“FORGIVE U.S. ITS TRESPASSES?”: LAND TITLE DISPUTES WITH THE SOVEREIGN—PRESENT REME- DIES AND PROSPECTIVE REFORM

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The United States is the owner of some 755 million acres of land—almost one-third the total acreage of the nation.¹ Nearly 700 million of these acres constitute what remains of the original public

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1. ONE THIRD OF THE NATION’S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION 19-20 (1970) [hereinafter cited as PLLRC REPORT]. The Public Land Law Review Commission (PLLRC) was established in 1964 to make a comprehensive review of the public land laws of the United States and the rules and regulations promulgated thereunder, and to determine whether and to what extent revisions thereof are necessary. Pub. L. No. 88-606, 78 Stat. 982. The research program of the Commission included staff and consultant studies of some 33 individual subject areas and provides an invaluable source of information about the public lands. The individual manuscripts and their availability are listed in PLLRC REPORT 318-19. All the records and files of the Commission have been deposited in the National Archives in approximately 50 large rather dusty cardboard boxes, and may be examined there by the public.

THE FOLLOWING ADDITIONAL HEREINAFTER CITATIONS WILL BE USED IN THIS ARTICLE:

L. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES (1970) [hereinafter cited as JAYSON];

P. NICHOLS, EMINENT DOMAIN (3d rev. ed. 1969) [hereinafter cited as NICHOLS];

D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT (1970) [hereinafter cited as SCHWARTZ & JACOBY, TEXT];

Hearings on S. 3568 [Sovereign Immunity] Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. (1970) [hereinafter cited as *Hearings on Sovereign Immunity*];

Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH.

L. REV. 387 (1970) [hereinafter cited as Cramton];

S. 216, 92d Cong., 1st Sess. (1970) [hereinafter cited as SENATE PASSED BILL];

S. 2805, 92d Cong., 1st Sess. (1971) [hereinafter cited as JUSTICE BILL].

domain,² while the remaining 55 million have been acquired from non-federal owners.³ Although almost half of it is in Alaska, some 400 million acres are located within the continental states—especially in the West.⁴ Because federal land ownership is so pervasive—Minnesota, for example, has federal lands which exceed the area of Connecticut, and ten other non-western states each contain federal lands which approximate or exceed the area of Delaware⁵—it is vitally important in almost all the states. It is even important in urban areas, where the federal government is becoming, albeit unwillingly, a signif-

2. The original federal public domain consisted of cessions by seven of the original states to the federal government of some 233.4 million acres lying westward of their present boundaries to the Mississippi River. Thereafter, through purchase and treaty, the United States acquired an additional billion or more acres. PLLRC DIGEST OF PUBLIC LAND LAWS vii (1968) (prepared for the PLLRC by Shepard's Citations, Inc.).

3. The bulk of the federal land subject to the PLLRC's review is managed by the Bureau of Land Management of the Department of the Interior. The Bureau is responsible for 62% of the total, including the more than 465 million acres of public land which have never been set aside for particular uses. This is principally land not considered suitable for farming or for inclusion in national parks and forests; about two-thirds of it is in Alaska. The United States Forest Service of the Department of Agriculture manages 25%, the Department of Defense 4%, the Fish and Wildlife Service of the Department of the Interior 4% and the National Park Service of the Department of the Interior 3%. All other agencies manage a total of 2%. PLLRC REPORT 20-22, 331-34.

In the last ten years, more than 200,000 individual parcels containing more than ten million acres have been acquired by purchase and condemnation by the United States at a total cost in excess of \$1.6 billion. At the present time, some 18,000 parcels of land are being acquired in pending condemnation cases. Kashiwa, *The United States and Its Relation to the Land Title Profession*, 40 TITLE NEWS 2 (Aug. 1971).

4. Federally owned land in the 11 western states totals about 350 million acres and is distributed in percentages of total state area as follows: Arizona 44.6%; California 44.3%; Colorado 36.3%; Idaho 63.9%; Montana 29.6%; Nevada 86.4%; New Mexico 33.9%; Oregon 52.2%; Utah 66.5%; Washington 29.4%; Wyoming 48.2%. In Alaska, 95.3% of all land is federally owned. PLLRC REPORT 327. A sizable portion of the federally owned acreage in Alaska is subject to disposition under rights granted by Congress to the state and to Alaska natives, although the exact extent of such rights is in dispute. Alaska Statehood Law of 1958 § 4, 72 Stat. 339, *as amended*, Alaska Omnibus Act of 1959, 73 Stat. 141; Alaska Native Claims Settlement Act, P.L. 92-203 (1971).

5. Fifteen non-western states, plus the District of Columbia, each have 5% or more of their total land area federally owned, as follows: Arkansas 9.4%; District of Columbia 28.4%; Florida 9.8%; Georgia 5.6%; Hawaii 9.7%; Michigan 9.1%; Minnesota 6.7%; Mississippi 5.2%; New Hampshire 12.2%; North Carolina 6.2%; South Carolina 5.8%; South Dakota 7.0%; Tennessee 6.4%; Virginia 8.6%; West Virginia 6.4%; Wisconsin 5.1%. The percentage of federal land in the remaining states is as follows: Alabama 3.4%; Connecticut 0.3%; Delaware 3.0%; Illinois 1.5%; Indiana 1.8%; Iowa 0.6%; Kansas 1.3%; Kentucky 4.8%; Louisiana 3.6%; Maine 0.7%; Maryland 3.0%; Massachusetts 1.4%; Missouri 4.3%; Nebraska 1.5%; New Jersey 2.3%; New York 0.8%; North Dakota 4.8%; Ohio 1.0%; Oklahoma 3.2%; Pennsylvania 2.1%; Rhode Island 1.2%; Texas 1.8%; Vermont 4.4%. PLLRC REPORT 327.

icant land owner.⁶ The United States has, in addition, granted or sold over one billion acres of land,⁷ often retaining property interests of one sort or another.⁸ The scope of contact between federal and private land interests is indicated by the length of the boundaries between the national forests alone and privately owned land, which are estimated to total over 270,000 miles⁹—the approximate distance to the moon.¹⁰

In this setting, it is inevitable that land title disputes will arise between the United States and private parties.¹¹ It will, therefore, be the purpose of this article to examine the judicial remedies presently

6. *U.S. Now Big Landlord in Dacaying Inner City*, N.Y. Times, January 2, 1972, at 1, col. 4. The article quotes George Sternlieb, Director of the Center for Urban Policy Research at Rutgers University, and a member of President Nixon's task force on housing, as noting that there is every indication that the federal government through the process of foreclosures, defaults of mortgage payments and overseeing the management of federally subsidized projects on the verge of bankruptcy will "end up owning or operating a high percentage of housing in the central cities."

7. PLLRC REPORT 27.

8. The major examples appear to be "(1) outstanding interests of the United States in railroad rights-of-way, (2) mineral and other reservations in dispositions of lands under the public land laws and (3) defeasible titles or interests granted under the public land laws." Letter from Acting Secretary of the Interior to Wayne N. Aspinall, dated September 6, 1963, in 1964 U.S. CODE CONG. & AD. NEWS 3746, 3750. See also 43 U.S.C. § 1424 (1970) ("patents and other evidences of title may contain such reservations and reasonable restrictions as are necessary in the public interest . . ."); *Exceptions and Reservations in United States Patents to Public Lands*, 35 TITLE NEWS 2 (Mar. 1956). The PLLRC recommends even greater use of covenants and easements, both in disposal of land and its acquisition. PLLRC REPORT 82-83, 214, 268. The federal government also holds reserved mineral interests in over 62 million acres of land, the surface of which is in non-federal ownership. PLLRC REPORT 137.

9. Of the 270,000 miles of boundary, approximately 253,000 need to be established or re-established. PLLRC REPORT 260. The national forests comprise about 180 million acres. *Id.* at 21.

10. This distance, in the author's boyhood used as a common measurement for near-infinity, seems these days to be much less impressive; as a mostly undefined boundary line, however, it still is a long string of miles.

11. For economy of words, "land" shall be defined to include all interests in real property. The opposing party in a dispute with the United States—who may be an individual, private corporation or state or local governmental unit—over title to a real property interest shall be called a "private disputant." A dispute over title to real property interests between a private disputant and the United States is a "land title dispute with the United States." Such a dispute between two private disputants is a "private land dispute."

An interesting and vivid example of how such land disputes may arise, and the course they may take, is the North Carolina case where a forest ranger faced trial on a charge that he had his men bulldoze a large hole and bury a man's mobile home and barn in it. These actions allegedly occurred after a dispute over ownership of about an acre of mountain land. "The United States Forest Service considers the land part of the Pisgah National Forest, but 89-year old Cannon McColl argues that he laid claim to the land legally several years ago after it had ceased being used as a school site." N.Y. Times, March 7, 1971, § 1, at 35.

available to such private parties and to explore the prospects and problems of statutory reform in that narrow, if somewhat neglected,¹² cranny¹³ of the law.

12. Although historical reviews of the management and disposal of the public domain are many, there is a surprising paucity of legal source material relating specifically to the intricacies of judicial relief in land title disputes with the United States. Within the past several years, however, as discussed in this article, an upsurge of interest has developed and important reform steps seem underway. Most significant is the recent formal proposal by the United States Department of Justice that legislation be enacted permitting quiet title suits against the United States and the subsequent passage by the Senate of such a bill. See notes 286-87 *infra* and accompanying text. The saga of United States public land history, rich in romance and intrigue, is described in P. GATES & R. SWENSON, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968) (which also has an extensive bibliography at 773-96). See also V. CARSTENSEN, *THE PUBLIC LANDS* (1963); M. CLAWSON & B. HELD, *THE FEDERAL LANDS: THEIR USE AND MANAGEMENT* (1957); M. ROHRBOUGH, *THE LAND OFFICE BUSINESS* (1968).

13. "Nook" would have been the alliterative choice of words, but it was replaced by "cranny" when I found that the latter was defined as an "obscure nook." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 194 (1967).

Outside the scope of this article is any detailed, specialized discussion of the body of law relating to disputes between private individuals and the United States arising out of administrative activities in relation to public lands. A massive study of judicial review of determinations made by the executive branch relating to land use and disposal appears in Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From the Public-Land Cases*, 68 MICH. L. REV. 867 (1970). See also C. MCFARLAND, *ADMINISTRATIVE PROCEDURES AND THE PUBLIC LANDS* (1969); Peak, *Judicial Review of Administrative Actions of the Bureau of Land Management and Secretary of the Interior*, 9 ROCKY MOUNT. L. REV. 225 (1964); Comment, *The Conservationists and the Public Lands: Administrative and Judicial Remedies Relating to the Use and Disposition of the Public Lands Administered by the Department of the Interior*, 68 MICH. L. REV. 1200 (1970). Some similarity, of course, exists between this area and the garden-variety dispute over property rights, but conceptually a distinction may be drawn between situations where an individual is resisting a governmental assertion of ownership, or another property right, in land that he claims he owns and situations where he claims a denial of alleged rights vis-a-vis the sovereign—for example, the denial of a grazing permit, mining claim or lease, see, e.g., *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970); *Udall v. Tallman*, 380 U.S. 1 (1965); *Cord v. Morton*, 449 F.2d 327 (1971), or their cancellation as authorized by law. See, e.g., *Boesche v. Udall*, 373 U.S. 472 (1963). Put another way, in the former case the individual's dispute is over a governmental claim of ownership to his property; in the latter, he is usually complaining about how the government is managing or disposing of its own property. See note 61 *infra*.

Of course, in the former type of case, which involves disputed title, judicial interpretation of the public land laws may be required where the individual's claimed property interest turns upon the legal effect of some bygone action (or inaction) of the federal government—usually relating to the land's disposition—that is, the dispute is over the effect of administrative action rather than the legality of the action itself. See, e.g., *Ward v. Humble Oil & Ref. Co.*, 321 F.2d 775 (5th Cir. 1963); *United States v. MacMillan*, 331 F. Supp. 435 (D. Nev. 1971); *Seiford v. United States*, 280 F. Supp. 443 (D. Mont. 1968). It should also be observed that certain rights of individuals to public lands have been labeled as a form of property right, even though further procedures are required before "title" is bestowed by formal patent. A mining claim on public lands has, for example, been characterized as a "unique form of property"—that is, a "posses-

LAND TITLE DISPUTES WITH THE SOVEREIGN: PRESENT JUDICIAL REMEDIES AND THE DOCTRINE OF SOVEREIGN IMMUNITY

The arsenal of those engaged in land title disputes is stocked with many weapons—common-law and statutory, civil and criminal, ancient and modern. Although their details rapidly grow dim, the concepts of trespass, ejectment, bills of peace and bills *quia timet* are part of the lore of lawyers, and they, or their contemporary counterparts, exist in all states. The choice between these remedies in private land disputes is principally determined by the relief desired—recovery of possession, damages or declaratory relief.¹⁴ Regardless of the nature of the relief sought, however, one transcendent obstacle faces an aggrieved party when the land title dispute is with the United States: the doctrine of sovereign immunity, which provides that the United States, as sovereign, may not be sued without its consent.¹⁵ Since the

sory interest in land that is 'mineral in character.'" *Best v. Humboldt Mining Co.*, 371 U.S. 334, 335 (1963), *quoting* *Cameron v. United States*, 252 U.S. 450, 456 (1920). The initial determination of the validity of which, however, has been entrusted to the Department of Interior, 371 U.S. at 336, and until such determination, and perfection by issuance of a patent, legal title remains in the United States. 252 U.S. at 459-60. *See United States v. Delta Dev. Co.*, 322 F. Supp. 121, 128 (E.D. La. 1970).

14. Later in this article, some specifics of the remedies available in private land disputes are briefly set out. See notes 140-55 *infra* and accompanying text. The variation in details from state to state, of course, is great.

15. The scope of the doctrine in its fullest flower was set forth in *Lynch v. United States*, 292 U.S. 571 (1934) as follows:

[C]onsent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration [citations omitted]. The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress [citations omitted] and to those arising from some violation of rights conferred upon the citizen by the Constitution [citations omitted]. The character of the cause of action—the fact that it is in contract as distinguished from tort—may be important in determining (as under the Tucker Act) whether consent to sue was given. Otherwise, it is of no significance. For immunity from suit is an attribute of sovereignty which may not be bartered away. *Id.* at 581-82.

For the latest Supreme Court addition to the endless stream of citation to sovereign immunity, see *Honda v. Clark*, 386 U.S. 484, 500-01 (1967). *See also United States v. Sherwood*, 312 U.S. 767 (1941). An outstanding discussion of the subject area, with an analysis of its application to land disputes as to which this article is singularly indebted, appears in Cramton. *See also* K. DAVIS, *ADMINISTRATIVE LAW* § 25.01 (1959); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* ch. 6 (1965); Byse, *Proposed Reforms in Federal 'Nonstatutory' Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479 (1962). A long listing of scholarly output on the subject may be found in Scalia, *supra* note 13, at 867 n.1.

immunity is viewed as a defect affecting the subject matter jurisdiction of federal courts, federal officers or attorneys cannot confer jurisdiction by purporting to waive the sovereign's immunity—that is a power enjoyed only by the Congress.¹⁶

The rationale for this purely technical defense has been shifting and unclear. The handiest shibboleth in its support has been that “the king can do no wrong,” with the United States now sitting on the sovereign's throne¹⁷—although this, of course, expresses a result, not a reason. The only rationale presently accorded any degree of respect is that official actions of the government require protection from undue judicial interference.¹⁸ Regardless of its justification, however, the doctrine has enjoyed a general applicability which has prevented suits against the United States *eo nomine*, except as authorized by Congress. Such a draconian doctrine, of course, has resulted in various procedural devices to circumvent its harsher features—for example, the “officer suit,” which indulges the fiction that the doctrine does not apply, in certain circumstances, when suit is brought against an individual government officer or employee, rather than the United States.¹⁹ There are, in addition, several major statutory measures which ameliorate the impact of the doctrine. These include, notably, the Tucker Act, waiving sovereign immunity as to contracts,²⁰ and the

16. See, e.g., *Minnesota v. United States*, 305 U.S. 382, 388-89 (1939); *Case v. Terrell*, 78 U.S. (11 Wall.) 199 (1871).

17. Another has been that

[t]he reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants. A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. *United States v. Shaw*, 309 U.S. 495, 501 (1940). Cf. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

18. See Cramton 397.

19. See the authorities cited in note 15 *supra*. See also Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963). At least where land title disputes are involved, it appears that such “officer suits” will only lie where the officer's action “is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.” *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 702 (1949). Whether this is necessarily the case where the dispute involves the public land laws of the United States will be subsequently discussed. See notes 55-61 *infra* and accompanying text.

20. The Tucker Act, Act of March 3, 1887, ch. 359, 24 Stat. 505, has since been amended, and now appears in various sections of the United States Code. Its principal provisions are in 28 U.S.C. § 1491, 1346(a)(2) (1970). Actually, the waiver as to contract disputes was first granted in 1855 by the establishment of the Court of Claims with advisory powers to the

Federal Tort Claims Act,²¹ waiving the immunity as to torts (albeit, in both cases, with some limitations). In a number of other areas, however, the doctrine continues to be applied in full force.²²

This much discussed and criticized doctrine will not be explored in any great detail, inasmuch as that task has already been ably accomplished by numerous scholars, who have exhaustively chronicled its various twists and turns.²³ Since, however, application of the

Congress. Act of Feb. 24, 1855, ch. 22, 10 Stat. 612. The history of the Court of Claims is extensively reviewed in Glidden Co. v. Zdanok, 370 U.S. 530 (1967). The Tucker Act also waives sovereign immunity in several other types of claims against the United States, such as those "founded . . . upon the Constitution."

21. The Federal Tort Claims Act enacted in the Legislative Reorganization Act of Aug. 2, 1946, ch. 753, §§ 401-24, 60 Stat. 812, 842, is also presently scattered throughout the Code, with its major provision in 28 U.S.C. § 1346(b) (1970). A number of torts, however, are excluded. See 28 U.S.C. § 2680 (1970). An exhaustive review of the FTCA and its provisions may be found in JAYSON. For a handy discussion of both the Tucker Act and the FTCA, see SCHWARTZ & JACOBY, TEXT.

22. Some of the latest examples of sovereign immunity at work are *Blaze v. Moon*, 440 F.2d 1348 (5th Cir. 1971) (denial of review of Civil Service Commission determination of no racial discrimination in hiring practice of the Army Corps of Engineers); *County of Bonner v. Anderson*, 439 F.2d 764 (9th Cir. 1971) (dismissal of title dispute with the United States); *Zapata v. Smith*, 437 F.2d 1024 (5th Cir. 1971) (dismissal of suit for back pay on account of allegedly unconstitutional dismissal of VISTA volunteers, although the court does note that the case could have been brought against the United States in the Court of Claims or district court under the Tucker Act). See generally Project, *Federal Administrative Law Developments—1971, 1972* DUKE L.J. 115, 233-52.

23. See note 15 *supra*. Perhaps the most virulent of the recent attacks is Davis, *Sovereign Immunity Must Go*, 22 AD. L. REV. 383 (1970). He criticizes sovereign immunity as a doctrine that "(1) often causes substantive injustice, (2) frequently results in final determinations without the safeguards necessary for procedural justice and (3) causes gross inefficiency in the allocation of functions between the officers and agencies, by preventing courts from resolving controversies they are especially qualified to resolve." *Id.* There is also a belief that executive department officials simply tend to act more carefully when they know their actions are subject to a second look. See *Hearings on Sovereign Immunity* 45. As applied to land title disputes, however, the full import of these considerations is relevant only where no Tucker Act relief is available. Where Tucker Act relief is not available, the claimant is unable to get clear title, and the determination of the issue of ownership can be made by an administrative officer without evidence, cross-examination, oral argument, briefs or an impartial tribunal. In addition, executive department officials, rather than the courts, decide issues of property law and statutory interpretation, which are functions courts are supremely equipped to handle. Based upon such criticism, some feel a need to do away with the doctrine entirely. The House of Delegates of the American Bar Association in February, 1970, adopted in principle a proposal to abolish nearly all remnants of the doctrine in the federal courts. See *Hearings on Sovereign Immunity* 55-60. One of the early recommendations of the Administrative Conference of the United States was along the same lines. See note 281 *infra* and accompanying text. A bill to amend § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), to accomplish such a general waiver of sovereign immunity was introduced in the 91st Congress, 2d Session, at S. 3568, and hearings were held on the bill on June 3, 1970. No action was taken on the bill. It was reintroduced as S. 598 in the 91st Congress.

doctrine in the area of land disputes causes considerable difficulty, a brief historical review will be necessary. It is plain that the doctrine bars the typical quiet title action directly against the United States as such.²⁴ The issue through the years has been whether a more or less equivalent result could be achieved by proceeding personally against an officer or agent of the United States, such as in an action of ejectment to regain possession of the disputed land.

Malone v. Bowdoin: The Door Seems to Close on Specific Relief

From Lee to Malone. In 1959 Buford Malone, Jr. was a Forest Service ranger in charge and in possession of a tract of land located in Jasper County, Georgia. The land had been purchased by the United States in 1936, at which time it was thought that the land was being acquired in fee simple ownership. In 1959 an ejectment action was brought by James A. Bowdoin and others against Malone, alleging that the interest obtained by the United States in 1936 was only the life interest of one Martha A. Sanders, and that plaintiffs, as successors to the interests of the remaindermen, were entitled to possession of the property. The United States pled sovereign immunity—that is, that a suit against an individual which is in effect a suit against the United States is subject to dismissal on that ground.

Although the district court dismissed on the sovereign immunity ground,²⁵ the Fifth Circuit reversed,²⁶ reasoning that ejectment, under Georgia law, involved possession and not title, and that it was bound by the long-standing decision of *United States v. Lee*.²⁷ *Lee* involved a plot of land which had come into the possession of the United States as a result of a default in the payment of taxes. Action had been brought in ejectment against the individuals occupying the land on behalf of the United States, upon the allegation that the proffered payment of taxes had been wrongfully refused. On these facts, the Supreme Court held that where the agent of the United States is tortiously and wrongfully holding possession of property which is in fact owned by the private claimant, the doctrine of sovereign immunity will not protect the agent from an action for specific relief.

24. See, e.g., *United States v. Brosnan*, 363 U.S. 242 (1960); *Ward v. Humble Oil & Ref. Co.*, 321 F.2d 775 (5th Cir. 1963).

25. 186 F. Supp. 407 (M.D. Ga. 1959).

26. 284 F.2d 95 (5th Cir. 1960), *rehearing denied*, 287 F.2d 282 (5th Cir. 1961), *rev'd*, 369 U.S. 643 (1962).

27. 106 U.S. 196 (1882).

When *Malone* reached the Supreme Court it, in turn, reversed the Fifth Circuit.²⁸ The Court considered the case to fall within the category of suits against government agents specifically affecting property in which the United States claimed an interest,²⁹ but observed that a number of cases had denied relief under similar circumstances on the ground of sovereign immunity.³⁰ In so ruling, the Court chose to follow its holding in *Larson v. Domestic & Foreign Commerce Corporation*,³¹ which involved a suit against the War Assets Administrator for specific performance of a contract for the sale of personality, based upon the passage of title to the plaintiff buyer from the United States. In upholding the United States' defense of sovereign immunity, the Court in *Larson* postulated the rule that the action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if his action exceeded his statutory powers or if the exercise of these powers in the particular case was constitutionally void.³² The action of construing the contract and refusing delivery, the Court held, was within the statutory powers of the War Assets Administrator and, since there was no claim of an unconstitutional taking, the action must fail as an attempt to enjoin the sovereign.³³ The Court in *Malone* distinguished *Lee*, as it had in *Larson*, as a situation involving an unconstitutional taking of property, since at that time no monetary

28. 369 U.S. 643 (1962).

29. As the Court acknowledged, in the years following *Lee*, its principles had been applied in a number of cases in a variety of factual situations. See *Malone v. Bowdoin*, 369 U.S. 643, 646 n.6 (1962). One of the most notable was *Land v. Dollar*, 330 U.S. 731 (1947), decided only two years prior to *Larson*. There plaintiffs were attempting to recover the shares of stock which they alleged had been pledged as collateral for a debt which had been paid. The United States alleged that the stock had in fact been transferred outright. The Supreme Court analyzed the claim as resting on the common law right of pledgors to recover pledged property on payment of the debt. In following and approving *Lee*, the defense of sovereign immunity was rejected. *Id.* at 737.

30. 369 U.S. at 646 n.7. It also acknowledged that an attempt "to reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task." *Id.* at 646.

31. 337 U.S. 682 (1949).

32. *Id.* at 701-02. The doctrine clothing the possessor with the immunity of the sovereign is not limited to cases where the United States itself has the right of possession. Even prior to *Malone*, it was declared as settled that title to land in possession of the United States under a claim of interest cannot be tried as against the United States by a suit against persons holding as lessees from it. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 226 (1957). See also *Simons v. Vinson*, 394 F.2d 732 (5th Cir. 1968); *Ward v. Humble Oil & Ref. Co.*, 321 F.2d 775 (5th Cir. 1963).

33. 337 U.S. at 703.

relief was available. Today, it was noted, damages for a taking of property actually owned by the plaintiff could be obtained by a suit in the Court of Claims under the Tucker Act.³⁴ Since in *Malone* there was neither an unconstitutional taking nor any allegation that the defendant had exceeded his statutory powers, the two exceptions to the immunity doctrine articulated by the Court in *Larson* were not applicable.

The aftermath of Malone. *Malone v. Bowdoin* is, of course, the law of the land in land title dispute cases,³⁵ and although plaintiffs keep knocking, it seems to close the door upon specific relief.³⁶ The question, then, is whether anything remains of the *Lee* rule that sovereign immunity will not immunize the wrongful holding of property owned, in fact, by a private party³⁷—that is, do any possibilities remain for specific relief in land title disputes with the United States? Three faint shreds of hope for plaintiffs do seem extant.

(1) *Acts of the sovereign's agent which exceed his authority.* The Ninth Circuit appears to be in the process of developing a theory which, if pursued, could on occasion neatly circumvent the holding

34. See notes 77-87 *infra* and accompanying text.

35. Indeed, the holding was reaffirmed in the very next year in *Dugan v. Rank*, 372 U.S. 609 (1963), which involved the taking of water rights by the United States without compensation; plaintiffs sought an injunction against diversion of river water. The Court dismissed the action since no waiver of immunity had occurred and dismissed the suit against the federal officers since it did not involve actions which either exceeded statutory power or were constitutionally void. The Court held that the United States was empowered to acquire the water rights by physical seizure rather than formal condemnation. In yet a third case, *Hawaii v. Gordon*, 373 U.S. 57 (1963), the doctrine was also applied to an original action by the State of Hawaii against the Director of the Bureau of the Budget to require a determination of whether certain land was needed by the United States and, if not, to require its conveyance to Hawaii. *Malone*, *Dugan* and *Gordon* tend to be discussed and cited as a trio. For an analysis of *Malone* in context of the other cases, see Roarty, *Lee, Land, Larson and Malone—Sovereign Immunity Revisited*, 43 TEX. L. REV. 1062 (1965).

36. This lack of specific relief is made clear by two cases which recently arose in the Fifth Circuit. In one, *Simons v. Vinson*, 394 F.2d 732 (5th Cir.), *cert. denied*, 393 U.S. 968 (1968), a suit to quiet title to a tract of land, apparently valuable for its oil rights, formed by accretion along a river which formed the boundary between land owned by the United States and land owned by plaintiffs, was dismissed because of sovereign immunity. Similarly, in *Gardner v. Harris*, 391 F.2d 885 (5th Cir. 1968), the plaintiff's predecessor in interest had sold the United States a tract of land which became part of a parkway. The conveyance had been subject to an access easement, but the federal officer in charge of the parkway erected barricades across the right-of-way. In an injunction suit seeking removal of the barricades, it was held that sovereign immunity barred the action. See also *Switzerland Co. v. Udall*, 337 F.2d 56 (4th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); *Ward v. Humble Oil & Ref. Co.*, 321 F.2d 775 (5th Cir. 1963); *Mims v. United States*, 324 F. Supp. 489 (W.D. Va. 1971).

37. See note 27 *supra* and accompanying text.

in *Malone*. An early hint of the development of the doctrine was the refusal in *Turner v. Kings River Conservation District*³⁸ to adopt the alleged *Larson* rule that suit may not be maintained against government officers *even* for unauthorized or unconstitutional acts if the relief would “expend itself upon the property of the United States” or would “require affirmative action by the sovereign.”³⁹ Rather, it read *Dugan v. Rank*⁴⁰ to allow such suits where the action could be shown to have been unauthorized or unconstitutional,⁴¹ and then proceeded to examine in detail whether the relevant statute authorized the disputed taking by the federal defendants of plaintiffs’ alleged water rights.

Subsequently in *Andros v. Rupp*,⁴² the court espoused a rather curious doctrine which would apparently look to the individual or entity in whom *record* title is vested. In *Rupp* the United States was asserting a right to manage plaintiff’s land as if it were part of the national forest. Plaintiff, who was conceded to have a valid patent, brought the action to enjoin the defendant, supervisor of the national forest within which plaintiff’s land lay, from interfering with his use and enjoyment of his land. The court held that since title was admittedly in the plaintiff, the defendant had no statutory power to control the property. *Larson* and *Malone* were distinguished as cases where *record* title was in the sovereign. Furthermore, the court said, statu-

38. 360 F.2d 184 (9th Cir. 1966).

39. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949). In this famous footnote 11, the *Larson* Court said that “[o]f course a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.” In *Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969), the court read the footnote as permissive, rather than mandatory, suggesting only that in such circumstances, the suit *might* be dismissed “because the relief sought would work an intolerable burden on governmental functions, outweighing any consideration of private harm.” *Id.* at 1318. *But cf.* *Knight v. New York*, 443 F.2d 415 (2d Cir. 1971).

40. 372 U.S. 609 (1963).

41. 360 F.2d at 189-90. This holding was reaffirmed more recently in *Washington v. Udall*, 417 F.2d 1310 (9th Cir. 1969), where the court was again willing to examine whether the Secretary of the Interior had exceeded his statutory authority in determining that a 160-acre limitation on land entitled to water from reclamation projects applied to state-owned land—although a vigorous dissent contended the court was gutting *Malone*. Actually, the case represents one of the few examples of serious consideration by a court of the possible application of the *Larson-Malone* doctrine to a case involving an administrative denial of alleged private rights to receive federal property. See note 13 *supra*. See also the cases cited in note 49 *infra*.

42. 433 F.2d 70 (9th Cir. 1970).

tory authority need not be cited by the plaintiff to show that the defendant had exceeded his powers, for "we know of no statute saying that a government official shall not take private property;" indeed, "the defendant as a supervisor of property belonging to the United States does not, by definition, have authority to control property which does not belong to the United States."⁴³ This view was reaffirmed in *Armstrong v. Udall*,⁴⁴ which involved the question of whether a parcel of land was included in a United States patent. The case was remanded, significantly, for a specific finding of whether the parcel had been included within the patent. If so, the court said that, under *Andros*, the action would lie; if not, "then the apparent title would be in the United States and the action is one against the United States without its consent," which would be barred by *Malone*.

The root question in these cases appears to be the determination of when a federal official is exceeding his statutory powers, subjecting himself to suit without the cloak of sovereign immunity. Although the argument may logically be made that an officer is not authorized to possess that which the sovereign does not own, *Larson* seems to have expressly considered and rejected this approach. There it was held that the defendant's statutory authority included the power to construe contracts and to withhold delivery in cases where he believed the contract had not been complied with—that is, simply because his construction may have been wrong, it does not follow that it was unauthorized.⁴⁵ Though subjected to biting criticism, the distinction between "error" and "authority" seems to have been accepted.⁴⁶ It would appear from *Larson* that if the officer were a private agent and if the government were a "principal," the action would be within the "authority" of the officer if the government would be liable for his acts.⁴⁷

The fact of the matter, however, is that this issue has not been fully tested in land dispute cases. In *Malone*, no allegation was even made that Malone exceeded his delegated powers in occupying the land in

43. *Id.* at 72.

44. 435 F.2d 38 (9th Cir. 1970).

45. 337 U.S. at 703.

46. See Cramton 406-08, 412-14; Comment, 68 MICH. L. REV., *supra* note 13, at 1222-23.

47. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 692-95 (1949). Cf. *Switzerland Co. v. Udall*, 337 F.2d 56, 60 (4th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965) (blocking of alleged easement); *Hudspeth City, County & Reclamation Dist. v. Robbins*, 213 F.2d 425, 432 (5th Cir.), *cert. denied*, 348 U.S. 833 (1954) (allegedly vested water rights).

question. In *Dugan*, the seizure of the water rights was found to be authorized by statute, and, indeed, by specifically deciding the issue, the court was by implication suggesting that if such authority had not existed, the action against the officers individually would lie within the *Larson* exception.⁴⁸

Andros and *Armstrong* may show the way to relief in some circumstances. They appear to stand for the proposition that while plaintiff will never be able to show a *limiting* statute expressly prohibiting defendant from interfering with land not owned by the sovereign, it may be presumed that at least where record, or even colorable, title is vested in the plaintiff, defendant will be exceeding his authority in taking possession of the property unless affirmative statutory authorization to do so can be shown. Indeed, it would not untenably stretch the point to limit *Malone* to cases where there is no allegation of colorable merit that the government officer acted beyond his authority,⁴⁹ particularly where the act complained of did not occur upon

48. It is true that lower court cases such as *Simons* and *Gardner* have had this argument presented to them, but the plaintiffs in those cases seem in part to have been blocked by the requirement in *Larson* that "plaintiff set out in his complaint the statutory limitation upon which he relies." 337 U.S. at 690. In *Simons*, the dilemma was recognized and plaintiffs alleged that dealing with the disputed land was beyond the Secretary's authority since the United States did not in fact own it. The court labeled the argument "circuitous" because it assumed the ultimate issue, which the court said must "necessarily" be established by a suit against the United States. 394 F.2d at 737. As the dissent noted, *id.*, the latter assertion seems erroneous in that the relief sought by the plaintiff was in essence to gain control over the land, which, as in *Lee*, could be attained by successful action against the federal officers. In *Gardner*, the court found authority in the statutes for the defendant to administer and maintain the parkway, and the act complained of, blocking plaintiff's alleged easement, occurred on the parkway property of the federal government. 391 F.2d at 888. The case is, thus, distinguishable from a situation in which the acts complained of occurred off of clearly federal property.

49. The suggestion that a clearly public act by a federal officer was "unauthorized" worked in *Zager v. United States*, 256 F. Supp. 396 (E.D. Wis. 1966). There the Bureau of Land Management had resurveyed the property in dispute (32 acres), determined that it belonged to the United States, and taken possession. In a quiet title action, the court held that since the plaintiff had alleged that the resurvey was beyond the delegated authority of the federal officials, the action would not be dismissed on grounds of sovereign immunity presumably because, for jurisdictional purposes, averments in the complaint will be accepted at face value, unless frivolous. *Carter v. Seamans*, 411 F.2d 767, 770-71 (5th Cir. 1969). See *Smith v. Katzenbach*, 351 F.2d 810, 814 (D.C. Cir. 1965). One other land title case to the same effect is *Blask v. Sowl*, 309 F. Supp. 909 (W.D. Wis. 1967). For other recent cases not involving title disputes, which depart from the strict *Larson* rule, see *Rockridge v. Lincoln*, 449 F.2d 967 (9th Cir. 1971) (unauthorized non-action); *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045 (D.C. Cir. 1971) ("[T]here is no magic about real estate, or its ownership by the United States, which hedges its guardians about with an immunity.").

unquestionably federal property.⁵⁰

(2) *Unconstitutional acts—those with no “public use.”* In rare circumstances, it is conceivable that even if the federal officer's action is “authorized,”⁵¹ it may be held to exceed the sovereign's constitutional powers.⁵² Such a case might arise, for example, where a taking would not be constitutionally authorized because no “public use” was involved.⁵³ It has been intimated that under these circumstances an action for specific relief would be permitted, presumably because of

50. In *United States v. 2005.32 Acres of Land*, 160 F. Supp. 193 (D.S.D. 1958), a district court held that the Secretary of the Army had no statutory power to condemn certain tribal lands. On appeal the judgment was vacated and the cause remanded with directions to dismiss as moot. 259 F.2d 271 (8th Cir. 1958). It has also been held on the district court level that failure to comply with the requirements of the statute would be a good defense to the condemnation. *United States v. 37.6 Acres of Land*, 126 F. Supp. 789 (D. Conn. 1954); cf. *United States v. 10.69 Acres of Land*, 425 F.2d 317 (9th Cir. 1970) (Department of Transportation attempted to condemn land held by another department of the government: appropriate administrative procedures must be complied with).

51. Rarely has the condemnation of a particular property or property interest been voided as beyond the statutory authority of an administrative officer. Where there is some statutory basis for the action, the courts will only review it upon an allegation that the condemnation is arbitrary, capricious or in bad faith. *United States v. Carmack*, 329 U.S. 230 (1946). And although various courts of appeals have said they would review such an action, no holding has been found at that level that a condemnation allegedly pursuant to a valid statute was ultra vires the officer's authority. See *Chapman v. Public Util. Dist. No. 1*, 367 F.2d 163 (9th Cir. 1966); *United States v. 64.88 Acres of Land*, 244 F.2d 534 (3d Cir. 1957); *United States v. Certain Real Estate*, 217 F.2d 920 (6th Cir. 1954); *United States v. Certain Parcels of Land*, 215 F.2d 140 (3d Cir. 1954); *Simmonds v. United States*, 199 F.2d 305 (9th Cir. 1952); *United States v. Meyer*, 113 F.2d 387 (7th Cir. 1940). The analysis used is that once the statute is held valid, it is an administrative function to determine the particular properties necessary to carry out the legislative program; the courts will not second guess the executive branch. See *United States v. 80.5 Acres of Land*, 448 F.2d 980 (9th Cir. 1971).

52. For the classic example of specific relief against a totally unauthorized appropriation of property by the executive branch, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

53. U.S. CONST. amend V. Cf. *Berman v. Parker*, 348 U.S. 26 (1954); *Puerto Rico v. Eastern Sugar Ass'n*, 156 F.2d 316 (1st Cir.), cert. denied, 329 U.S. 772 (1946). It should be noted that the Supreme Court has never invalidated a taking by a federal agency for the reason that the particular project lacked a public use—apparently because a government of enumerated powers acts for a public use if the act is for an object within the authority of Congress. See *PLLRC Committee Print No. 31*, 88th Cong., 2d Sess. 51-53 (1965). Cf. Comment, *The Public Use Doctrine on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

There have been a few instances at lower court levels where the statute pursuant to which condemnations were made was held unconstitutional as serving no public purpose. *United States v. Certain Lands in Louisville*, 78 F.2d 684 (6th Cir.), cert. granted, 296 U.S. 567 (1935), petition for cert. dismissed, 297 U.S. 726 (1936); *United States v. Certain Lands in Detroit*, 12 F. Supp. 345 (E.D. Mich. 1935).

the unconstitutionality of the action.⁵⁴ An unconstitutional taking may even have occurred in the *Simons* case—where the dispute apparently arose because of the existence of oil on the property—since the United States could not, presumably, have exercised its power of eminent domain to acquire the property in the absence of an established public purpose or constitutional function.

(3) *Public land law decisions.* Finally, mention should be made of the inapplicability of *Malone* to disputes involving administrative decisions under the public land laws. Such cases, a somewhat disparate class from those generally involved in this article,⁵⁵ typically do not involve questions of title, but rather are attempts to obtain judicial review of administrative decisions principally involving refusals to grant a plaintiff rights in public lands or cancellations thereof as authorized by law.⁵⁶ An exhaustive recent study⁵⁷ has demonstrated that the doctrine of sovereign immunity has in practice presented little problem in this class of case, either before or after the *Larson* and *Malone* decisions.⁵⁸ However, a few post-*Malone* decisions essentially

54. See *Washington v. Udall*, 417 F.2d 1310, 1316 n.8 (1969). But cf. *Knight v. United States*, 443 F.2d 415 (2d Cir. 1971), where the court refused to order the return of property allegedly taken for a non-public use in violation of the Constitution—reading footnote 11 of *Larson* broadly to preclude such action. See note 39 *supra*.

55. See notes 13 *supra* and 61 *infra*.

56. A recent example in the Supreme Court is *Udall v. Taliman*, 380 U.S. 1 (1965), where the issue was the rightfulness of a denial by the Secretary of the Interior of an oil and gas lease to plaintiffs, to which they claimed they were entitled under the relevant statute. Mandamus was sought to compel the issuance of the lease. Without mentioning sovereign immunity, the Court undertook a careful analysis of the underlying legal issue—the interpretation of the relevant statute.

57. Scalia, 68 MICH. L. REV., *supra* note 13.

58. The article analyzes the cases in detail. *Id.* at 910-11. The principal problems are the familiar ones in review of administrative actions such as standing, jurisdiction, joinder, ripeness, exhaustion of administrative remedies, and the scope of review. See Comment, 68 MICH. L. REV., *supra* note 13, at 1220-43. To the extent that sovereign immunity remains a difficulty, the recent study of such judicial review of administrative action by the consultant for the PLLRC proposes a “simple statutory affirmation of the right to court review,” although recognizing other problems might exist. C. MCFARLAND, *supra* note 13, at 305. The proposed amendment to the Administrative Procedure Act, discussed at note 281 *infra* and accompanying text, should constitute an effective waiver of sovereign immunity as to such cases, or, if such action is unavailing, expansion of the statute herein proposed could be considered. But see note 252 *infra*. An occasional report does appear in which the *Malone* doctrine will be carried over to this class of case. See *Colson v. Hickel*, 428 F.2d 1046 (1970), involving a determination by the Secretary of the invalidity of scrip held by plaintiff, who asserted that by virtue thereof he was entitled to select a certain amount of federal land; the court dismissed the action on the basis of sovereign immunity. Concern over such instances was sufficient to cause the PLLRC consultant to comment that in this area the “precedents baffle lawyers, tempt government

appearing to be disputes over title have collaterally involved the interpretation of the public land laws and regulations, and the application of the sovereign immunity doctrine has been uneven. In *Brennan v. Udall*,⁵⁹ for example, the issue involved the scope of a reservation of oil and gas rights in a patent issued to plaintiff's predecessor in interest. The court rejected the defense of sovereign immunity and proceeded to review the extent of the reserved interest. On the other hand, in *Ward v. Humble Oil & Refining Co.*,⁶⁰ the plaintiff claimed a valid title through a patent by the United States to Mississippi under the Swamp Lands Act, and the court dismissed the action on the basis of *Malone*. It may simply be said that the long-standing tradition of judicial review of such administrative decisions may be sufficient in a given land title dispute involving a public-land law interpretation to overcome the impact of the *Malone* doctrine, particularly if the issue can be framed in terms of a review of an administrative decision.⁶¹

counsel, and feed the despair of commentators." C. MCFARLAND, *supra*, at 188. *Hawaii v. Gordon*, 373 U.S. 57 (1963), might also be considered a "public land law" case in this category, but is probably more accurately viewed as falling within the narrow category of original land actions by states in the Supreme Court, as to which the application of sovereign immunity has been the rule. See Scalia, *supra*, at 910 n.209.

59. 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967). See also *California Co. v. Udall*, 296 F.2d 384 (D.C. Cir. 1961).

60. 321 F.2d 775 (5th Cir. 1963). The plaintiff's demand was that the Secretary cancel leases to third persons on the ground that the leases clouded the title to the disputed land. As Professor Scalia points out, the case does not have the "smell" of a typical public land law case, as "the essence of the plaintiff's grievance was not that officers had denied him a grant to which he was entitled, but rather that they were interfering with land which he already owned." Scalia, 68 MICH. L. REV., *supra* note 13, at 912 n.212. Cf. *Seifert v. United States*, 280 F. Supp. 443 (D. Mont. 1968).

61. In *Brennan v. Udall*, 379 F.2d 803 (10th Cir.), *cert. denied*, 389 U.S. 975 (1967), for example, the court characterized the action as a review of a decision by the executive branch authorized by the APA, and followed the rule of determining the reasonableness of the interpretation of the relevant statute. *Id.* at 806.

While this analysis shows how the two classes of cases differ, it of course does not explain why they should differ, nor have the courts expressly recognized any distinction. History alone serves as one explanation. Indeed, the concept that courts will not hesitate to issue mandamus orders to require the disposal of public land, but will refuse to interfere on the grounds of sovereign immunity when the only issue is whether the land is the sovereign's in the first place seems convoluted. One distinction, however, may be drawn—resting on the underlying thesis that sovereign immunity is designed to prevent an unacceptable judicial interference with executive branch actions. Where the executive branch determination case deals with some aspect of the management or disposal of public land, the executive branch has already made a determination that something will be done with it, and judicial participation in the carrying out of that determination does not seem a particularly severe interference. In a land title dispute, however, it may well be that the executive branch activity bears no relation to its role as a disposer of public land. That is to say, the property occupied by the sovereign may be used as a fort, office

Alternatives to Specific Relief

What then, with *Malone* on the books, is the private party in a land title dispute with the United States to do? There may be alternatives available, even if the picture now facing the land disputant is, to say the least, often dismal. A discussion of these possible alternatives is necessary to frame the setting within which statutory reform must fit.

Existing waivers for specific relief. Although the sovereign may not be sued without its consent, it can consent. There is nothing in the property field equivalent to the near-blanket waivers which exist for contract and tort disputes,⁶² but efforts to obtain a statutory waiver permitting specific relief in disputes over certain land interests have been successful in three areas. The first occurred in 1931 in the area of mortgages and liens. Here, the Congress said that the United

building, national forest or in connection with a myriad of other governmental activities unrelated to its land management function. In such circumstances, the courts by disposing of the ultimate ownership issue may be much more likely to directly interfere with governmental action wholly unrelated to that of managing land. Another unarticulated distinction may well be that in the garden-variety dispute, when sovereign immunity is applied, at least compensation for the challenged governmental seizure of property can be achieved under the Tucker Act. In the public-land cases involving challenges to administrative determinations, a denial of judicial review will leave the claimant totally uncompensated.

62. Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), provides that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." On its face, this would appear to be a blanket waiver of sovereign immunity as to actions within the APA. In *Blackmar v. Guerre*, 342 U.S. 512 (1953), however, the Court indicated that the Act was not to be construed as such an implied waiver of all governmental immunity from suit, and a number of lower courts have specifically so held. See *Cramton* 417 n.143; *Scalia*, 68 MICH. L. REV., *supra* note 13, at 923 n.249. In *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 873-74 (D.C. Cir. 1970), the Court of Appeals for the District of Columbia found it "axiomatic" that the section constituted a waiver of sovereign immunity, citing cases from the Ninth and Fifth Circuits. *Cf. Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). However, in *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971), the court reviewed *Scanwell* and the cases on which it relied, noted that they had been later modified or overruled, and concluded that the waiver theory could not be sustained. This certainly is the suggestion of the several Supreme Court cases in the property dispute field between 1946 (the adoption of the APA) and 1964 which applied the doctrine of sovereign immunity with no mention of the APA. Even if the section should be held effective as a waiver, difficult questions are raised as to what constitutes "agency action" thereunder in the title dispute field. See Note, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968); Note, *Judicial Control of Administrative Inaction*, 57 U. VA. L. REV. 676 (1971); *cf. Rockbridge v. Lincoln*, 449 F.2d 967 (9th Cir. 1971). Problems would exist in subject-matter jurisdiction. See, e.g., *White v. Sparkhill Realty Corp.*, 280 U.S. 500 (1930); *In re Green River Drainage Area*, 147 F. Supp. 127 (D. Utah 1956); *Cramton* 448.

States may be sued in any federal district court, or in any state court having jurisdiction of the subject matter, to quiet title to, to foreclose a mortgage or other lien upon, to partition, or to condemn real or personal property on which the United States has or claims a mortgage or other lien.⁶³ Though it does provide a number of protective provisions—such as a requirement for judicial sale and a one-year mandatory right to redeem⁶⁴—the waiver can provide effective specific relief where the interest of the United States is in the nature of a lien.⁶⁵ From the reported cases, the section has been much used. However, attempts to persuade the courts to stretch the provision to cover disputes over other types of disputed titles have failed.⁶⁶ This is not surprising when it is recalled that acts of Congress waiving sovereign immunity are to be strictly construed, and exceptions not to be implied.⁶⁷

The strictness of this prohibition may be observed in the second area in which statutory waiver exists—namely, in actions for partition, where the United States is one of the tenants in common or a

63. 28 U.S.C. § 2410 (1970). The proponents of the legislation noted a clamor on the part of building associations and title and trust companies over the inability to unfetter real property from "oppressive and unendurable" government liens. *See* 72 CONG. REC. 1998 (1930). The United States was said to have its status the same as any other second-lien creditor, citizen, or corporation, and it should be put in no different a position. *Id.* at 3120. Thus the purpose of section 2410 was essentially to provide relief for mortgagees and other creditors rather than to relieve property holders in general.

However, the policy behind section 2410 seems also to militate for relief in the situations discussed in this article. The essence of the legislation was best described in the Senate report of the bill: The Government ought not to desire to occupy a dog-in-the-manger position with respect to its liens, neither taking steps to enforce them nor permitting others interested to test their validity or priority. S. REP. NO. 351, 71st Cong., 2d Sess. 2 (1930). Again, when the "quiet title" language was added in 1942, Attorney General Robert Jackson wrote to the Chairman of the House Judiciary Committee: "It appears that justice and fair dealing would require that a method be provided to clear real estate titles of questionable or valueless Government liens." H. R. REP. NO. 1191, 77th Cong., 1st Sess. 2 (1941).

64. 28 U.S.C. § 2410(c) (1970).

65. Some additional provisions relating specifically to tax liens and their enforcement appear in 26 U.S.C. §§ 7424-26 (1970).

66. *Stewart v. United States*, 242 F.2d 49 (5th Cir. 1957) (mineral rights); *Haggard v. Lancaster*, 320 F. Supp. 1252 (N.D. Minn. 1970) (right of way); *see, e.g., Zager v. United States*, 256 F. Supp. 396, 398 (E.D. Wis. 1966).

67. *United States v. King*, 395 U.S. 1, 3 (1969); *Soriano v. United States*, 352 U.S. 270, 276 (1957). *But cf.* the generous reading of the waiver statute relating to water rights in *United States v. District Ct. in & for County of Eagle, Colo.*, 401 U.S. 520 (1971); *United States v. District Ct. in & for Water Div. No. 5*, 401 U.S. 527 (1971); *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 146 (5th Cir. 1971) ("any doubts as to its waiver [of sovereign immunity] are to be resolved against the sovereign").

joint tenant.⁶⁸ The statute provides plainly that the action "shall proceed, and be determined, in the same manner as would a similar action between private persons."⁶⁹ Efforts have been made to persuade the courts that these provisions constitute a waiver of sovereign immunity extending to cases where the very existence of the cotenancy is challenged by the United States. The few appellate cases on the point have held, however, that unless the title of the private claimant in the cotenancy is "clear and uncontroverted," no action will lie.⁷⁰

The only area involving property interests where the United States has consented to adjudications of full ownership is that of water rights. The waiver permits joinder of the United States as defendant in any suit for the adjudication of water rights.⁷¹ Although not all such disputes fall within the statute,⁷² the existence of this waiver provision is significant,⁷³ and it can impose a considerable litigation burden upon the United States.⁷⁴ Absent a case involving a mortgage or other lien, partition or water rights, however, the claimant must look to other relief—first and foremost, the possibility of damages.

Damages. If sovereign immunity were absolute, no relief could be obtained from the sovereign. There exists, however, one additional area of waiver which in effect gives the land claimant a remedy in the form of damages in certain cases. While, of course, such a remedy is not the traditional one in land dispute cases,⁷⁵ its availability provides a significant amelioration to an otherwise intolerable situation. Thus,

68. 28 U.S.C. §§ 1347, 2409 (1970).

69. *Id.* § 2409.

70. *Stanton v. United States*, 434 F.2d 1273, 1276 (5th Cir. 1970); *Rambo v. United States*, 145 F.2d 670 (5th Cir. 1944), *cert. denied*, 324 U.S. 848 (1945). Historically, it was noted, the equity court's jurisdiction over partition actions did not include questions of controverted title. *Id.* at 671. *See also* *Jones v. United States*, 127 F. Supp. 31 (E.D.N.C. 1954).

71. 43 U.S.C. § 666 (1970). It provides that the United States shall be subject to the judgment of the courts "in the same manner and to the same extent as a private individual under like circumstances" except that no costs shall be entered. *See Green River Adjudication v. United States*, 17 Utah 2d 50, 404 P.2d 251 (1965).

72. In *Dugan v. Rank*, 372 U.S. 609 (1963), the statute was construed to permit joinder of the United States only where the law suit sought a *general* adjudication of rights in waters and not just to determine the priority of the claimants' rights vis-a-vis the United States. For full discussion, see *State v. Rank*, 293 F.2d 340, 347 (9th Cir. 1961). In *United States v. District Ct.*, 401 U.S. 520 (1971), the definition of a "general adjudication" is given a rather generous reading.

73. Under the statute, the United States waives any right to "plead that the state laws are inapplicable." 43 U.S.C. § 666(a) (1970).

74. *See United States v. District Ct.*, 401 U.S. 520 (1971).

75. *See* notes 156-67 *infra* and accompanying text.

in a number of circumstances, the United States *has* waived its sovereign immunity in land title dispute cases, but limited the remedy to damages. Indeed, the *Malone* decision has been supported by respected authority on the ground that "the United States may regulate in a reasonable fashion suits against its officers," and that providing damage compensation was just such regulation.⁷⁶

(1) *Compensation via the Tucker Act.* By the Tucker Act,⁷⁷ the United States has waived its sovereign immunity in suits for breach of contract, express or implied, and by amendment in actions founded upon the Constitution.⁷⁸ It was, therefore, an easy step to permit private claimants whose properties were taken without formal eminent domain proceedings to bring suit for damages under the Tucker Act on the basis of an implied promise by the United States to pay compensation.⁷⁹ Where the government took under a claim of title, however, no such promise could be fictionalized and no remedy was available.⁸⁰

The doctrinal breakthrough came in *United States v. Causby*,⁸¹ which involved frequent and regular flights of military aircraft over plaintiffs' land at low altitudes. In upholding plaintiffs' right to recover compensation under the Tucker Act, the Court noted that it was unnecessary to decide whether the repeated trespasses gave rise to an implied contract. If there is a taking, the claim is "founded upon the Constitution," and thus within the scope of the sovereign immunity waiver afforded by the Tucker Act.⁸² Sometimes referred to as "inverse condemnation,"⁸³ this same doctrine was relied upon in *Malone*

76. Jaffe, 77 HARV. L. REV., *supra* note 19, at 39.

77. See note 20 *supra*.

78. 28 U.S.C. §§ 1346(a)(2), 1491 (1970). On the Tucker Act generally, see SCHWARTZ & JACOBY, TEXT.

79. See *Hurley v. Kincaid*, 285 U.S. 95 (1932); *United States v. Cress*, 243 U.S. 316 (1917).

80. See, e.g., *Tempel v. United States*, 248 U.S. 121 (1918); *Hill v. United States*, 149 U.S. 593 (1893); *Langford v. United States*, 101 U.S. 341 (1879).

81. 328 U.S. 256 (1946). See *Jacobs v. United States*, 290 U.S. 13 (1933); *Hill v. United States*, 149 U.S. 593, 600 (1893) (dissent).

82. The constitutional reference, of course, is to the provision prohibiting the taking of private property for public use without just compensation. U.S. CONST. amend. V. See *Sioux Tribe v. United States*, 315 F.2d 378 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 825 (1963); *St. Regis Paper Co. v. United States*, 76 F. Supp. 831 (Ct. Cl. 1948), *cert. denied*, 335 U.S. 815 (1948).

83. A recent discussion of "inverse condemnation" is Pittle, *Suits Against the U.S. for Taking Property Without Just Compensation*, 55 GEO. L.J. 631 (1967). See also Comment, 46 NEB. L. REV. 816 (1967); 44 A.B.A.J. 883 (1958).

to support the decision that no specific relief was required where damages were available.⁸⁴

Although the award by the Court of Claims is compensation rather than damages, the net effect is similar—a forced sale of the land interest by the private claimant to the United States, valued as of the time of taking.⁸⁵ In property terms, it is the equivalent of the award given to a plaintiff in an action for personal property when the specific property itself cannot be found—that is, damages equal to the value of the property.⁸⁶ The nonexistence of a private law equivalent in the real property area is, presumably, due to the fact that real property can always be found and returned in specie.

However, such compensation is often unavailable in land title disputes. The most significant limitation is that the United States must have exerted itself to the extent of asserting possession or use sufficient to constitute a constitutional taking. Where such a taking has not occurred, this avenue to a settlement of a land title dispute is not open.⁸⁷

84. 369 U.S. at 647 n.8. In *Dugan v. Rank*, 372 U.S. 609 (1963), the court again held a Tucker Act action sufficient where an uncompensated taking of property (the water rights) was involved.

85. The measure of compensation is the full value of the property at the time of taking. *United States v. Herrero*, 416 F.2d 945 (9th Cir.), *cert. denied*, 397 U.S. 973 (1969). The decree granting compensation may recite a vesting in the United States, *Wright v. United States*, 279 F.2d 517, 521 (Ct. Cl. 1960), or require an actual conveyance. *Jensen v. United States*, 305 F.2d 444, 449 (Ct. Cl. 1962). See notes 163-67 *infra* and accompanying text.

86. See K. YORK & J. BAUMAN, *REMEDIES* 385 (1967).

87. It may be speculated whether the mere assertion of a claim of ownership by the United States in a land dispute might not be enough to constitute a "taking" upon which the private disputant might bottom a Tucker Act action. However, the theory presents difficulties. If the United States in fact owns the claimed property interest, no compensation is due. If it does not own the claimed property interest, then under the Tucker Act theory of inverse condemnation, plaintiff would be faced with the general rule that no right exists to compensation for exercise of the right of eminent domain until the United States actually takes possession or title vests in it, whichever first occurs, *United States v. Dow*, 357 U.S. 17 (1958), or at least some positive action is begun to this end. *Hurley v. Kincaid*, 285 U.S. 95 (1932). See also *United States v. Garlach Live Stock Co.*, 76 F. Supp. 87 (Ct. Cl. 1948), *aff'd*, 339 U.S. 725 (1950). While it is true that the concept of a "taking of property" is an enlarging one where possession is increasingly ephemeral, see, e.g., *Thornburg v. City of Portland*, 376 P.2d 100 (Ore. 1962) (noise from aircraft flying near, but not over, plaintiff's property may constitute "taking"); cf. *United States v. Certain Parcels of Land in Kent County, Mich.*, 252 F. Supp. 319 (W.D. Mich. 1966), and that under certain circumstances regulatory actions of the government short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject property, to amount to a "taking," see *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *R.J. Widen Co. v. United States*, 357 F.2d 988, 993 (Ct. Cl. 1966); cf. *Armstrong v. United States*, 364 U.S. 40 (1960), to find a "taking"

(2) *Compensation via the FTCA*. The passage of the Federal Tort Claims Act in 1946⁸⁸ opened another possible avenue for damage relief in land title disputes by making available the ancient tort of trespass. Prior to the FTCA, trespasses were noncompensable,⁸⁹ although at some point repeated governmental trespasses had been acknowledged to ripen into a constitutional taking, which would justify a Tucker Act case.⁹⁰ Indeed, much of the history of the Tucker Act reflects the influence of the lack of relief for torts committed by the

by mere verbal assertions by the government would push the concept beyond any prior limits. *But cf.* *State v. Rank*, 293 F.2d 340, 357-58 (9th Cir. 1961). Moreover, compensation is normally not available for any reduction in land value brought about by the prospect of condemnation; until the "taking," the United States may change its mind without liability. *Danforth v. United States*, 308 U.S. 271, 284-85 (1939). *But cf.* *City of Cleveland v. Carcione*, 190 N.E.2d 52 (Ohio App. 1963). Plaintiff's argument rests essentially on the theory that the value of his land is diminished by the government's wrongful assertion of an ownership interest, for which the usual remedy is a tort action for slander of title. However, under the FTCA, actions for libel or slander are excluded, 28 U.S.C. § 2680(h) (1970), and in any event a good faith belief in one's claim and lack of malice seem a defense. W. PROSSER, *TORTS* 920-22, 924-25 (4th ed. 1971).

Likewise, in determining when the statute of limitations begins to run for the six-year period within which "inverse condemnation" actions must be brought under the Tucker Act, the Supreme Court has held that the statute does not begin to run until the taking is complete. *United States v. Dickinson*, 331 U.S. 745 (1961). The facts in that case involved the construction of a dam, as a result of which plaintiff's land was eventually flooded by the backed-up waters. The government's assertion was that the statute began to run when the dam began to impound water or, at the latest, when the first portion of plaintiff's land was inundated. The Court on the contrary stated that "property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *Id.* at 748. In this case, it held that the statute did not begin to run until the "situation was stabilized"—that is, the extent of the flooding was determined. Although the Court specifically reserved the question whether the landowner might be allowed to bring suit as soon as inundation threatens, it would certainly appear that the accrual of the statute of limitations should be coincident with the commencement of the existence of the cause of action as a general matter. The Court of Claims has phrased the test as whether the government has "acquired effective control over the property." *Cuban Truck and Equipment Co. v. United States*, 333 F.2d 873, 878 (Ct. Cl.), *cert. denied*, 382 U.S. 844 (1964). *But cf.* *Confederated Bands of Ute Indians v. United States*, 100 Ct. Cl. 413 (1943) (United States by statute declared all Ute lands to be "the absolute property of the United States"; held, a taking).

88. 28 U.S.C. § 1346 (1970).

89. *Langford v. United States*, 101 U.S. 34 (1879).

90. The most famous case adopting this rule was *Portsmouth Co. v. United States*, 260 U.S. 327 (1922), where, despite two prior appeals which had denied that the firing of guns over plaintiff's property warranted recovery, *Peabody v. United States*, 231 U.S. 530 (1913); *Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U.S. 1 (1919), Mr. Justice Holmes concluded that a sufficient number of successive firings could eventually ripen into a taking.

sovereign.⁹¹ It is now, however, well-settled that a damage claim based upon trespass to land or chattels is actionable under the FTCA.⁹² Thus, trespasses to land such as low-flying aircraft,⁹³ the destruction of trees by government agents⁹⁴ and the deposit of mud and silt upon plaintiff's land⁹⁵ have all been compensated under the FTCA.⁹⁶

On the question of whether the FTCA route is available in a land title dispute when a Tucker Act action would also lie, however, there is a split of opinion. The issue assumes significance if, for example, the plaintiff sought damages on the theory of a continuing trespass,⁹⁷ or if, where the claim exceeded \$10,000, the plaintiff sought the more familiar landscape of a federal district court in preference to the Court of Claims—which is where such Tucker Act cases are brought.⁹⁸ In *Simons v. United States*⁹⁹ the actual dispute was over ownership of land on which oil had been found. After the plaintiffs failed in an action to recover possession on *Malone* sovereign immunity grounds, they brought an action under the FTCA to recover damages, which would be measured by the value of oil royalties produced. Notwithstanding the argument that the relief sought would adjudicate title against the United States, the court permitted the trespass action.¹⁰⁰

91. See SCHWARTZ & JACOBY, TEXT ch. x.

92. JAYSON § 212.02, at 9-8. See also *Hatahley v. United States*, 351 U.S. 173, 180-81 (1956). That is not to say, however, that one of the defenses under the Act may not be applicable, such as the discretionary function exception.

93. *Western v. McGehee*, 202 F. Supp. 287 (D. Md. 1962); *Weisberg v. United States*, 193 F. Supp. 815 (D. Md. 1951).

94. *Kephart v. United States*, 242 F. Supp. 469 (E.D. Pa. 1965).

95. *Anderson v. United States*, 259 F. Supp. 148 (E.D. Pa. 1966).

96. See also *Robin Constr. Co. v. United States*, 345 F.2d 610 (3d Cir. 1965). For a discussion of taking vis-a-vis trespass, see NICHOLS § 6.11.

97. See, e.g., *509 Sixth Ave. Corp. v. New York City Transp. Auth.*, 15 N.Y.2d 48, 203 N.E.2d 486 (1964). Trespass damages might exceed those available under the Tucker Act. See, e.g., *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963). An intriguing collateral problem is the degree to which a trespass action encompasses a wrongful withholding of possession as well as wrongful dispossession in the first instance. See *Roman v. Velarde*, 428 F.2d 129, 132 n.5 (1st Cir. 1970); F. HARPER & F. JAMES, THE LAW OF TORTS § 1.7 (1956); RESTATEMENT (SECOND) OF TORTS § 162, comment c (1965). State law would be determinative. As to whether proceedings for compensation for property condemned precludes an action for damages arising from prior trespasses, see Annot., 33 A.L.R.3d 1132 (1970).

98. See note 107 *infra*.

99. 413 F.2d 531 (5th Cir. 1969).

100. *Id.* at 533-34. The states are split on the question whether, in a trespass action, the plaintiff may collect for all damages, past and future, on the basis of a permanent appropriation of land. Some will allow damages for the trespass only. Others, however, have given the plaintiff the right to permanent damages at his election, and by so doing he waives the invasion and

Roman v. Velarde,¹⁰¹ which also involved a trespass action for damages against the United States under the FTCA, is in contrast to *Simons*. In *Velarde*, the government had argued that it had not consented in the FTCA to suit on a claim for trespass where the issue of title was involved. Agreeing with that view, the court held that the FTCA does not provide a forum for a plaintiff demanding compensation for land which had been permanently taken. In those circumstances only a Tucker Act action would be available.¹⁰² This distinction was based on the policy judgment that a trespass action remedied wrongs which were limited in time and quality, whereas a Tucker Act action would allow complete and final compensation for land permanently taken.¹⁰³

Although the logic of *Roman v. Velarde* seems persuasive, its difficulty lies in the murky distinction drawn between a trespass and a constitutional taking. This is partly attributable to the historical fact that the absence of any tort liability in the sovereign prior to 1946 led to a somewhat strained concept of how much action was necessary to constitute a taking,¹⁰⁴ for in the title dispute area every act for which a taking would lie would also constitute a trespass.¹⁰⁵ Anomalous situations may, thus, develop. Relief may be unavailable under the FTCA because of one of its numerous exceptions—for example, a discretionary function—and yet be maintainable as an unconstitu-

consents to the continued occupancy of the land. *Kornoff v. Kingsburg Cotton Oil Co.*, 288 P.2d 507 (Cal. 1955); *McCormick, Damages for Anticipated Injury to Land*, 37 HARV. L. REV. 574 (1924).

101. 428 F.2d 129 (1st Cir. 1970).

102. *Id.* at 132.

103. *Id.* at 133. *Accord*, *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963). Oddly, none of the three cases cites the others.

104. *See, e.g.*, *Portsmouth Co. v. United States*, 260 U.S. 327 (1922). *Cf.* *United States v. Lynah*, 188 U.S. 445 (1903).

105. The nature of government action in certain types of "takings" often is analyzed on the distinction between a valid exercise of the regulatory power, on the one hand, for which no compensation need be paid, and acts which constitute a taking. *See* Abend, *Federal Liability for Takings and Torts: An Anomalous Relationship*, 31 FORD. L. REV. 481, 488-89 (1963); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). In the case at hand, however, the issue is between a clear case of trespass and the permanence required for a taking. *Cf.* *Gottlieb, The Tort Claims Act Revisited*, 49 GEO. L.J. 539, 573 (1961).

This uncertainty is evidence of the difficulty which is often experienced in determining the extent of the estate taken. *See generally* *United States v. Dickinson*, 331 U.S. 745 (1947); 5 NICHOLS ¶ 16.104. *See also* *Pittle, Suits Against the United States for Taking Property Without Just Compensation*, 55 GEO. L.J. 631, 636 (1967), which asserts that prior to *Malone*, injunctive or trespass relief would be allowed under *Lee. Id.* at 633.

tional "taking."¹⁰⁶ Apparently the crucial distinction is that to constitute a "taking" under the Tucker Act, the action of the government must be sufficiently continuous and permanent as to constitute the acquisition of a property interest.¹⁰⁷ Where a plaintiff is presented with a potential dilemma because the permanence of the taking is in doubt, an action in trespass under the FTCA commenced in the district court may be transferred to the Court of Claims if necessary.¹⁰⁸

Action by the United States. While sovereign immunity protects the United States as a defendant, it in no way limits it as a plaintiff. If, therefore, the United States can be persuaded, induced or compelled to bring an action against the private claimant in which the issue of land ownership is at stake, effective specific relief may be obtained. In *Malone*, the government asserted that it is willing to bring its own actions to quiet title "when substantial, reasonable, and active claims may be asserted by private citizens."¹⁰⁹ In *County of Bonner v. Anderson*,¹¹⁰ however, the Ninth Circuit followed *Malone* and dismissed an action brought by the county to quiet title to some disputed land, but declared in exasperation that

As a matter of policy, it seems a shame that the County of Bonner cannot find a forum or a proper party to sue to test its claim to the land in question. In other fields, the government has created the Court of Claims and the Federal Tort Claims Act for its citizens.

We wonder why the government won't sue the County of Bonner, as it may, to quiet title, rather than laughing at its contentions and saying, "If you have a right, you can't vindicate it."¹¹¹

106. See, e.g., *Coates v. United States*, 181 F.2d 816 (8th Cir. 1950) (FTCA held inapplicable); *Coates v. United States*, 93 F. Supp. 637, 639 (an unconstitutional "taking" found). See also Abend, *supra* note 105, at 494-99.

107. See *United States v. Dickinson*, 331 U.S. 745, 748 (1947). See also *Fromme v. United States Victoria County Navigation Dist.*, 412 F.2d 1192 (Ct. Cl. 1969) (no taking for occasional flooding); *Finks v. United States*, 395 F.2d 999 (Ct. Cl.), *cert. denied*, 393 U.S. 960 (1968) (no taking where temporary seizure of property by United States); *United States v. 40.60 Acres of Land*, 324 F. Supp. 573 (N.D. Cal. 1971) (no taking where condemnation of fee renders easement useless); *United States v. 967.905 Acres of Land*, 305 F. Supp. 83 (D. Minn. 1969) (taking); *Lombardy v. Peter Kiewit Sons Co.*, 266 Cal. App. 2d 599, 72 Cal. Rptr. 240 (1968), *appeal dismissed*, 394 U.S. 813 (1968) (no taking for noise, dirt and the like in freeway construction). Cf. *National Bd. of YMCA v. United States*, 395 U.S. 85 (1969) (no taking).

108. *Roman v. Velarde*, 428 F.2d 129, 133 (1st Cir. 1970). The Court of Claims has exclusive jurisdiction of Tucker Act actions where the amount involved exceeds \$10,000. 28 U.S.C. §§ 1346(a)(2), 1491 (1970).

109. Transcript of Record, at 48.

110. 439 F.2d 764 (9th Cir. 1971).

111. *Id.* See also *Gardner v. Harris*, 391 F.2d 885, 887 n.3 (5th Cir. 1968).

This exasperation is not without foundation. Clearly the United States is willing to bring quiet title actions in some circumstances,¹¹² but their pattern is difficult to discern.¹¹³ For the United States to institute judicial relief actions¹¹⁴ as a matter of course where a dispute exists, it appears that two criteria must exist.¹¹⁵ The first is that the

112. For very recent examples, see *United States v. Severson*, 447 F.2d 631 (7th Cir. 1971), *cert. denied*, ___ U.S. ___ (1972); *United States v. MacMillan*, 331 F. Supp. 435 (D. Nev. 1971); *United States v. Buras*, 332 F. Supp. 1017 (E.D. La. 1970).

113. Quiet title and other real property actions have been brought by the United States without jurisdictional challenge, apparently based on the broad authority of 28 U.S.C. § 1345 (1970). *Coleman v. United States*, 390 U.S. 599 (1968) (ejectment); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957) (mineral rights); *United States v. Fallbrook Pub. Util. Dist.*, 101 F. Supp. 298, 300-01 (S.D. Cal. 1951); 110 F. Supp. 767, 784 (S.D. Cal. 1953) (quiet title in Cal., 28 U.S.C. § 1345 invoked).

The assertion is made that the United States like any other owner of property may have its property rights adjudicated by a court of competent jurisdiction, and may sue on a non-statutory cause of action. *United States v. Shanks*, 384 F.2d 721, 723 (10th Cir. 1967); *United States v. Gallas*, 269 F. Supp. 141 (D. Md. 1967) (ejectment); *United States v. Wilcox*, 258 F. Supp. 944 (N.D. Iowa 1966) (quiet title); *United States v. Louisiana*, 229 F. Supp. 14 (W.D. La. 1964) (quiet title); *United States v. Parks*, 211 F. Supp. 516 (W.D.N.C. 1962) (quiet title). *Cf. United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 338 (1906) (equitable title under patent right). The United States does not, furthermore, waive its sovereign immunity by the institution of an action. *United States v. Patterson*, 206 F.2d 345, 348 (5th Cir. 1953), although successful defense against the action may amount to an adjudication of title. *United States v. Williams*, 441 F.2d 637 (5th Cir. 1971). *But cf. United States v. Louisiana*, 229 F. Supp. 14 (W.D. La. 1964). The United States may also seek injunctive relief pending administrative determination of a disputed claim. *United States v. Barrows*, 404 F.2d 749 (9th Cir. 1968), *cert. denied*, 394 U.S. 974 (1969); *United States v. Foresyth*, 321 F. Supp. 761 (D. Colo. 1971); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917).

While such actions have been brought for seemingly minor property interests in the sovereign, the United States has not brought suit in one of the most active land ownership controversies now existing in the public land law field—the long-standing dispute over the Snake River omitted lands. That dispute, involving some 15,000 acres of land located along the Snake River in Idaho, appears to turn, at least in part, upon the resolution of a disputed legal issue involving the effect of an erroneous government survey. Although Congress did pass relief legislation in 1962, Pub. L. No. 87-469, 76 Stat. 89, the problem continues to fester. *See Ireland, Stapleton, Pryor & Holmes, Study of Trespass and Unauthorized Use of the Public Lands of the United States*, in PLLRC REPORT 129-58.

114. The nature of the action which the United States may bring in the event that it is willing to initiate steps to settle the land dispute by judicial means may be varied. Local state remedies have been used, such as quiet title, trespass to try title and ejectment. Declaratory relief might also be available, under the federal statute, 28 U.S.C. § 2201 (1970). The statute is not available, however, to the private claimant, for it is well settled that it does not constitute a jurisdictional ground for suit where no other ground exists. *United States v. King*, 395 U.S. 1 (1969); *Western v. McGehee*, 202 F. Supp. 287, 293 (D. Md. 1962).

115. The then assistant attorney general in charge of the Division of Lands and Natural Resources testified on September 30, 1971, that

The fact that a claim of ownership of land is asserted, which is inconsistent with the Government's own claim, is not ordinarily enough in itself to bring the Government into

quieting of title must have some advantage to the United States. This may be the case, for example, where the land is about to be sold as surplus¹¹⁶ or the United States has some present use for the land.¹¹⁷ Conversely, where the United States has no particular use for the land or is indifferent toward the outstanding interest, it may feel its limited resources for litigation may best be directed elsewhere. Also, the prospects of success in the quiet title action should seem reasonably favorable. This could result in the ironic situation that the weaker the federal claim, the more likely it will be that the true owner will be unable to clear his title.

Self-help. If the claimant is unable to induce the United States to sue, he may be able to provoke it to do so by occupying what is claimed to be federal.¹¹⁸ The formidable practical problem with this approach, however, is that the statute of limitations is inoperative against the United States.¹¹⁹ As a result, occupancies of federal lands, although known to exist by government agents, are sometimes permit-

court to resolve the dispute. As a practical matter, unless the conflicting claimant is interfering with the Government's use of land, or unless it is for some other reason deemed to be in the interest of the United States to bring suit, no action will be taken. *Hearings on S. 216, S. 579 and S. 721, Before the Subcomm. on Public Lands of the Senate Interior and Insular Affairs Comm.*, 92d Cong., 1st Sess. (1971).

116. Interviews with the General Services Administration, which is responsible for disposition of surplus lands, indicate that title actions are readily brought where needed to maximize the monetary return to the United States.

117. If *Malone* is read literally, of course, the United States could simply take possession of the land and pay whatever compensation may fall due. Such direct action, however, could be dissuaded both by a contemplation of proprieties in physically ejecting a private possessor and by the reluctance to pay the compensation necessary if it should turn out that the land is not in fact owned by the United States. In this regard, compensation for land taken by formal condemnation procedures is normally paid out of individual appropriations to the department or agency involved, while Court of Claims judgments are paid out of a special appropriations for that purpose. 31 U.S.C. § 724a (1970).

118. In *Malone v. Bowdoin*, the private claimant offered to cut down a "hollow tree" on the disputed land and let the United States bring a trespass action "or any other action they desired," in order to get the matter settled. The invitation was declined. See Brief for the Respondents before the Supreme Court at 8.

119. "Nullum tempus occurrit regi;" its reason is that "the law intended that the king is always busied for the public good and therefore has not leisure to assert his right within the times limited to subjects." 1 W. BLACKSTONE, COMMENTARIES § 348 at 368-69 (Jones ed., 1916). A more acceptable reason, it would be thought, in land controversies is that the vastness of the federal lands and the limitations on federal manpower make any such limitation unacceptable as public policy. It has been recommended, however, that the doctrine of adverse possession in cases of good faith occupancy should apply against the United States under modern conditions. PLLRC REPORT 260-62. See Comment, *Real Property—Nullum Tempus Occurrit Regi*, 24 U.M.K.C.L. REV. 187 (1956).

ted to exist until there is a federal use for the lands.¹²⁰ This would be especially true where the occupancy does not result in any diminution of the value of the lands—such as where only grazing or farming are taking place, as opposed to mineral extraction.¹²¹ Thus, it may, as a practical matter, be difficult to induce the sovereign to sue.

There are also other problems with such a strategy. An assertion of private ownership that is proven to have been in error, may, first of all, result in consequences more serious than simple ejectment. It can be a federal crime to trespass upon federal lands,¹²² federal administrators may retaliate, for example, by denying grazing privileges,¹²³ civil damages for trespass can be imposed well in excess of actual damage,¹²⁴ and any actual destruction of government property may be heavily penalized.¹²⁵ Moreover, where the United States is in

120. PLLRC REPORT 262.

121. A marked example of such passivity in the face of invasion occurred in the case of the squatters on the banks of the lower Colorado River. Occupancy of federal lands along the river, beginning around the time of the construction of Parker Dam in 1934, eventually reached the point where the United States maintained that over 36,000 acres were illegally occupied. Ireland, *supra* note 113, at 105. Two relief bills passed by the Congress in the 1960's to alleviate the *fait accompli* faced by the United States were vetoed by President Johnson. *Id.* at 119-20. A third bill was signed by President Nixon in 1970. Pub. L. No. 91-505, 84 Stat. 1106 (1970).

122. See 18 U.S.C. §§ 1851-63 (1970). Other federal statutes can also provide for criminal penalties for trespassing on public lands—for example, 16 U.S.C. § 471 (1970), which provides for the establishment of national forests, contains a penalty provision of \$500 or one year in jail for violation of regulations promulgated under the statute. Such regulations prohibit, *inter alia*, the cutting of timber, 36 C.F.R. § 261.6 (1971), grazing or fencing, *id.* § 261.11. Like regulations exist for Interior lands. See 43 C.F.R. §§ 9239.0-7, .11-1 (1971). The civil damages for trespassing can also be significant. In *Wooden-Ware Co. v. United States*, 106 U.S. 432 (1882), the principle was established that in assessing damages against a "wilful" trespasser, the increase in value of the property taken attributable to the acts of the trespasser may be included in the damages recoverable by the United States. Good faith mistake as to location of the boundary is of course no defense to a trespass action. *United States v. Hudspeth*, 384 F.2d 683, 688 (9th Cir. 1967). Furthermore, an administrative determination as to the mineral nature of public land will be conclusive in the absence of fraud or abuse of discretion, even where the consequence is to brand the occupier a trespasser. See *Standard Oil Co. v. United States*, 107 F.2d 402 (9th Cir. 1939), *cert. denied*, 309 U.S. 654 (1940). See generally Ireland, *supra* note 113.

123. See Clarence S. Miller, 67 Int. Dec. 145 (1960) (grazing licensee who repeatedly and "wilfully" grazes his cattle in trespass on the public domain may be properly subjected to a reduction of his grazing privileges).

124. See *Ansay v. Boecking-Berry Equip. Co.*, 450 F.2d 433 (10th Cir. 1971).

125. 18 U.S.C. § 1361 (1970). The nature of the dilemma in a somewhat analogous situation was recognized in *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1948), involving the validity of a regulation of the Secretary of the Interior closing an Indian reservation to commercial fishing without a permit:

In the pursuit of their otherwise lawful business respondents are threatened with criminal

possession, it is less than obvious that a successful taking of possession by the private claimant, even if he be in fact the true owner, will provide the relief he anticipates. The privilege of even one *entitled* to possession to enter and recover by "force" is a matter of dispute. Under the Statute of Forcible Entry,¹²⁶ for example, such action is a criminal offense, and that statute has been accepted as part of the common law, or reenacted, by nearly all the states. Many states also provide a civil action for assault and battery or trespass, and a specific and speedy statutory remedy for forcible entry¹²⁷—that is, even one entitled to possession of land can be ejected from property under the forcible entry and detainer statutes as against one displaced from possession.¹²⁸ In addition, the ousted party, in this case the United States, even if a trespasser, can sue for damages for forcible entry, and title in such an action is irrelevant.¹²⁹

Even should the land claimant be successful in provoking the United States to sue¹³⁰ for ejectment and succeeds in establishing his title, this victory may be hollow if the United States decides to assert possession. This is the implication of *Malone*¹³¹ as well as other cases

prosecution should they fish in the water of the Karluk Reservation without a permit from the native village. For the violation of the applicable regulation under the White Act, severe penalties are imposed, including fine, imprisonment, the summary seizure of boats, haul, gear, equipment, and their forfeiture to the United States. These sanctions deny to respondents an adequate remedy at law, for to challenge the regulation in an ordinary criminal proceeding is to hazard a loss against the payment of a license fee and compliance with the fishing rules of the natives. Yet to stay out of the reservation prevents the profitable operation of the canneries. *Id.* at 99.

126. 5 Rich. 11, c. 2 (1381).

127. *E.g.*, N.Y. REAL PROP. ACTIONS § 713(10) (McKinney, 1963).

128. 1 H. TIFFANY, REAL PROPERTY § 72 (2d ed. 1920); Annot., 45 A.L.R. 323 (1920).

129. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 315, at 260-62 (1956). Of course the questions as to what is "peaceable possession" by defendant and what is "force" used by plaintiff in taking possession are major ones. *See* W. PROSSER, TORTS 123-24 (4th ed. 1971); Shapre, *Forcible Trespass to Real Property*, 39 N.C.L. REV. 121 (1961) (which takes up the analogous but little used purely common law crime of forcible trespass). As to what constitutes "possession," see 1 RESTATEMENT OF THE LAW OF TORTS § 157 (1934).

130. Land claimants have indeed been successful in some cases in provoking suit by retaining possession against the United States. *See, e.g.*, *United States v. Coleman*, 390 U.S. 599 (1968) (ejectment against mining claimant); *United States v. Williams*, 441 F.2d 637 (5th Cir. 1971).

131. Of course, it could be argued that if a judgment in a quiet title or ejectment action brought by the United States establishes ownership in the private disputant, the continued possession by the United States would clearly be beyond the authority of the federal officer and hence an officer's suit could be brought against him even under the *Larson* theory. *See* notes 19, 31 *supra* and accompanying text.

decided well before it.¹³²

Thus, while desperate straits may call for desperate measures, the fact that the land disputant with the United States is put in such a predicament that he must seriously consider self-help measures simply highlights the need for reform of the present system.

Non-judicial relief. Finally, several non-judicial courses of action should be mentioned. First, a private relief bill may be sought from the Congress. This has long been the ultimate resort where sovereign immunity has blocked judicial relief. The constitutional basis for such relief is broad, including the power to dispose of property and the power to pay the debts of the United States,¹³³ which has been construed to include those resting solely upon an equitable or honorary obligation.¹³⁴ Indeed, both the passage of the Tucker Act and the FTCA were in large part brought about by the desire of Congress to rid itself of this burden.¹³⁵ Congressional assistance may also be sought in attempting to persuade the United States to initiate a quiet title action on its own.¹³⁶

Several rather general "relief" bills for land disputes have also been enacted. The best-known is the Color of Title Act,¹³⁷ which

132. Thus, in *United States v. Patterson*, 206 F.2d 345 (5th Cir. 1953), the United States had instituted an action for damages and to quiet title to disputed acreage. Certain of the defendants were successful in proving that part of the disputed acreage belonged to them and not the United States, and the district court entered an injunction prohibiting the United States from further trespassing upon that part of the land. On appeal, the injunction was dissolved, on the ground that because of sovereign immunity, "it is beyond dispute that unless expressly permitted by an Act of Congress, no injunction can be granted against the United States." *Id.* at 348. In *United States v. Ivie*, 163 F. Supp. 138 (N.D. Ga. 1957), the United States sought in a civil action to enjoin the defendants from trespassing on certain forest lands to which it claimed title by condemnation, and to recover damages for timber cut by defendants on that property. Defendants also claimed title. There the court made a finding that the United States had acquired valid title through the condemnation proceedings, but the implication was clear that even if the condemnation proceedings had been ineffective, the only relief available to the defendants where the United States had possession would be a Tucker Act action. *Id.* at 143. *But cf.* *United States v. Buras*, 332 F. Supp. 1017, 1034 (E.D. La. 1970).

133. U.S. CONST. art. I, § 8. See note 171 *infra*.

134. *United States v. Realty Co.*, 163 U.S. 427, 440-41 (1896).

135. See JAYSON §§ 52, 58 (sections 21.01-.02 contain an excellent general discussion of the recommended steps in obtaining such relief).

136. The elimination of sovereign immunity in this area (land title disputes) would also take an unpleasant burden off the backs of members of Congress. The mere fact that no remedy is available, unless the Government in fact initiates a lawsuit to determine title, means that many private individuals beseech their Congressmen to intervene on their behalf to get the Department of Justice to initiate suit, because that is the only way that the title can now be tried. *Hearings on Sovereign Immunity* 48.

137. 43 U.S.C. §§ 1068, 1068a (1970).

provides in essence that where a tract of public land has been held in adverse possession "under claim or color of title for more than twenty years," and the land has either been improved or cultivated, a patent shall be issued, and if taxes have been paid without improvements or cultivation a patent may be issued upon payment of not less than \$1.25 per acre. The purchase price is based on appraised value, excluding value attributable to the applicant's improvements. The act was designed to "materially reduce the number of hardship cases that otherwise would have to be handled by private bills."¹³⁸ The Act has, however, been strictly construed by the Interior Department and appears to have been of more limited usefulness than might have been hoped.¹³⁹

LAND TITLE DISPUTES WITH THE SOVEREIGN: THE ROAD TO REFORM

The foregoing discussion has shown the common futility of judicial efforts by the private claimant in land title disputes with the sovereign. The next step toward a discussion of the principal factors involved in statutory reform of this unsatisfactory status quo is to briefly review the panoply of judicial remedies normally available to one when he has a land title dispute with another private party,¹⁴⁰ and to compare them with the remedies available in the land title dispute with the sovereign.

138. S. REP. NO. 588, 83d Cong., 1st Sess., reprinted in 1953 U.S. CODE CONG. & AD. NEWS 2014, 2016.

139. See PLLRC REPORT 259. Thus, denial of a patent in the discretionary situation involving tax payments has been held to be non-reviewable, *Hamel v. Nelson*, 226 F. Supp. 96 (N.D. Cal. 1963); the statute is said to cover only patentable public lands, 43 C.F.R. § 2540.05(b) (1970). See also *Beaver v. United States*, 350 F.2d 4 (9th Cir. 1965), cert. denied, 383 U.S. 937 (1966). In addition, a claim based upon color of title must be shown to be based upon a written document, *Howerton*, 71 Int. Dec. 429 (1964); *Maftreer*, 70 Int. Dec. 145 (1963), and a claim will lack "good faith" where it is asserted with knowledge that the land is owned (which has been interpreted to mean claimed) by the United States, 43 C.F.R. § 2540.05(b) (1970). *Lester J. Hamel*, 74 Int. Dec. 125 (1967); *Prentis E. Furlow*, 70 Int. Dec. 500 (1963).

140. The problem of resolving an existing land title dispute should not be confused with the problem of ensuring the validity of a particular title, as against the world, which has led to a vast body of literature and a number of proposed reforms—for example, the Torrens title system and marketability of title acts. See generally C. BAYSE, *CLEARING LAND TITLES* (2d ed. 1970). This is not to say, of course, that the issues and remedies do not in part overlap. However, the problem discussed in this article involves only an existing dispute with an identified counterclaimant, the United States, and thus the entangling issues of service by publication, unknown claimants, and so forth are here absent. The suit to quiet title has been exhaustively reviewed in its role as a mechanism for title security in Note, *Enhancing the Marketability of Land: The Suit to Quiet Title*, 68 YALE L.J. 1245 (1959).

Land Dispute Resolution in the Private Sector

The most striking feature of a survey of the array of real property actions and remedies is their variety, prolixity and complexity.¹⁴¹ Steeped in the ancient history of English law, bedeviled by the remnants of the old common law forms of actions, barnacled by the encrustment of centuries of judicial decisions, the nature of the subject matter would stamp any state-by-state or action-by-action chronicle as neither feasible, nor useful. In the context of statutory reform, however, a helpful analysis may be found in approaching the problem from the point of view of available remedies which may be characterized as declarative, specific and compensatory.¹⁴² Indeed, the forms of action may be used in a rather imprecise sense as short-hand phrases to reflect this situation. Thus, trespass will lie where a plaintiff seeks damages from a defendant who is, or has been, in actual possession or use of plaintiff's land (compensatory relief); ejectment will lie when the defendant is in possession and the plaintiff seeks possession himself (specific relief); and quiet title will lie in all other cases (declarative relief).

Damages (Herein of Trespass). At common law, the form of action to be used in a land dispute where damages were sought was some variant of trespass. An extraordinary amount of legal brainpower went into such determination as whether trespass *quare clausum fregit* or trespass on the case was the appropriate form of action. A critical element of the former was that the plaintiff had to have possession of the property at the time of the trespass.¹⁴³ If he did not then have, or was not then entitled to, possession, the action would not lie.¹⁴⁴

141. The following discussion is, of course, summary in nature. It is designed as a refresher of basic principles. Exhaustive studies of each of the forms of actions and equitable remedies may be found not only in the cited works (which are deliberately picked by and large as of recent issue) but in the numerous authorities which may be found therein.

142. See J. COUND, J. FRIEDENTHAL & A. MILLER, *CIVIL PROCEDURE* 18 (1968).

143. See, e.g., *Daniels v. Coleman*, 253 S.C. 218, 169 S.E.2d 593 (1969). The logic was that the lodestone of title is the right to possess, and it was the possessory right that trespass protected. This characteristic led to the development of fixed rules as to the nature of the tort—for example, strict liability and the absence of any need for actual damage. Furthermore, since the action was designed to protect the interest in exclusive possession of the land in its intact physical condition, any person in actual possession, even one with no legal title, could maintain the action. The *RESTATEMENT (SECOND) OF TORTS* would limit the no-damage requirement to cases where the trespass was intentional, so that the trespass action would then be used only in a genuine title dispute. See W. PROSSER, *TORTS* §§ 63-75 (4th ed. 1971).

144. It is not altogether easy to reconcile the cases or draw the line with precision as to what constitutes adequate "possession." W. PROSSER, *TORTS* § 74 (4th ed. 1971).

Rather, the action would then be trespass on the case—for the damage to the reversion—or in ejectment—if the plaintiff did not then have, but was entitled to, possession.¹⁴⁵ Once ejectment was successful and possession regained, the appropriate action would then be trespass for mesne profits—that is, damages for the period of possession by the defendant.¹⁴⁶

The availability of this remedy in title disputes, however, is clearly limited. It is applicable only where the defendant is, or has been, in possession of the property in dispute, or has used the land in some lesser way. The damage remedy provides no relief where the claimed interest of the defendant has not been or cannot by its nature be asserted by taking or interfering with possession. Furthermore, while title may often be involved, it is not the essence of a trespass action.

Specific relief (Herein of Ejectment). Insofar as ownership and the right to possession are one, ejectment is the ultimate remedy. Specific relief began as little more than a variant of trespass, adapted to the situation where the trespasser had acquired possession,¹⁴⁷ and because of its relatively streamlined nature, it replaced the older “possessory writs”¹⁴⁸ as the means to obtain possession of land. The limitations of this remedy, however, were significant. It provided, most importantly, no relief against a land disputant who claimed title but was not in possession. Ejectment was also unavailable for non-possessory interests such as easements, and, since it was fictitious in form, it had no res judicata effect.¹⁴⁹

Statutory forms of the ejectment action are now prevalent in most, if not all, states. They retain as their basic purpose the recovery of possession from the adverse claimant rather than trying title as such.¹⁵⁰ For other forms of relief, however, the plaintiff must turn to

145. See, e.g., *Ragsdale v. Superior Oil Co.*, 237 N.E.2d 492 (Ill. 1968); *More v. Urbano*, 198 A.2d 211 (Conn. 1964).

146. See generally J. KOFFLER & A. REPPY, *COMMON-LAW PLEADING* § 114 (1969).

147. See J. CRIBBERT, *JUDICIAL REMEDIES* 116-19 (1954); I F. HARPER & F. JAMES, *THE LAW OF TORTS* 7 (1956).

148. See J. KOFFLER & A. REPPY, *supra* note 146, § 106.

149. See D. LOUISELL & G. HAZARD, *PLEADING AND PROCEDURE* 81 (1962).

150. Although it is a maxim that in ejectment the plaintiff must recover on the strength of his own title and not on the weakness of his adversary's, this means only that the plaintiff must show a right to possession superior to the defendant, either by proving a superior title or by proving prior possession where the defendant is a mere trespasser. *Bradshaw v. Ashley*, 180 U.S. 59 (1901). In any event, it remains true that “no adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law.” *Holland v. Challen*, 110 U.S. 15, 24 (1884).

modern equivalents of equity jurisdiction.

Declaratory Relief (Herein of Quiet Title). Modern equity-type jurisdiction in land title disputes has grown out of two ancient equitable remedies: the bill of peace and the bill *quia timet*. The bill of peace, designed to prevent multiple suits at law, was designed to cover two situations: first, where a number of rival claimants to the land existed, and, second, where a defendant repeatedly took possession of plaintiff's land, requiring continuous ejectment actions.¹⁵¹ To avert such multiple suits, equity was prepared by way of a bill of peace to render a judgment and enjoin the parties from any further actions. Certain rigid jurisdictional prerequisites were imposed. The most important was that the plaintiff was required to be in possession, otherwise an ejectment action would normally lie as an adequate remedy at law. In addition, at least for relief against repeated ejectment actions, the plaintiff had to have been harassed, and to have established his good title in at least one legal action.

The bill *quia timet* (because he fears) had a different purpose: to aid a plaintiff faced with some sort of cloud on his title, usually a document purportedly vesting a title interest in another. The fear was that because of delay witnesses would die or evidence would be lost or destroyed, leaving the plaintiff vulnerable to a later suit at law. To avoid such a result equity would grant relief by cancelling the instrument or ordering a release. Here again, however, because of the nature of the action, jurisdictional and decisional rules hampered the rendering of full relief. The plaintiff was required to have possession, the adverse claim had to be evidenced by an apparently valid writing, and an instrument void "on its face" would not invoke the remedy since its validity was plain to all, and only claimants of fee title could sue.

As the original form of the suit to quiet title gradually became obsolete—such as ejectment suits being given *res judicata* effect—its name was applied to all actions of a fundamentally declarative nature brought to settle titles to land. The various technical limitations imposed on both the ancient bills of peace and bills *quia timet* were removed in many states by specific statutory provisions confirming and expanding the action. In a number of states, the statutes provided for the inclusion of unknown as well as known parties, giving the

151. Because of the fictitious nature of the ejectment action, involving nonexistent leases, *res judicata* did not apply. See J. KOFFLER & A. REPPY, *supra* note 146, at 229-31.

action an in rem or quasi in rem character. But at its heart, with all the diversity from state to state,¹⁵² the quiet title action remains one of a declaratory nature.¹⁵³ Although marked procedural technicalities and differences continue to exist, it may be generally said that in the states today some judicial procedure exists whereby land title disputants may obtain a declaratory resolution¹⁵⁴ of most conflicts.¹⁵⁵ It is

152. The sharp variety in requirements from state to state is finely detailed in the superb Note, 68 YALE L.J., *supra* note 140. In recent years, for example, cases have involved such issues as the need for a plaintiff cotenant in common to join his cotenant in a quiet title action, *Velasco v. Mallory*, 5 Ark. App. 406, 428 P.2d 540 (1967), the right to a jury trial, *Anderson v. Whipple*, 71 Idaho 112, 227 P.2d 351 (1951), and the need for plaintiff to have possession, *Currier v. Gonsales*, 78 N.M. 541, 434 P.2d 66, and 467 P.2d 719. Many other important areas of difference exist.

153. The foregoing summary of the growth of declaratory relief in land title disputes has been taken from a number of sources. See D. LOUISELL & G. HAZARD, *PLEADING AND PROCEDURE* 82-83 (1962); H. MCCLINTOCK, *EQUITY* ch. 19 (2d ed. 1948); Finnegan, *Problems and Procedure in Quiet Title Actions*, 26 NEB. L. REV. 485 (1947). See also *Sharon v. Tucker*, 144 U.S. 533 (1892); *Thomson v. Thomson*, 7 Cal. 2d 671, 62 P.2d 358 (1936); 1 J. POMEROY, *EQUITY JURISPRUDENCE* § 246 (5th ed. 1941); Howard, *Bills to Remove Clouds from Title*, 25 W. VA. L. REV. 109 (1917); Note, *supra* note 140.

154. To a considerable degree, the quiet title action was a precursor to the modern action for declaratory relief. Declaratory judgment statutes simply make available generally the use of a device that theretofore existed only in certain fields—for example, construction of wills, instructions as to management of trusts and estates, bills of interpleader, action to annul marriages, as well as real property actions. Indeed, the question has been raised in another context whether the need for, and hence the availability of, such equitable remedies as bills of peace, *quia timet*, and injunction should be reconsidered in view of the existence of declaratory relief. See *Beacon Theatres v. Westover*, 359 U.S. 500, 509 (1959).

155. Examination of the available remedies in California, a state with extensive federally-owned property, may be illustrative. In that state there is only one form of civil action for the enforcement or protection of private rights, but much of the respective nature of the rights of action and the rules governing damages survives. Thus ejectment remains as basically a possessory action, and is designed to allow a plaintiff to recover possession from a defendant who unlawfully holds the property. The action squarely raises the issue of the greater right to possession, and to the extent that title is put into issue, it has a *res judicata* effect against the defendant. The critical element, of course, is that as part of his cause of action, plaintiff must have a present right of possession as against the defendant.

The preferred remedy in California, in many cases, is one of the statutory actions to determine adverse claims, CAL. CIV. PRO. CODE §§ 738, 749, 749.1, 751, 1050 (West 1955), or to remove a cloud from title, *id.* §§ 3412-14 (West 1970). The former are the outgrowth of the old bill of peace, designed to put to an end the continuous disturbance of a party's possession. Although at common law an ejectment action had actually to have been brought, under the statute any adverse claim will suffice. The basic point is that the action is not aimed at a particular piece of evidence, but at the pretensions of an individual. The action to remove a cloud, on the other hand, is aimed at a particular instrument, and a piece of evidence. It is an application of the equitable bill *quia timet*. Unlike the actions in trespass or ejectment, however, title, not possession, is the primary interest at stake. Although the equitable actions were not

the absence of any equivalent remedy in the case of land disputes with the United States that presents the major inequity requiring reform.

The Case for Reform

Prior to the Tucker Act, a contractor with the United States was wholly without judicial remedy in the event of breach. Prior to the Federal Tort Claims Act, an injured person was wholly without judicial remedy when the United States was the tortfeasor. As has been shown, however, the private disputant in a land title dispute with the United States is not always wholly without a judicial remedy.

As a general principle, it may be asserted that in any case where damages are available as a remedy in a dispute between private land disputants, similar compensation is available in land title disputes with the United States. Where the action of the United States is such as to constitute a constitutional taking, a remedy is available under the Tucker Act. Where the act of the United States is of a lesser nature, damages may be available under the FTCA. The question which must, therefore, be answered is why is this not sufficient. The answer, as demonstrated by the foregoing discussion of remedies available in the case of private land title disputants, lies in the fact that it is inherent in the nature of land title disputes that damages are often not the most appropriate remedy, and indeed are often not an available remedy at all.

*Inadequacy of the damages remedy.*¹⁵⁶ One of the most firmly established principles in American jurisprudence is that where land is

available at common law to a plaintiff out of possession, the California statute has no such limitation. *Thomson v. Thomson*, 7 Cal. 2d 671, 62 P.2d 358 (1936). See generally *Williamson, Improving California's Quiet Title Laws*, 21 HASTINGS L.J. 835 (1970).

156. The discussion of the inadequacy of damages speaks in terms of the plaintiff. The United States as defendant also should have an interest in making available relief other than compensatory damages. The cost to the government in forced condemnation could be far more expensive and administratively less desirable than a simple stoppage of the complained of activity. See, e.g., *Switzerland Co. v. Udall*, 337 F.2d 56, 60-61 (5th Cir. 1964); *Cramton* 414. On the other hand, if the federal government does not want to keep (and pay for) the land where it does not have title, it is possible that the Tucker Act taking could be found to be temporary only, and the property returned in specie to the true owner. See *Transcript of Record, Malone v. Bowdoin*, at 47 n.2. If the government occupied the land under claim of title, however, it would seem this should be the option of the injured private party, not the government's.

It should be added that the discussion in this section covers only the specific problems raised by sovereign immunity in the land title dispute area. To them may be added all the arguments for abolishing sovereign immunity across the board, set forth in the authorities cited in notes 15 and 23 *supra*.

involved there is no substitute for the thing itself.¹⁵⁷ The reasons why this uniqueness must inexorably lead to specific relief rather than damages, however, are only dimly articulated.¹⁵⁸ No doubt practicality (the evaluation of land is a difficult and uncertain art),¹⁵⁹ reality (land is often of special, individualized use to one individual and not to another),¹⁶⁰ and sentimentality (the old homestead can be literally priceless)¹⁶¹ are all separately or in combination responsible. These classic reasons do not necessarily outweigh the potentially superior interests of the sovereign. They do suggest, however, that unless a case

157. [L]and—a favorite and favored subject in England, and every country of Anglo Saxon origin. Our constitution gives to land preeminence over every other species of property; and our law, whether administered in Courts of law or of equity, gives to it the same preference. Land, whether rich or poor, cannot be taken to pay debts until the personal property is exhausted. Contracts concerning land must be in writing. Land must be sold at the Court House, must be conveyed by deeds duly registered, and other instances “too tedious to mention.” The principle is, that land is assumed to have a peculiar value, so as to give an equity for a specific performance, without reference to its quality or quantity. *Kitchen v. Herring*, 42 N.C. 190, 192 (1851).

(The force of the quotation should not be impaired by the unfortunate further reference that “the same is assumed as to slaves.”)

In less lyric form, the *sui generis* nature of land and the consequent inadequacy of money damages has been recognized over and over again. *See, e.g.*, *Danciger Oil Ref. Co. v. Burroughs*, 75 F.2d 855 (10th Cir.), *cert. denied*, 295 U.S. 758 (1935); *Wilhite v. Skelton*, 149 F. 67 (1906); *Clark v. Cagle*, 141 Ga. 73, 82 S.E. 21 (1914); *Bennett v. Moon*, 110 Neb. 692, 194 N.W. 802 (1923); *Spencer v. Bales*, 108 Ore. 339, 216 P. 746 (1923); *Larrabee v. Bjorkman*, 79 Ore. 467, 155 P. 974 (1916); *In re Scott*, [1895] 2 Ch. 603.

The same principle is expressed by the textbook authorities, *see* G. CLARK, *EQUITY* § 42 (1919); H. MCCLINTOCK, *EQUITY* § 44 (2d ed. 1948); J. POMEROY, *EQUITABLE REMEDIES* § 2184 (2d ed. 1892); W. WALSH, *EQUITY* 303 (1930), and the periodical literature. *See Cox, Specific Performance of Contracts to Sell Land*, 16 KY. L.J. 338 (1928); *Lee, Remedies for Breach of the Installment Land Contract*, 19 U. MIAMI L. REV. 550, 570 (1965).

158. *E.g.*, “In a suit by vendee for specific performance of a land sale contract, the inadequacy of the remedy at law is generally accepted without discussion.” K. YORK & J. BAUMAN, *REMEDIES* 949 (1967).

159. Where the damage to the plaintiff-vendee can be absolutely measured—for example, where he has contracted to resell the land—the principle of specific performance has occasionally been challenged, *Hazelton v. Miller*, 25 D.C. App. 337 (1905), *aff’d on other grounds sub nom. Hazelton v. Sheckells*, 202 U.S. 71 (1906), but generally rejected. K. YORK & J. BAUMAN, *REMEDIES* 949 (1967).

160. This is the explanation given in *Adderly v. Dixon*, 57 Eng. Rep. 239, 240 (1824). In the *Kitchen* case, *see* note 157 *supra*, the argument was made that since the land was only good for timber, no special use was involved and therefore no specific relief should be given.

161. An articulated discussion of this factor appears more starkly in the cases discussing the availability of specific relief in contracts for the sale of personal property. *See, e.g.*, *Pusey v. Pusey*, 23 Eng. Rep. 465, 1 Vern. 273 (1684) (the family horn given by King Canute); *Duke of Somerset v. Cookson*, 24 Eng. Rep. 1114, 3 Peere Williams 390 (1735) (silver altar-piece); *Burr v. Bloomsburg*, 101 N.J. Eq. 615, 138 A. 876 (1927) (diamond ring).

can be made that shows those superior interests to be unprovided for, specific relief in the form of recovery of the land itself, rather than damages, should be an available remedy to the private title disputant with the United States. Surely the overriding power of eminent domain, which permits the sovereign to obtain land required "for public use," should normally protect the interests of the sovereign.

Indeed, a special feature of the inadequacy of damages doctrine is present in the case of land disputes with the sovereign. In the presently available Tucker Act proceedings for the kind of "taking" under discussion, the amount paid for a taking, while in a sense "damages" is better characterized as compensation paid for the exercise of the power of eminent domain.¹⁶² The considerations involved

162. Generally, the principles relating to recovery in inverse condemnation do not differ from those involved in formal condemnation actions. Consequential damages are not allowable, at least in those terms. D. MANDELKER, *INVERSE CONDEMNATION: THE CONSTITUTIONAL LIMITS OF PUBLIC RESPONSIBILITIES* 19-20 (1964). See *United States v. Cress*, 243 U.S. 316 (1917).

The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain. Where formal proceedings are initiated by the party condemning, it is usual and proper to specify the precise interest taken, where less than the fee. But where, as in this case, the property-owner resorts to the courts, as he may, to recover compensation for what actually had been taken, upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require . . . , and it appears that less than the whole has been taken and is to be paid for, such a right or interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking . . . *Id.* at 328-29.

That the principles do not differ is further attested to by the tendency of the Supreme Court to discuss formal proceedings and inverse condemnation suits interchangeably. For example, in *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950), plaintiff sued for the destruction of the agricultural value of his land. A formal proceeding, *United States v. Chicago, M. St. P. & Pac. Ry. Co.*, 312 U.S. 592 (1941), was seen as pointing the way to decision. Moreover, *Chicago, M. St. P. & Pac. Ry. Co.* was seen as limiting *Cress*, an inverse condemnation action, but in a way not pertinent to this note. Then in *United States v. Va. Elec. & Power Co.*, 365 U.S. 624 (1961), a formal proceeding, *Kansas City Insurance* was cited, and in *United States v. Twin City Power Co.*, 350 U.S. 222 (1956), the Court found it necessary to distinguish *Kansas City Insurance*.

MANDELKER, *supra*, distinguishes between two types of inverse suits: those in which the damage is evident on completion of the government's improvement, where "the fact that recovery is had by way of inverse does not alter the substantive result," *id.* at 2, and those in which the damage is only probable on completion of the improvement, where there could be no recovery at that time. Mandelker points out that in the latter type, tort and nuisance theories have tended to creep into the discussions, in part because of the prevalent and continuing state immunity from tort liability, which leads to rather tortured applications of the doctrine of inverse condemnation. For the purposes of this article, however, it is only important that in what must be considered part of the "evident" class of cases—that is, cases in which a landowner would desire to remove some form of government encumbrance on his land, the principles relating to recovery in formal condemnation would apply, and consequential damages would not be allowable.

in the two concepts do not perfectly coincide, with the result that the compensation paid in a Tucker Act action may be significantly less than the true cost—that is, damages—to the claimant. In such a situation, specific relief would be of enhanced relevance.

Without attempting to review exhaustively the principles relating to compensation in federal condemnation,¹⁶³ the basic principle at work is that the compensation is paid for the interests in the land taken, and not for consequential damages.¹⁶⁴ Thus, no compensation is generally payable for such losses as good will, lost profits, moving expenses, and start-up expenses at a new location.¹⁶⁵ Furthermore, in valuation of the property taken, the general market value of the land is the test for compensation, not an individualized computation as to the value to the actual owner.¹⁶⁶ In damages for trespass, by comparison, both particularized damages to the owner and consequential damages can be awarded, since the aim is to make the particular plaintiff whole for the wrongful act of the tort-feasor.¹⁶⁷

Unavailability of the damages remedy. Far more troublesome than the inadequacy of the damages remedy at present is the nonavailability of damages to many private disputants who are significantly affected by a possible federal interest in their land. In order for a Tucker Act action to be available, the United States must be actively asserting its interest, to the extent that an actual “taking” has occurred.¹⁶⁸ A similar dilemma existed in time past with regard to purely

163. The classic work is NICHOLS. A good capsule discussion is *Study of Compensation and Assistance for Persons Affected by Real Property Acquisitions in Federal and Federally Related Programs*, COMMITTEE PRINT NO. 31, 88th Cong., 2d Sess. 51-87 (1965).

164. *Mitchell v. United States*, 267 U.S. 341 (1925). See 4A NICHOLS ch. XIV.

165. See *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. Powelson*, 319 U.S. 266, 281-83 (1942); *United States v. 22.95 Acres*, 450 F.2d 725 (9th Cir. 1971); *R.J. Widen Co. v. United States*, 357 F.2d 988 (Ct. Cl. 1966); 4 NICHOLS § 14, 2471; COMMITTEE PRINT NO. 31, *supra* note 163, at 54-55. But cf. P.L. 91-646 (1970). See Aloit & Goldring, *Reevaluation of Value, Good Will, and Business Losses in Eminent Domain*, 53 CORNELL L.Q. 604 (1968).

166. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1964). In measuring the property interest taken, the test is the loss to the owner, not the gain to the condemnor: *Kimball Laundry Co. v. United States*, *supra*, at 13; *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1910).

167. A good recent case is *Frustuck v. City of Fairfax*, 212 Cal. App. 2d 345, 28 Cal. Rptr. 357 (1963). In discussing the appropriate damages, the court cited many prior holdings granting damages, where appropriate, for such items as cost of making repairs, loss of use of the property, lost profits, loss of prospective profits, and increased operating expenses pending repairs.

168. See notes 77-87 *supra* and accompanying text.

private disputes. The land disputant had legal causes of action in trespass for damages or ejectment for possession by the rival claimant, but if the rival claimant passively asserted no rights, or if the interest was nonpossessory, neither legal form of action was available. To fill this void the equitable remedy of quiet title arose.

In land title disputes with the United States, however, there is no such relief, which presents an especially severe problem. The absence of property taxes and of the profit incentive eliminates economic pressures upon the United States to assert a possessory interest. Moreover, since neither adverse possession¹⁶⁹ nor laches¹⁷⁰ operate against it, the United States has no incentive for those reasons to actively assert its interests, even against an allegedly trespassing land disputant—thus, there will be no Tucker Act cause of action. Besides making the damage remedy essentially unavailable, this state of affairs also inhibits the economic development of land in which it is feared that there may be an ownership claim by the United States at some future time. Extractive resources in land, such as timber or minerals, may go unused; construction and other improvements may go unbuilt. Land as a limited resource should not be so restrained from maximum use.

The possibility of a nonpossessory interest in the United States is also very real, inasmuch as patents from it have often reserved mineral rights and the like, or granted defeasible interests. Likewise, disputed restrictive covenants, equitable servitudes, and negative ease-

169. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132-33 (1938). The theory seems to have been that "the king is always busy in the public good and has not the leisure to assert his right within the times limited to his subject." See note 119 *supra* and accompanying text. Until 1966, no general statute of limitations applied to the United States. In that year, such a statute was passed, Pub. L. No. 89-505, §§ 2415-16, 80 Stat. 304 (1966), but it expressly provided that "[n]othing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property." 28 U.S.C. § 2415(c) (1970). The statute does provide that "an action to recover damages resulting from a trespass on lands of the United States, including trust or restricted Indian lands . . . may be brought within six years after the right of action accrues." *Id.* § 2415(b).

170. *United States v. California*, 332 U.S. 19, 40 (1946); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917). Whether the new general statute of limitations will cut into this doctrine remains to be seen. The Public Land Law Review Commission has, however, recommended that the defenses of equitable estoppel and laches should be available against the United States, as well as the doctrine of adverse possession "where land has been occupied in good faith." PLLRC REPORT 260-61. See Note, *Immunity from Statutes of Limitations and Other Doctrines Favoring the United States as Plaintiff*, 55 COLUM. L. REV. 1177 (1955).

ments are all beyond challenge or recompense absent an actual violation thereof by the private disputant and an affirmative attempt to assert the rights by the United States. Future interests, moreover, such as reverter and re-entry rights, may not be actively asserted by the United States regardless of its willingness to do so, until the event occurs which triggers the right. The United States is even barred in most cases from effectively disclaiming an interest in land which may be of dubious validity or worth,¹⁷¹ thus resolving the dispute by conveyance of a quitclaim.

Fundamental unfairness. Transcending the issues of inadequacy or absence of damages is a question of fundamental fairness. Deep-seated in Anglo-American law is the doctrine that ownership entitles the individual to possession of the property itself and he need take no substitute. Thus, a breach of contract to sell goods may result in damages, but not specific performance. If, however, a bailee refuses to deliver up bailed goods themselves, the true owner may obtain possession of the goods in replevin and is not forced to accept their equivalent in damages.¹⁷² So, too, if a structure extends onto another's land, he may, as a general principle, subject to equitable considerations such as relative hardship, require the structure itself to be removed and need not accept damages.¹⁷³ "In itself nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again in specie."¹⁷⁴

The sovereign, of course, has overriding rights in eminent domain. But where congressional authorization is lacking or no public purpose

171. Under the Constitution, U.S. CONST. art. 4, § 3, (cl. 2), only the Congress may dispose of property belonging to the United States, and executive branch officials are powerless in this regard absent congressional authorization. See *United States v. California*, 332 U.S. 19 (1947); *Osbourne v. United States*, 145 F.2d 892 (9th Cir. 1944).

172. See RESTATEMENT OF TORTS §§ 223, 237 (1934). The action in most states is statutory in nature, called "replevin" or "action in claim and delivery" or "action to recover a chattel." M. ROSENBERG, J. WEINSTEIN, & H. SMIT, *ELEMENTS OF CIVIL PROCEDURE* 73 (1970). It is true that the effectiveness of the specific remedy may be limited by the inability to locate the chattel, and so-called "equitable replevin," forcing cooperation by the defendant, is more limited by considerations of uniqueness. See, e.g., *Charles Simkin & Sons v. Massiah*, 289 F.2d 26 (3d Cir. 1961); RESTATEMENT OF TORTS § 946, comments *a* and *b* (1934).

173. See, e.g., *Brown Derby Hollywood Corp. v. Hatton*, 61 Cal. 2d 855, 395 P.2d 896, 40 Cal. Rptr. 848 (1964); *O'Havia v. Savarese*, 338 Mass. 330, 155 N.E.2d 432, 2 A.L.R.3d 997 (1959).

174. *Duke of Somerset v. Cookson*, 24 Eng. Rep. 1114, 3 Peere Williams 390 (Chancery 1735). For more arcane references, going back to the Digest of Justinian, see *Succession of Or*, 219 La. 1, 51 So. 2d 804 (1951).

is involved, it is both unfair and unseemly that the sovereign should force the true owner to accept damages in lieu of possession. The basic philosophy at stake was articulated two decades ago by Mr. Justice Douglas in *Land v. Dollar*,¹⁷⁵ the last Supreme Court case effectively to follow *United States v. Lee*:

[P]ublic officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. *The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld.*¹⁷⁶

Considerations of Statutory Reform

The general principle may thus be stated that judicial resolution of land title disputes between the United States and private parties should not be barred by the doctrine of sovereign immunity. It is next necessary to explore the considerations involved in determining the shape, form and scope of the statutory relief that should be forthcoming.¹⁷⁷

Right to possession. To the extent that the doctrine of sovereign immunity has any justification in its application to land title disputes with the sovereign, it arises out of the fear that if specific relief is allowed in lieu of damages, governmental functions could be subject to undue interference.¹⁷⁸ The point reflects a justified concern, and possible untoward disruption of governmental functions should be taken into account in any statutory reform. This suggests that any actual possession by the United States of the disputed land should not

175. 330 U.S. 731 (1947). The case involved an action for an injunction to require the government to return specific shares of stock alleged to be owned by the plaintiff which had been pledged to the government as collateral for a debt that had been paid. The government's defense was that the stock had not been pledged but transferred outright.

176. *Id.* at 738 (emphasis added).

177. The United States Department of Justice has proposed legislation which, in amended form has passed the Senate, would permit the bringing of quiet-title actions against the United States. See text at note 286 *infra*. This important proposal has served as a vehicle for crystalizing the considerations here discussed. The decision was made to frame the discussion in an abstract form rather than as a section-by-section analysis of the proposed bill, in the belief that a more permanent analysis of the underlying factors can thereby be presented. References to relevant sections of the Justice bill and the Senate-passed bill are, however, set forth where appropriate; and the full text of the Justice bill, prior to amendment, is printed in the Appendix to this article.

178. See, e.g., *Larson v. Foreign & Domestic Commerce Corp.*, 337 U.S. 682, 704 (1949). See also Cramton 397.

be disturbed until a final adjudication of the state of the title has been made. In private litigation, an ejectment action will lie at that point, either independently or in connection with the quiet title action.¹⁷⁹ Thus, it is appropriate to assert that once title has been determined to be in another, the United States should be required to follow the procedures for acquiring property by eminent domain if it wishes to retain possession.¹⁸⁰ Formal proceedings in eminent domain are not, however, the only "normal" means by which the United States can lawfully acquire property under its constitutional power to take private property for public use.¹⁸¹ For example, in *Dugan v. Rank*,¹⁸² the Court specifically found that Congress itself had authorized the United States to acquire water rights by physical seizure, with relief to be found in a Tucker Act action.¹⁸³ Thus, pursuant to congressional authorization, the United States can exercise its power of eminent domain either by entering into physical possession of property without a court order¹⁸⁴ or by instituting condemnation proceedings.¹⁸⁵ Under the first method, the owner must look to the Tucker Act remedy; under the second, the statutes may be broadly classified either as requiring compensation *before* the United States takes possession¹⁸⁶ or permitting it to take immediate possession upon court order without prior compensation.¹⁸⁷

179. See notes 147-50 *supra* and accompanying text.

180. *E.g.*, "[T]he government should not be able to seize private land without following eminent domain procedures." *Hearings on Sovereign Immunity* 26.

181. The power of the Government to take private property for public use has been declared an "integral aspect of sovereignty." *Kohl v. United States*, 91 U.S. 367 (1875).

182. 372 U.S. 609 (1963).

183. *See also* *Turner v. Kings River Conservation Dist.*, 360 F.2d 184 (9th Cir. 1966); *State v. Rank*, 293 F.2d 340, 354-55 (1961). Another example of the United States having the power to summarily seize property with the owner relegated to a damage claim is in the field of patent and copyright infringement. 28 U.S.C. § 1498 (1970); SCHWARTZ & JACOBY, TEXT § 11.105.

184. It may be speculated, however, whether *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1967) may not have affected this practice, at least where the United States concedes title to rest in another.

185. Another rarely-used method is for the Congress by statute simply to declare that title to certain land is thereby vested in the United States. This was done in 1968 with respect to the establishment of the Redwood National Park. 16 U.S.C. § 79c(b)(1) (1970). The Act further provided that any action for compensation against the United States for the taking should be brought in inverse condemnation under the Tucker Act. *Cf. Confederated Bands of Ute Indians v. United States*, 100 Ct. Cl. 413 (1943).

186. *See, e.g.*, 50 U.S.C. § 257 (1970), 10 U.S.C. § 2663 (1970).

187. *See, e.g.*, 33 U.S.C. § 594 (1970). *See also* *Best v. Humboldt Mining Co.*, 371 U.S. 334, 340 (1963); *United States v. Dow*, 357 U.S. 17, 21 (1958). The fifth amendment does not require compensation to be paid in advance of the taking. *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932).

The critical point at issue, then, may be whether the taking of the property by seizure without court order is authorized by law in a given case. In cases where such seizure is so authorized and it is adjudicated that title is in the private party, there would seem to be no significant objection to permitting the court hearing the quiet title action to adjudicate the issue of Tucker Act damages as well.¹⁸⁸ However, where summary seizure is not legally permissible, and condemnation must be carried out by other methods, it would be unjust for the United States to retain possession without being required to follow the prescribed methods. Important differences could result—for example, entitlement to a jury trial¹⁸⁹ or the right to raise the defense of lack of public purpose.¹⁹⁰ Above all, any provision providing a limited right in the United States to retain possession until final judgment should not be expanded into a back-door general congressional authorization permitting, in effect, land seizures as a general lawful condemnation technique.¹⁹¹ Any truly serious problems presented to the United States by a requirement that it deliver up possession where title is decreed against it and statutory authority is lacking to permit imme-

188. Where the damages are less than \$10,000, the district court would have jurisdiction in any event. While the plaintiff might object that he would have preferred to bring the action for damages in the Court of Claims, no serious inequity seems sufficient to outweigh the desirability of cleaning up the dispute in a single action. The courts have interpreted congressional intent to assure that "substantial rights of claimants are to be governed alike whether suit is brought in the Court of Claims or the District Court." *Bates Mfg. Co. v. United States*, 303 U.S. 567, 570 (1938). Thus, for example, sections of the judicial code in terms applicable to the Court of Claims alone are held applicable to the district courts as well in cases involving concurrent jurisdiction. See SCHWARTZ & JACOBY, TEXT 96. Where the damages exceed \$10,000, however, there can be objection based upon considerations of orderliness and uniformity of result, and provision should, therefore, be made for transfer of the case to the Court of Claims. Indeed, 28 U.S.C. § 1406(c) (1970) does permit the transfer of a case from the district court to the Court of Claims "in the interest of justice." It would indeed seem appropriate that, upon assertion early in the litigation that the United States intended to assert its right of seizure in the event that title should be found to be in the plaintiff, the district court should thereupon transfer the case.

189. See notes 201-04 *infra*, and accompanying text.

190. See notes 53-54 *supra* and accompanying text.

191. The Justice bill provides that the United States may retain possession and control over the disputed property until final judgment, and thereafter (in the event of adverse determination) upon payment into court of just compensation. JUSTICE BILL § 2409a(b). The Senate-passed bill amended this section to require such possession or control to have existed at least ninety days prior to the commencement of the action, and, in the event of adverse determination, to require the United States to file a separate condemnation action within ninety days if it wishes to retain possession or control.

diate condemnation¹⁹² should be resolvable by the broad equitable willingness, in appropriate cases, to weigh relative hardships before requiring dispossession.¹⁹³

Jury trial. The classic quiet title action, being equitable in nature, did not involve the right to jury trial. However, where an ejectment action was available—that is, where the defendant had possession—equity would, under the traditional doctrine of adequate remedy at law, decline to take jurisdiction. Thus, the right to a jury trial in such cases was preserved. A statutory waiver by the United States of its sovereign immunity in land title disputes, then, presents two questions: first, whether absent any provision a jury trial right would exist,¹⁹⁴ and second whether the United States may or should condition its waiver upon the absence of a jury trial.

Although state law is by and large controlling on the substantive claims in land title disputes, characterization of the claims as legal or equitable for determining whether a right to jury trial exists in federal court must be made under federal law.¹⁹⁵ Thus, simply because a state statute has expanded the traditional equity action to permit suits to quiet title where the defendant is in possession, the right to trial by jury in an action brought in federal court under the state statute is not thereby thwarted.¹⁹⁶ The Supreme Court may, in addition, be pushing the question one step further by approaching a doctrine that if the basic issue is “legal,” the right to a jury trial exists under the seventh amendment even if the form of action and relief

192. The anomaly involved in holding that a public official was “unauthorized to seize land,” and yet permitting Tucker Act damages to be obtained, is discussed in the first section of this article. See notes 44-55 *supra* and accompanying text.

193. See, e.g., *Dolske v. Gromley*, 58 Cal. 2d 513, 25 Cal. Rptr. 270, 375 P.2d 174 (1964).

194. Absent an express provision in a statute waiving sovereign immunity, plaintiff's right to a jury in an action against the United States will depend upon whether such a right would exist in an ordinary action of the same type. See *United States v. Pfitsch*, 256 U.S. 547 (1921); *Collins v. Virgin Islands*, 366 F.2d 279 (3d Cir. 1966), *cert. denied*, 386 U.S. 958 (1967); *Hacker v. United States*, 16 F.2d 702 (5th Cir. 1927); cf. *Law v. United States*, 266 U.S. 494 (1925).

195. *Simler v. Conner*, 372 U.S. 221 (1963); *United States v. Williams*, 441 F.2d 637, 643 (5th Cir. 1971) (right to jury trial exists in trespass action brought by the United States). The declaratory judgment action, as an interesting blend of law and equity jurisdiction, presents an especially acute problem as to the right to a jury trial. See Note, *Right to Trial by Jury in Declaratory Judgment Actions*, 3 CONN. L. REV. 564 (1971).

196. *Whitehead v. Shattuck*, 138 U.S. 146 (1891); 5 J. MOORE, FEDERAL PRACTICE ¶ 38.11[5] (2d ed. 1969). See also *Ross v. Bernhard*, 396 U.S. 531 (1970).

were traditionally "equitable" in nature.¹⁹⁷ Thus, although a quiet title action is equitable, the basic issue of "title" is clearly "legal" and by that analysis a jury trial right would exist.

It does not, however, follow that the United States in waiving its immunity would be similarly bound. Since the waiver of sovereign immunity is a privilege, the government may, notwithstanding the seventh amendment, attach to it a condition that trial shall not be by jury.¹⁹⁸ Indeed, the fact of the matter is that most suits against the United States are triable by court and not by jury¹⁹⁹—the basic rationale, it would appear, being a fear of the deep pocket syndrome.²⁰⁰

On the other hand, in formal condemnation proceedings in federal district courts, any party may have a trial by jury on the issue of just compensation "unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission."²⁰¹ This rule replaced the previous practice of following state procedure; at the time of the adoption of the rule, some 43 states provided for a jury in condemnation actions.²⁰² When the issue arises, jury trial is the fa-

197. See *Ross v. Bernhard*, 396 U.S. 531, 534 (1970); *Dairy Queen Inc. v. Wood*, 369 U.S. 469 (1962) (equitable "clean-up" doctrine does not deprive plaintiff of jury trial for legal issues); *Beacon Theatres v. Westover*, 359 U.S. 500, 509 (1959); Note, *Federal Courts: Right to Jury Trial in Cases Involving Both Equitable and Legal Issues*, 47 CALIF. L. REV. 760 (1959).

198. *Cargill, Inc. v. Commodity Credit Corp.*, 275 F.2d 745 (2d Cir. 1960); *United States v. Green*, 107 F.2d 19 (10th Cir. 1939). On the right of the United States to attach conditions to waivers of sovereign immunity, see *Honda v. Clark*, 386 U.S. 484, 501 (1967); *United States v. John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 306 (1960); *United States v. Sherwood*, 312 U.S. 584, 587 (1941); *McElrath v. United States*, 102 U.S. 426 (1880). Such limitations and conditions are, however, to be strictly observed, and exceptions thereto are not to be implied. *Soriano v. United States*, 352 U.S. 270, 276 (1957).

In *Reynolds v. United States*, 397 U.S. 74 (1970), the Court specifically reaffirmed that there is no constitutional right to a trial by jury in eminent domain proceedings.

199. See SCHWARTZ & JACOBY, TEXT 93.

200. See *United States v. Reynolds*, 397 U.S. 14, 23-24 (1970) (dissent). Both actions under the Tucker Act, whether brought in a district court or in the Court of Claims, 28 U.S.C. § 2402 (1970) (no actions in the Court of Claims are tried before a jury), and under the FTCA, 28 U.S.C. § 2402 (1970) are tried without a jury, although under the FTCA the court may empanel an advisory jury. See FED. R. CIV. P. 39(c). *Boston v. United States*, 262 F. Supp. 22 (D. Hawaii 1966); 5 J. MOORE, FEDERAL PRACTICE ¶ 39.10[1], n.8 (2d ed. 1968). A significant exception is the right to trial by jury in suits for income tax refunds. 28 U.S.C. § 2402 (1970).

201. FED. R. CIV. P. 71a(h).

202. 5 J. MOORE, FEDERAL PRACTICE ¶ 38.22(2) (1971).

vored procedure, and appointment of commissioners the exception.²⁰³ In 1967, the Congress amended the one provision of law that made the commissioner system mandatory, in connection with Tennessee Valley Authority acquisitions, to permit a jury trial.²⁰⁴

While, as a matter of first impression, it might be argued that trial by jury should be provided for, consistency with prior waiver statutes of general scope and with the basically equitable nature of quiet title would support the proposition that no jury trial be provided in statutory reform in the land title dispute area.²⁰⁵ However, the fact that a jury trial is provided in formal condemnation proceedings, reinforces the point already made that the United States should be required to follow statutory procedures where the seizure of land was unauthorized by Congress.

Statute of Limitations. Waiver statutes have generally set a time period within which an action may be brought—for example, the Tucker Act provides for six years,²⁰⁶ and the FTCA for two.²⁰⁷ The limitation problem in suits involving real property, however, presents special perplexities.

The classic limitation period in private real property disputes is twenty years,²⁰⁸ subject to extensions for various forms of disabilities. While the trend is for shorter limitation periods and reduction of

203. *United States v. 2,862.88 Acres of Land*, 310 F.2d 775 (4th Cir. 1962), *modified on other grounds*, 376 U.S. 192 (1964); *Parks v. United States*, 293 F.2d 482 (5th Cir. 1961). See Jurgensmeyer, *Federal Rule of Civil Procedure, 71A(h) Land Commissions: The First Fifteen Years*, 43 IND. L.J. 677 (1968).

204. 16 U.S.C. § 831x (1970). In its report, the Senate Committee commented: "While the committee makes no judgment as to the benefits of either the commissioner or jury-trial system, it does feel that a right to trial-by-jury is basic to our American way of life, and accordingly recommends adoption of this legislation." 1968 U.S. CODE CONG. & AD. NEWS 3659.

205. The Justice bill and the Senate-passed bill so provide. JUSTICE BILL § 2409a(e).

206. 28 U.S.C. §§ 2401, 2501 (1970). The time is extended for those "under legal disability or beyond the seas." *Id.* § 2401. The limitation is a nonwaivable question of subject matter jurisdiction and may be raised at any time. *Christian Beacon v. United States*, 322 F.2d 512 (3d Cir. 1963); *Berry v. United States*, 126 F. Supp. 190 (Ct. Cl. 1954), *cert. denied*, 349 U.S. 938 (1955). In inverse condemnation actions, interesting questions may arise; for example, when is the asserted possession of the United States sufficient so that a constitutional taking has occurred and the statute commenced to run? See *United States v. Dickinson*, 331 U.S. 745 (1947); SCHWARTZ & JACOBY, TEXT 93. No statute of limitations appears in 28 U.S.C. § 2410 (1970), authorizing suits against the United States in quiet title actions where the federal interest is a lien.

207. 28 U.S.C. § 2401(b) (1970). Unlike the Tucker Act, no extension period is provided.

208. 21 Jac. 1, c. 16, §§ 1, 2 (1623).

extensions.²⁰⁹ such statutes are generally considerably longer than the limitations on contract or tort actions. The pressure for shortened periods probably arises from an increasing desire to assure the validity of titles, a purpose which the statute of limitations serves in cases of adverse possession.²¹⁰ Where the United States has actual possession of disputed real property, therefore, it might be desirable that challenges to the title of the United States be brought with reasonable promptness. Since a claimant under the Tucker Act has only six years within which to bring his claim in inverse condemnation,²¹¹ a case can be made for the same period under a waiver permitting other forms of relief.²¹²

209. See A. AXELROD, C. BERGER, & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE* 726-27 (1971); C. BERGER, *LAND OWNERSHIP AND USE* 248-53 (1968). California's statute is as short as five years. CAL. CIV. PRO. CODE §§ 324, 325 (West 1954).

210. See P. BAYSE, *CLEARING LAND TITLES* §§ 51-60 (2d ed. 1970); Simes & Taylor, *Improvement of Conveyancing By Legislation*, in 3 AM. LAW OF PROP. § 15.2 (A.J. Casner ed. 1952).

211. While the possession required for the statute of limitations to run in favor of an adverse possessor is not necessarily entirely coextensive with the possession sufficient to constitute a "taking" under the fifth amendment, compare 3 AM. LAW OF PROP. § 15.3 (A.J. Casner ed. 1952) with *United States v. Causby*, 328 U.S. 256 (1946), the situations are sufficiently analogous so that no great point need be made of the difference.

212. Whether the six-year period should be absolute is a close question. The Tucker Act itself provides for extension where the claimant is under a disability. See note 206 *supra*. However, there, no overriding need for prompt action is involved, since the only remedy is monetary damages. While of course problems of proof are presented by delays, it is not difficult to make a policy decision that such problems are outweighed by the inequity of barring a claim to one under disability. However, where the action to be permitted involves the right to oust the United States from possession, it is less clear that considerations of certainty in title are not paramount. Still, since in any case where the continued possession of the United States is desirable and authorized, the proposed waiver would presumably bar ejectment, it would appear that the equities would favor permitting extension in the case of disability, as with the Tucker Act.

Even if the six-year period is adopted as the statute of limitations under the quiet title statute where the United States is in possession, there is a certain lack of full coverage. The intent is to have the period serve as a title determinant just as the statute of limitations normally operates in adverse possession situations. It has been said that the United States can indeed acquire title to land "by adverse possession," even though it could not be sued in its own name. See *Stanley v. Schwalby*, 147 U.S. 508 (1893); *United States v. McCulley*, 100 F. Supp. 379 (D. Tenn. 1951); *United States v. Collins*, 78 F. Supp. 259 (D. Va. 1948); 6 R. POWELL, *REAL PROPERTY* 738 (1965); Annot., 18 A.L.R.3d 678 (1970). These cases were decided, however, when *United States v. Lee* would have upheld an ejectment action against the federal possessors individually, and there may be some doubt as to the result if the true owner had no relief whatever, as in the post-*Malone* era. Cf. *Johnson v. Oregon*, 418 P.2d 509 (Ore. 1966), *opinion withdrawn*, 423 P.2d 964 (Ore. 1967). In *United States v. Chatham*, 323 F.2d 95 (4th Cir. 1963), the United States brought a quiet title action following an invalid condemnation action many years pre-

The appropriate period of limitation, however, is a more complex question where the claim of the United States is nonpossessory, either because the United States has not chosen to assert a possessory right or because the claim is intrinsically nonpossessory. The important determination is whether claimants suing under the waiver should be put in a position of claimants in a purely private dispute, or in a position where they have more limited rights because their conflict is with the federal government. Arguably, the waiver establishes new rights and, unlike the private quiet title action, does not constitute an embellishment of existing rights; therefore the consent need not set up a system analogous to the private situation. But no reason appears why a different doctrine should apply as against the nonpossessing sovereign. The rules fashioned in the private context are based on experience and reason.

The fundamental operative principle is that the right to bring an action to quiet title is not in itself enough to commence the running of any limitation period. This is in significant contrast to the general rule that a cause of action accrues when suit may be maintained thereon, and the statute of limitations then begins to run.²¹³ For example, a claimant in possession *may* bring a quiet title action at any time against a rival private claimant out of possession. However, he certainly *need* not, for no statute of limitations runs against him—the statute by its terms applies only to bar actions for the recovery of real property.²¹⁴ and a claimant in possession may wait until his possession

viously. It asserted good title by adverse possession, and the court seemed to assume this would have been a valid basis for good title. However, it had not held actual possession of the property, and the court held that the color of title given by the invalid condemnation action was not sufficient to cause the statute to run. The difficulty is that neither the Tucker Act limitation nor that in the quiet title statute technically operates as a final determinant of title, as does true adverse possession. While the practical result will be the same whenever the United States continuously holds possession, cases may arise where it is out of possession and the private claimant asserts, after taking possession, that true title never vested in the United States, a technically tenable position. If the six years are to serve as the congressional determination that the period of adverse possession for the United States is to be that time, it would be best if the waiver statute clearly so stated.

213. See, e.g., *United States v. Wurtz*, 303 U.S. 414 (1938); *Maguire v. Hibernia S. & L. Soc'y*, 23 Cal. 2d 719, 146 P.2d 673 (1944).

214. However, once the statute has run in favor of one in possession, equity will act affirmatively to quiet the possessor's title as against the prior owner, *Sharon v. Tucker*, 144 U.S. 533 (1892); *W. WALSH*, *EQUITY* 1014-35 (1930), and otherwise recognize the adverse possessor's good title. *Smith v. Clark*, 248 Ill. 255, 93 N.E. 727 (1910) (equitable remedies cut off); *Ballantine*, *Title by Adverse Possession*, 32 HARV. L. REV. 135 (1918).

is disturbed or his title attacked before taking steps to vindicate his rights.²¹⁵ That is to say, the private claimant in possession has no statute of limitations running against him in the event he takes no action at all against the claimant out of possession, and indeed the statute is running in his favor wherever the rival claimant has a present right of possession.

Where the dispute is over an interest not affected by possession, such as an easement, profit, restrictive covenant, or other incorporeal interest, it appears that the statutory limitation period does not commence until the nonpossessory interest is challenged.²¹⁶ Similarly,

215. *Fulton v. McCullough*, 232 Iowa 1220, 7 N.W.2d 910 (1943) (quiet title action: plaintiff in possession claimed title based on unacknowledged deed delivered to plaintiff; held, statute did not begin to run when unacknowledged deed delivered, plaintiff's suit not barred); *Jones v. Hammond*, 118 Kan. 479, 235 P. 857 (1925) (action to remove cloud by plaintiff in possession; statute of limitations ran against de facto mortgagee, but not against plaintiff); *Cooper v. Rhea*, 82 Kan. 109, 107 P. 799 (1910) (action to remove cloud upon title by one in possession referred to as "continuing right," never barred by the statute of limitations while the cloud continues to exist); *Cauble v. Trexler*, 227 N.C. 207, 42 S.E.2d 77 (1947) (action to remove cloud of void mortgage; "continuing right"); *Ford v. Clendenin*, 215 N.Y. 10, 109 N.E. 124 (1915) ("The owner of real property who is in possession may wait until his possession is invaded or his title attacked before taking steps to vindicate his right").

None of the above cases held that a claimant in possession was barred by the statute. It is, therefore, difficult to tell what would be a sufficient "invasion" or "attack" to trigger the statute of limitations. The cases dealing with whether laches bars suits by claimants in possession suggest that a lawsuit would certainly be a sufficient attack, see *Ruckman v. Cory*, 129 U.S. 387 (1889), but it is unlikely that a party in possession will fail to take action after being made the subject of a lawsuit. As to whether words will trigger the statute, see *Brainard v. Buck*, 184 U.S. 99 (1902), where plaintiff's "passive acquiescence" in the "mere hope" of another that he could keep title to the property, did not bar the plaintiff on the grounds of laches. *But cf.* *Ruckman v. Cory*, *supra*, where statements of the nonpossessing party concerning the ownership of the land were not admitted into evidence. Whether these statements would have subjected the plaintiff to laches was not discussed.

216. See, e.g., *New England Home for Deaf Mutes v. Leader Filling Stations Corp.*, 276 Mass. 153, 177 N.E. 97 (1931) (erection and maintenance of structures for longer than the term required for prescription irreconcilable with rights of easement owner, thereby extinguishing the easement); *Graham v. Safe Harbor Water Power Corp.*, 315 Pa. 572, 173 A. 311 (1934) ("Nothing less than an absolute denial of the right, followed by an enjoyment inconsistent with its existence for a period of twenty-one years or more, can amount to an extinguishment of it"); *Sabins v. McAlister*, 116 Vt. 302, 76 A.2d 106 (1950) (easement not lost where fee owners did nothing to which easement owners could object); *Scampini v. Rizzi*, 106 Vt. 281, 172 A. 619 (1934) (obstruction of right of way by building on part of it not sufficient to extinguish entire easement; "The tenant must unfurl his flag on his land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest"); *In re Nisbet and Potts' Contract* [1905] 1 Ch. 391, *aff'd* [1906] 1 Ch. 386 (restrictive covenant held enforceable against one who got title by mesne conveyances from an adverse

where the dispute is over an interest which may become but is not yet possessory—such as a remainder, reversion, right of re-entry, unripened lien, or inchoate dower²¹⁷—the statute of limitations does not begin to run until the interest becomes possessory, and an action in ejectment against the rival claimant in possession thus is possible.²¹⁸ The justification for this is that the action to quiet title was designed as an expansion, not a limitation, of available legal remedies.²¹⁹ Thus the legal statute of limitations operates as the outside limit within which the quiet title action must be brought²²⁰—that is, after the limitation has run adverse possession will constitute the defendant as both the equitable and legal owner of the disputed interest.

It is true that laches or estoppel may bar a claimant from quiet title relief even if a legal statute of limitations has not run. In the case of the plaintiff in possession, the defendant out of possession must interfere with the claimant's possession or attack his title; lapse of

possessor; adverse possessor whose legal title has ripened is not freed from obligation of a negative covenant; RESTATEMENT OF PROPERTY § 539, comment i (1944). See also 3 AM. LAW OF PROP. §§ 15.13, 15.14 (A.J. Casner ed. 1952).

217. In several states marketable title statutes may affect remainder interests. See 1 AM. LAW OF PROP. § 4.115 (A.J. Casner ed. 1952).

218. See, e.g., *Superior Oil Corp. v. Alcorn*, 242 Ky. 814, 47 S.W.2d 973 (1931). 1 AM. LAW OF PROP. § 4.113; 3 *id.* § 15.8 (A.J. Casner ed. 1952); 2 R. POWELL, THE LAW OF REAL PROPERTY § 301 (1967). Decisions in Nebraska and Iowa have taken the position that since a quiet title action is available to a future interest owner, the statute should run. *Lane v. Travelers Ins. Co.*, 230 Iowa 973, 299 N.W. 553 (1941); *Criswell v. Criswell*, 101 Neb. 349, 163 N.W. 302 (1917); *Foster*, *Nebraska Law of Adverse Possession*, 23 NEB. L. REV. 105, 112-16 (1944). However in *Maxwell v. Hamel*, 138 Neb. 49, 292 N.W. 38 (1940) and *Unick v. St. Joseph Loan & Trust Co.*, 146 Neb. 789, 21 N.W.2d 752 (1946), Nebraska adopted the majority rule.

219. *Maxwell v. Hamel*, 138 Neb. 49, 292 N.W. 38 (1940). The RESTATEMENT OF PROPERTY firmly adopts this position:

Frequently the owner of a future interest as such can establish his ownership by a suit in equity to quiet title or to remove a cloud upon title or by analogous statutory proceedings legal or equitable. It might be reasoned that this fact should require him to avail himself of these rights of action and that the statutory period should thenceforth run, not only upon these equitable and statutory proceedings, but also upon the action of ejectment which might be brought when the interest becomes present. However, these equitable and statutory proceedings are considered to be created for the additional protection of the owner of the future interest . . . Statutes of limitations are rarely in terms applicable to suits to quiet title and to remove cloud on title and to statutory proceedings for the trial of title. However, these types of proceedings are considered as supplementary to the possessory actions, usually ejectment; and the statute of limitations is applied to them in the same manner as it is applied to such actions. To bar these proceedings while an action to recover possession can still be brought would give the adverse possessor no substantial protection. RESTATEMENT OF PROPERTY § 222, comments *d* & *e* (1936).

220. See note 214 *supra*.

time alone is not enough;²²¹ although where the delay has prejudiced the defendant or third persons, or where the defendant has relied to his detriment on actions or statements of the claimant, relief may be denied under the rubric of either laches or estoppel.²²² Such defenses would be available to the United States under the statutory waiver in appropriate cases, and should provide sufficient protection without an inflexible statute of limitations.²²³

Thus, the statutory waiver permitting actions in the nature of quiet title against the United States would present a serious problem if the mere right to bring an action thereunder were sufficient to cause the action to accrue and thus to start to run any limitation period provided in the statute. Private parties in possession may have no knowledge of the sovereign's interest, and placing upon them the duty to institute an action would be contrary to established legal doctrine. Indeed, the result of such a provision might be that the government's non-adverse non-possession would effectively transfer title to the government as far as the right to specific relief is concerned—a rather odd paradox.

It would not seem excessively difficult to adopt from private law the types of events which would trigger a wholly private right of action. One mechanism for instituting this type of rule would be a simple statutory provision that the cause of action against the government accrues only at such time as under applicable state law the limitation period would begin to run on a quiet title action.

This raises the question, however, whether it is desirable for state law to determine when the statute begins to run. Under the FTCA, with its two-year statute, the question has arisen in a number of cases and the courts have split, with the majority holding that federal law

221. See, e.g., *United States v. New Orleans Pac. Ry. Co.*, 248 U.S. 507 (1919); *Brainard v. Buck*, 184 U.S. 99 (1902); *Ruckman v. Cory*, 129 U.S. 387 (1889); *Miller v. Henry*, 105 Ark. 261, 150 S.W. 700 (1912); *Atkin v. Westfall*, 246 Iowa 822, 69 N.W.2d 523, 527 (1955); *Finley v. Finley*, 43 Wash. 2d 755, 264 P.2d 246 (1953). The cases indicate that the doctrines of laches and estoppel are used practically interchangeably, but in cases where estoppel is claimed there is usually some alleged manifestation of acquiescence by the claimant.

222. See *Bannard v. Duncan*, 79 Neb. 189, 112 N.W. 353 (1907); cf. *Clark v. Glos*, 180 Ill. 556, 54 N.E. 631 (1899).

223. Conversely the PLLRC has recommended that laches and estoppel should apply against the United States. They concluded that their innate flexibility and equitable nature would serve to protect the United States against their unjust application. See PLLRC REPORT 261.

determines the question.²²⁴ The basic argument for the applicability of state law is that the FTCA provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances."²²⁵ and that, logically, a substantive right arises only when a judicial action may be brought on it.²²⁶ The contrary result is based on considerations of uniformity—that is, the designation in the statute of a period of limitation leads to the conclusion that Congress intended that the period within which claimants must bring suit should be identical, regardless of where the acts occurred that led to the claim.²²⁷

In the case of title disputes over land, the argument is even stronger that nationwide uniformity is desirable. The United States is entitled to know that on the basis of certain acts, a period of time has begun to run after which its title may not be challenged, and it is difficult to see why the peculiarities of individual state laws should be determinative on the issue. The key point is that in fashioning such a federal rule, the legislature and courts should be sensitive to and aware of the general state doctrines applicable to limitations periods for quiet title actions.²²⁸

Retroactivity. Related to the question of the statute of limitations is whether, and to what degree, any waiver of sovereign immunity should apply to existing disputes, since such a statute raises the specter of opened floodgates. This is not an entirely unjustified concern of overworked and harassed federal lawyers.²²⁹ The problem is in

224. JAYSON § 277.01.

225. 28 U.S.C. § 2674 (1970).

226. See *Tessier v. United States*, 269 F.2d 305, 309 (1st Cir. 1959).

227. See *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962). The pressure toward such uniformity is reflected in cases which hold that the two-year period under the FTCA is applicable even where state law imposes a shorter period of limitation. JAYSON § 276. See, e.g., *United States v. Westfall*, 197 F.2d 765 (9th Cir. 1952).

228. The Justice bill provides that actions are barred under the statute "unless the complaint is filed within six years after the right of action first accrues." JUSTICE BILL § 2409a(f). The Senate-passed bill amended this section to provide that the complaint must be filed within six years after the "claim for relief" first accrues and that such claim shall be deemed to have accrued "upon actual knowledge of the claim of the United States."

229. As just one instance, in 16 months in 1969-1970, cases of an injunctive nature increased from 3400 to 7800. *Hearings on Sovereign Immunity* 67. At that hearing, Assistant Attorney General W.D. Ruckelshaus presented in some detail the Department of Justice's concern about a general waiver of sovereign immunity leading to an unacceptable increase in judicial activity. See also *id.* 64-75.

assessing the seriousness of the threat and fashioning an appropriate response.

Initially, the desirability of settling disputes about title to interests in land must be conceded. As our most fundamental resource, land can be put to its highest and most productive use only where title to it is clear. Much academic and legislative activity has for years been devoted to various mechanisms for enhancing the marketability of land by resolution of various title defects.²³⁰ Considerable inconvenience is justified on economic grounds alone if the result will be more certain titles.

One can be of two minds about the floodgates probability. Agitation for reform has been late in coming and modest in intensity. If a massive head of prospective cases had built up, the pressure would have long since been manifested, especially when it is considered that congressional impatience with the burdensome volume of private bills for contract and tort relief was a significant factor in the establishment of the Court of Claims and the enactments of the Tucker Act and the FTCA.²³¹ Although pressures of such intensity have not been detected in the property dispute field.²³² There is probably no accurate way to assess the burden which a full statutory retroactive effect would impose.

Analysis of the effects of previous waivers is not particularly en-

230. The literature is immense. The latest treatise is P. BAYSE, *CLEARING LAND TITLES* (2d ed. 1970). The numerous and varying forms of curative and marketable title acts adopted and proposed are discussed therein in detail. See also L. SIMES & C. TAYLOR, *IMPROVEMENT OF CONVEYANCING BY LEGISLATION* (1960).

231. Many good articles exist describing the origins and activities of the Court of Claims. See, e.g., Ellison, *The U.S. Court of Claims, Keeper of the Nation's Conscience for One Hundred Years*, 24 GEO. WASH. L. REV. 251 (1956). An extensive bibliography is cited in SCHWARTZ & JACOBY, TEXT 75.

232. The Department of Justice has asserted that "many . . . situations exist in which there is an undoubtedly sincere claim to title in land also claimed by the United States," Statement from Clyde O. Martz, Assistant Attorney General, Lands Division, in National Archives files of the PLLRC, dated April 5, 1968, and the American Land Title Association believes that "hundreds of such actual or potential claims exist today." Statement by American Land Title Association on S. 216, dated September 30, 1971. The PLLRC report itself acknowledges that the lack of manpower in federal land managing agencies to make the investigations required to defend the government's claims was at least historically a justification for sovereign immunity, although it concludes that this appears no longer to be the case. PLLRC REPORT 261. On the other hand, the Department of the Interior, in commenting upon the PLLRC proposal, suggested that no such waiver was needed because so few disputes existed to which the waiver might apply.

lightening. When the McCarren Amendment,²³³ authorizing suits against the United States in water rights disputes, was originally proposed, a Department of the Interior official expressed grave concern over the floodgates issue by saying that "it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation."²³⁴ However, very few reported cases have reached the courts in the nearly twenty years since its enactment.²³⁵ When the FTCA was passed on August 2, 1946, the floodgates issue was handled by making the act applicable only to claims accruing on or after January 1, 1945²³⁶—which was closely related to the one-year statute of limitations originally provided.²³⁷ The FTCA, however, may be distinguished by the fact that prior to its enactment the nonavailability of tort relief affected only the immediate parties and had no in rem effect.

With property title disputes, however, a solely prospective application of a quiet title act²³⁸ will result in the continuance of outstanding but unresolvable disputes, with accompanying uncertainty of true ownership and all the drawbacks presented thereby. Furthermore, considering the vast bulk of federal land transactions which have already taken place, the usefulness of a quiet title action which ex-

233. 43 U.S.C. § 666 (1970).

234. Letter from the Acting Assistant Secretary of the Interior to the Committee on the Judiciary, dated August 3, 1951, quoted in *United States v. District Court*, 169 Col. 555, 582, 458 P.2d 760, 773 (1969).

235. *Cf. Scanwell Labs, Inc. v. Shaffer*, 424 F.2d 859, 872 (D.C. Cir. 1970):

The spectacle of opening a Pandora's box of litigation has always seemed groundless to us, particularly in the area of standing to sue. Certainly the same hue and cry went up when the states relaxed the criteria for standing to sue; but so far the dockets in the states have not increased appreciably as a result of new cases in which standing would previously have been denied.

236. Act of Aug. 2, 1946, ch. 753, § 403(a), 60 Stat. 843.

237. *Id.* § 420.

238. The Justice bill in an early form provided that "the provisions of this Act shall be prospective in operation, and shall not apply to any claim or right of action which accrued prior to the date of the enactment of this Act." *Hearings on Sovereign Immunity* 154. As finally presented to the Congress, the draft legislation omits the first phrase, § 4, but the cover letter makes it clear that "since pre-existing claims can be settled as heretofore, under the Tucker Act or by special act of Congress, and because we wish to ensure that the workload of the Department and the courts under this legislation can develop at a rate which can be absorbed, we have made the draft bill prospective in operation." The Senate-passed bill struck out this section entirely, and instead amended the statute of limitations section to provide that actions would be barred unless begun "within six years after the claim for relief first accrues or *within two years after the effective date of this Act, whichever is later.*" (emphasis added)

cludes all existing claims is, indeed, a limited solution. To exclude all claims existing as of the date of the Act is particularly anomalous if, as is proper,²³⁹ claims under a quiet title statute are construed not to accrue for limitations purposes until possession is disturbed or other active challenge asserted. Yet, even such an interpretation would be to exclude from operation of the Act most present active disputes with the United States but not inchoate disputes.

The purpose of the statute, in essence, should be to provide a mechanism to resolve all land title disputes with the sovereign, present and future. To do so, no existing disputes should be barred.²⁴⁰ In particular, the statute should be available to private parties, who, prior to its passage, were wholly without judicial remedy in title disputes with the United States—such as cases not involving a Tucker Act taking or not subject to prior statutory waivers. The limitations period built into the statute itself could be effective in establishing an outside limit of six years as to any such disputes which, but for sovereign immunity, a cause of action in quiet title would have accrued.²⁴¹

No significant danger to the interests of the United States will arise from making the waiver retroactive because just as the sovereign may waive its immunity, the waiver may also be withdrawn. The power to so withdraw knows no limitation,²⁴² nor the power to condition its operation.²⁴³ Should the floodgates open, the Congress will be able to fashion such procedures as are necessary to permit a reasonable and orderly channeling of the waters. But before procedures of this nature are formulated, the floodgates should first be opened and the results awaited.²⁴⁴

239. See notes 206-28 *supra* and accompanying text.

240. Possibly adverse possession, laches, or estoppel would operate to bar existing claims in some cases. See notes 221-24 *supra* and accompanying text.

241. See notes 206-28 *supra* and accompanying text.

242. *Maricopa County v. Valley Nat'l Bank*, 318 U.S. 357, 362 (1943); *Lynch v. United States*, 292 U.S. 571, 581-82 (1934).

243. See notes 198-200 *supra* and accompanying text.

244. In the last analysis, it may come down to the words of Jerre Williams, then chairman of the Administrative Conference of the United States, in dealing with the "floodgates" objection to a general waiver of sovereign immunity: "The second answer is [the first answer was that there wouldn't be that much litigation anyhow] that the government of the United States must be willing to assume its responsibility to play openly and fairly with its citizens. And if it gets crank suits, as it will, if it gets frivolous suits, it should deal with those suits with the honest defenses . . . whatever they are. And it should take whatever effort, whatever time, whatever

Mesh with existing statutes. Federal land laws are of a bewildering multiplicity and prolixity. Enacted piecemeal over a century and a half, they often mesh imperfectly, if at all.²⁴⁵ In the area of land title disputes, in addition, special waiver statutes have been enacted to meet special needs, as already discussed. Thus, the issue arises as to the degree to which the passage of a quiet title statute should supplement or supersede existing legislation.²⁴⁶ Traditionally, the quiet title remedy was viewed as an expansion, not a duplication, of existing remedies. Where adequate relief at law existed, the equitable remedy was unavailable. Increasingly, however, the trend has been to consider quiet title as an alternative and supplementary form of relief which is declaratory in nature—as opposed to compensatory or specific.²⁴⁷

At present, the remedies available in a private land title dispute with the United States fall into two categories. Under the Tucker Act, one can in some cases receive compensatory relief, which is the exclusive and generally inadequate remedy. In partition suits, lien claims and water rights, on the other hand, the relief available is similar to that of a quiet title action—that is, declaratory and specific in nature. Conceding that damages—even where available²⁴⁸—are not an adequate remedy in land title disputes, it follows that the quiet title action should not automatically be foreclosed in the first category of cases. If the United States wishes to have continued possession, notwith-

money is necessary, to deal fairly with its citizens.” *Hearings on Sovereign Immunity* 11. The government’s argument on the “floodgates” issue in a general waiver of sovereign immunity appears in *id.* 51-52, 60, 66-69, 255-57. The government’s recommendation is that instead of a blanket waiver, Congress should make a careful determination of the specific types of cases that should be subject to judicial review and provide appropriate safeguards for each type of waiver. Adoption of a quiet title statute is suggested as one such example of an appropriate waiver!

245. See generally S. REP. NO. 1444, 88th Cong., 2d Sess. (1964). The PLLRC’s DIGEST OF PUBLIC LAND LAWS (1968) contains some 2,700 separate enactments covering, in one-paragraph summaries, 858 pages.

246. The Justice bill and the Senate-passed bill completely exclude “water rights” and “security interests” disputes from its operation. They also exclude actions which “may be or could have been brought” under provisions dealing with partitions, mortgages and other liens, and water rights. See notes 63-74 *supra* and accompanying text. The proposed language also excludes such actions as might have been brought under 28 U.S.C. §§ 1346, 1491 (1970), which encompass both the Tucker Act and the FTCA. JUSTICE BILL § 2409a(a). It is not clear whether this is intended to exclude the quiet title remedy in cases where compensation could be obtained under the Tucker Act. *Cf. id.* § 2409a(b).

247. See notes 151-55 *supra* and accompanying text.

248. See notes 162-71 *supra* and accompanying text.

standing a decision against it as to ownership, the quiet title statute can and should make provision for such an event.²⁴⁹

With regard to waivers which already provide for specific relief, however, the issue is not so clear. These waivers are designed with safeguards to meet the special situations involved.²⁵⁰ To the extent that relief of a declaratory nature is available under such statutes, it is appropriate that actions of this nature be excluded from the operation of the general quiet title statute, at least until its practical implementation and operation can be observed. However, the argument for *total* exclusion of certain types of land disputes from the operation of the quiet title statute is unclear. For example, sovereign immunity has already been waived as to water right disputes involving a "general adjudication" of a river system.²⁵¹ If the quiet title statute is to exclude water rights disputes altogether from its operation, the resolution of such disputes not involving a "general adjudication," will continue to lie totally outside any remedy, other than possible Tucker Act relief. With a provision in the quiet title statute authorizing continued United States possession or use of disputed interests where such seizure is authorized by law, and with preliminary injunctive relief prohibited, it is difficult to see any justification for their total exclusion.²⁵²

249. See notes 180-87 *supra* and accompanying text.

250. See, e.g., 28 U.S.C. § 2410 (1970). See notes 62-74 *supra* and accompanying text.

251. 43 U.S.C. § 666 (1970). See notes 71-74 *supra* and accompanying text. The Justice bill also provides for the total exclusion of "trust or restricted Indian lands." JUSTICE BILL § 2409a(a). The scope of the exclusion must be found in the arcane inner reaches of Indian land lore. See *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968); M. PRICE, *NATIVE AMERICAN LAW MANUAL* 562 *et seq.* (1970); U.S. DEP'T OF INTERIOR, *FEDERAL INDIAN LAW* (1958). The exclusion has been explained as follows: "The Federal government has over the years made specific commitments to the Indian People through written treaties and through informal and formal agreements to hold lands for the Indians in trust A unilateral waiver of the defense of sovereign immunity as to this land would, we feel, be contrary to President Nixon's pledge not to abridge the historic relationship between the Federal government and the Indians without the consent of the Indians." Testimony of the Solicitor of the Department of the Interior on S. 216 and S. 579, September 30, 1971. Some 50 million acres are involved in the exclusion. See BUREAU OF INDIAN AFFAIRS, *ANNUAL REPORT ON INDIAN LANDS* (1971). It may be questioned, however, whether a waiver of sovereign immunity could fairly be deemed a breach of trust, since only property not in fact owned by the Indians could ultimately be affected. The Senate-passed bill adds to the Justice bill exclusions an additional one, providing that the act does not apply to "any lands claimed by Indian or Native people based upon aboriginal right, title, use or occupancy."

252. Discussion has already appeared as to the class of cases involving disputes over administrative actions relating to the management and disposition of public lands which are not land title disputes, and as to which sovereign immunity is not now generally a significant obstacle to

Disclaimer of interest. One of the vital constitutional limitations upon the executive branch is its inability to dispose of federal property without the authorization of Congress, which, of course, constitutes a significant limitation on effective resolution of clouds upon title involving the United States.²⁵³ A quiet title statute, then, to be effective must provide for actions against the United States whenever it appears to have any possible interest in title to land. The determination of when the United States has an interest, moreover, should not turn on whether the United States in fact claims an interest,²⁵⁴ because the determination of the insignificance or nonexistence of such an interest by the analysis of the executive branch will not suffice to eliminate the cloud—the critical question is what others may think. Rather, the action should be open to anyone who thinks the United States may have an interest.

judicial review. See notes 13 & 54-61 *supra* and accompanying text. Such disputes would not typically be amenable to judicial resolution in actions in the nature of quiet title. To the extent that claims by individuals to public lands under such statutes or regulations may be elevated to the status of title disputes, *see, e.g.*, note 13 *supra* with respect to mining claims, it is possible that on occasion judicial relief under a statute of the type herein discussed could be involved. However, as a general matter, actions in the nature of quiet title are not considered the appropriate remedy even in actions by the holder of an asserted "equitable" title against the holder of the legal title, such as the vendee against the vendor in an unexecuted contract for the sale of real property. *See, e.g.*, *Chase v. Cameron*, 33 Cal. 231, 65 P. 460 (1901); *MacNeil Bros. Co. v. State Realty Co.*, 131 N.E.2d 178 (Mass. 1956); *cf. White v. GSA*, 343 F.2d 444 (9th Cir. 1965). Exceptions do exist where, for example, the legal title holder is in effect a stakeholder, *see, e.g.*, *O'Keefe v. Aptos Land & Water Co.*, 134 Cal. App. 2d 772, 286 P.2d 417 (1955), or under the particular wording of a statute. *See, e.g.*, *Polson Sheep Co. v. Owen*, 106 P.2d 181 (Mont. 1940). In any event, it is essential that the passage of legislation permitting the institution of actions to quiet title against the United States not be construed as directly or indirectly adversely affecting the present longstanding tradition and practice of nonstatutory judicial review of public land determinations. See notes 54-61 *supra* and accompanying text. The whole purpose is to supplement, not foreclose, existing modes of relief. Note, for example, that there is no statute of limitations applicable to nonstatutory review of administrative actions other than laches. *Brennan v. Udall*, 379 F.2d 803, 807-08, *cert. denied*, 389 U.S. 975 (1967).

253. An interesting analogy arises in the dispute over the power of executive branch officials to settle disputes over breaches of government contracts. The Comptroller General has taken the position that no such authority exists, since only the Congress may release or otherwise dispose of the rights and property of the United States. *See* 44 Comp. Gen. 353 (1964). *See also* *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294 (1941) (release of taxpayer's surety bond by collector of internal revenue). An extensive discussion of the issue appears in Shedd, *Administrative Authority to Settle Claims for Breach of Government Contracts*, 27 GEO. WASH. L. REV. 481 (1959), an article with which, it is interesting to note, the Comptroller General disagreed. 44 Comp. Gen. at 356-57.

254. The Justice bill provides that the action may be brought if "the United States claims an interest." JUSTICE BILL § 2409a(a).

Conservation of governmental time and effort also dictates that the executive branch be specifically empowered to disclaim any interest when it determines that no governmental interest, in fact, exists. The disclaimer authority might well go further and authorize a disclaimer when it appears that the interest has no significant value to the United States or the chances of its validity being upheld are too slight to justify the time and expense of trial.²⁵⁵ Such a disclaimer, however, should not, in and of itself, cause the dismissal of the quiet title action.²⁵⁶ The whole purpose of the action is to remove once and for all the cloud, and the disclaimer by the United States should either authorize the immediate entry of a quiet title judgment in favor of the plaintiff as against the United States²⁵⁷ or the United States should be authorized to deliver the equivalent of a quitclaim deed to the plaintiff.

Exclusive federal jurisdiction. The Tucker Act provides for concurrent jurisdiction in the Court of Claims and the United States district court in actions up to \$10,000, while actions in excess of \$10,000 may be heard only by the Court of Claims.²⁵⁸ Actions under the FTCA, however, may only be brought in federal district court, regardless of their amount.²⁵⁹ In neither case do state courts have any

255. Compare the provisions of 28 U.S.C. § 2410(e) (1970), which provides that where it appears to an officer in the executive branch that the lien of the United States will not be wholly or partly satisfied out of the proceeds of sale, "or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien." See generally Note, *The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts*, 70 HARV. L. REV. 350 (1956). Authority does exist for the executive branch to give quitclaim deeds in some situations. See 7 U.S.C. § 2253 (1970); 43 U.S.C. §§ 641a, 872 (1970).

256. The Justice bill provides that upon disclaimer prior to trial, the jurisdiction of the court shall cease. JUSTICE BILL § 2409a(d). The Senate-passed bill amends this section to require that the disclaimer of the United States must be "confirmed" by decree of the court, and to provide that where federal jurisdiction ceases for this reason, and there are other defendants, the case shall be remanded to the appropriate state court.

257. The United States would not thereby be prejudicing the rights of third parties. The quiet title action here is in personam against the United States and does not have an in rem effect. Even after issuance of a formal patent, rival claimants can litigate their respective rights to the former public land in a private law suit without the joinder of the land officials. See *Borox Consol. Ltd. v. Los Angeles*, 296 U.S. 10 (1935); *Anderson v. Clune*, 269 U.S. 140 (1925); *C. McFarland*, *supra* note 13, at 186.

258. 28 U.S.C. §§ 1346(a)(2), 1491 (1970).

259. *Id.* § 1346(b).

jurisdiction.²⁶⁰ It is equally clear that the United States, in waiving immunity, may designate in which courts it may be sued.²⁶¹

Which courts are appropriate for quiet title actions against the sovereign? It may be observed that matters of title are often questions of state rather than federal law.²⁶² Furthermore, state courts have extensive experience in dealing with matters of title.²⁶³ In addition, to the extent that the "floodgates" argument expresses concern about an overload upon the federal court system, as opposed to executive branch officials, opening the door to state court jurisdiction would be a significant ameliorative measure. And where the interest of the United States is relatively marginal and other parties are the primary disputants, the ability to include the United States in a state court action would be particularly appropriate. On the other hand, no compelling argument can be made against exclusive federal jurisdiction, particularly where the United States has possession of the disputed

260. *Richards v. United States*, 369 U.S. 1, 13 n.28 (1962); JAYSON § 190.02.

261. *Minnesota v. United States*, 305 U.S. 382, 388 (1939).

262. A detailed study of the degree to which property interests of the United States are determined by federal law as opposed to state law is beyond the scope of this article. Suffice it to say that in such matters, state law must govern in the absence of a federal statute or policy making federal law applicable. *United States v. Williams*, 441 F.2d 637, 643 (5th Cir. 1971); *Leiter Minerals, Inc. v. United States*, 329 F.2d 85, 90 (5th Cir. 1964); *United States v. Certain Property*, 306 F.2d 439, 444 (2d Cir. 1962). Cf. *United States v. Certain Property*, 344 F.2d 142 (2d Cir. 1965) (applicable law in condemnation); *Humble Oil v. Sun Oil*, 191 F.2d 705 (5th Cir. 1951) (applicable law in diversity action). Even *Swift v. Tyson*, 41 U.S. 1 (1842), acknowledged that state law should be looked to as regards "rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and territorial in their nature." *Id.* at 18.

Although in actions by the United States under 28 U.S.C. § 1345 (1970), the *Erie* rule is inapplicable, still in the absence of a contesting federal statute or policy, suits by the government to protect its property interests in land are local in nature. *Mason v. United States*, 260 U.S. 545 (1923); *United States v. Williams*, 441 F.2d 637, 643 (5th Cir. 1971). Cf. *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 308-09 (1947); *United States v. Marin Rock & Asphalt Co.*, 296 F. Supp. 1213 (C.D. Cal. 1969).

Of course, in numerous cases, where federal actions involve the public land laws, federal law will be controlling. Thus, "the construction of grants by the United States is a federal not a state question . . . and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances." *United States v. Oregon*, 295 U.S. 1, 28 (1935). See also *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966); SCHWARTZ & JACOBY, TEXT ch. XI1; Mishkin, *The Variousness of 'Federal Law': Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

263. Of course, so do the federal courts in diversity actions. See, e.g., *Kron v. First Federal Savings & Loan Ass'n*, 449 F.2d 865 (5th Cir. 1971).

land. The burden of the FTCA has apparently not proved excessive, although it may be significant that in 1966 the Department of Justice felt called upon to recommend legislation to permit more administrative settlements of disputed claims under the FTCA and other statutes. Among the aims of the proposals were to ease court congestion and avoid unnecessary litigation.²⁶⁴ Delays occasioned by the necessity of deferring to state tribunals appear to have been minimal in land cases in federal courts,²⁶⁵ and of course the controlling law may well be federal rather than state.

Should the workload prove excessive in actual practice, either administrative settlement or a turn to state courts could be considered. Since the pattern in waiver statutes appears generally to provide for exclusive federal jurisdiction²⁶⁶ and since the removal provision would normally be operative in any event,²⁶⁷ exclusive federal jurisdiction, at least at the outset, appears to be appropriate.²⁶⁸

264. See 2 U.S. CODE CONG. & AD. NEWS, 89th Cong., 2d Sess. 2502-14 (1966).

265. A dramatic instance of the deference paid to state law in this regard appears in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 228-30 (1957), where the interpretation of a Louisiana state statute affecting mineral rights was involved. The Supreme Court deliberately modified the judgment of the court below to allow an expeditious interpretation of the state statute in the state court. The court of appeals had issued a statutory injunction against prosecution of the state court proceedings, to which only the claimant and the lessees from the United States were parties, not the United States *eo nomine*. The Supreme Court noted that the Louisiana declaratory judgment procedure was available to secure such an interpretation of the state statute and that the United States could appear to urge its interpretation of the statute. See also *Stanley v. Schwalby*, 147 U.S. 508, 512-13 (1893). See Mattis, *Certificate of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717 (1969).

266. This is true with regard to the Tucker Act, and the FTCA, as mentioned in text, as well as the statute authorizing partition actions. 28 U.S.C. §§ 1347, 2409 (1970).

On the other hand, the water rights statute, 43 U.S.C. § 666 (1970), and the foreclosure statute, 28 U.S.C. § 2410(a) (1970), permit suit in either federal or state courts. It has been held that while they constitute waivers of sovereign immunity, they do not bestow jurisdiction upon the federal district courts. In such actions, therefore, jurisdiction in the district courts must be found in other provisions. See *Wells v. Long*, 162 F.2d 842 (9th Cir. 1947); *In re Green River Drainage Area*, 147 F. Supp. 127 (D. Utah 1956). The removal statute itself, 28 U.S.C. § 1444 (1970), may constitute such a grant of jurisdiction. *Hood v. United States*, 256 F.2d 522, 525 (9th Cir. 1958). See D. SCHWARTZ & S. JACOBY, CASEBOOK 191-94 (1963). While jurisdiction is generally granted to the federal district courts in all actions in which the United States is a plaintiff, such jurisdiction is more limited where it is a defendant. Compare 28 U.S.C. § 1345 (1970) with *id.* § 1346.

267. The quiet title statute would clearly confer jurisdiction upon the district courts, JUSTICE BILL § 1347a, and 28 U.S.C. § 1441 (1970) would authorize removal.

268. The statute should be carefully worded, however, to make it clear that federal jurisdiction is exclusive only when the United States is named as a party. Private litigants may have

As to which federal court should be given jurisdiction, the district court in which the property is located appears clearly to be the appropriate forum.²⁶⁹ Both in terms of familiarity with local law and with accessibility to practitioners, the district court is preferable to the other logical choice, the Court of Claims, which has been characterized as a "distant and unfamiliar tribunal, and one more expensive and time-consuming than a local federal district judge."²⁷⁰

The form of action. Related to the question of jurisdiction is the issue of whether the waiver statute should attempt to frame essentially a federal cause of action, or whether state remedies should be the basis of relief. The latter would certainly be a straightforward and not unprecedented approach. This was the general route followed with respect to the waiver of sovereign immunity in actions involving water rights,²⁷¹ and, to a lesser degree, in actions involving mortgages or other liens claimed by the United States.²⁷²

A waiver permitting quiet title actions to be brought against the United States could be framed in terms allowing state law to control as to the form of action and the ability to seek relief, interposing only such safeguards as may be deemed crucial for protection of the United States. Thus, just as with regard to foreclosure of liens where there is

disputes between themselves over title matters in land in which the United States claims an interest but which does not involve the United States. In this regard, the Senate-passed bill amends Justice bill section 2409a(a) to provide that the quiet title action may be brought against the United States only where the interest claimed by the United States is adverse to the plaintiff, but makes no corresponding amendment in Justice bill section 1347a.

269. The Justice bill and the Senate-passed bill so provide in the venue provision. JUSTICE BILL § 1347a. If the property is located in more than one district in the same state, any such district has proper venue.

270. *Hearings on Sovereign Immunity* 25-26. While it is true that Court of Claims commissioners, who hear cases as rough equivalents to trial judges, will travel to hear the testimony of individual witnesses, most activities in relation to such hearings occur in Washington. SCHWARTZ & JACOBY, TEXT 106. In Tucker Act actions, the Court of Claims would have acquired some familiarity with determinations of title disputes, however, such cases are relatively rare in the totality of the court's work. Historical accident, rather than reasoned choice, has thrown cases of this nature into the Court of Claims in the past. Finally, and perhaps most compellingly, the jurisdiction of the Court of Claims traditionally has been limited to money judgments only and not extended to actions of a declaratory nature. See *United States v. King*, 395 U.S. 1 (1969); Note, *Declaratory Relief in Tucker Act Suits*, 1968 DUKE L.J. 1169. The power of the district courts to grant relief under the Tucker Act has been said to be no greater or less than that possessed by the Court of Claims over the same kind of case. *United States v. Sherwood*, 312 U.S. 584, 591 (1941). See Note, 1968 DUKE L.J., *supra*, at 1178-80.

271. 43 U.S.C. § 666 (1970). See *United States v. Dist. Ct. in and for Co. of Eagle, Colo.*, 401 U.S. 520 (1971).

272. 28 U.S.C. § 2410 (1970). See *United States v. Brosnan*, 363 U.S. 237 (1960).

a provision for judicial sale and a right of redemption.²⁷³ such critical elements as continued possession by the United States pending final judgment²⁷⁴ could be preserved in the waiver in land title disputes. In other regards, the position of the United States would be brought in line as closely as possible with that of private parties in land title disputes under the law of the state where the land is located.

Such an approach, however, virtually assures both a confusing and diverse application of procedural quirks turning on vagaries of state law²⁷⁵ and, perhaps more importantly, a limitation on effective judicial resolution of land title disputes. In part, this reflects the fact that state laws now often postulate the availability of specific relief in land disputes. For example, in those states where quiet title actions lie only where the plaintiff has possession, it is assumed that the plaintiff may first bring an ejectment action to gain possession. If, however, this rule were applied where the possessor is the sovereign, the rival claimant would be effectively deprived of the possibility of relief.²⁷⁶

The interests of prompt and efficient resolution of land disputes would be better served by a federal cause of action providing the basic framework of judicial relief and accommodating the particular needs of the United States. While the needs of uniformity should not be overriding in every regard where the United States is concerned, it does appear that in this area a specific federal provision is fully justified.²⁷⁷ The aim, it should be repeated, is to effectively provide for the

273. 24 U.S.C. § 2410 (1970).

274. See notes 178-87 *supra* and accompanying text.

275. See note 152 *supra*.

276. See notes 25-34 *supra* and accompanying text.

277. Upon passage of a quiet title statute, presumably the declaratory judgment provision of the federal statutes, 28 U.S.C. § 2201 (1970), would also become available as a theoretical alternative remedy, although the existence of the quiet title statutory remedy would probably cause relief to be denied. See *Katzenbach v. McClung*, 379 U.S. 294, 296 (1964); 6A J. MOORE, *FEDERAL PRACTICE* § 57.08(3). The provision has apparently been little used in real property matters. In *Mims v. United States*, 324 F. Supp. 489 (W.D. Va. 1971), an attempt was made to use the section as the jurisdictional basis to bring an action against the United States involving a title dispute. The action of course failed on sovereign immunity grounds. Cf. *Miller v. Udall*, 368 F.2d 548 (10th Cir. 1966). The United States, on the other hand, has made use of the section. See, e.g., *Wyoming v. United States*, 310 F.2d 566 (10th Cir. 1962), *cert. denied*, 372 U.S. 953 (1963).

Indeed, for that matter, the action for declaratory relief, were the United States to waive its immunity thereunder in land title disputes, would provide a vehicle for the disposition of claims against it without the risk of "interference with governmental processes" which bottoms the current rationale for any survival of sovereign immunity. One of the reasons, indeed, for declara-

efficient resolution of land title disputes with the United States.²⁷⁸ Therefore, to subject this process totally to the vagaries of state procedural law designed to adjust such disputes between private claimants seems unwise.²⁷⁹

CONCLUSION

The basic inequities in the present structure for resolution of land title disputes with the sovereign are becoming increasingly accepted. Sovereign immunity is under relentless attack,²⁸⁰ and the Administrative Conference of the United States at one of its earliest sessions adopted a recommendation that the doctrine be limited "where it blocks the rights of citizens to challenge in courts the legality of acts of government administrators."²⁸¹ While the recommendation itself does not so state, it is clear that one of its objectives was an overruling

tory relief was to exclude the necessity of a plaintiff taking a step, often irrevocable, which might entail serious liability. E. Borchard, *DECLARATORY JUDGMENTS* 26-28 (2d ed. 1941). However, the desirability of special statutory safeguards in quiet title actions against the sovereign militates against this solution, and in any event, actions under the declaratory judgment provision require separate jurisdictional grounds. J. Moore, *supra*, § 57.23. See note 114 *supra*.

278. The statute might well be extended to permit quiet title actions in disputed personal property. Cf. 28 U.S.C. § 2410 (1970). Some state quiet title actions by express statutory language or otherwise may be so used, see *Chicago Auditorium Ass'n v. Willing*, 20 F.2d 837, 840 (7th Cir. 1927), *rev'd on other grounds*, 277 U.S. 274 (1928); *Newman Machine Co. v. Newman*, 275 N.C. 189, 166 S.E.2d 63 (1969), although there is authority to the contrary, *Annot.*, 105 A.L.R. 295 (1936). Such actions involving personal property are relatively rare since complicated title problems arise less frequently and an adequate remedy at law is more often available.

279. The Justice bill provides for a federal cause of action "to adjudicate disputed titles to real property," and by implication makes possession by plaintiff unnecessary. JUSTICE BILL § 2409a(a). The Senate-passed bill changes the description of the action to "an action . . . to quiet title to an estate or interest in real property." The cover letter from the Attorney General makes clear the basic philosophy that uniformity at least as to the plaintiff's qualifications for instituting suit is desirable, and that the state law of real property would apply to decide any questions not covered by federal law. The guiding principle of the FTCA is to accept liability ". . . where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346 (1970); JAYSON § 66.03. Even under the FTCA, however, though substantive state law determines the existence of the claim, it was deemed best to establish a federal framework for relief. Similarly, with regard to land title disputes while the state law may determine the substance of the title to the real property, federal law should basically fashion the framework for relief.

280. See notes 15, 23 *supra*. See generally Project, *Federal Administrative Law Developments—1971*, 1972 DUKE L.J. 115, 233.

281. Recommendation No. 9, adopted October 21-22, 1969, published in *Recommendations and Reports of the Administrative Conference of the United States* 23 (1970). For subsequent history, see note 23 *supra*.

of *Malone v. Bowdoin*, so as to make available a general judicial review of land title disputes with the United States.²⁸² The House of Delegates of the American Bar Association has adopted in principle a similar proposal.²⁸³

More specifically, the Public Land Law Review Commission in its 1970 report recommended that "citizens should be able to bring quiet title actions in which the Government could be named as defendant."²⁸⁴ The Commission recognized the rationale for sovereign immunity as protecting official actions of governmental officials from interference by the judiciary but concluded that this rationale does not support the application of the doctrine in a suit in which the only purpose is to determine the validity of the government's claim to title in land.²⁸⁵

The most hopeful development of all is the recent official submission to the Congress by the Department of Justice of a legislative proposal for a quiet title statute, and its subsequent passage with amendments by the Senate.²⁸⁶ Final enactment would significantly open the door to specific judicial relief in land title disputes with the United States. Although to date the bill remains with a House subcommittee, hearings have been held,²⁸⁷ and this measure could well serve as the vehicle for long overdue reform.

282. See the consultant's report for the Conference, prepared by Professor Roger C. Cramton, published in *Hearings on Sovereign Immunity* 92, and the testimony of Professor Cramton. *Id.* at 35. Even were this general waiver of sovereign immunity to pass the Congress, while undoubtedly beneficial for some land disputes, it should still be supplemented by specific legislation authorizing a judicial determination of land titles in disputes between the United States and private parties, both to provide subject-matter jurisdiction in the United States district courts and to deal with necessary procedural aspects as discussed in this article. See *Hearings on Sovereign Immunity* 142; Cramton 446-49.

283. See note 23 *supra*.

284. PLLRC REPORT 260-61.

285. Congressman Aspinall has introduced a bill—the "Public Land Policy Act of 1971"—incorporating many of the recommendations of the PLLRC REPORT. H.R. 7211, 92nd Cong., 1st Sess. (1971). Among other things, the bill provides for the public lands of the United States to be administered "so that the United States solely because it is the sovereign never takes advantage of its position as landowner." *Id.* § 5(m)(2).

286. The letter from the Attorney General to the Congress, transmitting the draft legislation, is set out at 117 CONG. REC. S17530-31 (Nov. 3, 1971). The legislation was introduced in the Senate as S. 2805, 92d Cong., 1st Sess. (1971), and in the House, as H.R. 11127, 92d Cong., 1st Sess. (1971) and is the product of several years of drafting and interdepartmental coordination in the executive branch. The text of the proposed legislation as submitted by the Department of Justice is set out in the Appendix of this article.

287. Although no hearings were held by the Senate on the Justice proposal, as such, the assistant attorney general in charge of the division of lands and natural resources testified on

The time for action thus is here. Too many millions of acres and too many thousands of boundary miles are involved to avoid the issue further. Just as sovereign immunity was abolished as a defense in contract cases in 1855, and tort cases in 1946, the time has now come to abolish it in land title disputes with the sovereign—a last major bastion of our monarchical heritage that the king can do no wrong.²⁸⁸

September 30, 1971 with respect to a bill introduced by Senator Church which in broad terms would have permitted quiet title actions to be brought against the United States. S. 216, 92d Cong., 1st Sess. (1971). At that time, the assistant attorney general proposed that the Justice bill be substituted for the Church bill, and indicated that the Justice bill would be formally sent to the Congress shortly thereafter, as it was. The Church bill was then reported out by the Senate committee, incorporating the provisions of the proposed legislation submitted by the Department of Justice, although amended as discussed in notes 177, 191, 205, 228, 238, 251, 256, 268, and 279 *supra*. Thus, the Justice bill, as amended, passed the Senate as S. 216. The bill was referred to Subcommittee No. 2 of the House Committee on the Judiciary. Hearings were held on February 24, 1972.

288. Professor Jaffe suggests that the slogan actually has been applied backwards. He says its true meaning was that since the king can do no wrong, the courts will do what is necessary to keep him in the right. Jaffe, *supra* note 19, at 3-4.

APPENDIX

The following is the full text of the Justice Bill:

A BILL

To permit suits to adjudicate disputed titles to lands in which the United States claims an interest.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 85 of title 28, United States Code, is amended by adding after section 1347 of such title the following new section:

“§ 1347a. Disputed land titles

“The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to adjudicate disputed titles to lands in which the United States claims an interest.”

(b) The chapter analysis at the beginning of chapter 85 of title 28, United States Code, is amended by inserting after the item relating to section 1347 the following new item: “1347a. Disputed land titles.”

SEC. 2. Section 1402 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

“(d) Any civil action under section 2409a to quiet title to lands claimed by the United States shall be brought in the district court of the district where the land is located or, if located in different districts in the same State, in any of such districts.”

SEC. 3. (a) Chapter 161 of title 28, United States Code, is amended by adding after section 2409 of such title the following new section:

“§ 2409a. Actions to adjudicate disputed land titles

“(a) The United States may be named as a party defendant in a civil action under this section to adjudicate disputed titles to real property in which the United States claims an interest, other than security interests and water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which

may be or could have been brought under section 1346, 1347, 1491, or 2410 of this title, section 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

“(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree and the conclusion of any appeal therefrom; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

“(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

“(d) If the United States disclaims all interest in the real property at any time prior to the actual commencement of the trial, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1347a of this title.

“(e) A civil action against the United States under this section shall be tried by the court without a jury.

“(f) Any civil action under this section shall be barred unless the complaint is filed within six years after the right of action first accrues.

“(g) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.”

(b) The chapter analysis at the beginning of chapter 161 of title 28, United States Code, is amended by inserting after the item relating to section 2409 the following new item:

“2409a. Actions to adjudicate disputed land titles.”

SEC. 4. This Act shall not apply to any claim or right of action which accrued prior to the date of its enactment.