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THE BUFFALO RIVER: A JURISPRUDENCE OF PRESERVATION

*John W. Ragsdale, Jr.**

In the middle of the country lie the Ozark Mountains, islands of green and rumped respite from the human-dominated sameness of the surrounding plains. These lower-case mountains, though less imposing than their eastern or western counterparts, are nonetheless interesting, exciting and often untamed. There is particular wildness and isolation in the hollows because the highways, unlike those in the western mountains, have tended to run on the ridge crests. The crystal streams in these roadless valleys, though usually calmer than the snow-fed chargers of the Colorado Rockies, still have numerous rapids and shoals whose allure is enhanced by their solitude. At the center of this verdant repose of highlands, forest and waters is the Buffalo River, a free-flowing stream throughout its length and a place of incomparable beauty. How has this river escaped the heavy impacts of human control and for how long?

Through much of American history, wildness has stood in fundamental opposition to law and economy. The imperatives of growth and market-driven law have not boded well for the continuance of wild-places and free-running rivers. Dams, in particular, have stifled the flow and choked the life out of countless natural streamways, and have covered the corpses with fungible stillwater reservoirs. They have done so generally in the name of progress. The proponents of dams

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urge that a growing economy needs an efficient use of resources and that an evolving civilization needs order. These promoters of progress and their concepts have generally held sway; the law has embraced efficiency and reductivism, and the inexorable dynamics of the marketplace have guided the actions of the people.

Yet some wild places and rivers remain, and our appreciation of them has grown—paralleling, perhaps, our emergent recognition of the possibility of imminent and total loss. In the last several decades, law has occasionally broken its lockstep with material efficiency, and has preserved wilderness areas and wild streams against the incursions of a gain-seeking society.

Before we lapse into complacency, however, we should remember that laws are not ends in themselves or endless in nature. Laws are adaptive tools that serve the society's collective values. Should these values change, the law will change to reflect them. The congruence between law and value may, at any given moment, be inexact but the tendency toward congruence is ever present.

This homeostatic dynamic can both inspire and concern the lovers of wild rivers. The quest for material gain prompted the efficiency-based laws that aided the destruction of wild rivers, while the residual love of free-flowing waters saved some of them. This dynamic opposition continues and there are no guarantees of enduring protection. Rivers apparently saved or savable can still be lost.

It is the contention of this article that the residing love of wild rivers needs articulation as a jurisprudence in order to maintain the laws that exist against erosion, and to promote the future laws that are needed. I believe that innate feelings for a river can be expressed, can be expanded into a philosophy of place, life and meaning, and can be formed into a jurisprudence that will undergird both present and emerging preservation laws.

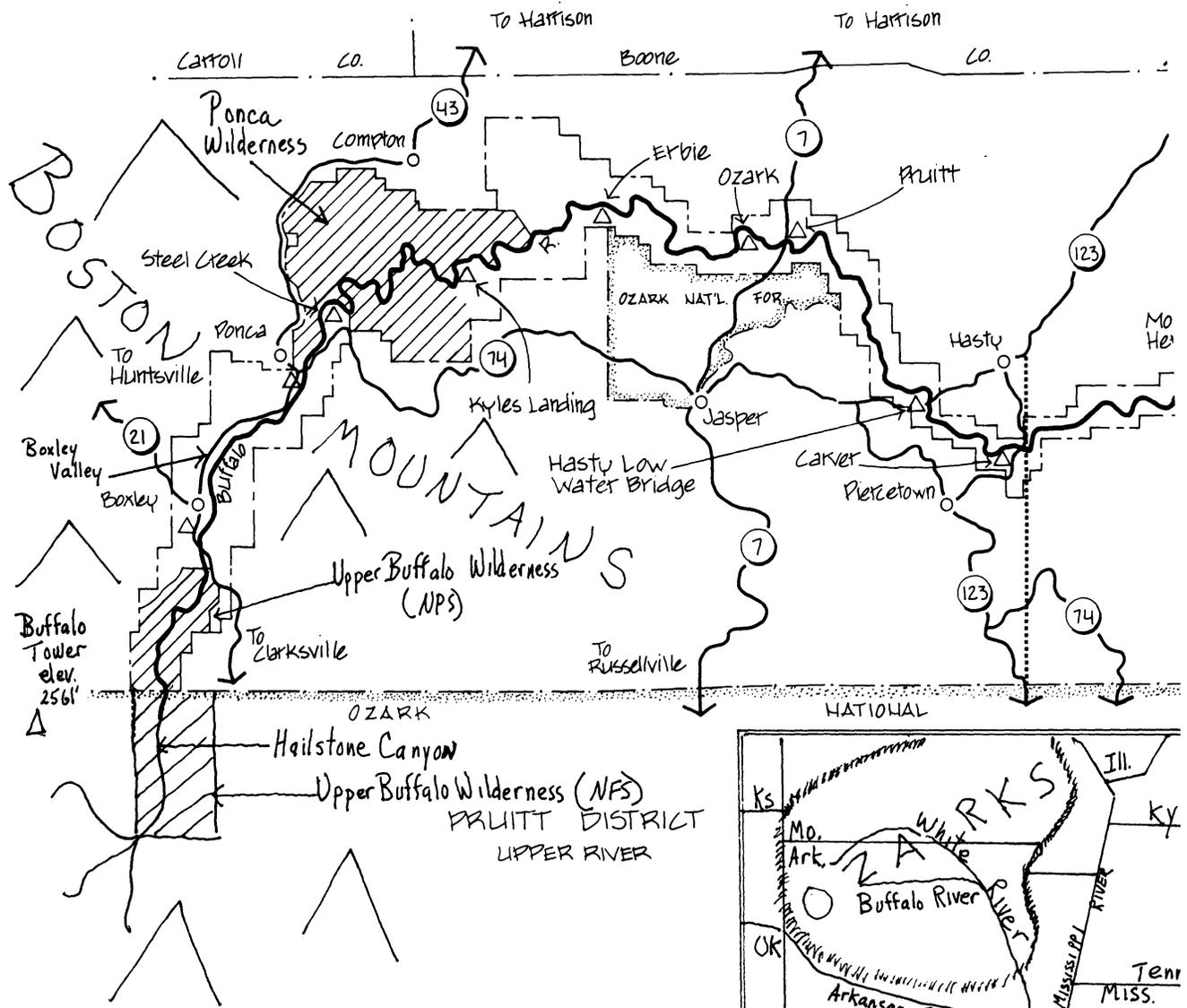
This article focuses on the Buffalo River. It is the source of deeply held feelings—my own and those of countless others. It has been the inspiration to a great deal of protective law and action. It serves well as the basis of a philosophy or jurisprudence that not only will stabilize the present laws that serve it, but will inspire and elicit the laws that it and other special, sacrosanct places need in the future.

This article, in Section One, introduces the reader to the Buffalo River and inventories the existing scheme of common law and statutory regulation that protects it. This introductory section also explores both the fundamental necessity of regulation to preserve scarce and threatened natural resources from the impacts of growth,

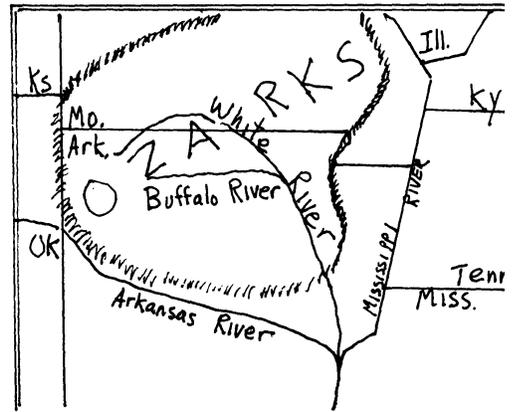
and the basic jurisprudential requirement that such laws coexist with societal values.

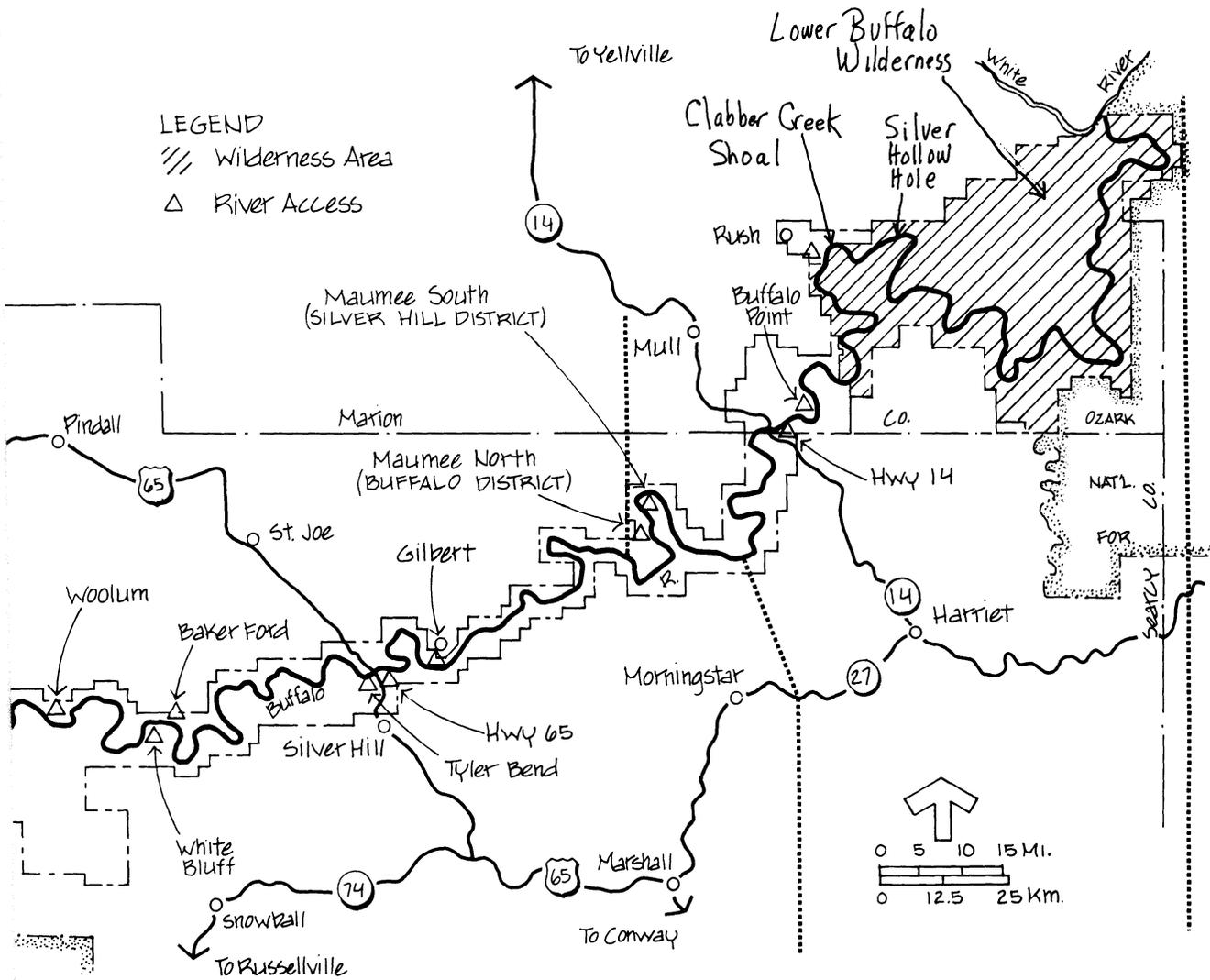
In Section Two, this article examines the origins of value at the personal level, and hypothesizes that the particular valuation of wild rivers such as the Buffalo begins in the emotional encounter between individual and place. Section Three involves an articulation and synthesis of these values into a philosophy that will hopefully buffer existing laws against efficiency-induced erosion and will inspire other laws that may be needed by this place and other threatened natural jewels.

This Article concludes with a Section on two problematic qualifiers of a functioning jurisprudence and a preservation system: the excess of love and the overall decline of the society. The article will sidestep the first conundrum by contending that there are no fundamental problems with an outpouring of affection for a place, only issues of management. It will then suggest that the decline of a material society will not necessarily compromise the philosophy or reality of sacred place preservation. If the philosophy is strong enough and held deeply, then preservation will continue, and the revered places can give troubled societies solace, meaning and direction toward a future revival.



Location Map





SILVER HILL DISTRICT
 MIDDLE RIVER

BUFFALO DISTRICT
 LOWER RIVER

BUFFALO NATIONAL RIVER

Buffalo National River • Arkansas
 By U.S. Dept. of the Interior • National Park Service
 with additions by John Ragdale

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I. INTRODUCTION

A. Description and Chronology

The Ozark Mountains are not so much a collection of independent peaks, as they are the valleys, plains, hollows, facets and ridges of four ancient, eroded plateaus.¹ They present themselves subtly and gently to a southbound Missouri traveler, with no sudden upthrusts or ramparts. The terrain begins gradually, almost imperceptibly, to roll. The undulations accentuate south of Springfield, and then, from a hill crest, one can see the landscape resolved into a series of sequential ridges, extending into the distance in shades first of green and then blue.

The ridges intensify further in Arkansas, as one approaches the Boston Mountains, the heart and highest points of the Ozark region. The Bostons, with weathered crests of limestone and sandstone, are unSierra-like or even unAppalachian in stature, but they are still high enough to catch the numerous north-moving, moisture-laden storms from the Gulf of Mexico. The rains, heaviest in spring and early summer, water the lush pine and hardwood forests, and feed the numerous clear and free-flowing streams that have their birth in the Bostons. The Piney, the White, the Mulberry, the Kings' and the Buffalo all begin here.

Rivers and mountains shape each other. The northeast-face escarpment of the Bostons catches the surface flow of rain water, and its contours guide the numerous rivulets and small branches into a confluence called the Buffalo River for the first time at a place about three miles southeast and 870 vertical feet below the Ozark's high point.² As the young river gains strength and volume, it begins to etch the surface rather than merely run across it; the water starts to carve the rocks and eventually cut the gorges, bluffs and cliffs that make the Buffalo one of the most beautiful and distinctive rivers in the country.

¹ The Ozark region is comprised of the Salem Plateau, the Springfield Plateau, the St. Francis Mountains and the Boston Mountains. See DWIGHT PITCAITHLEY, *LET THE RIVER BE: A HISTORY OF THE OZARK'S BUFFALO RIVER* 3 (1978).

² The headwaters of the Buffalo are formed by the union of Reeves Fork, Big Buffalo Creek and Nuckles Creek at an elevation of about 1690 feet. Buffalo Fire Tower, set astride the high point of the Ozarks and the Bostons is a somewhat modest 2,561 feet above sea level. See TOM KENNON, *OZARK WHITEWATER* 89 (1989); KENNETH L. SMITH, *THE BUFFALO RIVER COUNTRY* 164 (1978).

The river runs unimpeded for its entire length of nearly 150 miles. It moves swiftly through the deep canyons of the upper sections, more slowly through the bluffs and rolling hills of the center stretches, and rather sedately through the lower gorges, on its way to an eventual junction with the White River. The water is transparent throughout, green-tinted in the deep pools and so clear in the shallow shoals that a boat can sometimes seem suspended in air.

The Buffalo is a living river, animated by its wild species, fluctuating hydrology and ongoing geological modification. The hand of man seems to have touched lightly here. This is in part due to the inaccessibility of much of the river, especially in the upper and lower portions. It is also partially an illusion; the minimal evidence of human impact in approachable places is largely a testament to the regenerative capacity of the land.

There was logging in the river basin from the late nineteenth century until around 1920, with cut timber transported downstream during high water periods.³ Lead and zinc were mined, principally in the Rush and Clabber Creek areas, from the late 1880's until shortly after World War I.⁴

The land and the river survived these intrusions; new forest growth replaced the old and hid the mining scars. Water and wind, over time, crumbled the miners' cabins, stores, roads and even the shafts themselves. A new naturalness emerged. However, an even greater threat to the river appeared.

The Depression era, and the projects in the Tennessee Valley, spawned interest throughout the Ozark region in dam construction as a means of flood control, hydroelectric power and economic stimulation. With its deep canyons, the Buffalo was a prime target for the builders. In 1954, the Army Corps of Engineers recommended the construction of two dams on the Buffalo: one at Lone Rock, near the river's mouth; and another at Gilbert, sixty miles upstream.⁵ In 1956 and again in 1957, Congress passed flood control bills that would authorize these projects, but on both occasions the bills were vetoed by a cost-conscious President Eisenhower.⁶

In 1961, Arkansas Representative James Trimble introduced yet another bill involving the Lone Rock and Gilbert dams.⁷ This signalled

³ PITCAITHLEY, *supra* note 1, at 59-61.

⁴ *Id.* at 83-86.

⁵ *Id.* at 96.

⁶ *Id.* at 96-97.

⁷ *Id.* at 97.

the start of a decade-long fight between dam proponents and a newly-energized Arkansas conservation coalition.⁸ The Arkansas conservation movement paralleled the rise in national environmental consciousness and the outpouring of federal preservation legislation,⁹ and culminated in the passage of the Buffalo National River Act of 1972.¹⁰ This Act, which created the nation's first National River,¹¹ and subsequent preservation acts and legal doctrines have combined to make the Buffalo one of the most protected rivers in the country.

B. The Existent Preservation Scheme

The Buffalo River's primary protection is afforded by the provisions of the National Park Service Organic Act of 1916,¹² and by the terms of the specific National River implementing legislation.¹³ The National Park Service Organic Act provides in part that the National Park Service

... shall promote and regulate the use of the Federal areas known as national parks . . . by such means and measures as conform to the fundamental purpose . . . which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.¹⁴

The Buffalo National River's implementing legislation provides a *sine qua non* of river protection by limiting dam activity that would affect the flow. The act states that the Federal Energy Regulatory Commission shall not license any project "on or directly affecting the Buffalo National River," and no other agencies "shall assist by loan, grant, license, or otherwise in the construction of any water resources

⁸ See generally NEIL COMPTON, *THE BATTLE FOR THE BUFFALO RIVER* (1992).

⁹ See, e.g., Wilderness Act of 1964, 16 U.S.C. §§ 1131-36 (1988 & Supp. IV 1992); Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271-1287 (1985 & Supp. IV 1992); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(c) (1988 & Supp. III 1991); Clean Air Act of 1970, 42 U.S.C. §§ 7401-76719, (1988 & Supp. III 1991).

¹⁰ Pub. L. No. 92-237, 86 Stat. 44 (1972) (codified as amended at 16 U.S.C. §§ 460m-8 to 460m-14 (1988 & Supp. IV 1992)).

¹¹ The Buffalo, as a National River, includes substantial land within its boundaries, and involves administration by the National Park Service. See 16 U.S.C. § 460m-12 (1988). Though the Buffalo was the first designated National River, there was a substantially similar precedent made with the creation of the Ozark National Scenic Riverways on southern Missouri's Current and Jack's Fork Rivers. 16 U.S.C. §§ 460m to m-7 (1988).

¹² 16 U.S.C. §§ 1-18f-1 (1988 & Supp. IV 1992).

¹³ 16 U.S.C. §§ 460m-8 to m-14 (1988 & Supp. IV 1992).

¹⁴ 16 U.S.C. § 1 (1988 & Supp. IV 1992).

project that would have a direct and adverse effect on the values for which such river is established"¹⁵

It has been argued by some courts that National Parks—and thus National Rivers—are impressed with a public trust. This concept suggests that a particular land interest is held by the government for the non-utilitarian benefit of the public and the benefit, perhaps, of the place itself.¹⁶ A public trust doctrine would enable—or compel—a court to strictly enforce the trustees' duty of care, especially when the duty is being executed by an administrative agent.¹⁷ There is a legitimacy problem, however, in that public trust is a judicially-created common law doctrine,¹⁸ and National Parks are included in both an area of extensive statutory treatment,¹⁹ as well as an arena of constitutionally-committed congressional authority.²⁰ Thus, an influential case suggests that the Secretary of the Interior's duties with respect to National Park preservation will flow exclusively from the statutory terminology alone, and not from an independent, court-imposed concept of public trust.²¹

It seems likely, however, that, beyond the precise issues of legal duty, the concept of public interest and the theoretical rights of inanimate places²² may well influence Congress in the creation of preservation statutes. Such ideas may also affect the courts in the interpretation of statutes and regulations, as well as the administrators who enforce them.²³

¹⁵ 16 U.S.C. § 460m-11 (1988 & Supp. IV 1992).

¹⁶ See *Sierra Club v. Dept. of the Interior*, 398 F. Supp. 284, 287 (N.D. Cal. 1975); *Sierra Club v. Dept. of the Interior*, 376 F. Supp. 90, 95-96 (N.D. Cal. 1974).

¹⁷ GEORGE C. COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* 6-54 (1993).

¹⁸ See *infra* notes 48-58.

¹⁹ Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 467 (1989).

²⁰ "The Congress shall have the power to dispose of and make all Needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3.2.

²¹ *Sierra Club v. Andrus*, 487 F. Supp. 443, 449 (D.D.C. 1980).

²² See CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING?: TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS* (1974).

²³ See *Wilkins v. Lujan*, 798 F. Supp. 557 (E.D. Mo. 1992), *rev'd on other grounds sub nom. Wilkins v. Secretary of the Interior*, 995 F.2d 850 (8th Cir. 1993). The Administrator of the Ozark National Scenic Riverway employed public trust concerns in deciding to remove a small band of wild horses that were perceived as detrimental to the park. *Id.* at 560, 563. The district court, itself operating under concerns for public rights, intangible factors and non-human interests, overcame its traditional deference to administrative expertise and enjoined the removal. *Id.* at 559, 563. The court of appeals, proceeding along strict statutory lines, reversed over strong dissent. *Wilkins v. Secretary of the Interior*, 995 F.2d at 850.

Segments of the Buffalo River and the surrounding forests, gorges, valleys, plateaus, and mountains are protected as designated wilderness areas under the National Wilderness Preservation System.²⁴ Such areas are to “be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness”²⁵ In particular, wilderness areas have been, since January 1, 1984, closed to new mining locations and mineral leaseings.²⁶ Wilderness areas are also to be free from all water diversions and impoundments that are not specifically authorized by the President,²⁷ and are to be generally closed to roads, commercial enterprise and motorized equipment.²⁸

The Secretary of the Interior was charged under the Wilderness Act with evaluating the National Parks for areas that could possibly be included within the wilderness system.²⁹ Three resultant recommendations and congressional designations were made within the Buffalo National River: the Upper Buffalo Wilderness, the Ponca Wilderness and the Lower Buffalo Wilderness.³⁰ These areas remain under the administration of the National Park Service.

There are, in addition, three other wilderness units within the Buffalo River drainage. They lie within the Ozark National Forest, adjacent to the National River’s boundaries, and are administered by the National Forest Service. The Upper Buffalo Wilderness lies immediately upstream from the Park’s upper wilderness unit,³¹ the Leatherwood Wilderness is next to the Lower Buffalo Wilderness,³² and the Richland Creek Wilderness,³³ south of the middle Buffalo region, includes the headwaters of a major whitewater tributary. The Buffalo River drainage has, in total, approximately 80,000 acres or 125 square miles of wilderness.³⁴

²⁴ 16 U.S.C. §§ 1131–1136 (1988 & Supp. IV 1992).

²⁵ *Id.* § 1131.

²⁶ The Wilderness Act protects mining and leasing rights vested before the designation of particular areas. Even after designation, the Act allowed the establishment of new rights until December 31, 1983. *See id.* § 1131(d)(3).

²⁷ *Id.* § 1133(d)(4).

²⁸ *Id.* § 1133(c).

²⁹ *Id.* § 1132(c).

³⁰ These areas were included by Congress in the wilderness system by statute in 1978. National Parks and Recreation Act of 1978, Pub. L. No. 95-625, § 401, 92 Stat. 3467, 3489 (1978).

³¹ This segment was added to the Wilderness System by the National Wilderness Preservation System, Pub. L. No. 93-622, 88 Stat. 2096 (1974).

³² This was added by the Arkansas Wilderness Act of 1984, Pub. L. No. 98-508, 98 Stat. 2349 (1984).

³³ *Id.*

³⁴ THOMAS ERNST, BUFFALO RIVER HIKING TRAILS 12 (1991).

A wilderness designation definitely restricts the possible land and water uses that can be made in either National Forests or National Parks. In several situations, however, the National Park or National River wilderness provisions are, as interpreted, more strict than the wilderness standards applicable in National Forests. In the case of a land use regulatory conflict, the more restrictive provisions, generally, should apply. For example, the Buffalo National River Act, unlike the Wilderness Act, makes no allowance for water projects, even on presidential authorization, and makes minimal concessions to mining. Thus, a miner who located a claim in 1976 in a Buffalo National River wilderness area derived no comfort from the Wilderness Act's pre-1984 window for mineral right vesting.³⁵ Instead, his claims were deemed void at inception because the passage of the Buffalo National River Act in 1972 was found to have impliedly withdrawn the particular area from new mineral locations.³⁶ The subsequent designation of this area within the park as wilderness did not, by means of the more generous Wilderness Act mining provisions, reopen the land to new locations.³⁷

The Wild and Scenic Rivers Act³⁸ and resultant system of protected streamways provide a spectrum of protection that can overlap with or exist independently of the measures afforded by National River and Wilderness Act status.³⁹ A wild or scenic river designation forbids all federal agencies, including the Federal Energy Regulatory Commission, from undertaking, authorizing or facilitating water development projects "that would have a direct and adverse effect on the values for which such river was established . . ."⁴⁰ In addition, and subject to vested existing rights, all new mining and mineral leasing within one quarter mile of wild rivers is forbidden.⁴¹

A use of the Wild and Scenic Rivers Act within the boundaries of the Buffalo National River might be helpful in preserving the wilderness, scenic and recreational values of the park.⁴² The use of the Act, however, has so far been limited to the protection of the first sixteen miles of the Buffalo,⁴³ which lie within the Ozark National Forest and

³⁵ See *Brown v. United States Dept. of the Interior*, 679 F.2d 747, 751 (8th Cir. 1982).

³⁶ *Id.* at 750.

³⁷ *Id.* at 751.

³⁸ 16 U.S.C. §§ 1271-1287 (1988 & Supp. IV 1992).

³⁹ Brian E. Grey, *No Holier Temples: Protecting the National Parks Through Wild and Scenic River Designation*, 58 U. COLO. L. REV. 551, 552-58 (1988).

⁴⁰ 16 U.S.C. § 1278(a) (1988).

⁴¹ 16 U.S.C. § 1280 (1988).

⁴² See Grey, *supra* note 39, at 561-65.

⁴³ These miles were included by congressional designation in the Arkansas Wild and Scenic Rivers Act, Pub. L. No. 102-275, § 2, 106 Stat. 123 (1992) (amending 16 U.S.C. 1274(a) (1988 & Supp. IV 1992)).

its Upper Buffalo Wilderness, but which are not part of the Buffalo National River. In spite of the earlier wilderness designation,⁴⁴ this upper stretch, which includes part of the magnificent and remote Hailstone Canyon, is vulnerable to timbering and mining activities on National Forest lands and private lands adjoining the wilderness.⁴⁵ The Wild and Scenic Rivers Act imposes comprehensive planning obligations on the National Forest Service with respect to the protected river corridor.⁴⁶ It also obligates all agencies with lands adjacent to a wild or scenic river inclusion to take such action as necessary to protect the segment.⁴⁷

Beyond the direct shieldings afforded by the federal statutory preservation systems, the Buffalo River is an indirect but substantial beneficiary of several common law doctrines that can be invoked in its defense.⁴⁸ Canoeists had traveled on the river, openly and adversely, for many years preceding the establishment of the Park. Such passage was held by the federal courts to create a prescriptive right for continued public recreational usage.⁴⁹ This means that private riparian owners, whose lands were not acquired by the federal government for inclusion within the Park and whose land patents include the bed of non-navigable rivers such as the Buffalo,⁵⁰ are subject to a

⁴⁴ See *supra* note 32.

⁴⁵ Congress occasionally states with specificity that the establishment of a wilderness area does not impliedly create a buffer zone around a wilderness area and is not meant to preclude activities and uses on adjacent federal lands. In the Arkansas Wilderness Act of 1984, Pub. L. No. 98-508, § 7, 98 Stat. 2349, 2352 (1984), Congress stated:

Congress does not intend that the designation of wilderness areas in the State of Arkansas lead to the creation of protective perimeters or buffer zones around each wilderness area. The fact that nonwilderness activities or uses can be seen or heard from areas within the wilderness shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area.

The National Forest Service Implementation Document for the Upper Buffalo Wilderness says that timbering will continue outside the wilderness boundaries and that buffer zones will not be established. It does say, however, that an attempt will be made to "harmonize wilderness and adjacent land management activities." See NATIONAL FOREST SERVICE, U.S. DEP'T. OF AGRIC., UPPER BUFFALO WILDERNESS IMPLEMENTATION DOCUMENT 20 (1990).

⁴⁶ 16 U.S.C. § 1274(d) (1988). See *Wilderness Soc'y v. Tyrrel*, 918 F.2d 813 (9th Cir. 1990).

⁴⁷ *Id.* § 1283(a) (1988).

⁴⁸ The doctrine of public trust, noted *supra* at notes 16-21, is created by the common law process but, as a result of case decisions, it has been deemed largely preempted by statute in the area of National Parks.

⁴⁹ *Buffalo River Conservation and Recreation Council v. National Park Serv.*, 558 F.2d 1342, 1345 (8th Cir. 1977).

⁵⁰ The Buffalo is considered non-navigable for purposes of title, despite its early use as a logging highway. *Buffalo River Conservation*, 558 F.2d at 1345. If a river was navigable for ordinary commercial purposes at the time of statehood, title to the bed would not remain in the federal government and would not pass thereafter to federal land patentees; rather, it would vest immediately in the State and could be subject to a public trust and public right of passage. See *Utah v. United States*, 403 U.S. 9 (1971); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

public servitude and are thereby unable to obstruct the river or passage on it.⁵¹ This doctrine was expanded in scope in the case of *Arkansas v. McIlroy*⁵² which recognized a general public right of recreational passage on the surface of commercially non-navigable streams, even when periods and intensity of use would not otherwise establish a prescriptive servitude.⁵³

The doctrine of federal reserved water rights provides a further source of common law protection for the Buffalo. Specific federal land set-asides, such as national parks, national forests, wilderness areas and wild rivers, are deemed by the courts to impliedly possess sufficient in-stream water rights to fulfill the primary purposes of the land reservation.⁵⁴ The federal reserved water rights doctrine has been invoked primarily in appropriation jurisdictions, but there are indications that a similar doctrine will apply to federal land reservations established in riparian jurisdictions such as Arkansas. The California Supreme Court has held that the United States can assert riparian rights for the public lands in a fashion similar to any other property owner.⁵⁵

As a final common law, or perhaps constitutional, source of protection for the Buffalo River, it should be noted that the Eighth Circuit Court of Appeals (which includes Arkansas) is the leading jurisdiction

⁵¹ *Buffalo River Conservation*, 558 F.2d at 1344-45.

⁵² *Arkansas v. McIlroy*, 595 S.W.2d 659 (Ark. 1980), *cert. denied*, 449 U.S. 843 (1980).

⁵³ It is less clear, but still possible, that the public right to recreational passage and the servitude on private property would preclude a dam. Harrison C. Dunn, *Impact of the Public Right on Private Rights in WATER AND WATER RIGHTS* 97, 97-108 (Robert E. Beck ed., 1991).

⁵⁴ See *United States v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128 (1976); *Arizona v. California*, 373 U.S. 546 (1963); *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Denver*, 656 P.2d 1 (Colo. 1982).

The Wild and Scenic Rivers Act creates an oblique statutory analogue to the common law doctrine of reserved water rights. In 16 U.S.C. § 1284(c) (1988) the Act says:

Designation of any stream or portion thereof as a national wild, scenic or recreational river shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes.

This provision is preceded, confusingly, by 16 U.S.C. § 1284(b) (1988) which states:

Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

The Act may create, or attempt to create, some species of federal water right which will protect the flow of the river *itself* rather than adjacent land. In an appropriation jurisdiction, the priority of any such right would be set on the date the river was included in the system. See Grey, *supra* note 39, at 568-79. A better priority of the acquisition of previously appropriated water rights will require the federal government to use its powers of contract or condemnation.

⁵⁵ See *In re Water of Hallett Creek Stream System*, 749 P.2d 324, 328 (Cal. 1988). California is a mixed or hybrid water rights jurisdiction, and thus recognizes both riparian and appropriation rights. *Id.* at 331.

in the recognition of the extraterritorial regulatory powers of the federal government and the federal land management agencies. The Eighth Circuit has frequently held that both Congress and authorized federal administrators can pass regulations under the constitutional power of the property clause⁵⁶ that reach state or private conduct taking place beyond the federal property lines.⁵⁷ The court has concluded that “[u]nder this authority to protect public land, Congress’ power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands.”⁵⁸ The extra-territorial power is especially significant in the case of a National River since the federal land ownership configuration is long and narrow, and it is vulnerable along the extended perimeter to outside intrusive actions such as timbering, commerce and mining on adjacent lands.

C. The Necessity of a Jurisprudence

With such an array of laws, doctrines and powers already in place, one might easily wonder why a jurisprudence or philosophy is necessary. Americans often feel that the passage of a statute is a final resolution. People may feel that after decisive legislative enactments there is no longer a requirement to think critically about why the laws were passed, or what values prompted them. Reflection and experience should dispel this equanimity. When successful, preservation law can hold threats in abeyance, but it does not dissipate them. It may divert the forces, but it seldom transforms them. Thus, logging, mining and water project proponents frequently maintain a continuing, undeterred desire to subvert the preservation laws while adjacent commercial interests often strive to exploit them. If such threats intensify, the administrative will to enforce existing laws, and the legislative resolve to pass necessary new ones, may depend on the existence and the clarity of a preservation jurisprudence.

To endure, laws must fulfill the values and philosophies, or at least the feelings and the sentiments, of an effective majority of the citizens. The laws may follow such values and sentiments, or the laws may occasionally instill them,⁵⁹ but this is certain: there must be, for

⁵⁶ U.S. CONST., art. IV, § 3, cl. 2.

⁵⁷ *Free Enterprise Canoe Renters Ass’n. v. Watt*, 711 F.2d 852 (8th Cir. 1983); *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

⁵⁸ *Block*, 660 F.2d at 1249.

⁵⁹ It is sometimes questioned whether laws actually change values as opposed to reflect them or inculcate them. Charles Reich states that:

[T]he political structure, the law and the formal institutions of society are not the creative part of the Corporate State. They are merely its *administrative* department

legal continuity, efficacy and legitimacy, a nexus between collective theories and attitudes, and the positive legal embodiment. Charles Meyers has written:

[A]t root, law reflects cultural attitudes and value choices of the society. To be sure, the law may alter by a few degrees the course of a cultural or ideological movement. Nevertheless, within broad limits the direction of social action is ultimately set by ideas whose roots typically lie outside the legal system⁶⁰

If there is no jurisprudence behind the preservation laws, or if the popular sentiments fade or change, then inevitably, the laws will also fail or erode, or evoke a growing cynicism. The consequences of such failure or erosion is higher in preservation contexts than in others. Unlike social or economic areas, where there can be continually shifting, dynamic accommodations,⁶¹ there is only one opportunity to preserve a given place or element. If the opportunity is not taken, the objective is damaged or lost forever. Life does not get better for the preservationists as the focal points of their passions and energy are constantly shrinking.

If, on the other hand, there is a jurisprudence of preservation, if there is a coherent philosophy that can be individually and collectively embraced and ultimately manifested in the institutions and actions of the society, then an endurance of both preservation law and the targets of such law is much more likely.⁶² Vice President Al Gore has written on the preeminence of belief and philosophy:

If it is possible to steer one's own course—and I do believe it is—then I am convinced that the place to start is with faith, which for me is akin to a kind of spiritual gyroscope that spins in its own circumference in a stabilizing harmony with what is inside and what is out This is the . . . decision to invest belief in a spiritual reality larger than ourselves. And I believe that faith is the primary force that enables us to choose meaning and direction and then hold to it despite all the buffeting chaos in life.⁶³

and they administer whatever values there are to be administered. They do not have the power to change values

CHARLES REICH, *THE GREENING OF AMERICA* 306 (1970).

⁶⁰ Charles Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 *IND. L.J.* 426 (1975).

⁶¹ E.F. Schumacher cautions, in *Small is Beautiful*, "that these are problems of divergence and involve the attempted reconciliation of opposites. Such problems can never be finally solved but must be continually grappled with and will submit to only temporary or partial accommodation." E.F. SCHUMACHER, *SMALL IS BEAUTIFUL* 97-99 (1973).

⁶² CHARLES WILKINSON, *THE EAGLE BIRD* 138 (1992).

⁶³ AL GORE, *EARTH IN THE BALANCE* 367-68 (1992).

D. The Appropriateness of Regulation

Accepting, at least preliminarily, the pivotal significance of jurisprudence to the continuity of both preservation law and the law's objectives, we might then examine, whether regulatory law is a proper or necessary means to implement such beliefs. Regulatory laws are generally non-optional, non-compensatory restraints on behavior. Such law is created by representative public bodies to prospectively govern, resolve or implement a broad range of social interests such as health, safety, economics, and general welfare. Regulation can be contrasted to decentralized legal controls whereby privately-initiated actions or transactions determine the extent of objectives, the allocation of risks and the distribution of costs and benefits. The array of decentralized controls or mechanisms could include private property rights, easements, contracts, covenants, nuisance and trespass actions, along with the dynamism and energy supplied by the free market system.⁶⁴

The examination of the propriety of regulation might seem moot with respect to the Buffalo River since there is, as noted, a substantial collection of preservation statutes already in place. However, the focus of this writing is on prescriptions for the future more than on descriptions of the present. The maintenance and expendability of a preservation system might necessitate both a jurisprudential foundation not only for law in general, but also for the choice of implementing legal means.

An examination into the basic theoretical propriety of non-compensatory regulation as a means of preservation is made philosophically and practically less complex, in the case of the Buffalo, by the fact that the United States owns most of the surrounding land. The government has chosen regulation, in forms such as the Wilderness Act,⁶⁵ the Wild and Scenic Rivers Act,⁶⁶ and the Buffalo National River Act⁶⁷ to control the use and disposition of "what is, after all, *its* land."⁶⁸ The regulations represent a public decision on what private rights can be acquired and what uses can be made on lands permanently held by the government.

⁶⁴ See generally Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

⁶⁵ See *supra* note 24.

⁶⁶ See *supra* note 38.

⁶⁷ See *supra* note 13.

⁶⁸ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988).

Preservation regulations are also clearly possible in situations where the government does not have proprietary interests,⁶⁹ or where private, vested rights have been acquired in governmental holdings.⁷⁰ Sustainability of such regulations is often problematic, as general restraints are posed by politics and economics,⁷¹ and specific limits are possibly established by the taking clause of the Constitution.⁷² Thus, in the case of the Buffalo, even though regulation may be justified on the basis of ownership, it seems desirable to formulate a more comprehensive rationale.

The benefits of preservation may initially seem to be intangible, aesthetic or non-utilitarian in nature. Proponents of preservation may stress the attributes of beauty, simplicity, peace or balance. In isolation or without reflection, such elements may seem ephemeral, subjective or even inconsequential.⁷³ Indeed, one of the purposes of this writing is to create a more systematic or comprehensive theory of intangible concerns, and dispel some of the vagueness surrounding preservationist motivation. However, even if the theory is made clearer, it remains undeniable that preservationist values tend to be more intellectual, spiritual, emotional or subjective, and are less likely to be associated with the immediate physical necessities of human life.

Since intellectual values are by nature less amenable to quantification, standardization or even calculation, some might argue that regulatory implementation is undemocratic, arrogant or elitist.⁷⁴ Some might also argue that, in the arena of preference as opposed to necessity, the decentralized imperatives of the marketplace should dictate

⁶⁹ See, e.g., Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1988 & Supp. IV 1992); Horses and Burros: Protection, Management, and Control, 16 U.S.C. §§ 1331–1340 (1988); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (1988 & Supp. IV 1992).

⁷⁰ See, e.g., 43 U.S.C. § 1744 (1988) (imposes filing requirements on pre-existing mining claims located on public lands); 30 U.S.C. § 226 (1988) (obligates the Secretaries of Interior and Agriculture to regulate the surface-disturbing activities of oil and gas lessees).

⁷¹ See *Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407 (1992). In *Robertson*, economic problems and social problems precipitated by the protection of the Northern Spotted Owl, an endangered species, caused Congress to change forest management obligations and limit federal court involvement in certain cases. *Id.* at 1412–14.

⁷² See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); see also James Burling, *Property Rights, Endangered Species, Wetlands and Other Critters—Is It Against Nature to Pay for a Taking?*, 27 LAND & WATER L. REV. 309 (1992).

⁷³ Douglas Linder, *New Directions for Preservation Law: Creating an Environment Worth Experiencing*, 20 ENVTL. L. 49, 51–68 (1990).

⁷⁴ See JOSEPH SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 51 (1980).

both the allocation of scarce resources, as well as those to be preserved.⁷⁵

Marketplace allocations tend to be guided—generally if not inevitably—by the criterion of maximized efficiency which in its most basic form is an optimum ratio of benefit to cost.⁷⁶ Some proponents, such as the so-called “Chicago School,” are so captivated by the simple elegance and unrelenting energy of the efficiency standard that they would urge the promotion of efficiency as the central preoccupation for law itself.⁷⁷

There are central, perhaps inescapable, problems for preservation interests if efficiency is the paramount criterion for decision-making. Though some marketplace zealots earnestly and confidently assure us that preservation values can be served and secured in the marketplace,⁷⁸ this has seldom been the actual case. History has demonstrated that economic efficiency analysis is generally the shortcut to utility and conversion rather than the highroad to preservation. This is true for several reasons.

The intangible virtues of preservation are not, as mentioned, easily quantified for use in the benefit-cost calculations; therefore, they have historically been discounted or ignored by decision-makers.⁷⁹ In another, perhaps more troubling sense, preservation interests, even if calculated and recognized as costs of development, may be imperiled by the competitive dictates of the market. Preservation interests such as those in wilderness or wild rivers, are usually non-remunerative and uncontrolled in their essence. However, water, power, lumber and minerals can be discretely and profitably captured from the wild forms by gain-seeking individuals. Such individuals are able to get an exclusive increment of benefit and avoid much of the costs which are borne by the collective public in the form of diminished wildness. From the acting individual's point of view, there is a favorable benefit-cost ratio, and there is an efficient transaction. In the language of Garrett Hardin, the collectively-held values in wilderness are inexorably destroyed in a “tragedy of the commons.”⁸⁰ The true tragedy is

⁷⁵ Meyers, *supra* note 60, at 453.

⁷⁶ ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 30 (1992).

⁷⁷ *Id.* at 32.

⁷⁸ See RICHARD STROUP & JOHN BADEN, NATURAL RESOURCES: BUREAUCRATIC MYTHS AND ENVIRONMENTAL MANAGEMENT 118–27 (1983), *quoted in* GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 30–33 (3d ed. 1993).

⁷⁹ Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1317–26 (1974).

⁸⁰ Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

that no individual competitor can afford to forbear in order to save wilderness from destruction—even when such a competitor has knowledge of the negative dynamics and an awareness of the imminence of loss. Restraint in the form of forbore conversion would mean the economic imperilment of the altruist and would have no significant effect in stemming the destruction of the commons, as other, more self-motivated competitors would quickly consume any temporarily-saved increments of wildness.

Beyond these situations, where loss of preservation values, or wildness, is recognized by actors as only a secondary cost of development, and not as a primary or preclusive one, are the situations where individuals or groups enter the market as consumers specifically to secure preservation values. This is not impossible, but there is an inherent limiting factor. Preservation values, especially those in land, serve a large, scattered constituency, indefinite in breadth and duration and variable in intensity of belief. Such a body has basic organizational, representational and financial problems, and has seldom been able to consistently and successfully contend in a market geared to individual or corporate competition and monetary return on investment. Those who desire to convert preservation resources for profit will generally be able to outbid those who might lay out money to save them.

Preservation, then, is not a consistent result of efficiency analysis. Preservation, in its realistic essence, requires a checking on, or a diversion of, economically rational decisions that would otherwise convert or change the scarce preservation resource. As mentioned, this is *not* meant to suggest that preservation is impossible in the marketplace. Individuals or groups can purchase resources of natural or historic significance and preserve them as a matter of choice.⁸¹ But this is not “rational” or “efficient” economic behavior. Instead, it is the private sheltering of valuable resources from the full force of the

⁸¹ For example, the Nature Conservancy is responsible for the preservation of more than 5 million acres in the United States. See Editors, *This Green Thing*, OUTSIDE, Apr. 1990, at 49, 55. The Nature Conservancy bought over 50,000 acres on the south bank of Nebraska's Niobrara River and greatly helped implement the effectiveness of a recent Wild and Scenic River designation. See DUANE GUDGE, *NIORRARA RIVER CANOEING GUIDE* 15 (1992). As a purely private example, Leo Drey of St. Louis bought Greer Spring and 6,900 acres adjacent to Missouri's Eleven Point River, which is in the Wild and Scenic River System. Drey purchased the spring because it is critical to the flow of the Eleven Point and because Anheuser-Busch proposed bottling the spring water and selling it commercially. Drey bought the land for 4.5 million dollars, held it until the federal government would authorize a repurchase, then sold it to the federal government in early 1993 for 3.5 million dollars. See Michael Manser, *Federal Agency Plans to Preserve Spring in Missouri*, K.C. STAR, Jan 16, 1993, at C3.

marketplace. It means that preservation can exist, not because of a market-dominated system, but rather, in spite of it.

Concluding that the competitive processes of the free market do not present a viable route to significant public preservation is not necessarily the same as confirming the appropriateness of regulation. It must still be asked if there are legitimate, affirmative reasons for the enactment of non-compensatory, non-voluntary restraints that, within limited designated areas, will counter the forces of economic transformation that would otherwise hold sway. To answer this, we must refocus on the incorporeal attributes of preservation interests that make use of the marketplace and the efficiency calculus ineffective in stemming conversions. We must also reflect on the difference between public and private decision-making.

If the efficiency calculus is made the invariable norm for public as well as individual decision-making, then the outlook for preservation is bleak. However, this need not and should not be the case. In one sense, the government is not inevitably bound by the rigid competitive forces that spawn the tragedy of the commons. The state is at least somewhat more free to follow altruistic, cooperative or non-profitable courses. It has in fact been argued that the people and the competitors themselves may want the state to make the non-efficient yet compelling choices that the market precludes individuals from making.⁸² Thus, regulatory means may be necessary and desirable ways to implement values and beliefs that people genuinely hold, but are not free to pursue or adhere to as competitive individuals. It has been contended, in a somewhat disdainful sense, that much of the regulatory machinery of the twentieth century was actually sought by already-successful competitors seeking to escape or transcend the "iron laws of trade."⁸³ Such an observation is cynical to the extent that established businesses seek regulation to insulate their advantages from new competitors. In a more positive sense, it might be supposed that competitors, who are unable to fulfill or adhere to a personal morality, need regulation to make the arena safe for moral choices, or to provide an externalized, overarching conscience that replaces the repressed, individual ones. In these latter senses, the law, though selectively stifling the dominant compulsion of individual gain-seeking, can simultaneously achieve personal, non-utilitarian values, such as those in preservation.

⁸² Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1418 (1981).

⁸³ See LAWRENCE M. FREIDMAN, *A HISTORY OF AMERICAN LAW* 396-97 (2d ed. 1973).

The theory of the public trust, a common law doctrine, provides an additional rationale for the proper use of regulation. The public trust involves resources that are held by the government for the benefit of the citizenry,⁸⁴ or by individuals with servitudes running in favor of the public.⁸⁵ The doctrine originally focused on the beds of navigable waters and recognized both a federal responsibility for transferring title to such beds to emergent states⁸⁶ and a state responsibility to hold and use the lands in the public interest.⁸⁷ The various state courts have expanded the doctrine to include diverse preservation interests such as wetlands, recreational passage on non-navigable streams, and parks.⁸⁸ If such interests were not protected by a trust and accompanying legislation, they would be vulnerable to efficiency-based calculations. A broad theory of the public trust would hold that the government is obligated to protect such fragile resources with regulation. The government should not be willing to relinquish control to self-interested decision-makers in the market.⁸⁹

To conclude, preservation values are often incompatible with efficiency principles. It becomes both necessary and appropriate for the state to implement such values with regulation. It is also of paramount significance to couple the implementation, or even precede it, with a jurisprudential prelude. Such philosophy can illuminate, intensify, or possibly instill the values that must coexist with enduring law. If the jurisprudence is sufficiently clear, and if the focus of the decision-makers and constituents remains strong, the public and private actions necessary to secure scarce preservation resources will emerge. A concentration on the philosophy of preservation indeed offers the fuller, more dramatic possibility of a paradigmatic shift or a "re-visioning of history."⁹⁰ A nation, discouraged with its commitment (or enslavement) to economic growth might, through an in-

⁸⁴ See *supra* notes 16–21 and accompanying text; see also *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 455 (1892).

⁸⁵ *Marks v. Whitney*, 491 P.2d 374, 381 (Cal. 1971). See generally Ralph Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 529–82 (1992).

⁸⁶ *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987).

⁸⁷ *Illinois Cent. R.R.*, 146 U.S. at 455.

⁸⁸ See John W. Ragsdale, Jr., *The Principles, Tools, and Limits of Preservation Law in Missouri*, 60 U.M.K.C. L. REV. 195, 210 (1991); Johnson et al., *supra* note 85, at 562–74.

⁸⁹ Wilkinson, *supra* note 62, at 16–17 (1992). What matters about the public trust doctrine is not just whether the courts will enforce it, but whether the trust can become a working part of federal and state policy. See *Id.* at 17.

⁹⁰ WILLIAM I. THOMPSON, *AT THE EDGE OF HISTORY/PASSAGES ABOUT EARTH* 205 (1990).

creased appreciation of preservation values, evolve toward a more enduring, balanced, and stable society.⁹¹

II. THE PRESERVATIONIST: A COMPOSITE

Joseph Sax has characterized the preservationist as not an elitist, but a moralist who wishes to convert others.⁹² This may be partially true, but it is incomplete. The philosophy, jurisprudence, or moralizing of the preservationist which precedes and underlies the law is itself preceded by an emotional experience or a sensorial engagement between the individual and particular surroundings.⁹³

Exploring emotions and then attempting to tie them to philosophy and, beyond that, to the law, is an imprecise and often untidy business. Lawyers generally dislike such discussions and avoid them. Others might try to finesse this hazy subject by reconceiving the nature-human relationship as a bonding or a wholeness rather than a dichotomy.⁹⁴ It would seem undeniable, however, that even with an ultimate union between consciousness and environment, there is a pre-intellectual transition that should be focused on. From these pre-verbal feelings will come the intellectual response and the jurisprudence that, in turn, spawns and anchors the law.⁹⁵

Because of the basic nonutilitarian nature of their endeavor, preservationists cannot easily deny or escape the intangible underpinnings of their formal logic. Most do not try. Indeed, most preservationists freely acknowledge their feelings and seek to honor and serve them. They strive to articulate a philosophy that is rooted in and tied

⁹¹ See John W. Ragsdale, Jr., *Ecology, Growth and Law*, 16 CAL. W. L. REV. 214, 223-28 (1980).

⁹² SAX, *supra* note 74, at 14.

⁹³ See *id.* at 45-46.

⁹⁴ See, e.g., ALAN WATTS, TAO: THE WATERCOURSE WAY 96-98 (1975).

But it is worth re-emphasizing the principle that "you" cannot go along with "things" unless there is the understanding that there is, in truth, no alternative since you and the things are the same process—the now—streaming Tao. The feeling that there is a difference is also that process. There is nothing to do about it. There is only the stream and its myriad convolution—waves, bubbles, spray, whirlpools and eddies—and you *are* that.

Id. at 98.

⁹⁵ Laurence H. Tribe would agree that the bedrock of preservation law is emotion. In his classic article, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, Tribe says:

Suppose a person feels an obligation to protect a wilderness area from strip mining. The initial perception of that obligation is likely to take the form of sympathy for the wildlife and vegetation which could be destroyed or displaced.

Supra note 79, at 1330.

to their emotions, and they hope to enlist others in the same thoughts and efforts.

In John Fowles' novel, *Daniel Martin*, the protagonist was entranced by the spirit of a place called Tsankawi and was moved to communicate this passion to friends.⁹⁶ Tsankawi, obviously loved by Fowles as well as his semi-fictional hero, is an unexcavated, unpublicized Anasazi Indian ruin near Santa Fe, New Mexico. It is part of Bandelier National Monument, but it is located several miles away from the main group of ruins in Frijoles Canyon and is far less frequently visited. It sits on a narrow mesa that projects out from the eastern flank of the Jemez Mountains and commands a view of the Rio Grande Valley and the Sangre de Cristo Mountains. It is a magical place, especially on a summer evening when the river valley descends into cool shadows and the distant Baldy Peak glows reddish-gold with the day's last sun, and it shows how the Sangre de Cristo's got their name. Fowles wrote of Tsankawi:

I have never understood why some places exert this deep personal attraction, why at them one's past seems in some mysterious way to meet one's future, one was somehow always to be there as well as being there in reality. It is a feeling . . . that my real need for the place came from the depths of my unconsciousness and only secondarily from the various conscious reasons that I found.⁹⁷

If the preservationist can communicate deep emotions and can draw others into the thrall of a particular place, then he or she can simultaneously or subsequently promote the thought, philosophy, conduct and laws that will ensure the perpetuation of the threatened, vulnerable or fragile. I read *Daniel Martin* in 1972 and was transfixed by Fowles' description. Visits to Tsankawi in 1978 and 1981 with my wife, Lisa, and my father confirmed the mystical power of this extraordinary place and left me with a lasting feeling of commitment. Like Fowles, I had become a spiritual trustee for Tsankawi, concerned about and responsible for its future. Even now, over a decade since my last visit, the images from Tsankawi, the colors, sounds, smells and stories, all emanate from my memory and give me the energy to serve this place. If such feelings are held by sufficient numbers then jurisprudence and protective laws can—and will—easily follow.

There is a risk of failure. If the preservationist falls short in the communication, and is unable to evoke any sentiments in the listeners, then he or she may be dismissed as overly emotional, maudlin,

⁹⁶ JOHN FOWLES, *DANIEL MARTIN* 362–64 (1977).

⁹⁷ *Id.* at 364.

smarmy, irrelevant or hopelessly romantic.⁹⁸ The preservationist may transfer or appear to transfer passion from and for a place into contempt for those who think differently or act inappropriately. It is this transference that may provoke charges of elitism and may even produce backlash.⁹⁹ Perhaps worse, the objective of the crusade may be diminished along with the crusader.¹⁰⁰

The risk of being misunderstood is one that preservationists must ultimately accept, since successful preservation cannot generally take place through anomalous episodes or solitary actions. At least to the extent that preservation involves public funds, laws or lands, it is and must be a political event.¹⁰¹ An effective consensus must support the enactment and the maintenance of the policy. Therefore, the preservationist must venture forward and attempt to communicate both the emotional and the rational bases for his or her position.

A. *The Preservationist and the Sense or Love of Place*

One emotional component of the pre-intellectual experience of the preservationist is a love or sense of a particular place.¹⁰² This multifaceted set of feelings can be seen as the forward edge of experience, thought, and even reality, and can be acknowledged as the foundation for philosophy, obligation and law.¹⁰³

There are many spots on the Buffalo River that can push deep into the emotions of the beholder. One such place for me is Silver Hollow Hole. It lies beyond the take-out at Rush, and not far below Clabber Creek Shoal, the largest rapid on the lower Buffalo. Virtually all the canoe traffic, originating seven miles upriver at Buffalo Point, the National River headquarters for the lower Buffalo area, stops at

⁹⁸ Joyce Carol Oates mockingly described nature writers as "painfully limited" and prone to the use of simplistic superlatives like "REVERENCE, AWE, PIETY and MYSTICAL ONENESS, . . ." *Against Nature*, ANTAEUS No. 57 (Autumn 1986), at 236, quoted in *THIS INCOMPERABLE LAND* (Thomas J. Lyon ed.), XIV (1989).

⁹⁹ Harold and Margaret Hedges, leaders in the fight to establish the Buffalo National River, were perceived as elitist by some and insensitive to the needs and desires of local residents. In 1990, while the Hedges were vacationing in Mexico, an arsonist torched their house which lay adjacent to the Upper Buffalo Wilderness. See Compton, *supra* note 8, at 223. For a description of high-handed ecological nagging about low-impact camping, see Elizabeth Royte, *She Knows If You've Been Bad or Good*, OUTSIDE, Apr. 1992, at 70.

¹⁰⁰ Environmentalism was denigrated along with Al Gore when ex-president Bush mocked "The Ozone Man." HOWARD FINEMAN, *The Torch Passes*, NEWSWEEK, Nov.-Dec. 1992, at 4, 9. See also Compton, *supra* note 8, at 213-23.

¹⁰¹ See Sax, *supra* note 74, at 103.

¹⁰² See BARRY LOPEZ, *THE REDISCOVERY OF NORTH AMERICA* 38 (1990); Charles Wilkinson, *Law and the American West: The Search for an Ethic of Place*, 59 COLO. L. REV. 401 (1988).

¹⁰³ See ROBERT PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* 254-55 (1981).

Rush, which is an abandoned, river-side mining town and the last exit point before the extensive Lower Buffalo Wilderness. One must travel thirty miles through pristine canyon solitude and camp overnight in order to reach the next possible termination at Buffalo City.¹⁰⁴

The Rush landing is part way down a long, calm, north-heading stretch of the river. The sense of placidity is invaded, vaguely and almost subliminally, by the muted, distant sound of water speeding over the Clabber Creek Shoal. This rapid begins a quarter of a mile below Rush, when the river turns suddenly to the right, narrows and drops quickly. After one hundred yards of fast, rolling water, the Buffalo turns left, constricts even further and surges over limestone ledges. The waves are biggest here—and capped with white when the water crests curl back on themselves.

It is a playground for kayaks. One can surf on the upstream faces of the waves, drop the boat into holes and spin out. With their short length, shallow draft and stream-lined design, the agile plastic boats can cut from side to side, move from eddy to eddy and rock to rock, work upstream in the back waters and then dart again into the main current. They can provide an exhilarating, hypnotic dance; however, the partnership, unlike the gregariousness of a raft or canoe, is limited to the union of a single, responsible individual, a quasi-animate boat, and the moving water.

Every trip that I have made from Buffalo Point to Rush has culminated with an extended frolic in the Clabber Creek rapids. The routine ends with a final portage back to the head of the rapid, and a paddle upstream to Rush and the waiting cars. We have never made the full trip below Clabber Creek through the wilderness to Buffalo City because our kayaks—though unequaled for sport—are each incapable of transporting much more than one paddler and minimal gear.

One day though, in mid-May of 1992, Bob Popper, Oscar Aitken and I decided to descend beyond the rapids, explore the wilderness for a few miles, and then work our way back up the river to Rush. Below Clabber Creek, the rapids diminish, the speed slows, and the flawless water moves quietly but firmly through high limestone and sandstone bluffs. After a mile and several bends, the Buffalo opens into the perfect isolation and pervasive calmness of Silver Hollow Hole. The soft spring winds, flowing oak trees, brilliant golden light, pellucid waters and understated, rhythmic sounds form a unity of complete-

¹⁰⁴ Buffalo City is barely one. Rand McNally's 1980 Commercial Atlas and Marketing Guide at 117 lists the population as 25.

ness and peace. It was a timeless moment and place, a dreamscape that was different yet familiar and deeply comforting. From such a surreal yet elemental well can emerge some of the rudimentary feelings and responses that, perhaps disproportionately, determine what we think, say, and ultimately do.

Can the emotions making up a sense of place be particularly described? The quest is often undertaken and, as noted, success is only variable.¹⁰⁵ Failure to move or to persuade and the sin of mawkishness are not uncommon. Perhaps the difficulty is inevitable, in one sense because emotions are intangible, pre-rational, and hard to capture with words. In another sense, the emotions stem from the essence of a place which itself may not be amenable to calculation or description.¹⁰⁶ Far Eastern philosophers called the rhythm, harmony and intrinsic meaning of natural places the Tao, and viewed it as a pervading essence to be learned intuitively rather than through language.¹⁰⁷

It would seem that even if the essence of place is beyond precise language, and even if an emotional response to a place is difficult to catch in words,¹⁰⁸ the efforts are legitimate and critical to the success of philosophy and law.¹⁰⁹ Beyond this, many attempts are not failures, and some are extraordinarily successful. The feelings constituting and accompanying a sense of place have been described as: sympathy,¹¹⁰ peace,¹¹¹ religious consciousness,¹¹² validation,¹¹³ supreme harmony,¹¹⁴ merger,¹¹⁵ filial piety¹¹⁶ and happiness unalloyed.¹¹⁷

Charles Wilkinson recently wrote:

Our reactions to wild land are dignified and deserving. They call to the same parts of us as the vibrant exhibit of the French Impressionists of a year past, the long prayer in a steepled church in that time of pain and confusion, and that classic book of a far away place read on a slow-moving childhood summer day.¹¹⁸

¹⁰⁵ See *supra* note 98.

¹⁰⁶ See BARRY LOPEZ, RIVER NOTES 24–26 (1974).

¹⁰⁷ WATTS, *supra* note 94, at 41–42. See also PIRSIG, *supra* note 103. Pirsig called this essence “quality.” *Id.* at 226–28.

¹⁰⁸ See CALVIN MARTIN, IN THE SPIRIT OF THE EARTH 23–24 (1992).

¹⁰⁹ See *supra* notes 94–95.

¹¹⁰ Tribe, *supra* note 79, at 1330.

¹¹¹ JOHN MUIR, OUR NATIONAL PARKS 59 (1991).

¹¹² JOHN MUIR, SOUTH OF YOSEMITE 9 (1968).

¹¹³ Fowles, *supra* note 96, at 325.

¹¹⁴ *Id.*

¹¹⁵ NORMAN MACLEAN, A RIVER RUNS THROUGH IT 104 (1976).

¹¹⁶ WILLA CATHER, THE PROFESSOR’S HOUSE 227 (Vintage Classics ed., Vintage Books 1990).

¹¹⁷ *Id.*

¹¹⁸ WILKINSON, *supra* note 62, at 84–85.

B. The Preservationist and the Fear of Loss

The sense of place, the love and happiness beyond explanation, may be simultaneously accompanied and intensified by fear of loss. Fear and love, as emotions, are perhaps not unrelated and are probably on a continuum. Yet at the extreme of each, sight of the other is obscured. Preservationists who are clearly cognizant of their passion for a place may deny the accompanying presence of fear. It is likely, however, that most preservationists operate at least part of the time from the substantial or even primary spur of anxiety. William Kittredge said: "never again in my lifetime will it be possible for a child to stand out on a bright spring morning in Warner Valley and watch the water birds come through in enormous, rafting vee-shaped flocks of thousands—and I grieve."¹¹⁹

Grief for places destroyed in the past and the fear of loss for the future can help spark the energy for philosophical resolve and legal resistance. My personal concern and efforts for the future of the Buffalo River are in part shaped by both fear of its transformation and a continuing anguish over the fate of vanished loves like Glen Canyon. This magnificent place was changed forever by the closing gates of Glen Canyon Dam in 1963, and the rising waters of Lake Powell.¹²⁰ I traveled through Glen Canyon in the spring of 1961 with the legendary Walter Kirschbaum who was at that time teaching high school French and German at Denver's Colorado Academy from which I graduated in 1962. Kirschbaum, a Czech, had been a seventeen year-old soldier in the Axis Forces; a prisoner of war in a Russian camp; a world champion kayaker; and a pioneer of kayaking in the western United States. In home-made canvas and fiberglass kayaks of his own design, he made many first descents in places like the Grand Canyon, Gore Canyon on the Colorado, the Black Canyon of the Gunnison, and Royal Gorge on the Arkansas River. I will never forget seeing a 1958 home movie of Kirschbaum's historic first run down the Grand Canyon's notorious Lava Falls, when the Colorado was running at a heart-stopping 125,000 cubic feet per second,¹²¹ and

¹¹⁹ WILLIAM KITTREDGE, *OWNING IT ALL* 62 (1987).

¹²⁰ See JOHN MCPHEE, *ENCOUNTERS WITH THE ARCHDRUID* 163–245 (1977).

¹²¹ In the aftermath of the Glen Canyon Dam, the water flow in the Grand Canyon is much more even, with modulated highs and lows. Gone are the raging, muddy rampages of spring when the flow could hit over 200,000 cubic feet per second, and the subsequent trickles of late summer. See PHILLIP FRADKIN, *A RIVER NO MORE* 201 (1981). Summer flows, which are now higher than other months because of power needs, range between 5,000 and 35,000 cubic feet per second. *Id.* In addition, the water flow is clearer and cooler, and relatively free of the silt which lies trapped in the canyons at the bottom of Lake Powell. *Id.* at 206.

only the bottom of his overturned kayak could occasionally be seen in the quarter-mile of crushing froth that composed one of the most vicious and previously-unkayakable rapids in the country.¹²²

Kirschbaum was also an alcoholic and drinking eventually killed him; but in the spring of 1961, he was god-like to high school juniors. We followed him into Glen Canyon like obedient, albeit nervous, ducklings. There was in fact nothing there to harm us. Glen Canyon was not, unlike Gore, Glenwood, Westwater, Cataract and the Grand, a particularly difficult canyon to run.¹²³ The general serenity of the waters allowed us to give full attention to the incredible beauty: the sculpted and streaked sandstone walls, the multitude of sheer-cut side canyons and grottos, and the array of pastel colors. Glen Canyon today shimmers in my memory, a blending of reds, yellows, blacks and beiges, a contrasting of light and deep shadow, a dance of flowing water over stone. The names of the places we saw reflect the elegance and the mystery of the canyon's many songs: Rainbow Bridge, Music Temple, and the Hidden Passage.

All of these were to be changed forever when the gates of Glen Canyon Dam swung shut in 1963 and the waters began to rise. It is difficult to reflect on the loss of this place and not feel, beyond anger¹²⁴ and sadness,¹²⁵ both a fear for the future of sacred places like the

¹²² Some suggest that the visage and the bark of Lava Falls are worse than the substance and the bite. Richard Bangs and Christian Kallen contend that:

Lava Falls strikes terror in the hearts of first-timers-swampers and boatmen included. It appears so angry, confused and huge, with no evidence of passage, that the initial urge is to look for a hidden staircase out of the canyon or a bush to crouch behind. It is all quite deceptive, nonetheless. Whenever a boat enters this thundering, fuming, spitting monument to chaos the chances are better than even it will issue upright at the bottom. If a boat flips—and many have—the passengers have the swim of their lives. But they bob out of it okay, unscathed, every time.

RICHARD BANGS & CHRISTIAN KALLEN, *RIVER GODS* 152 (1985).

¹²³ See WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* 116–17 (1969). Stegner writes:

This part of the Colorado canyon has been a blessed interlude of rest for every river expedition since Powell's first one in 1869. In all the miles of Glen Canyon there is not a rapid, hardly a rock, nothing more dangerous than whirlpools and sucks.

Id. We found Glen Canyon somewhat harder on occasion, due to high winds and three to four foot waves moving upstream.

¹²⁴ For top-flight, humorous fulminating over Glen Canyon Dam, read the late Edward Abbey's classic cult fiction *The Monkey Wrench Gang* (1975).

¹²⁵ David Brower, environmental activist and former director of the Sierra Club, never got over the loss of Glen Canyon, nor his role in precipitating the construction of the dam there rather than either in the Grand Canyon or Dinosaur National Monument. See FRADKIN, *supra* note 121, at 195. See *infra* note 130 and accompanying text. Brower is quoted as saying that his part in the demise of Glen Canyon was "the greatest sin I ever committed." RUSSELL MARTIN, *A STORY THAT STANDS LIKE A DAM* 328 (1989).

Buffalo River that are loved and still remain,¹²⁶ and a determination that they will be preserved.

The generalized apprehensions of the preservationists may be heightened by an awareness of the nature of growth in modern society. Growth, a pervasive term including a rising population, an intensifying technology, expanding economy, and insatiable personal aspirations and expectations, is continuous in American history, and it is relentless.¹²⁷ In particular, the pursuit of economic growth on collective and individual levels poses a constant pressure on those scarce resources which can be converted to more profitable forms. Profit and gain may not only be the determinants of what is considered efficient resource allocation, but they may also be the mission itself. Some speculate that the American Dream, the American Mission, is simply, irreducibly, and insatiably "*more*."¹²⁸

The pressures of growth can qualify preservation efforts and can heighten the emotions and energies generated by particular places. Successful battles waged by preservationists will not destroy the forces of conversion; they can merely delay them or divert them. In the former sense of delay, even National Park or National Monument designation by Congress may mean merely postponement rather than enduring salvation. Congress is able to concede or reverse what it has previously created. It has allowed the construction of dams and reservoirs to compromise National Parks such as Yosemite¹²⁹ and National Monuments such as Rainbow Bridge.¹³⁰

In cases where growth forces were diverted from one threatened landmark into other sectors, it was probably inevitable that apparently successful preservation battles actually propelled the redirected growth forces over the barricades of less intensely defended, but no less unique, treasures. Glen Canyon itself and Rainbow Bridge were

¹²⁶ Edward Abbey noted:

The philosophers and the theologians have agreed, for three thousand years, that the perfect is immutable—that which cannot alter and cannot ever be altered. They were wrong. We were wrong. Glen Canyon was destroyed. Everything changes and nothing is more vulnerable than the beautiful.

THE BEST OF EDWARD ABBEY 345 (Edward Abbey ed. 1984).

¹²⁷ See LOPEZ, *supra* note 102, at 42–47; Ragsdale, *supra* note 91, at 265–98.

¹²⁸ See generally LAURENCE SHAMES, *THE HUNGER FOR MORE* (1989); see also FRANCES M. LAPPÉ, *REDISCOVERING AMERICA'S VALUES* 9–10 (1989).

¹²⁹ ALFRED RUNTE, *NATIONAL PARKS*, 78–81 (2d ed. rev. 1987) details the loss of Yosemite's Hetch Hetchy Valley to dam builders in 1913.

¹³⁰ See *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974); Felicity Hannay, *In Memoriam: Rainbow Bridge National Monument*, 4 *ECOL. L. Q.* 385 (1974).

the victimized bystanders of the seemingly successful Sierra Club fight against proposed dams in Grand Canyon National Park and Dinosaur National Monument.¹³¹ The forces that would have invaded the Grand Canyon and Echo Park were not defeated or destroyed—merely redirected and redeployed.¹³²

In short, then, the grief for the defeats of the past and the fear of harmful future change may join with the love and joy of particular places to form much of the emotional underpinning of preservationists, and to support much of the preservationist philosophy and resultant law. There is yet another possible source of undergirding emotion and energy to consider.

C. *The Preservationist and the Sense of Wonder*

Wonder is related to love and fear but nevertheless can stand apart and provide a separate font for philosophy and law. From early infancy to the brittleness of old age, human beings can feel the emotion of wonder or, more prosaically, can experience curiosity toward the unknown and uncontrolled. There can be great energy in the fluctuating encounter between an individual and the mysterious.¹³³

Rivers are by nature mysterious,¹³⁴ and the Buffalo is no exception. There are countless places—in the wilderness areas, along the cliff faces, within the river-side caves and up the tributary creeks—that are seldom seen or traveled and that are compelling in substantial part because they are unknown.¹³⁵ One particular example stands out: the wilderness canyon above Boxley, the place known as the Hailstone which has been a deep source of mystery to me.

¹³¹ See DONALD WORSTER, *RIVERS OF EMPIRE* 274 (1985); MARK REISNER, *CADILLAC DESERT* 293–94 (1986); see also *supra* note 125.

¹³² See MARTIN, *supra* note 125, at 73.

¹³³

This is because mystery has energy. It pours energy into whoever seeks an answer to it. If you disclose the solution to mystery, you are simply depriving the other seekers . . . of an important source of energy.

JOHN FOWLES, *THE MAGUS* 235 (1977).

¹³⁴ In his compelling allegory, *River Notes*, Barry Lopez writes:

In recent years, I have spent considerable time above the falls, along what I believe to be an unknown section of the river. It is in some ways the most dangerous country, reverberating with hope, seducing in its simplicity. It is little traveled . . . Farther up the river are the unfolding of other relationships together with the loss of the promise of anything to be found. I have been led to believe that is the reason no one goes up that far, though the promise, in its way, is kept. It is the walk home that is terrifying.

LOPEZ, *supra* note 106, at 72, 74.

¹³⁵ *Id.*

The name "Hailstone" could refer to the numerous car and house-size boulders that choke the river's channel. According to Tom Kennon, however, the name was devised by savvy local administrators and river runners to keep the identity of the place secret, and to thereby discourage boaters seeking an alternative to the usual Buffalo canoe courses which begin at Ponca or, occasionally, at Boxley.¹³⁶ The Hailstone section, with its steep gradient,¹³⁷ numerous falls, narrow channel and total inaccessibility is far too difficult for most boaters. Local outfitters like Mike Mills of the Buffalo Outdoor Center and park administrators are not enthusiastic about proliferating mishaps and rescues. They discourage publicity about the Hailstone and thus confirm Kennon's conclusion that the name represents an informal conspiracy of semi-silence. The concealment may also be designed as a means of preserving the untouched vitality of an extraordinary wilderness for the sake of the place and, not incidentally, for the personal enjoyment of the secret-keepers.¹³⁸

The Hailstone, because of its sharp drops and rocky channels, is best run after a heavy rain. For visitors from distant venues, the hydrologic timing can be preclusive. For me, the Hailstone exists largely in extrapolated form, inspired by kayak runs on the lower stretches,¹³⁹ by hikes in the upper reaches above the gorge, by topographic maps and guidebooks, by pictures from the expeditions of others, and mostly, by exercises of the imagination. It remains a mystery. Its unexplained wildness is an intoxicant. The real and the

¹³⁶ TOM KENNON, *OZARK WHITEWATER* 89 (1989).

¹³⁷ The gradient measures the average drop of the river in feet per mile. The river, in the Hailstone section, drops over 500 vertical feet in less than 14 miles, which translates into an overall gradient of nearly 40, with portions much higher. See KENNON, *supra* note 136. A gradient of forty will assure a fast, powerful current especially if combined with a high volume and with channel constriction. Tom Kennon considers the Hailstone section Class III, which means "waves numerous, high, irregular; rocks, narrow passages . . ." *Id.*; DOUG WHEAT, *THE FLOATER'S GUIDE TO COLORADO* 280 (1983).

¹³⁸ Mills, in particular, is a fine canoeist who has appeared in numerous videos and who has boated all over the United States. He counts the Hailstone as one of his favorite white water runs. Mills has somewhat of a disdain for kayakers and he is prone to dwell on the numerous kayakers who have come to grief-shattered boats and pride in the Hailstone.

¹³⁹ In the spring of 1993, there was timing and then some. John Slater, Oscar Aitken and I were visiting in Ponca and kayaking the Boxley run when the rains began. Downpours lasted one entire afternoon and one night. The river rose from 28 inches under the Ponca bridge to six inches over it. Mike Mills, who had previously regaled us with tales of chastened kayakers and broken boats, entreated us to boat the Hailstone with him. We waffled, fearing that we were to become the latest chapter in the Mills' chronicle of kayaker comeuppance. We partially atoned for our timidity by later running the lower quarter of the Hailstone after a lengthy portage through the wilderness area. It was a spectacular run and rekindled our curiosity about what lay above.

conjured images provide, hauntingly,¹⁴⁰ both mental equanimity and excitement. The Hailstone, as a reality and as a mystery, becomes an inspiration for philosophy and for law.¹⁴¹

There is the potential for irony here, for does not a mystery call out for answers? What then will remain for wonderment? Will a mystery solved become inert, lifeless and incapable of promoting energy, feeling, philosophy and law?¹⁴² We may discover in the cold, gray light of successful resolution that the questions were more important to us than the answers. We may find that the mysterious gave us numerous visions of life, place and what could be, while control gives us only a sterile, solitary reflection of what we are. Those who attempt to surmount the unknown with forceful transformation and reduction may find that the priceless has been changed into the mundane.

Preservationists tend to understand this and thus may be more inclined to pursue resolutions in a passive, accepting way. A pursuit of secrets combined, somewhat oxymoronicly, with acceptance may allow mystery to expand, to unfold in multiple layers, and ultimately to intensify.

Behind a cabin that I used to visit in Indian Creek Park, Colorado, lies Bear Mountain, a rather unimposing rise of fifteen hundred vertical feet that is actually a shoulder of nearby Meridian Peak. Bear Mountain, whose north face is covered with ponderosa, lodge pole and aspen, flattens at the summit and stretches south at an elevation of around ten thousand feet for five roadless miles before descending into the Deer Creek Basin. I had climbed the north flank of the mountain numerous times and had hiked the Meridian trail which ran east and west along the north edge of the summit. I had not, however, ventured to the south and the wilderness expanse remained for many years unknown to me and promise-laden. One day, filled with purpose, I climbed the north slope of Bear Mountain, crossed the Meridian Trail at the summit, and pushed south into the unfamiliar terrain. Images and expectations were changed, veils were lifted. I discovered unexpected ravines, unimagined springs and rivulets and, improbably, even a mountain lion. But each of these elements and others were

¹⁴⁰ Norman MacLean's famous concluding line of his classic work, *A River Runs Through It*, *supra* note 115, is: "I am haunted by waters."

¹⁴¹ The Hailstone section of the Buffalo River was added to the Wild and Scenic River System by Congressional action in 1992. *See* Arkansas Wild and Scenic Rivers Act of April 22, 1992, Pub. L. 102-275, 106 Stat. 123 (amending Wild and Scenic Rivers Act of 1989 (codified as amended at 16 U.S.C. §§ 1271-1282 (Supp. IV 1992))).

¹⁴² John Fowles wrote "[a]n answer is always a form of death," but ". . . questions are a form of life." *Supra* note 133, at 626.

encountered without force or resistance. They thus presented new stories, more secrets, and more entreating power.¹⁴³

In the aftermath, the lure of the place—and my commitment to it—were not dispelled by the exploration; they were enhanced by it. But this regeneration of attraction and this recapture of mystery were largely a consequence of accepting discovery rather than forceful domination. One is hard-pressed to imagine an equivalent endurance of wonderment and mystery if such a place were reduced to numbing predictability by ham-handed controls such as asphalt highways, contoured landscapes, even-age timber management and predator elimination.¹⁴⁴

The non-transformative explorations of the preservationist are partly the result of the emotional responses generated by particular places. They are also the manifestation of philosophy that extends beyond such feelings. Thus, in traveling the narrow highway of simultaneous pursuit and protection, the preservationist may employ intellectual constructs that are anchored in emotions of wonder, love of place, and even fear. These constructs, as jurisprudence, can invite the protective laws. It remains for us to explore the principles of such a jurisprudence, to examine the tenets of a philosophy that will bond to a foundation of feeling and emotion, that will provide a focus for implementing law, and that will, at its best, provide a context, purpose and meaning for human life.

III. A PHILOSOPHY OF PRESERVATION

A. Introduction

This philosophy or jurisprudence will, in an initial and a personal sense, attempt to serve the varied emotions engendered by the Buffalo River. These feelings could, undoubtedly be considered complete within themselves. They do not necessarily demand an intellectual accompaniment. The intensity of these elicited responses, however, has inspired articulation, in part to explain and in part to build a foundation.

A philosophy can then be a personal catharsis. It can serve, in a broader sense, as a basis for human choice, conduct, policy and law—not only with respect to the Buffalo River, but with regard to other

¹⁴³ The rediscovery of mystery within the seemingly familiar parallels the scientific theory of chaos wherein order, under analysis, breaks down into apparent chaos and after further examination, reemerges in new patterns. See JAMES GLEICK, *CHAOS* 305 (1987).

¹⁴⁴ See generally Tribe, *supra* note 79.

unique places whose existence and continuation evoke the sentiments and concerns of an effective majority.

Preindustrial societies such as the traditional tribal societies of North America were tied closely to the land and each other.¹⁴⁵ They were, in clear comparison with modern industrial and technocratic groups, more concerned with the formulation, communication and employment of coherent and cohesive philosophies about the relation of people and places.¹⁴⁶ Some suggest that, before the advent of industry, technology and free market competition, there was less speed, noise, distraction and interference. There was more of an opportunity and more of a need to explore and explain the roles and obligations of humans to the land, the species, and particular places.¹⁴⁷ People in modern society, induced or seduced by the inexorable advance of technology, have, according to Jerry Mander, "lost a sense of the sacredness of the natural world."¹⁴⁸

Technology, urbanization and the background dissonance of modern industrial societies may make a philosophy of preservation peripheral and more difficult to state or communicate. They certainly do not preclude it, however. Indeed, in the last several decades, there has been an outpouring of scholarly preservation works,¹⁴⁹ suggesting perhaps that a growing number seek respite from the rigidity of technocracy and a buffer against further loss of the sacred.

A jurisprudence of preservation is not and probably cannot aspire to be a pure, precise product of deductive reasoning or detailed scientific methodology. A philosophy of preservation, at least this one, is grounded in emotions. It does not attempt to avoid or escape these, but seeks instead to build a bridge between the intuitive and the rational.

¹⁴⁵ JOHN COLLIER, *INDIANS OF THE AMERICAS* 7-24 (1947).

¹⁴⁶ *See generally* JOSEPH BROWN, *THE SPIRITUAL LEGACY OF THE AMERICAN INDIAN* (1982).

¹⁴⁷ *See* CHARLES EASTMAN, *THE SOUL OF THE INDIAN*, 3-24 (1980); JERRY MANDER, *IN THE ABSENCE OF THE SACRED* 211-20 (1991).

¹⁴⁸ MANDER, *supra* note 147, at 187. Stephen Hawking, the eminent theoretical physicist, thinks that modern philosophers have not merely been distracted by technology, but have been surpassed and perhaps rendered obsolete. He writes:

. . . [I]n the nineteenth and twentieth centuries science became too technical and mathematical for the philosophers or anyone else except a few specialists. Philosophers reduced the scope of their inquiries so much that Wittgenstein, the most famous philosopher of this century, said "The sole remaining task for philosophy is the analysis of language." What a comedown from the great tradition of philosophy from Aristotle to Kant!

STEPHEN HAWKING, *A BRIEF HISTORY OF TIME* 174-75 (1988).

¹⁴⁹ *THIS INCOMPARABLE LAND* (Thomas Lyon ed. 1989) contains a 77 page bibliography on recent American nature writings. *Id.* at 399-476.

A further concession must be made before starting on the philosophical voyage. The diminished leverage of modern philosophy¹⁵⁰ is in part due to the great leaps that science has made in charting the spatial and temporal scale of the universe.¹⁵¹ Against this background, human senses, perceptions, thoughts, and existence seem so fundamentally limited and ineffective that resultant philosophies and hypotheses may seem inherently compromised. Even the most sophisticated technological enhancement of humans' mental and physical processes can make only incremental, linear advances along the continuous streaming of the infinite and the eternal.¹⁵²

Limits on human perception, cognition and apparent significance could, if dwelt upon, foster total concession and nihilism, and could legitimize Dostoevsky's haunting fear that "everything is permitted."¹⁵³ Inescapable consciousness,¹⁵⁴ however, and the necessary contemplation of self and context, force philosophers to continue the Sisaphean quest of justifying human existence and directing human endeavor.¹⁵⁵ The inherent uncertainty about ultimate truth and reality

¹⁵⁰ *Supra* note 148.

¹⁵¹ See STEPHEN HAWKING, *supra* note 148, at 174–75; see also PAUL DAVIES, *THE MIND OF GOD* 7 (1992).

¹⁵² See GREGORY BATESON, *MIND AND NATURE* 29–30 (1988); Paul Davies wrote:

. . . [I]n the end, a rational explanation for the world in the sense of a closed and complete system of logical truths is almost certainly impossible. We are barred from ultimate knowledge, from ultimate explanation, by the very rules of reasoning that prompts us to seek an explanation in the first place.

Supra note 151, at 231.

¹⁵³ FYODOR DOSTOEVSKY, *THE BROTHERS KARAMASOV* 317 (1970).

¹⁵⁴

Subjective conscious mind is an analog of what is called the real world. It is built up with a vocabulary or lexical field whose terms are all metaphors or analogs of behavior in the physical world. Its reality is of the same order as mathematics. It allows us to shortcut behavioral processes and arrive at more adequate decisions. Like mathematics, it is an operator rather than a thing or repository. And it is intimately bound up with volition and decision.

JULIAN JAYNES, *THE ORIGIN OF CONSCIOUSNESS IN THE BREAKDOWN OF THE BICAMERAL MIND* 55 (1976).

¹⁵⁵ William Barrett wrote:

If I project this paltry life of mine against the possibility of not being at all, then this gift of being floods through me like a tide. To exist at all is to be happy. Dostoevski, in his startling and unpredictable way, chose to put his supreme truth in the mouth of the half-crazed Kirillov: "We are all happy if we but knew it." Against the void of nonexistence, any fragment of existence, however paltry, becomes a supreme miracle. My God, I am happy! This freedom as galley slave here in this garret is inexhaustible. So each day I pass judgment and sentence myself to remain among the living. Condemned to live; I must ceaselessly create reasons for living. The judgment is not so severe nor the task so difficult as we imagine. We have only to be open to the world and it will pour its riches at our feet. Before this winter, I had not known that the bark of a tree, caught in yellow sunlight, could be enough to restore a life.

WILLIAM BARRETT, *THE ILLUSION OF TECHNIQUE* 345 (1978).

may require residual flexibility and a willingness to modify, but it does not prevent a present commitment to perceived and chosen verities. Laurence Tribe said “[C]onsciousness remains in a double stance. While vigorously living out the values provided by the present stage, we remain aware that these values themselves pass through evolutionary stages whose unfolding we participate in and sanctify.”¹⁵⁶

B. Prerequisites of Preservation: Need and Power

Why should we collectively and individually, strive to preserve rare places, and in particular, the Buffalo River? A partial answer, not complete in itself, is because of need. In the past, the Buffalo River has been threatened by external forces that would fundamentally and permanently impair it. Dam builders, loggers, miners, farmers and entrepreneurs have sought, at various times, to exploit the river and even to silence it. Though the threats have, for the present, been legally allayed, their vitality remains. They can resume if law or the public will should falter.

Continuing need is an intellectual requirement for preservation philosophy as well as a practical requirement for political or legal action. There will be no resolve—intellectual or statutory—to preserve something (like gravity) whose permanence is not subject to present or potential threat.

Another partial answer to the question of why we should preserve the Buffalo is that we can,—or at least, that we can try. The mental commitment to preserve depends in part on the actual or potential power to resist the threat—if not totally to defeat it.¹⁵⁷ At both the personal and the collective levels, a philosophy of preservation will steer toward choices or exercises of will that it is possible to make. One cannot philosophically renounce death, because its certainty precludes such renouncement as a moral choice; nevertheless though, one could choose to resist death rather than to hasten it.

The question of whether we have the basic power to preserve contains several linked components: a social concept of responsible, altruistic, non-competitive power, and the ability to choose it. Deter-

¹⁵⁶ Tribe, *supra* note 79, at 1346.

¹⁵⁷

. . . [I]t's hard, sitting on a mountain, to think that there's some great and exalted and sensible reason for your presence on this planet. But it's a joyful existentialism, because we clearly can fit in—because the world in which we're inexplicably thrown is magnificent, sweet. It's within our power, too, to leave much of it alone.

BILL MCKIBBEN, *THE AGE OF MISSING INFORMATION* 230–31 (1992).

minists might seek to end this or any philosophical odyssey by asserting that human or social behavior is not the result of free choice, but the inescapable, inevitable product of pre-occurring events.¹⁵⁸ The Determinists would thus pull the plug on any moral discussion of the power to preserve by arguing that we are not free to even make the choice.

There is a clear distinction between determinism and predictability. Determinism implies an absolute cause and effect relationship between events and their antecedents. Predictability, though approaching certainty at some point, has ranges that are clearly less than absolute. Even if human actions may be predictable in percentile ranges approaching one hundred, there is still no warranted conclusion of determinism, because of the residual presence of consciousness.¹⁵⁹

An actor may, because of prior events, adhere to particular courses of conduct with a consistency approaching certitude. In spite of this, the actor would still be regarded as free and not captive of determinism because at each separate transitional point, there is an opportunity for conscious reflection and self-control.¹⁶⁰ Thus, one can choose to adhere to a particular course of conduct or to hold and serve a certain value. As Laurence Tribe wrote, "To be free is to choose what we shall want, what we shall value, and therefore what we shall be."¹⁶¹

If our society has, by virtue of consciousness, the power of choice, the next basic question is whether there is a developed social concept of nonutilitarian, altruistic power that this freedom of choice can act on. Altruistic power would be that employed for the collective good¹⁶²

¹⁵⁸ See generally BARRETT, *supra* note 155, at 257-61.

¹⁵⁹ See JAYNES, *supra* note 154, at 55.

¹⁶⁰ See CORLISS LAMONT, FREEDOM OF CHOICE AFFIRMED (1967).

A potent reason for the widespread acceptance of the determinist thesis is a rather common misunderstanding of the operation of cause and effect. Many individuals, including scientists and philosophers, look upon the present as merely the effect of antecedent causes and forget that the present in its multitudinous forms is itself an active cause, the spearhead of all existence and activity, the great forward thrust of universal being. The past does not create the present; it is always the activity of some immediate present that produces the past, working upon it, transforming it or conserving what has been built by *former* presents that have become part of the past. The present alone exists and has efficacy; the past is efficacious only as embodied in the substance or structure of some present event or object. As the dynamic present forges ahead, it leaves its past behind it, making a trail as it were, as a skier gliding downhill through the snow or a boat stirring up a foamy wake.

Id. at 122. See also John W. Ragsdale, Jr., *The Natural Law of Rhythm and Equality*, 58 UMKC L. REV. 375, 376 (1990).

¹⁶¹ Tribe, *supra* note 79, at 1326-27.

¹⁶² Including both human and non-human communities. See *infra*, Part III C; see also John W.

and would be contrasted to the self-interested power characteristic of competitive endeavors.¹⁶³ Indian societies traditionally tended to view all power as held in trust for the tribe and the world.¹⁶⁴ An individual with the gift of power—physical, mental or social—was obligated to employ it responsibly, for the good of the tribal and environmental communities.¹⁶⁵

Although altruistic, responsible power is more characteristic of and more pervasive in a tribal society, it is clearly not unknown in modern-day America. The extensive legal preservation efforts in the Buffalo River area¹⁶⁶ give eloquent testimony to the ability of even a competitive, growth-oriented society to act in a responsible, altruistic fashion.

A recognition that we as a society can choose to use power, and that we can opt to use it responsibly and altruistically still leaves several key philosophical questions unanswered. *Why* is it morally responsible to use available power for the preservation of scarce, threatened resources like the Buffalo River? In addition, *why* might it be desirable, as well as responsible or obligatory, to preserve such a place?

C. Responsibility

The moral or philosophical concept of responsibility, as well as the dictionary definition,¹⁶⁷ posits an accountability by one as group or individual. The accountability is for the care and welfare of another.¹⁶⁸ To whom the accountability is owed, however, is a bit obscure. Responsibility as well as care may run to the recipient-obligee. Responsibility might be a legal issue with official, external sanctions for shortfallers in the care of a beneficiary. Responsibility might also represent an obligation owed to one's self, although this seems at odds with our dictionary definition of responsibility as an accountability for the care and welfare of another. Also, to characterize responsibility as a debt owed to one's self seems philosophically tautological.

Ragsdale, Jr., *Altruistic Communities and the Responsible Use of Legal Power*, 60 UMKC L. REV. 497, 499 (1992).

¹⁶³ See MURRAY BOOKCHIN, *REMAKING SOCIETY* 93-94 (1990).

¹⁶⁴ See John W. Ragsdale, Jr., *Indian Reservations and the Preservation of Tribal Culture: Beyond Wardship to Stewardship*, 59 UMKC L. REV. 503, 545-46 (1991).

¹⁶⁵ See EASTMAN, *supra* note 147, at 102-04; KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* 78-79 (1928); LAURA THOMPSON, *CULTURE IN CRISIS* 79 (1973).

¹⁶⁶ See *supra* notes 13-58, 92-144 and accompanying text.

¹⁶⁷ See AMERICAN HERITAGE DICTIONARY 1053 (2nd College ed. 1991).

¹⁶⁸ *Id.*

The concept of responsibility to be advanced here as a philosophical or jurisprudential basis for the preservation of the Buffalo River does not necessarily involve a legal sanction, although the concept would clearly be compatible with formal law. In addition, although care might be directed to a terrestrial beneficiary, this philosophy postulates an accountability or an obligation owed to an entity beyond both the obligor and the recipient. That entity to whom responsibility is owed—the obligee—has been regarded as God,¹⁶⁹ the Tao,¹⁷⁰ homeostasis,¹⁷¹ quality,¹⁷² the Great Mystery,¹⁷³ the Gaia¹⁷⁴ and rhythm.¹⁷⁵

Observation, experience and logic can easily convince us that the Buffalo River is a place of extraordinary patterns. Water, mountains, rock, grasses, trees, fish, animals and birds interact in an ageless montage. The perceptive individual must, in all humility, recognize that these patterns precede humankind by countless eons. One must acknowledge that, barring dissonant human interference such as dams, dynamite or bulldozers, these natural designs will continue, indefinitely if not eternally. One should further admit that the origin of these patterns, their meaning and ultimate importance, are issues far beyond existing human comprehension.¹⁷⁶ Even though human beings may never be fully able to fathom the plan or ultimate purpose of the world, the universe, or the Supreme Architect because of the limited extent of their intelligence, senses and life span, they can still assume that these patterns, rhythms, harmonies and cycles are part of this higher plan.

Humans encountering such transcendent marvels should as a matter of logic, not to mention morality, display humility and respect, and exercise extreme caution. When a person encounters a system of great complexity far surpassing the individual's own ability to create or comprehend, that person, if thoughtful, proceeds carefully to avoid unanticipated dislocations.

Beyond the exercise of due care against disruption, humans are, arguably, obligated or responsible for affirmative protection. Humans arguably should choose to use available power and resources to maintain and protect special places such as the Buffalo River against

¹⁶⁹ RODERICK NASH, *THE RIGHTS OF NATURE*, 111–12 (1989).

¹⁷⁰ *Id.* at 113.

¹⁷¹ KENNETH E. BOULDING, *ECODYNAMICS* 324 (1978).

¹⁷² See PIRSIG, *supra* note 103, at 226–28 (1981).

¹⁷³ See EASTMAN, *supra* note 147, at 3–24.

¹⁷⁴ DHARMA GAIA (Allan H. Badiner ed., 1990).

¹⁷⁵ ALAN MCGLASHAN, *GRAVITY AND LEVITY* 137 (1976).

¹⁷⁶ See NASH, *supra* note 169, at 95–97.

external threats. They should, in effect, treat such places as sacred shrines.¹⁷⁷ Barry Lopez discusses this responsibility:

We need to find our home. We need to find a place where we take on the responsibility of adults to the human community What we need is to discover the continent again. We need to see the land with a less acquisitive frame of mind. We need to sojourn in it again to discover the lineaments of cooperation with it. We need to discover the difference between the kind of independence that is a desire to be responsible to no one but the self—the independence of the adolescent—and the independence that means the assumption of responsibility in society, the independence of people who no longer need to be supervised. We need to be more discerning about the sources of wealth. And we need to find within ourselves and nurture a profound courtesy, an in alloyed honesty.¹⁷⁸

The responsibility that forms the basis of this segment of the jurisprudence is, then, an accountability for the care and welfare of the Buffalo River. Prior to the formal preservation statutes, this philosophy or moral obligation was not directly enforced by the natural order. Rather, the obligations and responsibilities were compulsory because committed individuals chose to make them so. As Laurence Tribe said: “We can be truly free to pursue our ends only if we act out of obligation, the seeming anti-thesis of freedom. To be free is not to follow our ever-changing wants wherever they might lead.”¹⁷⁹

One might justifiably ask why the obligation runs to the particular patterns constituting the Buffalo River, and not to other patterns as well. The response is that responsibility *could* run to other special patterns or even to the entire physical and biotic communities.¹⁸⁰ However, at some point, this might prove philosophically problematic with regard to our basic doctrinaire postulate of possibility.¹⁸¹ Although preservation of the Buffalo River against physical transformation is possible, preservation of the country against all human impact is not.

If the responsibility to the Buffalo River *is* a matter of choice, the question may then be why or how does an individual or a group decide to obligate itself to this particular place? The answer to this may, in

¹⁷⁷ DAVID SUZUKI & PETER KNUDTSON, WISDOM OF THE ELDERS 151–74 (1992).

¹⁷⁸ LOPEZ, *supra* note 102, at 47.

¹⁷⁹ Tribe, *supra* note 79, at 1326. *See also supra* note 161.

¹⁸⁰ Aldo Leopold proposed as the major tenet of his land ethic: “A thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise.” A SAND COUNTY ALMANAC 262 (Sierra Club/Ballantine ed., 1974).

¹⁸¹ *See supra* note 157.

part, precede the intellectual philosophy or jurisprudence and lie within the realm of emotion and feelings. The decision to obligate oneself springs from the singular emotional union between a person and a special place.¹⁸² John Collier, the former Commissioner of Indian Affairs, chose to be obligated and responsible for the preservation of threatened tribal cultures as a result of his mystical first encounter with the Indians of the Taos Pueblo. Collier wrote:

We climbed to the Taos plateau in a blinding snowstorm, just before Christmas. Then, while great snowflakes descended at twilight, we watched the Virgin and the Child borne from the Christian church, high along an avenue of fires to a vast chanting of pagan song. After two days, the Red Deer Dance began and the Sacred Mountain which haunts the sky northwestward from Taos shuddered and poured forth a cold flaming cloud to the sun and all the stars The Taos experience, twenty-six years ago, changed my life plan.¹⁸³

Another major aspect of this issue regarding the decision and the choice to be responsible may be alleviative of the burden of obligation. It may well be that people will elect to be responsible, not just because they feel it is right, but also because they consider it desirable and beneficial.

D. Desirability

The desirability of a particular course of conduct such as preservation may be measured by a variety of factors. There may be intellectual, moral or philosophical reasons why a decisionmaker would feel it desirable and beyond obligation to preserve a place like the Buffalo River. Alternatively, there may be more mundane, but still compelling, elements of preference. An actor, for instance, may find it efficient, convenient or profitable to preserve certain scarce resources.

Arguments or rationales keyed to efficiency, convenience and profitability tend to be homocentric in focus and short-term in projected returns.¹⁸⁴ Such arguments are not uncommon; they are, in fact, the dominant form of political discourse and action. Politicians, special economic interests, and working constituents tend to operate with limited time horizons. They generally want laws and decisions that

¹⁸² See *supra* notes 92–95.

¹⁸³ COLLIER, *supra* note 145, at 9–11.

¹⁸⁴ Tribe, *supra* note 79, at 1329–32.

promise a quick and positive return—even at the risk or expense of long-term losses and disruptions.¹⁸⁵

Since politics is usually centered on the practical, it is probably not surprising that preservation legislation has often been advanced with supporting arguments premised on immediate human utility. Proponents of preservation might, for example, stress the provision of unique, high-quality recreational benefits,¹⁸⁶ the protection of scientifically or economically useful genetic diversity,¹⁸⁷ and the stimulation of recreational product manufacture and local service economies.¹⁸⁸ It is certainly tempting for preservation advocates, even those primarily inspired by philosophical or emotional reasons, to cite economic advantages for preservation and to concoct “shadow pricing” for recreation and scientific benefits¹⁸⁹ in order to fit the standard efficiency-based, cost-benefit analysis so common in political decision-making.¹⁹⁰

There is a danger in reducing all preservation arguments to the common, dollar-based denominators used in efficiency and benefit-cost analysis. In one sense, by translating the preservation issue into fungible, monetary considerations, it becomes vulnerable to future recalculations if the preserved resources prove to be more valuable in a converted form.¹⁹¹ In a related sense, the reduction of qualitative intellectual considerations to a quantitative linear scale may blur or even eclipse the essence of some desirable philosophical or emotional considerations that could stand apart—perhaps more enduringly—from the arguments based on mere efficiency.¹⁹²

Our objective remains, then, to identify and refine some elements comprising the philosophical desirability of preserving the Buffalo River. This will hopefully add to the obligatory basis of philosophical support for preservation law, and it will result in an abiding jurisprudence based on duty and desirability that will not reduce to nor collapse from ordinary efficiency analysis.

The concept of reciprocity, a central tenet in the world-view of many North American Indian Tribes,¹⁹³ is useful in the examination

¹⁸⁵ STEPHEN SCHNEIDER, *THE GENESIS STRATEGY* 43 (1977).

¹⁸⁶ See Linder, *supra* note 73.

¹⁸⁷ Robert E. Manning, *The Nature of America: Visions and Revisions of Wilderness*, 29 NAT. RESOURCES J. 34–35 (1989).

¹⁸⁸ UTAH WILDERNESS COALITION, *WILDERNESS AT THE EDGE* 31 (1990).

¹⁸⁹ See generally Lloyd C. Ireland, *Economics of Wilderness Preservation*, 7 ENVTL. L. 51 (1976).

¹⁹⁰ See Tribe, *supra* note 79, at 1330.

¹⁹¹ See *id.* at 1331–32.

¹⁹² See *id.* at 1332.

¹⁹³ BROWN, *supra* note 146, at 125.

of philosophical desirability. Reciprocity suggests a fundamental universal principle whereby harmony and balance on the animate, inanimate, spiritual and cosmic levels are maintained through ongoing, alternating, essentially equivalent exchanges. These exchanges, which theoretically involve all elements in the universe, comprise a complex, coordinated, cooperative and correlative set of interrelationships.

Theoretically all phenomena, natural and supernatural, living and dead—including man, animals, plants, the earth, sun, moon and clouds, the ancestors and the spirits—are interrelated and mutually dependent through the underlying dynamic principle of the universe—which we shall call the law of universal reciprocity. The law implies the concept of immanent or cosmic justice, the emphasis is not, however, on the idea of rewards and punishments or on punishments alone (retribution), but on the mutual exchange of essentially equivalent but not identical values according to fixed traditional patterns in the interest of the common weal. Man, the elements, animals, plants and the supernatural cooperate in an orderly fashion by means of a complex set of correlative interrelationships, for the good of all.¹⁹⁴

Under the theory of reciprocity, an individual who fulfills a commitment to a person or place can expect, in some sense, a return. This forms, in effect, a linkage between our concepts of obligation and desire; a fulfillment of obligation can lead to a fulfillment of desire. More specifically, if a human should choose¹⁹⁵ to complete an obligation of protection to a special or sacred place like the Buffalo River, then there would or should be a reciprocal return.

Reciprocity is not only basic to concepts of obligation and return, but also to the idea of community. Within the reciprocal interrelationship there is a unification or bonding between the constituent elements, and the strengths of each flow to the others. In particular, we can find that a fulfillment of the obligation of preservation can facilitate communities with both the land and the people of the land.

¹⁹⁴ LAURA THOMAS & ALICE JOSEPH, *THE HOPI WAY* 37 (1965). See also LOPEZ, *supra* note 102, at 27; THEODORE ROZAK, *THE VOICE OF EARTH* 89 (1992).

¹⁹⁵

Whereas, according to Hopi theory, the non-human universe is controlled *automatically* by the reciprocity principle, man is an active agent who may or may not acquiesce in it. While the world of nature is *compelled* to respond in certain prescribed ways to certain stimuli, man not only responds, but also *elicits* response. Hence, man, in the measure that he obeys the rules, may exercise a certain limited control over the universe. Hopi philosophy, therefore, ascribes to man an element of choice—which it seems, is dependent on his *will*.

THOMAS & JOSEPH, *supra* note 194, at 37.

Furthermore, these communities could offer a return that may prove transcendent.

1. A Community of Place

Can a human join or form a community with a particular place—with the rocks, cliffs, rapids, pools, trees, clouds, rain, wind and wild species? The Indians clearly thought so, and lived this way. John Collier spoke admiringly of their “power for living” embodied in their “reverence and passion for the earth and its web of life.”¹⁹⁶ Just as clearly, white Americans have generally failed to conceive of a community with the land. Frontiersmen tended to use and misuse the land rather than respect it. They exploited it and when it was exhausted, they moved on. Wallace Stegner noted “. . . The American community, especially in the West, is an overnight camp. American individualism, much celebrated and cherished, has developed without its essential corrective, which is belonging.”¹⁹⁷

A community with the land implies commitment, but simultaneously, it provides a sustaining return. A community with the land, then, involves belonging. To fulfill an obligation of preservation and love for a special place is to find a home.¹⁹⁸ To find a home in a particular place is to find standing in the world and the universe.¹⁹⁹ In return for the discharge of a duty of care, one can become part of a place or a community and can be embraced by it. Willa Cather wrote about Tom Outland’s feelings for a fictional southwestern mesa, in a way that revealed her own feelings for, probably, Mesa Verde.

I remember these things because in a sense, that was the first night I was ever really on the mesa at all. The first night that all of me was there. This was the first time I ever saw it as a whole. It all came together in my understanding, as a series of experiments do when you begin to see where they are leading. Something had happened in me that made it possible for me to co-ordinate and simplify, and that process going on in my mind brought with it great happiness. It was possession.²⁰⁰

I recall an evening on the Buffalo River which brought forth similar feelings of possession by a place. Oscar Aitkin and I were boating on Missouri’s Swan Creek in mid-summer of 1992 when we noticed dense

¹⁹⁶ COLLIER, *supra* note 145, at 7.

¹⁹⁷ WALLACE STEGNER, *THE AMERICAN WEST AS LIVING SPACE* 23 (1987).

¹⁹⁸ LOPEZ, *supra* note 102, at 46.

¹⁹⁹ THOMAS BERRY, *THE DREAM OF THE EARTH* 219–20 (1990).

²⁰⁰ CATHER, *supra* note 116, at 226.

afternoon rain clouds forming over the Boston Mountains. The prospect of rain and a rising Buffalo River inspired us to change our plans and head south to Arkansas. We arrived in Jasper in late afternoon with the clouds heavy and distant rumbling to the west promising storms higher up the river. We decided to paddle upstream from the river's Pruitt access, and practice a few rolls in a long, deep pool we were familiar with. The water was dark and almost still in the shaded light, but it seemed cool and comforting rather than threatening. Our kayaks cut through the glassiness below the dark-stained sandstone bluffs, and the sounds of paddles and water splashing echoed lightly off the walls. In the crystalline, velvety waters, we did a number of enthusiastic eskimo rolls.²⁰¹

Exuberance and peace in a place known well, loved, and cared-for seemed then and now to be the essence of a community. It was and is a reciprocation that makes all sacrifice, obligation and duty eminently worthwhile. It was and is a home, an embrace, a possession. Even now, three hundred miles from the river, I can rejoin its community in my mind. The visions, the union and the bond are sustaining.

2. A Community with the People of a Place

The concept of a community with other people stands abstractly and separately from the idea of a community with a particular place. In reality, the two communities are related. Wendell Berry said “[a] human community, then, if it is to last long, must exert a sort of centripetal force, holding local soil and local memory in place.”²⁰² In return for the fulfillment of an obligation to a place, we can thus join not only the community of the land, but also the community of all those who have lived and will live in the particular place. To manifest care or reverence for the Buffalo River involves one in an embracing social linkage that includes the various Indian tribes that lived along the river, the early settlers, the miners at Rush, the present-day farmers in the Boxley Valley and the generations of future visitors.

²⁰¹ Learning the eskimo roll requires submission to some initial crises of orientation and oxygen—debt. One turns upside down in a moving river, semi-entrapped by a neoprene spray deck in a small, skittish plastic boat. One discovers, quickly, one hopes, that, with a little shoulder rotation and a quick snap of the hips, the boat will roll upright. There is a mixture of relief, satisfaction and happiness when one learns the roll, replicated each particular time one reemerges after inversion. Mastering the maneuver is the beginning of kayaking as a sport to be relished rather than one to be endured or survived. The freedom afforded by this technique is high pleasure, and an exercise of this independence in the early twilight on the Buffalo River was exultation.

²⁰² WENDELL BERRY, *WHAT ARE PEOPLE FOR?* 155 (1990).

There is a cave along Panther Creek, a small tributary of the Buffalo, where prehistoric tribes lived, cooked, ate, slept, and made pottery and arrows. When one sits in the center of the vast main room, looks through the wide main entrance at the surrounding green forests, watches a shaft of sunlight piercing the darkness through a hole in the ceiling, and listens to the steam rushing down through the rocks at the back of the cave toward a distant juncture with the Buffalo, one must realize that these sights and feelings have affected countless generations in fundamentally similar ways.²⁰³ One can escape the bonds of time and mortality and join a chain of people who have lived here and loved this place. There is an obligation of respect and protection:

. . . we know that the time that has stretched back so far will also stretch out in front just as far, beyond the far distant ridge of human comprehension. We ought to be courageous enough to take responsibility—mark down that hard and fixed word, responsibility—for that long stretch of time out in front of us. And we ought to take responsibility for the people and other things, living and not, that will inhabit this earth then.²⁰⁴

In return for this responsibility of respect and protection, there is a return gift of membership in the procession. There is a chance to join in and share the cultures of the past. There is an opportunity to learn or relearn some truths of existence,²⁰⁵ to touch traditions and

²⁰³

From the ancient dwelling there came always a dignified, unobtrusive sadness; now stronger, now fainter—like the aromatic smell which the dwarf cedars gave out in the sun—but always present, a part of the air one breathed. At night, when Thea dreamed about the canyon—or in the early morning when she hurried toward it, anticipating it—her conception of it was of yellow rocks baking in sunlight, the swallows, the cedar smell, and that peculiar sadness—a voice out of the past, not very loud, that went on saying a few simple things to the solitude eternally.

Standing up in her lodge, Thea with her thumb-nail could dislodge flakes of carbon from the rock-roof—the cooking smoke of the Ancient People. They were that near! A timid, nest-building folk, like the swallows. How often Thea remembered Ray Kennedy's moralizing about the cliff cities. He used to say that he never felt the hardness of the human struggle or the sadness of history as he felt it among those ruins. He used to say, too, that it made one feel an obligation to do one's best. On the first day that Thea climbed the water-trail, she began to have intuitions about the women who had worn the path, and who had spent so great a part of their lives going up and down it. She found herself trying to walk as they must have walked, with a feeling in her feet and knees and loins which she had never known before—which must have come up to her out of the accustomed dust of that rock trail. She could feel the weight of an Indian baby hanging to her back as she climbed.

WILLA CATHER, *THE SONG OF THE LARK* 238 (1991).

²⁰⁴ WILKINSON, *supra* note 62, at 130 (1992).

²⁰⁵ See CONGER BEASLY, JR., *CANYON DE CHELLY: THE TIMELESS FOLD* 104 (1988).

cultural vestiges—perhaps treasured even more by those from a culture-gobbling growth society,²⁰⁶ and to build a walkway to the future.²⁰⁷ Implicit in these opportunities is the possibility of transcendence.

3. Transcendence

Humankind's all-too-clear awareness of finiteness and mortality, viewed against a none-too-clear, perhaps incomprehensible background of infinity and eternity,²⁰⁸ has driven an incessant search for meaning and salvation. Seeking understanding, assurance and security, people have traveled down a variety of difficult highways, including the organization of religion, the maintenance of warfare, the pursuit of wealth, and the quest for notoriety. Since the industrial revolution and the rise of the idea of progress,²⁰⁹ westerners have increasingly sought to delay death, save time, and transform nothingness with linear growth including technological fixes, environmental exploitations, medical advances, and increases in material well-being.²¹⁰

Quantitative increases—faster, longer, bigger—do not, in truth, directly add to the essential quality of existence, nor can they answer the problems of meaning in an endless universe. Quests fixed on quantitative increase fail for several physical and perceptual reasons. For one thing, a quantitative increase, such as faster, is only relevant to the original recipient who can compare the new rate to the old. Thereafter, the augmented rate becomes the normative or commonplace rate, and future satisfactions will depend on continuing increases. Further, it is questionable whether the earth's natural resources can, even under the goading spur of technology, continually fuel the quest for more.²¹¹ Beyond these earth-bound limitations is the cold reality that quantitative increase can make no inroad on infinity.²¹² Those who pursue linear increases as a hedge against mortality are doomed to failure.²¹³

²⁰⁶ BERRY, *supra* note 202, at 153–69.

²⁰⁷ See WILKINSON, *supra* note 62, at 131.

²⁰⁸ DAVIES, *supra* note 151, at 231.

²⁰⁹ See generally J.B. BURY, *THE IDEA OF PROGRESS* (1960).

²¹⁰ See generally HAZEL HENDERSON, *CREATING ALTERNATIVE FUTURES* 1–222 (1978); BERRY, *supra* note 199, at 202–03.

²¹¹ See generally WILLIAM OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY* (1977).

²¹² See ALAN LIGHTMAN, *EINSTEIN'S DREAMS* 28–32 (1993).

²¹³ See JEREMY RIFKIN, *ALGENY* 248–51 (1984).

Thoreau said "in Wildness is the preservation of the World."²¹⁴ In a related sense, it can be said that in the preservation of the world there is fundamental unity. If an individual or a group takes a qualitative, preservationist focus, such as a focus on balance, stability or harmony, then there is a distinct chance for understanding, acceptance and transcendence. Participating in a larger, enduring pattern provides an opportunity to derive both energy and peace, and to escape the feckless, futile chasing after more. Jeremy Rifkin has written:

We gain immortality through our sacrifices. It is by giving something back, by leaving something unspent, by going without, that we live on. This is our present to the future. It is the only real legacy. By leaving behind all of the unspent possibilities, we bequeath the finest endowment of all, the gift of life for future generations to enjoy.²¹⁵

The preservation of the Buffalo River, then, presents a chance for transcendence, as well as a task for law. One can respect and maintain these timeless patterns through personal and institutional measures. Reciprocally, we can receive a gift of membership in over-arching communities. These in turn can counter the burdens of mortality. Thus, through the efforts of care and restraint, and from the return of possession, humans and even societies can be lifted beyond limits and beyond fear. From the completed obligations of stewardship, one can acquire an unquestioned purpose, a guiding vision and a place.²¹⁶ Then in the Arctic half-light of the canyon, all existence fades to a being with my soul and memories and the sounds of the Big Blackfoot River and a four-count rhythm and the hope that a fish will rise. Eventually, all things merge into one and a river runs through it.²¹⁷

Along the east river bank, below Buffalo Point, there is a flat limestone ledge approximately one hundred feet in length. At low water, the polished rock is several feet above the river's surface, and the unimpeded current runs smoothly by. At high water, part of the river surges with a rush across the rock, and drops into a trough. The water then curls upward in a green-hued arching wave, crests white at the top, tumbles and then moves on. The waters of the Buffalo run a circular course from rain cloud to mountain to creek to river to sea and back to the sky. For a brief instant on this epic journey, countless

²¹⁴ HENRY DAVID THOREAU, *WALKING, EXCURSIONS* 224 quoted in MAX OELSCHLAGER, *THE IDEA OF WILDERNESS* 165, 410 (1991).

²¹⁵ Rifkin, *supra* note 213, at 254.

²¹⁶ See CHARLES E. LITTLE, *HOPE FOR THE LAND* 210 (1992).

²¹⁷ MacLean, *supra* note 115, at 104.

individual droplets are united by energy in the pattern of this wave. There is a merger, a pure moment of form, power and substance. Then the myriad of droplets move on, to be eternally followed by others. The wave remains.²¹⁸

On Buffalo Point, high above the river, there is a clearing where the park service has built a small restaurant. On a moonlit night one can see the river far below as a silver path cutting through the surrounding hills and forest. On a dark night without the moon, the river is invisible, but one can sense it in the cool gulf, and in the spring, one can hear the distant roar of the water moving endlessly across the limestone ledge. On this high spot there is a stone monument to a small boy who died young and tragically.²¹⁹ What sustained the child in life was his great love for the Buffalo River. In return for his care, he received no less than an enduring vision from Buffalo Point of emerald water moving strongly through a narrow valley, the wind-borne smells of black oak and pine, and rising from the canyon, the sound and rhythm of a distant rapid. One might say that he was lucky.

If time, against the backdrop of infinity, is arbitrary and perhaps an illusion,²²⁰ then fulfillment and transcendence are better determined by quality²²¹ than by duration or expansion or utilitarian transformation. This transcendence can lie in the vigilant protection of a jewel like the Buffalo River, and these ideas can anchor the actions of the individual and the laws of the society.

IV. EPILOGUE: SOME FUTURE ISSUES OF PRESERVATION

We have attempted a course from a personal, emotional encounter with a particular place, on to the formulation of a philosophy or a jurisprudence that will intellectually justify and promote preservation, and further on to the creation of implementing laws and institutions. Beyond the intuition, intellectualization, and institutionalization

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Utram bibis? Aquam an undam?

'Which are you drinking? The water or the wave?'

'He drank the wave?'

'We all drink both. But he meant the question should always be asked. It is not a precept. But a mirror.'

FOWLES, *supra* note 133, at 188.

²¹⁹ This and other information about the Buffalo was provided by Becky Moreland who runs the restaurant and the cabins at Buffalo Point.

²²⁰ See LIGHTMAN, *supra* note 212, at 28-32.

²²¹ See PIRSIG, *supra* note 103, at 226-28.

that comprise preservation lie several unresolved and not unrelated issues.

A. Can Preservation Survive an Excess of Love?

The emotional response to a place and the ensuing philosophical encapsulation are formed at the individual level. The laws and institutions, however, require collective political action.²²² Thus, preservation law, if not philosophy, will depend on education, promotion and publicity.²²³

Promotional efforts and legal successes have, logically and perhaps inevitably, brought growing numbers of constituents out to enjoy the fruits of their support.²²⁴ The problem of escalating visitation has become a major issue of National Park planning and management.²²⁵ Rivers, in particular, such as the Buffalo and the Colorado, have been subject to intense and growing traffic.²²⁶

One resolution of the high-popularity issue might be a total isolation of the resource. Numerous National Parks, including the Buffalo River, have closed certain limited sections, such as caves, for reasons of visitor safety and resource fragility.²²⁷ Permanent closure of an extensive, central, popular resource such as a river, however, though conceivable in theory, is unlikely in practice and probably unwise.

Permanent isolation would short-circuit all subsequent human encounters. Also, without continuing personal and emotional involvement, the sparks for philosophy and maintenance of the law could be lost. The lack of significant popular knowledge and appreciation is probably one major reason why the laws failed to adequately protect Rainbow Bridge National Monument.²²⁸

In the case of resources like the Buffalo River, resolution of excessive traffic will therefore require accommodation rather than sequestration. The administrators of preservation areas could, for example,

²²² SAX, *supra* note 74, at 103.

²²³ See RUNTE, *supra* note 129, at 187-96.

²²⁴ *Id.* at 82-105; see *Friends of Yosemite v. Frizzell*, 420 F. Supp. 390 (N.D. Cal. 1976).

²²⁵ STEERING COMMITTEE NATIONAL PARK SERVICE, NATIONAL PARKS FOR THE 21ST CENTURY: THE VAIL AGENDA 69-75 (1992).

²²⁶ COGGINS ET AL., *supra* note 78, at 900.

²²⁷ The Buffalo National River has basically eliminated public access to several wilderness caves which contain endangered species of bats or which pose threats to public safety. See NATIONAL PARK SERVICE BUFFALO NATIONAL RIVER: WILDERNESS AND BACK COUNTRY MANAGEMENT PLAN 25, 29 (1992). See also NATIONAL PARK SERVICE, MANAGEMENT POLICIES Ch. 7, at 4 (1988).

²²⁸ See Martin, *supra* note 125, at 215-46.

utilize rationing or timing measures rather than total preclusion.²²⁹ These measures, which can balance user desires and area needs, can preserve both the essence of the resource and the individual goodwill necessary for political viability.

There are some other factors that physically and philosophically ameliorate the impact of large numbers on places like the Buffalo River. For one thing, heavy visitation presents problems of cumulative wear and loss of solitude rather than irreversible consumption. In general, individuals seek and the National Park Service provides, recreational opportunities of a personal, low-intensity, non-competitive nature.²³⁰ The impact of such actions tends to be short term rather than—as with a dam—fundamentally transformative. Solitude, though in limited supply in central areas, remains available within short distance.

Beyond this, these numbers need not be a monolithic horde or swarm of insensitive boors, oblivious to their own discordance. The more people that visit a place may well mean not only support for the laws, but also better care and protection for the sensitive areas and qualities.²³¹ The Buffalo River, for example, can certainly be crowded with canoers on a warm summer weekend; and some of them undeniably may be loud, obnoxious, intoxicated and prone to discharge trash. Yet the Buffalo has been continually cleaned and groomed by the far greater numbers who love it and who loathe even the partial blemish of a wayward beer can, or a vagrant styrofoam cup.

The permanent salvation of the Buffalo, then, depends on an informed, appreciative and involved constituency. An outpouring of interest and affection for a place is not so much a threat to be discouraged as it is a sometimes unruly resource to be managed.

B. Can Preservation Survive a Decline in Society?

We have recognized that a major threat to the Buffalo River and to other preservation resources is the economic imperative; preservation law, in effect, creates islands in the stream of economic growth. The ability of these islands to resist the tides of conversion may

²²⁹ See BUFFALO NATIONAL RIVER AND NATIONAL PARK SERVICE, RIVER USE MANAGEMENT PLAN 20–27 (1983); Wilderness Pub. Rights Fund v. Kleppe, 608 F.2d 1250 (9th Cir. 1979), cert. denied, 446 U.S. 982 (1980).

²³⁰ SAX, *supra* note 74, at 56, 111–112; see also MANAGEMENT POLICIES, *supra* note 227, at ch. 8.

²³¹ See JOHN NICHOLS, THE LAST BEAUTIFUL DAYS OF AUTUMN (1982). The concept of active or adaptive reuse as a preferred method of historic preservation is increasingly accepted. See READINGS IN HISTORIC PRESERVATION 233 (Norman Williams, Jr. et al. eds. 1983).

reflect, somewhat ironically, the overall success of the economy. A society is more willing to support nonutilitarian endeavors and concessions when survival at a satisfactory level of material well-being is assured. It is significant that preservation movements have seldom arisen on the frontier, where people are locked in a struggle with the land for their very survival.²³² Preservation impulses are more likely to begin in Thoreauvian repose, when the immediate necessities of existence are assured.²³³

If the economy fails, if the political institutions decline or swing under stress toward autocracy,²³⁴ then environmentally protective laws or their enforcement may deteriorate as well. Scarce resources and preserved places may again become vulnerable, not from greed, but perhaps from despair.²³⁵ People may ravage the land as an immediate means of basic survival. They may cut trees, light fires, erode the soil, and pollute the waters, especially if they are displaced, un-woodsman-like urbanites forced back to the land by economic or political exigencies. It is perhaps of some consolation that societies on a downward arc and people with immediate and pressing survival needs do not often build dams, freeways or major installations that would irrevocably alter the visage of places like the Buffalo River. Thus, the impact of a struggle for subsistence, though temporarily disruptive, may be ultimately countered (as in the past) by the regenerative capacity of the natural processes.

There is another possibility. If an attitude, philosophy, jurisprudence, ethic or religion is deeply entrenched in the conscience and consciousness of a people, then it may weather an economic collapse or a political upheaval. In fact, sacred places in symbolic form and in reality can unify a group against other threats and problems. An untouchable sacred core can validate and dignify an aging society in the same way that it can an individual. In particular, indian tribes, have maintained the physical integrity of their sacred sites and their spiritual sense in spite of intense economic and political disruption.²³⁶ Indeed, the Taos Indians, the Sioux, and the Western Shoshone are vivid present examples of Indian nations under fierce economic pressures who have refused monetary substitutes, preferring to hold on to their spiritual, legal, and equitable claims on sacred lands.²³⁷

²³² NASH, *supra* note 169, at 35.

²³³ See OELSCHLAGER, *supra* note 214, at 133-71.

²³⁴ See ROBERT L. HEILBRONER, *BEYOND BOOM AND CRASH* 80-86 (1978).

²³⁵ WILLIAM JOHNSON, *MUDDLING TOWARD FRUGALITY* 180 (1978).

²³⁶ See, e.g., R.C. GORDON McCUTCHAN, *THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE* (1991).

²³⁷ *Id.* See also Richard Pemberton, 'I Saw That It Was Holy': *The Black Hills and the Concept*

A society in decline may in fact need its spiritual polestars even more than one in ascendance. The reality, the vision and the philosophy of untouchable places like the Buffalo River can give solace²³⁸ and comfort to a society as well as its individuals. The timeless rhythms of a free-flowing river can sustain, can heal and can even point the way toward resurrection and future better days of balance. The words and thoughts that are tied to these rhythms can provide an incantation in the twilight and an anchor for the evolving law.

Margaret and Harold Hedges, originally from the Kansas City area, have paddled the Ozark rivers since World War II, almost half a century. Of all the streams, they have loved the Buffalo most, and they have been fierce, unyielding advocates in the long fight to preserve and honor it. In 1968, four years before the Buffalo became a National River, they left the big city life, bought seven hundred acres in the Hailstone Canyon and built a beautiful wood and stone house within sight and earshot of the river.²³⁹ They donated the fee interest in the land to the Park Service in 1972, retained a life estate, and continued living by the river until 1990, when a suspicious fire destroyed their home on New Years Eve.²⁴⁰ In a filmed interview made the summer before the fire, Margaret Hedges who was in her seventies but was still attractive and vibrant, said:

The river is the pulse of my life. When I wake up in the morning, the first thing I hear is the river running. I wonder 'Is the river up today? Did it rise last night?' It means almost everything to me.²⁴¹

Today, after the fire, the Hedges live in Harrison, a few miles from the river. Their house in the Hailstone is forever gone, rebuilding precluded by their age as much as the law, but their passion for the river remains. During their lives, their deep feelings for the place have shaped their philosophy and in turn, the laws that establish and protect the Buffalo National River. The river gave to them and they gave in return. Their lives have become entwined with the river; they will endure along with it. We can join them.

of *Sacred Land*, 3 LAW AND INEQ. J. 287 (1985); EDWARD LAZURUS, BLACK HILLS WHITE JUSTICE (1991); MANDER, *supra* note 147, at 303-18.

²³⁸ See GRETEL EHRLICH, THE SOLACE OF OPEN SPACES (1985).

²³⁹ See COMPTON, *supra* note 8, at 222-23.

²⁴⁰ *Id.*

²⁴¹ See THE BUFFALO RIVER: A NATIONAL TREASURE (T.L. Bass ed., 1991).