous appropriation acts." *Id.* at 2.

455. 128 CONG. REC. H4887 (daily ed. July 29, 1982). As to the effect of the *Chadha* decision on this "one-House veto," *see infra* notes 463-500 and accompanying text.

456. The House disapproved a proposed deferral of $400,000 for land acquisition by the FWS. *See* 128 CONG. REC. H4887 (daily ed. July 29, 1982).

457. *Compare* Arkansas *ex rel.* Arkansas State Highway Comm'n v.Goldschmidt (E.D. Ark. 1980), *vacated as moot*, 627 F.2d 839 (8th Cir. 1980), where the court held that

even if the ICA independently authorizes presidential impoundment, the language of the [Federal-Aid Highway Act ("F-AHA")], read in conjunction with *State Highway Commission of Missouri v. Volpe* [479 F.2d 1099 (8th Cir. 1973)], makes it clear that F-AHA budget authority is subject to the disclaimer of 31 U.S.C. § 1400(4) [current version at 2 U.S.C. § 681(4) (1982)]. The Court therefore concludes that any authority which the ICA may be construed to have given the President to defer budget authority was not intended to, and may not, reach F-AHA budget authority.

Third, even if the ICA does not preclude the withholding of Fund appropriations because of the mandatory nature of the LWCF Act's funding authorizations, the moratorium violates the ICA because the President has failed to fully comply with the procedures required by the ICA to properly rescind or defer budget authority. The ICA requires that the President send a message to Congress prior to rescinding or deferring any budget authority to which the LWCF Act applies.[458] The President has forwarded such messages to Congress with respect to proposed deferrals of advance contract authority,[459] FWS land acquisition appropriations[460] and a small amount of state matching grant funding for fiscal year 1982.[461] These proposals, however, cover less than $33 million of the amounts appropriated annually by Congress from the Fund. To the extent that the Administration has withheld more than that amount of Fund appropriations (or has withheld funds the deferral of which was disapproved by Congress), it has impounded money in violation of the procedures for congressional notification set forth in the ICA.[462]

492 F. Supp. at 628. *Accord* Maine v. Goldschmidt, 494 F. Supp. 93 (D. Me. 1980): "[t]he plain and unambiguous language of the statute [2 U.S.C. § 681(4) (1982)] . . . makes clear the congressional intent that the provisions of the Impoundment Control Act shall not apply to any other act which mandates the obligation or expenditure of funds." *Id.* at 98 (footnote omitted). Accordingly, the court held that the Secretary of Transportation lacked the legal authority to reduce the obligational limit for the current fiscal year established by Congress under the F-AHA. *Id.* at 100.

458. *See* 2 U.S.C. §§ 683(a), 684(a) (1982), discussed *supra* at notes 436-43 and accompanying text.

459. H.R. Doc. No. 140, *supra* note 342, at 43.

460. H.R. Doc. No. 193, *supra* note 349, at 8.

461. H.R. Doc. No. 155, *supra* note 346, at 9; H.R. Doc. No. 262, 97th Cong., 2d Sess. (1982).

462. In several of the proposed deferral messages, the President relied not only on the deferral provisions of the ICA itself, 2 U.S.C. § 684 (1982), but also on the Antideficiency Act, 31 U.S.C. § 665 (1982) as his authority to defer budget authority. The latter statute provides, with certain exceptions, that all appropriations or funds available for obligation shall be apportioned so as to prevent a necessity for deficiency or supplemental appropriations. 31 U.S.C. § 665(c)(1) (1982). In apportioning appropriations, the Office of Management and Budget ("OMB") may set up reserves to provide for contingencies or to effect savings through changes in requirements or greater efficiency of operations. *Id.* § 665(c)(2) (1982). Such reserves can be established, however, only where they are not "required to carry out the full objectives and scope of the appropriation concerned . . . ." *Id.*

Even if the Anti-Deficiency Act authorizes the deferrals proposed to Congress by the President, that Act provides no support whatsoever for the moratorium and the resulting deferral of Fund appropriations. In State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th

2. The ICA After *Chadha*

In *Immigration and Naturalization Service v. Chadha*,[463] the Supreme Court declared unconstitutional the one-House veto provision of the Immigration and Nationality Act.[464] That provision authorized either the House of Representatives or the Senate, by passing a resolution, to veto the determination of the Attorney General to suspend the deportation of certain aliens.[465] The Court held that this "one-House veto" provision violated the concept of separation of powers between the executive and legislative branches of the federal government.[466] Specifically, the veto mechanism

Cir. 1973), the court, construing the Anti-Deficiency Act, declared that the power to withhold funds granted to the Executive in the Anti-Deficiency Act cannot be used if it would jeopardize the policy of the statute.

> 'It is perfectly justifiable and proper for all possible economies to be effected and savings to be made, *but there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds*. If this principle of thwarting the will of Congress by the impounding of funds should be accepted as correct, then Congress would be totally incapable of carrying out its constitutional mandate of providing for the defense of the Nation.' (Emphasis ours.) H.R. REP. No. 1797, 81st Cong., 2d Sess. 311 (1950).
>
> It is thus apparent that any withholding in order to 'effect savings' or due to 'subsequent events,' etc. must be considered in context of not violating the purposes and objectives of the particular appropriation statute. Such purposes and objectives are necessarily violated when one charged with implementing the statute acts beyond his delegated authority.

479 F.2d at 1118. The Anti-Deficiency Act has been construed in a similar manner in several lower court decisions. For example, in Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319 (D.D.C. 1975), the court stated that the Anti-Deficiency Act "was not a blank check to nullify congressional intent or to reserve funds for non-program related reasons." *Id.* at 1324 (footnote omitted). *See also* Illinois *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 726 (N.D. Ill. 1973). In short, under the Anti-Deficiency Act "[t]he President can trim the fat, but he must not disturb the meat." Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 696 (D.S.D. 1973), *aff'd*, 504 F.2d 168 (8th Cir. 1974).

463. _____ U.S. _____, 103 S. Ct. 2764 (1983).

464. 8 U.S.C. § 244(c)(2) (1982).

465. *Id.*

466 103 S. Ct. at 2787. The Court said:

> The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.
>
> . . .
>
> We hold that the Congressional veto provision in § 244(c)(2) is severable from the Act and that it is unconstitutional.

Id. at 2787-88.

failed to comply with either the Constitution's bicameral requirement[467] or the Presentment Clauses.[468]

The breadth of the Court's analysis in *Chadha* indicates that any statutory provision containing a one-House veto mechanism is unconstitutional.[469] The ICA authorizes either House of Congress to pass an impoundment resolution disapproving a deferral of budget authority proposed by the President.[470] Like the provision invalidated in *Chadha*, section 1013(b) of the ICA authorizes congressional actions which are "legislative in . . . character and effect."[471] Thus, section 1013(b) is also subject to and presumably violative of the bicameral requirements and the Presentment Clauses contained in Article I of the Constitution.[472]

The only issue left open by *Chadha* is whether the one-House veto mechanism in the ICA is severable from the remainder of that Act. If the invalid veto mechanism is severable, then the remainder of the ICA is unaffected by the unconstitutionality of section 1013(b). In such a case, the President could apparently propose to defer budget authority under the ICA provision, and Congress would no longer be able to overturn such a deferral through enactment of a resolution by one House. The only way for Congress to register its disapproval would be to pass another bill reappropriating the moneys which the President had proposed to defer. Such a bill would then have to be signed by the President to become law. Of course, even if the President signed the bill, or if his veto were overridden by both Houses of Congress, the President could simply issue another proposal to defer.

If, on the other hand, section 1013(b) is not severable from the remainder of the ICA, then the unconstitutionality of the one-House veto provision serves to invalidate all of the provisions relating to the deferral of budget authority.[473] In such a case, the President apparently would lose even the limited authority under

467. U.S. CONST. art. I, §§ 1, 7, cl. 2.

468. *Id.* at art. I, § 7, cls. 2, 3.

469. 103 S. Ct. at 2792 (White, J., dissenting), 2788 (Powell, J., concurring).

470. Impoundment Control Act § 1013(b), 2 U.S.C. § 684(b) (1982). *See* 103 S. Ct. at 2811 (app. I to opinion of White, J., dissenting, listing statutes with legislative vetoes); *supra* notes 440-43 and accompanying text.

471. 103 S. Ct. at 2784, quoting S. REP. No. 1335, 54th Cong., 2d Sess. 8 (1897).

472. 103 S. Ct. at 2787.

473. 2 U.S.C. § 684 (1982).

the ICA to defer spending of appropriated funds. Since the President lacks any express or inherent constitutional authority to impound funds, and since Congress delegated no such authority to the President in the LWCF Act, any further attempts to defer spending of money appropriated from the LWCF for land acquisitions would be improper.

The authors contend that a court faced with the issue must hold that the veto provisions of the ICA are not severable from the provisions of that Act authorizing the President to defer budget authority. In *Chadha*, the Court held that the disputed section of the Immigration and Nationality Act[474] was severable from the remainder of the statute.[475] Because the Immigration and Nationality Act contained an explicit severability clause,[476] the Court started with "a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether the veto clause of § 244(c)(2) was invalid."[477] The Court then fortified its conclusion of severability by reference to the legislative history.[478]

The ICA, unlike the Immigration and Nationality Act, does not contain a severability clause. Accordingly, there should be no presumption of severability.[479] In fact, there may be a presumption to

474. 8 U.S.C. § 244(c)(2) (1976).

475. 103 S. Ct. at 2775-76, 2788.

476. 66 Stat. 281 (1952), 8 U.S.C. § 1101 historical note (1982): "If any particular provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby."

477. 103 S. Ct. at 2774.

478. *See id.*

479. In *Chadha*, the Court stated that "[a] provision is further presumed severable if what remains after severance 'is fully operative as a law.' " 103 S. Ct. at 2775, quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932). This presumption appears to have had its origin as the second part of a two-part test to determine severability. The first inquiry is whether the legislature evidently would not have enacted particular provisions of a statute if it had known that other provisions of the same statute were beyond its authority and would be judicially invalidated. Such evidence will preclude severance of the unconstitutional provisions and the entire statute will fall. Only in the absence of such evidence should a court address the second inquiry, *i.e.* whether the valid portions of the statute would be "fully operative as a law." *See* Buckley v. Valeo, 424 U.S. 1, 108 (1976); Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932); *infra* text accompanying note 482. The Court in *Chadha* did not clearly indicate whether it meant to apply the "operability" test as a separate test, regardless of the outcome of the initial inquiry into the legislature's intent. This probably was not the Court's intent, for separate application of the "operability" test could

the contrary.[480] In any event, "the determination, in the end, is reached by applying the same test, namely, what was the intent of the lawmakers?"[481] Unlike the *Chadha* situation, "it is evident that the Legislature would not have enacted those provisions which are within its power [i.e., section 1013(a) of the ICA, permitting the President to propose deferrals of budget authority], independently of that which is not [i.e., the veto mechanism]."[482]

Congress enacted the ICA to limit the President's power to impound funds. A conclusion that section 1013(b) is severable from the remainder of the ICA, by authorizing presidential deferrals which could not be vetoed, would enhance that presidential impoundment power, and therefore would be inconsistent with Congress' original intent. The ICA was enacted as part of the Congressional Budget and Impoundment Act of 1974.[483] The purpose provisions of the statute state "that it is essential (1) to assure effective *congressional control* over the budgetary process; (2) to provide for the *congressional determination* each year of the appropriate level of Federal revenues and expenditures; [and] (3) to provide a system of impoundment control . . ."[484] Congress also declared that nothing in the ICA shall be construed as

> (2) ratifying or approving any impoundment heretofore or hereafter executed or approved by the President or any other Federal

leave standing statutory provisions which Congress clearly would never have adopted absent the invalidated portions of the law on its own, merely because the remaining provisions are "operative as a law." In any event, absent the veto mechanism, the deferral provisions of the ICA would not be "fully operative" as the law Congress thought it was enacting. Congress enacted the ICA as a means of limiting the President's power to impound appropriated funds. *See infra* notes 483-500 and accompanying text. A provision that permitted the President to defer budget authority without being subject to a congressional veto power would be "fully operative" only in the sense that it would create a statute which directly contravenes Congress' purpose in adopting the ICA.

480. *See* Carter v. Carter Coal Co., 298 U.S. 288, 312 (1936).

481. *Id.*; Consumer Energy Council of America v. FERC, 673 F.2d 425, 442, 445 n.70 (D.C. Cir. 1982), *aff'd mem.* _____ U.S. _____, 77 L. Ed. 2d 1402 (1983).

482. 103 S. Ct. at 2774, quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976) (quoting Chaplin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)).

483. Pub. L. No. 93-344, § 1, 88 Stat. 297 (1974).

484. *Id.* § 2, 88 Stat. 297 (1974) (current version at 2 U.S.C. § 621 (1982)) (emphasis added).

> officer or employee, except insofar as pursuant to statutory authorization then in effect; . . . or (4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder.[485]

These provisions indicate that Congress would not have authorized the President to defer budget authority unless Congress retained the power to veto any such deferral. The ICA was passed to *limit* the President's power to impound and to reassert congressional control over the budget process; severance of section 1013(b) of the ICA would serve to expand the President's power to impound.

The legislative history also reflects Congress' overriding desire to restrict, not expand, the President's exercise of impoundment authority. The legislative efforts which culminated in the enactment of the ICA originated as a response to what Congress perceived as improper presidential infringement on congressional authority to set spending priorities. The House Committee on Rules explained: "Concern has mounted in recent years about the practice of the President and other officers of the executive branch to impound funds that the Congress has duly appropriated or otherwise authorized for expenditure or obligation."[486] The purpose of the Congressional Budget and Impoundment Act of 1974, which included the ICA, was "to improve congressional control of budget outlays by (1) establishing a legislative budget process for determining national policies and priorities and (2) providing for congressional review of any impoundment of funds by the executive branch. H.R. 7130 thus seeks to remedy the two main deficiencies that have weakened congressional control of the purse."[487] The statute was intended

> to provide for more effective and responsible congressional control over both the expenditure and nonexpenditure of funds by the executive branch. It seeks to accomplish that purpose . . . by establishing an appropriate permanent mechanism and orderly procedures whereby Congress can review individual impound-

485. 2 U.S.C. § 681 (1982).

486. H.R. REP. No. 336, 93d Cong., 1st Sess. 3 (1973) [hereinafter cited as H.R. REP. No. 336].

487. H.R. REP. No. 658, 93d Cong., 1st Sess. 16 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3462, 3462 [hereinafter cited as H.R. REP. No. 658].

> ment actions by the executive branch, and by disapproval of either House require impoundments to cease. . . .[488]

The "basic purpose" of the ICA was "to give each House an opportunity to veto an impoundment."[489]

By enacting the ICA, Congress was not conceding that the President had any constitutional authority to impound appropriated funds.[490] In fact, Congress heard considerable testimony from "distinguished and knowledgeable witnesses" who charged that the executive branch, by impounding funds,

> has encroached upon the legitimate role of Congress in establishing spending priorities, eroded Congress' constitutional and vital power of the purse, upset the delicate constitutional balance of powers between the legislative and executive branches, aggrandized executive power, exercised an item veto never authorized by Congress, and created chaos in the operations of state and local governments.[491]

The House Committee on Rules agreed: "[y]our Committee sees no explicit or inherent authority in the Constitution for the President to impound funds, as he has been doing, even when the goals seem desirable to him."[492]

Thus, the committee that recommended enactment of the ICA felt that what was "[a]t stake is the constitutional role of Congress as the guardian of the treasury."[493] "No less than in 1789 it is the job of Congress today to decide how much shall be spent and for what purposes."[494] The members of the House Committee on Rules warned their colleagues that "Congress must not permit its own vital and constitutional role in deciding spending priorities to lapse by default. It will surely do so if Congress does not provide a suitable and equitable institutional mechanism to preserve its legitimate prerogatives."[495]

In light of Congress' strong objection to presidential impoundments during the early 1970's, why did Congress in the ICA autho-

488. H.R. REP. No. 336, *supra* note 486, at 2. *See also* S. REP. No. 924, 93d Cong., 2d Sess. 1, 49 (1974); H.R. REP. No. 1101, 93d Cong., 2d Sess. 1, 49 (1974).

489. H.R. REP. No. 658, *supra* note 487, at 43.

490. *See* 2 U.S.C. § 681(1) (1982).

491. H.R. REP. No. 658, *supra* note 487, at 25.

492. *Id.* at 26. *See also* H.R. REP. No. 336, *supra* note 486, at 5.

493. H.R. REP. No. 658, *supra* note 487, at 19.

494. *Id.* at 20.

495. *Id.* at 26. *See also* H.R. REP. No. 336, *supra* note 486, at 5.

rize deferrals of budget authority, which would take effect unless vetoed by either House of Congress? The one-House veto mechanism was adopted because of its "practicability."[496] Congress did not have the time or the resources to review the "hundreds of occasions" during every fiscal year when the executive branch withholds funds.[497] Congress would therefore permit presidential impoundments to a limited extent, provided that the president notified Congress of each impoundment and provided that Congress had an opportunity to veto each impoundment. "The negative mechanism provided in H.R. 7130 will permit Congress to focus on critical and important matters, and save it from submersion in a sea of trivial ones."[498] It is clear, however, that Congress would not have authorized the President to defer the expenditure of funds if Congress could not overturn such deferrals. The one-House veto mechanism was included in the ICA

> on the ground that the impoundment situation established by the bill involves a presumption against the President's refusing to carry out the terms of an already considered and enacted statute. To make Congress go through a procedure involving agreement between the two Houses on an already settled matter would be to require both, in effect, to reconfirm what they have already decided. . . . [W]e believe [the one-House veto] approach is most appropriate.[499]

The House Committee on Rules summarized its position as follows: "Budget reform and impoundment control have a joint purpose: to restore responsibility for the spending policy of the United States to the legislative branch. One without the other would leave Congress in a weak and ineffective position. No matter how prudently Congress discharges its appropriations responsibility, legislative decisions have no meaning if they can be unilaterally abrogated by executive impoundments."[500] The severance of the one-House veto mechanism of section 1013(b) from the rest of the ICA would permit just such unilateral impoundments. Because Congress en-

496. H.R. REP. No. 658, *supra* note 487, at 41.

497. *Id.*

498. *Id. See also* H.R. REP. No. 336, *supra* note 486, at 6.

499. H.R. REP. No. 568, 93d Cong., 1st Sess. 42 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3462, 3487. *See also* H.R. REP. No. 336, *supra* note 487, at 7.

500. H.R. REP. No. 658, *supra* note 487, at 16.

acted the ICA to avoid precisely that situation, the one-House veto mechanism of section 1013(b) should be deemed inseparable from the deferral provisions of the ICA. The result of such a construction would be the removal of even the limited deferral authority of the President contained in section 1013(a) of the ICA.

E. *The Moratorium May Violate the Public Trust Duty*

A Secretary of the Interior who refuses to acquire lands the acquisition of which has been congressionally authorized and the funds for which have been congressionally appropriated arguably violates a duty to act as a public trustee of the national lands. In the case of the LWCF, the public trust doctrine should mandate, at a minimum, that the trustee take the necessary steps to gain protective control over the recreational assets (parts of the trust corpus) that Congress has entrusted to his care. This argument is couched in tentative terms because the public trust doctrine at the federal level is at best nebulous, and no precedent is directly on point. Nevertheless, the public trust notion has ancient and honorable antecedents as a general matter, the decisions in one noteworthy lawsuit offer a persuasive analogy and the circumstances of the moratorium are peculiarly amenable to the doctrine's application.

The public trust doctrine became prominent in this country as a common law limitation on the powers of state legislatures to alienate certain public assets.[501] In the landmark *Illinois Central* case,[502] decided in 1892, the United States Supreme Court ruled that the public trust doctrine prohibited the State of Illinois from transferring the lands underlying Chicago's harbor to private interests.[503]

501. As early as 1821, in the leading case of Arnold v. Mundy, 6 N.J.L. 1 (1821), an American court adopted the law of the public trust as it had been interpreted in the common law. The court stated that rights in beds of navigable waters had been held by the Crown in trust for the common use of the people, that the states succeeded to this trust, and that a grant purporting to divest the citizens of these common rights was void. The sovereign power itself "[c]annot, consistent with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right." *Id.* at 78. The American history of the public trust is recounted at length in Shively v. Bowlby, 152 U.S. 1 (1894).

502. Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892).

503. This case involved a purported grant by the Illinois legislature to the Illinois Central Railroad of all the right and title of the state to the submerged lands constituting the bed of

The court reasoned that:

> A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of that kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties except in the instance of parcels mentioned for the improvement of the navigation and use of the water, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.[504]

Commentators have traced the roots of the doctrine to Roman and medieval times[505] to show that Anglo-American societies have re-

Lake Michigan, for one mile from the shore opposite the company's tracks and breakwater in the City of Chicago. The attempted transfer involved almost one thousand acres, comprising virtually the whole commercial waterfront of the city. Justice Field set forth rules that have been adopted and elaborated by other courts and other states:

> The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve water for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining . . . .

Id. at 452-53.

504. *Id.* at 453-54. The court went on to declare that:

> The harbor of Chicago is of immense value to the people of the state of Illinois . . . and the idea that its legislature can deprive the state of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose . . . is a proposition that cannot be defended.

Id. at 454.

505. *See* Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C.D. L. REV. 195 (1980). *See also* JUSTINIAN, INSTITUTES, 2.1.1 to 2.1.6 (T. Cooper trans. & ed. 1841).

garded some real estate and public access to it as transcending contrary notions of exclusive private property. Although the early focus of the American doctrine was on lands underlying navigable waters,[506] state courts sporadically expanded the doctrine to protect other public places such as parks and beaches.[507]

After publication of Professor Joseph Sax's seminal article on the public trust doctrine in 1970,[508] litigants tried to expand the reach of the nascent doctrine into many areas, sometimes successfully.[509]

506. The public trust doctrine deals with lands beneath navigable waters, with constraints on alienation by the sovereign, and with an affirmative protective duty of government in dealing with certain publicly-held properties. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter cited as Sax, *The Public Trust Doctrine*]. *See generally* Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C.D. L. REV. 185 (1980); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971). *See also* Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912) (title of the tidelands grantee was subject to pre-existing rights to pass over in boats, hunt and fish); State v. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657 (1947) (state patents invalidated to preserve the public trust); Hughes v. State, 67 Wash. 2d 799, 410 P.2d 20 (1966), *rev'd on other grounds*, 389 U.S. 290 (1967) (prohibiting the sale of trust lands); Priewe v. Wisconsin State Land & Improvement Co., 93 Wis. 534, 67 N.W. 918 (1896), *aff'd on rehearing*, 103 Wis. 537, 79 N.W. 780 (1899) (the state is powerless to divest itself of its trusteeship as to submerged lands under navigable waters, even under the guise of a public purpose).

507. *In re* Oneida County Forest Preserve Council, 309 N.Y. 152, 128 N.E.2d 282 (1955) (clause in New York constitution which reserves the Adirondack Forest as a wilderness is a dedication to public uses which cannot be abrogated without a constitutional amendment repealing the clause); Sacco v. Department of Public Works, 352 Mass. 670, 227 N.E.2d 478 (1967) (action taken enjoining the Dep't of Public Works from filling a great pond as part of its plan to relocate part of a state highway); Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 215 N.E.2d 114 (1966) (lease by state park management agency for large commercial skiing development in the park area was struck down); State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) (public has a right to dry sand area contained within legal description of ocean front property and state can prevent landowners from enclosing such area); Higginson v. Slattery, 212 Mass. 583, 99 N.E. 523 (1912); Lusardi v. Curtis Point Property Owners Ass'n, 86 N.J. 217, 430 A.2d 881 (1981); Department of Natural Resources v. Mayor and Council of Ocean City, 274 Md. 1, 332 A.2d 630 (1975); Southern Idaho Fish and Game Ass'n v. Picabo Livestock, Inc., 96 Idaho 360, P.2d 1295 (1974) (navigable streams, for "all recreational purposes"); Day v. Armstrong, 362 P.2d 137, 143 (Wyo. 1961) (floatable streams, regardless of navigability); Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970) (lot of land near beach, used historically for picnicking, fishing, and beach access).

508. Sax, *The Public Trust Doctrine*, *supra* note 506.

509. Many state legislatures passed environmental statutes impressing a public trust on all natural resources. *See* CONN. GEN. STAT. ANN. § 22a-15 (West 1958); MINN. STAT. ANN. Ch. 116b (West 1977); MONT. CONST. art. 9, § 1; N.Y. CONST. art. 14, §§ 1, 4; MICH. STAT. ANN. § 14.528 (202) (1980). In some jurisdictions courts have found the doctrine to protect

Not only did courts uphold actions restricting privatization of beaches,[510] rivers[511] and similar real estate[512]—often real estate primarily devoted to or suited for recreation—but they also found in the doctrine requirements that state agencies promulgate general plans before irrevocably allocating scarce resources[513] and that the state not lease resources without receiving fair market value for them.[514] The California Supreme Court recently handed down a landmark opinion in the controversy over the fate of Mono Lake:[515] perfected water rights, the Court held, remain subject to a preexisting public trust that may require diminution of the private rights in

resources including parklands, wildlife, non-navigable water courses and air. *See generally* W. RODGERS, ENVIRONMENTAL LAW 170-86 (1977).

510. *E.g.*, City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied sub nom.* Santa Fe Land Improvement Co. v. City of Berkeley, 449 U.S. 840 (1980). The California Supreme Court held that the private owners of 15,448 acres of land beneath San Francisco Bay do not hold clear title to their land. Rather, the court declared that they hold title subject to the paramount public trust rights of the people of California. *See also* City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970); Lane v. City of Redondo Beach, 49 Cal. App. 3d 251, 122 Cal. Rptr. 189 (2d Dist. 1975); Lusardi v. Curtis Point Property Owners Ass'n, 86 N.J. 217, 430 A.2d 881 (1981); State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969); Department of Natural Resources v. Mayor and Council of Ocean City, 274 Md. 1, 332 A.2d 630 (1975).

511. *See, e.g.*, Morse v. Oregon Div. of State Lands, 34 Or. App. 853, 581 P.2d 520 (1978), *aff'd*, 285 Or. 197, 590 P.2d 709 (1979) (permit to fill 32 acres of estuary for airport runway found inconsistent with public trust); Meunch v. Public Serv. Comm'n, 261 Wis. 492, 53 N.W.2d 514, *aff'd on reh.*, 261 Wis. 515, 55 N.W.2d 40 (1952) (Wisconsin court used the doctrine to deny a local government the power to commit state wide resources [a fishing stream] to power generating purposes). *See also* McCauley v. Salmon, 234 Iowa 1020, 14 N.W.2d 715 (1944).

512. *See, e.g.*, Stephenson v. Monroe, 43 A.D.2d 897, 351 N.Y.S.2d 232 (1974) (disposal of refuse in a park inconsistent with park purposes); Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (patentee of tidelands owns the soil, subject to easement of public for public uses of navigation and commerce and to rights of state as administrator and controller of public uses and public trust thereof to enter upon the land for preservation and improvements as may be deemed advisable for those purposes); People *ex rel.* Scott v. Chicago Park Dist., 66 Ill.2d 65, 360 N.E.2d 773 (1976) (found the trust responsibility to be a constitutional mandate to legislatures, based on the requirement that legislative acts be for public purpose).

513. *See* United Plainsmen v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976). The court interpreted the public trust doctrine as requiring a comprehensive plan for the state's natural resources before permits for coal-related power and energy-related production facilities would be issued.

514. Jerke v. State Dep't of Lands, 182 Mont. 294, 597 P.2d 49 (1979). *Compare* United States v. Certain Lands in the Borough of Brooklyn, 346 F.2d 690 (2d Cir. 1965); Jacobson v. Parks and Recreation Comm'n of Boston, 345 Mass. 641, 189 N.E.2d 199 (1963).

515. National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

order to protect the ecological integrity of the basic resource.[516] Application of a public trust doctrine at the state level is an evolving, uncertain process, but it unquestionably exists in a variety of forms in various states.[517] Even in its relatively simple state incarna-

516. The court stated:

> This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values [citations omitted] the two systems of legal thought have been on a collision course. . . .
>
> Attempting to integrate the teachings and values of both the public trust and the appropriative water rights system, we have arrived at certain conclusions which we briefly summarize here. In our opinion, the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority . . . bars DWP or any other party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust. . . . Accordingly, we believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests. . . .
>
> Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.

Id. at 33 Cal. 3d at 412, 428, 658 P.2d at 712, 728, 189 Cal. Rptr. at 349, 365.

517. *See generally* Sax, *The Public Trust Doctrine, supra* note 506. In addition to the cases cited *supra* at notes 506-15, *see also* Harvard v. State, 23 Ala. App. 229, 124 So. 912, *cert. denied*, 220 Ala. 359, 124 So. 915 (1929); State v. Parker, 132 Ark. 316, 200 S.W. 1014, *cert. denied*, 247 U.S. 512 (1918); State v. Hooper, 3 Conn. Cir. Ct. 143, 209 A.2d 539 (1965); Hayes v. Bowman, 91 So.2d 795, 799 (Fla. 1957); Application of Sanborn, 57 Hawaii 585, 562 P.2d 771 (1977); Lake Sand Co. v. State, 68 Ind. App. 439, 120 N.E. 714 (1918); A.K. Ray, Inc. v. Board of Comm'rs for Pontchartrain Levee District, 237 La. 541, 111 So.2d 765 (1959); Opinion of the Justices, 216 A.2d 656 (Me. 1966); Oliphant v. Frazho, 5 Mich. App. 319, 146 N.W.2d 685 (1966), *reversed on other grounds*, 381 Mich. 630, 167 N.W.2d 280 (1969); Nelson v. DeLong, 213 Minn. 425, 7 N.W.2d 342 (1942); Harrison County v. Guice, 244 Miss. 95, 140 So. 2d 838 (1962); State *ex rel.* Citizens' Elec. Lighting & Power Co. v. Longfellow, 169 Mo. 109, 129, 69 S.W. 374, 379 (1902); State *ex rel.* Thompson v. Babcock, 147 Mont. 46, 54, 409 P.2d 808, 812 (1966); People of the Town of Smithtown v. Poveromo, 71 Misc. 2d 524, 336 N.Y.S.2d 764 (1972), *reversed on other grounds*, 79 Misc. 2d 42, 359 N.Y.S.2d 848 (1973); Miller v. Coppage, 261 N.C. 430, 135 S.E.2d 1 (1964); State v. Cleveland & Pittsburgh R.R. Co., 94 Ohio St. 61, 113 N.E. 677 (1916); Conneaut Lake Ice Co. v. Quigley, 225 Pa. 605, 74 A. 648 (1909); Nugent v. Vallone, 91 R.I. 145, 161 A.2d 802 (1960); State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972); Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937); Webster v. Harris, 111 Tenn. 668, 69 S.W. 782 (1902); City of Corpus Christi v. Davis, 622 S.W.2d 640 (Tex. 1981); State v. Mahnquist, 114 Vt. 96, 40 A.2d 534 (1945); Caffall Bros. Forest Prods., Inc. v. State, 70 Wash. 2d 223, 227, 484 P.2d

tion, however, the doctrine has inspired more learned commentary than concrete results.[518]

The application of a public trust doctrine to federal legislators and officers is even more limited and questionable. From an early date, courts declared that the United States was a trustee charged with protecting the welfare of Indians.[519] Apart from those Indian law decisions, early nineteenth century courts also conjured up a "trust" whereby the trustee United States was obliged to divest itself of federal lands.[520] As national policy changed, so too did the public trust concept.[521] Since 1888, judicial decisions have described the Secretary of the Interior as a public trustee.[522] In every case, how-

912, 915 (1971); Campbell Brown & Co. v. Elkins, 141 W.Va. 801, 93 S.E.2d 248 (1956); Day v. Armstrong, 362 P.2d 137, 143 (Wyo. 1961).

518. *See* Sax, *The Public Trust Doctrine, supra* note 506; Montgomery, *The Public Trust Doctrine in Public Land Law: Its Application to the Judicial Review of Land Classification Decisions*, 8 WILLAMETTE L.J. 135 (1972); Littman, *Tidelands: Trusts, Easements, Custom and Implied Dedication*, 10 NAT. RESOURCES J. 279 (1977); Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C.D. L. REV. 269 (1980); Okon, *The Public Trust Doctrine: Procedural and Substantive Limitations on Governmental Reallocation of Natural Resources in Michigan*, 1975 DET. C.L. REV. 161; Sehepps, *Maine's Public Lots: The Emergences of a Public Trust*, 26 ME. L. REV. 217 (1974); Note, *Proprietary Duties of the Federal Government Under the Public Land Trust*, 75 MICH. L. REV. 586 (1977); Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Doctrine*, 79 YALE L.J. 762 (1970). *See also* W. RODGERS, *supra* note 509, at 171 n.8.

519. The United States holds legal title to most tribal lands, but the rights to beneficial use and occupancy of these lands is in the respective tribes. *E.g.*, United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938). In some cases land is held in fee by the tribes, but a trust relationship still exists and alienation is subject to consent of the United States. *E.g.*, United States v. Cahdelaria, 271 U.S. 432 (1926); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). *See generally*, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (3d ed. 1981); Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

520. In Pollard v. Hagen, 44 U.S. (3 How.) 212 (1845), when referring to inland public lands which did not pass from federal ownership at statehood, the Supreme Court said that the United States held such land in trust, *id.* at 222, and that the object of the trust was to convert the land into money for payment of the debt, and to create new states in the territory thus ceded. *Id.* at 224. *See also* Shively v. Bowlby, 152 U.S. 1 (1894); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

521. For a complete discussion of how the trust notions have evolved to meet changing needs, *see* Wilkinson, *supra* note 518.

522. *See, e.g.*, Knight v. United Land Ass'n, 142 U.S. 161 (1891):

> The Secretary . . . is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.

Id. at 181. *See also* United States v. City & County of San Francisco, 310 U.S. 16 (1940); Utah Power & Light v. United States, 243 U.S. 389 (1916); Hannifin v. Morton, 444 F.2d 200 (10th Cir. 1971); United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1974).

ever, the reference was in the nature of a dictum, uttered to reinforce the judicial conclusion that the Secretary had power to act as he did in the disputed instance.[523] In no case did the court use the doctrine as a means of invalidating a secretarial action because it violated the supposed public trust. Nevertheless, the Supreme Court has firmly established that the United States was far more than a mere proprietor in relation to the lands it owned;[524] its repeated characterizations of the Secretary's office as the holder of a trust duty must mean that the Secretary has obligations to the public interest independent of statutory commands.

The Secretary of the Interior has ultimate responsibility for a variety of line agencies, each of which has a fundamentally different mission.[525] As a trustee, the Secretary will have duties that necessarily differ depending on the lands, agency and use at issue. If the purpose of the trust is protection of public assets for public purposes, the corresponding trust duty will be higher in relation to parks and wilderness and lowest in connection with the BLM and the Bureau of Reclamation. As the LWCF moratorium operates against the agencies and lands concerned more with preservation of natural phenomena than with production of goods, the initial hurdle of appropriate land type for application of the public trust doctrine is easily surmounted.

Even if an affirmative trust duty exists—a proposition that remains a matter of heated controversy[526]—its content and requirements are vague or unknown. Well-reasoned authority suggests that the notion should serve, at the federal level, more as a rule of

523. Cases cited *supra* note 522; Causey v. United States, 240 U.S. 399 (1916); Light v. United States, 220 U.S. 523 (1911); Stoneroad v. Stoneroad, 158 U.S. 240 (1895); Orchard v. Alexander, 157 U.S. 371 (1895).

524. That lesson was reinforced in Kleppe v. New Mexico, 426 U.S. 529 (1976).

525. *Compare* The National Park Service Organic Act of 1916, 16 U.S.C. §§ 1-18f (1982) (providing that national park lands are to be managed "to conserve the scenery and the natural and historic objects and 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," *id.* at § 1 (1982)), *with* National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee (1982); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1782 (1976 & Supp. V 1981); and Reclamation Act of 1902, 43 U.S.C. §§ 371-600e (1976 and Supp. V 1981).

526. Even the existence of the duty was denied in a shallow opinion in Sierra Club v. Andrus, 487 F. Supp. 443 (D.D.C. 1980), *aff'd in part*, 659 F.2d 203 (D.C. Cir. 1981). *See* Jawetz, *The Public Trust Totem in the Public Land Law: Ineffective—and Undesirable—Judicial Intervention*, 10 ECOLOGY L.Q. 455 (1982).

statutory construction or a facet of judicial review than as a substantive rule.[527] Courts have not clarified the nature or application of the federal public trust doctrine generally, but the *Redwood National Park* litigation[528] offers suggestive parallels for evaluating the failure of the Interior Department to spend appropriated acquisition funds.

In *Sierra Club v. Department of the Interior*,[529] the Sierra Club sued the Interior Secretary and the NPS to force the Interior Department to take affirmative steps for the protection of Redwood National Park. The court initially held that the discretionary governing statutes[530] combined with the public trust doctrine to create a mandatory duty on the federal agency to exercise all its powers, use all its resources and appeal to other decisionmakers toward the end of expanding the park or curtailing incompatible activities on adjacent lands.[531] The court later dismissed the suit after finding

527. *See* Wilkinson, *supra* note 518, at 304-15; Sax, *The Public Trust Doctrine*, *supra* note 506, at 556-57.

528. Sierra Club v. Department of Interior, 376 F. Supp. 90 (N.D. Cal. 1974); Sierra Club v. Department of Interior, 398 F. Supp. 284 (N.D. Cal. 1975); Sierra Club v. Department of Interior, 424 F. Supp. 172 (N.D. Cal. 1976) [hereinafter cited as *Redwood National Park* cases].

The litigation involved a Sierra Club request that the Department of Interior, acting through the National Park Service, use its powers to prevent damage to the Redwood National Park allegedly caused by logging operations occurring on lands adjacent to the upstream watershed of the park.

529. 376 F. Supp. 90 (N.D. Cal. 1974).

530. In the first *Redwood National Park* case, the court found that the Secretary of Interior had general fiduciary obligations over the public lands and specific statutory directives, both in the National Park Service Organic Act of 1916, 16 U.S.C. §§ 1-18f (1982), and the Redwood National Park Act, 16 U.S.C. §§ 79a-79j (1982), to preserve the park's resources. The court stated:

> The terms of the statute [Redwood National Park Act], especially § 79c(e), authorizes [sic] the Secretary 'in order to afford as full protection as is reasonably possible to the timber, soil, and streams within the boundaries of the park'—'to acquire interest in land from, and to enter into contracts and cooperative agreements with, the owners of land on the periphery of the park and on the watershed tributary to streams within the park'—impose a legal duty on the Secretary to utilize the specific powers given to him whenever reasonably necessary for the protection of the park and that any discretion vested in the Secretary concerning time, place and specifics of the exercise of such powers is subordinate to his paramount legal duty imposed, not only under his trust obligation but the statute itself, to protect the park.

376 F. Supp. at 95, 96.

531. The second *Redwood National Park* decision went to the merits of the case. The opinion surveyed the statutory provisions for park protection in the Redwood National Park Act and discussed the five studies conducted by the Department of Interior on the actual or

that the NPS had done everything in its power to comply;[532] still later, Congress mooted the litigation by authorizing expansion of park boundaries to obviate the immediate threats.[533]

Despite its inconclusive result, several aspects of the *Redwood* litigation are significant for possible lawsuits challenging the LWCF moratorium. First, the statutes in the former case were broader and less precise than the LWCF Act. The Park Service's 1916 organic authority merely stated a general purpose for NPS management[534] and did not purport to govern park expansion or off-park activities. The Redwood National Park Act itself was clearly phrased only in discretionary terms;[535] it gave the Secretary certain limited powers but in no way forced him to exercise them. The court nevertheless decided that the general import and direction of these statutes adequately supported the imposition of a trust duty.[536] In the LWCF case, by contrast, the governing legislation is phrased in nondiscretionary language as an initial matter, greatly strengthening the case for imposition of mandatory requirements. Second, the *Redwood Park* court was not at all reluctant to require the Park Service to spend public money.[537] In the LWCF instance,

threatened damage to the park by logging operations on adjacent lands. The court found that the Secretary had not implemented any of the recommendations made by or on behalf of his own agency in these studies except (1) to enter into so-called "cooperative agreements" with the timber companies that owned and operated on lands surrounding the Park and (2) to conduct further studies. Sierra Club v. Department of Interior, 398 F. Supp. 284, 291 (N.D. Cal. 1975). The court concluded that such actions were not sufficient to meet the affirmative duties imposed on him by the National Park System Act, 16 U.S.C. § 1 (1982), the Redwood National Park Act, 16 U.S.C. § 79a (1982), and the trust duty. The court ordered the Secretary to take reasonable steps within a reasonable time to exercise the powers vested in him. *Id.* at 294.

532. In the third *Redwood National Park* case, the court ruled that the Department of Interior had complied with its statutory and trust duties, and dismissed the action. Sierra Club v. Department of Interior, 424 F. Supp. 172, 175 (N.D. Cal. 1976). The court took note of the Department's five progress reports, its submission to Congress of five alternative proposals for park protection, its request for additional appropriations and authority for park protection, and its attempts to obtain from major timber companies voluntary compliance with guidelines aimed at reducing the impact of logging operations. *Id.* at 173-74.

533. In 1978, Congress added 48,000 acres to the Redwood National Park, Pub. L. No. 95-250, 92 Stat. 163 (1978) (codified in scattered sections of 16 U.S.C.).

534. *See supra* note 525.

535. *See supra* note 530.

536. *See supra* notes 530-31 and accompanying text.

537. One of the duties found to be incumbent on the Secretary was the possible purchase of additional acreage to provide the needed protection for the park lands. Congress had included in the discretionary powers expressly vested in the Secretary the power to:

the defense that the agency had neither authorization nor appropriations to acquire the needed lands is not available. Third, the administrative evil in the *Redwood* situation was the failure to take *effective* action; the Park Service had pursued a variety of studies and easy-way-out options and could not be said to have done nothing at all. The court nevertheless imposed an affirmative injunction, ordering the agency to take specified steps with specified deadlines.[538] The case for such use of the court's equity powers is far more compelling in the LWCF situation because the essence of the administrative position is an outright refusal to achieve the congressional aim. The Park Service in the *Redwood* case at least took preliminary steps in line with statutory purposes, but the moratorium, whether complete or partial, openly violates everything the LWCF Act was intended to accomplish.

Even if, as one court has held,[539] no affirmative public trust duty exists independently of statute, an environmental litigant can still argue with considerable force that the LWCF Act itself creates a trust and requires administrators to implement the Act in conformance with that trust. Congress decreed that the receipts from sale or lease of national resources were to be devoted to acquisition of other national resources in the form of recreation lands. The relationship between the sources of LWCF revenues and the objects of LWCF expenditures is neither accidental nor casual. The legislature repeatedly emphasized that it aimed to convert surplus property and offshore oil into a permanent recreational legacy. The LWCF is not just a program, it is a trust fund to be used for specific trust

(1) modify the boundaries of the Park with particular attention to minimizing siltation of the streams, damage to timber and preservation of the scenery. 16 U.S.C. § 79b(a).

(2) acquire interests in land from and enter into contracts and cooperative agreements with the owners of land on the periphery of the Park and watershed tributary streams within the Park designed to assure that the consequences of forest management, timbering, land use and soil conservation practices, would not adversely affect the timber, soil and stream within the Park. 16 U.S.C. § 79c(e).

538. The court ordered the Secretary of Interior and Assistant Secretary for Fish, Wildlife and Parks to use all their powers to protect the lands from adjacent logging, to attempt to negotiate contracts with private logging firms and to consider acquiring private lands. The court even ordered the Park Service to lobby Congress for funds to buy some of the private lands and to report periodically to the court. Sierra Club v. Department of Interior, 398 F. Supp. 294, 294 (N.D. Cal. 1975).

539. Sierra Club v. Andrus, 487 F. Supp. 443 (D.D.C. 1980), *aff'd on other grounds*, 659 F.2d 203 (D.C. Cir. 1981).

purposes. The administrator of the Fund, like any private trustee, is bound to devote the available trust assets and income to the purposes defined by the settlor, the United States Congress.

The Secretary of the Interior is responsible both for LWCF administration and for selling the OCS leases that generate much of the LWCF revenues. The oil and gas sold underlie lands beneath navigable waters, property traditionally impressed with public trust. When he refuses to allot the OCS revenues to acquisition of recreational resources, the Secretary is subverting trust purposes and dissipating the trust corpus. In other words, the LWCF Act creates a trust fund with corresponding trust duties for the administrator of the fund; the Secretary of the Interior violates those affirmative public trust duties when he refuses to purchase recreational lands.

The public trust doctrine is not yet sufficiently defined to give a litigant confidence of success when the judicial challenge is premised on public trust notions alone. The application of the doctrine to upset the moratorium on spending, however, would be a natural extension of the idea. The difference between an injunction against refusal to retain or protect trust property and an injunction against refusal to acquire properties destined for the trust with appropriated trust funds is not a radical one. Because the moratorium should be overturned on several more conventional grounds, the public trust question may never be reached or, if considered by a reviewing court, the doctrine could be used to buttress other findings of illegality.

In sum, withholding or impounding funds that Congress has dedicated to specific uses has no warrant or justification in law. The Constitution provides no executive power to do so, the Land and Water Conservation Fund Act confers no such secretarial discretion, the action is in plain violation of the Impoundment Control Act (to the extent the ICA remains in force) and the refusal should be deemed a dereliction of the Secretary's trust duty.

If the moratorium, even as now relaxed, were challenged in court, procedural defenses would avail the government little:[540]

540. In National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897 (D.D.C. 1973), Judge Gesell, in rejecting the government's "standard objections so typical in these cases," such as sovereign immunity, political question and lack of standing, decided that "[i]t is time this litany was displaced by a modicum of common sense." *Id.* at 900. "These cases should move to higher courts for prompt, definitive determination shorn of

courts in other impoundment cases have almost uniformly rejected assertions that the court lacked subject matter jurisdiction;[541] that the question was not justiciable[542] or reviewable;[543] that the action

of the confusing inconsequential defenses so typical of Government legalese these days." *Id.* at 901.

541. The courts have found a basis for subject matter jurisdiction in the federal question statute, 28 U.S.C. § 1331 (1976 & Supp. V 1981), § 10 of the Administrative Procedure Act, 5 U.S.C. § 701 (1982) (*but see* Califano v. Sanders, 430 U.S. 99 (1977)) and the mandamus statute, 28 U.S.C. § 1361 (1976). *See* Iowa *ex rel.* State Highway Comm'n v. Brinegar, 512 F.2d 722, 723 (8th Cir. 1975); Sioux Valley Empire Elec. Ass'n v. Butz, 504 F.2d 168, 173 (8th Cir. 1974); State Highway Comm'n v. Volpe, 479 F.2d 1099, 1105 (8th Cir. 1973); Maine v. Goldschmidt, 494 F.Supp. 93, 95 (D. Me. 1980); Arkansas *ex rel.* Arkansas State Highway Comm'n v. Goldschmidt, 492 F. Supp. 621, 624 (E.D. Ark. 1980), *vacated as moot*, 627 F.2d 839 (8th Cir. 1980); Minnesota v. Coleman, 391 F. Supp. 330, 332 (D. Minn. 1975); Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319, 1322 (D.D.C. 1975); Illinois *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 723 (N.D. Ill. 1973); Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1363 (D.N.J. 1973); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 900 (D.D.C. 1973); Oklahoma v. Weinberger, 360 F.Supp. 724, 726 (W.D. Okla. 1973); Berends v. Butz, 357 F. Supp. 143, 149 (D. Minn. 1973).

542. The Supreme Court dismissed this objection in Kendall v. U.S., 37 U.S. (12 Pet.) 524 (1838), discussed *supra* at notes 356-60 and accompanying text, as follows:

> We do not think the proceedings in this case interfere, in any respect whatever, with the rights or duties of the executive; or that it involves any conflict of powers between the executive and judicial departments of the government. The mandamus does not seek to direct or control the postmaster general in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial duty, which neither he nor the President had any authority to deny or control.

Id. at 610. *See also* Iowa *ex rel.* State Highway Comm'n v. Brinegar, 512 F.2d 722, 723 (8th Cir. 1975); Sioux Valley Empire Elec. Ass'n v. Butz, 504 F.2d 168, 172 (8th Cir. 1974); State Highway Comm'n v. Volpe, 479 F.2d 1099, 1106-07 (8th Cir. 1973); Maine v. Goldschmidt, 494 F. Supp. 93, 97 n.5 (D. Me. 1980); Arkansas *ex rel.* Arkansas State Highway Comm'n v. Goldschmidt, 492 F. Supp. 621, 632 (E.D. Ark. 1980), *vacated as moot*, 627 F.2d 839 (8th Cir. 1980); Minnesota v. Coleman, 391 F. Supp. 330, 332 (D. Minn. 1975); Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319, 1322 (D.D.C. 1975); Louisiana v.Weinberger, 369 F. Supp. 856, 862 (E.D. La. 1973); Guadamuz v. Ash, 368 F.Supp. 1233, 1238 (D.D.C. 1973); Illinois *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 725 (N.D. Ill. 1973); Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1379 (D.D.C. 1973); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 900 (D.D.C. 1973); Local 2816, Office of Econ. Opportunity Employees Union v. Phillips, 360 F. Supp. 1092, 1096 (N.D. Ill. 1973); Local 2677, American Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 67-68 (D.D.C. 1973). *But see* Housing Auth. of San Francisco v. HUD, 340 F. Supp. 654, 655-57 (N.D. Cal. 1972) (holding that, since Congress intended to allow spending discretion in the executive, it is up to the legislature to decide when such discretion is abused, and that because there are no judicially discoverable and manageable standards there is a basis for dismissal as a political question).

543. This defense was rejected in Sioux Valley Empire Elec. Ass'n v. Butz, 504 F.2d 168 (8th Cir. 1974), on the ground that the question involved was one of statutory interpretation and therefore within the province of the courts. *Id.* at 172. *See also* International Union,

was barred by sovereign immunity;[544] or that plaintiffs lacked standing.[545] A reviewing court should enjoin the Interior Department's refusal to purchase recreational lands when the funds for purchase have been appropriated.

V. Conclusion

The Administration has justified the moratorium on acquisition of new recreation lands on three grounds. First, federally-owned

UAW v. Donovan, 570 F. Supp. 210, 219 (D.D.C. 1983); Berends v. Butz, 357 F. Supp. 143, 151 (D. Minn. 1973). *But see* Housing Auth. of San Francisco v. HUD, 340 F. Supp. 654, 656 (N.D. Cal. 1974).

544. In submitting its petition for a writ of certiorari in Train v. City of New York, 420 U.S. 35 (1975), the government claimed that a suit to compel the allotment of sums for sewage treatment construction grants under the FWCPA is barred by the doctrine of sovereign immunity. The government abandoned that argument prior to briefing. In fact, the EPA Administrator conceded "that, if § 205(a) [of the FWPCA] requires allotment of the full amounts authorized by § 207, then 'allotment is a ministerial act and the district courts have jurisdiction to order that it be done.' " *Id.* at 41 n.7, quoting Brief for Petitioner, at 14.

The sovereign immunity defense was flatly rejected in State Highway Comm'n v. Volpe, 479 F.2d 1099 (8th Cir. 1973). The Eighth Circuit, relying on Larson v. Domestic and Foreign Corp., 337 U.S. 682 (1949), held that the suit was not barred because the thrust of plaintiff's complaint was that the Executive Officer had acted beyond his statutory powers. The court noted that *Larson* stated that a suit making such an allegation will nevertheless be barred if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign. *Id.* at 1123, *citing* North Carolina v. Temple, 134 U.S. 22 (1890). The Eighth Circuit stated that this exception did not apply in the instant case, since the court's decree only required the agency official to cease unauthorized action; "[t]he resultant release of funds is only to the extent that Congress has already authorized them to be appropriated and expended." 479 F.2d at 1123. A suit challenging the moratorium should not be barred by sovereign immunity, since the court would be asked only to require the government to cease unauthorized action by releasing funds which had already been appropriated. This argument seems strongest as applied to an attempt to release appropriated funds for the purpose of purchasing land whose acquisition Congress has already authorized.

For other decisions rejecting the sovereign immunity defense in an impoundment situation, see Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319, 1322 (D.D.C. 1975); Louisiana v. Weinberger, 369 F. Supp. 856, 862 (E.D. La. 1973); Guadamuz v. Ash, 368 F. Supp. 1233, 1238 (D.D.C. 1973); Illinois *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 724 (N.D. Ill. 1973); Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1379 (D.D.C. 1973); Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1361 (D.N.J. 1973); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 900 (D.D.C. 1973); Local 2816, Office of Econ. Opportunity Employees Union v. Phillips, 360 F. Supp. 1092, 1096 (N.D. Ill. 1973); Berends v. Butz, 357 F. Supp. 143, 149 (D. Minn. 1973). *But see* Housing Auth. of San Francisco v. HUD, 340 F. Supp. 654, 655-56 (N.D. Cal. 1972) (action to compel release of funds appropriated by Congress for urban renewal projects barred by sovereign immunity because Executive Officer did not act outside of his delegated statutory authority).

recreation facilities have deteriorated and are in dire need of restoration and repair. Second, this deterioration has stemmed from the acquisition by the federal government of too much land too quickly, coupled with insufficient funding to maintain existing federal recreational facilities. Finally, budgetary constraints prohibit simultaneous funding of both an acquisition and a restoration program. In addition to these three explicit reasons, the moratorium may also be premised on the Administration's overriding hostility to public ownership of land for "nonproductive" purposes.

Recently, the former chairman of the Outdoor Recreation Resources Review Commission called for "a fresh, bipartisan review of outdoor recreation policy in this country to close a circle begun twenty-five years ago."[546] Legislation has been introduced in both houses of Congress to establish a new National Outdoor Recreation Resources Review Commission,[547] which would prepare a comprehensive review of outdoor recreation resources and make policy recommendations to the President and Congress.[548] A congressional review of federal land acquisition policy would seem particularly

545. The courts have rejected allegations that the plaintiff suffered no injury in fact, Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1358-59 (D.N.J. 1973); Local 2816, Office of Econ. Opportunities Employees Union v. Phillips, 360 F. Supp. 1092, 1097 (N.D. Ill. 1973); Local 2677, American Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 69 (D.D.C. 1973); that the plaintiff's injury was not within the "zone of interests" protected by the statute, Community Action Programs Executive Directors Ass'n v. Ash, 365 F. Supp. 1355, 1359 (D.N.J. 1973); and that the injury alleged by plaintiff could not be redressed even if the court granted the relief requested, Rocky Ford Housing Auth. v. Department of Agriculture, 427 F.Supp. 118, 124 (D.D.C. 1977). *See also* International Union, UAW v. Donovan, 570 F. Supp. 210, 214-15 (D.D.C. 1983); Dabney v. Reagan, 542 F. Supp. 756, 763 (S.D.N.Y. 1982). In *Rocky Ford*, however, the court held that there is no private cause of action under the ICA, and that suits challenging improper withholding under the ICA could only be brought by the Comptroller General pursuant to 2 U.S.C. § 687 (1982) (perhaps only after receiving "the tacit approval" of Congress in each particular case). 427 F. Supp. at 134. *Accord* Public Citizens v. Stockman, 528 F. Supp. 824 (D.D.C. 1981).

546. Diamond, *Old Style Conservation—Once More Unto The Breach*, 13 ENVTL. L. REP. 10,126 (1983).

547. *See* S. 1090, 98th Cong., 1st Sess. (1983), 129 CONG. REC. S4852, S4862-63 (daily ed. Apr. 19, 1983); H.R. 2837, 98th Cong., 1st Sess. (1983), 129 CONG. REC. H2510 (daily ed. Apr. 28, 1983). On November 18, 1983, the Senate passed S.1090. 129 CONG. REC. S16912-16 (Nov. 18, 1983).

548. *See* 129 CONG. REC. S4865 (daily ed. Apr. 19, 1983) (statement of Senator Jackson). The creation of a new Commission was initially recommended by the Outdoor Recreation Policy Review Group ("ORPRG"), a private entity which included former members of the first ORRRC. In its report, "Outdoor Recreation for America—1983," the ORPRG made the following findings:

appropriate as the LWCF enters the last several years of its original authorization.[549] And a central component of that review should be a careful assessment of the validity of the Administration's reasons, both explicit and unstated, for imposing the moratorium.

The first two justifications for the moratorium focus on the need to defer further acquisition until Congress has provided the means for redressing the deterioration of existing federal recreation facilities and resources. Several significant steps have already been taken, however, to insure that these facilities and resources will be restored. Congress has reacted very favorably to the Administration's PRIP and has funded that program at the levels requested by the Administration. Congressional determination to reverse the deterioration of NPS facilities is also reflected in the enactment of the National Park System Visitor Facilities Fund Act[550] in early 1983. This statute created a NPS Visitor Facilities Fund for reconstruction, rehabilitation, and improvement of NPS facilities which provide food, lodging or other services to visitors.[551]

> The role of the federal government needs to be reassessed, redefined, and revived. Adequate provision for the nation's recreation needs urgently requires a rethinking of the responsibilities of all levels of government, particularly that of the federal government, in providing leadership in policy and programs. Federal leadership will be necessary to:
> . . .
> Complete critical land purchases without which important National Parks and other elements of the national recreation estate will be threatened or lost [.]
> . . .
> Federal funding mechanisms for buying and protecting national recreation lands and fulfilling federal responsibilities in areas inadequately served by recreation lands such as the eastern United States will need to be revived or replaced. There is substantial sentiment for continuing the Land and Water Conservation Fund or some similar mechanism through which revenues from our diminishing nonrenewable resources can be reinvested in permanent, renewable resources. Specifically, some means for providing federal recreation assistance to state governments will be required to respond adequately to soaring public visitation of state parks. Further, policies and procedures for transferring federal surplus real property to states and local governments need to be reexamined.
> 129 CONG. REC. S4864 (daily ed. Apr. 19, 1983).

549. The funding mechanisms of the LWCF are scheduled to expire on Sept. 30, 1989. *See* 16 U.S.C. § 460*l*-5 (1982).

550. Pub. L. No. 97-433, 96 Stat. 2277 (1983) (current version at 16 U.S.C. §§ 19aa-19gg (1982)).

551. *Id.* §§ 3, 5(a), 2(4), 96 Stat. 2277-78 (current version at 16 U.S.C. §§ 19bb, 19dd(a), 19aa(4) (1983)). The report of the House Committee on Interior and Insular Affairs explained that "numerous structures" of the NPS "were constructed many years ago and are now in serious need of major maintenance and rehabilitation." H.R. REP. No. 953, 97th Cong., 2d Sess. 3 (1982) [hereinafter cited as H.R. REP. No. 953]. Although Congress has appropriated

Other means of remedying deteriorated NPS resources recently considered by Congress also indicate that the deterioration problem can be addressed by means other than a moratorium on further land acquisitions. One program receiving legislative attention is a new American Conservation Corps,[552] similar to the Civilian Conservation Corps of the 1930's and the more recent Young Adult Conservation Corps and Youth Conservation Corps.[553] The creation of an American Conservation Corps of young, unemployed adults would help to

> reduce the backlog of conservation, rehabilitation, and improvement work on the public lands, prevent the further deterioration of public lands and resources and facilities, conserve energy and restore and maintain community lands, resources, and facilities.[554]

The House bill would achieve this objective by authorizing the Secretary of Interior to set up a public lands conservation, rehabilitation, and improvement program.[555] Under this program, the Secretary would assist federal and state recreation agencies in establishing and operating American Conservation Corps centers.[556] These centers would carry out the projects for rehabilitating public land resources.[557]

increased funds recently to remedy this problem, "such funds have primarily been directed to work on major park structures. There are over 1,000 small buildings in the park system (mostly cabins and small motels, including associated support facilities) which are owned by the U.S. Government . . . and which are used for overnight visitor accommodations or for providing support services for visitors. These buildings have been consistently placed at the bottom of the priority list for maintenance funding and most are now in critical need of major rehabilitation. It has become apparent that . . . special efforts must be made to assure maintenance before the structures deteriorate to the point where rehabilitation is economically infeasible." *Id. See also* 128 CONG. REC. H9441-42 (daily ed. Dec. 10, 1982) (statement of Rep. Seiberling).

These activities will be funded from NPS concession fees and from additional annual appropriations of up to $1 million. *See* Pub. L. No. 97-433, §§ 3-4, 96 Stat. 2227 (1983). *See also* H.R. REP. No. 953, *supra* note 551, at 4.

552. H.R. 4861, 97th Cong., 1st Sess. (1981) [hereinafter cited as H.R. 4861]; S. 2061, 97th Cong., 2d Sess. (1982). *See also* 128 CONG. REC. S361 (daily ed. Feb. 3, 1982).

553. *See* 128 CONG. REC. S362 (daily ed. Feb. 3, 1982) (statement of Senator Moynihan).

554. H.R. 4861, *supra* note 552, at § 2(b)(1).

556. *See* H.R. REP. No. 500, 97th Cong., 2d Sess., pt. 1, at 11 (1982) [hereinafter cited as H.R. REP. No. 500].

557. Under § 4(b) of the bill, the Corps could work on projects such as:

(1) forestry, nursery, and silvicultural operations;

The Reagan Administration opposed the creation of the American Conservation Corps program.[558] The Secretary of Agriculture admitted that the work of the Young Adult Conservation Corps and the Youth Conservation Corps[559] made "a valuable contribution" to the agencies' objectives.[560] He stated, however, that the Administration opposed the creation of a new Corps because "the budget restraint necessary to aid in the Nation's economic recovery requires close examination of priorities and compels difficult decisions."[561]

(2) wildlife habitat conservation, rehabilitation, and improvement;
(3) rangeland conservation, rehabilitation, and improvement;
(4) recreational area development, maintenance, and improvement;
(5) urban revitalization;
(6) historical and cultural site preservation and maintenance;
(7) fish culture and habitat maintenance and improvement and other fishery assistance;
(8) road and trail maintenance and improvement;
(9) erosion, flood, drought, and storm damage assistance and control;
(10) stream, lake, and waterfront harbor and port improvement and pollution control;
(11) insect, disease, rodent, and fire prevention, and control;
(12) improvement of abandoned railroad bed and right-of-way;
(13) energy conservation projects and renewable resource enhancement;
(14) recovery of biomass from public lands, particularly forestlands; and
(15) reclamation and improvement of strip-mined lands.

H.R. 4861, *supra* note 552, at § 4(b). Priority would be afforded to those projects which "(1) will provide long-term benefits to the public; (2) will provide meaningful work experience to the enrollee involved; (3) will be labor intensive; and (4) can be planned and initiated promptly." *Id.* § 4(c).

558. *See* H.R. REP. No. 500, *supra* note 556, at 17 (letter from John Block, Secretary of Agriculture, to Morris K. Udall, Chairman, House Committee on Interior and Insular Affairs (Mar. 5, 1982)).

559. These two entities were phased out by the Reagan Administration "as part of the Administration's effort to achieve budget savings." *Id.*

560. *Id.*

561. *Id.* at 18. The Secretary added:

> [F]unding of a separate and new youth employment program by earmarked receipts is not appropriate or consistent with sound budgetary practices. . . . Earmarking receipts to the Treasury removes the program from the normal competition for the Federal dollar, giving it a priority not necessarily consistent with overall spending priorities, and requiring a downward adjustment elsewhere in the Federal budget.

Id. The Interior Department supported the creation of a new Corps only if it were staffed wholly by volunteers. *Id.* at 18-20 (letter from Garrey Carruthers, Assistant Secretary of the Interior, to Thomas P. O'Neill, Jr., Speaker of the House of Representatives (Apr. 27, 1982)).

The Administration also opposed another bill aimed at the prevention and reversal of degradation of NPS natural and cultural resources. The National Park System Protection and Resources Management Act of 1982 was passed by the House in September 1982. H.R. 5162, 97th Cong., 2d Sess., 128 CONG. REC. H7878 (daily ed. Sept.29, 1982). The House bill was intended to provide for the protection and preservation of NPS resources through the development of certain comprehensive management plans and decisionmaking processes. *Id.* § 3. For example, the bill would require the Interior Secretary to prepare and submit to Congress

In light of these preliminary congressional efforts, the Administration's first two justifications for the moratorium appear less than persuasive. In fact, the Administration's opposition, on budgetary grounds, to proposals for park rehabilitation through agencies such as a new youth conservation corps indicates that the third justification for the moratorium is probably of primary importance to the Administration. Moreover, the Reagan Administration's unstated hostility to federal public land and resources ownership simply makes it unwilling to spend the money required to purchase new recreational lands, even if ordered to do so by Congress.

The history of the LWCF reflects a congressional policy favoring timely acquisition of available recreation land. The funding of the PRIP and other recent legislative activities also indicates a desire to reverse the deterioration of existing federal recreation facilities. The Administration has argued that budgetary constraints prohibit the simultaneous implementation of these two goals. Yet, despite its awareness of recent economic difficulties, Congress has continued to appropriate moneys for land acquisition. By imposing the moratorium, the Administration has unilaterally and illegally redrawn

every two years a "State of the Parks Report" describing, among other things: (1) the past, current, and projected conditions of the natural and cultural resources of each NPS unit; (2) any threats of damage to those resources; (3) ongoing and planned protection and management actions; and (4) an itemized estimate of the funding required to carry out those actions. *Id.* § 4(a). H.R. 5162 would also require the preparation of resource management plans for each NPS unit (*id.* § 7), and would establish a procedure for the Interior Secretary to comment on the proposed action of any other federal agency which might significantly degrade the natural or cultural resources or values for which a NPS unit was created. *Id.* § 11.

The Interior Department "fully support[ed] the goals and intent of the bill: to identify threats and provide for the highest possible degree of protection, preservation and enhancement of the natural and cultural resources within the National Park System." H.R. REP. No. 881, 97th Cong., 2d Sess. 20 (1982) (quoting letter from Donald Paul Hodel, Acting Secretary of the Interior, to Morris K. Udall, Chairman, House Committee on Interior and Insular Affairs (Sept. 28, 1982)). The Administration nevertheless was "strongly opposed to this bill for many reasons," including its concern about "the adverse budgetary and personnel impacts which will inevitably result from many of the provisions of this legislation." *Id.* at 20, 21.

A bill identical in substance to H.R. 5162 was introduced in the 98th Congress as H.R. 2379. *See* 129 CONG. REC. H1809 (daily ed. Mar. 24, 1983); H.R. REP. No. 170, 98th Cong., 1st Sess. 4 (1983). The Administration remains "strongly opposed to this bill for many reasons. . . ." *Id.* at 12 (quoting letter from J. Craig Potter, Acting Assistant Secretary of the Interior, to Morris K. Udall, Chairman, House Committee on Interior and Insular Affairs (Apr. 26, 1983)). Nevertheless, the bill again passed the House. *See* 129 CONG. REC. H7910-34 (daily ed. Oct. 4, 1983).

the balance struck by Congress between the desire to expand recreational opportunities and the desire to control federal spending.

Even if the Administration's fiscal concerns are valid, it is not necessarily impossible to finance both an acquisition and a restoration program without unduly increasing the federal deficit. For example, the General Accounting Office has suggested two means of minimizing the impact of funding restoration and improvement projects on federal spending. Congress could authorize higher user fees at federal recreation facilities.[562] Alternatively, the Interior and Agriculture Departments could shift to NPS and NFS concessioners part of the burden of repairing the facilities they operate.[563] Thus, an acquisition moratorium is not the inevitable result of congressional willingness to emphasize fiscal concerns.

Since 1981, the Administration has succeeded in convincing Congress to reduce LWCF appropriations. But Congress has so far refused to stop authorizing recreation land acquisitions, believing, as one Congressman stated, that such acquisitions are "too important to be terminated."[564] The Administration may certainly continue its attempts to convince Congress that land acquisition should be subordinated to the exigencies of current economic policy. Having failed to persuade Congress, however, the Interior Secretary abuses his authority when he unilaterally dictates federal recreation policy. A public official cannot ignore the legislative mandate to spend appropriated funds. This kind of government by executive fiat is particularly disturbing in light of the possibility that the LWCF moratorium is merely one example of a pattern of executive impoundments and refusals to fund various environmental and energy programs to which the current Administration is politically hostile.[565]

562. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, INCREASING ENTRANCE FEES—NATIONAL PARK SERVICE, GAO/CED-82-84 (1982); FACILITIES DO NOT MEET HEALTH AND SAFETY STANDARDS, *supra* note 245, at ii-iv, 22-23.

563. *See* FACILITIES DO NOT MEET HEALTH AND SAFETY STANDARDS, *supra* note 245, at iii-iv, 24-27, 117. *But cf.* H.R. REP. NO. 953, *supra* note 551, at 4 (the House Committee on Interior and Insular Affairs does not intend anything in the National Park System Visitor Facilities Fund Act to "be used in any manner as a reason or justification for any future increase in any franchise or building fee.").

564. 128 CONG. REC. H8850 (daily ed. Dec. 3, 1982) (statement of Rep. Yates).

565. *See, e.g.*, Dabney v. Reagan, 542 F. Supp. 756 (S.D.N.Y. 1982) (holding that plaintiffs demonstrated a substantial likelihood that the Administration violated the Solar

Energy and Energy Conservation Bank Act, Pub. L. No. 96-294, title V, 94 Stat. 611 (1980) (current version at 12 U.S.C. §§ 3601-3602 (1982)) and a fiscal year 1982 appropriation statute, Pub. L. No. 97-101, 95 Stat. 1417, 1420 (1981), by failing to spend funds appropriated for the establishment of a Solar Energy and Energy Conservation Bank); Hudson River Sloop Clearwater, Inc. v. Ruckelshaus, No. 83 Civ. 3861 (CLB) (S.D.N.Y.) (alleging failure by the Environmental Protection Agency to fund the Hudson River reclamation demonstration project, contrary to § 116(b) of the Clean Water Act, 33 U.S.C. § 1266(b) (1976 & Supp. V 1981)); *GAO Impoundment Notice Sparks New Debate on Fill Rate for Oil Reserve,* INSIDE ENERGY/WITH FEDERAL LANDS, May 9, 1983, at 4a (General Accounting Office ruled that the Administration was illegally withholding $800 million in fiscal year 1983 funds which Congress ordered the Department of Energy to spend to purchase crude oil for the Strategic Petroleum Reserve, contrary to the Energy Emergency Preparedness Act of 1982, Pub. L. No. 97-229, § 4, 96 Stat. 248, 250 (1982) (to be codified at 42 U.S.C.§ 6202 note) and the ICA; *Johnston Hits DOE Plan to Scrap Oil Data,* INSIDE ENERGY/WITH FEDERAL LANDS, April 18, 1983, at 1-2, and *FRS Flap Prompts Review of EIA Programs,* INSIDE ENERGY/WITH FEDERAL LANDS, May 30, 1983, at 1-2 (Senator Johnston of the Senate Energy Committee, and a report of the Senate Appropriations Committee, concluded that the Department of Energy's decision to terminate the collection of financial data from the 26 largest oil companies under the Energy Information Administration's Financial Reporting System, on the ground that the DOE budget is too small to continue the program, violates § 205(h)(2) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, 573 (1977) (codified at 42 U.S.C. § 7135(h)(2) (Supp. V 1981). The Department eventually agreed to collect the data, after settling a suit brought in federal district court by the Citizen/Labor Energy Coalition and others, to compel compliance with the statute. *See DOE Throws In The Towel; Agrees to Collect Oil Company Financial Data,* INSIDE ENERGY/WITH FEDERAL LANDS, June 27, 1983, at 10.).