Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs

Part 2

by

Karen A. Jordan

Originally published in CASE WESTERN RESERVE LAW REVIEW
43 CASE W. RES. L. REV 401 (1993)

ties as national forests or parks, wilderness areas and wildlife refuges, and Congress may enact legislation to effectuate these land use policies.[342] For instance, in the case of *Minnesota v. United States*,[343] federal legislation prohibiting the use of motorboats and snowmobiles on certain lands and waters not owned by the federal government was upheld because the legislation reasonably related to protecting federal land reserved for wilderness.[344]

The breadth of the property power is illustrated by *Kleppe v. New Mexico*.[345] In *Kleppe*, the Court upheld legislation authorizing federal agencies to protect and manage wild horses and burros on federal lands.[346] The Court sustained Congress' determination that the legislation was a "needful" regulation "respecting" federal property without finding that the animals themselves were federal property or that the legislation was necessary to protect the federal land from harm.[347] Rather, the Court reiterated the view that Congress' power under Article IV, at least as to "public lands," is without limitations.[348] The Court held that Congress' power under the Article IV Property Clause necessarily includes the power to regulate and protect wildlife living on the property.[349]

On the other hand, there are potential limits on the federal property power that protect state sovereignty. In *United States v. City & County of San Francisco*,[350] the Court indicated that the

---

use polices. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 546 (1976) (upholding federal legislation protecting wild horses and burros that set foot on federal lands at any time); Camfield v. United States, 167 U.S. 518, 528 (1897) (upholding federal law forbidding fences on non-federal property which would enclose public lands).

342. *See* Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 529-30 (1938) (holding the federal government may acquire state land for national parks and exercise exclusive jurisdiction over such lands, except as reserved to the state by the terms of the conveyance); Silas Mason Co. v. Tax Comm'n of Washington, 302 U.S. 186, 206-09 (1937) (holding the federal government may acquire property to reclaim arid and semi-arid lands, provided the property is subject to state jurisdiction in accordance with agreement between the state and federal governments); *see also* Gaetke, *supra* note 329, at 387 (reviewing legislation enacted to protect federal land designated as national forests, parks, wilderness areas or wildlife refuges).

343. 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

344. *Id.* at 1250-51.

345. 426 U.S. 529 (1976).

346. *Id.* at 546 (upholding the Wild Free-Roaming Horses and Burros Act §§ 1-10, 16 U.S.C. §§ 1331-1340 (1988)).

347. 426 U.S. at 536-37.

348. *Id.* at 539.

349. *Id.* at 541.

350. 310 U.S. 16 (1940) (quoted with approval in *Kleppe*, 426 U.S. at 540).

property power does not authorize "an exercise of a general control over public policy in a State."[351] In that case, California challenged the constitutionality of a land grant and certain rights of way which included a condition prohibiting the state from selling to private utilities hydroelectric power generated on the land.[352] The condition was challenged as an attempt to regulate the disposition of electricity in San Francisco.[353]

The Court found that the congressional policy underlying the legislation — the avoidance of monopolies to help keep power rates low for consumers — did not represent an exercise of general control over public policy in a state. Instead, the Court found the legislation was an exercise of the complete power which Congress has over particular federal property.[354] The case thus sheds light on the possible parameters of the property power. The avoidance of monopolies for the benefit of consumers is an area in which the federal government has long been active. Congressional policies underlying such legislation are national in scope and do not affect a state's general public policy; they only affect a particular aspect of a state's public policy as reflected in its laws.

An additional limitation on the federal government's power under the Article IV Property Clause was noted by the Supreme Court in *Ashwander v. TVA*.[355] The Court in *Ashwander* stated that the federal government's power to dispose of federal property "must be consistent with the foundational principles of the dual system of government and must not be contrived to govern the concerns reserved to the States."[356] As this article has noted, the Supreme Court subsequently rejected the notions of dual federalism and discrete areas reserved for state control.[357] Nevertheless, the case supports the premise that incidents of state sovereignty are accorded protection through limitations on the federal property power.

---

351. *Id.* at 30.
352. *Id.* at 18-19.
353. *Id.* at 28.
354. *Id.* at 30.
355. 297 U.S. 288 (1936).
356. *Id.* at 338. Disposal of federal property must also be appropriate to the nature of the property and in the public interest. *Id.*
357. *See supra* notes 245, 275-76 and accompanying text.

c. Analysis of LURE Programs Under Preemptive Property Power

This article will now determine whether a federal condition requiring LUREs acquired under federal conservation programs to be perpetual is capable of preemption. Further, this section will determine whether such a federal rule oversteps limitations intended to protect state sovereignty, succumbing to the "independent constitutional bar" prong of the *Dole* test.[358]

Conservation programs using LUREs capture the essence of the Article IV power which the federal government would have over the land if it acquired the lands in fee. Conditions restricting certain land uses and requiring restorations or conservation plans would readily fall within the scope of the property power because they constitute regulations of conduct to protect the federal property from harm. However, for the Property Clause analysis it is crucial to note that the federal property interest in a LURE is the right to enforce the terms of the LURE. In particular, it is the right to enforce a perpetual LURE despite state law limitations on duration.

The FmHA provision mandating establishment of perpetual LUREs on wetlands in FmHA inventories[359] falls within the category of Article IV property power capable of preemption. Because the federal government holds fee title, encumbering such lands with a perpetual LURE constitutes a regulation of conduct on the land to protect the federal property. Moreover, any disposition of a LURE[360] created pursuant to the provision falls within Congress' broad power to choose the terms and conditions in disposing of federal property.

The other federal agriculture programs using LUREs — the CRP, WRP, EEP, FLP, RECP, and the FmHA debt-restructuring program — authorize the federal government to acquire LUREs from individual landowners.[361] It is not readily clear that the use

---

358. *See supra* notes 256, 259-70 and accompanying text.

359. 7 U.S.C. § 1985(g)(1) (Supp. II 1990).

360. *Id.* § 1985(c)(1). The FmHA provisions expressly authorize the government to transfer perpetual LUREs to state or private non-profit entities. *Id.*; *see supra* note 83 and accompanying text.

361. *See* discussion *supra* part I.B.2. The Farms Act and the Watershed program, through which approved state or private non-profit entities acquire the LUREs and the federal government merely offers assistance, do not readily fall within the scope of the property power. Because these programs require the entities acquiring the LUREs to prove that the LUREs will be valid and enforceable perpetual LUREs, these programs are limit-

of the federal condition in these programs would be capable of preemption. The issue is whether Congress can legislate that the federal government, as an ordinary proprietor in a voluntary transaction with an individual landowner, may acquire a property right that is not a cognizable aspect of the landowner's "bundle of rights" under state law.

Federal legislation requiring LUREs to be perpetual despite state law limitations on duration effectuates the specific congressional policy of attaining long-term conservation goals. Assuring long-term enforceability of LUREs held by the federal government protects the federal property interest and effectuates the land use policies underlying the LURE acquisition programs. However, the exercise of preemptive property power relating to the protection of federal property derives from cases where *conduct* affecting federal property was regulated. Preemptive property power relating to the effectuation of congressional policies generally derives from federal rules affecting the *use* of federal property.

A federal condition that LUREs acquired under conservation programs be perpetual is not a regulation of conduct, nor a rule affecting the use of federal property. Furthermore, federal legislation allowing the federal government to acquire enforceable perpetual LUREs does not fall within the authority to dispose of federal property. Nevertheless, close examination of case law reveals that federal acquisition of enforceable, perpetual LUREs from individual landowners is capable of preemption.

In *United States v. Albrecht*,[362] a federal LURE acquired from a landowner in North Dakota pursuant to a federal conservation program was valid despite state law which presumably did not recognize that type of property interest.[363] Because the LURE effectuated an important national concern, the court held that it should not be defeated by state law.[364] The court noted that to hold otherwise would permit states to rely on local laws to defeat the acquisition of reasonable property rights and to destroy an important national program.[365] However, since the court did not

---

ed to states which do not have laws precluding perpetual LUREs. Therefore, these programs do not raise property power issues. *See supra* notes 116-27 and accompanying text.

362. 496 F.2d 906 (8th Cir. 1974). *See infra* notes 430-37 and accompanying text for a more detailed analysis of *Albrecht*.

363. *Id.* at 911.

364. *Id.*

365. *Id.* The program authorized the United States to acquire interests in wetlands and potholes to aid the breeding of migratory birds. *See supra* notes 58-59 and accompanying

engage in a property power analysis, the case only provides implicit support for the proposition that the federal acquisition was a constitutional exercise of Article IV property power.

Explicit support can be gleaned from case law, but only via a meandering avenue beginning with the case of *North Dakota v. United States*.[366] In *North Dakota*, the federal government had acquired LUREs over wetlands for protection of migratory waterfowl.[367] The Supreme Court stated that the United States is authorized to incorporate into such LURE agreements rules and regulations that the Secretary of the Interior deems necessary to protect wildlife, including restrictions on land outside the legal description of the LURE itself.[368] The Court noted that as long as North Dakota landowners were willing to negotiate agreements, the agreements could not be abrogated by state law.[369] As discussed in the next section, the holding in *North Dakota* is expressly limited to LURE agreements entered into by the federal government before enactment of state laws which could defeat the purpose of the federal program. Thus, the case is not authority for the notion that the federal government may negotiate terms and thereby acquire a property right not recognized or precluded by existing state law.[370]

However, in a footnote,[371] the Court cited the earlier case of *United States v. Burnison*.[372] The *Burnison* Court held that a state may control and prohibit the testamentary transfer of property to the United States but clarified that its holding would "not affect the right of the United States *to acquire property by purchase* or eminent domain in the face of a prohibitory statute of the state."[373] The *Burnison* Court justified its distinction by explain-

---

text.

366. 460 U.S. 300 (1983).

367. *Id.* at 305.

368. *Id.* at 319 (citing *Kleppe*, 426 U.S. at 546; Camfield v. United States, 167 U.S. 518, 525-26 (1897)). The non-federal lands involved in the case were after-expanded wetlands. *Id.*

369. *Id.*

370. *See infra* notes 417-29 and accompanying text.

371. *North Dakota*, 460 U.S. at 319 n.22.

372. 339 U.S. 87 (1950).

373. *Id.* at 93 n.14 (citing Kohl v. United States, 91 U.S. 367 (1985)) (emphasis added). The *Burnison* Court expressly declined the opportunity to overrule *United States v. Fox*, 94 U.S. 315 (1876). 339 U.S. at 93. In *Fox*, the Court held that the disposition of immovable property, whether by deed, descent or any other means is subject to the exclusive control of the government of the state where the property is situated. *Fox*, 94 U.S.

ing that the legal concept of a transfer of property may be separated into a series of steps, including the acts of giving, receiving, and purchasing, and that a party's particular role in the transaction may determine its legal consequences.[374]

Burnison discusses a state's ability to control its domiciliaries' power to give and the United States' corresponding power to receive.[375] The case held that state laws may preclude a transfer of property to the United States where the United States is merely receiving the property.[376] Furthermore, citing *Kohl v. United States*,[377] *Burnison* expressly distinguished the situation where the federal government exercises its power to acquire by purchase or eminent domain.[378] In *Kohl*, the Supreme Court held that the powers vested by the Constitution in the federal government necessarily entail the ability to acquire lands in the United States, explaining that:

> If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen.[379]

Thus, the Court upheld the federal government's right of eminent domain as a necessary and proper means to effectuate the powers conferred by the Constitution.[380]

Similarly, as recognized by the Court in *Burnison* and *North Dakota*, the right of the federal government to acquire a real property interest by negotiated purchase may also constitute a necessary and proper means to effectuate an enumerated power. Thus, because an exercise of Article IV property power in conjunction with the Necessary and Proper Clause is within the sphere of property

---

at 320-21.

374. *Burnison*, 339 U.S. at 91.

375. *Id.*

376. *Id.* at 93. It is noteworthy, however, that *Burnison* and *Fox* involved testamentary dispositions of property. The Supreme Court's positions in the cases may have been influenced by the fact that the states would have been unable to collect inheritance taxes from the United States if the devises had been upheld.

377. 91 U.S. 367.

378. *Burnison*, 339 U.S. at 93 n.14; *Fox*, 94 U.S. at 320.

379. *Kohl*, 91 U.S. at 371.

380. *Id.* at 372.

power legislation that has preemptive capability, the question becomes whether federal acquisition of an enforceable, perpetual LURE is a proper exercise of the Necessary and Proper Clause.

The Necessary and Proper Clause[381] confers upon Congress: (1) the power to legislate through a means outside the scope of any of the other enumerated powers to effectuate an enumerated power; or (2) the power to attain an extraneous end so long as the means bears a relationship to the effectuation of an enumerated power.[382] However, Congress' election to use the necessary and proper power must have a rational basis[383] and the effectuation of the enumerated power must be substantial.[384]

The primary end achieved by a condition requiring LUREs acquired under federal conservation programs to be perpetual is long-term protection of environmentally significant aspects of the land resource. Environmentally sensitive lands directly, or at least indirectly, affect interstate commerce by virtue of their maintenance of the ecosystems which generate marketable products and hence interstate movement.[385] Long-term protection of environmentally important lands, such as highly erodible lands, farmland and non-federal forest lands, is crucial to the ability of the agricultural and forestry industries to meet the long-term demands of future markets. Thus, a condition that LUREs be perpetual substantially effectuates congressional Commerce Clause policies.[386]

Although a modest standard, the rational basis test requires the government to choose means reasonably related to its ends.[387] Given our country's experience with the consequences of environmental degradation, including degradation of the land resource, it is rational to conclude that long-term protection of environmentally sensitive lands is critical to the ability of the agricultural and forestry industries to meet the demands of future markets. Further, much of the testimony in congressional hearings on the conservation provisions of the 1990 Farm Bill advocated using perpetual

381. U.S. CONST. art. I, § 8, cl. 18.

382. *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 421 (1819).

383. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261-62 (1964).

384. United States v. Darby, 312 U.S. 100, 119-20 (1941).

385. *See supra* note 240.

386. Furthermore, the ends clearly promote the general welfare of our country, which may be deemed an extraneous end. However, because the means also bear a relationship to the effectuation of the commerce power, the Necessary and Proper Clause may be used to attain the extraneous end.

387. *Heart of Atlanta*, 379 U.S. at 261-62.

LUREs to attain federal conservation and preservation objectives.[388] Thus, Congress has a rational basis to condition LURE acquisitions on a perpetuity requirement.

Because conditional LURE acquisition has a rational basis, it is a proper exercise of the Necessary and Proper Clause. Therefore, federal legislation authorizing the federal government to acquire a property right that is not a cognizable aspect of the landowner's bundle of rights under state law in a voluntary transaction with an individual landowner falls within the category of Article IV property power capable of preemption.

The second level of inquiry is whether the federal condition oversteps limitations intended to protect state sovereignty. As explained, property power doctrine does not authorize "an exercise of general control over public policy in a state."[389] Because a state's property law reflects its public policy, a condition in a federal conservation program requiring LUREs to be enforceable in perpetuity may be contrary to state public policy — especially where the federal government has conveyed the right to enforce the LURE to private, nonprofit entities. However, congressional policies underlying federal conservation legislation are national in scope and potentially affect only a particular aspect of a state's public policy. Applying the rationale set forth in *United States v. City and County of San Francisco*,[390] such a federal condition does not sufficiently affect a state's public policy to cast it into a potential limitation on the property power.

ASARCO, Inc. v. Kadish[391] supports this conclusion. In *ASARCO*, the Supreme Court enforced conditions imposed through the disposition of a federal land grant to a state.[392] The case involved the grant of federal land to Arizona to be held in trust for public schools.[393] The federal enabling legislation directed that the lands could only be sold or leased in accordance with federal advertising, bidding and appraisal conditions.[394] Nevertheless, Arizona granted mineral leases in violation of the federal directive. Individual taxpayers and the Arizona Education Association brought

388. *See supra* notes 74-77 and accompanying text.
389. United States v. City & County of San Francisco, 310 U.S. 16, 30 (1940).
390. *Id.; see supra* notes 350-54 and accompanying text.
391. 490 U.S. 605 (1989).
392. *Id.* at 625-33.
393. *Id.* at 626.
394. *Id.* at 627.

suit.[395] The Supreme Court held the state statute void, enforcing the rights created by the conditional grant against the grantees even though state laws directed otherwise.[396]

ASARCO is instructive because the Arizona law reflected state public policy in an area of property law — mineral leases. The Court upheld federal legislation which imposed a more restrictive public policy to protect the purpose of the federal land grant, even though the federal law hindered the alienability of interests in real property. By analogy, state laws precluding perpetuity or assignability of LUREs reflect a state's public policy in an area of property law. A federal condition that LUREs be perpetual even when conveyed to third parties would impose a less restrictive policy to protect the conservation purpose of the LURE. Although the federal legislation arguably hinders free transferability of an interest in real property, both *ASARCO* and *United States v. City & County of San Francisco* indicate that the enforceability of LUREs in perpetuity would not overstep property power limitations protecting state sovereignty.

C. Application to the Spending Power Analysis

A federal condition requiring LUREs acquired under federal conservation programs to be perpetual and preemptive of contrary state law limitations on duration is within the scope of the Article IV property power. Further, this exercise of preemptive power under Article IV does not violate constitutional limitations intended to protect state sovereignty. Accordingly, a federal conservation program which subjects the offer of federal funds in exchange for a LURE to a condition requiring the LURE to be perpetual is a constitutional exercise of the federal property power. Therefore, federal property power doctrine does not provide an independent constitutional bar sufficient to render the condition an unconstitutional exercise of the spending power under the fourth prong of the *Dole* test.

IV. FEDERAL LEGISLATION PERMITTING PERPETUAL LUREs WILL RESULT IN BETTER CONSERVATION POLICY

Federal legislation authorizing enforceable, perpetual LUREs

395. *Id.* at 610. ASARCO and other mineral lessees of the state school lands intervened in the action as defendants. *Id.*

396. *Id.* at 633.

despite state law limitations on duration raises important public policy concerns. Because a federal directive to acquire perpetual LUREs is a proper exercise of congressional powers, and because the incorporation of state law may hinder federal conservation policies, Congress could easily conclude that a federal directive is the better policy choice. However, even if authorizing enforceable, perpetual LUREs does not intrude on state sovereignty, Congress should engage in a thoughtful decisionmaking process before enacting legislation which preempts traditional areas of state control. Under the Supreme Court's holding in *Garcia v. San Antonio Metropolitan Transit Authority*,[397] a deliberate process of federal decisionmaking is a critical aspect of Tenth Amendment protection.[398] Accordingly, by identifying the relevant policy factors, this article develops and applies a framework for the policy decision.

Whether federal or state law should govern LURE duration is analogous to the question a federal court would address if asked to interpret LUREs under federal programs which do not specify the governing law. Such programs include the MBCA, the RECP, and the FmHA LURE provisions of the CRP.[399] Thus, this article reviews analogous federal cases to glean the relevant policy considerations and to provide a guide for courts in considering LUREs under federal programs that do not specify the governing law. A framework founded upon the judicial process should ensure that policy questions are fairly and reasonably considered.

A. The Judicial Framework for the Policy Decision

Before the 1990 Farm Bill, LURE provisions in federal conservation legislation did not dictate whether state or federal law should determine the permissible duration of LUREs held by the federal government.[400] Scholars have noted the presence and significance of the resulting choice-of-law issue.[401] These scholars

397. 469 U.S. 528 (1985).

398. *See supra* notes 275-78 and accompanying text.

399. *See supra* notes 58-59, 67-73, 83-93 and accompanying text.

400. *See, e.g.*, 16 U.S.C. §§ 715a, 715d, 1501 (1988 & Supp. II 1990) (providing examples of LURE provisions which do not prescribe whether federal or state law should govern).

401. *See, e.g.*, Janet L. Madden, *Tax Incentives for Land Conservation: The Charitable Contribution Deduction for Gifts of Conservation Easements*, 11 B.C. ENVTL. AFF. L. REV. 105, 119-20 (1983) (noting that state common law hostility toward conservation easements has yielded to developing support for such easements in federal property law); Ross D. Netherton, *Environmental Conservation and Historic Preservation Through Re-*

have generally concluded that the federal common law of real property should govern the interpretation of LUREs because an "aberrant or hostile" state law will generally not defeat a federal land acquisition program.[402] While adhering to the "aberrant or hostile" rule, federal courts also engage in a more refined analysis to determine whether to incorporate state law.

Where Congress has appropriately exercised its power but failed to specify whether federal or state law should apply, the resulting choice-of-law question may be properly resolved by the federal courts.[403] In effect, there is an exception to the *Erie* doctrine[404] when the issue involves the operation of a congressional program.[405] Because issues relating to the operation of a federal program are within the competence of the federal judiciary, state law is not necessarily controlling.[406] Rather, in exercising the

---

corded Land-Use Agreements, 14 REAL PROP. PROB. & TR. J. 540, 558 (1979) (noting development in federal law limiting state rules regarding assignability and enforceability).

402. *See, e.g.*, Neil D. Hamilton, *Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief*, 35 DRAKE L. REV. 477, 510 (1985-86) (arguing that federal law should override state law governing easements under the Agricultural Land Trust due to the strong federal policy to promote soil conservation and land preservation).

403. *See, e.g.*, United States v. Little Lake Misere Land Co., 412 U.S. 580, 590-93 (1973) (when the United States is party to a land acquisition that arises from or bears heavily upon a federal program, the federal courts may decide the choice-of-law question); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (stating that when there is no applicable act of Congress, the federal courts must decide the governing rule of law).

404. The *Erie* doctrine derives from the Supreme Court decision in Erie R.R. v. Tompkins, 304 U.S. 64 (1938). *Erie* stands for the proposition that federal courts must apply state law where the subject matter involved is beyond the federal courts' law-making competence. *Id.* at 78.

405. *See* Paul J. 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, 799 (1957) ("[I]nsofar as *Erie* represents authority for the required application of state law by federal courts, it is not controlling on problems implicated in the operation of a congressional program.").

406. *Id.* at 799; *see also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 883 (1986) (arguing that the power to create federal common law is very broad and that state law is rarely applied of its own force); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1038 (1967) (stating that in cases where the United States has a proprietary interest, there is a constitutional basis for federal preemption). Due to inherent defects in the legislative process, "effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate statutory patterns enacted in the large by Congress." Mishkin, *supra* note 405, at 800; *see also Clearfield Trust*, 318 U.S. at 366-67 (stating that law-making competence of federal courts is implic-

choice-of-law task, a federal court may choose a federally created substantive rule as the governing law.[407] Alternatively, the court may adopt state law as the governing rule by incorporating state law into the federal law.[408]

In *United States v. Little Lake Misere Land Company*,[409] the Supreme Court applied this choice-of-law process to a federal land acquisition program. The Court stated that the law controlling the acquisition and transfer of property, and defining the rights of its owners, is generally the law of the state where the property is located.[410] However, where local transactions involve the federal government and raise serious questions of national sovereignty, a federal court must decide whether to "borrow" state law.[411] To resolve the question, a court must examine "a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law."[412] Yet the Court noted that "specific aberrant or hostile" state laws should not be applied.[413] Determining whether a state law is aberrant or hostile to the federal program is thus a component of the analysis to determine whether state law should be incorporated. Since an affirmative answer to this sub-question averts the need to continue the analysis, determining whether state law is aberrant or hostile is an appropriate point of departure. Because federal LUREs

---

it in the Constitution).

407. *See, e.g., Clearfield Trust*, 318 U.S. at 366-67 (finding a federal rule appropriate to determine the rights of the United States against the endorser of a federal check); Deitrick v. Greaney, 309 U.S. 190, 200-01 (1940) (creating a federal rule for determining the availability of defenses under the National Bank Act).

408. *See, e.g.*, De Sylva v. Ballentine, 351 U.S. 570, 580-81 (1956) (incorporating state law to determine whether illegitimate children qualify as "children" under the Copyright Act); Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 209-10 (1946) (incorporating state definition of "real property" to interpret provision of the Reconstruction Finance Corporation Act subjecting government property to local taxes). The "discretionary" incorporation of state law is distinguishable from an application of state law pursuant to the *Erie* doctrine. The decision to incorporate state law permits the federal court to control the extent of the state law which will be incorporated; in this manner, the court may limit the application of state law to a single narrow issue. Mishkin, *supra* note 405, at 805. More importantly, in contrast to application of the *Erie* doctrine, the substance of the applicable state rule is a relevant fact. *Id.*; *see also* United States v. Standard Oil Co., 332 U.S. 301, 309-10 (1947) (recognizing that state law is either governed by *Erie* or chosen to fulfill federal policy).

409. 412 U.S. 580 (1973).

410. *Id.* at 591.

411. *Id.* at 592-93.

412. *Id.* at 595.

413. *Id.* at 595-96.

promote an important national concern, the analysis must focus on the state law's effects on federal conservation programs.

Several cases have analyzed whether a particular state law is aberrant or hostile to a federal land program. In *Little Lake Misere*, the government acquired fee title to lands pursuant to the Migratory Bird Conservation Act.[414] The terms of the acquisition permitted the United States to extinguish certain mineral reservations encumbering the acquired lands after ten years.[415] However, after the transfer but before the ten years had expired, the state enacted a statute which would prevent the United States from extinguishing the mineral rights. Since retroactive application of the state law would deprive the United States of its contractual interests, the Court found the state law "plainly hostile" to the federal program.[416]

In *North Dakota v. United States*,[417] the federal government acquired easements pursuant to the Migratory Bird, Hunting, and Stamp Act ("MBHSA") on wetlands used for waterfowl breeding and nesting.[418] The MBHSA requires such acquisitions to be approved by the governor of the state or an appropriate state agency.[419] Although the Governor of North Dakota had given his consent, the state later enacted legislation requiring the Governor to submit MBHSA land acquisition proposals for approval by local county commissioners.[420] The legislation also authorized landowners to drain after-expanded wetlands exceeding the legal descriptions in the easement agreements and limited all easements to ninety-nine years.[421]

The Supreme Court upheld the requirement that proposals be submitted to county commissioners.[422] This requirement was not

414. *Id.* at 582-84.

415. *Id.* at 582-83.

416. *Id.* at 597. Although the United States urged the Court to decide that land acquisition programs should be governed by federal law without qualification, the Court declined to resolve the question on such broad terms. *Id.* at 595. The Court noted that its decision might change if the Louisiana statute served legitimate and important state interests which Congress might have contemplated. *Id.* at 599.

417. 460 U.S. 300 (1983).

418. *Id.* at 304-305.

419. *Id.* at 303.

420. *Id.* at 306-308.

421. *Id.*

422. Although not considering the question of consent to future acquisitions, the Court noted that state conditions on consent to federal jurisdiction over land are constitutionally permitted. *See id.* at 316 n.20 (citing James v. Dravo Contracting Co., 302 U.S. 134,

hostile to the federal legislation because the MBHSA expressly required state approval and because the state law did not apply retroactively to the consent granted by North Dakota's governor.[423] However, because the easement agreements previously executed by the United States prohibited draining after-expanded wetlands, the Court deemed the state's new provision authorizing draining an attempt to abrogate terms already expressly negotiated by the United States.[424] Following *Little Lake Misere*, the Court found the provision hostile to the federal program.[425]

Finally, the Court held that the provision limiting easements to ninety-nine years could not retroactively abrogate easement terms previously negotiated by the United States.[426] However, the Court did not consider whether the limitation could be applied to future agreements.[427] Thus, the Court did not address whether prospective application of the law would be deemed hostile to the federal program.[428] Nonetheless, the Court did acknowledge that the federal commitment to protect migratory birds would not terminate in ninety-nine years.[429]

The holdings of the Supreme Court decisions are necessarily limited. The cases indicate that state law should not be incorporated where it would function retroactively to abrogate agreements negotiated by the United States which were valid when executed. The Court's holdings do not indicate whether state law limitations on duration with prospective operation will also be circumscribed.

Lower federal court decisions, on the other hand, have expanded the concept of what constitutes a hostile state law. In *United States v. Albrecht*,[430] a landowner disputed the validity of a federal LURE granted by the previous owner under a small wetlands acquisition program.[431] The landowner argued that North Dakota

---

146-47 (1937)).

423. *Id.* at 316-17.

424. *Id.* at 319.

425. *Id.*

426. *Id.* at 320.

427. *Id.* at 320 n.24.

428. *Id.*

429. *Id.* at 320. "To ensure that essential habitats will remain protected, the United States has adopted the practice of acquiring permanent easements whenever possible." *Id.* In addition, the Court noted that the state law was enacted in response to discontent over the amount of lands encumbered by permanent easements. *Id.* at 320 n.23.

430. 496 F.2d 906 (8th Cir. 1974).

431. *Id.* at 909-10; *see supra* note 59 and accompanying text (describing the federal program).

law only recognized interests in realty created by statute and that no state statute authorized a LURE of the type conveyed to the United States.[432] Thus the federal government could not have acquired the disputed LURE.[433] For purposes of the analysis, the court assumed that state law did not recognize LURES.[434] However, because the LURE effectuated an important national concern, the court held that, despite its label, the agreement should not be defeated.[435] To hold otherwise would have permitted states to use local laws to defeat federal property rights and destroy important national programs.[436] Thus, the *Albrecht* court expanded the concept of hostile state laws to include laws in existence at the time of conveyance if they would invalidate the conveyance itself.[437]

In *Sierra Club v. Marsh*,[438] a private developer agreed to convey land to the United States as mitigation for a public works project by the Army Corps of Engineers.[439] The land was adjacent to Chula Vista, California.[440] Chula Vista impeded the proposed conveyance by requiring the developer to reserve seven easements in favor of Chula Vista across the mitigation land.[441] The Army Corps and the Fish and Wildlife Service contended that the conditions substantially diminished the use of the acreage as mitigation land.[442] Characterizing Chula Vista's efforts as "an attempt to stymie any transfer of the property which . . . does not serve the City's interests," the court held the state law was hostile to a federal program of national scope and did not require the United States to comply with the local permit process.[443] Thus, *Sierra Club* expanded the concept of a hostile state law to include prospective application of local laws affecting conveyances not yet consummated. This expansion applies to local laws which abrogate

---

432. *Albrecht*, 496 F.2d at 909.
433. *Id.*
434. *Id.* at 911.
435. *Id.*
436. *Id.*
437. *Id.* ("We, therefore, specifically hold that the property right conveyed to the United States in this case, whether or not deemed a valid easement or other property right under North Dakota law, was a valid conveyance under federal law and vested in the United States the rights as stated therein.").
438. 692 F. Supp. 1210 (S.D. Cal. 1988).
439. *Id.* at 1212-13.
440. *Id.* at 1212.
441. *Id.* at 1213.
442. *Id.*
443. *Id.* at 1214-15.

or invalidate the conveyance, as well as laws which impede a federal program by imposing conditions limiting the usefulness of the acquisition.[444]

The lower court holdings do not conclusively resolve whether a state law precluding perpetual LUREs is hostile or aberrant to federal conservation programs. Under the Supreme Court cases, a court should not incorporate a state law which would result in retroactive abrogation of the LURE itself or which would eliminate an expressly negotiated term requiring the LURE to be perpetual. However, even under the expanded view expressed by the Eighth Circuit in *Albrecht*, a state law precluding the enforcement of perpetual LUREs is not clearly hostile. *Albrecht*'s holding only encompasses state laws existing at the time of the acquisition which would invalidate the conveyance. A law which limits the duration of a LURE does not invalidate or abrogate the conveyance itself; rather, it only affects the period of time over which the LURE may be enforced.

This distinction was recognized in *Cortese v. United States*.[445] In *Cortese*, the federal government had acquired restrictions limiting the commercial and residential development of land. Under state law, the interest constituted a restrictive covenant, but the federal government argued that the restrictions created an easement and were thus permanent. However, the court found the state law was not hostile[446] even though characterizing the interest as a covenant threatened its permanency through possible application of the equitable doctrine of changed circumstances.[447]

Only the holding of *Sierra Club* can be construed as fully supporting the proposition that state laws precluding perpetual LUREs are hostile and should not be incorporated. State laws preventing the enforcement of LUREs in perpetuity clearly impede or limit the usefulness of the government's acquisition. Since a district court's analysis is not controlling, however, it cannot be concluded definitively that a state law limitation on the duration of

---

444. *See id.* at 1215 ("[I]t is clear that the City would not grant the United States the permit it seeks, or if it did do so, would condition its issuance on terms which would render the acquisition meaningless.").

445. 782 F.2d 845 (9th Cir. 1986).

446. *Id.* at 849. The court expressly distinguished *Little Lake Misere* and *Albrecht* because *Cortese* did not involve a program of national scope. *Id.*

447. "The doctrine of changed circumstances . . . stays enforcement of unreasonably burdensome restrictions on land use, notwithstanding an agreement between the parties specifying the intended duration of the restrictions." *Id.* at 851.

LUREs acquired under federal conservation programs is aberrant or hostile.

As established by the Supreme Court in *Little Lake Misere*, where a state law is not aberrant or hostile, the analysis of whether to incorporate state law must include the "variety of considerations" relevant to the specific governmental interests and to the effects upon them of applying state law.[448] An assessment of the factors contemplated by the Supreme Court can be gleaned from case law[449] and scholarly articles.[450] The most relevant policy considerations for a determination of whether federal or state laws should govern the maximum permissible duration of LUREs include the following:

> (1) the effect of applying state law on federal legislative goals;
>
> (2) the possible gains from applying federal law;
>
> (3) the balance of losses and gains at the local level from non-integration of the national program with normal state activities; and
>
> (4) the distribution of powers between federal and state governments, not only in its constitutional aspect, but in its daily operation as well.

In addition to providing a framework for courts examining existing federal programs which do not specify the governing law, these factors provide an appropriate analysis for Congress to consider in crafting legislation requiring the same type of policy decision. The following section of this article applies these policy factors to resolve the question whether federal or state laws should govern the maximum possible duration of LUREs under federal conservation programs.[451]

---

448. United States v. Little Lake Misere Land Co., 412 U.S. 580, 595 (1973).

449. *See, e.g.*, Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966) (applying state law because it did not threaten an identifiable federal interest); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (applying federal rule due to great need for uniformity); De Sylva v. Ballentine, 351 U.S. 570 (1956) (applying state law in areas of highly developed state law, such as domestic relations); United States v. Standard Oil Co. of Cal., 332 U.S. 301 (1947) (applying federal law to protect proprietary interests of the United States).

450. *See generally* Field, *supra* note 406; Hill, *supra* note 406; Mishkin, *supra* note 405.

451. The factors set forth in the Congressional framework outlined above are considerably intertwined. Although this analysis addresses the factors separately, many of the considerations are relevant to more than one factor. For example, many of the considerations

B. Application of the Policy-Making Framework

1. The Effect of State Law on Federal Legislative Goals

In making the policy decision, it is important to consider the effect of state law incorporation on federal legislative goals. There is no need to displace state law unless it poses a significant threat to an identifiable federal goal or policy interest.[452] The primary goal of federal conservation legislation authorizing LUREs is to protect environmentally significant lands through restrictions in the LURE agreements.[453] Furthermore, the legislative history of the 1990 Farm Bill indicates that a distinct goal of the conservation programs is the attainment of long-term protection.[454]

Incorporation of state law to govern the maximum possible duration of LUREs hinders long-term protection by precluding enforcement of perpetual LUREs in some states. Traditional common law doctrines in some states could impede perpetuity, assignability, and alienation of restrictive easements in gross.[455] Further, even in states which have legislatively authorized the use of conservation easements the federal government may still encounter difficulties enforcing perpetual LUREs due to statutory limitations. While state statutes authorizing LUREs are designed to simplify and clarify common law doctrines so that enforceable property rights may be created, the statutes are diverse.[456] In particular, the duration of statutory LUREs is an area of divergence among the states.[457] Although some statutes explicitly allow LUREs to be held in perpetuity,[458] others do not[459] or have complicated provisions regarding duration. For example, under California's stat-

---

flowing from the latter three factors could readily threaten federal interests, the primary consideration of the initial factor. However, to maintain clarity of the analysis, considerations are addressed in the context of the factor to which they are most relevant.

452. Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966).

453. *See, e.g.*, 16 U.S.C.A. § 2101(a)-(b) (West 1985 & Supp. 1992) (forestry conservation); 16 U.S.C. § 3472(a) (1988) (agricultural conservation); 16 U.S.C. § 3901(a)-(b) (1988) (wetlands conservation).

454. *See supra* notes 74-78 and accompanying text.

455. *See supra* notes 28-34 and accompanying text.

456. *See* Atherton, *supra* note 34, at 62-63 (noting that state conservation statutes have been drafted to meet the individual needs of each state).

457. Katz, *supra* note 30, at 389-90.

458. *See, e.g.*, CAL. GOV'T CODE § 51075(d) (West 1983); MONT. CODE ANN. § 76-6-202 (1991); WASH. REV. CODE ANN. § 84.34.220 (West 1991).

459. *See, e.g.*, ILL. ANN. STAT. ch. 30, paras. 400-406 (Smith-Hurd 1992); MICH. COMP. LAWS ANN. §§ 399.251-.256 (West 1988); WASH. REV. CODE ANN. § 64.04.130 (West Supp. 1992).

ute, LUREs may not run for terms of less than ten years; furthermore, LUREs running for a term of years must provide that on the anniversary of the date of acceptance, one year will be added automatically to the initial term unless written notice of non-renewal is given.[460] The resulting duration is a "perpetual ten-year term."[461]

More significantly, most state statutes authorize LUREs only for specified purposes and prescribe qualified holders.[462] Although some state statutes use language encompassing the federal government,[463] many exclude the federal government from the list of qualified LURE holders.[464] In states where the federal government is not explicitly authorized to hold LUREs, state common law presumably controls.[465] Thus, the federal government may experience difficulty enforcing the terms of its LUREs, especially a term requiring perpetual duration. For example, a subsequent landowner may challenge the validity of a LURE held by the federal government under a program providing that duration is the maximum term permitted under applicable state law. Because the state statute does not authorize the federal government to hold LUREs, the applicable state law is the state's common law. The common law of the state may render the LURE unenforceable by the federal government either because it is a negative easement or because it is an easement in gross.

Incorporation of state law also subjects the LURE to potential

460. CAL. GOV'T CODE § 51081 (West 1983).

461. Atherton, *supra* note 34, at 65 n.29.

462. Katz, *supra* note 30, at 386-87. The legislative restraints stem from the traditional reluctance to encourage the use of negative easements in gross. *See id.*

463. *See, e.g.*, MICH. COMP. LAWS ANN. § 399.253 (West 1988) (authorizing any "governmental entity" to acquire conservation easements); WASH. REV. CODE ANN. § 64.04.130 (West Supp. 1992) (authorizing any "federal agency" to acquire conservation easements); MONT. CODE ANN. § 76-6-106 (1991) (authorizing any "public body" to acquire interests in real property for the purpose of preservation).

464. For example, California's LURE provisions state that only the following entities or organizations may acquire the authorized LUREs: (1) tax-exempt nonprofit organizations qualified under section 501(c)(3) of the Internal Revenue Code, qualified to do business in the state, and organized for the primary purpose of preservation, protection or enhancement of land; and (2) the state or any city, county, city or county, district, or other state or local governmental entity. CAL. CIV. CODE § 815.3(a)-(b) (West 1982). Similarly, Illinois' conservation rights statute authorizes an owner of realty to convey a LURE to "an agency of the State, to a unit of local government, or to a not-for-profit corporation or trust." ILL. ANN. STAT. ch. 30, para. 402 (Smith-Hurd 1992).

465. *Cf.* Katz, *supra* note 30, at 389 (noting that when statutes fail to mention duration, LUREs are presumably governed by applicable state law).

conflicts between perpetual duration and a state's marketable title laws. Marketable title acts generally render non-possessory interests in realty invalid unless the holder of the interest re-records notice of the interest within a designated number of years.[466] Even in those states which have statutorily authorized perpetual LUREs, a LURE may be unenforceable if the state has not expressly resolved inconsistencies with its marketable title laws in the event that the LURE holder inadvertently fails to re-record.[467] In contrast, federal legislation authorizing LUREs to be perpetual despite state law limitations on duration can preempt limitations stemming from marketable title acts.[468]

Moreover, failure to designate the appropriate governing law for federal LURE programs generates inefficiency and uncertainty. When federal legislation does not address whether state or federal law governs LURE duration, valid arguments can be made for either outcome. Thus, enforceability often requires judicial interpretation. Reliance on judicial enforcement, however, is an inefficient, unpredictable means to attain conservation goals. A court analyzing the "variety of considerations" under a federal program that does not state whether federal or state law applies could conceivably choose either option.[469]

In sum, even though state laws limiting the duration of LUREs may not be definitively characterized as aberrant or hostile, incorporation of state law could readily hinder federal legislative goals by preventing long-term protection of environmentally significant lands.

2. The Possible Gains from Prescribing a Federal Rule

The most significant gain from the use of an express federal directive is the achievement of lasting conservation goals. As not-

466. *See, e.g.*, FLA. STA. ANN. § 712.05 (West 1988); VT. STAT. ANN. tit. 27 § 605 (1989). Katz has suggested LUREs could be exempted from the effect of marketable title acts if they were recorded in a separate index. Katz, *supra* note 30, at 395.

467. *See* Dana & Ramsey, *supra* note 26, at 20 (quoting Charles Boetsch, *Conservation Restrictions: A Survey*, 8 CONN. L. REV. 383, 407 (1975-76)). Although the drafters of the Uniform Conservation Easement Act pointed out the conflict between marketable title acts and perpetual duration of non-possessory interests, they did not suggest a resolution. Katz, *supra* note 30, at 395.

468. *See* 16 U.S.C.A. § 2103c(k)(2)(C) (West Supp. 1992) (providing that no conservation easement held by the federal government "shall be limited in duration or scope or be defeasible by . . . any requirement under State law for re-recordation or renewal of the easement").

469. *See supra* notes 400-08 and accompanying text.

ed, a federal directive yields readily enforceable rights that are not impaired by common law or statutory limitations. Linked with the achievement of lasting conservation is the significant gain from protecting the investment of public funds. That is, ensuring enforceability protects the proprietary interests of the United States.

In addition, given the potential for successful takings arguments,[470] a federal directive will allow LURE acquisition programs to continue to proliferate. Federal legislation governing the maximum duration of LUREs will enable the federal government to continue conservation programs despite potential roadblocks created by states. For example, as acquisitions of federal LUREs increase, states may become concerned about the quantity of acreage controlled by the federal government.[471] Alternatively, once the monetary payments end, state residents may become dissatisfied with LURE restrictions,[472] or subsequent owners who did not negotiate the LUREs may seek to have them invalidated.[473] Responding to these concerns, state legislatures may attempt to limit the federal government's ability to acquire LUREs or the duration of such agreements, undermining the continued success of LURE acquisition programs for conservation purposes.

Although states may not enact and retroactively apply adverse laws to deprive the federal government of negotiated terms in LURE agreements,[474] statutory incorporation of state law governing LURE duration permits states to prospectively impose limitations. Cases examining prospective applications of hostile state law[475] are overruled by express incorporation of state law and

---

470. *See supra* notes 180-83 and accompanying text for a discussion of Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

471. *See, e.g.*, North Dakota v. United States, 460 U.S. 300, 319-20 n.23 (1983) (state law limiting duration of wetland LUREs attributable, in part, to state dissatisfaction with amount of land encumbered by permanent LUREs); Sabine River Auth. v. United States Dep't of Interior, 745 F. Supp. 388 (E.D. Tex. 1990) (Fish and Wildlife Service's LURE conflicted with state agency's land use plans), *aff'd*, 951 F.2d 669 (5th Cir.), *cert. denied*, 60 U.S.L.W. 3843 (U.S. Oct. 5, 1992) (No. 91-1929).

472. *Cf. Incentive Programs Can Help You Meet Conservation Compliance Requirements*, NEWSLETTER (Center for Rural Affairs, Walthill, Neb.) June 1990, at 3 (noting the LURE requirement for partial field enrollments in the CRP may discourage farmers from participating because, although the LUREs themselves may last longer, the annual installment payments may not exceed ten years).

473. *See, e.g.*, United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974) (subsequent landowner attempted to defeat validity of LURE which restricted the draining of surface water to preserve a waterfowl production area).

474. *North Dakota*, 460 U.S. at 320-21; United States v. Little Lake Misere Land Co., 412 U.S. 580, 596-97 (1973).

475. *E.g., Sierra Club v. Marsh*, 692 F. Supp. 1210 (S.D. Cal. 1988); *see also supra*

thus do not protect federal programs. Federal legislation expressly permitting perpetual LUREs despite state law limitations will therefore provide critical protection for the continued viability of federal conservation programs.

The express preemption of state laws governing duration will also enable the federal government to continue protecting environmentally sensitive lands without raising federal land use control controversies. Although LURE acquisition programs are a more appropriate means for attaining federal conservation goals than direct regulation,[476] this is true only if LURE programs achieve long-term conservation goals.[477] If LUREs run a significant risk of not being perpetually enforceable, their use may cease to be the more appropriate federal means. The alternative of direct land use regulation raises takings challenges which may render conserving the land resource fiscally impractical.[478] Accordingly, express federal preemption of state limits on duration will maintain the effectiveness of LURE acquisition programs and avoid the necessity of finding alternative means to achieve conservation goals.

Along similar lines, a federal directive will permit Congress to continue its working partnership with the agricultural industry. Attaining a lasting conservation legacy by protecting social rights in environmentally significant land held by private individuals is an important federal goal.[479] Notably, because much of the land resource requiring protection is on agricultural land, that goal may be politically feasible only within the context of voluntary incentive programs.[480] Yet Congress will continue using voluntary incentive programs only if it can guarantee enforceability. And Congress can assure protection in perpetuity only with express language preempting state law limitations on the duration of LUREs.

Therefore, many significant gains at the federal level accrue from the policy decision to enact federal legislation requiring perpetual duration of LUREs acquired through federal conservation programs.

---

text accompanying notes 377-80.

476. *See supra* part II.

477. *See supra* part II.B.

478. *See supra* notes 199-201 and accompanying text.

479. *See supra* notes 156-57 and accompanying text.

480. *See* discussion *supra* part II.A.1.

3. The Balance of Losses and Gains at the Local Level

Federal legislation authorizing perpetual LUREs and preempting state laws may result in losses from non-integration with normal state activities. States have well developed bodies of law governing the acquisition and transfer of property and defining the resulting rights and responsibilities.[481] These laws reflect each state's public policy choices.[482] Allowing the federal government to acquire or convey rights in real property beyond those recognized by a state alters the normal conduct or real estate transactions within the state. Losses include encumbering land essential for development with perpetual LUREs, perceived infringements on the notion that land use decisions rest with state or local governments,[483] and the potential effect on local land values caused by perpetual LUREs.[484]

Upon closer examination, these perceived losses are not compelling. Concerns regarding the loss of local control over land use and development decisions can be mitigated by provisions in federal conservation programs expressly allowing the federal government to modify or terminate LUREs.[485] For example, the WRP permits modification of LUREs acquired under the program if needed to facilitate the administration of the program or to achieve other appropriate or consistent goals.[486] LUREs may be terminated if the landowner agrees and termination is in the public interest.[487] Although states will be required to seek modification or termination of LUREs and to demonstrate a sufficient public need, important state or local development will not be precluded by the presence of LUREs created under federal conservation programs.

Concerns regarding land values are misplaced because the

---

481. *See Little Lake Misere*, 412 U.S. at 591; Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 208-10 (1946).

482. *Reconstruction Fin. Corp.*, 328 U.S. at 210 ("Concepts of real property are deeply rooted in state traditions, customs, habits, and laws.").

483. *See* Lawrence MacDonnell, *Federal Interests in Western Water Resources: Conflict and Accommodation*, 29 NAT. RESOURCES J. 389, 390 (1989) (discussing western hostility to federal control of state water resources).

484. Concern over decreasing land values may be a residual notion stemming from early reluctance to hinder alienation of realty. *See supra* notes 28-31 and accompanying text.

485. *E.g.*, 16 U.S.C. §§ 3837e(b)(1)-(2), 3839d(B)(1)-(2) (Supp. 1990).

486. *Id.* § 3837e(b)(1)(A)-(B).

487. *Id.* § 3837e(b)(2)(A). However, at least 90 days before terminating LUREs acquired under the WRP, the Secretary must give written notice to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry. *Id.* § 3837e(b)(2)(B).

federal government fairly compensates landowners for LUREs.[488] Owners who agree to encumber their lands with a LURE derive adequate compensation from the transaction, and subsequent landowners purchase the property at a value determined in light the LURE. Moreover, LURE agreements can be drafted so that property values are maintained. The provisions in the 1990 Farm Bill requiring the FmHA to place perpetual LUREs on wetlands which come into the federal inventory are an excellent model for designing LUREs to maintain the productive capabilities of land.[489] These steps should go far to preserving the marketability of land. Furthermore, because encumbered lands remain on state property tax rolls, LUREs do not adversely affect state revenues.[490] Potential losses are therefore more perceived than real.

Conversely, significant gains occur at the local level from federal conservation programs permitting enforceable, perpetual LUREs. First, local gains flow from avoiding Fifth Amendment takings controversies. Although probable, it is not definitively clear that direct regulation of uses of agricultural lands for conservation purposes would in fact constitute a taking.[491] Thus, if the Supreme Court decides that a particular regulation is not a taking, Congress could control land use decisions without compensating the landowner, resulting in a direct loss of income to the farmer. Further, farmers would also lose income indirectly because they cannot readily absorb the cost of direct regulation.[492] By contrast, LURE acquisition programs guarantee the landowner fair compensation for voluntary land use restrictions.[493] However, LURE acquisition programs will only be used if Congress can assure the enforceability of LUREs in perpetuity. Hence, the use of a federal directive assures that agricultural landowners will be fairly compensated for the imposition of land use restrictions.

On the other hand, if direct regulations are consistently deemed takings, Congress may find the potential for costly ad hoc inverse condemnation proceedings fiscally impractical.[494] Congress may then simply forego affirmative conservation of our diverse land

---

488. *See supra* notes 80-81 and accompanying text.

489. *See* 7 U.S.C.A. § 1985(g)(2)-(3) (West Supp. 1992); *see also supra* notes 89-93 and accompanying text (discussing same).

490. *See supra* notes 48-49 and accompanying text.

491. *See* discussion *supra* part II.A.2.

492. *See* discussion *supra* part II.A.3.

493. *See supra* notes 80-81 and accompanying text.

494. *See supra* notes 199-201 and accompanying text.

resource. Yet an agricultural landowner's stewardship often encompasses managed land use for the future.[495] These landowners may voluntarily restrict their use of the land without any affirmative conservation initiatives. Without affirmative federal conservation programs, farmers might forego the opportunity to derive a fair income for restricting their use of the land. Fair compensation accrues gains at the local level because farmers are able to contribute more readily to the local economy.

Furthermore, a number of other less significant gains result from federal legislation authorizing the acquisition and enforceability of perpetual LUREs. The terms of LURE agreements often allow landowners to use the land for fishing, hunting, or wildlife habitats.[496] Because these uses may draw people for recreational or scientific purposes, local commerce may benefit over the years.[497] Additionally, conservation of significant aspects of the land typically enhances aesthetic quality, ultimately increasing property values in the long run.[498] Finally, most states recognize the importance of long-term conservation or preservation of the land resource in order to maintain the viability and productive capabilities of land within their boundaries, yet lack the requisite funds to operate effective state acquisition programs.[499] Thus, states benefit from federal LURE programs that achieve conservation and preservation goals on their behalf. Balancing the gains and losses at the local level, the gains from federal legislation ensuring long-term and effective conservation outweigh the losses from non-integration with normal state activities.

4. The Distribution of Power

The distribution of power between the federal and state govern-

---

495. *See supra* notes 167-70 and accompanying text.

496. *See, e.g.*, 16 U.S.C. §§ 3837a(d), 3839(b)(4) (Supp. 1990) (detailing land uses compatible with LUREs acquired under the WRP and the EEP).

497. *See* Utah v. Marsh, 740 F.2d 799, 803-04 (10th Cir. 1984) (allowing Congress to regulate the discharge of dredged fill material into Lake Utah because as an outlet for recreational activities, the lake benefitted local and interstate commerce).

498. *See* Konrad J. Liegel, Note, *The Impact of the Tax Reform Act of 1986 on Lifetime Transfers of Appreciated Property for Conservation Purposes*, 74 CORNELL L. REV. 742, 768 (1989) (noting that restrictions may enhance the value of land for recreational or residential purposes if neighboring properties are subject to similar restrictions).

499. *See* David Owens, *Land Acquisition and Coastal Resource Management: A Pragmatic Perspective*, 24 WM. & MARY L. REV. 625, 635 n.45 (1983) (noting state and local opposition to land acquisition proposals usually centers on the high cost and lack of available funds for such programs).

ments is an important congressional consideration. Federal legislation requiring LUREs under federal conservation programs to be perpetual despite contrary state laws does not overstep fundamental federalism principles.[500] Nevertheless, it is still important to consider perceived infringements on the proper distribution of power.[501]

Federal legislation authorizing enforceable, perpetual LUREs may be viewed as a form of federal land use regulation.[502] Land use controls are historically considered within the sphere of state and local authorities.[503] Yet many aspects of land and resource management have necessarily shifted to the federal government over the years. Indeed, the "quiet federalization" of land use controls has been commonly noted.[504] Quiet federalization began in the 1960s when the federal government took steps to address environmental problems attracting sufficient public concern.[505] In present times, federal regulation of land use is pervasive.[506] Thus, historical deference to the traditional notion of land use control is an insufficient reason to inhibit legitimate federal policies promoting conservation and preservation of the land resource.[507]

In addition to the constitutional aspect of the relative powers between the federal and state governments, it is important to consider the effect of federal legislation on the daily operation or administration of governmental programs.[508] In this context, the appropriate distribution of powers between federal and state governments should be governed by practicality. A federal directive requiring LUREs to be perpetual is practical because it enables the government to acquire LUREs throughout the country more efficiently. Incorporation of state laws will require the federal govern-

---

500. *See* discussion *supra* part III.

501. *See generally* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954) (discussing respective roles of federal and state law in the "affirmative governance of private activities").

502. *Cf.* Caldwell, *supra* note 157, at 330-34 (discussing the tension between social environmental interests and individual ownership interests); Torres, *supra* note 209 at 204-05 (discussing the problems uniform federal groundwater regulations create for heterogeneous state farms).

503. *See supra* notes 225, 408-10 and accompanying text.

504. *See, e.g.*, FRED P. BOSSELMAN ET AL., FEDERAL LAND USE REGULATION 1 (1977).

505. *Id.*

506. *Id.*

507. MacDonnell, *supra* note 483, at 408 (citing A. Dan Tarlock, *The Endangered Species Act & Western Water Rights*, 20 LAND & WATER L. REV. 1, 29 (1985)).

508. *See* Hart, *supra* note 501, at 490-91; Mishkin, *supra* note 405, at 812.

ment to continually monitor state laws regarding the permissible duration of LUREs, to adjust negotiations accordingly, and to draft LURE agreements in compliance with the multitude of diverse state statutes authorizing LUREs. Further, the difficult problem of valuation is exacerbated by incorporation of state law. Placing a monetary value on a perpetual LURE is difficult,[509] yet it is even more difficult to assess distinct, appropriate values for LUREs that will only endure for a certain term of years. Such considerations suggest that incorporation of state law will necessitate additional time and money to implement LURE acquisition programs, resulting in a less efficient expenditure of public funds.

In the agricultural arena, federal agencies often work directly with local advisory committees. The 1990 Farm Bill called for the establishment of technical advisory committees in each state to assist in the implementation of the conservation provisions.[510] Although the committees do not accord the state any authority in administering the conservation programs, they provide an opportunity for input at the local level regarding which lands to protect. Thus, even if federal legislation dictates the acquisition of perpetual LUREs despite contrary state laws, conservation programs will be implemented with a healthy degree of federal-state cooperation.

V. CONCLUSION

Consideration of the policy factors indicates that federal law should require LUREs acquired through federal conservation programs to be perpetual despite state laws limiting duration. Federal preemption of state laws limiting LURE duration constitutes a stronger conservation policy than wholesale incorporation of state law. A federal directive will yield enforceable, perpetual rights protecting the land resource, will assure the continued viability of LURE acquisition programs, will enhance efficient implementation of conservation programs, and will not preclude important state or local development.

Federal LURE acquisition programs for conservation and preservation purposes are likely to proliferate as recent developments render it more feasible for courts to find direct regulation of land use to be a taking, and fiscal constraints on both states and the federal government continue. Thus, formulating effective and effi-

509. *See supra* notes 204-08 and accompanying text.
510. 16 U.S.C. §§ 3861-3862 (Supp. II 1990).

cient legislation authorizing the use of perpetual LUREs is imperative. Federal legislation authorizing the acquisition of enforceable, perpetual LUREs despite state law limitations on duration will go a long way toward achieving federal conservation goals and assuring desired long-term protection of our nation's land resource.