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**Public Lands Federalism: Judicial  
Theory and Administrative Reality**

by

Richard H. Cowart & Sally K. Fairfax

Originally published in *ECOLOGY LAW QUARTERLY*  
15-3 *ECOLOGY L.Q.* 375 (1988)

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# Public Lands Federalism: Judicial Theory and Administrative Reality\*

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## TABLE OF CONTENTS

Introduction .....	377
I. Context and History of the Sagebrush Rebellion .....	383
A. The Antecedents to the Ranchers' Revolt .....	385
1. The Post-World War I Grazing Fee Controversy...	386
2. The Taylor Grazing Act .....	388
3. The 1940's Grazing Fee Controversy and the "Great Land Grab" .....	390
B. The Ranchers' Revolt, 1970's Style .....	392
C. The Sagebrush Rebellion Writ Large .....	395
1. The Philosophical Factors .....	396
2. The Federal Bulldozer: The Energy Crisis and the MX Missile .....	401
3. State Resource and Environmental Management Programs .....	405
D. Summary .....	407
II. Dual Regulation on the Ground: Cooperative Federal/State Programs in Federal Public Lands Planning and Management .....	408

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\* Gail Achterman, Linus Masouredis, Jan Stevens, John Thorson, Johanna Wald, and Charles Wilkinson have all read previous versions of this Article. Special thanks are due to Karen Nardi for her research on preemption and for a guided tour of early *Granite Rock* matters, to Leonard Wilson, our colleague on much of the initial field work for this project, and to Carolyn Yale for her assistance on cooperative management programs. We are also grateful for the assistance of our *Ecology Law Quarterly* editors, especially Chip Miller, Tom Starrs, and Rebecca Kurland.

Earlier, abbreviated sections of Part III of this Article appeared in Fairfax & Cowart, *Judicial Nationalism vs. Dual Regulation in Public Lands: Granite Rock's Uneasy Compromises*, 17 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,276 (July 1987).

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A.	The Forces Driving Cooperative Land Use Planning and Management.....	409
1.	Intensifying Development Impacts in an Urbanizing West .....	409
2.	The Myth of the Green Blob: Inholdings and Intermixed Ownership .....	410
3.	Congressional Reliance on States To Refine and Implement Federal Land Policies.....	412
4.	Eroding Capabilities of Federal Land Management Agencies .....	413
B.	The Federal Perspective: Efforts To Achieve Consistency Between Federal Land Use Planning and State Land Use Objectives .....	414
1.	Procedures for State and Local Participation in Environmental Assessments .....	415
2.	Statutory Requirements for State/Federal Consistency in BLM Planning: A New and Familiar Wrinkle .....	416
3.	The BLM Planning Process Under FLPMA: The Regulatory Basis for Involving State and Local Interests.....	418
4.	Forest Service Efforts To Coordinate with State and Local Land Use Objectives .....	420
C.	State and Local Strategies for Participating in Federal Lands Planning .....	421
1.	State Initiatives for Intrastate Coordination .....	421
2.	State and Local Involvement in Project Review and Mitigation .....	430
D.	Lessons from Ten Years of Cooperative Experience....	438
III.	Judicial Federalism and the Public Lands.....	439
A.	The Sweeping Scope of Federal Authority.....	441
B.	Federal Preemption and the Scope of State Authority: Congressional Choices .....	448
1.	Introduction.....	448
2.	Express Preemption of a Field.....	450
3.	Implied Preemption—Federal Occupation of a Field .....	450
4.	Concurrent State/Federal Jurisdiction and Specific Preemption .....	450
5.	Congressional “Silence” .....	451
6.	State Authority over Federal Activities .....	452
C.	The Emergence of Preemption as a Public Lands Issue .....	452

D. Public Lands Preemption—Competing Judicial Policies	
.....	456
1. Judicial Nationalism: <i>First Iowa</i> and its Progeny . . .	456
2. Muddling Through: The Regulation Versus Prohibition Cases . . . . .	460
3. Judicial Accommodation and Dual Regulation . . . . .	462
4. <i>Granite Rock</i> and the Prospects for Dual Regulation . . . . .	463
Conclusion . . . . .	473

[T]he Old West has become the Angry West, a region racked by an increasingly bitter sense of isolation and political alienation . . . . The first blow came when Congress passed the Federal Land Policy and Management Act of 1976. . . . Interior's Bureau of Land Management—known to detractors as the bureau of livestock and mining—abandoned decades of indifference to become an aggressive master. . . . "We're like serfs," groans J.W. Swan, president of the Idaho Cattlemen's Association. "There's no way that we can control our destiny while Washington controls the land."<sup>1</sup>

It seems to me ultimately irrelevant whether state environmental regulation has been pre-empted with respect to federal lands, since the exercise of state power at issue here is not environmental regulation but land use control. . . . Since . . . state exercise of land use authority over federal lands is pre-empted by federal law, California's permit requirement must be invalid.<sup>2</sup>

#### INTRODUCTION

During the last half of the 1970's, Western anger at a remote and increasingly assertive federal landlord boiled over into what political activists and the media styled the "Sagebrush Rebellion."<sup>3</sup> The 1976 Fed-

1. *The Angry West vs. The Rest*, NEWSWEEK, Sept. 17, 1979, at 22-23.

2. *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1417, 1438-39 (1987) (Scalia, J., dissenting) (citations to majority opinion omitted).

3. The tempest started quietly. Few noticed earlier unrest in Nevada. After all, ranchers from that state, which is 87% federally owned, frequently were unhappy with the federal land managers. See *infra* note 65. Little interest was stirred when Dean Rhoades, president of the Nevada Cattlemen's Association, threatened in early 1976 to withhold grazing fees to protest allotment modifications. PUB. LANDS NEWS, Feb. 11, 1976, at 6.

For general background, see R. LAMM & M. MCCARTHY, *THE ANGRY WEST* (1982); Babbitt, *Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982); Fairfax, *Riding into a Different Sunset—The Sagebrush Rebellion*, 79 J. FORESTRY 516 (1981) [hereinafter Fairfax, *Different Sunset*]; Mollison & Eddy, *The Sagebrush Rebellion: A Simplistic Response to the Complex Problems of Federal Land Management*, 19 HARV. J. ON LEGIS. 97 (1982); Nelson, *Why the Sagebrush Rebellion Burned Out*, REG. 27 (May/June 1984); Popper, *Essay: What Should be Done About the Public Lands*, AM. LAND F. MAG., Summer 1985, at 58; Wald & Temkin, *The Sagebrush Rebellion: The West Against Itself—Again*, 2 J. ENVTL. L. 187 (1982); Note, *The Sagebrush Rebellion: Who Should Control*

eral Land Policy and Management Act (FLPMA)<sup>4</sup> and other major federal environmental statutes fueled the Rebellion.<sup>5</sup> For a period, ranchers dominated the action in Western state legislatures. The Nevada State Assembly enacted legislation claiming most federal public lands in Nevada for the state and called for legal action to compel the federal government to "return" the land to its rightful owners.<sup>6</sup> This action inspired similar bills in Western states with less dominant livestock interests.<sup>7</sup>

FLPMA aside, at least three other national developments intensified Western states' attention to federal land management. First, the Arab oil boycott and energy price hikes prompted the Carter Administration to propose rapid, disruptive development of Western federal energy resources.<sup>8</sup> Second, the federal government attempted to force MX missile siting on a few Western states.<sup>9</sup> Third, moves to "privatize" the federal lands as a means of reducing the federal deficit threatened to diminish state revenues and to dislocate state programs.<sup>10</sup> Alarmed by these ac-

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*The Public Lands?*, 1980 UTAH L. REV. 505; Nelson, Making Sense of the Sagebrush Rebellion: A Long Term Strategy for the Public Lands, (1981) [hereinafter Nelson, Making Sense] (paper presented at the Third Annual Conference of the Association for Public Policy Analysis, Washington, D.C.).

For a view of the coastal states' variation on these themes with regard to territorial seas, see Shapiro & Shapiro, *Opportunities for a State-Federal Partnership in an Expanded Territorial Sea*, 11 COASTAL ZONE MGMT. J. 335 (1984); Shapiro, *Sagebrush and Seaweed Robbery: State Revenue Losses from Onshore and Offshore Federal Lands*, 12 ECOLOGY L.Q. 481 (1985). For a discussion of the extent of congressional power over federally owned lands in the West, see Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980).

4. Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-84 (1986). For a useful legislative history, see SENATE COMM. ON ENERGY AND NATURAL RESOURCES, 95TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, S. DOC. NO. 99, 95th Cong., 2d Sess. (1978). For a discussion of the FLPMA management regime, see Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA and the Multiple Use Mandate*, 14 ENVTL. L. 1 (1983) [hereinafter Coggins, *Multiple Use*].

5. This is not meant to suggest that those who joined the Sagebrush Rebellion were anti-environmental in their viewpoints. In fact, the philosophy of the rebellion intermingled and confused Western environmental and free market development concerns, as discussed *infra* notes 105-30 and accompanying text, and the Western states themselves have developed extensive environmental programs. See *infra* notes 163-72 and accompanying text.

6. The Nevada Act of June 2, 1979, ch. 33, 1979 Nev. Stat. 1362 (codified at NEV. REV. STAT. §§ 321.596 - 321.599), reprinted in Mollison & Eddy, *supra* note 3, at 123 n.127.

7. Between Nevada's 1979 enactment and June 1981, 38 bills were introduced in the public domain states as well as in Alaska and Hawaii. See NEVADA LEGISLATURE'S SELECT COMMITTEE ON PUBLIC LANDS, COALITION COMMENTS, Feb. 1981, at 2-5 [hereinafter COALITION COMMENTS]. For a survey of all the "Sagebrush Rebellion" bills, see Mollison & Eddy, *supra* note 3, at 121-26.

8. See *infra* notes 144-57 and accompanying text.

9. See *infra* notes 158-62 and accompanying text.

10. See *infra* note 131 and accompanying text. We focus on the states' positions. For a useful and different perspective, compare Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317, 341 (1980).

tions, the Western states became increasingly effective in asserting their interests in federal land management. Although the respite in the energy crisis in the late 1980's has lessened the intensity of the conflict,<sup>11</sup> state efforts to exert control over federal land managers continue.<sup>12</sup>

To environmentalists, the Rebellion crystallized anew their long-standing suspicion that livestock operators and the growing array of mineral, timber, and development interests aimed to plunder or gain title to the nation's treasures.<sup>13</sup> The environmentalists' defense of federal land retention and management was ardent; it was also part of a clear historic pattern.<sup>14</sup> Nevertheless, among some environmentalists and throughout the nation there was growing agreement that the rebels had a point: perhaps the federal government had attempted too much and failed too often, and perhaps state and local efforts could be more effective.<sup>15</sup>

Much has changed since the period from 1976 to 1981 when "Sagebrush Rebels" ran rampant in Western legislatures, Sunday supplement features and, some would say, the Department of the Interior. The conventional wisdom views the Rebellion as a thinly disguised and unsuccessful land grab by ranchers, other commodity interests, and would-be developers of federal lands, which environmental groups once again defeated, defending public land ownership and federal land managers from the exploiters.<sup>16</sup>

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11. For example, the synfuels program aggressively promoted by the Carter Administration has now been abandoned by Congress. For the story of the rise and fall of that overly ambitious federal program, see S. FAIRFAX & C. YALE, *FEDERAL LANDS* 92-93 (1987). This book is designed to be a quick and dirty introduction to diverse federal land management programs and is cited frequently below to refer readers to more background than this text can offer. Those knowing little or nothing will find it a useful starting point, but it is not intended to be more than that. Aficionados—or those aspiring to be aficionados—will need to refer to the additional references it cites.

12. For example, Oregon Governor Neil Goldschmidt recently hired Norm Johnson, principal developer of the U.S. Forest Service's computer planning model FORPLAN, to help state officials critique forest plans and evaluate state alternatives. See *infra* notes 205-07 and accompanying text.

13. See Shaw, *Sagebrush Rip-off—We've Got a Lot to Lose*, THE YODELER, Nov. 1979, at 2; Starnes, *The Theft of the West*, OUTDOOR LIFE, June 1981, at 51; see also Leshy, *supra* note 10, at 319.

14. Regarding "The Great Land Grabs," see *infra* notes 66-76 and accompanying text. Typically, environmentalists favor the concept of federal land management even while they attack the land management agencies. See, e.g., Secretary of Interior v. California, 464 U.S. 312, 319 n.3 (1983) (numerous environmental groups joined the State of California to obtain injunctive relief against offshore oil drilling lease sales).

15. Not at all coincidentally, the strongest arguments on behalf of state authority on federal lands in *California Coastal Comm'n v. Granite Rock Co.* were filed by a contingent of environmental groups. Brief of *Amici Curiae*, The Big Sur Foundation, Natural Resources Defense Council, Inc., The Sierra Club and The Wilderness Society in Support of Appellants, *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419 (1987).

16. See, e.g., Peterson, *Rising Opposition Stalls U.S. Effort to Develop Federal Lands in West*, N.Y. Times, Mar. 5, 1986, at 10, col. 1. But see COALITION COMMENTS, *supra* note 7, Apr. 1982, at 5 (describing further "thrusts" in the Sagebrush Rebellion). For the most thorough account of the environmentalists' activities in previous shoot-'em-ups, see W. VOIGT &

We argue differently. Our investigation focuses not on the familiar scenario of environmentalism versus exploitation, but on "street level bureaucrats."<sup>17</sup> We view the Sagebrush Rebellion as far broader than a mere "ranchers' revolt." We find the true Sagebrush Rebellion not in "the" Nevada case seeking the return of federal lands to the states<sup>18</sup> but in dozens of efforts by increasingly effective state and local governments to influence a wide spectrum of resource management issues. Furthermore, we conclude that neither the Rebellion nor the ranchers' revolt failed.

Major changes in the location, definition, and exercise of public land management authority have emerged since the mid-1970's. Efforts by ranchers and commodity developers to gain tenure, privilege, or title on the federal lands were only a part of a broad effort that significantly shifted political power over management of federal natural resources from the federal government to the states.

From that perspective, three things are important about federalism and this new state and local posture. First, despite familiar lamentations concerning the stock operators and other putative plunderers of the public estate, and despite the tenacious view of state resource managers as possessed of "incompetence or venality,"<sup>19</sup> the new state and local assertiveness cuts in many directions across the gamut of resource management issues.

Second, this new assertiveness is not led or even accompanied by a coherent intellectual position from the judiciary.<sup>20</sup> During the closing quarter of the 20th century, the contours of state and federal authority over the management of public lands have evolved independently of judicial decisions. Litigation has not been central in the day-to-day management of Western resources,<sup>21</sup> and the case law has contributed little to the federalism issues underlying the Sagebrush Rebellion. Worse, incon-

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R. HELD, *THE PUBLIC GRAZING LANDS: USE AND MISUSE BY INDUSTRY AND GOVERNMENT* (1976).

17. See M. LIPSKY, *STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* xi-xvi (1980).

18. *Nevada ex rel. Bd. of Agric. v. United States*, 512 F. Supp. 166 (D. Nev. 1981), *aff'd*, 699 F.2d 486 (9th Cir. 1983).

19. M. CLAWSON, *THE FEDERAL LANDS REVISITED* 188 (1983).

20. *Nevada Bd. of Agric.*, 512 F. Supp. at 166, was one of the elements of the "official" Sagebrush Rebellion. Its import was primarily symbolic. More significant to our discussion are the many judicial decisions addressing the contours of state and federal authority in such areas as water rights, natural resources taxation, concurrent regulation, and royalties management. As for these cases, the courts have not developed a consistent approach, but instead decide them on a case-by-case, resource-by-resource, and statute-by-statute basis. See *infra* notes 357, 418 and accompanying text.

21. See S. Fairfax & R. Cowart, *State-Federal Relations: A Practitioner's Guide to the Law and Politics of Federalism* 6 (Institute for Governmental Studies 1984) (occasional paper). See generally Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945 (1982) [hereinafter Fairfax, *Old Recipes*].

clusive and often incompatible case decisions have obscured and impeded growing federal/state relationships in the last two decades even as interest group activity has dominated the realignment of political power in this area. When issues of federal/state relations regarding resource management have come before the bar, the results have been inconsistent and contradictory. The courts have not taken the lead in defining or redefining state and federal relations, and they have neither clearly endorsed nor rejected the efforts of federal and state administrators to create new working relationships. Consequently, the study of federalism in resource management cannot be confined to analysis of judicial opinions, however appealing such a limited intellectual exercise may be.

Third, this ubiquitous new state and local assertiveness extends beyond resource-related issues to other policy areas.<sup>22</sup> Although we examine only Western resource management, our insights regarding the nature and study of federalism inform the analysis of federal systems irrespective of time, place, and policy. The public lands have been a major policy issue ever since Delaware and Maryland hesitated to sign the Articles of Confederation because of a dispute with Virginia over her "Western reserves."<sup>23</sup> Public land management involves diverse and durable policy issues that are relatively easy to identify and that are inherently intriguing. For these reasons, the public lands provide a particularly effective context for federal/state, interregional, and state/state conflicts and accords. Thus, broadly defined, the Sagebrush Rebellion is an excellent case study of modern American federalism. It is particularly valuable for evaluating the changing judicial, political, and administrative

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22. See, e.g., ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS (ACIR), STATE AND LOCAL ROLES IN THE FEDERAL SYSTEM (1984) (summarizing an evolving non-traditional state role in development of federal programs); ACIR, IN BRIEF, STATE AND LOCAL ROLES IN THE FEDERAL SYSTEM (1980); Stenberg, *States Under the Spotlight: An Intergovernmental View*, 45 PUB. ADMIN. REV. 319 (1985). For a more recent elaboration of this point, see Nathan & Derthick, *Reagan's Legacy: A New Liberalism Among the States*, N.Y. Times, Dec. 18, 1987, at 29, col. 1.

23. See generally T. ABERNETHY, WESTERN LANDS AND THE AMERICAN REVOLUTION (1937); P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968). Other good background materials are M. JENSEN, THE ARTICLES OF CONFEDERATION 198-210 (1940); P. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC (1983) [hereinafter P. ONUF, ORIGINS]; Fairfax, *Interstate Bargaining over Revenue Sharing and Payments in Lieu of Taxes: Federalism as if States Mattered*, in FEDERAL LANDS POLICY 80-84 (P. Foss ed. 1987) [hereinafter Fairfax, *Interstate Bargaining*]; Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27 (1936); Jensen, *The Creation of the National Domain, 1781-1784*, 26 MISS. VALLEY HIST. REV. 323 (1939); Onuf, *From Colony to Territory: Changing Concepts of Statehood in Revolutionary America*, 97 POL. SCI. Q. 447 (1982) [hereinafter Onuf, *Statehood in Revolutionary America*]; Onuf, *Toward Federalism: Virginia, Congress, and the Western Lands*, 34 WM. & MARY Q. (3d ser.) 353 (1977) [hereinafter Onuf, *Toward Federalism*]; Phillips, *American Opinions Regarding the West, 1778-1783*, 7 PROC. MISS. VALLEY HIST. ASS'N 286 (1913-14); Sioussat, *The Chevalier de la Luzerne and the Ratification of the Articles of Confederation by Maryland, 1780-1781*, 60 PA. MAG. HIST. & BIOG. 391 (1936); P. Onuf, *New States and the Extended Republic* (Aug. 1986) (paper presented at the Convention of the American Political Science Association, Washington, D.C.).



roles in the evolution of federal/state relations.<sup>24</sup>

Our discussion proceeds as follows: Part I distinguishes the Sagebrush Rebellion from the ranchers' revolt. It explores this century's history of livestock industry advocacy and concludes that the "return of lands to the states" theme is a familiar rancher ploy, one of several stratagems to elicit management agency support for industry priorities. It suggests that the broader Sagebrush Rebellion was defined less by the ranchers than by the energy crisis and an ideological shift towards unprecedented economic analysis of resource management<sup>25</sup> and that its key feature was a quest by state governments to influence or control federal lands decisions.

Part II analyzes federalism "on the ground": mechanisms devised by Congress, state legislatures, and federal, state, and local administrators to meet increasingly diverse public and congressional expectations regarding resource and environmental management on the public lands. This section is based on four years of field research in nine Western states.<sup>26</sup> We have found an impressive array of initiatives to mitigate the adverse economic and environmental consequences of large-scale development proposals under federal jurisdiction, to assert state and local interests in public lands planning, and to protect those interests in day-to-day public lands management decisions. In these administrative arrangements—sometimes informal, often ad hoc, often complex—we find an emerging federal/state partnership in public resource management. This administrative federalism is every bit as important as the holdings of the courts in defining intergovernmental relations in the American federal system.

Part III examines the legal framework of federalism on the public lands. This framework has evolved along with congressional policies and public expectations. During the 18th and 19th centuries, Congress was primarily concerned with the disposition of public lands. Judicial discussions of federal authorities over the public domain centered around the concept of the federal government as an ordinary proprietor, subject to state regulation. As Congress changed its basic approach to the public

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24. For a fuller discussion of the importance of public lands history to the study of federalism, see Fairfax, *Old Recipes*, *supra* note 21.

25. See *infra* notes 105-16 and accompanying text. See generally Nelson, *Mythology Instead of Analysis: The Story of Public Forest Management* in *FORESTLANDS: PUBLIC AND PRIVATE* 23 (R. Deacon & M. Johnson eds. 1985) [hereinafter Nelson, *Mythology*]; S. Fairfax, *The Role of Economic Analysis in Forest Policy* (Mar. 1986) [hereinafter Fairfax, *Economic Analysis*].

26. The field research was funded by the Western Conference of the Council of State Governments. Interviews were conducted with state and local government officials, federal agency administrators, and resource users in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, and Utah. The authors were assisted in the field research by Leonard Wilson, formerly Senior Research Associate with the Council of State Governments.

domain from land disposition to retention, the courts increasingly viewed federal actions as an expression of superior sovereignty.

In the late 20th century, judicial and public efforts to define the nature of federal authority have focused on statutory questions. This focus began as Congress became more sophisticated about public land reservations and intensified as Congress became more aggressive in federal management.<sup>27</sup> When we discuss legal developments, we do not dwell on the sovereign-proprietary distinction long associated with public land matters. Instead, we focus on judicial decisions on preemption. We conclude that recent decisions in the area of public land management are inconsistent and fail to respect federal and state attempts to develop concurrent management regimes.

Part III concludes with an analysis of the Supreme Court's recent decision in *California Coastal Commission v. Granite Rock Co.*,<sup>28</sup> a case exemplifying the judicial confusion attending public lands preemption conflicts. We argue that "on the ground" administrative federalism is hampered by, and vulnerable to, judicial misunderstandings about the complexities of federal and state resource management programs.

As a result, we conclude that in resolving public lands management conflicts, the courts should be particularly reluctant to find preemption in the absence of a clearly stated congressional intent to preempt state and local management efforts.

## I

### CONTEXT AND HISTORY OF THE SAGEBRUSH REBELLION

The Sagebrush Rebellion was a political movement far more interesting and influential than the more familiar "ranchers' revolt" characterization suggests.<sup>29</sup> This section puts the Sagebrush Rebellion into context, focusing first on this century's earlier rancher-inspired public lands controversies,<sup>30</sup> then describing the recent ranchers' revolt and not-

27. This took time to achieve. The reservation doctrine evolved slowly. Although land reservations were made early in the 19th century to protect naval stores, the early modern land reservations, such as Yosemite (1865) and Yellowstone (1874), were for park purposes. Early Forest Service authorities were also used to protect land for parks now managed by the National Park Service. On land reservations and reservation policy, see generally E. PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN* 90-98 (1951). See also Fairfax & Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 509 (1979) (discussing shifting priorities regarding the purposes of the forest reserves).

28. 107 S. Ct. 1419 (1987).

29. This by itself is not an insight. Many policy analysts, though fewer media commentators, have noticed the complexity of the Rebellion as compared with its image. See Nelson, *Making Sense*, *supra* note 3, at 1-9; Leshy, *supra* note 10, at 342-49.

30. For a quick runthrough of these affairs, see S. DANA & S. FAIRFAX, *FOREST AND RANGE POLICY* 136-38, 181-90 (1980) and references cited therein. Standard sources include U.S. PUBLIC LAND LAW REVIEW COMM'N, *ONE THIRD OF THE NATION'S LAND* (1970); W. CALEF, *PRIVATE GRAZING AND PUBLIC LANDS* (1960); M. CLAWSON & R. HELD, *THE FED-*

ing why it is easy but misleading to mistake the most recent revolt as merely another in a series.

Scholars have been awaiting signs of the range livestock industry's last hurrah for several decades now,<sup>31</sup> and it would be foolish to conclude that we have already witnessed it. However, it is accurate as well as symbolic to observe that although the ranchers' revolt began as a traditional scene from the Old West, the broader Sagebrush Rebellion concluded as a major expression of the New West. Major shifts in the politics, economics, and sociology of the Western states became apparent as the progressive consensus<sup>32</sup> around centralized government planning for Western resource management was challenged by federal proposals for massive energy and defense developments. This progressive consensus finally collapsed in the face of longstanding critiques by environmentalists and economists.<sup>33</sup>

ERAL LANDS: THEIR USE AND MANAGEMENT (1957); G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 675-778 (2d ed. 1987); P. FOSS, POLITICS AND GRASS (1960); P. GATES, *supra* note 23, at 607-34; S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY 49-65 (1959); E. PEPPER, *supra* note 27; P. ROBERTS, HOOF PRINTS ON FOREST RANGES 7-20 (1963); W. VOIGT & R. HELD, *supra* note 16; Coggins, Evans & Lindberg-Johnson, *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535 (1982); Coggins, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1 (1982) [hereinafter Coggins, *The Taylor Act*]; Coggins, *The Law of Public Rangeland Management III: A Survey of Creeping Regulation at the Periphery, 1934 - 1982*, 13 ENVTL. L. 295 (1983) [hereinafter Coggins, *Creeping Regulation*]; Coggins, *Multiple Use*, *supra* note 4; Coggins, *The Law of Public Rangeland Management V: Prescriptions for Reform*, 14 ENVTL. L. 497 (1984). For a discussion of more recent events, see Fradkin, *Environmentalism at Large: The Eating of the West*, AUDUBON 94 (1977); Stanfield, *Cowboys and Conservationists in Range War over Grazing Fees on Public Lands*, 17 NAT'L J. 1623 (1985); Wald & Schwartz, *Thawing the Freeze on Grazing Fees*, FOREST WATCH, Mar. 1987, at 20; *Feds Reset Grazing Fee Formula*, PUB. LANDS NEWS, Feb. 18, 1988, at 2. For a technical perspective, see COMMITTEE ON DEVELOPING STRATEGIES FOR RANGELAND MANAGEMENT, NATIONAL RESEARCH COUNCIL/NATIONAL ACADEMY OF SCIENCES, DEVELOPING STRATEGIES FOR RANGELAND MANAGEMENT (1984) [hereinafter NRC/NAS].

31. W. CALEF, *supra* note 30, is unique in its early analysis of conflicts between grazing and non-grazing uses. *Id.* at 152-53, 177-80; see Fairfax, *Coming of Age in the Bureau of Land Management: Range Management in Search of a Gospel*, in NRC/NAS, *supra* note 30, at 1714 [hereinafter Fairfax, *Coming of Age*]; see also R. Nelson, *The New Range Wars: Environmentalists versus Cattlemen for the Public Rangelands* (1980) (unpublished draft manuscript). This manuscript examines the trend towards lessening influence of the range livestock industry since the 1950's due to an assertive Bureau of Land Management and the emergence of powerful environmentalists, particularly the Natural Resources Defense Council.

32. For a discussion of the progressive era consensus, see S. HAYS, *supra* note 30, at 261-76. The erosion of the consensus in the context of the Sagebrush Rebellion is discussed in Nelson, *Making Sense*, *supra* note 3 at 15-16; Fairfax, *Different Sunset*, *supra* note 3.

33. For the basics of the environmentalist critique, see P. CULHANE, PUBLIC LANDS POLITICS 1-36 (1981). For the economists' barrage, see Nelson, *Mythology*, *supra* note 25. See also P. FOSS, *supra* note 30, at 174-75 (discussion of early (1930's) resistance by Nevada ranchers to any economic regime in the post-Taylor Grazing Act period). These ranchers objected to imposition of any fee by the grazing service, even one covering only administrative costs. *Id.*; see also *infra* notes 105-13 and accompanying text.

A. *The Antecedents to the Ranchers' Revolt*<sup>34</sup>

For most of this century the livestock industry has successfully pursued an awkward combination of goals vis-a-vis federal land retention and management. Ranchers protected their independence and controlled "their" operations (which in the eyes of the ranchers included the public lands they utilized)<sup>35</sup> by solidifying their tenure on the public range. Early in the century, ranchers relied on the federal government to reserve grazing lands from homestead entry, thereby excluding competitive settlement and development. More recently, they have expected the federal government to invest in improved forage resources without interfering significantly with livestock operations. The ranchers were encouraged by the consistently successful efforts of their elected representatives, particularly in the U.S. Senate, to hold real federal management at bay. In addition, federal managers have, since World War II, attempted to sell management directly to ranchers with a "less will be more" strategy in which, for instance, a temporary cut in a grazing allocation would be replaced with an increased allotment after the resource came under management and began producing at capacity.<sup>36</sup>

Efforts to maintain low grazing fees, first on Forest Service grazing lands and later on the Grazing Districts managed by the Department of the Interior, have been a common focus of ranchers' periodic efforts to

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34. A dominant theme in public lands history, and one that does not appear to have escaped the notice of commodity users, is the idea of "legalizing the illegal." The federal government early on adopted a pattern of proclaiming in stentorian tones that x or y is illegal and then yielding to pressure to reverse itself. This began, perhaps, in the ultimately successful fight for squatters' rights. See P. GATES, *supra* note 23, at 41, 66-68. The pattern appears as well in mining law, which began as an attempt to control trespass and wound up adopting the "law of the camp" in the 1872 Mining Act. The pattern is plainest perhaps in the government's relations with the livestock industry: "cattle barons" made efforts to fence public lands in the 1860's, 1870's, and 1880's, and with much ballyhoo the feds, most notably under Interior Secretary Carl Schurz, declared the action illegal and had some fences removed. See generally Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 MONT. L. REV. 155 (1967). Subsequently, however, these ostensibly illegal fences were accepted as key indicators of "historic range use" entitling the owner to range privileges under the Taylor Grazing Act. In view of this history, and not unexpectedly, the industry has been extraordinarily resilient even though FLPMA in 1976 sounded to some the death knell for single use management on the public range. Stock operators have no reason, historically speaking, to fear changing political fortunes in Washington. They wait them out and win. See Fairfax, *Coming of Age*, *supra* note 31, at 1715, 1736-39, for a discussion of the shift from FLPMA to PRIA viewed in this context. See also *infra* note 86 (discussing the benefits of PRIA for ranchers).

35. The issue of whether the livestock operators enjoyed rights to the public range or were merely permitted access to a privilege was settled only recently. See Coggins, *The Taylor Act*, *supra* note 30, at 23-35, 68-75.

36. See E. PEPPER, *supra* note 27, at 308-09. Pepper's view is somewhat jaundiced, but it is worth noting that federal land managers talking to their clients, and not California Governor Jerry Brown, should be credited with developing the "less will be more" theme as a politically viable slogan.

solidify their position.<sup>37</sup> More spectacularly, in several famous congressional investigations, livestock operators have sought to impress upon the managing agencies the reach of their political clout. In carefully managed episodes, the ranchers mixed their quest for secure tenure with an apparently tactical quest for title.<sup>38</sup> A quick review of this historic pattern will help identify both the fundamental attributes of the 1970's ranchers' revolt and the unique features of the larger Sagebrush Rebellion. This review also will underscore the strategic nature of recent transfer-of-title emphasis by noting the livestock industry's continuing dependence on and benefit from minimal federal range management.

### 1. *The Post-World War I Grazing Fee Controversy*

The first pertinent range management controversy began in 1916 when the Forest Service tried to double grazing fees. The rates had been artificially low for a decade following an effort to minimize hostility to forest management programs implemented in the early 1900's.<sup>39</sup> When the rate doubling was unsuccessful, the Forest Service offered multi-year permits in 1918 to make a gradual fee increase palatable.<sup>40</sup> This careful appeasement of the livestock interests was an important component of the Forest Service effort to retain the favor of the stock operators. Their support was needed both to facilitate the agency's fledgling efforts to control the range<sup>41</sup> and to support its battle with the Department of the Interior to gain authority to manage the grazing lease program for the remaining unreserved, unentered public domain.<sup>42</sup> Almost immediately

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37. *Id.* at 186.

38. *See infra* notes 58-65 and accompanying text.

39. The Forest Service's authority to regulate and charge for use of forage was challenged successfully until 1911. *Light v. United States*, 220 U.S. 523 (1911), and *United States v. Grimaud*, 220 U.S. 506 (1911), established the Forest Service authority. *See* P. ROBERTS, *supra* note 30, at 7-20. *See also* S. HAYS, *supra* note 30, at 50, for examinations of early chaos and anarchy on the open range.

Crisis hit the livestock industry in the severe winter of 1886-87. Blizzards helped to end the livestock boom years on the Western range. *See generally* G. GRESSLEY, *BANKERS AND CATTLEMEN* 243-72 (1966). The end of the boom led many operators to advocate a range leasing system. *See* S. HAYS, *supra* note 30, at 51-54. Opposition to such programs was complex, *id.*, but Peffer argues convincingly that throughout the period 1915-30, the major barrier was competition between the Departments of Agriculture and the Interior rather than the rancher opposition commonly supposed. *See* E. PEFFER, *supra* note 27, at 182-202. For a legal interpretation of this dramatic tale of boom, bust, and blizzards, *see* Coggins, *The Taylor Act*, *supra* note 30, at 1.

40. E. PEFFER, *supra* note 27, at 186.

41. *See generally* P. ROBERTS, *supra* note 30 (history of the Forest Service's early efforts at rangeland control). J. ISE, *THE UNITED STATES FOREST POLICY* 168-76 (1920), and G. PINCHOT, *BREAKING NEW GROUND* 177-82, 268-72 (1947), offer a slightly different progressive era apologia on grazing in national forests.

42. *See* E. PEFFER, *supra* note 27, at 27-31 and references cited therein. The head of the Department of the Interior hoped to change it to the Department of Conservation and to manage all public lands, but the Department of Agriculture wanted to maintain control of grazing. *Id.* at 232-46.

after the first five-year permits went into effect in 1920, the House Committee on Agriculture and Forestry began to press the Forest Service to help retire the national debt from World War I by rapidly raising fees to what we now would call fair market value.<sup>43</sup> Senate supporters of the livestock operators took a different tack, attempting to force the agency to rescind even the proposed minimal increases that had been stayed during the economic crises that hit the industry following World War I.<sup>44</sup>

The debate continued for several years. Two grazing studies were done in 1924 and 1925. The first was undertaken at the insistence of the Forest Service, which "finally persuaded the [House] Committee on Agriculture and Forestry to drop its demands" for a fee increase by promising to raise its fees in accord with the results of the study.<sup>45</sup> When the recommended increase was seventy-five percent, the livestock industry and its supporters in the Senate initiated an investigation of public land management.<sup>46</sup> The 1925 Stanfield Investigation "served as a sounding board for the complaints of the stockmen and kept the whole grazing controversy stirred up by a constant repetition of grievances."<sup>47</sup> Forest Service partisans launched a vitriolic counterattack.<sup>48</sup> The haggling over grazing fees was interrupted briefly in 1929-31. Following a major public land policy review,<sup>49</sup> President Hoover proposed giving the unreserved, unentered lands to the states.<sup>50</sup>

Ironically (in view of more recent developments, including the Sagebrush Rebellion), the chief opponents of the disposal plan were the states themselves. Their opposition was nearly unanimous, in part because the federal government planned to reserve title to the subsurface minerals and in part because the transfer would reduce each state's share of federal aid for highways, which was apportioned according to the number of federally owned acres in the state.<sup>51</sup> Although some ranchers supported the transfer as a route to reduced regulation of range leasing,<sup>52</sup> they were

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43. *Id.* at 187.

44. *Id.* at 190-97.

45. The Rachford Report was released in 1924. *See id.* and references cited.

46. *Id.* at 187-90.

47. *Id.* at 190 (citing *Hearings on S. 2584 Before the Committee on Public Lands and Surveys*, 69th Cong., 1st Sess. 323-24 (1925-26)).

48. E. PEFFER, *supra* note 27, at 195. The Society of American Foresters opposed legal recognition of grazing as a legitimate use of the national forests. *See S. DANA & S. FAIRFAX, supra* note 30, at 137-38.

49. *See* E. PEFFER, *supra* note 27, at 203-09; P. GATES, *supra* note 23, at 524-27; *see also* REPORT OF THE COMM. ON CONSERVATION AND ADMINISTRATION OF THE PUBLIC DOMAIN (1931), *reprinted in Granting Remaining Unreserved Public Land to States: Hearings on S. 17, S. 2272 and S. 4060 Before the Comm. on Public Lands and Surveys*, 72d Cong., 1st Sess. 31 (1932) [hereinafter *Remaining Unreserved Public Lands*].

50. P. GATES, *supra* note 23, at 525-27. *See generally* E. PEFFER, *supra* note 27, at 203-09.

51. P. GATES, *supra* note 23, at 526-28; E. PEFFER, *supra* note 27, at 203, 209.

52. E. PEFFER, *supra* note 27, at 207; *see also* S. HAYS, *supra* note 30, at 51-54.

in the minority. Most opposed the shift without the minerals or the machinery at the state level to control access to the range.<sup>53</sup>

In 1933, in the midst of the Depression, the livestock industry was once again successful in reducing fees, this time by pressuring the Forest Service to rescind the slight increases that already had been put into effect.<sup>54</sup> The Forest Service yielded the point in order to maintain the support of the livestock industry on public domain management proposals then pending in Congress.<sup>55</sup> There the matter rested until Secretary of the Interior Harold Ickes underbid the Forest Service fee structure by a degree sufficient to gain rancher support for grazing districts managed by the Department of the Interior.<sup>56</sup>

In retrospect, rancher efforts in the late 1910's and the 1920's were clearly designed to manipulate federal management rather than to prevent it. The strategy was so successful that, when combined with the rejection of Hoover's proposal at the end of the decade, it casts doubt on the sincerity of the ranchers' apparent quest for title, pursued in the 1940's and again in the 1970's. Among other things, taking title could have required ranchers to pay for the land and, perhaps, to bid against rival claimants. It also could have required them to pay property taxes and to pay for range improvements and other investments.

With the first grazing fee controversy and the attendant congressional investigation, the livestock industry demonstrated that its political power, especially in the Senate, was sufficient to maintain low grazing fees and to make the lives and careers of unsupportive federal range professionals miserable. Sustaining that perception has continued to serve the industry well.

## 2. *The Taylor Grazing Act*<sup>57</sup>

Passage of the Taylor Grazing Act in 1934 capped almost two decades of wrangling between the Departments of Agriculture and the Interior for control over the unreserved, unentered public domain.<sup>58</sup> The purpose of the Taylor Grazing Act was to conserve the public range and to stabilize the livestock industry by establishing a leasing system for grazing access to the unreserved, unentered public domain. Within a few years of the passage of the Act, 142 million acres of such land had been allocated to ranchers under grazing permits and included in grazing dis-

53. E. PEFFER, *supra* note 27, at 232-46.

54. *Id.* at 219, 260.

55. The proposals ultimately were supplanted by the Taylor Grazing Act, discussed *infra* notes 58-65 and accompanying text.

56. See *infra* notes 60-61 and accompanying text.

57. The terms "Taylor Grazing Act" and "Taylor Act" are used interchangeably to refer to ch. 865, 48 Stat. 1269 (codified as amended at 43 U.S.C. §§ 315-315r (1986)).

58. The provisions are discussed in Coggins, *The Taylor Act*, *supra* note 30; see also Fairfax, *Coming of Age*, *supra* note 31, at 1724-25.

tricts. A new administrative entity in the Department of the Interior, the Grazing Service, was established to administer the districts.<sup>59</sup>

The common assumption that ranchers were opposed in principle to a leasing program is incorrect. Livestock operators, Peffer argues convincingly, were looking primarily for a way to exclude homesteaders and "vagrant" (i.e., sheep) operators. At the same time, they did not want the Forest Service or any other bureaucracy to interfere with their established access. By playing on the rivalry between the two departments, ranchers were able to maintain access to the range with minimal management restrictions.<sup>60</sup>

Indeed, passage of the Taylor Act was an almost complete victory for the range cattle industry. Harold Ickes, Franklin Roosevelt's Secretary of the Interior, promised that management of what were to become Grazing Districts would be minimal and that fees would be tied to the cost of that management.<sup>61</sup> Ickes' promise that he would not create a bureaucracy to interfere with livestock operations sealed his victory by luring rancher support to Interior from the Forest Service and, thus, assuring passage of the Act.

The grazing industry completed its victory in the implementation of the Act through careful manipulation of the statutory and administrative criteria defining eligibility for initial grazing permits. The Act gave first preference to those who owned property adjacent to the allotment.<sup>62</sup> Early implementation added a "preference period" favoring prior users who grazed from 1929-34.<sup>63</sup> This necessarily allowed a comparatively small number of large ranchers who owned their properties and ran stock during the early years of the Depression to dominate the allocation process.<sup>64</sup> The Grazing Service was to improve range conditions by increas-

59. Ch. 270, 53 Stat. 1002 (1939) (amending 48 Stat. 1269) (codified at 43 U.S.C. § 3150-1 (1976)). Management of the newly designated Grazing Districts was to be achieved by a small force of experienced range managers, recruited from the state in which they would be assigned, and overseen by grazing advisory boards to be made up of local ranchers in each district. *Id.* For good discussions of the Taylor Grazing Act, see P. FOSS, *supra* note 30, at 39-72; E. PEFFER, *supra* note 27, at 214-31; Coggins, Evans & Lindberg-Johnson, *supra* note 30, at 550-52; Coggins, *The Taylor Act*, *supra* note 30, at 47-62.

60. E. PEFFER, *supra* note 27, at 214-23; see I. H. ICKES, *THE SECRET DIARIES OF HAROLD ICKES* 21-24, 49, 151 (1954).

61. P. FOSS, *supra* note 30, at 172-74.

62. 43 U.S.C. § 315b (1976); see also Coggins, *The Taylor Act*, *supra* note 30, at 50-61.

63. Coggins, *The Taylor Act*, *supra* note 30, at 82.

64. *Id.* at 62. The granting of a permit to use federal range at below market value, *see id.* at 63, was undeniably a subsidy to the original permittees. Subsequent permit holders do not enjoy the same subsidy. The use value of subsidized grass is capitalized into the value of the base property and is paid by the purchaser when a base ranch is transferred. Permits are not necessarily transferred to base property purchasers, but this is the general practice, and exceptions are rare. Although BLM rejects the notion of "permit value" as a component of base property value, the real estate markets recognize it, and the Internal Revenue Service includes it for estate tax purposes when ranches change title under wills. There is extensive literature on this point; the intrepid might start with NRC/NAS, *supra* note 30.



ing investment and restricting involvement in the lands that ranchers leased for their own operations.<sup>65</sup>

### 3. *The 1940's Grazing Fee Controversy and the "Great Land Grab"*

A second grazing fee controversy began just before the United States entered World War II and continued through the 1950's. As with the earlier disputes, a House effort to raise grazing fees prompted a Senate investigation of federal grazing programs.

In 1944, the newly appointed director of the Grazing Service attempted to raise fees. His proposal immediately ran into opposition from the livestock industry's supporters in the Senate.<sup>66</sup> Meanwhile, facing a new war debt, the House also sought to force the Grazing Service to raise fees.<sup>67</sup> By then, Senate hearings were again under way in the West, vilifying federal land managers. As in the 1920's, both houses of Congress viewed the Grazing Service as recalcitrant for opposite reasons, so they agreed to cut the agency's budget eighty-five percent.<sup>68</sup> At that nadir, an executive reorganization plan combined the Grazing Service with the General Land Office to form the Bureau of Land Management (BLM).<sup>69</sup> BLM began operations with virtually no budget. The livestock industry, however, recognized the benefits of a weak and malleable federal agency,

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65. This has long been viewed by the BLM and conservationists as lamentable. See, e.g., Coggins, *The Taylor Act*, *supra* note 30, at 64 ("[F]ees remained unconscionably low."). It underscores a frequently overlooked but absolutely central point in comparing BLM and the Forest Service: BLM lands were encumbered at the onset of management. Further, the issue of whether the federal grazing lands were in some sense the property of the ranchers remained a live one for quite some time. In the 1940's, Nevada ranchers, for example, challenged the authority of the BLM to create grazing districts, issue permits, and collect grazing fees. See P. FOSS, *supra* note 30, at 174-75 (including a brief discussion of Nevada restiveness in the early period following passage of the Taylor Grazing Act); *Brooks v. Dewar*, 60 Nev. 219, 106 P.2d 755 (1940), *rev'd sub. nom.* *Dewar v. Brooks*, 313 U.S. 354 (1941) (Nevada ranchers argued that the BLM could not charge a blanket fee to finance data collection for setting variable fees at a later date). The vague "rights" versus "privileges" debate continues to haunt the BLM, although the courts may have finally blown the ball dead. See *United States v. Fuller*, 409 U.S. 488 (1973); Coggins, *The Taylor Act*, *supra* note 30, at 75-80.

66. The *Dewar v. Brooks* decision caught the attention of Nevada Senator Patrick McCarran, who successfully introduced numerous resolutions calling for an investigation of the Grazing Service. P. FOSS, *supra* note 30, at 175-77.

67. See P. GATES, *supra* note 23, at 615-32; E. PEFFER, *supra* note 27, at 260-78.

68. The standard source is P. FOSS, *supra* note 30, at 171-930.

69. E. PEFFER, *supra* note 27, at 271. This merger was ill-conceived in terms of organizational culture (the green eyeshade orientation of the old General Land Office has blended only recently with the range conservationist and cowboy culture of the Grazing Service); it also was not examined in terms of its effect on minerals management. Prior to May 1982, BLM had management responsibility for the entire federal minerals estate, including the Outer Continental Shelf, irrespective of surface ownership or management regime. In 1982, the OCS-related activities of the Departments of the Interior and Energy were consolidated in the Minerals Management Service (MMS) at Interior. See S. FAIRFAX & C. YALE, *supra* note 11, at 74-76. BLM continues to have management responsibility for minerals on national forest lands and elsewhere in the federal domain. BLM came to manage the federal lands in Alaska as a result of the 1982 reorganization. *Id.*

and local Grazing Advisory Boards paid BLM staffers' salaries until Congress decided, in the early 1950's, to budget the programs at viable levels once again.<sup>70</sup>

Meanwhile, the hearings initiated by Senator Patrick McCarran of Nevada continued under the orchestration of Representative Frank Barrett of Wyoming. The hearings focused briefly on livestock industry efforts to enact legislation granting permittees title to the grazing districts.<sup>71</sup> The response to the title change proposal, known as the "Great Land Grab" in conservation circles,<sup>72</sup> removed any vestige of doubt that the public lands were going to remain in federal ownership.<sup>73</sup> Indeed, public outcry was so widespread that the livestock industry's friends in the Senate were soon denying that a title transfer was ever contemplated.<sup>74</sup>

Although conservationists claimed victory in the "land grab" episode, the range land management programs of both the Forest Service and the BLM were distorted by the decade-long show of political force from the livestock industry. Efforts in the BLM to readjudicate the range to cut back on overallocations<sup>75</sup> and to raise grazing fees were ef-

70. W. VOIGT & R. HELD, *supra* note 16, is the most extensive account of BLM funding woes. See also E. PEFFER, *supra* note 27, at 279-94.

71. See W. VOIGT & R. HELD, *supra* note 16, at 296-98.

72. B. DEVOTO, *THE EASY CHAIR* (1955), is normally cited for this phrase.

73. Cf. E. PEFFER, *supra* note 27, at 212-13 (rejection of President Hoover's proposal to return federal grazing lands to the states made clear that "in no circumstances would the country . . . consent to have the reserved natural resources restored to entry or otherwise pass from national control"); P. GATES, *supra* note 23, at 524-29.

It is frequently argued that the Taylor Grazing Act left a cloud on the future of public domain lands. See, e.g., S. DANA & S. FAIRFAX, *supra* note 30, at 181. This arises from the fact that the land was to be managed as grazing districts "pending its final disposition." 43 U.S.C. § 315 (1982). The legislative history of this phrase is cloudy, and scholars have been unable to determine how it actually slipped into the final version of the bill. *But see* P. GATES, *supra* note 23, at 632-33. Nevertheless, the possibility that the Grazing Districts would not be held permanently in federal ownership appears to be a mere technicality. It is probably true, however, that the technicality justified minimal congressional attention to managing the areas. See, e.g., E. PEFFER, *supra* note 27, at 221-23 (the phrase is not mentioned in the analysis of the provisions of the Taylor Grazing Act). If the fact that grazing lease systems were being discussed as early as the 1850's does not clinch this argument, passage of the Mineral Leasing Act of 1920 should. Pub. L. No. 66-146, 41 Stat. 437 (codified as amended at 30 U.S.C. §§ 181-287 (1982)). The Mineral Leasing Act of 1920 diffused most of the advocacy for disposition and established a land access and revenue sharing system of such uncontested benefit to the Western states that longstanding presumptions against continuing wholesale disposition were solidified. See C. Yale, *Compensation and Collaboration: Integration Strategies for Mitigating Socioeconomic Impacts of Mineral Development of Federal Lands*, at 1-6 (1986) (Ph.D. dissertation, University of California, Berkeley, Department of City and Regional Planning).

74. See E. PEFFER, *supra* note 27, at 285; see also W. VOIGT & R. HELD, *supra* note 16, at 296-98.

75. See generally P. FOSS, *supra* note 30, at 140-70. W. CALEF, *supra* note 30, is more insightful, however.

fectively stalled.<sup>76</sup>

### B. *The Ranchers' Revolt, 1970's Style*

The conventional wisdom regarding FLPMA's role in the Sagebrush Rebellion is that the range livestock industry was alarmed at the statute's land retention and multiple use planning requirements.<sup>77</sup> Because the new legislation threatened to unbalance the long-established rancher domination of federal range allocation and management, the range livestock industry sought more advantageous access and secure title to what they regarded as "their" allocations. This perspective is by now familiar as part of a century-long series of industry responses to similar attempts at independent range management.

FLPMA is more accurately understood, however, as a livestock operators' victory in a longer battle. The modern ranchers' revolt can be said to have begun before the passage of FLPMA.<sup>78</sup> The 1974 district court decision in *NRDC v. Morton*,<sup>79</sup> mandating environmental review for grazing management plans, particularly troubled the ranchers.<sup>80</sup>

Although the revolt's beginnings and first successes went unrecognized, FLPMA is, in many particulars, appropriately viewed as a "Sagebrush Rebel's bill."<sup>81</sup> The livestock industry was not pleased, for

76. See generally P. Foss, *supra* note 30; Coggins, *The Taylor Act*, *supra* note 30, at 61 (calling the process "hogtying the BLM").

77. 43 U.S.C. § 1702(c) (1982); see Coggins, *Multiple Use*, *supra* note 4, at 15-16. See generally Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. COLO. L. REV. 229 (1982); Behan, *The Succotash Syndrome, or Multiple Use: A Heartfelt Approach to Forest Land Management*, 7 NAT. RESOURCES J. 473 (1967).

78. See *infra* notes 81-85.

79. 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976).

80. See Achterman, *The BLM and the NRDC Grazing Case*, (n.d.) (copy on file with author Fairfax). In this significant decision, the court held that the National Environmental Policy Act (NEPA) required the preparation of environmental impact statements prior to agency approval of grazing allotment management plans. *NRDC v. Morton*, 388 F. Supp. at 832, 841. The BLM had devised a tiered system consisting of a national or programmatic Environmental Impact Statement (EIS) for grazing management plans and environmental analyses (EA's)—a less detailed level of study—for district and allotment plans. *Id.* at 832. Even as the case was argued, however, BLM's programmatic statement still was not forthcoming. *Id.* The court concluded that grazing has specific impacts on specific areas and that a programmatic EIS was not sufficient. *Id.* at 841. The BLM and the NRDC agreed to a schedule for preparation of 214 statements for allotment management plans. See Coggins, *Creeping Regulation*, *supra* note 30, at 357-63; see also *NRDC v. Hodel*, 624 F. Supp. 1045 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987).

81. For a brief FLPMA summary, see Coggins, *Multiple Use*, *supra* note 4, at 17-18. Coggins notes that although the bill "threatened drastic consequences for livestock operations on public lands," FLPMA "softened the blow in several ways." *Id.* at 19. Our own view of FLPMA is that it was not intended to be a disaster for ranchers. See *infra* note 84 and accompanying text. Even some legislative defeats have turned out well for ranching interests. Over the objections of the livestock community, environmental groups successfully advocated political appointment of the head of BLM. While Frank Gregg, President Carter's long-delayed

example, by FLPMA's wilderness provisions<sup>82</sup> or its multiple use planning provisions.<sup>83</sup> Nevertheless, the industry was successful in convincing Congress not to use FLPMA to repeal the favorable language of the Taylor Grazing Act.<sup>84</sup> The industry was also successful in keeping BLM law enforcement authority to a minimum.<sup>85</sup>

Even larger successes were achieved subsequently in the Public Rangelands Improvement Act of 1978 (PRIA),<sup>86</sup> which authorized \$365 million for range improvement investments. Subsequent BLM appropriations bills provided that any grazing allotment cuts resulting from grazing Environmental Impact Statements (EIS's) be suspended during the period of a livestock operator's appeal and, where appropriate, phased in over a five-year period.<sup>87</sup> Like most legislation, FLPMA did not entirely please anyone. However, the ranchers' victories in FLPMA and in PRIA suggest that Congress continues to be responsive to livestock operators' priorities.

From the media's perspective, the ranchers' revolt had two principal components. First, ranchers sought to build a movement in Western state legislatures demanding the return of federal lands to the states. Sec-

choice, was appropriately considered supportive of environmental goals, his successor, Colorado rancher Robert Burford, was not.

82. FLPMA § 603, 43 U.S.C. § 1782 (1982). Confusion in the language and priorities of section 603 may have been a victory for commodity developers, principally miners. *But see* Leshy, *Wilderness and the Public Lands* (June 1984) (materials prepared for a course on FLPMA by the Natural Resources Law Center, University of Colorado School of Law, June 6-8, 1984, at Boulder, Colorado) (suggesting why it may not be a victory after all). Livestock operators are not excluded from either BLM or Forest Service wilderness areas and have not been major opponents of wilderness designations until recently. For an interesting suggestion about a possible change in that position, see *PUB. LANDS NEWS*, Mar. 20, 1986, at 1 (noting that the livestock industry threatened to oppose wilderness designations unless environmental groups ceased their opposition to grazing fee formulas).

83. FLPMA § 302(a), 43 U.S.C. § 1732(a) (1982). *See generally* BLM, Planning, Programming and Budgeting, 43 C.F.R. § 1601 (1987).

84. Coggins, *Multiple Use*, *supra* note 4, at 19-20. The practical significance of this fact is not yet manifest. Coggins, in taking the position that FLPMA "threatened drastic consequences" for ranchers, *id.*, probably understates the import of Congress' unwillingness to repeal the Taylor Grazing Act. In any event, the FLPMA provisions that affect grazing are sorted out *id.* at 21-26.

85. FLPMA § 303, 43 U.S.C. § 1733 (1982); see Smyth, *Federal Law Enforcement On Public Lands: Reality or Mirage?*, 21 *ARIZ. L. REV.* 485 (1979), for a jaundiced discussion of BLM's post-FLPMA authority. Paul Smyth, at the Solicitor's Office of the Department of the Interior, was responsible for explaining FLPMA's terms to the BLM. *Cf.* Harvey, *Support Your Local Sheriff: Federalism and Law Enforcement Under the Federal Land Policy and Management Act*, 21 *ARIZ. L. REV.* 461 (1979). Michael Harvey, Chief Counsel to the Senate Committee on Energy and Resources, was instrumental in the passage of FLPMA. The different roles of these two authors explain the differences, such as they are, in their views.

86. 43 U.S.C. §§ 1901-08 (1982). PRIA authorized range improvements over a 20-year period. *Id.* § 1904(a). It also established an experimental stewardship program whereby ranchers could waive 50% of their grazing fees in return for certain range investments. *Id.* § 1908.

87. *See* 43 U.S.C. § 1752 note (1982) (codifying Pub. L. No. 97-394, tit. I., 96 Stat. 1968).

ond, they initiated a lawsuit challenging federal title to lands in Nevada.<sup>88</sup> Both of those efforts, if taken at face value, must be considered failures.

The legislative movement was initially a popular issue in the West. During the 1980 presidential campaign, candidate Ronald Reagan gave some support to the organizing efforts by declaring that he was a Sagebrush Rebel.<sup>89</sup> Nevertheless, the legislation actually enacted in most Western states<sup>90</sup> did not support Nevada's extreme "return the lands to the states" position. Rather, Western legislatures usually attempted to placate the ranchers without embracing them by calling for analyses of state options.<sup>91</sup>

Nor was the ranchers' litigation a major success. The lawsuit was actually a poorly conceived amendment to an ongoing action seeking to enjoin the federal government from continuing a moratorium on new agricultural entries in Nevada under the Homestead Act and the Desert Lands Act.<sup>92</sup> The moratorium had been imposed in 1964 by Secretary of the Interior Stewart Udall.<sup>93</sup> Nevada's initial complaint, filed in 1978, sought an end to the moratorium. In December 1978, Secretary of the Interior Cecil Andrus rescinded the moratorium, seemingly ending the controversy in favor of the state.<sup>94</sup> Nevada, however, filed an amended complaint seeking a judicial order confirming state ownership of the unreserved, unappropriated federal lands as a matter of fundamental constitutional law.<sup>95</sup> The Ninth Circuit Court of Appeals quite properly avoided deciding the constitutional issue in the absence of a concrete factual controversy and dismissed the amended complaint as moot.<sup>96</sup>

During its pendency, the Nevada case gave a veneer of credibility to the "return the land to the states" arguments. Virtually no legal analyst,

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88. *Nevada ex rel. Bd. of Agric. v. United States*, 512 F. Supp. 166 (D. Nev. 1981), *aff'd*, 699 F.2d 486 (9th Cir. 1983).

89. Mosher, *Reagan and the G.O.P. Are Riding the Sagebrush Rebellion—But for How Long?*, 13 NAT'L J. 476 (1981).

90. Beginning in 1978, U.S. Senators introduced various bills for "returning" lands to the states. See, e.g., PUB. LANDS NEWS, Mar. 9, 1978, at 1 (regarding S. 2594); PUB. LANDS NEWS, June 1, 1978, at 1 (one bill to reach the hearing stage focused on selling checkerboard lands to states and using the receipts to buy parkland).

91. See, e.g., STATE OF CALIFORNIA, CALIFORNIA AND THE FEDERAL LANDS: REPORT AND RECOMMENDATIONS (Mar. 1987) (published seven years after the passage of A.B. 2302 (codified at CAL. PUB. RES. CODE § 6201.5 (West Supp. 1988)), which called for such a study). The report carries no identification as to which state department produced it.

92. Cowart & Fairfax, *Adjudicating Federalism: An Essay on the Ninth Circuit's "Sagebrush Rebellion" Decision*, W. NAT. RESOURCES LIT. DIG. COMMENTARY, Summer 1983, at 19-20.

93. Nevada had approved the moratorium, pending completion of a study of water availability. *Id.* at 19.

94. *Id.*

95. *Id.* at 20. Nevada relied chiefly on the "equal footing" doctrine, described *infra* notes 366-68 and accompanying text.

96. *Nevada ex rel. Bd. of Agric. v. United States*, 699 F.2d 486, 487 (9th Cir. 1983).

however, took the constitutional argument seriously.<sup>97</sup> It was pursued by the Nevada Attorney General only to comply with state law requirements and to give political support to the disgruntled ranchers.<sup>98</sup>

The outcome of the Nevada case was an anticlimax even in political terms. By the time the decision came down, the ranchers' revolt had been overrun by the broader Sagebrush Rebellion. Although the "Marlboro Man" imagery persisted, economists and energy developers had come to the fore. The ranchers were confused and thrown into disarray by the scene-stealing "privatizers" who recommended that the ranchers' allotments be put up for sale to the highest bidder.<sup>99</sup>

Thus, if the chief aim of the ranchers' revolt was to "return" the public domain to the public land states, then the revolt must be considered a failure. If, however, the ranchers merely wanted to retain control of their allotments or to regain ground arguably lost during the environmental initiatives of the mid-1970's, they were more successful.<sup>100</sup> As during the previous incarnations of this recurring drama, the ranchers were effective in working through Congress to make their priorities felt in federal range management programs.

### C. *The Sagebrush Rebellion Writ Large*

The problem with relying on the past to describe the present is that the public lands management conflict of the 1970's and early 1980's was significantly different from earlier renditions. Despite the apparent similarities, the ranchers' distress was a minor, perhaps vestigial attribute of the major social, economic, and political changes manifested in the Rebellion. The full story is a complex web of national ideological shifts, changes in Western priorities arising from the urbanizing sunbelt and intermountain West, and growing state assertiveness. Thus, the Rebellion ultimately focused not on ranchers but on harbingers of federal control over state resources: the MX missile siting controversy and the

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97. At least, no legal analyst with whom the authors spoke in the last four years seriously advocated this argument.

98. Interview with Larry Strube, Office of the Attorney General, State of Nevada, in Berkeley, California (July 8, 1981). Significantly, the California Attorney General viewed litigation making the same arguments regarding public lands in California as without merit. See Letter from John Van de Kamp, Office of the Attorney General, to California Assemblymember Larry Stirling (Jan. 10, 1985) (regarding Complaint for Quiet Title, Stirling v. United States, No. 842481N (M) (S.D. Cal. filed Oct. 25, 1984)).

99. See *infra* notes 122-28 and accompanying text.

100. One report quoted Capitol Hill staffers as saying that the Sagebrush Rebellion legal case has no merit, "[b]ut that doesn't mean the Sagebrush Rebellion isn't taking its toll. Supporters of the rebellion admit a principal—if not the principal—reason for the rebellion is to make federal agencies go overboard in meeting rebels' complaints. No doubt that is working." PUB. LANDS NEWS, Feb. 7, 1980, at 5. Ranchers were successful in getting bills introduced in Congress to limit allotment cuts, see PUB. LANDS NEWS, Nov. 1, 1979, at 4, although these bills were watered down in the final appropriations legislation. See *supra* note 87.

nation's realization of the significance of Western energy minerals to the national economy.

Both philosophical and substantive issues separate the ranchers' revolt from the Sagebrush Rebellion. The philosophical factor is the erosion of the progressive-era consensus and a resulting shift in the ideological framework of public resource management. With this shift, the revolt's traditional progressive-era preference for technical expertise and centralized government planning<sup>101</sup> (a preference that characterized public land management from its inception until the mid-1970's) is, we argue, giving way to the Rebellion's frequently unstable amalgam of economic analysis and public involvement.<sup>102</sup>

The substantive issues of the Rebellion centered on state reaction to federal plans for the MX missile system and massive energy developments that would have radically disrupted established chains of decision-making authority in the states.<sup>103</sup> The more ubiquitous concern regarded the federal minerals estate, which had played a minuscule role in the nation's energy budget and economy until the Arab oil boycott in the mid-1970's.<sup>104</sup> State governments responded to the diverse threats with acumen enhanced by more than a decade of front-line experience in federally mandated environmental protection programs. These three forces—ideological shifts, massive federal energy and defense programs, and aggressive state responses—swirled in the media blitz of the ranchers' revolt. Each of these forces, however, involved a distinctly different objective.

### 1. *The Philosophical Factors*

A major difference between the Sagebrush Rebellion and the ranchers' revolts of the past is the framework of values in which each has occurred. The Sagebrush Rebellion, in clear contrast to the ranchers' revolt, emphasized efficiency criteria as the basis for public resource decisionmaking.<sup>105</sup> The economists' analytical tools entered the conceptual

101. See S. HAYS, *supra* note 30, at 55-65.

102. For an interesting set of reflections on the instability that unconvincingly supports the economists' side, see Krutilla & Haigh, *An Integrated Approach to National Forest Management*, 8 ENVTL. L. 373 (1978); Stroup & Baden, *Response to Krutilla and Haigh*, 8 ENVTL. L. 417 (1978); Krutilla & Haigh, *Reply*, 8 ENVTL. L. 423 (1978).

103. See *infra* notes 131-62 and accompanying text.

104. See, e.g., S. FAIRFAX & C. YALE, *supra* note 11, at 63 n.17 (gas production on federal lands represented only 5% of total domestic production in 1955, growing to 30% by 1980); *id.* at 79 (describing casual nature of federal coal leases granted by BLM prior to 1971).

105. See *id.* at 3, 18-20, for a development of this theory. For a diversity of views on resource economics, see *supra* note 102; Nelson, *Mythology*, *supra* note 25. "Old" resource economists include those cited and discussed *infra* notes 111-15. "New" resource economists include Stroup & Baden, *supra* note 102. See also R. O'TOOLE, *REFORMING THE FOREST SERVICE* (1988); Libecap, *The Efficiency Case for The Assignment of Private Property Rights to Federal Lands*, in *PRIVATE RIGHTS AND PUBLIC LANDS* 29 (P. Truluck ed. 1983); D. Salazar

void created by two decades of eroding public confidence in government experts. The economists, however, were trusted no more than other experts.<sup>106</sup> As a result, efficiency dogma has not become accepted as the new gospel of resource management. Instead, it coexists with environmental preservation, public involvement,<sup>107</sup> and other due process values and priorities<sup>108</sup> in this complicated policy arena.

Free market economists provided a major source of confusion for the Sagebrush Rebellion. A simple ideological preference for the market led some, including two economists strategically associated with the President's Council of Economic Advisers,<sup>109</sup> to assert that the public lands would be more efficiently managed if they were sold to private holders.

Another group of economists, less ardently ideological than the "privatizers," have long advocated increased economic efficiency in what they accept as a national political commitment to public land ownership. Building on a tradition of forty years<sup>110</sup>—and the works of such eminent public lands scholars as Marion Clawson,<sup>111</sup> William Duerr,<sup>112</sup> and G. Robinson Gregory,<sup>113</sup>—they have long challenged the federal resource management establishment's ideological commitment to sustaining maxi-

& R. Lee, *Natural Resource Policy Analysis and Rational Choice Theory: A Strategy for Empirical Research* (n.d.) (developing draft, University of Washington, College of Natural Resources). For an economist's middle ground, see Teeguarden & Thomas, *A Public Corporation Model for Federal Forest Land Management*, 25 NAT. RESOURCES J. 375 (1985).

106. See Norgaard & Fairfax, *Book Review*, 61 LAND ECON. 217, 219 (1985) (reviewing M. CLAWSON, *THE FEDERAL LANDS REVISITED*); Fairfax & Norgaard, *Rethinking the Federal Lands*, *A Comment*, 13 LANDSCAPE & URB. PLAN. 65 (1986); see Gelman, Thomas, Shapiro, Joseph & Karagianis, *What Good are Economists?*, NEWSWEEK, Feb. 4, 1985, at 60; Kuttner, *The Poverty of Economics*, ATLANTIC MONTHLY, Feb. 1985, at 74. *But see* Nelson, *Mythology*, *supra* note 25 (arguing that economics is or at least ought to be the new gospel).

107. See *supra* note 102; see also Achterman & Fairfax, *The Public Participation Requirements of the Federal Land Policy Management Act*, 21 ARIZ. L. REV. 501 (1979).

108. See CONSERVATION FOUND., *A CITIZEN'S GUIDE TO THE RESOURCES PLANNING ACT AND FOREST SERVICE PLANNING* 31-33 (1980).

109. The two economists were Steve Hanke and William Niskanen. Hanke's opening volley came at the October 1981 meeting of the Public Lands Council. See PUB. LANDS NEWS, Oct. 19, 1981, at 2. Niskanen's major address came the following month in a speech at the American Recreation Coalition Roundtable. See PUB. LANDS NEWS, Oct. 29, 1981, at 7-8. Hanke resigned his position as an economist for the Council of Economic Advisers on June 25, 1982; his positions were comprehensive, widely cited, significantly different from the Reagan Administration's proposals, and quite unpopular. PUB. LANDS NEWS, July 20, 1982, at 9.

110. The conflict between economic efficiency and resource management as a moral virtue has a long history. See S. OLSON, *THE DEPLETION MYTH* (1971); Nelson, *Mythology*, *supra* note 25; S. Fairfax, *Economic Analysis*, *supra* note 25. However, the economists until recently did not dent the Pinchot-sprung dogma favoring timber productivity irrespective of cost or value.

111. M. CLAWSON, *supra* note 19; M. CLAWSON, *THE FEDERAL LANDS SINCE 1956* (1967); M. CLAWSON & R. HELD, *supra* note 30; M. CLAWSON, *UNCLE SAM'S ACRES* (1951).

112. W. DUERR, *THE ECONOMIC PROBLEMS OF FORESTRY IN THE APPALACHIAN REGION* (1949); W. DUERR, *FUNDAMENTALS OF FOREST ECONOMICS* (1960).

113. G. GREGORY, *FOREST RESOURCE ECONOMICS* (1972).



imum levels of biological productivity irrespective of the cost or value to society.<sup>114</sup> The economists' emphasis on economic efficiency is fundamentally at odds with the traditional ideology of progressive resource management.<sup>115</sup> Thus, the preference for market mechanisms so pronounced in the Reagan Administration deepened that longstanding challenge to the traditions of federal resource management agencies.<sup>116</sup>

The economists' new-found attention supplemented a separate, popular challenge to progressive era assumptions. Environmentalists' opposition to resource management theory as a justification for maximizing productivity surfaced in the wilderness movement in the 1950's and, more specifically, in the clearcutting controversy during the 1960's and early 1970's.<sup>117</sup> Their opposition successfully undermined progressive era deference to professional expertise—the idea that “Smokey knows best.”<sup>118</sup> The challenge, and its success, can be read in Congress' embrace of public involvement and negotiated resource management planning in both FLPMA and the National Forest Management Act (NFMA).<sup>119</sup>

Environmentalists who criticized federal land management were successful not only in securing a place for nonprofessionals in the decisionmaking process, but also in arguing for the expansion of the range of goods and services that federal management sought to produce.<sup>120</sup>

114. The best discussion is found in S. HAYS, *supra* note 30. See also S. OLSON, *supra* note 110; D. WORSTER, *NATURE'S ECONOMY* (1977); Behan, *Forestry and the End of Innocence*, 73 AM. FORESTS 16 (1975); Hays, *From Conservation to Environment*, 6 ENVTL. REV. 14 (1982).

115. It may be necessary, if economic efficiency is a new concept to the progressive era conservation agencies, to clarify why the classic discussion of that subject is entitled *Conservation and The Gospel of Efficiency*. S. HAYS, *supra* note 30. Hays used the term “efficiency” to describe the preference for decisions defined by technical or professional rather than political criteria. *Id.* at 122-27. The economists' current definition of efficiency—a relationship between costs and benefits—was not an issue for public resource managers until recently. To illustrate, Pinchot conceived of timber *supply* as the physical volume of timber on the stump which could only be increased by using expertise to grow more trees or to grow trees in more places, *not* as the volume of timber which would be offered for sale at a given price. See generally G. PINCHOT, *supra* note 41. This approach elevates biological efficiency over financial efficiency. See also Fortmann & Fairfax, *American Forestry Professionalism in the Third World: Some Preliminary Observations on Effects*, in WOMEN CREATING WEALTH 105 (1985) (Proceedings of the Meetings of the Association of Women in Development, Washington D.C.).

116. H. KAUFMAN, *THE FOREST RANGER* (1960), develops the concept of the “pre-made decision” in analyzing the importance of ideology in Forest Service decisionmaking.

117. See, e.g., West Virginia Div. of The Izaak Walton League of Amer. v. Butz, 522 F.2d 945 (4th Cir. 1975).

118. See, e.g., Behan, *The Myth of the Omnipotent Forester*, 64 J. FORESTRY 398 (1966).

119. National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1601(c), 1604(d), 1612 (1982); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1712(f), 1714(h), 1739, 1753 (1982). There was a rash of public involvement provisos inserted into legislation, and NFMA is not the *ne plus ultra*. Achterman & Fairfax, *supra* note 107.

120. Wilkinson argues that this embrace of multiple use, long the conservationist antidote to timber dominance, may be slipping in favor of a concept of “public use.” Wilkinson, *The End of Multiple Use*. HIGH COUNTRY NEWS, Mar. 30, 1987, at 15.

Although environmentalists, like economists, had attacked federal land management for decades, they generally responded to the ranchers' "return" theme and the subsequent privatizers' "sell" theme by vociferously defending public management.<sup>121</sup> Nevertheless, the wavering consensus supporting federal land management programs was thrown into deep disarray when the economists crashed the ranchers' party.

One result of the disarray was temporary confusion among the Rebellion's players; uncertainty developed regarding who was advocating what. Private market ideologues within the economics profession seized upon the ranchers' discontent with federal management to advocate wholesale disposal of the federal lands.<sup>122</sup> Others proposed "Asset Management," a selective selling of surplus properties and expensive-to-manage sites held by the General Services Administration, the Department of Defense, and the Bureau of Land Management.<sup>123</sup> This apparent embrace confused the ranchers, who must have been hoping, by some murky legerdemain, to receive title to "their" allotments in the process of transferring title out of federal hands. Ranchers at first supported the economists. They soon realized, however, that they were unlikely to compete successfully if lands were sold off to the highest bidder.<sup>124</sup>

The conflict between returning to the states, selling to the ranchers, and selling to the highest bidder was further confused by the generally negative reaction to the policies and political style of Reagan's first Secretary of the Interior, James Watt. Although Watt undeniably was an advocate of expanded development of publicly owned minerals, confusion about his role in the Sagebrush Rebellion evinces both the growing confusion about the Rebellion itself and an inability of many observers to make key distinctions.

Although the Nevada litigation artificially prolonged the life of the

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121. See *supra* note 14.

122. See *supra* note 109 and accompanying text.

123. A working group was formed in the White House to study selected sales of GSA surplus and idle military lands and to include a proposal for the same in the 1982 Presidential Budget Proposal. PUB. LANDS NEWS, Feb. 4, 1982, at 3. On February 25, a "Real Property Review Board" was established to manage the inventory and review process. The next day, Senator Charles Percy held hearings on his own proposal to sell excess Department of Defense, General Services Administration, and Energy Department lands. PUB. LANDS NEWS, Mar. 4, 1982, at 4-5. See generally Libecap, *supra* note 105.

124. "We couldn't afford it," lamented erstwhile Rebel leader Dean Rhoades. PUB. LANDS NEWS, Apr. 1, 1982, at 3. See PUB. LANDS NEWS, JUR. 10, 1982, at 7. The ranchers were not, of course, the only ones who were confused by all this. Environmentalists were also thrown into partial confusion by the economists. Many groups were impressed by the strategy, if not the morality, of efficiency arguments and effectively raised issues such as below cost timber sales. See, e.g., T. BARLOW, G. HELFAND, T. ORR & T. STOEL, JR., GIVING AWAY THE NATIONAL FORESTS 29-32 (1980) (Natural Resources Defense Council's economic analysis of below cost timber sales). See WHOLE EARTH REV., Mar. 1985, for a collection of articles decrying the growing professionalization and market orientation of the environmental movement and exploring the nuances of the current countertheory, deep ecology.

"return to the states" issue, the Rebellion debate focused rather quickly on various "privatization" or "asset management"<sup>125</sup> proposals emanating more or less officially from the White House. Although Secretary Watt was repeatedly and inaccurately associated with both proposals, his "Good Neighbor Policy" approach was incompatible with all of the above. Instead, he embraced a distinctive variant on the "return" theme, focusing on expediting dispositions under the Recreation and Public Purposes Act (RPP), a 1920's statute that authorized grants of free public lands to localities for public purposes.<sup>126</sup> By the time the "privatizers" had achieved official status in the "Real Property Review Board,"<sup>127</sup> Watt had elicited requests from local governments for 900,000 acres of RPP grants. Much of the land that Watt was offering free would have been attractive to potential bidders.<sup>128</sup>

The significance of all this—and what separates the Sagebrush Rebellion from the ranchers' revolts in philosophical terms—is that economic analysis gained legitimacy as a new variable in public lands decisionmaking for the Sagebrush rebels. Supplementing their traditional arguments favoring protection of "priceless" resources and values, environmentalists came to support economic efficiency arguments as well. Several key groups now attack selected management programs as inefficient money-losers for the federal treasury.<sup>129</sup> Similarly, having lulled themselves for decades with the belief that investment in regulated forests and range revegetation was morally right and should not be evaluated in economic terms, federal managers are now having to reexamine their bases for legitimacy and decisionmaking. This philosophical reorientation in resource management, followed closely by a federal budget crisis, suggests that a reordering of the premises of resource decisionmaking in the United States may be afoot.<sup>130</sup>

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125. For a different and more broadly applicable effort to sort out the various meanings of privatization, see Koldevie, *The Two Different Concepts of Privatization*, 46 PUB. ADMIN. REV. 285 (1986). See also Johnson & Heilman, *Metapolicy Transition and Policy Implementation: New Federalism and Privatization*, 47 PUB. ADMIN. REV. 468 (1987); Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 PUB. ADMIN. REV. 461 (1987).

126. Recreation and Public Purposes Act, ch. 578, 44 Stat. 741 (codified as amended at 43 U.S.C. § 869 (1982)).

127. See *supra* note 123.

128. See PUB. LANDS NEWS, Mar. 4, 1982, at 4.

129. All of the proponents of economic analysis seem to have selective vision. See *infra* note 130; *supra* note 124.

130. Nelson, *Mythology*, *supra* note 25, argues that economics will be the new paradigm of public resource management. However, there is ample evidence to suggest that economic efficiency has not yet, and probably will not, rise to rule the roost. Rather, it has been added to the stew of arguments to be used selectively by advocates in ways similar to the ways advocates employ federalism arguments. For example, the same groups that are opposing "below-cost" timber sales from national forests tend to embrace non-declining-even-flow harvest schedules, which gall efficiency-minded economists. Nor is the environmental community's embrace of economics and efficiency total. See Foreman, *Making the Most of Professionalism*, WHOLE EARTH REV., Mar. 1985, at 34.

## 2. *The Federal Bulldozer: The Energy Crisis and the MX Missile*

The Sagebrush Rebellion is further distinguished from the century's recurring ranchers' revolts by dramatic changes in the nature of federal goals regarding the public lands and in the national view of their strategic significance. During the 1970's, the federal government promoted enormous programs that threatened to radically alter traditional land uses and to impose environmental, financial, and social costs on rural communities in the public lands states. These programs were not advanced in the interest of the public lands states themselves, but in the interest of the nation as a whole.<sup>131</sup> The most significant federal initiatives were the decade-long effort to attain "energy independence" through increased use of public lands energy resources, and the attempt to base the MX missile in the intermountain Western states.

### a. *The Energy Crisis and the "EMB"*

A major reason for the increasing assertiveness of states and localities in efforts to steer or control federal lands decisionmaking is the increasing importance of Western energy minerals. Before the Arab Oil Boycott of 1973, Western federal lands played a minor role in domestic energy production.<sup>132</sup> The "energy decade" of the 1970's brought the Western states a series of federal initiatives to expand dramatically the nation's use of public lands energy resources.<sup>133</sup>

Subsequent preoccupation with James Watt's management style and public persona has also caused all but a few to forget the decade-long string of public lands energy initiatives proposed by the Nixon, Ford, and Carter Administrations in what was not one but two "energy crises." President Nixon's 1974 energy message to Congress,<sup>134</sup> submitted just two months after his announcement of "Project Independence,"<sup>135</sup> included several public lands energy proposals: deregulation of the price of new discoveries of natural gas, new coal surface mining legislation, revi-

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131. That is a *key* shift. For most of our history, Western federal resources have been granted and/or managed explicitly to benefit Western states. Western resources and lands have, in fact, been a conduit by which the federal government subsidizes Western economies. See Fairfax, *Interstate Bargaining*, *supra* note 23, at 77-85. The declining willingness of Eastern states to invest in Western development is broadly noted. See Markusen & Fastrup, *The Regional War for Federal Aid*, PUB. INTEREST, Fall 1978, at 87-99. See generally K. PRICE, REGIONAL CONFLICT AND NATIONAL POLICY (1982).

132. See S. FAIRFAX & C. YALE, *supra* note 11, at 63, 79, 91, 102-04, 113.

133. Federal lands, including the outer continental shelf, were estimated to hold 37% of all undiscovered oil and 43% of undiscovered natural gas. About 40% of coal reserves and 80% of recoverable Western oil shale were located on federal lands. CONGRESSIONAL QUARTERLY, ENERGY POLICY 104 (2d ed. 1981).

134. President's Message to Congress on the Energy Crisis, PUB. PAPERS, Jan. 23, 1974, at 17.

135. Special Message to The Congress Proposing Emergency Energy Legislation, PUB. PAPERS, Nov. 8, 1973, at 328.

sion and consolidation of the federal mineral leasing laws, acceleration of federal Outer Continental Shelf (OCS) oil and gas leasing (with plans to lease 10 million acres in 1975 alone),<sup>136</sup> quick action on the proposed Alaska oil pipeline, and a study of incentives for synthetic fuels production.<sup>137</sup>

Throughout 1975 and 1976, President Ford promoted a massive synthetic fuels program. In his 1975 State of the Union address, for example, he urged Congress to stimulate the commercial production of synthetic fuels, setting a goal of one million barrels per day by 1985.<sup>138</sup> This would have required constructing at least twenty major synthetic fuels plants, many of them either located on federal lands<sup>139</sup> or dependent on those lands for transportation, access, and other support. In 1976, Congress refused to enact many of Ford's energy taxing and pricing proposals<sup>140</sup> but did pass several initiatives affecting the public lands. The most important were the accelerated development of leased federal coal reserves,<sup>141</sup> the opening of naval petroleum reserves for production,<sup>142</sup> and the setting of deadlines to facilitate development of the proposed Alaska Natural Gas Pipeline.<sup>143</sup>

Although the energy programs of 1973-76 had important effects on public lands management, the full impact of national energy policy on the public lands states was not realized until the second energy crisis in 1977 and the ambitious energy programs of the Carter Administration. President Carter's initial energy program was complex and comprehensive, but by 1978 it focused a great deal of attention on public lands energy resources. In a news conference in early 1977, Carter acknowledged that his plan relied almost entirely on Western coal to alleviate energy

136. See Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA), Pub. L. No. 95-372, 92 Stat. 629 (codified as amended at scattered sections of 16, 30, and 43 U.S.C. (1986)); see also S. FAIRFAX & C. YALE, *supra* note 11.

137. See President's Message to Congress on the Energy Crisis, *supra* note 134, at 29.

138. Address Before a Joint Session of Congress Reporting on The State of the Union, PUB. PAPERS, Jan. 15, 1975, at 27.

139. *Id.* at 42.

140. See *House Rejects Guaranteed Loans for Synthetic Fuel Developments*, N.Y. Times, Sept. 24, 1976, at I17, col. 4.

141. Pub. L. No. 95-554, § 2, 92 Stat. 2073 (codified at 30 U.S.C. §§ 201(a), 203 (Supp. 1985)) (FCLAA) (amending Mineral Leasing Act of 1920); Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083 (codified as amended at scattered sections of 30 U.S.C.) (amending Mineral Leasing Act of 1920); see also S. FAIRFAX & C. YALE, *supra* note 11, at 79; Tarlock, *The Making of Federal Coal Policy: Lessons for Public Lands Management From a Failed Program. An Essay and Review*, 25 NAT. RESOURCES J. 349 (1985) (reviewing R. NELSON, *THE MAKING OF FEDERAL COAL POLICY* (1983)). Tarlock puts the mid-1970's coal "program" in excellent perspective. Nelson's book is longer but richer.

142. Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, 90 Stat. 303 (codified as amended at 42 U.S.C. §§ 6244, 6501-6507 (1982 & Supp. III 1985)).

143. Alaska Natural Gas Transportation Act of 1976, Pub. L. No. 94-586 § 7(a)(1), 90 Stat. 2903, 2907 (codified at 15 U.S.C. § 719e (1982 & Supp. IV 1986)).

shortages and price increases, with virtually all of the increased production to come from Western public lands.<sup>144</sup>

As the ranchers voiced their own complaints, Congress struggled with a diverse package of proposals designed to alleviate the nation's energy crisis.<sup>145</sup> Two proposals that stand out were the synfuels legislation<sup>146</sup> and its companion, the Energy Mobilization Board (EMB). Both promised, in different ways, to alter radically the environment, the economy, and the social structure of every public lands state.<sup>147</sup> The states' concern is understandable when one considers the congressional testimony of Exxon representatives who envisioned a 21st century synthetic fuels industry in the intermountain West employing 870,000 people in 150 plants.<sup>148</sup>

To facilitate such developments, Carter proposed "fast track" energy project siting by a federal superagency, the Energy Mobilization Board.<sup>149</sup> The EMB proposal never passed Congress, but versions debated during the heat of the Sagebrush Rebellion variously threatened to exempt high priority energy projects from all state and federal environmental regulation or simply from state regulations.<sup>150</sup> At the very least, the proposals seriously threatened the states' traditional role in energy facility siting. The states' concerns were heightened by growing recognition of the close relationship between energy development and water allocation.<sup>151</sup>

Western hostility toward the energy-grasping Eastern states was ex-

144. News Conference, PUB. PAPERS, Feb. 8, 1977, at 97 ("It is obvious that . . . major portions of our coal resources, particularly in the West, are derived from publicly owned land."); Tarlock, *supra* note 141, at 351, 356-57. President Carter's 1978 Energy Message also emphasized the development of public domain energy resources, especially coal and synthetic fuels. See PUB. LANDS NEWS, Apr. 19, 1979, at 1.

145. While the Carter Energy Program was being honed in Congress, the states were working with federal officials to develop regulations for previously enacted energy development programs such as the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1328 (1982), FCLAA, 30 U.S.C. §§ 181-202a (1982), and OCSLAA, 43 U.S.C. §§ 1331-1356 (1978). See R. NELSON, *THE MAKING OF FEDERAL COAL POLICY* 236-37 (1983) (FCLAA); Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 *ECOLOGICAL L.Q.* 401 (1984) (OCSLAA).

146. See Developments, *The Development of Synthetic Fuels*, 8 *ECOLOGICAL L.Q.* 721, 785 n.38 (1980) (describing the history of S. 932, 96th Cong., 1st Sess. (1979)).

147. See generally Hall, White & Ballard, *Western States and National Energy Policy*, 22 *AM. BEHAVIORAL SCIENTIST* 191 (1978).

148. PUB. LANDS NEWS, Aug. 7, 1980, at 12.

149. Address to the Nation on Energy and National Goals, PUB. PAPERS, July 15, 1979, at 1235, 1240.

150. See, e.g., 125 *CONG. REC.* 29,207 (daily ed. Oct. 23, 1979) (comparing House Energy Mobilization Board bills).

151. See P. FRADKIN, *A RIVER NO MORE: THE COLORADO RIVER AND THE WEST* 21-28 (1981). See Tarlock, *Western Water Law and Coal Development*, 51 *COLO. L. REV.* 511 (1980), for a probably overly optimistic discussion of the issue. See Harte & El Gasseir, *Energy and Water*, 199 *SCIENCE* 623 (1978), for insight into the difficulties involved in determining the amount of available water.

pressed by the bumper sticker reported to have blossomed throughout the energy producing states, "Let the Bastards Freeze in the Dark."<sup>152</sup> The Western congressional delegations cooperated with environmental and other affected interests to secure first one and then another concession to protect state prerogatives from the EMB.<sup>153</sup> Finally, when it appeared that the fast-track procedure, thus modified, probably would complicate siting decisions rather than expedite them,<sup>154</sup> the proposal fell of its own weight.

Public lands and coastal states were organized and effective in defending their interests in the face of the national crises. The EMB was stopped, the synfuels program was modified (it ultimately also fell of its own weight),<sup>155</sup> and the Coal Leasing Program was curtailed<sup>156</sup> by a series of moratoria and protests from states and environmental groups.<sup>157</sup>

### b. *The MX Missile Siting Conflict*

The energy issue was mixed with another equally alarming set of federal initials: MX. Indeed, there are striking parallels between the Carter Administration's Western energy programs and that administration's controversial basing proposal for the MX missile. By April 1978, after five years of study,<sup>158</sup> the Air Force decided to base the MX missile

152. The sentiment was reciprocated after the collapse of oil prices—and the oil states' economies—in the early 1980's, when Easterners replied "Let Them Fry in the Sun."

153. See, e.g., 125 CONG. REC. 29,207, *supra* note 150 (Interior Committee's version of the EMB bill deleted the Board's enforcement authority over energy production timetables established by state and local governments.)

154. See 126 CONG. REC. S16,136 (daily ed. June 21, 1980) (statement of Sen. Melcher).

155. For a quick rundown on the demise of the synfuels program, see S. FAIRFAX & C. YALE, *supra* note 11, at 92-93.

156. This saga is not a topic for the faint-hearted. Start with R. NELSON, *supra* note 145, and if you still have the stamina, look into NRDC v. Hughes, 437 F. Supp. 981 (D.D.C. 1977), *modified*, 454 F. Supp. 148 (D.D.C. 1978).

157. Not all state action was designed to prevent energy development. While opposing run-amok energy developments, the Western states also sought to assure that they would get their cut of the revenues from any energy developments that actually materialized. The coastal states were successful in obtaining grants and loans to mitigate the effects of massive OCS leasing programs. FCLAA, 30 U.S.C. § 201(a)(1) (1982), effectively increased the states' share of coal leasing revenues while attempting to spur development of federal coal reserves. See generally S. FAIRFAX & C. YALE, *supra* note 11, at 91; *id.* at 3-11 (discussing the increasing importance of resource revenues in diverse contexts); *id.* at 23-24, 83-84 (discussing the Powder River Basin Coal controversy); *id.* at 74-75 (a brief introduction to the growing state interest in oil and gas royalty accounting which culminated in the passage and implementation of the Federal Oil and Gas Royalty Management Act of 1982, Pub. L. No. 97-451, 96 Stat. 2447 (codified as amended in scattered sections of 30 U.S.C.)); *id.* at 85-88 (discussing diligent coal developments).

In alliance with environmental groups, states also worked to have the revenue-sharing formula of the Mineral Leasing Act of 1920 altered to benefit producing states and to procure "energy impact" loan provisions in FLPMA, OSCLAA, SMCRA and other pertinent statutes. C. Yale, *supra* note 73, at 70-86.

158. J. EDWARDS, SUPERWEAPON: THE MAKING OF MX 152 (1982). The overall MX missile program began in June 1973. *Id.* at 100.

on mobile launchers in order to protect the missiles from a first-strike enemy attack.<sup>159</sup> The launchers were to be rotated frequently among numerous launching sites and were to be widely separated by dedicated, special-access highways. The administration's proposal would have spread the MX missiles, launchers, and "racetracks" over 40,000 square miles of Utah and Nevada.<sup>160</sup>

As with the energy programs, the proposal was motivated by national need, with little if any concern for the individual states involved. Also, as with the energy programs, MX construction was to proceed on a massive scale with control over the development process residing almost exclusively with federal decisionmakers. Although these programs promised the affected states significant new economic activity and population growth, they also threatened to produce adverse effects on water resources, wildlife, aesthetics, and cultural values. Talk of "national sacrifice areas" was common to both the energy and MX proposals. Environmental impact assessments and hearings throughout the affected states drew heated opposition to the MX basing proposal, even among staunch proponents of a stronger defense posture. In May 1981, the MX proposal was dealt a decisive blow when the elders of the Mormon Church voted to oppose it.<sup>161</sup> The Department of Defense withdrew the proposal, and starting in August 1986 the missiles were placed in preexisting hardened silos in Wyoming and North Dakota.<sup>162</sup>

### 3. *State Resource and Environmental Management Programs*

The third general characteristic distinguishing the Sagebrush Rebellion from the more traditional ranchers' revolt was the increasing urbanization, environmental awareness, and managerial sophistication of the public lands states. Although the cowboy image of the "public lands states" endures, their economies and politics have changed dramatically since 1960. There were two elements to this new pattern. First, during the decade of the 1970's, population growth in the mountain states, and most especially in the rural West, was an impressive part of the reversal of the longstanding pattern of population growth in cities exceeding that of rural areas.<sup>163</sup> Moreover, the West's sunbelt and mountain states also experienced rapid urban growth. In the West, it was not births but migrants—"instant voters with few roots yet sunk into their new communi-

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159. *Id.* at 73.

160. H. SCOVILLE, *MX: PRESCRIPTION FOR DISASTER* 28 (1981).

161. R. HOOVER, *THE MX CONTROVERSY* 25-26 (1982).

162. Smith, *Air Force Installs First MX Missiles in Minuteman Silos*, *AVIATION WEEK & SPACE TECH.*, Aug. 11, 1986, at 25.

163. See, e.g., L. Fortmann & L. Huntsinger, *California's Oak Lands: Owners, Use and Management* 40 (unpublished, Dep't Forest & Resource Management, University of California, Berkeley, 1986). This study noted that 40.2% of oak land owners moved to their lands to get away from the city. *Id.* at 72, table C-11.



ties"—who "arrived in the scene along with their urban outlooks."<sup>164</sup> The Western states also have been affected powerfully by the national environmental movement, for the "energy decade" of the 1970's was also the "environmental decade." A major consequence of all of these trends has been a shift in the public lands states from acceptance of traditional, laissez faire land management policies toward increasing state fiscal and environmental controls over public lands and resources.

Many of the relevant state programs parallel well-known federal environmental programs enacted since the 1970's. Indeed, many of the state programs were encouraged or mandated by national legislation. But the public lands states have gone far beyond the requirements of the national programs. For example, several public lands states have enacted state environmental policy acts modeled on the federal NEPA.<sup>165</sup> States also have enacted air and water quality control laws,<sup>166</sup> environmentally sensitive mining and reclamation statutes,<sup>167</sup> wildlife management programs,<sup>168</sup> minerals taxation and mitigation programs,<sup>169</sup> pesticide management programs,<sup>170</sup> and improved range management laws.<sup>171</sup> States also have significantly extended state and local governmental involvement in community planning, land use planning, major facility siting, and other development activities.<sup>172</sup>

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164. P. FRADKIN, *supra* note 151, at 28. During the 1970's, growth in the Rocky Mountain states led all other regions in the United States. Bureau of the Census, U.S. Dep't Com., *Statistical Abstract of the United States 1988*, at 26-27 (1987) [hereinafter *1988 Abstract*]. See also text accompanying *supra* notes 181-83.

165. Indeed, about 30 states have passed state environmental policy acts (SEPA's). All of these were passed during the early 1970's. Although some of the SEPA's exhibit creative or novel responses to environmental problems, most are imitations or watered-down versions of NEPA. For a state-by-state survey, see W. RODGERS, *HANDBOOK ON ENVIRONMENTAL LAW* § 7.11 (1977).

166. See, e.g., ARIZ. REV. STAT. ANN. §§ 49-401 to 49-505 (1987) (air pollution control); *id.* §§ 49-541 to 49-552 (1987) (annual emissions inspections of motor vehicles); California Air Resources Act of 1968, CAL. HEALTH & SAFETY CODE §§ 39001-44384 (West 1986 & Supp. 1988); Wyoming Environmental Quality Act of 1973, WYO. STAT. §§ 35-11 to 35-11-1304 (1973). See generally ENVIRONMENTAL LEGISLATION: A SOURCEBOOK (M. Sive ed. 1976).

167. See, e.g., Idaho Geothermal Resources Act of 1972, IDAHO CODE §§ 42-4002 to 42-4012 (1987); *id.* §§ 47-1601 to 47-1611 (1985); Montana Strip and Underground Mine Reclamation Act, MONT. CODE ANN. §§ 82-4-20 to 82-4-254 (1987).

168. All states have adopted wildlife management laws, primarily for the purpose of regulating hunting and fishing activities. Most states also protect rare or endangered species of wildlife. See, e.g., CAL. FISH & GAME CODE §§ 2050-2098 (West 1984 & Supp. 1988).

169. See, e.g., WYO. STAT. §§ 39-6-303 to 39-6-306 (1988) (Wyoming Severance Tax).

170. E.g., CAL. FOOD & AGRIC. CODE §§ 11501-11516 (West 1986 & Supp. 1988).

171. See, e.g., MONT. CODE ANN. § 76-14 (1987); WYO. STAT. § 11-16 (Michie 1987).

172. Among the public lands states, California and Oregon have developed comprehensive systems for land use planning and community development. See J. DEGROVE, *LAND, GROWTH AND POLITICS* (1984). Other states simply have enhanced local planning, zoning, and subdivision controls, or have enacted state-level programs for siting major facilities, e.g., Colorado's Local Land Use Control Enabling Act of 1974. COLO. REV. STAT. § 29-20-101 to 29-20-107 (1986); see also Barnhill & Sawaya-Barnes, *The Role of Local Government in Mineral Development*, 28 ROCKY MTN. MIN. L. INST. 221, 255 (1983); Stenberg, *supra* note 22

As a consequence of these programs, states now have the information, the institutional capability, and the statutory and political authority to challenge federal land management decisions effectively. The Sagebrush Rebellion was a broad-based demonstration of the states' increased political power in relation to federal land managers. The states' increased ability to function as a management partner with federal agencies is documented in Part II of this Article.

#### D. Summary

There are obvious reasons why the Sagebrush Rebellion emerged in the media and the popular understanding as an Old West cowboy story. "Cattle baron steals grass" is a simple and straightforward story line. The scenario is a familiar artifact of the dominant progressive-era historians' analysis of the conservation movement.<sup>173</sup> In spite of the more sophisticated insights of Hays and others, simple stories of vice and virtue continue to dominate the conventional wisdom of conservation history and contemporary environmental advocacy.<sup>174</sup> Hence, recent references to looters adrift on the public domain<sup>175</sup> fell upon well-fertilized public imaginations. In addition, as noted above, the response of ranching interests to increased regulation has fallen into a familiar pattern over the course of the 20th century. This characteristic political behavior was present during the early phases of the Sagebrush Rebellion. Ranching interests continued to enjoy considerable legislative success in Congress, but they were not able to control their revolt once it began.

President Nixon's "Project Independence"<sup>176</sup> and President Carter's effort to portray the energy "crisis" as the "moral equivalent of war"<sup>177</sup> therefore set in motion economic and political forces with environmental and social impacts that fundamentally altered the setting of federal land management. State response was swift, competent, and effective; it

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(evaluating states' recent activities); Fairfax & Cowart, *Judicial Nationalism vs. Dual Regulation in Public Lands: Granite Rock's Uneasy Compromises*, 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,276, 10,279, 10,282-83 (1987) (discussing the interplay between federal and state law).

173. Fairfax & Tarlock, *supra* note 27, at 534 n.106, provides a concise reflection of the degree to which the progressive-era myths dominate the public lands literature.

174. S. HAYS, *supra* note 30, argues that rational planning rather than the struggle of the "people" against the "interests" characterized the conservation movement; see also S. OLSON, *supra* note 113; W. ROBBINS, *LUMBERJACKS AND LEGISLATORS* (1982). Tarlock refers to the field of public land scholarship's "Miltonian legacy" where "there were only angels, advocates of public management, and devils, 'interests' bent on subverting the public interest." Tarlock, *supra* note 141, at 370.

175. S. PUTER, *LOOTERS OF THE PUBLIC DOMAIN* (1908), originated that phrase in the process of describing land frauds in Oregon. It was written in a jail cell by the "king of the Oregon land fraud ring." Also convicted at the time were a U.S. Senator, a U.S. Congressman, a former U.S. Attorney, and a member of the Oregon legislature. S. DANA & S. FAIRFAX, *supra* note 30, at 81. The tradition is a long one.

176. President's Message to Congress on the Energy Crisis, *supra* note 134, at 23-32.

177. Address to the Nation on Energy and National Goals, *supra* note 149, at 1240.

thereby demonstrated the states' growing capacity for resource and environmental management. This capacity is a critical component in a new scheme of public land management, a component explicitly recognized and supported in congressional policy and one that transcends the confrontational period of the Sagebrush Rebellion.

## II

### DUAL REGULATION ON THE GROUND: COOPERATIVE FEDERAL/STATE PROGRAMS IN FEDERAL PUBLIC LANDS PLANNING AND MANAGEMENT

The system of cooperative regulation, which both fed and grew out of the Sagebrush Rebellion, is vital to the environmentally sound management and use of public lands and resources. This federal/state partnership is not a marble cake<sup>178</sup> in the sky, nor is it some glint in the eye of optimists touting cooperation.<sup>179</sup> Rather, it is the longstanding practice, manifest in a diverse set of institutions and interactions, that constitutes the heart of resource management in the West.

This section on cooperative regulation has three parts. First, we analyze some of the forces shaping the system of public land management in the West, concluding that because of historical, physical, and fiscal realities (combined with and expressed in congressional policy), the federal government and state governments have always shared the responsibility for managing and developing public lands and must increasingly do so in the future.

Next, we discuss the land use planning processes of both the Bureau of Land Management and the Forest Service, with particular attention to their mandates for state participation. The fact is that both the Forest Service and the BLM affirmatively anticipate and rely upon the existence of a state/local regulatory capacity, even though there is no question that Congress could preempt state and local regulations if it so chose.<sup>180</sup>

The third part of this section describes a number of recent cooperative efforts. We first analyze how some states maximize their leverage over federal land use decisions after achieving internal unity on management issues. We then present several examples of the institutional arrangements states have developed to formulate land use policies in

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178. The marble cake of cooperative federalism is, of course, distinguished from the layer cake of "dual federalism" which ostensibly passed during the Depression. See Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950). Both images are metaphors initially presented by Grodzins, *The Federal System*, in GOALS FOR AMERICANS 265 (1960).

179. See Fairfax, *Old Recipes*, *supra* note 21, at 956-57.

180. This review reminds us that federalism is dynamic and political, and that constitutional theory must be informed by historical and empirical analysis. The words of *Kleppe v. New Mexico*, 426 U.S. 529 (1976), on the theoretical reach of the property clause, are probably less instructive than the political fate of the EMB and the MX. See *supra* notes 132-62 and accompanying text.

cooperation with federal managers. Finally, we consider the particularly difficult challenges raised by large-scale development projects involving federal lands, exploring the ways state and local governments participate in the review and permitting of such projects, and the various mechanisms these governments use to mitigate the offsite impacts of large projects.

*A. The Forces Driving Cooperative Land Use  
Planning and Management*

As discussed in the preceding section, one of the major forces distinguishing the Sagebrush Rebellion from earlier ranchers' revolts was the states' development of the institutional capacity to assert their own management priorities for public lands and, in many cases, the expertise to implement these priorities through state-run planning and regulatory programs. In part, the states developed institutional capacity in response to increasing urbanization and recognition of the importance of environmental goals. And in part, the states' managerial expertise was the result of federal programs that mandated or encouraged active state participation.

Although the popular image of this new state assertiveness is one of confrontation, with states responding to unpopular federal programs such as Project Independence and the MX missile basing plan, the reality is that day-to-day public land management is the product of state and federal cooperation. Although the judiciary has been hostile or at best ambivalent towards an active state role in public land management, the federal, state, and local managers responsible for making programs work are understandably less confused about intergovernmental cooperation. Land managers cannot avoid making complex, multidimensional decisions under intense public scrutiny. Those decisions necessarily reflect the ecological and political realities of resource ownership: management cannot be pursued efficiently, if at all, when distinct but intermingled jurisdictions are guided by conflicting priorities. For a number of increasingly obvious reasons, "on the ground" management must be pursued cooperatively.

*1. Intensifying Development Impacts in an Urbanizing West*

One impetus for an increased state and local role in public lands management is that the number of people with a stake in the decisions is increasing. Between 1960 and 1980, population in the thirteen Western states with sixty percent of the public lands<sup>181</sup> grew from 28.1 million to 43.2 million.<sup>182</sup> During the same period, the number of congressional

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181. *1988 Abstract*, *supra* note 164, at 186.

182. *Id.* at 18.

representatives from these states grew from 69 to 85.<sup>183</sup> Federal decisions regarding land and resource use on the public lands have always had an important effect on communities and economies in the West, but states are more willing and able to take an active role in influencing federal managers because of the growing number of people affected.

The Western states' growth in population and political muscle combined with controversial federal programs to create the Sagebrush Rebellion. However, even apparently low-impact management decisions, such as grazing allocations and range improvement investments, can have significant impacts on local economies. Ironically, federal decisions to refrain from use (as in the designation of wilderness areas) can also lead to offsite impacts by raising development pressures on state and privately held lands. With increased population has come increasing pressures on public lands from a wide range of often competing uses. In this context, cooperation becomes essential.

## 2. *The Myth of the Green Blob: Inholdings and Intermixed Ownership*

It is inadequately recognized that, in many parts of the West, federal land holdings are not unified or integrated but rather are mixed with state and private inholdings. Development of federal lands is often tied to development on nearby state and private lands. One does not, for example, lease a federally owned coal deposit and develop it in a vacuum; many issues—transportation, pollution, supply of labor, and supply of housing—affect surrounding lands. In particular, access to federal lands surrounded by state and private lands is frequently a contentious issue.<sup>184</sup> Even in the relatively rare instance where development rights are held solely by the federal government, large-scale projects almost always require offsite improvements and supporting facilities.<sup>185</sup> Historic federal land disposition policies have intermingled landholdings to the point where, for most projects, a combination of development rights must be assembled from diverse federal, state, and private interests.<sup>186</sup> Assembling these development rights can be an arduous and expensive task, one that is enormously complicated by the multiplicity of federal and state policies for any given resource or land area. Hence, the reality of Western land ownership compels some level of state and local involvement in planning for federal lands and resources.

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183. Bureau of the Census, U.S. Dep't Com., *Statistical Abstract of the United States 1985*, at 242 (1984).

184. See, e.g., Note, *Public Access to Landlocked Public Lands*, 39 STAN. L. REV. 1373 (1987).

185. See *infra* notes 307-48 and accompanying text.

186. S. FAIRFAX & C. YALE, *supra* note 11, at 28-31, 79-80. Problems of assembling developable tracts are particularly acute in the coal area on account of severed mineral estate problems and the need to obtain surface owner consent. *Id.* at 84.

The states face similar land use constraints. Perhaps the most familiar federal land disposition program (other than homesteading) was the practice of supporting state education with grants of "school lands." Under this program, a portion of every township was granted to the state for educational purposes.<sup>187</sup> This resulted in state landholdings arrayed like polkadots throughout areas predominantly under federal ownership. In Utah, for example, fourteen percent of the state, or 5.8 million acres, is held in school sections dispersed among federal lands.<sup>188</sup>

The problem of scattered state lands is exacerbated in many parts of the West by the checkerboard of intermingled railroad holdings. This checkerboard was the result of a disposition program associated with federal land grants to the railroads. The federal government subsidized rail construction by granting each company odd-numbered sections on either side of the rail in a six- to twenty-mile swath. The idea was that granting every other section would prevent the corporations from monopolizing access to their lines,<sup>189</sup> while at the same time it would provide a valuable asset that they could sell to finance construction.<sup>190</sup> Unfortunately for current would-be land users, many sections were not sold, and the resulting "checkerboarding" still exists today, with the federal government and the railroad companies or their successors in title holding every other section.

Surface title is not the only complexity in the pattern of land ownership. Title issues were further confused when the federal government agreed to grant ranchers in the arid West enlarged homesteads,<sup>191</sup> on the condition that the United States retain subsurface mineral rights.<sup>192</sup> As a result, mineral rights were severed from surface rights, mineral title was

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187. P. GATES, *supra* note 23, at 65.

188. *Id.* at 314; *see also* *Andrus v. Utah*, 446 U.S. 500 (1980).

189. *See* P. GATES, *supra* note 23, at 341-86.

190. Note, *Public Land Law—Checkerboard Land: Public Access and Private Rights: Leo Sheep Co. v. United States*, 60 OR. L. REV. 203, 203-07 (1981); *see* R. HENRY, *THE RAILROAD LAND GRANT LEGEND IN AMERICAN HISTORY TEXTS* (1943) (showing the extent and location of the grants). Sometimes the railroads were offered land distant from their lines. This irked residents for several reasons. First, given the distance from the rail line, the area enjoyed no benefit from such railroad grants. Residents were further frustrated by the unavailability of the land for entry and settlement and by the subsequent sale of the railroad lands at speculators' prices. *See* P. GATES, *supra* note 23, at 366.

191. The Stock Raising Homestead Act of 1916, ch. 9, § 1, 39 Stat. 862, 862 (1917) (repealed by Federal Land Policy and Management Act of 1976, § 702, 43 U.S.C. § 1701n (1982)), granted 640 acres rather than the standard 160 acres. Congress was slow to recognize the edaphic differences between the Eastern seaboard and the states of the Great Plains and was smitten early in this century with a fad called "dry farming"—roughly, "rain follows the plow." P. GATES, *supra* note 23, at 495, 503-04; *see also* E. PEPPER, *supra* note 27, at 141-44.

192. Most federal coal holdings (58%) are in split estates where the surface is privately held. U.S. COMM'N ON FAIR MARKET VALUE POLICY FOR FEDERAL COAL LEASING, *FAIR MARKET VALUE POLICY FOR FEDERAL COAL LEASING* 155-60 (1984). *See id.* at 304-13 for a discussion of the resulting economic impacts of "surface owner consent."

retained by the federal government, and yet another series of contemporary land use conflicts was spawned.

In 1935, after retaining the "gems" in the Western states as national parks and forests, the United States finally withdrew all remaining unreserved, unentered public domain land from entry and settlement and organized the land into grazing districts,<sup>193</sup> cementing a tangled mix of federal, state, local, and private property interests.<sup>194</sup>

### 3. *Congressional Reliance on States To Refine and Implement Federal Land Policies*

Although the federal government may have virtually unlimited constitutional authority over federal lands, effective management of jointly held resources is likely, as a practical matter, to be a joint undertaking.<sup>195</sup> Indeed, Congress has been mindful of the impact federal land use decisions have on local economic, social, and political systems, and on state and local tax bases.<sup>196</sup> As the disposition era ended and the retention era began, Congress developed management programs that protected valid existing rights and historic uses of public resources and compensated Western states and local governments for real and imagined burdens created by federal land holdings.<sup>197</sup>

In many critical areas, federal management regimes developed after state regulation already was in place, so that federal law relies on and incorporates state law rather than displaces it. Oil and gas law is one illustration. Long before Congress enacted the 1920 Mineral Leasing Act of 1920 to regulate access to sedimentary deposits on federal lands, California, Texas, Oklahoma, and Louisiana acted to control private development of oil and gas. To prevent the boom and bust cycles—and waste of resources—resulting from unfettered competition among land

193. For different perspectives on the process of range adjudication, see P. GATES, *supra* note 23, at 614-17; E. PEPPER, *supra* note 27, at 225-31.

194. For data on the lack of harmony, see generally S. DANA & S. FAIRFAX, *supra* note 30; Sax & Keiter, *Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations*, 14 *ECOLOGY L.Q.* 207 (1987).

195. Many programs in fact limit the authority of land management agencies to pursue statutory goals by protecting "valid existing rights." See, e.g., Trails System National Act § 7, 16 U.S.C. § 1246(a), (e), (h) (Supp. IV 1986); Wild and Scenic Rivers Act § 9, 16 U.S.C. § 1280 (1982); Wilderness Act, § 4(d)(3), 16 U.S.C. § 1133(d)(3) (1982). *But see* Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 *MICH. L. REV.* 239 (1976) (arguing that Congress has the constitutional power to authorize the Park Service to curtail "nuisance-like" activity outside park boundaries).

196. The economic "burdens" argument—the assertion that the federal lands constitute an economic burden on the localities in which they are located—is institutionalized in the Act of Oct. 20, 1976, Pub. L. No. 94-565, 90 Stat. 2662-66 (currently codified at 31 U.S.C. §§ 6901-6907 (1982 & Supp. IV 1986)), in spite of the fact that it has absolutely no empirical support. Nevertheless, it continues to be a standard part of the state and local repertoire in public lands debates. See generally Fairfax, *Interstate Bargaining*, *supra* note 23.

197. See generally C. Yale, *supra* note 73.

owners, states enacted well-spacing and field unitization requirements and instituted production quotas.<sup>198</sup> When the federal Mineral Leasing Act of 1920 was enacted, it presumed the existence of such state systems and relied upon them to regulate activities on federal as well as state and private lands.<sup>199</sup> Thus, Congress simply relied upon, without displacing, state regulatory programs.<sup>200</sup>

A more recent pattern is for Congress to set minimum performance standards for state regulatory programs rather than to delegate an entirely new area of regulatory authority to a federal agency. Some of the major examples of this new approach are the Clean Air Act,<sup>201</sup> the Federal Water Pollution Control Act,<sup>202</sup> and the Coastal Zone Management Act.<sup>203</sup> Each carefully preserves state and local authority and self-determination. When Congress has directed that states take the lead in land management, federal agencies generally do not develop strong management capabilities.<sup>204</sup> Thus, cooperative management is the expectation—not the exception. As the public lands become increasingly appreciated for their role in maintaining environmental quality—visual resources and genetic diversity, as well as air and water—the state regulatory programs established as part of this national system must operate on federal lands, as there is no substitute at the federal level to replace them.

#### 4. *Eroding Capabilities of Federal Land Management Agencies*

Finally, and most seriously, there has been little recognition that federal land management capabilities are seriously contracting. Federal budget constraints make it likely that recent reductions in professional staffing and funding of federal agencies will continue. It is unlikely, therefore, that the Forest Service and the Bureau of Land Management will be able to step in and fill management gaps that might arise from displacing state programs. Forest Service staffing and funding, for example, dropped sharply during the early Reagan years; they have remained flat since that time.<sup>205</sup> These budget constraints may have unexplored

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198. See S. FAIRFAX & C. YALE, *supra* note 11, at 74.

199. See *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979) (citing *Texas Oil & Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366, 371 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir. 1969)); see also *Fairfax & Cowart*, *supra* note 172, at 10,286 n.118.

200. See generally *Fairfax*, *Old Recipes*, *supra* note 21.

201. 42 U.S.C. §§ 7401-7642 (1982).

202. 33 U.S.C. §§ 1251-1376 (1982).

203. 16 U.S.C. §§ 1451-1464 (1982).

204. See, e.g., *Fairfax & Cowart*, *supra* note 172, at 10,286 n.118 (noting that in an era of declining Forest Service resources, state systems cannot be replicated by federal agencies).

205. Forest Service data are not compiled or published in a way that facilitates comparisons over time. The authors are grateful to Mark Rey, National Forest Products Association, for interpreting the 1989 Executive Summary of the Budget and the most recent (1987) Annual Report of the Forest Service to produce comparable data. To put it simply, the 1989 projected budget is actually less than that of 1986, while staffing remains at the same level.



legal and practical consequences for the forest plans being devised. The draft plan on the Tahoe National Forest, for example, anticipates a doubling of budget resources available to the forest. Forest planners, however, estimate that the funds are more likely to be halved instead. Hence, only twenty-five percent of anticipated funds will be available to implement the plan.<sup>206</sup> Whether this will constitute a "significantly changed" condition requiring a revision of the plan<sup>207</sup> is not clear.

Given continuing budget and personnel constraints that make it difficult for federal land managers to fulfill their own nondelegable responsibilities, it seems improbable that these managers will enter into air quality control, solid waste regulation, coastal zone management, socio-economic impact analysis, and the other fields of environmental management left largely to the states by Congress.

As the West's population grows, proposals for public land use increase in scope and frequency. Given the fact that any project may encompass federal, state, and private landholdings, declining federal capacity to manage even federal resources emphasizes the need for cooperative management of federal lands. The remainder of this section describes intergovernmental arrangements used to coordinate public land planning and use in the West.

### *B. The Federal Perspective: Efforts To Achieve Consistency Between Federal Land Use Planning and State Land Use Objectives*

As described above,<sup>208</sup> Congress has taken a new approach in some recent environmental regulatory enactments in which minimum regulatory standards are set at the federal level and any state meeting those standards can implement the program within the state. In other regula-

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Although the 1989 appropriation probably will be higher than requested, the trend is indeed flat, considering that current figures are not quoted in constant dollars.

206. This was the conclusion of a graduate seminar in forest planning at the University of California, Berkeley. The seminar reviewed the Tahoe draft plan for a semester and interviewed the planning "team" individually and as a group on numerous occasions. The Tahoe Plan appears to be an extreme case because the planners presumed a massive increase in investment in its early years. Other forest plans have presumed gradually increasing resources or no increases at all. Budget cutbacks will affect all forests, but none so dramatically as Tahoe. For recent reflections on the process, see R. O'TOOLE, *supra* note 105, at 174-84.

207. 16 U.S.C. § 1604(f)(5)(A) (1982). There are two schools of thought on this point. The first, leading to the conclusion that major budget shifts *do* require revisions, views money as a resource like a land base, and a plan as a commitment to produce a specified output. Alternatively, the plan is viewed as expressing guidelines and goals at a particular level of funding; in case of a budget shortfall the planners would simply reduce the outputs. The timber industry favors the former position, the Forest Service the latter, yielding the logic of its FORPLAN linear programming model on which the plans are based. See Randolph, *Comparison of Approaches to Public Lands Planning*, 24 TRENDS No. 2., at 44-45 (1987), for a description of how the FORPLAN methods aids Forest Service planners.

208. See *supra* notes 195-204 and accompanying text.

tory regimes, federal agencies play the lead role. Even in these cases, however, states maintain an important consultative role.

In the public lands context, the two major federal agencies, the BLM and the Forest Service, and the two major regulatory acts, FLPMA and NFMA, all incorporate some level of state and local involvement in regulating use of public lands and resources. At a minimum, both agencies mandate public participation for any major action, as required by the National Environmental Policy Act (NEPA).

### 1. *Procedures for State and Local Participation in Environmental Assessments*

State and local participation in federal resource management is a longstanding ideological and political goal of the progressive era conservation movement<sup>209</sup> reinforced by the requirements of recent statutes such as NEPA, NFMA, FLPMA, and the Forest and Rangelands Renewable Resources Planning Act (RPA).<sup>210</sup> Both the BLM and the Forest Service prepare environmental assessments in conjunction with proposed land use plans, thus triggering the public review and comment procedures of NEPA.<sup>211</sup>

The opportunity to comment on a proposed federal action does not necessarily give state and local government any meaningful leverage over federal land use decisions;<sup>212</sup> NEPA itself requires neither impact mitigation nor consistency with state and/or local policies.<sup>213</sup> State and local officials, however, can use the EIS process to monitor federal activities. In doing so, state officials learn when key decisions are being made, discover the likely impacts of the alternatives considered, and inform the

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209. Gifford Pinchot's famous letter of instruction to Secretary of Agriculture Wilson expressed this view: "[L]ocal questions will be decided upon local grounds." G. PINCHOT, *supra* note 41, at 261-62. *But see* Haslam, *Federal and State Cooperation in the Management of Public Lands*, 5 J. CONTEMP. L. 149, 162 (1978) (asserting that this role for states is newly created by Congress).

210. 16 U.S.C. §§ 1600-1687 (1982).

211. 42 U.S.C. § 4332 (1982). NEPA requires BLM to prepare environmental impact statements on grazing permit decisions on a location-specific basis. *NRDC v. Morton*, 388 F. Supp. 829, 841-42 (D.D.C. 1974), *aff'd per curiam*, 527 F.2d. 1386 (D.C. Cir. 1976), *cert. denied*, 427 U.S. 913 (1976).

The process of environmental review has been extended to the comprehensive resource management plans mandated by FLPMA. The BLM planning regulations, implementing the FLPMA planning mandate, incorporate the NEPA guidelines on preparation of environmental impact statements. BLM, Resource Management Planning, 43 C.F.R. §§ 1610.2, 1610.4 (1987). Forest Service land use plans are required by statute to be prepared in accordance with the NEPA process. 16 U.S.C. § 1604(g)(1) (1982).

212. State and local authorities can sue to ensure compliance with NEPA's procedural requirements. *See, e.g.,* *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 224 (1980) (local neighborhood group allowed to bring suit challenging application of NEPA procedures in the construction of low-cost housing).

213. *Id.* at 227-28 (duties that NEPA imposes on agencies are "essentially procedural," and agencies thus need only *consider* the environmental consequences of their decisions).

federal agency of their concerns. At a minimum, therefore, the EIS process provides an opportunity for consultation among federal, state, and local officials that may lead to cooperation in achieving mutual objectives.

## 2. *Statutory Requirements for State/Federal Consistency in BLM Planning: A New and Familiar Wrinkle*<sup>214</sup>

The principal statute governing BLM's planning process is the Federal Land Policy and Management Act of 1976 (FLPMA).<sup>215</sup> The Act provides a statutory basis for consistency between federal and state objectives. Although consistency is mentioned at various points throughout FLPMA,<sup>216</sup> the two key components are in section 202(c), which describes criteria for preparation and revision of land use plans.<sup>217</sup> Section 202(c)(8) states unambiguously in one short phrase that the Secretary's plans "shall provide for compliance" with federal and state pollution control laws.<sup>218</sup> The next section, several paragraphs long, requires that the Secretary's plans "shall be consistent with state and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act."<sup>219</sup> The subsection states earlier:

In the development and revision of land use plans, the Secretary shall . . . to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and activities of or for such lands with the land use planning and management programs of . . . the States and local governments within which the lands are located . . . assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands.<sup>220</sup>

As interpreted in BLM's planning regulations, the FLPMA consistency provisions give substantial consideration to the resource-related

214. A number of statutes establish planning processes for various federal agencies. For example, sections 201-202 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1711-1712 (1982), govern BLM; section 6, formerly section 5, of the Forest and Rangelands Renewable Resources Planning Act of 1974 (RPA), 16 U.S.C. § 1604 (1982), governs the U.S. Forest Service. For similar planning provisions, see NEPA § 101, 42 U.S.C. § 4331(b) (1982), and SMCRA § 201, 30 U.S.C. § 1211 (1982). Federal lands policy and management is a radically different setting for federal/state relations than a field of regulation involving one agency and one state. See generally Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429 (1984).

215. 43 U.S.C. §§ 1711-1712 (1982).

216. S. Fairfax, R. Twiss & C. Yale, *FLPMA and the Sagebrush Rebellion* 38-39 (1981) (draft prepared for the California State Lands Commission).

217. 43 U.S.C. § 1712(c) (1982).

218. *Id.* § 1712(c)(8).

219. *Id.* § 1712(c)(9).

220. *Id.*

plans and policies of the appropriate state and local governments.<sup>221</sup> The regulations require that a BLM state director formalize the exchange of information and policy preferences with a state governor.<sup>222</sup> The governor may identify inconsistencies between federal and state or local positions and recommend changes in the BLM document. If the BLM state director does not accept the governor's recommendations, the governor may appeal to the director of BLM. At this juncture, "the Director shall accept the recommendations of the Governor(s) if he/she determines that they provide for a reasonable balance between the national interest and the State's interest."<sup>223</sup> In practice, use of the appeal process has been limited, with most differences settled less formally. A governor's inconsistency protest may be resolved by negotiation between the governor and the state BLM director without referral to the national BLM director.<sup>224</sup> Even when an appeal reaches the national level, negotiation and compromise is possible.<sup>225</sup>

The importance of consistency provisions is probably more political and symbolic than legal.<sup>226</sup> Even in the more specific FLPMA formulation, the provisions do not grant states and localities a veto over federal programs. The appropriate federal managers have ultimate authority to determine whether federal programs are consistent with state and local priorities and to override these regional priorities if necessary to pursue federal objectives.<sup>227</sup> In challenging such a federal decision, a state

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221. In the public domain setting, environmental interests typically have opposed local priorities and urged adherence to clearly articulated national criteria. Environmentalists fight for diversity, however, when state programs are likely to be more restrictive, as under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136w-1 (1980 & Supp. 1988), and local industry supports local quirks which give it a local advantage. For an attempt to make this political reality more systematic, see Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L. J. 1196, 1211-32 (1977).

222. 43 C.F.R. § 1610.3-2(e) (1987). Although BLM officials are expected to be informed on state and local plans and policies and to acknowledge inconsistencies that they know of, BLM planners are not held accountable for ensuring consistency unless they are notified. *Id.* § 1610.3-2(c). Thus, state and local officials are responsible for informing the BLM of inconsistencies in draft plans and for recommending what changes should be made.

223. *Id.* § 1610.3-2(e).

224. Personal communication with Carl Rountree, Planning and Environmental Coordinator, California State Office of the BLM, in Sacramento, California (Apr. 25, 1985).

225. A protest in Colorado that went to the BLM in Washington, D.C., was resolved by compromise, allowing accommodation of local concerns through lease stipulations rather than in the resource management plan itself. Letter from W. Morck, Deputy Director, BLM, to Richard Pond, Chairman, and Jim Evans, Director, Associated Governments of Northwest Colorado (Apr. 25, 1985).

226. If challenged in court, the FLPMA consistency provisions will probably be held to carry less weight for the state than consistency provisions contained in other federal statutes, such as the Coastal Zone Management Act, 16 U.S.C. § 1451 (1982), the Deep Water Ports Act, 33 U.S.C. §§ 1501-1524 (1982), or the federal facilities provision of the Clean Air Act, 42 U.S.C. § 7418 (1982).

227. BLM planning regulations provide that the Director of BLM is the final arbiter of

would face the difficult hurdle of proving that the Secretary's decision was arbitrary and capricious.

### 3. *The BLM Planning Process Under FLPMA: The Regulatory Basis for Involving State and Local Interests*<sup>228</sup>

Management decisions concerning watershed, timber, range, minerals, wildlife, recreation, and other resources<sup>229</sup> in specific areas are made through the BLM's multiple use<sup>230</sup> planning process.<sup>231</sup> A resource management plan (RMP)<sup>232</sup> usually covers a resource area, a subunit of a BLM district.<sup>233</sup> The plan establishes: (1) restricted use areas (including areas for transfer from BLM administration); (2) allowable resource uses and levels of use; (3) objectives for resource conditions; (4) management practices and constraints; (5) needs for more specialized planning; (6) supporting actions such as surveys, resource protection, and access; (7) implementation schedules; and (8) monitoring processes.<sup>234</sup> The plan is prepared (in conjunction with an environmental impact statement) by district or resource area managers.<sup>235</sup> Resource-specific management de-

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state consistency appeals. 43 C.F.R. § 1610.3-2(e), 1610.5-2(b) (1987). In the Forest Service, regional guides are approved by the Chief. 36 C.F.R. § 219.4(b)(2) (1987). Decision appeals go first to the officer at the next highest level, with a further appeal available at the next organizational level. *Id.* § 211.18(f)(1).

228. We emphasize the BLM because it is less publicized. Moreover, in the present context FLPMA, with its consistency requirements (BLM Resource Management Consistency Requirements, 43 C.F.R. § 1610.3-2 (1987)), is probably more interesting than NFMA, which does not contain consistency language. Our discussion is not exhaustive, but is aimed rather at describing the process sufficiently to set a context for state and local participation and to demonstrate the inappropriateness of generic discussions of federal land use planning such as are found in the Supreme Court's recent decision in *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419 (1987). See *infra* notes 520-33 and accompanying text. The authors are grateful to Ronald Hoffman, BLM Associate State Director, California, for guidance on this section. See generally Hamilton, *Multiple Use Planning Under a Dominant Use Statute*, FOREST WATCH, Nov. 1987, at 15 (describing preparation of a new Resource Management Plan for western Oregon as part of a special issue devoted to BLM planning for the 1990's); Vertrees, *Introduction: Federal Land Resource Planning—Interagency Comparisons*, 24 TRENDS No. 2, at 2 (1987) (comparative overview of planning approaches taken by BLM, the National Park Service, the Fish and Wildlife Service, and the Forest Service as part of a special issue on federal land resource planning).

229. The BLM definition of multiple use covers renewable and nonrenewable resources "including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." FLPMA § 103(c), 43 U.S.C. § 1702(c) (1982).

230. BLM's 10 objectives for public land management are: domestic livestock grazing, fish and wildlife development and utilization, industrial development, mineral production, occupancy, outdoor recreation, timber production, watershed protection, wilderness preservation, and preservation of public values. BLM, *Components of Multiple Use Management*, 43 C.F.R. § 1725.3-3 (1987).

231. BLM, *Resource Management Planning*, 43 C.F.R. § 1610 (1987).

232. *Id.* §§ 1610.1(b), 1610.4.

233. *Id.* § 1601.0-5(j).

234. *Id.* § 1601.0-5(k).

235. *Id.* § 1601.0-4(c).

cisions may be spelled out in subsequent activity plans.<sup>236</sup>

BLM's RMP regulations require planners to solicit comment from other agencies and state and local government at two stages: at the beginning of the process (when identifying issues, considering related state and local policies and plans and developing procedural guidelines),<sup>237</sup> and when a draft plan is under consideration.<sup>238</sup> These regulatory requirements are intended to provide material for reviewing the consistency of federal and nonfederal plans, policies, and regulations,<sup>239</sup> but are distinct from the statutory consistency requirements discussed above.

Notice to state agencies of intent to initiate a specific area plan triggers the first step in the sequence, the identification of issues that the plan must address.<sup>240</sup> State and local participation can be influential at this stage. The regulations require that "the public, other Federal agencies, State and local governments and Indian tribes shall be given an opportunity to suggest concerns, needs, and resource use, development and protection opportunities for consideration in the preparation" of the plan.<sup>241</sup>

Based on the information gathered by BLM through this process, issues critical to the planning area are identified<sup>242</sup> and planning criteria are developed.<sup>243</sup> These criteria guide BLM planners throughout the formulation of the RMP, providing a framework for collecting further data and for identifying and analyzing alternatives. Before being approved, the proposed planning criteria must be made available for public comment.<sup>244</sup> After the BLM adopts planning criteria, it proceeds through the stages of inventory, management situation analysis, and formulation and evaluation of alternatives.<sup>245</sup> This process culminates in the selection of the preferred alternative. A draft resource management plan and environmental impact statement are then prepared and provided to the governor of the state and to other state and local officials.<sup>246</sup>

Finally, review procedures proposed by the BLM in 1981<sup>247</sup> and adopted in 1983 placed a new emphasis on coordination with state gov-

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236. *See id.* § 1601.0-2.

237. *Id.* § 1610.4-1.

238. *Id.* § 1610.4-2.

239. *Id.* § 1610.3-1(c).

240. The notice of intent to plan is sent to a designated state official for circulation among state agencies. *Id.* § 1610.3-1(d).

241. *Id.* § 1610.4-1.

242. *Id.*

243. The criteria are based on applicable federal law, regulations, and BLM national and state directives, and on "the results of public participation and coordination with other Federal Agencies, State and local governments." *Id.* § 1610.4-2.

244. *Id.*; *see id.* § 1610.2 (f).

245. *Id.* §§ 1610.4-3 to 1610.4-7.

246. *Id.* § 1610.4-7. Those wanting more information on federal lands planning should consult K. FLETCHER, C. WILLIAMS & R. O'TOOLE, *FOREST PLANNING BIBLIOGRAPHY* (1985 & Supp. 1987).

247. *See* Amendments to the Planning Regulations, 46 Fed. Reg. 57,448-49 (1981).

ernments: "To facilitate coordination with State governments, State Directors should seek the policy advice of the Governor(s) on the timing, scope, and coordination of plan components; definition of planning areas; scheduling of public involvement activities; and the multiple use opportunities and constraints on public lands."<sup>248</sup>

#### 4. *Forest Service Efforts To Coordinate with State and Local Land Use Objectives*

The National Forest Management Act (NFMA)<sup>249</sup> does not contain specific consistency language similar to that in FLPMA. Accordingly, Forest Service regulations<sup>250</sup> do not provide formal procedures for challenging agency decisions on consistency grounds. Nevertheless, the general stages of Forest Service planning resemble those of BLM planning, and in practice the level of consideration given state and local plans and policies is often similar. Forest Service planning regulations require coordination with state and local governments from notice of plan initiation through draft plan review.<sup>251</sup> Forest Service planners must review state and local plans and policies and assess their relationship to Forest Service objectives.<sup>252</sup> If conflicts are identified, the Forest Service must consider alternatives that avoid them.<sup>253</sup>

The line officer responsible for the plan is instructed to meet with state and local officials three separate times: first, at the beginning of the process to develop coordination; again after public issues and management concerns have been identified; and finally, prior to recommending the preferred alternative.<sup>254</sup> This schedule prescribes a minimum level of coordination: as with the BLM, where good communication among federal and nonfederal officials exists, notification and discussion may be continuous.

NFMA's less explicit embrace of state preferences and priorities does not mean that the state is without recourse in opposing a Forest Service decision when negotiation fails. California challenged the EIS accompanying the agency's recommendations to Congress regarding the

248. 43 C.F.R. § 1610.3-1(b) (1987).

249. 16 U.S.C. §§ 1600-1614 (1982).

250. See National Forest System Land and Resource Management Planning, 36 C.F.R. § 219 (1987).

251. *Id.* § 219.7(d)-(e).

252. "The review shall include—(1) Consideration of the objectives of other Federal, State, and local governments, and Indian tribes, as expressed in their plans and policies; (2) An assessment of the interrelated impacts of these plans and policies." *Id.* § 219.7(c)(1)-(2).

253. *Id.* § 219.7(c)(4).

254. *Id.* § 219.7(d). These conferences are specified as a minimum requirement. Also, it is required that "[a] program of monitoring and evaluation shall be conducted that includes consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest being planned and the effects upon national forest management of activities on nearby lands." *Id.* § 219.7(f).

allocation of RARE II wilderness areas in the state and won a major victory.<sup>255</sup> Clearly, however, the states have a stronger hand in dealing with the BLM than with the Forest Service.<sup>256</sup>

### *C. State and Local Strategies for Participating in Federal Lands Planning*

In addition to the federal consistency requirements described above, the states also have initiated a series of mechanisms to foster cooperative management on the ground. The concept of cooperative management is based on the belief that conflicts among competing uses and users of the federal lands can and should be resolved through direct negotiation at the local level. The cooperative management approach, which seeks to involve representatives of all affected interest groups, is particularly applicable to the many areas of the West where state, private, and federal lands are intermingled. Some state-sponsored programs are multipurpose arrangements, whereas others are directed toward managing particular resources.

The impetus for state initiatives came, in part, from the expanded state roles defined in FLPMA and NFMA and their regulations. In many cases, however, state interest stemmed from federal proposals to develop energy resources on federal lands.<sup>257</sup> Although the urgency and attention attached to the massive federal programs of the 1970's may have receded, the models are still in place and evolving. Even at their peak, the mechanisms and strategies states developed did not operate at all times, nor did they address all resources. State and local participation is expensive and politically demanding. Often states have lacked resources for active involvement in all phases of federal planning. In many situations where formal procedures are viewed skeptically, informal contacts still yield results. Thus, formal mechanisms often are of little importance to interaction: when state and local officials routinely work effectively with federal planners and managers on matters of mutual interest, the precise format for collaboration is less significant than the collaboration itself.

#### *1. State Initiatives for Intrastate Coordination*

One problem with FLPMA's consistency provisions is that they presume the existence of coherent state and local land use policies. Dis-

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255. *California v. Block*, 690 F.2d 753 (9th Cir. 1982) (Forest Service must comply with NEPA as well as NFMA in preparing an EIS for national forest land allocation).

256. Note also that BLM is organized by states, whereas the Forest Service is organized by regions. Thus the effect of state government and congressional delegation priorities is arguably greater on BLM state directors than on regional foresters, whose domains generally include several state resource agency administrators, governors, and congressional delegations.

257. See *supra* notes 132-57 and accompanying text.



agreements among state agencies and between state and local governments can prevent a state from presenting a clear position in the face of conflicting federal resource management policies. Where state agencies and/or local governments cannot agree on policy goals, the state may effectively default to the federal agency.<sup>258</sup>

Achieving interagency agreement can be a complex process. Agencies typically operate under different mandates and have separate program objectives and constituencies. In some states, agency heads are independently elected or are accountable to a board independent of the governor.<sup>259</sup> Where there is no satisfactory resolution to a dispute, a governor may be unwilling to take political heat for defending a clearly articulated position on a federal decision when he has little hope of controlling the outcome. Under such circumstances, legislation may be needed to establish a clear state position.

In Colorado, the legislature formally designated the Department of Natural Resources<sup>260</sup> as the lead agency for coordinating resource issues, both among state agencies and between state and federal agencies.<sup>261</sup> The executive director of the Department is responsible for orchestrating

258. See *infra* note 259. For examples of situations where state and local authorities may diverge on their goals and their methods of dealing with federal agencies, see *infra* notes 307-48 and accompanying text.

259. Consider the situation in Oregon, for example. The State Forester is appointed by the State Board of Forestry, an independent seven-member commission, which also controls the policies, appointments, and salaries of officials in the Department of Forestry. OR. REV. STAT. §§ 526.009, 526.031 (1987). The Fish and Wildlife Director is appointed by the State Fish and Wildlife Commission, which directs the policies and programs of that department. *Id.* §§ 496.090, 496.112. The State Geologist is appointed by the governing board of the Department of Geology and Mineral Industries. *Id.* § 516.120. The Director of the Division of State Lands is appointed by the State Land Board, which consists of the Governor, Secretary of State, and State Treasurer. *Id.* §§ 273.031, 273.161. Of the major state officials who must cooperate in order to present a unified position to the federal land management agencies, the Governor directly controls only three: the Water Resources Director, *id.* § 536.032; the Director of Agriculture, *id.* § 561.010; and the Director of the Department of Energy, *id.* § 469.040. The difficulty of developing a unified position was highlighted in 1981-83 by the controversy over the preservation of habitat for the spotted owl, a threatened species in Oregon. The Fish and Wildlife Commission, supporting habitat preservation, urged the BLM to restrict timber harvesting on the agency's rich O&C timberlands in western Oregon. The State Board of Forestry, on the other hand, urged the BLM to continue harvesting these lands in order to sustain the timber industry in the region. Because the two agencies were controlled by separate independent commissions, the state government was unable to resolve the conflict at the state level, and left the decision to the federal land managers. Interview with Pat Amadeo, Assistant to the Governor for Natural Resources, Office of the Governor, in Salem, Oregon.

260. COLO. REV. STAT. § 24-33-101 (1982).

261. The policy of the state is:

To encourage . . . the full development of the State's natural resources to the benefit of all of the citizens of Colorado and shall include, but not be limited to, creation of a resource management plan to integrate the state's efforts to implement and encourage full utilization of each of the natural resources consistent with realistic conversion principles.

*Id.* § 24-33-103.

all state responses to resource issues concerning the public lands.<sup>262</sup>

Nevada takes a more ambitious approach. In response to the consistency requirements in federal legislation, the state passed a public lands planning statute. S.B. 40 directs the state land use planning agency to "prepare, in coordination with appropriate state agencies and local governments throughout the state, plans or policy statements concerning the use of lands in Nevada which are under federal management."<sup>263</sup>

Implemented over a two-year period (1983-85), the Nevada program emphasized state assistance to local governments involved in analyzing federal lands issues. All Nevada counties now have adopted plans and are responsible for their implementation.<sup>264</sup> Although few controversies have tested the plans, S.B. 40 represents a reasonable effort to develop clear policies for the use of federal lands and may prove useful in bringing consistency questions to the forefront of political discussion.

A number of states have relied on memoranda of understanding (MOU's) to structure their coordination with federal agencies.<sup>265</sup> These MOU's, which establish guidelines for state/federal interaction, address subjects ranging from information exchange to shared commitments on resource planning and management; most address a specific activity or resource area.<sup>266</sup> Generally, MOU's establish coordination procedures between federal land agencies and the state; they also may require the designation of a state liaison officer. Often the MOU is a simple two-way agreement between a state and a single federal agency, but MOU's also have been used for multistate and multiagency agreements. MOU's often

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262. *Id.* §§ 24-33-102 to 24-33-103.

263. NEV. REV. STAT. § 321.7355 (1983) (commonly known as S.B. 40). The statute also provides that the plans or policy statements must not include zoning matters and must be consistent with local regulations concerning the use of private property. *Id.*

264. Interview with Mike DelGrosso, Division of State Lands, in Carson City, Nevada (May 7, 1987).

265. Subcomm. on Range Resource Management, Council of State Planning Agencies, Wanted: State Initiative in Public Land Planning 15 (workshop report, n.d.) [hereinafter Council of State Planning].

266. Some of the MOU's are very broad. For example, the New Mexico agreement is intended to provide a mechanism for "continual and appropriate involvement" by state government officials in BLM land use planning under NEPA, FLPMA, and PRIA. *See id.* at 23-31.

In other states, MOU's address much more specific issues. For example, the Oregon state office of BLM listed 140 agreements in its cooperative agreement register in June 1981. Personal communication, Eric Stone, Planning Coordinator, Oregon State Office of the BLM (Dec. 7, 1982). The agreements covered such subjects as cooperative education; resource program management including range, minerals, forest, wildlife, watershed, and recreational programs; fire protection; and technical services. Among the parties to these bilateral and multilateral agreements were colleges and universities, the Oregon Department of Environmental Quality, Douglas County, the State of Oregon, U.S. Forest Service, Oregon State Game Commission, and the Willamette Council of Campfire Girls. *Id.* This sampling suggests the complex network of formal agreements committing the signatories to collaborative endeavors.

serve as an umbrella for subsidiary agreements.<sup>267</sup>

One example of the use of an MOU to formalize cooperation in planning and management is an agreement dating from 1982 between the state of Colorado, the BLM, and the Forest Service.<sup>268</sup> Under this memorandum—which was signed by the Governor, the BLM State Director, and the Regional Forester for the Rocky Mountain region of the Forest Service—officials representing each party meet every four months. The meetings cover current resource and land management issues, upcoming planning decisions, and ways to cooperate in implementing solutions to specific problems. Cooperation may consist of developing compatible data management systems, identifying and mitigating the impacts of major development projects, or developing management plans and programs for resources with statewide significance.<sup>269</sup>

Although MOU's facilitate state/federal coordination, they usually do so by first defining how policy is formulated within the state. The lead state agency identifies the range of state interests and then attempts to work out policies that accommodate these interests to the extent possible. MOU's also may be used to help define a process for resolving interagency conflicts over program implementation.<sup>270</sup> Even when the mediation process laid out in an MOU is not fully successful, the effort may promote interagency understanding and cooperation in future projects.

A recurring observation made by parties to MOU's is that once they are signed they are seldom referred to. Through negotiation of the memorandum, representatives of the parties develop an understanding of each other's objectives and learn to recognize the constraints under which each operates. Once personal relationships are established and the benefits of cooperation acknowledged, it is seldom necessary to refer to the terms of the formal agreement.

#### *a. Multipurpose, Area-Specific Arrangements*

State/federal coordination in the resource management process is not simply a matter of federal policy; it also is a matter of practice through coordinated planning programs and joint planning teams. A

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267. These usually occur between a single federal agency at the state, district, or forest level and other federal agencies, local government and governmental entities, industrial corporations, and nongovernmental organizations.

268. Memorandum of Understanding Among the Governor of Colorado; United States Department of the Interior, Bureau of Land Management, Colorado; and United States Department of Agriculture, Forest Service, Rocky Mountain Region (Jan. 25, 1982).

269. *Id.* at 2. There is also a Supplemental Memorandum of Understanding Among the Governor of Colorado and the United States Department of Agriculture, Forest Service/Rocky Mountain Region (July 13, 1982), which establishes procedures for staff specialists to follow in coordinating land and resource planning and environmental documentation and analysis.

270. Often the differences stem from conflicting state statutes or from conflicting interests among state agencies.

leading example is Nevada's Coordinated Resource Management and Planning Program (CRMP).<sup>271</sup> The program is an example of a state-initiated multipurpose arrangement. Representatives of five state and five federal agencies established the CRMP by signing an MOU<sup>272</sup> and an operating agreement.<sup>273</sup> The Nevada MOU commits the agencies to developing and implementing cooperative management at the local level in the areas where private, federal, and local lands, resources, and facilities are interdependent.<sup>274</sup> At the state level, the MOU establishes an executive interagency group to coordinate, assist, and monitor local CRMP activities and to train field personnel.<sup>275</sup> This requires that senior state and federal officials delegate authority to their staffs, who can spend the time needed to coordinate and train local personnel. CRMP participants also must resolve jurisdictional and operational conflicts that otherwise would disrupt local planning. State agencies with more extensive field staff, such as agricultural extension agencies and fish and wildlife agencies, are the most active in local coordinating groups.

Although designed to respond to a wide range of resource issues, Nevada's CRMP is implemented locally in response to specific resource concerns.<sup>276</sup> When an issue first arises, all interested individuals and groups (including landowners, ranchers, private firms, environmental and wildlife advocacy groups, local government, and state and federal resource management agencies) are invited to participate in a voluntary working group.<sup>277</sup> This group develops plans and cooperative strategies for resource management consistent with laws and applicable local, state,

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271. A good description of this program can be found in 1 NEVADA COORDINATED RESOURCE MANAGEMENT AND PLANNING TASK GROUP, NEVADA COORDINATED RESOURCE MANAGEMENT AND PLANNING HANDBOOK (1980) [hereinafter CRMP HANDBOOK]. Use of the CRMP is common in Western states with intermingled federal, private, and state lands. California, for example, recorded at least 81 such programs in 1986. L. Wilson & F. Lundberg, Cooperative Management on the Public Lands 25 (n.d.) (report prepared for the Council of State Planning Agencies).

272. Memorandum of Understanding for Coordinated Resource Management and Planning in Nevada [hereinafter Nevada MOU], reprinted in Council of State Planning, *supra* note 265, at 33-39. State signatories to the Memorandum are the Nevada Department of Agriculture; State Conservation Commission; Department of Conservation and Natural Resources; Department of Wildlife; and Fleischman College of Agriculture, University of Nevada, Reno. Federal participants are the Bureau of Land Management, Fish and Wildlife Service, Forest Service, Soil Conservation Service, and Agricultural Stabilization and Conservation Service. *Id.* at 14.

273. The operating agreement defines the structure and duties of the task force. CRMP HANDBOOK, *supra* note 271, at 2.

274. Council of State Planning, *supra* note 265, at 34. Planning areas are determined flexibly, according to the specific resource problem. Usually parcels or properties are not divided.

275. The executive group is composed of the senior officials of the signatory agencies, CRMP HANDBOOK, *supra* note 271, at 2; there is also a task group of technical specialists. Council of State Planning, *supra* note 265, at 14.

276. CRMP HANDBOOK, *supra* note 271, at 2.

277. *Id.* at 4-5.

and federal resource plans.<sup>278</sup>

Joint planning teams are similar multipurpose planning arrangements. Joint planning teams may be created by a cooperative agreement between one or more state and federal agencies, or by creating a multilateral council, or both. Although encouraged by federal law,<sup>279</sup> these partnerships, like Nevada's CRMP, depend on the voluntary participation of interested parties.

Arizona repeatedly has demonstrated the usefulness of joint state/federal planning teams to create planning, management, and land transfer and exchange agreements that would be virtually impossible to implement by either government acting alone. The state used a joint planning team to select outstanding federal indemnity lands for transfer to state ownership.<sup>280</sup> Almost all of the 3.5 million acres of indemnity lands due Arizona upon statehood were identified and transferred by a joint planning team called the State Selection Board. In addition, the value of Arizona lands taken to construct the Central Arizona Project Canal was agreed upon and set at \$100 million by a team made up of the BLM state director, the state land commissioner, and their respective staff assistants.<sup>281</sup> The process of identifying lands suitable for transfer to state ownership was facilitated by the work of another state/federal group, the Joint Recreation Planning Advisory Council. The Council has institutionalized joint planning for recreational development and, thus, has helped clarify the appropriate use, management, and ownership of public recreation lands in the state.<sup>282</sup> Although the transfers were substantially completed by 1983,<sup>283</sup> Arizona is now consolidating its

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278. *Id.* at 1, 7-9.

279. *See, e.g.*, Sikes Act, 16 U.S.C. § 670g (1982); Taylor Grazing Act, 43 U.S.C. § 315(h) (1982); *see also* Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. § 1601(c) (1982); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1253 (1982).

280. "Indemnity lands" are those lands due states as a result of grants established at the time of admission to statehood. States typically were granted specified range/township sections, but where those sections already had passed to private ownership, states were allowed to select "in lieu" lands. *See Andrus v. Utah*, 446 U.S. 500, 507 (1980). Because of the scattered nature of these lands, the difficulty in valuing them, and restrictions on federal lands that can be selected, the in-lieu lands selection process has long been stalled in many states. The Arizona model thus represents a significant achievement in state/federal coordination.

281. *See* D. Bibles, *Repositioning Arizona Lands 4* (1987) (paper presented at the Natural Resources Law Center, University of Colorado School of Law).

282. The Council's most significant project has been the Lower Colorado River planning project, which has developed coordinated recreation management plans for areas under local, state, and federal jurisdiction. This planning is necessary because the Colorado River, which is bordered by a checkerboard of private, state, and federal lands, is under intense recreational pressure. Interview with Dean Bibles, BLM State Director, in Phoenix, Arizona (Nov. 1, 1982).

283. Interview with Glendon Collins, Deputy Commissioner, Land Department, in Phoenix, Arizona (May 7, 1987). Title has yet to be cleared on a few hundred acres with such complications as mining claims. *Id.*

holdings through an exchange agreement with the BLM.<sup>284</sup> The state legislature supported this effort through a three-year staffing and funding program approved in 1984.<sup>285</sup>

*b. Resource-Specific Management Arrangements*

Rather than tackle a broad range of planning issues, some states focus their efforts on specific resources. Regional coal teams, created by regulations implementing the federal Surface Mining Control and Reclamation Act,<sup>286</sup> represent this type of intergovernmental planning mechanism. Because the coal fields often span state borders, several states are usually represented.

The regional teams advise the Secretary of the Interior on the desirability of leasing specific federal tracts, after weighing national energy needs and regional production goals against potential environmental and socioeconomic impacts.<sup>287</sup> The teams monitor planning and environmental analyses<sup>288</sup> and make final recommendations to the Secretary of the Interior regarding which tracts to lease.<sup>289</sup> Once leasing is approved by the Secretary, the teams may coordinate state and federal permitting.

Although this process offers an opportunity for substantive state input into federal coal leasing decisions, participation can be frustrating. The teams' usefulness to the states depends on how much weight their recommendations receive from the Secretary, but federal accommodation of state interests has been grudging at times. In 1982, after careful analysis, Western coal teams ranked potential lease areas and recommended that they be leased in order of their rankings. Secretary Watt threatened to make the rankings meaningless, however, by proposing to lease virtually all the areas within a short period of time. Angry Western governors were able to reverse this decision after meeting with the Secretary in a closed-door session,<sup>290</sup> illustrating that political pressure sometimes succeeds where formal coordination fails.

Although the most pronounced threat to Western economies and environments has been associated with energy development,<sup>291</sup> much of

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284. *Id.*

285. *Bibles*, *supra* note 281, at 5-6.

286. 30 U.S.C. §§ 1201-1328 (1982). A regional coal team is established for each coal production region. The team consists of a Bureau of Land Management field representative for each state in the region (the state director), the governor of each state in the region, and a representative appointed by the director of the BLM. This representative chairs the team. 43 C.F.R. § 3400.4(a) (1987). Other state and federal agency officials may serve in advisory roles. *Id.* § 3400.4(e).

287. 43 C.F.R. § 3420.3-4 (1987).

288. *See id.* § 3420.3-1.

289. *Id.* § 3420.3-4(g)-(h).

290. Schmidt, *Watt Accepts Rule Changes by Western States*, *N.Y. Times*, Nov. 23, 1982, at A18, col. 1.

291. *See supra* notes 131-57 and accompanying text.

the political attention focused on federal land use policies has come from the protests of ranchers. Considering the ongoing efforts of ranchers and the extensive amount of land devoted to grazing, it is not surprising that the most common organizational manifestation of resource coordination is the statewide range coordinating committee, which acts as a bridge between decisionmakers and user groups.<sup>292</sup> Cooperative range management and "advisory boards" are not recent innovations; close dealing between federal range managers and ranchers has a long history.<sup>293</sup> Indeed, the mechanisms used to enhance state influence in federal range decisions have parallels in other resource areas.<sup>294</sup>

In Idaho, the Rangeland Committee is a voluntary association of governmental and nongovernmental agencies and organizations.<sup>295</sup> The committee addresses management issues and policies for public and private rangelands and facilitates the relationships among government agencies and user groups. By providing mediation services and technical advice, it also helps resolve local conflicts. The committee encourages member agencies and organizations to get involved in BLM and Forest Service planning efforts.<sup>296</sup>

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292. See, e.g., ARIZ. REV. STAT. ANN. § 37-1001 (1986) (Governor's Rangeland Advisory Council); MONT. CODE ANN. § 76-14-101 (1985). Montana has formally established the Rangeland Resources Committee which is comprehensive in membership. By statute, the Montana committee includes ranchers in key positions:

- (1) [T]he governor may select a committee of six members . . . composed as follows:
  - (a) a chairman who is a rancher;
  - (b) a vice chairman who is a rancher;
  - (c) a rancher from the eastern area of the state;
  - (d) a rancher from the northern area of the state;
  - (e) a rancher from the area of the state west of the continental divide;
  - (f) a rancher from the southern area of the state.

MONT. CODE ANN. § 2-15-3305 (1985). The committee also includes state and federal officials, university representatives, and members of non-governmental organizations. *Id.*

293. For a study of the close association between grazing administrators and livestock owners, see P. FOSS, *supra* note 30.

294. Wildlife management is one example. Federal/state cooperation in wildlife management is compelled by state jurisdiction over most hunting and fishing and federal jurisdiction over vast areas of wildlife habitat. Many states have developed joint programs with federal agencies, and some states have negotiated agreements to actually manage federal wildlife areas. For example, the California Department of Fish and Game has such an agreement with BLM and has taken responsibility for 14 National Cooperative Land and Wildlife Management Areas involving 800,000 acres. Telephone interview with Michael Ferguson, State Wildlife Biologist, BLM, in Sacramento, California (Oct. 24, 1988). Federal/state management of cultural resources is another example. Concerned with vandalism at archeological sites on both state and federal land, Arizona, BLM, and the Forest Service have developed collaborative programs that include education and media publicity, joint funding of guards at key sites, training for other state and federal law enforcement officers, and promotion of reporting of observed vandalism. Bibles interview, *supra* note 282.

295. The Idaho committee has broad membership, including representatives of four federal agencies, seven state agencies, two colleges of the state university, the Idaho Farm Bureau, and the state associations of the wool growers, forest industries, and wildlife interests. Council of State Planning, *supra* note 265, at 11.

296. *Id.*

Not all cooperative resource management programs are informal voluntary arrangements. A number of experimental cooperative management programs in Western states have a specific foundation in federal law and follow relatively formal guidelines.<sup>297</sup> The Public Rangelands Improvement Act of 1978 (PRIA)<sup>298</sup> provides for experimental range stewardship programs intended to encourage holders of grazing permits to adopt innovative management techniques for improving range conditions.<sup>299</sup> In enacting PRIA, Congress explicitly endorsed cooperative range management projects designed to foster closer collaboration between state and federal range management agencies and private range users.<sup>300</sup> The stewardship provisions allow federal agencies involved in range management to depart from the constraints of standard operating procedures when the plans developed by the Secretaries of the Interior and Agriculture authorize such departures.<sup>301</sup>

Three experimental stewardship programs were formally designated by the Secretaries of the Interior and Agriculture in November 1979: Challis (Idaho); Modoc/Washoe (California/Nevada); and East Pioneer (Montana). These programs involve all or most of the ranches formally designated in a BLM resource planning area. Each program has a formal steering group made up of area ranchers and representatives of state and federal agencies.<sup>302</sup> The steering groups operate much like Nevada's CRMP groups, resolving conflicts and integrating the planning and management efforts of the various agencies involved when land ownership is intermingled.<sup>303</sup> Two other programs, Tonopah (Nevada) and Randolph (Utah), have federal endorsement but are not formally designated.<sup>304</sup>

In Arizona, New Mexico, and Oregon the BLM has created at least fifteen individual stewardship programs, each designating a single

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297. L. Wilson & F. Lundberg, *supra* note 271, at 19-37.

298. 43 U.S.C. §§ 1901-1908 (1982).

299. The statute authorizes the Secretaries of the Interior and Agriculture to develop experimental programs on rangelands that are representative of a broad spectrum of range conditions and forage values. These programs provide incentives to holders of grazing permits and leases whose stewardship results in improved range conditions. *Id.* § 1908(a)(2). The programs also are required to explore innovative grazing management policies with the goal of providing incentives to improve range conditions. *Id.* One such incentive is to allow grazing permittees to pay up to 50% of their grazing fees in the form of range improvement costs. *Id.* § 1908(a)(2).

300. *Id.* § 1908(a)(1). "The key to interpretation . . . is provided in the Conference Committee Report [which notes that] [a]mong the experimental programs suggested are management projects that are designed to foster better Federal-State-Private cooperation and coordination." L. Wilson & F. Lundberg, *supra* note 271, at 21.

301. *See id.* § 1908.

302. BLM, DEP'T OF THE INTERIOR & FOREST SERV., DEP'T OF AGRIC., EXPERIMENTAL STEWARDSHIP PROGRAM: REPORT TO CONGRESS 15, 44-45 (1986) [hereinafter STEWARDSHIP PROGRAM]; *see* Council of State Planning, *supra* note 265, at 12 (describing the Challis program).

303. STEWARDSHIP PROGRAM, *supra* note 302, at 27.

304. *Id.* at 15.



ranch—rather than all ranches in the resource planning area—for a regulatory approach similar to the experimental stewardship program.<sup>305</sup> Single ranchers, or groups of ranchers who share allotments, are invited to submit proposed management plans to the BLM. The final proposal must be reviewed and recommended by the local steering group, which considers the proposed plan's impact on other users and which may propose amendments to alleviate objections.<sup>306</sup>

## 2. *State and Local Involvement in Project Review and Mitigation*

The preceding sections have described steps that state and local governments have taken to influence the planning and management of federal lands, as well as some of the cooperative management programs currently evolving. Generally, these strategies are directed toward two types of federal decisions: (1) federal policy decisions that, in turn, will affect the location and form of future developments on federal land; and (2) day-to-day management decisions regarding grazing allocations or recreation access. State and local participation in these matters can be very influential; nevertheless, participation is not by itself sufficient. State and local governments must also deal with the consequences of federal approval of specific development projects that are located on federal land.

In recent years, the most controversial developments on federal land have been large recreation projects and mineral developments. These projects typically are promoted, planned, and undertaken by private operators acting under the authority of federal leases or permits. Because these projects have long-run land use consequences and create substantial offsite socioeconomic impacts, they raise significant problems for state and, particularly, local governments. The potential for impacts of federal land projects spilling over to nonfederal lands is higher, of course, where land ownership is mixed—a situation typical of many Western areas. Moreover, these large-scale projects have the potential to transform the social and economic character of a region.

State and local participation in the planning and decisionmaking process is essential because federal managers have little authority to deal with offsite impacts, particularly when the impacts are socioeconomic

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305. *Id.* at 18-19.

306. The experimental stewardship program reserves to the BLM authority to prescribe livestock practices on public lands. This must be distinguished from an additional BLM program that further entrusted range management to individual ranchers through cooperative management agreements. *See* 43 C.F.R. § 4120.1 (1987). This program was struck down as an improper delegation of administrative authority. *NRDC v. Hodel*, 618 F. Supp. 848, 868-71 (E.D. Cal. 1985). The court stated that with these management agreements, BLM "unlawfully abdicated" the Secretary's statutory duty to allocate livestock on the grazing lands and failed to retain necessary governmental authority to enforce overgrazing prohibitions. 618 F. Supp. at 853.

rather than environmental. Certain offsite impacts are especially important to local governments: induced population growth; demand for expanded public services; dislocation and growth in the local economy; and changes in water and air quality. But the Forest Service, for example, has authority only to consider the protection of onsite surface resources affected by mineral development on national forest lands. The Forest Service and the BLM may mention—but rarely treat in depth—offsite socioeconomic impacts in their project environmental impact statements, but they take no responsibility for mitigating these effects or for modifying the proposed project to reduce the impacts.<sup>307</sup>

This section describes strategies used by Western states and local governments to document and manage the impacts of major federally approved developments. These strategies generally fall into two categories: (1) programs that bring state and local policies and priorities into play before a federal permit decision is made, including situations where the state and the federal agency have joint permitting responsibilities requiring especially close cooperation; and (2) programs that seek to mitigate effects of federal development decisions after those decisions are made.

*a. Coordination of Local, State, and Federal Project Review*

Where approval of large-scale projects involves many agencies, some states coordinate the review process. This may occur even for projects on federal lands. The Colorado joint review process<sup>308</sup> is a voluntary intergovernmental program that coordinates review of major developments in Colorado, including energy and mineral resource development projects. The joint review process addresses three problems in permit administration for large-scale projects: (1) the proliferation of required permits and the interagency conflicts that often ensue; (2) the belated and generally adversarial nature of public participation in the permit process; and (3) the reluctance of major proponents of the project to disclose fully project information early in the review process.<sup>309</sup> The joint review process is intended to improve permit administration by encouraging agency

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307. Although BLM includes socioeconomic impacts in its environmental statements, the Bureau's position that state and local governments have responsibility for socioeconomic impact mitigation has been documented repeatedly. See, e.g., GEN. ACCOUNTING OFFICE, ROCKY MOUNTAIN ENERGY RESOURCE DEVELOPMENT: STATUS, POTENTIAL, AND SOCIO-ECONOMIC ISSUES vii, 57 (1977) (placing responsibility for mitigating these impacts on the states). See J. Jørgensen, *Social Impact Assessments and Energy Developments*, 1 POL'Y STUD. REV. 70 (1981), for a challenge to the adequacy of social impact assessments and suggestions for improving them.

308. See COLORADO DEP'T NATURAL RESOURCES, COLORADO'S JOINT REVIEW PROCESS FOR MAJOR ENERGY AND MINERAL RESOURCE DEVELOPMENT PROJECTS (1980).

309. *Id.* at 2-4; Biddle, Livermore & Poe, *Amax Inc. and the Colorado Joint Review Process*, in CORPORATE DISPUTE MANAGEMENT 1982, at 275, 276 (Center for Public Resources, 1982).

representatives to agree on a project decision schedule.<sup>310</sup>

The Colorado joint review process is voluntary and does not modify or override existing laws and regulations.<sup>311</sup> Despite its limitations, however, the process can be successful in bringing state and local concerns to the attention of federal decisionmakers. First, contact among agency representatives increases understanding of issues and enhances respect for state and local interests. Second, structured review procedures help uncover data relevant to areas in which the agencies have legal control. Often, local governments initially do not have the technical support or administrative guile to bargain effectively with either project proponents or federal agencies. Participation on the review team improves their position by giving them the data and exposing them to the issues. Review process officials state that in their view a "big part" of their role as facilitators is to assist local governments in negotiating with the federal land agencies.<sup>312</sup> Third, state and local agencies use the review process to bargain for concessions from the developer.

At its inception, the Colorado review process was used for major energy proposals, such as coal and oil shale projects. With the slackening of Western energy developments, the joint review teams have turned their attention to smaller projects, including ski area expansion in national forests and multijurisdictional projects in urban areas.<sup>313</sup> Despite the shift in focus, the review process is firmly in place as a procedure for coordinating project review and permitting.<sup>314</sup>

Under some circumstances, states may join federal land agencies in joint environmental review of projects, exercising permitting power along with the federal agency. Among the more important examples are regulation of surface mining and permitting of power plants.<sup>315</sup> State and

310. COLORADO DEP'T NATURAL RESOURCES, *supra* note 308, at 1. The joint review process proceeds in three stages: (1) determination as to whether the project qualifies for joint review process; (2) formal organization of a joint review team and preparation of a project decision schedule; and (3) implementation of the decision schedule, including coordination of required studies. Biddle, Livermore & Poe, *supra* note 309, at 279-82.

311. "The Joint Review Process team is unique because it has no legal authority or power to influence the activities of individual agencies or the project developer . . . . The team thus acts as a facilitator but not a decision-making entity." Biddle, Livermore & Poe, *supra* note 309, at 282.

312. Interview with Adam Poe, Program Director, Joint Review Process, and Steve Norris, Staff Member, Colorado Dep't of Natural Resources, in Denver, Colorado (July 20, 1982).

313. Interview with Michael McQue, Assistant Director, Joint Review Process, Colorado Dep't of Natural Resources, in Denver, Colorado (May 7, 1987).

314. Several states have instituted coordinated review programs based on the Colorado model. Utah, for example, has a statutorily-based Resource Development Coordinating Committee with authority to coordinate the review process for natural resource development projects. UTAH CODE ANN. §§ 63-28A-1 to 63-28A-7 (1986 & Supp. 1988).

315. State permitting of surface mining is congressionally authorized by the state primacy provisions of SMCRA. See 30 U.S.C. § 1252(a) (1982). Joint permitting of power plants and utility rights-of-way on federal lands occurs in the context of state authority over power supply and distribution.

local governments also can gain leverage over projects on federal lands if the projects depend on permits for offsite activities that are regulated by the states or localities.<sup>316</sup>

The federal Surface Mining Control and Reclamation Act offers incentives for states to develop the legal and technical capability to evaluate and regulate surface mining activity.<sup>317</sup> State regulatory programs that meet the standards of the Act can assume primary responsibility for implementing surface mining regulations on all lands throughout the state, including federal lands.<sup>318</sup>

Montana offers an excellent example of aggressive and effective state actions that maximize state influence over minerals development on federal lands. The Department of State Lands reviews and controls minerals development through two laws: the Montana Strip and Underground Mine Siting Act<sup>319</sup> and the Montana Environmental Policy Act (MEPA).<sup>320</sup> The Siting Act provides state authority to "review new strip-mine and new underground-mine site locations and reclamation plans and either approve or disapprove such locations and plans."<sup>321</sup> MEPA enhances review capabilities by establishing a comprehensive process for evaluating the environmental effects of proposed major developments. For mineral projects, MEPA review and the permitting processes are integrated.<sup>322</sup>

When a proposed mining project in Montana requires federal and state permission, the agencies conduct joint impact assessments. Joint assessments simplify review procedures and encourage sharing of federal and state expertise. Typically, the environmental review is directed by a state/federal task force, with the Department of State Lands as the lead agency.<sup>323</sup> At the permit stage, the state and federal agencies schedule joint permit meetings to coordinate their requirements and

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316. These situations are discussed *infra* notes 328-48 and accompanying text.

317. 30 U.S.C. § 1295 (1982).

318. *Id.* § 1273(c).

319. MONT. CODE ANN. §§ 82-4-101 to 82-4-142 (1987).

320. MONT. CODE ANN. §§ 75-1-101 to 75-1-324 (1987) (MEPA). MEPA's project review is similar to the NEPA process. *Cf.* 42 U.S.C. §§ 4321, 4331-4335 (1982). The State Lands Division is designated the lead agency so that Montana can charge a significant portion of project assessment costs to the applicant. *See* MONT. CODE ANN. § 75-1-206 (1987).

321. MONT. CODE ANN. § 82-4-102(2)(a) (1987).

322. *See id.* § 82-4-227.

323. Joint review is applicable to both surface and underground mining on federal lands. The Department of State Lands (DSL) has a great deal of influence over permitting decisions involving federal minerals for several reasons. First, surface mines require state permits even if they are on public land because the state has primary responsibility for administering SM-CRA. 30 U.S.C. §§ 1201(f), 1252(a)(1) (1982). Second, state permits are often required for underground mines, even when located on federal land, to use adjacent private or state lands for processing sites, road access, or spoils piles. Because of the need for state permits, DSL can negotiate with federal mineral operators from a position of strength.

stipulations.<sup>324</sup>

Although the process offers a workable model for exercising cooperative state and federal authority over minerals operations on federal lands, it suffers from two serious limitations. First, the state/federal working teams provide limited opportunity for local government representatives to raise issues of local concern. Local governments are invited to participate but are not given legal authority to condition leases or mine plans.<sup>325</sup> The Department of State Lands does not consider itself an advocate for local interests.<sup>326</sup>

The second limitation is related to the first. Under Montana statutes, the Department of State Lands is empowered to condition mineral developments only with respect to certain "core" environmental matters, such as air and water quality, reclamation, and nuisance effects.<sup>327</sup> It cannot deny permission to develop on the basis of secondary impacts, such as the strain on local public services from large-scale minerals projects. These issues, often of intense local concern, must be addressed in other ways, such as through the permitting of related offsite activities or through programs that finance measures to mitigate the impacts.

#### *b. Negotiated Agreements with Federal Resource Developers*

In most states, land use regulation is conducted, if at all, at the local level. Numerous local governments throughout the West have successfully negotiated mitigation agreements with federal resource developers. This fact emphatically counters the legal argument that state regulatory powers are substantially preempted by federal authority on the public lands.<sup>328</sup> Local governments are able to negotiate with federal land de-

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324. The procedure usually follows eight steps: (1) application for an exploration permit, which is reviewed by both the BLM and DSL; (2) preparation of an agreement between the applicant and DSL on a review process for the mining proposal; (3) establishment of a federal/state task force to direct the review; (4) task force "scoping" of issues raised in the applicant's conceptual plan and, after hearings, adoption of a formal plan of study; (5) preparation of technical impact studies; (6) preparation of the draft EIS, typically written by DSL as the lead agency, with federal cooperation; (7) circulation of the draft EIS, review of comments, and preparation of the final EIS by cooperating state and federal agencies; and (8) preparation of federal and state permits for the project after joint permit meetings to coordinate the requirements and stipulations. Interview with Ralph Driear, Environmental Administrator, Department of State Lands, in Helena, Montana (July 27, 1982).

325. *Id.*

326. *Id.* Mr. Driear stated: "This office does not see its role as sticking up for local governments."

327. MONT. CODE ANN. § 84-2-227 (1987).

328. The recent Supreme Court decision in *California Coastal Comm'n v. Granite Rock Co.*, 107 S. Ct. 1419 (1987), *see infra* text accompanying notes 483-33, affirms that under certain circumstances states may regulate the environmental effects of activities on federal lands; but overall the extent to which state or local land use or health and safety regulations may be applied remains an open question. The consistency provisions in FLPMA state that federal land use plans must comply with state and local pollution regulations, 43 U.S.C. § 1712(c)(8) (Supp. IV 1986), and that rights-of-way leased by BLM or the Forest Service

velopers through the leverage afforded by related offsite permits or through the cooperation of state and federal land managers who recognize the interdependence of federal and nonfederal lands. For example, because many large development projects require transportation and transmission corridors across private land that is regulated by counties or cities, local ordinances controlling those uses can have a powerful effect on uses of federal land.

Being on good terms with local officials is often important to public land managers. Frequently, federal land agencies tacitly or explicitly assist local governments in negotiating agreements that modify major projects to accommodate local concerns. One BLM official, observing that in Colorado the agency allows local governments to negotiate conditions on federal developments, stated, "around here, nobody raises the *Ventura County* case."<sup>329</sup> Often, conditions for local assistance will not appear on the face of a lease or permit but will be established by an informal understanding among the concerned parties. The BLM may simply wait until the operator and the local government have reached an agreement on permit conditions and mitigation measures before issuing the permit or lease.<sup>330</sup>

A number of counties have formalized their positions with BLM on these issues through MOU's regarding the application of county ordinances to federal projects. For example, the Colorado Director of BLM has formally agreed to enforce all Rio Blanco County land use controls, except zoning requirements, against federal lessees within the county.<sup>331</sup> Controls subject to this agreement include not only pollution control ordinances, but also building codes, solid waste disposal restrictions, and subdivision regulations.<sup>332</sup>

Many of the mitigation measures sought by local governments simply seek to meet the public service demands of rapid growth and to avoid long-term financial burdens of growth-induced investments during periods of low revenue. When states are unable or unwilling to control the actual permit process for federal resource developments, they can effectively soften the effects of major federal projects by providing impact

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must comply with stricter state health, safety, environmental protection, siting, and construction standards. *Id.* § 1765(a)(iv).

329. Interview with Bob Moore, BLM Assistant State Director, in Denver, Colorado (July 19, 1982). In *Ventura County*, the Ninth Circuit held that state subdivisions may not apply local regulations which conflict with achievement of congressionally approved use of federal lands. *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1086 (9th Cir. 1979); see *infra* notes 451-61 and accompanying text.

330. Some in the BLM refer to this technique as "desk drawer" cooperation, because a resource user's federal application may simply sit in a federal official's desk until the applicant reaches an accord with state and local governments. Moore interview, *supra* note 329.

331. Memorandum of Understanding Between Board of County Commissioners, Rio Blanco County, Colorado, and State Director, BLM (July 5, 1977).

332. *Id.*

assistance. The best known examples are the minerals severance tax impact funds and trust funds.<sup>333</sup> A severance tax, which may be applied against resources extracted by federal lessees, is assessed on the removal of a natural product such as oil, gas, minerals, fish, or timber.<sup>334</sup> The main purpose of a severance tax is "to guarantee that the costs of energy development to affected communities are a part of the cost of consuming the resource."<sup>335</sup> Nationwide, severance taxes represent only three percent of state revenues. In several of the public land states, however, tax collections on natural resources are the second largest source of revenue.<sup>336</sup> Some states, such as Montana and Colorado, have set aside a significant portion of severance tax revenues for aid to local communities affected by major minerals projects, including those located on federal land.<sup>337</sup>

Other officials have bargained with developers for direct payments to mitigate major impacts of federal resource development. One instructive example of mitigation exactions arose in Rio Blanco County, Colorado.<sup>338</sup> In the early 1980's, Western Fuels-Utah, Inc. proposed developing a large mine-mouth electric generating facility in Rio Blanco County. Because the mine would be located in Rio Blanco County and the generating facility across the state border in Utah, the county would be unable to tax the generating plant.<sup>339</sup> Concerned over the potential

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333. Western states receive half of the revenues collected from mineral leasing and production on federal lands. 30 U.S.C. § 191 (1985). There is no statutory requirement that states actually channel these funds to the purpose intended under federal receipt sharing law, namely, mineral impact assistance. However, Colorado, Montana, New Mexico, North Dakota, Utah, and Wyoming all have programs that do apply the revenues to impact assistance. M. Zeller, *The Management of Mineral Revenues in the Western Energy Producing States* 34-75 (1982) (prepared for the Council of State Planning Agencies).

334. The severance tax is measured by value or quantity of the products removed or sold. See BUREAU OF THE CENSUS, DEP'T OF COM., *STATE GOVERNMENT FINANCES IN 1981*, GF 81, No. 3, at 78 (1981).

335. L. Brumer, *Investing Natural Resource Revenues: Options for the States* 2 (paper presented at Western Conference of the Council of State Governments, February 1982).

336. Montana and New Mexico are prominent examples; severance taxes are the primary source of revenue in Wyoming. See COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES* 265-66 (1986).

337. In Montana, at least 50% of the revenue received from the severance tax must be put in a perpetual trust. MONT. CONST. art IC, § 5. Much of the remainder (37.5% of the total) is deposited into accounts to fund education and to mitigate local impacts of energy projects. MONT. CODE ANN. § 15-35-108 (1987). Wyoming does not have a specialized program for awarding grants to affected local communities but divides the receipts from the severance tax among the general fund, a capital facilities fund, and the highway and water development accounts, WYO. STAT. § 39-6-305 (Michie 1987); many of these funds will benefit areas most affected by federal energy developments. Colorado has established a local government severance tax fund to channel assistance to affected local communities. COLO. REV. STAT. § 39-29-110 (1982 & Supp. 1987).

338. Interview with DeWitt John, Coordinator of State-Federal Relations, State of Colorado, in Denver, Colorado (July 19, 1982).

339. *Id.*

physical and social impacts in Rio Blanco, the county challenged the Western Fuels-Utah proposal in several ways: (1) it contested the adequacy of an EIS prepared by the BLM on the rights-of-way for access and transmission corridors; (2) it claimed the State Department of Natural Resources should intervene on the county's behalf; and (3) it threatened to postpone construction on county lands through land use regulation if Western Fuels-Utah refused to negotiate.<sup>340</sup>

Western Fuels-Utah finally agreed to provide mitigation measures estimated to cost between \$15 million and \$20 million, based on the principle that the developer should pay the full cost of the project, and that service and facility costs to the existing residents should not be affected.<sup>341</sup> Thus, for example, Western Fuels-Utah agreed to finance the capital expenses associated with the project itself and with related population change.<sup>342</sup>

There is a third recourse for state or local governments seeking ways to satisfy the spinoff costs of federal resource development. Rosebud County, Montana, is the site of the Colstrip mine and power facilities, a complex which, over ten years (1972-82), boosted the county's population by 150%. Much of the development necessary to support the projects and the population growth was built by the coal companies. To finance the public infrastructure serving a new residential and commercial area, the county created a Rural Special Improvement District and carefully negotiated an agreement with the development company.<sup>343</sup> Improvements were financed by a combination of sources, including prepayment of property taxes from the development company. Under Montana law, counties may enter into agreements with major new industrial facilities to prepay property taxes in the form of direct payments and guarantees to cover the costs of the impact of development.<sup>344</sup> To supplement a substantial impact assistance grant from state severance tax revenues, the Improvement District issued bonds for construction of infrastructure. The bonds are guaranteed by the development company. They will be paid off by property tax revenues on the property in the district, but if overall property taxes in the district are not sufficient to repay the bonds, the company must pay.

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340. *Id.*

341. A full description of the parties and terms to the agreement may be found in Barnhill & Sawaya-Barnes, *supra* note 172, at 259-61.

342. The 1981 Western Fuels-Utah, Inc. agreement was widely criticized outside of Rio Blanco County. The agreement, however, has spared Rio Blanco residents some of the costs of the recent collapse of oil shale development. John interview, *supra* note 338. As other local governments have suffered the consequences of oil shale shutdowns, such arrangements now seem prudent.

343. Interview with Ed McCaffree, County Commissioner for Rosebud County, in Forsyth, Montana (July 29, 1982).

344. MONT. CODE ANN. § 15-16-20 (1987).



The county and the development company were able to enter into this agreement in part because of that particular Montana law. The company's cash contribution to the arrangement is considered an advance payment on future property taxes. The company will not pay property taxes for a few years, until the credit is worked down.<sup>345</sup> Because the company cannot be refunded the advance payments if the coal project closes, the county is protected from the fiscal consequences of a shut-down. This mechanism differs from the agreement reached in Rio Blanco County in that the Colstrip developer received credit for the impact assistance paid in advance. The objectives, however, are the same. As a Rosebud County Commissioner put it, "The general county taxpayer hasn't paid a dime for these improvements."<sup>346</sup>

Whether financed by developers directly or through state impact funds, mitigation agreements should include measures designed to improve the capacity of local governments to predict the consequences of developments and to minimize those consequences.<sup>347</sup> On the other hand, local action is not always sufficient. The negotiation of impact mitigation agreements is a political process, and successful local governments often enlist the aid of supporters at the state and federal levels. The town of De Becque, Colorado, for example, asked the BLM to put specific social and economic conditions in a BLM permit required by a Chevron oil shale project. Because this decision rested with the BLM Director and the Secretary of the Interior, Governor Lamm of Colorado urged the BLM to require impact mitigation programs as a condition for obtaining oil shale leases. The state was largely successful in the effort.<sup>348</sup>

#### D. *Lessons from Ten Years of Cooperative Experience*

Extensive field research throughout the West has revealed an impressive array of techniques that have been employed by state, local, and federal resource managers to manage public domain resources cooperatively. These techniques take advantage of the opportunities for state participation created by federal law, tradition, political pressure, and the administrative realities of public lands management. Although the local government activities described here have had widespread application

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345. *Id.*

346. McCaffree interview, *supra* note 343.

347. Using impact assistance funds, Garfield County, Colorado, hired a professional planning staff and appointed an Impact Coordinator to assist in developing data, applying for aid, and bargaining for impact assistance. Interview with Lee Merkel, Impact Coordinator for Garfield County, in Glenwood Springs, Colorado (July 20, 1982). Jackson County, Colorado improved its capacity to negotiate with federal agencies and minerals operators by pressing for funds for data assembly, mapping, and planning; the funds were provided by Amoco, largely at the insistence of state officials. Moore interview, *supra* note 329.

348. John interview, *supra* note 338.

and suggest many opportunities for shaping and controlling major projects on federal lands, they are not fully representative of the situation throughout the West. As a practical matter, states and counties differ enormously in their sophistication and aggressiveness toward major projects. Some have had the opportunity to learn from past experiences: most observers have stated that the oil shale counties have done a far better job in protecting their citizens, environments, and fiscal resources from the most recent oil shale boom than they did in previous "boom-bust" cycles.

Much of the urgency of state and local efforts to intervene in federal land management has subsided with the 1980's oil bust, the dismantling of synthetic fuels projects, and the retreat of Western coal prices. The experience of the energy crisis era, on the other hand, teaches the importance of cooperative planning and management programs. Continuing state and local participation in BLM and national forest planning and management decisions,<sup>349</sup> though in some ways less dramatic than the regional coal team, oil shale and EMB battles of the energy crisis days, demonstrates that state and local capabilities and expectations have been enhanced permanently.

The future will require more measured, but steady, federal/state collaboration. As federal capabilities erode in the budget crisis era,<sup>350</sup> these cooperative planning and management experiences may be even more important to environmental protection programs than to timely resource development.

### III

#### JUDICIAL FEDERALISM AND THE PUBLIC LANDS

In this Part we consider judicial approaches to federalism and the public lands. Controversies over the use and regulation of public domain

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349. See *supra* notes 228-56 and accompanying text. Continued state and local government influence will not, however, be without cost, nor will it be easy to achieve politically. To strengthen this cooperation, state and local governments must become involved early in the federal planning process. Although there is no specific requirement for consistency in Forest Service planning regulations, and although the formal provision for challenging BLM planning on consistency grounds applies only at the initial stages, state and local governments should raise consistency issues at the beginning of the planning cycle. The likelihood of resolving consistency problems will be greater if done through informal consultation earlier in the process.

Furthermore, state and local governments must recognize that they can neither bargain nor litigate for federal consistency with local policies unless they provide the federal agency with a clear statement of priorities.

Finally, to take advantage of the consultation and collaboration purposes of federal land laws, states need to collaborate with local governments. Federal land planning most directly connects with county land use and resource planning. To represent and defend the interests of their residents most effectively, these counties need sound enabling legislation, financial support, and technical assistance.

350. See 1988 *Abstract*, *supra* note 164, at 242-93.

lands were central in the formation of the federal system of government<sup>351</sup> and continue to this day. Throughout the nation's history, conflicting state and national interests in the public lands have been reconciled primarily within the political and administrative systems rather than in the courts.<sup>352</sup> Nevertheless, judicial interpretations of the contours of state and federal authorities are critical. Beyond their direct legal significance, judicial definitions of federalism play an important role in the larger political conflicts over resource policy, often defining the context and vocabulary of resource disputes.<sup>353</sup>

Our discussion proceeds in five parts. It first reviews the constitutional basis for federal authority over the public lands. It begins with an analysis of the "equal footing" and "proprietary-only" theories, 19th century doctrines of constitutional interpretation<sup>354</sup> that were revived by the Sagebrush Rebels as fundamental checks on federal authority. The Supreme Court has now clearly rejected these doctrines, holding that Congress' authority to manage the federal public lands is virtually without limit. As a result, courts address federal/state conflicts in the public lands context—as in other fields of concurrent authority—chiefly through the framework of preemption analysis. Accordingly, the second part of this section discusses the congressional and judicial choices that govern preemption decisions. It introduces Supreme Court preemption doctrine generally and discusses the range of options available to Congress for state/federal relations in the field of natural resources management.

The latter parts of this section focus on public lands preemption

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351. In fact, the existence of unsettled public lands and extensive claims to them played a key role in the original definition of the federal bargain and in its subsequent implementation. Seven of the original states claimed vast areas beyond their borders, which they refused to cede during the debate on the Articles of Confederation, but then relinquished during and after the transition to the federal Constitution. Maryland refused to accede to the Articles of Confederation until Virginia indicated that it would cede its Western claims. P. GATES, *supra* note 23, at 49-57.

352. Indeed, the preceding two sections of this Article have demonstrated that the accommodations resulting from the Sagebrush Rebellion have been nearly exclusively political and administrative, rather than judicial, in origin.

353. Litigation and the formal constitutional aspects of resource federalism have been an important part of the growing assertiveness of Western states. Moreover, manipulation of the legal framework through litigation is often an important part of a political strategy. For example, the "Sagebrush Rebellion Case," Nevada *ex rel.* Bd. of Agric. v. United States, 512 F. Supp. 166 (D. Nev. 1981), *aff'd*, 699 F.2d 486 (9th Cir. 1983), by which Nevada sought to force a return of federal lands to the state, was not victorious in the courts: the district court held that "[n]o state legislature may interfere with Congress's power over the public domain." *Id.* at 172. It would be an error, however, to consider the effort a failure. The suit focused considerable analytic attention on the problems of the federal lands states and provided an aura of legitimacy for state political action over a sustained period in the dispute. See *supra* notes 88-98 and accompanying text.

354. The "equal footing" doctrine emanates not from the Constitution, of course, but from a 1780 declaration of the Confederated Congress. See *infra* note 366.

cases in the courts. The third part places public lands preemption analysis in historical context, observing that the situation facing regulators and courts today is the result of shifts in federal lands policies, state programs, and judicial doctrines. This is followed by a review of the major recent cases, revealing that judicial decisions in this field are inconsistent in their approach to state regulation and state policy goals. The section concludes with an analysis of the Supreme Court's recent decision in *California Coastal Commission v. Granite Rock Co.*<sup>355</sup> and argues that this symbolic victory for concurrent regulation highlights the Court's lack of understanding of the administrative and legislative realities of public lands management.

### A. *The Sweeping Scope of Federal Authority*

The current view that the power of Congress over the public lands is virtually unlimited is a perception that has emerged only recently<sup>356</sup> and after prolonged debate. The evolution of public lands federalism and the changing judicial interpretation of the property clause occurred largely in response to fundamental shifts in federal intention towards the public domain. For most of the 18th and 19th centuries, it was presumed by all branches of government that the large-scale federal land holdings would be temporary, pending disposition to the states and private users. Toward the close of the 19th century, however, Congress gradually but radically altered public domain policy. After 120 years of emphasis on disposition of the Western lands, Congress began to formulate a policy of land retention. The courts scurried to accommodate well-established doctrine to this new departure.<sup>357</sup>

Two different clauses of the Constitution confer federal jurisdiction over federal land holdings, adding to the historical confusion over the extent of federal authority. In article I, the jurisdiction clause confers upon Congress the "power to exercise exclusive Legislation [over the District of Columbia and other] Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards and other needful Building."<sup>358</sup>

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355. 107 S. Ct. 1419 (1987).

356. In holding to this view, for example, *Kleppe v. New Mexico* relies on a line of cases beginning in 1940. 426 U.S. 529, 539 (1976), (citing, inter alia, *United States v. San Francisco*, 310 U.S. 16, 29 (1940)). The *Kleppe* holding is discussed *infra* notes 376-83 and accompanying text.

357. The clearest example of judicial "scurrying" in this context is the Supreme Court's discovery of water reservations implicit though unmentioned in land reservations. See *Winters v. United States*, 207 U.S. 564 (1908) (congressional reservation of lands for Indians implied that water was reserved to effectuate the purpose of reservation). Numerous other decisions have refined how these implicitly reserved rights are determined. See, e.g., *United States v. New Mexico*, 438 U.S. 696 (1978); Trelease, *Federal Reserved Water Rights Since the PLLRC*, 54 DEN. U.L. REV. 473, 475-78 (1977).

358. U.S. CONST. art. I, § 8, cl. 17.

The jurisdiction clause, however, reaches only that small portion of the public lands expressly transferred by states to the United States for exclusive federal purposes. These lands are commonly known as "enclaves."<sup>359</sup>

The vast majority of federally owned land remains in federal ownership following initial acquisition, having been reserved or withdrawn from entry and disposition by executive order<sup>360</sup> or by legislation.<sup>361</sup> The property clause of the Constitution grants federal authority over the retained public domain: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."<sup>362</sup>

Although courts have interpreted the authority conferred by the language of the property clause broadly, some analysts traditionally have argued that its scope was quite narrow and that it was intended to provide only transitional federal authority over public lands until the territories achieved statehood.<sup>363</sup> After statehood, according to this analysis, such federal land holdings were to be temporary, pending disposition of the land. Accordingly, federal authority was viewed as merely "proprietary" in nature—that is, the federal government had virtually the same status as any other landowner vis-a-vis the state. Nineteenth century cases, especially state court decisions, generally reflect this view of congressional policy. In an 1853 dispute over title to mineral resources, the California Supreme Court noted:

In reference to the ownership of the public lands, the United States only occupied the position of *any private proprietor*, with the exception of an express exemption from State taxation. The mines of gold and silver on the public lands are as much the property of this State, by virtue of her sovereignty, as are similar mines in the lands of private citizens. She has, therefore, solely the right to authorize them to be worked; to pass laws

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359. These "enclaves" include, for example, post offices and military bases. G. COGGINS & C. WILKINSON, *supra* note 30, at 144-45.

360. For a discussion of executive withdrawal authority, see Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 282-90 (1982). Major executive withdrawals include President Theodore Roosevelt's withdrawal of 150 million acres as forest reserves under the General Revisions Act of 1891 (along with 66 million acres of coal lands), and President Taft's withdrawal of 3 million acres of petroleum lands in 1909. *Id.* at 290 n.31.

361. See, e.g., 16 U.S.C. §§ 161-181 (1982) (creating Glacier National Park).

362. U.S. CONST. art. IV, § 3, cl. 2.

363. Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 7-11 (1980). The argument is based upon the Framers' presumed intent to dispose of federal lands in the newly formed states. *Id.* An excellent historical and legal analysis is contained in Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976); see also Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 726 (1981) ("Recent legislation that allows the Congress to retain, manage, and control the public lands represents the culmination of errors in this field of law and is an impermissible extension of federal power over an area reserved to the states under the Constitution.").

for their regulation; to license miners; and to affix such terms and conditions as she may deem proper, to the freedom of their use.<sup>364</sup>

The "proprietary interest" theory is based upon two lines of argument, both rejected in modern decisions.<sup>365</sup> The first argument is that continued federal sovereignty over public domain lands frustrates the Framers' intent that new states enter the Union on an "equal footing" with the original states.<sup>366</sup> Since the early 1800's, representatives of Western states have argued that federal retention of public lands violates those early agreements and denies equal footing to the Western states by interfering with state sovereignty:<sup>367</sup> where federal land holdings are extensive, they impede states' political and economic self-determination.<sup>368</sup>

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364. *Hicks v. Bell*, 3 Cal. 219, 227 (1853) (emphasis added). "Contrary language began to appear in Supreme Court cases." G. COGGINS & C. WILKINSON, *supra* note 30, at 193 (citing, *inter alia*, *Camfield v. United States*, 167 U.S. 518 (1897)).

365. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976), discussed in detail *infra* notes 376-83 and accompanying text.

366. See J. BARRETT, *EVOLUTION OF THE ORDINANCE OF 1787 WITH AN ACCOUNT OF THE EARLIER PLANS FOR THE GOVERNMENT OF THE NORTHWEST TERRITORY* 59-60 (1891). In fact, the equal footing doctrine predates the Constitution, having been established initially by resolution of the Confederated Congress in 1780. It was the basis of initial land cessions to the central government. *Id.* at 20-21. The doctrine was explicitly confirmed in the General Land Ordinance of 1787, one of the most significant acts of Congress prior to the adoption of the Constitution. *United States, An Ordinance for The Government of The Territory of the United States Northwest of the River Ohio* (July 13, 1787), 32 J. CONTINENTAL CONG. 334, 342 (1910). Support for the doctrine was reiterated in the General Land Ordinance of 1789, one of the first acts of Congress under the new Constitution. *Fairfax, Interstate Bargaining*, *supra* note 23, at 80-81.

367. *Leshy*, *supra* note 10, at 320. Seven of the original colonies claimed "western reserve" lands. These claims were not inconsequential: Virginia claimed 164 million acres; Georgia, 94 million; North Carolina, 58 million. P. GATES, *supra* note 23, at 49-50, 57. Control over those lands was a major issue during the American Revolution, during the debate on the Articles of Confederation, and during the early days of the federal Constitution. See T. ABERNETHY, *supra* note 23, at 242. Under the Articles, the central government had no control of Western lands and "could not interfere in the matter of state boundaries except through an elaborate system of arbitration." *Id.* at 365. The Articles of Confederation were a victory for what were known as "the large states" (those with extensive Western reserves) over "the small states." See M. JENSEN, *supra* note 23, at 231.

Responding to a growing crisis over how and when Western lands should be ceded, the Confederated Congress, in October 1780, enunciated principles that controlled federal land policy for over 120 years. The document made three basic commitments: (1) that the lands ceded by the states "shall be disposed of for common benefit of the United States"; (2) that they "shall be settled and formed into distinct republican states"; and (3) that the lands shall become new states, which shall "become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states." On that basis, the land-claiming states began ceding their Western territories to the confederation, and the acquisition of the public domain was begun. Onuf, *Toward Federalism*, *supra* note 23, at 353; see Bestor, *Constitutionalism and the Settlement of the West: The Attainment of Consensus, 1754-1784*, in *THE AMERICAN TERRITORIAL SYSTEM* (G. Bloom ed. 1973).

368. See, e.g., LEGISLATIVE COUNSEL BUREAU, STATE OF NEVADA, STATE SOVEREIGNTY AS IMPAIRED BY FEDERAL OWNERSHIP OF LAND, Bull. No. 82-1 (Jan. 1982) (claiming that such holdings impede a state's political and economic sovereignty).

Although the Sagebrush Rebels argued that the inequality among the states with respect to federal landholdings was unconstitutional, some historians have argued that complete

Endorsement of the equal footing argument can be found in early Supreme Court cases. Notable is *Pollard's Lessee v. Hagan*,<sup>369</sup> which held that Alabama has the same rights to land within its borders as Georgia had before ceding that land to the United States.<sup>370</sup> Although *Pollard's Lessee* remains good law only with respect to land beneath onshore navigable water,<sup>371</sup> some recent scholars have interpreted it more broadly. Engdahl, for example, has refurbished the 19th century position, arguing that the case stands for the general proposition that non-enclave land within new states is held by the federal government only as a trustee and that legal disposition to the states is necessary to accord equal footing to the newer states.<sup>372</sup> The Supreme Court, however, has rejected the application of *Pollard's Lessee* to the public lands generally.<sup>373</sup>

The second assertion underlying the "proprietary interest" argument is that the jurisdiction clause provides the exclusive authority for federal ownership of land within a newly entered state. Thus, federal non-enclave land could be held, if at all,<sup>374</sup> only in a proprietary, not a

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equality did not survive the transition from the Articles of Confederation to the Constitution. Both Jensen and Onuf argue that the shift from the Articles to the federal Constitution marks a fundamental shift in the role of the states in the union. Jensen states that the "Articles of Confederation were designed to prevent the central government from infringing upon the rights of the states, whereas the Constitution of 1787 was designed as a check upon the power of the states and the democracy that found expression within their bounds." M. JENSEN, *supra* note 23, at 226. Onuf concludes that "[b]y 1787, the need to establish effective control over the states was generally recognized," and he goes on to note that sectionalism and a tide of counter-revolutionary feeling had diminished Americans' faith in statehood. Thus, new states, "carved out of national territory with predetermined boundaries and with their public lands pledged to the United States," had become ideal. Onuf, *Statehood in Revolutionary America*, *supra* note 23, at 458-59; see also Sates, *The Nationalizing Influence of the Public Lands: Indiana*, in THIS LAND OF OURS: THE ACQUISITION AND DISPOSITION OF THE PUBLIC DOMAIN (Ind. Hist. Soc'y 1978).

369. 44 U.S. (3 How.) 212 (1845).

370. The Court stated:

Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding.

44 U.S. (3 How.) at 228-29 (emphasis added).

371. The *Pollard's Lessee* rule does not apply to offshore lands. R. CLARK, WATERS AND WATER RIGHTS 192-93 (1967).

372. Engdahl, *supra* note 363, at 293-94.

373. "[*Pollard's Lessee*] cannot be accepted as limiting the broad powers of the United States to regulate . . . government lands under Art. IV, § 3 of the Constitution." Arizona v. California, 373 U.S. 546, 597-98 (1962).

374. Some advocates still assert that the federal public domain belongs to the states as a matter of law, and cannot be retained by the federal government even in a proprietary capacity. See, e.g., Nevada ex rel. Bd. of Agric. v. United States, 572 F. Supp. 166, 168 (D. Nev. 1981), *aff'd*, 699 F.2d 486 (9th Cir. 1983) (Nevada asserted that the United States holds lands only for eventual disposal to the states); Complaint for Quiet Title, Stirling v. United States,

governmental capacity. Although this theme was dominant in the 19th century,<sup>375</sup> a unanimous Court rejected this assertion in 1976 in *Kleppe v. New Mexico*.<sup>376</sup> *Kleppe* held that the federal Wild Free-Roaming Horses and Burros Act<sup>377</sup> applied to wild burros on the federal public lands despite conflicts with New Mexico's Estray Law.<sup>378</sup> The Court rejected the notion that only the jurisdiction clause empowered the federal government to exercise sovereign authority over public lands in the Western states.<sup>379</sup>

Indeed, the Court effectively rejected the "proprietary-only" theory as well,<sup>380</sup> asserting broad scope to federal authority under the property clause: "[W]hile the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" <sup>381</sup> The Court deferred to Congress on the question whether the federal act was a "'needful' regulation 'respecting' the public lands"<sup>382</sup> and found that it necessarily preempted the conflicting state law under the supremacy clause.<sup>383</sup>

Some observers criticize *Kleppe* as an overbroad assertion of federal authority over the public lands, contending that it sharply departs from earlier decisions with a more accommodating tone towards state author-

No. 842481N(M) (S.D. Cal. filed Oct. 25, 1984) (private attorney general action seeking declaration of California's sole ownership of public lands within the state). California Assemblymember Stirling's action was ultimately dropped. See *supra* note 98.

375. See text accompanying *supra* note 364; see also Engdahl, *supra* note 363, at 289-96.

376. 426 U.S. 529, 531 (1976).

377. 16 U.S.C. §§ 1331-1340 (1970 & Supp. IV 1986).

378. N.M. STAT. ANN. § 47-14-1 (1966).

379. 426 U.S. at 541-43. "Appellees' claim confuses Congress' derivative legislative powers, which are not involved in this case, with its powers under the Property Clause." *Id.* at 541-42.

380. *Id.* at 538-39. "In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain." *Id.* at 540.

381. *Id.* at 539 (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

382. *Id.* at 536. "[D]eterminations under the Property Clause are entrusted primarily to the judgment of Congress." *Id.* The Court did not question whether the federal act was a "needful" exercise of congressional authority, indicating that it would not review the merits of a congressional determination to act under the property clause: "[W]e note that the evidence before Congress on this question was conflicting and that Congress weighed the evidence and made a judgment. What appellees ask is that we reweigh the evidence and substitute our judgment for that of Congress. This we must decline to do." *Id.* at 541 n.10 (citations omitted).

Judicial deference to congressional action under the property clause is hardly remarkable; it parallels doctrines of deference applied to social and economic legislation, the exercise of eminent domain, and other enumerated powers. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (both regarding the commerce clause); *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (regarding the spending power); *Berman v. Parker*, 348 U.S. 26 (1954) ("when the legislature has spoken [regarding eminent domain], the public interest has been declared in terms well-nigh conclusive.").

383. *Kleppe*, 426 U.S. at 543. Judicial application of the supremacy clause, U.S. CONST. art. VI, cl. 2, is discussed in the text accompanying *infra* notes 419-35.



ity to regulate public land.<sup>384</sup> In fact, the easiest way to explain the decision is that the conflict between the federal burro program and the state estray law is peculiarly clear: under the former, the burros are absolutely protected; under the latter, they would be rounded up and shot.<sup>385</sup>

Further, earlier 20th century decisions point toward *Kleppe*. For example, in the 1917 decision in *Utah Power & Light Co. v. United States*, the Court held that the federal government had exclusive authority to govern the acquisition of private rights in public article IV lands.<sup>386</sup> By 1928, the Court also had held that the federal government had authority to protect the public lands, as sovereign as well as proprietor, through legislation, by requiring permits, by punishing trespass, and by imposing measures designed to prevent waste.<sup>387</sup> These powers are certainly unavailable to mere private landowners.

The notion that the federal government was merely a proprietor of the public domain died with the general assumption that the federal government must or would dispose of all of the lands it held. The modern era of federal land reservation and management<sup>388</sup> may have begun as early as 1872 with the establishment of Yellowstone National Park,<sup>389</sup> but the disposition era did not end until the authorization of forest reser-

384. Most notably Engdahl, *supra* note 363, at 349-58.

385. G. COGGINS & C. WILKINSON, *supra* note 30, at 182.

386. The Court flatly rejected any notion of state authority:

The first position taken by the defendants is that their claims must be tested by the laws of the State in which the lands are situated rather than by legislation of Congress, and in support of this position they say that lands of the United States within a State, when not used or needed for a fort or other governmental purpose of the United States, are subject to the jurisdiction, powers and laws of the State in the same way and to the same extent as are similar lands of others. To this we cannot assent. Not only does the constitution (Art. IV, § 3, cl. 2) commit to Congress the power to "dispose of and make all needful rules and regulations respecting" and lands of the United States, but the settled course of litigation, congressional and state, and repeated decisions of this court have gone upon the theory that the power of congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire the rights in them.

*Utah Power & Light Co. v. United States*, 243 U.S. 389, 403-04 (1917).

387. *Hunt v. United States*, 278 U.S. 96 (1928); *McKelvey v. United States*, 260 U.S. 353 (1922).

388. This subdivision differs from a common framework which divides public domain history into three periods: acquisition, disposition, and retention (*see* G. COGGINS & C. WILKINSON, *supra* note 30, at 34-143), with the final slot subdivided into numerous subspecies of management. The tryptich is useful but sloppy. The primary problem is that the periods overlap. S. DANA & S. FAIRFAX, *supra* note 30, at 10. Fairfax ruminates again that, after observing the standard tryptich, it may be more useful to think of the declining role of the entrepreneur and the increasing role of federal plans and bureaucrats in *specific* resource areas to understand where we have been and where we are headed. *See* S. FAIRFAX & C. YALE, *supra* note 11, at 14-20. *See generally* G. STEPHENSON, *THE POLITICAL HISTORY OF THE PUBLIC LANDS FROM 1840 TO 1862* (1917).

389. 16 U.S.C. § 21 (1982) (codifying the Act of Mar. 1, 1872, 17 Stat. 32).

vations in 1891.<sup>390</sup> A conflict in doctrines evolved as congressional policies and public expectations regarding the public domain changed in a way that required a reinterpretation of federal authorities.

Thus, in the late 19th century, land retention rather than disposition began to dominate congressional policy. Accordingly, in judicial and legislative decisions, the broad grant of authority inherent in the property clause began to take precedence over the assumptions in the original state cessions. During the 20th century, with land reservations increasingly well-established,<sup>391</sup> the Supreme Court has rejected the proprietary-only concept with respect to the public lands generally. Given the continuing evolution of congressional public domain policy from disposition to retention to more active federal management, efforts of the Sagebrush Rebels to reinvigorate the proprietary-only doctrine were unlikely to succeed<sup>392</sup> in spite of growing scholarly attention to the ambiguities of the source of early congressional authority over the public domain.<sup>393</sup>

Nevertheless, the shift to retention policy was gradual, and the transition created many lingering problems. One major ongoing problem is the unequal concentration of federal holdings, hence unequal social and economic consequences of retained lands for the public lands states.<sup>394</sup> Another major problem is the continuing controversy over water rights potentially reserved by the federal government for the benefit of the retained lands.<sup>395</sup> As it became obvious that the federal government would retain extensive land holdings, the assumption that it had acquiesced entirely to the application of state water law to federal lands became an untenable barrier to the achievements of federal management goals. The responding shift in judicial policy gave rise both to continuing conflict over water management in Western states and to the equally conflict-

390. Act of Mar. 3, 1891, ch. 24, 26 Stat. 1103 (codified at 16 U.S.C. 471; *repealed*, Act of Oct. 21, 1976, 90 Stat. 2792 (1976)).

391. See Fairfax, *Interstate Bargaining*, *supra* note 23, at 82-84.

392. For example, the doctrine was flatly rejected in Nevada *ex rel. Bd. of Agric. v. United States*, 512 F. Supp. 166, 168-72 (D. Nev. 1981) (the court held that permanent retention of Western lands did not deny Western states equal footing).

393. See P. ONUF, *ORIGINS*, *supra* note 23, at 75-126 (describing the pre-constitutional origins of federal land ownership and the role of federal lands in defining the rights and boundaries of states); Engdahl, *supra* note 363, at 288-92; Fairfax, *Interstate Bargaining*, *supra* note 23, at 80-84 (describing the contradictory and occasionally confusing congressional acts that emerged from interest group bargaining over retained lands).

394. The standard view (with cautions given *supra* note 388) points out that the "disposition era" ended before the land in the Western states was fully disposed of, leaving a significant percentage of land in 12 Western states in federal hands: Alaska, 88%; Arizona, 44%; California, 46%; Colorado, 36%; Idaho, 65%; Montana, 29%; Nevada, 85%; New Mexico, 33%; Oregon, 52%; Utah, 63%; Washington, 28%; and Wyoming, 48%. This compares with federal ownership in older public domain states as follows: Iowa, 0.6%; Ohio, 1.3%; Michigan, 9.9%; Minnesota, 6.7%; Missouri, 4.9%; and Oklahoma, 3.6%. G. COGGINS & C. WILKINSON, *supra* note 30, at 13.

395. Numerous cases have "discovered" reserved water rights. See *supra* note 357.

ridden doctrine of federal reserved water rights.<sup>396</sup>

Although the courts have continued to vacillate in the resolution of water rights conflicts, they have been more decisive regarding public lands. As a sovereign land manager, not a mere proprietor or temporary landholder, the federal government was increasingly conceded entry into resource conservation and development fields previously occupied by the states.

## *B. Federal Preemption and the Scope of State Authority: Congressional Choices*

### *I. Introduction*

*Kleppe* is most often remembered for its assertion that Congress has sweeping potential article IV authority. Equally significant but less frequently noted are the decision's repeated reminders that "a state undoubtedly retains jurisdiction over federal lands within its territory"<sup>397</sup> absent state consent, cession, or federal assertions of exclusive jurisdiction.<sup>398</sup> Although *Kleppe* provided a focus for the complaints of Sagebrush Rebels, it was not a remarkable break in public lands federalism; the Court simply found that the New Mexico Estray Law was in direct conflict with the federal act and, therefore, was preempted pursuant to the supremacy clause of the Constitution.<sup>399</sup> The decision is significant primarily because, by clearly rejecting the proprietary interest doctrine, it moved the question of state authority over the federal public lands from direct interpretation of the jurisdiction and property clauses of the Constitution to application of preemption doctrine to federal statutes and agency actions governing the public lands. Thus, in the judicial sphere,

396. See MEYERS, TARLOCK, CORBRIDGE & GETCHES, WATER RESOURCE MANAGEMENT 771-91 (1988).

397. *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976).

398. "The Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands." *Id.*

399. This leaves few constitutional arguments for state advocates. Nor is the tenth amendment of much aid to them. States' rights advocates have often claimed that exclusive federal management of federal lands and resources amounts to an impermissible intrusion into state governmental affairs and a violation of the tenth amendment. For a period following the Supreme Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), state advocates urged application of its doctrine to public lands management disputes. See, e.g., Lopach, *The Supreme Court and Resource Federalism: Commonwealth Edison Co. v. Montana*, in WESTERN PUBLIC LANDS: THE MANAGEMENT OF NATURAL RESOURCES IN A TIME OF DECLINING FEDERALISM 290-91, 298 (1984) (discussing Montana's claim that its severance tax on coal was related to essential state functions and entitled to judicial deference). The courts have declined all opportunities to hold that state power to control federal resources is grounded in the states' essential sovereignty and protected by the tenth amendment. Following the Supreme Court's renunciation of *Usery* in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985), such a decision is extremely unlikely.

For a discussion of judicial deference to state lawmakers in the natural resources area, see Stewart, *Interstate Resource Conflicts: The Role of the Federal Courts*, 6 HARV. ENVTL. L. REV. 241, 251-55 (1982).

the scope of public lands federalism is more a function of statutory interpretation than constitutional authority or sovereign or proprietary rights.

To what extent in any particular enactment has Congress exercised its "plenary" powers in this field? Does a state program directly conflict with the federal scheme or impermissibly frustrate the purpose of the federal program? Is the federal program so extensive that either directly or by implication it "occupies the field" of regulation? These issues, regularly addressed in preemption cases in other fields of federal activity, now occupy center stage in public lands federalism as well. The general rule in the coordination of state and federal authority on the public lands, as in other fields of concurrent authority, is that state law applies until it is preempted by a valid federal statute or rule.<sup>400</sup>

In its preemption decisions, the Supreme Court has applied a variety of doctrinal formulations that appear to cover an almost limitless range of circumstances. A recent restatement of these tests is as follows:

The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, . . . when there is outright or actual conflict between federal and state law, . . . where compliance with both federal and state law is in effect physically impossible, . . . where there is implicit in federal law a barrier to state regulation . . . where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, . . . or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress . . . .<sup>401</sup>

Preemption analysis falls into two general categories. The first type of preemption occurs when Congress has, either expressly or by implication, occupied a field of regulation validly within its control with the intent to exclude state regulation. In such cases, concurrent state regulation is barred even if the state scheme advances the aims sought by federal regulation. The second type of preemption arises from actual conflict between federal and state law. Impermissible conflict exists if it is impossible to comply with both laws or if state law frustrates the accomplishment of federal objectives.

In any preemption case, the key factor in the judicial calculus will be the intent of Congress, and the chief variable in judicial review will be the degree of deference accorded state action when Congress has been ambiguous or silent. It is therefore necessary to view potential state/federal preemption controversies as an intersection of both congressional and judicial choices concerning possible state action.

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400. Coggins, Evans & Lindberg-Johnson, *supra* note 30, at 598-602.

401. Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n, 476 U.S. 355, 368-69 (1986) (citations omitted).

Initially, the choice belongs to Congress. Congress has a wide range of options open to it. At one extreme, Congress can give great latitude to the states, and at the other extreme, it can expressly prohibit any state regulation in a field. In the middle, the courts make the choices. The result of these congressional and judicial choices may be arrayed in five analytical categories.

## 2. *Express Preemption of a Field*

The Marine Mammal Protection Act of 1972 precludes any concurrent regulation by the states on a particular topic: "No State may enforce . . . any state law relating to the taking of any species . . . unless the Secretary has transferred authority for the conservation and management of that species to the State . . ." <sup>402</sup> In such cases, congressional intent is clear. The federal statute bars state regulation even when it is only supplementary to and does not directly conflict with the federal law.

## 3. *Implied Preemption—Federal Occupation of a Field*

Congress rarely speaks as clearly as it did in the Marine Mammal Protection Act. Hence the courts make choices, sometimes *inferring* congressional intent to occupy a field of regulation from the overall statutory scheme.

Evidence of legislative intent to preempt state regulation may be found in the thoroughness of the federal regulatory scheme or in the nature of the regulations and regulated activity. For example, in *Ray v. Atlantic Richfield Co.*, <sup>403</sup> the Supreme Court invalidated a Washington state law that regulated the size and safety features of oil tankers in the environmentally vulnerable Puget Sound. The Court concluded that state regulation of tanker design was inconsistent with the purpose of a federal law establishing national standards for ships. <sup>404</sup> The federal statute did not expressly prohibit state regulation. Nevertheless, the Court found that uniform national standards logically were necessary for ships that called on ports in several states. <sup>405</sup> The federal government occupied the field. State law had to fall.

## 4. *Concurrent State/Federal Jurisdiction and Specific Preemption*

Exclusive federal occupation of a field of regulation is less common

402. 16 U.S.C. § 1379(a) (1982).

403. 435 U.S. 151 (1978).

404. *Id.* at 165.

405. *Id.* at 166 n.15. The Court reached a similar result in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2516 (1988), finding federal military contractors immune from state tort liability for injuries caused by design defects in their products, even though Congress had not granted express immunity, because imposition of such liability on government contractors would present a significant conflict with uniquely federal interests.

than situations where both sovereigns exercise legal authority. Frequently, the division of authority is made clear by statutory language, tradition, court decisions, or memoranda of understanding between government agencies. Congress might prohibit some state programs but permit or encourage others.<sup>406</sup> For example, state hunting and fishing license requirements apply to persons hunting and fishing in national forests,<sup>407</sup> but other state wildlife management laws are preempted by federal statutes and treaties concerning migratory waterfowl<sup>408</sup> and endangered species.<sup>409</sup>

An especially clear presentation of concurrent regulation arose from the California nuclear safeguard laws. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*,<sup>410</sup> the Supreme Court upheld state regulatory authority over nuclear power plants for "economic questions"—a category the Court found included land use questions<sup>411</sup>—because the Atomic Energy Act and the Nuclear Regulatory Commission regulations expressed an intent to preempt only safety and permitting issues.<sup>412</sup> The Court found that Congress did not intend nuclear power to be developed at all costs, but rather intended that the industry proceed "consistent with other priorities and subject to controls traditionally exercised by the States and expressly preserved by the federal statute."<sup>413</sup> Thus, the federal government regulates radiation hazards, and the state exercises its traditional authority over land use and ratemaking.<sup>414</sup>

##### 5. Congressional "Silence"

There is often too little legislative history or statutory language to determine whether Congress intended federal regulation to occupy a field fully or to permit concurrent state regulation. This is true especially with respect to the older resource management statutes, such as the 1872 Mining Act, which does not address the preemption question at all. If the intent to preempt is not clear from the language of the statute, the courts may infer the intent to preempt if federal regulation "is sufficiently comprehensive to make reasonable the inference that Congress 'left no room'

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406. See generally Coggins & Ward, *The Law of Wildlife Management on the Federal Public Lands*, 60 OR. L. REV. 59 (1981). For the most recent in the Coggins assault on public lands policy, see Coggins & Harris, *The Greening of American Law . . . The Recent Evolution of Federal Law for Preserving Floral Diversity*, 27 NAT. RESOURCES J. 247 (1987).

407. Coggins, *Creeping Regulation*, *supra* note 30, at 330-34 (discussing 43 U.S.C. § 1732(b) (1976)).

408. *Missouri v. Holland*, 252 U.S. 416 (1920).

409. *Palila v. Hawaii Dept. of Land & Nat. Resources*, 639 F.2d 495 (9th Cir. 1981).

410. 461 U.S. 190 (1983).

411. *Id.* at 212.

412. *Id.* at 216.

413. *Id.* at 200.

414. *Id.* at 212.

for supplementary state regulation” or if the federal interest “is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”<sup>415</sup> The Court repeatedly has emphasized, however, that the intent to preempt is not to be presumed lightly,<sup>416</sup> and absent persuasive evidence of such intent there is a presumption favoring the legitimacy of state legislation.<sup>417</sup> It is axiomatic that if Congress has failed to make clear its choice, the courts will apply a rule of decision that makes the choice for Congress. In the natural resources area, courts have used three inconsistent approaches to these cases, which are discussed below.

## 6. *State Authority over Federal Activities*

The intensity of recent debates over federal/state relations tends to obscure the fact that states exercise considerable authority over federal decisions and activities. This authority results in part from the fact that the states developed extensive management of regulatory programs for natural resources prior to the definition of federal management authorities and programs.<sup>418</sup> In part it results from political accommodation: Congress declines to exercise its full constitutional prerogatives in order to maintain administratively feasible and politically acceptable working relationships with the states. The Federal Land Policy and Management Act, as discussed in Part II above, provides one recent example of such a relationship.

### C. *The Emergence of Preemption as a Public Lands Issue*

None of the early public lands cases address preemption as an issue before the Court. There are numerous reasons for the omission. One is the gradually evolving congressional policy toward public domain discussed above: initially there was no question but that state law controlled regulation of the public lands. A second factor, also discussed above, is the increasing assertiveness of public lands states—a development linked to the improved quality and managerial capacity of state governments.

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415. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *accord Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 713 (1985).

416. *See, e.g., Schwartz v. Texas*, 344 U.S. 199, 203 (1952).

417. *See Malone v. White Motor Corp.*, 435 U.S. 497 (1978); *New York State Dep't of Social Serv. v. Dublino*, 413 U.S. 405, 413 (1973). The presumption should be heightened with respect to recent legislation, because Congress has, since the 1970's, developed clear and unambiguous language for expressing preemptive intent. The Supreme Court, however, has not adopted such a policy. *See infra* note 432 and accompanying text.

418. The most notable continuing controversy revolves around water. *See B. ANDREWS & M. SANSONE, WHO RUNS THE RIVERS? DAMS AND DECISIONS IN THE NEW WEST* (1983); *see also supra* note 357. Other examples include wildlife management, *Coggins & Ward, supra* note 406, and oil and gas conservation, *see infra* notes 451-61 and accompanying text.

A third fundamental factor in the evolution of public lands preemption doctrine has been the shifting position of the Supreme Court in its approach to preemption cases generally. The Court's decisions in federal preemption cases have not staked out a consistent boundary line for the exercise of state authority in fields of concurrent state/federal regulation; the boundary has shifted over time to accommodate political pressures and public views regarding the appropriate balance of power within the federal system.<sup>419</sup>

In the early 19th century, supremacy of federal law over state law in non-public domain arenas generally was presumed. The assumption was expressed judicially in findings that the federal government, in regulating a certain activity or type of conduct, had occupied the field.<sup>420</sup> Occupation of a field by the federal government necessarily excluded any concurrent state regulation of the same subject matter. Preemption by occupation thus created a sphere of exclusive federal jurisdiction within which the national government was not only supreme but autonomous.<sup>421</sup>

The Supreme Court abandoned this presumption of occupation in the 1930's, stating in a series of cases that occupation would not be found unless Congress had "definitely and clearly" shown an intention to oust concurrent state regulation.<sup>422</sup> The Court generally deferred to state legislative interests, sustaining concurrent state legislation and stating that it was especially reluctant to infer congressional intent to preempt "when public safety and health are concerned."<sup>423</sup>

The Court's emphasis began to shift again in the 1940's. In *Hines v. Davidowitz*,<sup>424</sup> the Court found a Pennsylvania law preempted by a parallel federal alien registration statute. The subject matter was "so intimately blended and intertwined with responsibilities of the national government"<sup>425</sup> that it barred even complementary state regulation in the field. Beyond the fact that the decision retreated from the clear statement requirement, *Hines* is important in the public lands context because

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419. See generally Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

420. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 8-18 (1824) (holding that a federal maritime license act had been violated but strongly implying that the constitutional grant of federal authority over interstate commerce was exclusive).

421. This view extended into the early 20th century as well. In *Charleston W. Carolina Ry. v. Varnville Furniture Co.*, the Court held that once "congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared as valid because it attempts to go farther than Congress has seen fit to go." 237 U.S. 597, 604 (1915).

422. *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933); see also *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940); *H.P. Welsh Co. v. New Hampshire*, 306 U.S. 79, 85 (1939).

423. *Maurer*, 309 U.S. at 614 (exercise of reserved state power to protect the safety and convenient use of its highways is not preempted under the commerce clause).

424. 312 U.S. 52 (1941).

425. *Id.* at 66.



it raises the question of whether occupation will be inferred solely from the "national" nature of the regulated subject matter. *Hines* was followed by a number of decisions finding state law preempted where federal law was comprehensive or pervasive, where federal interests appeared dominant, or where state law arguably would frustrate achievement of federal purposes.<sup>426</sup> The Court's position during this era was never wholly consistent. This federal-oriented approach, "fundamentally irreconcilable with the state-directed model of the 1930's decisions, emerged as a competing approach, and the long period of uneasy coexistence between these two conflicting frameworks has resulted in considerable doctrinal confusion and variability."<sup>427</sup> As will be discussed below, this doctrinal confusion still pervades the public lands preemption cases.

Recent preemption decisions suggest that the Court's period of confusion is continuing. Some of the recent decisions give greater weight to the policy concerns and governmental integrity of the states<sup>428</sup> and infer congressional approval of concurrent regulation in ambiguous cases. In these cases, the Court has refused to find federal preemption of concurrent state regulation in a variety of fields, pursuing instead a policy of accommodating the legitimate interests of both the state and federal governments.<sup>429</sup> These decisions seem to reflect an attitude of judicial accommodation of state interests and an understanding of the policies of the "clear statement" rule.<sup>430</sup>

Decisions taking this approach tend to begin with the assumption that states may exercise concurrent jurisdiction over federally regulated private activities unless state regulation is clearly prohibited by federal law. Occupation of the field will not be presumed unless the Court dis-

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426. *Pennsylvania v. Nelson*, 350 U.S. 497, 502-05 (1956); see, e.g., *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 155-56 (1942) (holding that a state regulation that interfered with the federal legislation in an area not "left unregulated by the nation" was invalid); see also *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260-61 (1964) (state law was displaced by federal law in private damage actions based on peaceful union activities); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 233 (1947) (warehouseman licensed under the United States Warehouse Act is "authorized to operate without regard to State acts."). This history is ably discussed in Note, *supra* note 419, at 630-39.

427. Note, *supra* note 419, at 632.

428. They do not, however, elevate the integrity of state institutions to a constitutionally protected level. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985).

429. See, e.g., *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355 (1986) (concurrent regulation of telecommunications equipment); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (concurrent regulation of nuclear power facilities); *United States v. California*, 438 U.S. 645 (1978) (concurrent regulation of water resources).

430. For a detailed argument supporting a "clear statement" rule, see Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 *ECOLOGY L.Q.* 679, 686-87 (1978). The evolution is not at all neat in the public land and resources cases, as the next section of this Article points out.

cerns that this is the "clear and manifest purpose of Congress."<sup>431</sup> Nor will prohibition of concurrent regulation be implied merely because the exercise of state authority arguably could frustrate one of the purposes of a federal program.<sup>432</sup>

Evidence that the Court might be moving steadily in the direction of accommodation and a clear statement requirement is countered by other recent decisions in which the Court has interpreted federal policies broadly and, accordingly, has found state law to be preempted. Some of these cases seem to ignore realistic opportunities for reconciling state and federal management objectives and defer to statements of preemptive intent by the federal agencies involved, rather than Congress.<sup>433</sup>

Taken together, these broad historical shifts in public domain policy, in the role of state and local government, and in preemption doctrine yield two conclusions. First, cases regarding the public lands must be read with a view to their administrative, political, and judicial settings. Thus, the language and approach of the older public lands cases may not be a reliable guide for modern decisions. More significantly, application of this long view to current controversies should strengthen judicial support for cooperative management of the public lands. Because permanent federal retention is now an established fact,<sup>434</sup> and because federal and state management programs are irrevocably intertwined, courts should seek to accommodate the interests of the heavily affected states and to respect their increasing assertiveness and competence in resource management. Such an approach would be consistent with recent judicial approaches to preemption in other fields of concurrent regulation. It would also respect and support the administrative and regulatory realities of modern public lands management.

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431. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) (quoting *Rice*, 331 U.S. at 230).

432. *Pacific Gas & Elec.*, 461 U.S. at 220-23; see, e.g., *Boyle v. United Technologies Corp.*, 108 S. Ct. 2516 (1988) (granting immunity to government military contractor from state tort actions because of conflict with federal interests); *Mississippi Power & Light Co. v. Mississippi*, 108 S. Ct. 2428 (1988) (preempting state utility commission prudency review of investment in nuclear power facility approved by the Federal Energy Regulatory Commission); *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145 (1988) (preempting state law requiring natural gas pipeline companies to obtain state approval before issuing long-term securities).

433. *Mississippi*, 108 S. Ct. 2428 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (FCC interpretation of Communications Act of 1934). The Court recently underscored the significance of the federal agency's role: "Thus we have emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'" *New York City v. Federal Communications Comm'n*, 108 S. Ct. 1637, 1642 (1988) (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982)).

434. 43 U.S.C. § 1701(a)(1), discussed in *Coggins, Multiple Use*, *supra* note 4, at 10.

#### D. Public Lands Preemption—Competing Judicial Policies

Although there are a few examples of instances in which Congress speaks so clearly that Congress, rather than a court, “chooses” the outcome, whether concurrent state regulation will be preempted in the majority of litigated cases in the natural resource fields depends largely upon the decision rule applied by the reviewing court. Unfortunately, recent judicial decisions are confused and inconsistent in their approaches to such controversies. For purposes of discussion, the decisions can be divided roughly into three categories, which we have labeled “judicial nationalism,” “regulation versus prohibition,” and “judicial accommodation.”

Confusion in the case law is compounded by the broad historical shifts in doctrine outlined in the preceding section. Application of preemption analysis is further confounded by the large number—some would say a bewildering array—of technical and sometimes conflicting statutes that govern public lands management.<sup>435</sup> These statutes are applied in a wide range of circumstances, and they intersect with numerous state statutes from politically diverse states. For this reason alone, it would be unrealistic to expect judicial outcomes of public land preemption controversies to fit into a superficially neat pattern. The discussion below reveals that the courts have yet to develop even a consistent *approach* to public lands preemption issues. The Supreme Court’s recent opinion in *Granite Rock* also fails to set out administrable guidelines for concurrent management of public lands and resources.

##### 1. Judicial Nationalism: First Iowa and its Progeny

At one extreme of judicial opinions are those seemingly hostile to concurrent state regulation of natural resources even when a federal statute provides grounds for dual regulation. These decisions seem to be based on the assumption that the public lands and resources are subject to exclusive federal management because of some or all of the following factors: (1) the federal character of the public lands, (2) the conclusion that federal management schemes necessarily “occupy the field,” and (3) judgment that any nonfederal management frustrates federal purposes in retention and management. Operating under this assumption of federal exclusivity, nationalist courts find that state regulation of activities on the public lands is preempted unless Congress has *explicitly authorized* such regulations. These courts will not even defer to federal administrative attempts to require third parties to comply with state regulations.

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435. Justice Powell’s *Granite Rock* dissent, for example, drew upon this complexity, *California Coastal Comm’n v. Granite Rock Co.*, 107 S. Ct. 1419, 1437-38 (1987) (Powell, J., dissenting), but referenced only a fraction of the relevant statutes. Compare the *Granite Rock* list (three statutes) with the lists in Fairfax & Cowart, *supra* note 172, at nn.63, 65 (over 15 statutes).

The most influential resources-related decision in this line of cases is *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*,<sup>436</sup> which established the doctrine of federal superiority over licensing of hydroelectric projects “with unmistakable clarity.”<sup>437</sup> In *First Iowa*, an electric cooperative petitioned for a license under the Federal Power Act<sup>438</sup> to construct a substantial hydroelectric facility on the Cedar River, near Moscow, Iowa. The state of Iowa intervened, seeking compliance with an Iowa statute requiring a state permit for the project and substantive compliance with state water management standards.<sup>439</sup>

The Supreme Court held that the state law was preempted. The Court found that Congress intended the Federal Power Act to create a “complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation.”<sup>440</sup> Accordingly, the Act’s detailed provisions left “no room or need for conflicting state controls,”<sup>441</sup> despite section 9(b) of the Act, which directs each license applicant to give the Federal Power Commission “satisfactory evidence that the applicant has complied with the requirements of the State . . . with respect to bed and banks and to the appropriation, diversion and use of water for power purposes.”<sup>442</sup> The Court reasoned that Congress intended section 9(b) only to secure “adequate information” for the Commission. Therefore, it did not save either the substantive or the procedural requirements of the Iowa statute.<sup>443</sup>

Although *First Iowa* is not a public lands case, it has been relied upon in public lands decisions based on similar principles. A decade later, in *Federal Power Commission v. Oregon*,<sup>444</sup> the Court applied the principles of *First Iowa* to a hydroelectric project located on reserved federal lands, holding that the Federal Power Act<sup>445</sup> preempted Oregon’s power to require a state license for the facility.<sup>446</sup> The result is not surprising. Nothing in the Federal Power Act or the public lands statutes would have given Oregon *more* authority vis-a-vis a licensee on federal lands than Iowa had with respect to a licensee using private lands. Once again, the Court found exclusive Federal Power Commission jurisdiction and characterized state regulation as duplicative and prohibitory rather than concurrent and supplementary: “To allow Oregon to veto such use,

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436. 328 U.S. 152 (1946).

437. 2 A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 616 (1969).

438. 16 U.S.C. §§ 791a-825r (1982 & Supp. IV 1986).

439. *First Iowa*, 328 U.S. at 165-66.

440. *Id.* at 180.

441. *Id.* at 181.

442. 16 U.S.C. § 802(b).

443. 328 U.S. at 177.

444. 349 U.S. 435 (1955).

445. 16 U.S.C. §§ 791a-828c (1982 & Supp. IV 1986).

446. 349 U.S. at 445.

by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision."<sup>447</sup>

Recent public lands decisions also evince similar reliance on *First Iowa* principles. Most significant are the Ninth Circuit decisions in *Ventura County v. Gulf Oil Corp.*<sup>448</sup> and *Granite Rock*,<sup>449</sup> both of which concern state and local efforts to exercise police power controls over private minerals operations on national forest lands. Despite significant differences in the resources and developments at issue,<sup>450</sup> in the federal statutes involved, and in the nature of the state and federal interests at stake, the Ninth Circuit has relied quite heavily and uncritically on the hydroelectric cases in the minerals decisions.

In *Ventura County*, the Ninth Circuit held that a Ventura County, California, ordinance regulating private oil and gas operations in the Los Padres National Forest was preempted by the Mineral Leasing Act of 1920.<sup>451</sup> The court first addressed the County's argument that Congress lacked the power to preempt local regulation of private activities on federal land, rejecting it out of hand as "legally frivolous."<sup>452</sup> This holding is certainly consistent with the Supreme Court's repeated statements that Congress' authority over the public lands is potentially "without limitations."<sup>453</sup>

The decision is entirely deficient, however, in its evaluation of whether the local ordinance was in fact preempted by federal law. Although the court's logic is unclear, the outcome seems to turn on two factors. First, the court emphasized the "extensive federal scheme" governing oil and gas leases in the National Forests,<sup>454</sup> apparently concluding that because the BLM and Forest Service programs are complex, they are necessarily preemptive. Because the applicant had never applied for a local permit, the court was unable to consider whether the local regulations and the federal lease stipulations could be harmonized, stating instead that the County's attempt to compel application raised the

447. *Id.*

448. 601 F.2d 1080 (9th Cir. 1979), *aff'd*, 445 U.S. 947 (1980).

449. *Granite Rock Co. v. California Coastal Comm'n*, 768 F.2d 1077 (9th Cir. 1985), *rev'd*, 107 S. Ct. 1419 (1987). The Supreme Court's opinion on these facts is analyzed *infra* notes 510-33 and accompanying text.

450. For example, *First Iowa* involved a dam, while *Granite Rock* was concerned with mining claims. Mining claims present common problems in land use issues, and one could argue that one dam in a dozen is a more significant component of a comprehensive federal scheme than one 1872 Mining Act claim among thousands.

451. *Ventura County*, 601 F.2d at 1083.

452. *Id.* at 1083.

453. *United States v. San Francisco*, 310 U.S. 16, 29 (1940). This concept can be seen in Supreme Court cases beginning at least as early as *Camfield v. United States*, 167 U.S. 518, 524 (1897).

454. *Ventura County*, 601 F.2d at 1084.

issue.<sup>455</sup> Nor did the court consider whether either the Mineral Leasing Act of 1920 or the regulations implementing it evidenced congressional intent to preempt concurrent state regulation.<sup>456</sup>

The second factor in the court's *Ventura County* decision is an unwarranted elevation of the status of the private lessees operating on public lands. Rather than viewing the federal minerals management regime as merely permissive, the court viewed the private operator almost as a federal instrumentality: "The federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use . . . in an attempt to substitute its judgment for that of Congress."<sup>457</sup>

This conclusion is incorrect on two counts. First, it assumes—in the face of clear evidence to the contrary—that Congress intended to preempt concurrent state regulation even though Congress had not explicitly done so.<sup>458</sup> Second, it assumes that agency leasing decisions embody the judgment of Congress in all aspects of a particular land use decision, including the decision to displace local environmental regulation.<sup>459</sup> Although the *Ventura County* court recognized in passing that federal oil and gas management depends almost entirely on state regulations concerning well spacing, field unitization, pumping, and other issues,<sup>460</sup> it

455. *Id.* at 1084-85. This is normal in public land use cases.

456. As in *First Iowa*, the decision seems to turn on a per se conflict with federal law. In a footnote, without elaboration, the court concludes that the mere existence of the local ordinance "strikes at the heart" of the federal management program. 601 F.2d at 1084 n.3. "The issue is whether Ventura has the power of ultimate control over the Government's lessee, and this issue persists whether or not a use permit would eventually be granted." *Id.* at 1085.

457. *Id.* at 1084.

458. Note in particular the court's treatment of the Minerals Leasing Act's savings clause, 30 U.S.C. § 189. 601 F.2d at 1086-87.

459. *Ventura County*, 601 F.2d at 1084. Unlike the free access policy of the 1872 General Mining Act at issue in the *Granite Rock* case discussed *infra* at text accompanying notes 510-33, the Mineral Leasing Act of 1920 gives the federal government considerable control over the location, timing, and intensity of oil and gas development. See S. FAIRFAX & C. YALE, *supra* note 11, at 59-62. Thus it is worth noting that the federal agency's role is more positive and less reactive in the *Ventura County* context than it was in the *Granite Rock* case. However, even under the 1920 Act, it is absurd to view individual agency leasing decisions as expressive of particularized congressional intent. Congress has nothing to do with the particular leasing decision. Moreover, it is well known (and currently the subject of considerable controversy) that oil and gas leases are granted well in advance of preparing an environmental impact statement for a given leasing activity. The Forest Service has defended this practice as efficient on the grounds that the vast majority of leases and leased acres will never be developed and, thus, do not require environmental impact analysis. See, e.g., *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983) (quoting the Forest Service's environmental assessment). Note that the court found this argument unpersuasive in view of NEPA. *Id.* at 1414; accord *Connor v. Burford*, 605 F. Supp. 107, 108-09 (D. Mont. 1985). The lease is appropriately considered the first step in a long and complex process that *might* actually lead to a federal decision to permit oil and gas development to proceed. See S. FAIRFAX & C. YALE, *supra* note 11, at 68-78.

460. Concurrent state regulations on well spacing and forced pooling are not preempted. *Ventura County*, 601 F.2d at 1086 (citing *Texas Oil & Gas Corp. v. Phillips Petroleum*, 277 F. Supp. 366, 371 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303, 1304 (10th Cir. 1969)).

nevertheless swept aside any state regulations that might prohibit what the federal land managers would allow.<sup>461</sup>

## 2. *Muddling Through: The Regulation Versus Prohibition Cases*

Western state governments understandably take a dim view of these sweeping federal court decisions preempting state regulation of private activities on federal land. State administrators and courts therefore have sought doctrinal compromises to preserve cooperative state/federal regulatory arrangements from attacks by private resource users. A substantial body of state case law holds that concurrent state regulation of private activities on federal land is not preempted so long as state regulations do not prohibit or render impossible federally sanctioned activities. This doctrine appears to have crystallized in the Idaho Supreme Court decision in *State ex rel. Andrus v. Click*.<sup>462</sup>

*Click* involved an attempt by the Idaho Board of Land Commissioners to enjoin mining activity on an unpatented federal mining claim until the miners obtained a state permit under the state's Dredge and Placer Mining Protection Act.<sup>463</sup> The state law established a permitting system for dredge and placer mines that required operators to obtain a nontransferable state permit, to post surety bonds, and to comply with substantive environmental requirements.<sup>464</sup> The Idaho Supreme Court upheld the state law against the miners' claim that it was preempted. The court found that the 1872 Mining Law and the Forest Service's mining regulations did not occupy the field of environmental management of mining operations on federal lands<sup>465</sup> and that there was no actual conflict because the state's stricter requirements were "in harmony with the federal legislation."<sup>466</sup>

In searching for that harmony between the state and federal programs, the Idaho court took a decidedly different approach to dual regulation situations than did courts following the *First Iowa/Ventura County* approach. However, the court stopped short of proclaiming a state right to dual regulation in the absence of a clear federal statement of exclusive authority, suggesting instead that a state *prohibition* of federally licensed mining would be preempted:

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461. *Id.* at 1083.

462. 97 Idaho 791, 554 P.2d 969 (1976).

463. IDAHO CODE §§ 47-1312 to 47-1316 (1977).

464. The requirements are to "restore disturbed land to its approximate natural contours, to replace topsoil and vegetation, and to restore disturbed watercourses on meander lines with pool structure conducive to good fish and wildlife habitat and recreational use." *Id.* § 47-1314.

465. "[W]e find nothing in the federal statute or its legislative history to indicate an intent to preempt state regulation. . . . Nor can the federal statute be characterized as a pervasive regulatory scheme. If anything, the federal statute is characterized by its absence of regulation." *Click*, 97 Idaho at 798, 554 P.2d at 976.

466. *Id.* at 799, 554 P.2d at 978.

[T]he mere fact that federal legislation sets low standards of compliance does not imply that the federal legislation grants a right to an absence of further regulation. *On the other hand, where a right is granted by the federal legislation, state regulation which rendered it impossible to exercise that right would be in conflict.*<sup>467</sup>

The regulation/prohibition distinction advanced in *Click* has proved attractive to litigants and courts in other contexts.<sup>468</sup> The Colorado Supreme Court embraced the distinction in *Brubaker v. Board of County Commissioners*,<sup>469</sup> a case considering an El Paso County, Colorado, ordinance that required a local special use permit for exploratory drilling operations in the Pike National Forest. Plaintiffs did not claim that the county ordinance was preempted on its face. In fact, they had applied for the required permit, but the county had denied their application because the requested land use was inconsistent with the county's general planning objectives for the area.<sup>470</sup>

The Colorado Supreme Court held that federal law preempted the county's denial. Although the court cited *Ventura County*, it did not follow the Ninth Circuit in preempting *any* local permit regulating the environmental effects of mining. Instead, the court relied on the perceived distinction between regulation and prohibition discussed in *Click*.<sup>471</sup> *Brubaker* states that "[s]tate and local laws that merely impose reasonable conditions upon the use of federal lands may be enforceable, particularly where they are directed to environmental protection concerns."<sup>472</sup> In this particular case, however, the Board sought "not to regulate but to prohibit" drilling activities authorized by federal law.<sup>473</sup> Such a prohibition "reflects an attempt by the County to substitute its judgment for that of Congress"<sup>474</sup> and, therefore, was invalid.

The regulation/prohibition distinction has influenced other deci-

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467. *Id.* at 796, 554 P.2d at 974 (emphasis added).

468. Indeed, it was relied upon in a federal decision preempting an amendment to the same Idaho statute. *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984). In 1977 the Idaho statute was amended to prohibit dredge mining in any form on the St. Joe River or its tributaries, following congressional designation of the St. Joe as a potential addition to the national wild and scenic river system. IDAHO CODE § 47-1323(3) (1977 & Supp. 1987). Even though Congress subsequently explicitly barred dredge or placer mining along the St. Joe in the National Parks and Recreation Act of 1978, 16 U.S.C. § 1274(a)(23) (1982), the United States Court of Appeals for the Federal Circuit held that the state could not have lawfully denied plaintiffs the right to mine because, when adopted, the Idaho law was "in conflict with and was preempted by previously enacted federal mining law." *Skaw*, 740 F.2d at 940. The Court's reasoning is unclear, but it seems to focus on the fact that the Idaho law "prohibited dredge mining on federal land," making it "impossible for plaintiffs to exercise rights theretofore granted by the mining laws." *Id.*

469. 652 P.2d 1050 (Colo. 1982).

470. *Id.* at 1058.

471. *Id.* at 1057-58 & nn.9-11.

472. *Id.* at 1059 (citations omitted).

473. *Id.*

474. *Id.* at 1056.



sions as well. The Oregon Court of Appeals relied on *Click* to uphold a state law requiring a permit to remove materials from a stream bed.<sup>475</sup> The same court, however, overturned two local ordinances that prohibited mining, on the ground that compliance with both the local and federal laws was a "physical impossibility."<sup>476</sup>

### 3. *Judicial Accommodation and Dual Regulation*

Because the use and management of the public domain has involved such a wide range of resources, statutes, and political and factual settings, courts have had the opportunity to develop different approaches for different resources. *First Iowa* preemption is not the only venerable theme in Supreme Court decisions in this area. In particular, with respect to concurrent state regulation of water and wildlife resources on the public lands, numerous decisions accept the principle that concurrent state regulation is valid, *even* where it would prohibit an activity otherwise permitted by federal law, as long as Congress has not clearly preempted the state management regime.

Decisions accepting the principle of concurrent jurisdiction over public domain resources are in fact relatively common, considering the small number of public lands preemption cases. They also have a well-established history. As early as 1905, for example, the Supreme Court held that the 1872 mining law did not preempt state laws regarding the location and filing of mining claims, even when supplementary state regulations would deprive a federal claimant of the legal right to his claim.<sup>477</sup> In 1918, the Court upheld an Idaho statute prohibiting sheep herders from grazing their sheep on those federal public lands that were previously occupied by cattle.<sup>478</sup> In response to the argument that the state had no authority to restrict use of the federal open range, the Court held that "[t]he police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject."<sup>479</sup>

These early decisions have contemporary progeny affecting a variety of public resources. The Supreme Court has upheld the application of state law to resources on federal lands in a variety of contexts. The leading minerals case is *Commonwealth Edison Co. v. Montana*,<sup>480</sup> in which

475. *State ex rel. Cox v. Hibbard*, 31 Or. App. 269, 570 P.2d 1190, 1193 (1977).

476. *Elliott v. Oregon Int'l Mining Co.*, 60 Or. App. 474, 481, 654 P.2d 663, 668 (1982) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963)).

477. "This court has in many cases recognized the validity of such state legislation." *Butte City Water Co. v. Baker*, 196 U.S. 119, 124 (1905).

478. *Omaechevarria v. Idaho*, 246 U.S. 343 (1918).

479. *Id.* at 346. As there were no federal grazing licenses or regulations at that time, *see id.* at 346 n.1, the state law prohibited grazing that was allowed, rather than specifically licensed, by the federal government.

480. 453 U.S. 609 (1981).

the Supreme Court upheld Montana's substantial severance tax on coal, including coal extracted by federal coal lessees, despite the plaintiff's claim that the tax would frustrate the energy promotion purposes of the federal coal leasing program.<sup>481</sup> The Court also has repeatedly deferred to state water laws affecting public lands, even where the federal management agencies claimed that application of state law would impair federal management programs.<sup>482</sup>

#### 4. Granite Rock and the Prospects for Dual Regulation

*California Coastal Commission v. Granite Rock Co.*<sup>483</sup> gave the Supreme Court a rare opportunity to resolve the judicial confusion concerning public lands federalism and to apply the principles of judicial accommodation of dual regulation in the public lands area, as it has in other regulatory arenas. A clear decision would have been especially welcome because the lower court decisions evinced the doctrinal confusion documented above. The district court applied the regulation-but-not-prohibition distinction.<sup>484</sup> On appeal, the Ninth Circuit extended the policy of judicial nationalism that it had announced previously in *Ventura County*.<sup>485</sup>

Although the Supreme Court's decision was a narrow victory for advocates of dual regulation, the Court was fragmented on this issue,<sup>486</sup> and the majority opinion fails to clarify either general preemption doctrine or its application to the public lands. Instead, the decision turns on a presumed fine-grained distinction between land use planning and environmental regulation.<sup>487</sup> That distinction is unclear, unsupported by the public lands statutes, and not at all helpful to state and federal legislators and administrators seeking to manage complex intermixed resources.

481. *Id.* at 636-37.

482. The most significant cases are *United States v. California*, 438 U.S. 645 (1978) (Bureau of Reclamation must comply with California water allocation law unless it conflicts with specific declarations of congressional policy); and *United States v. New Mexico*, 438 U.S. 696 (1978) (affirming congressional deference to state water law and limiting implied reserved water rights for the national forests).

483. 107 S. Ct. 1419 (1987).

484. *See* 590 F. Supp. 1361, 1373 (N.D. Cal. 1984).

485. *See* 768 F.2d 1077, 1083 (9th Cir. 1985).

486. The Justices delivered three opinions. The majority opinion by Justice O'Connor was joined by Chief Justice Rehnquist and Justices Brennan, Marshall (who wrote *Kleppe*), and Blackmun. 107 S. Ct. at 1422. Justices Powell and Stevens dissented on the preemption question, largely on the ground that "duplicative" state permit requirements are an unwarranted intrusion into "federal control over the use of federal land." *Id.* at 1437 (Powell, J., dissenting). Justices Scalia and White dissented on the narrower ground that the California law "is plainly a land use statute," the application of which is preempted by federal law. *Id.* at 1439 (Scalia, J., dissenting).

487. *Id.* at 1424-31; *see also id.* at 1438-42 (Scalia, J. dissenting).

a. *Facts*

The Granite Rock Company is engaged in commercial mining of chemical grade white limestone on an unpatented mining claim<sup>488</sup> pursuant to the Mining Act of 1872.<sup>489</sup> In February 1981, following the preparation of an environmental assessment,<sup>490</sup> the Forest Service approved the company's plan of operations for the years 1981-86.<sup>491</sup> Despite the fact that the Forest Service circulated a standard notice of decision regarding plan approval to pertinent state and local agencies and interest groups, the public comment period passed without challenge to the plan. Indeed, more than three years passed before the California Coastal Commission (CCC) informed Granite Rock that its operations were located within the California coastal zone.<sup>492</sup> The CCC stated first that the plan

488. The district court noted that Granite Rock's mining activity in Big Sur, conceded to be an area of great scenic beauty, included "blasting and opening a quarry, constructing and improving roads, building a bridge, boring test holes and conducting core drilling, improving a water storage system, and dumping rock waste in a disposal area." 590 F. Supp. at 1366.

489. 30 U.S.C. §§ 22-47 (1982). The Act established terms and conditions for granting miners essentially free access to federal minerals. It thus extended to mineral lands the congressional policy of public land disposal applied to non-mineral lands by numerous 19th-century statutes. J. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 9-16 (1987). Moreover, it is an early example of a continuing congressional policy relying on private entrepreneurs to develop public lands resources. See S. FAIRFAX & C. YALE, *supra* note 11, at 57-58 for a brief introduction to the 1872 Act. A miner who locates a valuable mineral deposit and complies with other rules of discovery gains the right to enter and develop a claim without paying rent or royalty to the government. 30 U.S.C. § 26 (1982); see also 2 *AMERICAN LAW OF MINING* § 30.01 (2d ed. 1984). The Act also allows the miner to take title to the land under specified procedures and conditions. 30 U.S.C. § 29. The 1872 Act established only a minimal federal regulatory scheme, relying primarily on established practices of Western minerals development as previously codified in state law for establishing private rights to public resources. J. LESHY, *supra*, at 18. Subsequent elaboration of conflicting federal goals, notably those of land retention, environmental protection, and amenity management, has not interrupted either the basic disposition scheme or the continuing pattern of reliance on state programs for significant aspects of both mineral exploitation and environmental regulation. *Id.* at 212-20.

490. See 590 F. Supp. at 1366. Other company sites are located on adjacent private land. See *id.* at 1375. The unpatented status of the federal claim and the propinquity of private Granite Rock properties are significant facts. One could argue that Granite Rock was working only its federal site in order to escape state regulations, which were clearly applicable on the company's private sites. Moreover, Granite Rock did not seek to gain a patent to the federal site, which would remove the site from federal ownership and also would subject the mining operation to state regulation. The company's strategy of working, but not patenting, a site in the National Forest creates the prospect of a mining operation being largely exempt from regulations that are applicable to other nearby sites. Fairfax & Cowart, *supra* note 172, at 10,278 n.19.

491. 590 F. Supp. at 1366. The Forest Service requires that any person proposing to mine in a national forest submit a plan of operation for any work that is likely to disturb surface resources. 36 C.F.R. § 228 (1987), and in Granite Rock's case it approved the plan after imposing certain conditions. 590 F. Supp. at 1366.

492. *Granite Rock*, 107 S. Ct. at 1423. The California Coastal Commission later conceded that it had waited too long to initiate a consistency review, *id.* at 1423 n.1, and the case focuses thereafter on the permit requirement alone. We emphasize the pedagogical import of the case because it probably never should have happened. Had there been a consistency review, the issues could have been resolved during that process. Moreover, *Granite Rock* will not decide

of operations was subject to a consistency review under section 307(c)(3) of the federal Coastal Zone Management Act (CZMA)<sup>493</sup> and, second, that Granite Rock was required to secure a permit for its mining operations from the CCC. Granite Rock sued to enjoin both the consistency review and the permit requirement.

*b. The District Court Opinion*

The district court upheld the Coastal Commission's claim that a state permit was required, concluding that Congress did not intend "to shield from direct state regulation purely private activity . . . on federal land."<sup>494</sup> The court found that hardrock mining claims are not excluded from the coastal zone<sup>495</sup> and adopting the logic of the regulation versus prohibition cases, found that the state regulations were not preempted by federal mining or public lands law. Distinguishing the instant regulatory context from the local ordinance struck down in *Ventura County*, the district court concluded that "[a]s long as the state's permit requirement does not render plaintiff's exercise of rights under the Mining Act impossible, no impermissible conflict exists."<sup>496</sup> The court noted that the Forest Service approval of the plan of operations "expressly stated that 'Granite Rock is responsible for obtaining any necessary permits which may be required by the California Coastal Commission.'"<sup>497</sup>

*c. The Ninth Circuit Decision*

On appeal, the Ninth Circuit largely ignored the facts of the case and focused on the principles of resource sovereignty expressed in *First Iowa*<sup>498</sup> and *Kleppe v. New Mexico*.<sup>499</sup> The court relied on *First Iowa* in

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the fate of the Big Sur coast. See Fairfax & Cowart, *supra* note 172, at 10,278 n.23, for a discussion of the belated environmental challenge to the finding of no significant impact.

493. 16 U.S.C. § 1456(c)(3) (1982). The consistency review process is described in detail in *Granite Rock*, 107 S. Ct. at 1430. If the state rejects the applicant's certification that the proposed action is consistent with an approved coastal management plan, the federal agency involved must reject the application absent a finding by the Secretary of Commerce that the application is either consistent with CZMA goals or "otherwise necessary in the interest of national security." CZMA § 307(c)(3)(A), 16 U.S.C. § 1456(c)(3)(A) (1982).

494. *Granite Rock Co. v. California Coastal Comm'n*, 590 F. Supp. at 1361, 1370 (N.D. Cal. 1984), *rev'd*, 768 F.2d 1077 (9th Cir. 1985), *rev'd*, 107 S. Ct. 1419 (1987).

495. *Id.* at 1372-73.

496. *Id.* at 1373. The trial court rejected the Coastal Commission's argument that "the CZMA 'converts the state Coastal Act into a federal standard that has the dignity of a federal law in a cooperative federalism program.'" *Id.* at 1370 (quoting Defendant's Brief at 14). Nevertheless, it supported the Coastal Commission's permit requirement, noting that conflict would not be presumed, nor could actual conflict between federal and state requirements be assessed, because the plaintiff had not attempted to comply with the state's regulations. The court further noted that the Forest Service regulations (codified at 36 C.F.R. § 228 (1988)) not only had not occupied the field, they in fact required compliance with applicable state standards for air and water quality and waste disposal. *Id.* at 1372-74.

497. *Id.* at 1374 (quoting Forest Service Environmental Assessment).

498. *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946).

rejecting the *Click* line of dual regulation cases. It noted that *First Iowa* made no distinction between a permitted state regulation and an unacceptable state prohibition of a federally permitted action. Thus, the court found it unnecessary to inquire into the reasonableness of the Coastal Commission's regulation, finding instead that the state permit system "was preempted simply because it would undermine the federal permit authority."<sup>500</sup> The circuit court opinion also established a novel standard for deciding when *First Iowa* reasoning should be applied. The court inquired "whether federal law establishes authority in a federal agency to prohibit or permit mining in national forests . . . and, if so, whether the state permit authority exercised in this case intrudes into that sphere of authority."<sup>501</sup> Having found a mere *intrusion*, the court found no need to look either for actual conflict or for congressional intent to preempt.<sup>502</sup>

In reaching this result, the Ninth Circuit unduly constrained the state's role by continuing to misread *Kleppe*, as it had in *Ventura County*. Contrary to the court's assumption, *Kleppe* does not hold that federal constitutional power ousts concurrent state authority over the federal public lands unless Congress explicitly states otherwise; rather, it reiterates that concurrent state authority is valid unless preempted by a federal statute or rule.<sup>503</sup>

The difference between these two propositions is particularly significant in the public lands context because of the complexity of the regulatory regime, potential conflicts among the federal statutes and, in most cases, congressional silence on the question of dual regulation. In this context, it is especially inappropriate for courts to infer preemptive intent. In *Granite Rock*, the Ninth Circuit did just that, finding the general purpose the court attributes to the 1872 Mining Act—to encourage mining on federal lands<sup>504</sup>—preempts any state law that would interfere directly with such mining.

Because state law is preempted when it " 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' "<sup>505</sup> the court's characterization of congressional purposes is crucial. There are two problems with the Ninth Circuit's approach to this matter. First, particularly in the area of public lands management, it is simplistic to focus on a single congressional enactment in determining congressional

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499. 426 U.S. 529 (1976).

500. *Granite Rock Co. v. California Coastal Comm'n*, 768 F.2d 1077, 1082 (9th Cir. 1985), *rev'd*, 107 S. Ct. 1419 (1987).

501. *Id.* at 1083.

502. *Id.* at 1080.

503. *Kleppe*, 426 U.S. at 543 (1976).

504. See *Fairfax & Cowart*, *supra* note 172, at 10,280 n.61.

505. 768 F.2d at 1080 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

intent.<sup>506</sup> The Ninth Circuit acknowledged this, noting that in the 1970's Congress "also declared its fidelity to the additional goal of lessening any adverse environmental impact from such mining."<sup>507</sup> The court, however, did not weigh the additional federal purposes that lie behind the multiple-use management regimes that are set out in dozens of public land and other environmental statutes.

Second, although it simplistically drew congressional intent from but one of a multiplicity of goals and priorities in statutes enacted over more than a century, the Ninth Circuit nevertheless took note of the statutory complexity, equating it with a congressional intent to preempt. The court appears to conclude, when confronted by numerous agencies, statutes, and analyses, that irrespective of which federal purpose the court chooses to emphasize, it is so amplified by complexity that it occupies the field by implication. This conclusion ignores the fact that federal management programs may be extensive without being exclusive, a fact recently emphasized by the Supreme Court in another case, *Hillsborough County v. Automated Medical Laboratories, Inc.*:

To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a role, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.<sup>508</sup>

Undaunted, and without considering the relatively explicit purposes of the Mineral Leasing Act of 1920 and the agency land use procedures arising from that statute,<sup>509</sup> the Ninth Circuit found preemption in the face of the federal agency's explicit reliance on state law.

#### d. *The Supreme Court Decision*

In a majority opinion authored by Justice O'Connor, the Supreme Court reversed the Court of Appeals for the Ninth Circuit. The Supreme Court's decision was welcome in spite of its fractures and narrowness because it backed off from the Ninth Circuit's invasive reading of federal

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506. Although public lands management is not unique in carrying out policy through multiple statutes and coordinated agency action, it is extreme. *First Iowa*, for example, involved one federal agency (the Federal Power Commission), one statute (the Federal Power Act), and one overarching federal goal (the generation of hydroelectric power). *Fairfax & Cowart, supra* note 172, at 10,280. Minerals management on national forest lands typically involves a minimum of seven federal agencies in four federal departments. *Id.* at 10,280 n.63 (listing these agencies and 14 of the numerous major statutes they implement, each with a clear federal purpose that is not necessarily consistent with the purposes of the others).

507. *Granite Rock*, 768 F.2d at 1081 (citing 30 U.S.C. § 21a (1982)).

508. 471 U.S. 707, 717 (1985).

509. The Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1982), analyzed in *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (1979), gives the Secretary of the Interior control over the location, timing, and intensity of development. *Id.* at 1083-84. By contrast, the 1872 Mining Act's location system allows miners to lay claim to mining sites without any prior consultation with federal officials. *See supra* note 489.

authority and left room, at least in theory, for the state to regulate private developers operating on federal public lands. On the preemption issue, the Court rejected the Ninth Circuit's blanket "no state permit" approach, employing instead a close case-by-case analysis.<sup>510</sup>

In responding to the first of Granite Rock's three allegations, the Court dismissed the defendant's argument that "the CZMA, by excluding federal lands from its definition of the coastal zone, declared a legislative intent that federal lands be excluded from all state coastal zone regulation."<sup>511</sup> The Court's review of CZMA found no such intent in that statute.<sup>512</sup>

As to Granite Rock's assertion "that the Federal Government's environmental regulation of unpatented mining claims in national forests demonstrates an intent to pre-empt any state regulation,"<sup>513</sup> the Court stated:

[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its

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510. The opinion cites the now-familiar array of preemption tests:

[S]tate law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

*Granite Rock*, 107 S. Ct. at 1425 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

511. *Id.* at 1426. "Because Congress specifically disclaimed any intention to pre-empt pre-existing state authority in the CZMA, we conclude that . . . the CZMA does not automatically pre-empt all state regulation of activities on federal lands." *Id.* at 1431.

512. It is significant that the Court looked for preemptive intent in the CZMA rather than in the 1872 Mining Act, where the Ninth Circuit had found so compelling a federal purpose. The Supreme Court found no such purpose in the 1872 Act, *id.* at 1426, and based its holding on its reading of the CZMA rather than on the more complex analysis of the Mining Act found in the district court opinion. One potentially positive result of the Supreme Court decision is that it may place the 1872 Act into a more realistic perspective. The Ninth Circuit stated flatly that "[t]he purpose of the Mining Act is to encourage mining on federal lands," 768 F.2d at 1081, and found that purpose preemptive. *Id.* at 1083. In fact, the congressional purpose is more properly described as promoting the development of the mining resources of the United States. See *Fairfax & Cowart*, *supra* note 172, at 10,280 n.61. This goal was primarily accomplished by regulating rather than abolishing trespass. See *supra* note 34. Justice Powell correctly noted that "[i]n general, that law opens the public lands to exploration." *Granite Rock*, 107 S. Ct. at 1432 (Powell, J., dissenting). The Court avoided making any statements as to the intent of the 1872 Act with respect to concurrent state regulation, but one must infer from the majority opinion that (a) the Court did not construe the Act in isolation from other relevant statutes and (b) the Act does not preempt concurrent state environmental regulation of hardrock mining.

513. *Granite Rock*, 107 S. Ct. at 1425.

regulations indicate that the agency did in fact intend to pre-empt.<sup>514</sup> The Court concluded that the Forest Service regulations “not only are devoid of any expression of intent to pre-empt state law, but rather appear to assume that those submitting plans of operations will comply with state laws.”<sup>515</sup>

Granite Rock’s third assertion was that the California Coastal Commission permit requirement was an impermissible state land use regulation because Congress intended to confine states to a purely advisory role in public land management decisions. The Court responded to this argument by distinguishing land use planning for the public lands from environmental regulation of development activities on those lands. The majority assumed, without deciding, that state land use planning would be preempted when the National Forest Management Act (NFMA) and the Federal Land Policy and Management Act (FLPMA) are considered together.<sup>516</sup> Citing FLPMA’s requirements that the Secretary’s land use plans be consistent with state plans to the extent practical, but that the Secretary’s plans “provide for compliance with applicable pollution control laws,”<sup>517</sup> the Court concluded that “Congress has indicated its understanding of land use planning and environmental regulation as distinct activities.”<sup>518</sup> Therefore, the Court rejected Granite Rock’s argument:

Considering the legislative understanding of environmental regulation and land use planning as distinct activities, it would be anomalous to maintain that Congress intended any state environmental regulation of unpatented mining claims in national forests to be *per se* pre-empted as an impermissible exercise of state land use planning. Congress’ treatment of environmental regulation and land use planning as generally distinguishable calls for this Court to treat them as distinct, until an actual overlap between the two is demonstrated in a particular case.<sup>519</sup>

e. *Analysis*

The Supreme Court’s holding in *Granite Rock* is helpful in advancing the continuing collaboration between state and federal resource managers for two reasons. First, the Court reiterates the necessity of finding actual conflict between federal and state schemes before preempting concurrent state regulations. The Court rejected the Ninth Circuit’s em-

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514. *Id.* at 1426 (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985)).

515. *Id.*

516. *Id.* at 1427.

517. FLPMA § 202(c)(8)-(9), 43 U.S.C. § 1712(c)(8)-(9) (1982). These sections specifically list “State and Federal air, water, noise, or other pollution standards or implementation plans.” *Id.*

518. *Granite Rock*, 107 S. Ct. at 1428.

519. *Id.* at 1429.



brace of judicial nationalism, which had found preemption in numerous circumstances: the complexity of the statutory matrix in this policy area; the weight of federal environmental analyses; the presence or absence of a permit requirement in the state scheme; or an alleged but often ill-defined duplication of regulatory regimes. Without expressly disavowing *Ventura County*, the Supreme Court reined in the Ninth Circuit and reiterated the principles of concurrent jurisdiction set out in previous cases, including *Kleppe*.<sup>520</sup>

However helpful this return to the principles of *Kleppe* may be, the Supreme Court's decision may bring more confusion than clarity to the issue of state regulation of private activities on the public lands. First, the Court meticulously put the narrowest possible framework on the issues. The Granite Rock Company chose to challenge the Coastal Commission's authority to regulate rather than apply for a permit and then litigate a specific conflict with federal law; hence the Court stated: "Granite Rock's challenge to the California Coastal Commission's permit requirement was broad and absolute; our rejection of that challenge is correspondingly narrow."<sup>521</sup> The Court concluded:

[W]e hold only that the barren record of this facial challenge has not demonstrated any conflict. We do not, of course, approve any future application of the Coastal Commission permit requirement that in fact conflicts with federal law. Neither do we take the course of condemning the permit requirement on the basis of as yet unidentifiable conflicts with the federal scheme.<sup>522</sup>

The Court, however, did not shed any light on the factors it would consider in evaluating whether a particular permit requirement "in fact conflicts with federal law." Supplementary state environmental requirements effectively could prohibit commercial development of a federal mineral claim.<sup>523</sup> Whether such a state requirement would be preempted depends on four factors: (1) where the court looks when seeking evidence of congressional intent; (2) whether the court will establish a lower standard for preemption in the public lands context than in other areas of

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520. See *supra* notes 376-87 and accompanying text regarding *Kleppe v. New Mexico*, 426 U.S. 529 (1976), and the line of cases leading to it.

521. *Granite Rock*, 107 S. Ct. at 1431.

522. *Id.* at 1432.

523. The fact that Granite Rock's claim is unpatented raises the possibility that compliance with environmental protection regulations could invalidate the claim under the Department of the Interior's "marketability" test implementing the "prudent man rule," which defines a discovery of a valuable deposit under the 1872 Act. See Fairfax & Andrews, *Debate Within and Debate Without: NEPA and the Redefinition of the Prudent Man Rule*, 19 NAT. RESOURCES J. 505, 513-14 (1979). According to this rule, if the claim is challenged, the agency asks whether the costs of complying with state and federal environmental protection stipulations are included in the calculation of what is marketable at a profit. A claimant who has located a valuable deposit has a valid mining claim and rights of *pedis possessio*. A claimant with no "valuable" (i.e., marketable at a profit) deposit has no rights to mine the deposit. Fairfax & Cowart, *supra* note 172, at 10,278 n.19; see also J. LESHY, *supra* note 489, at 151-66.

concurrent state/federal regulation; (3) the degree of judicial deference accorded federal administrative regulations and agency practice in deciding preemption questions; and (4) whether the court will preempt otherwise valid state regulations only when Congress has clearly stated such an intention, or assume preemption absent intent to the contrary. The *Granite Rock* decision is silent on all of these issues.

The second deficiency in the *Granite Rock* decision lies in the Supreme Court's confusing distinction between land use planning and environmental regulation.<sup>524</sup> Because that distinction is at best "not always bright,"<sup>525</sup> and may in fact be nonexistent, it is not clear where this new category of preemption analysis will lead. Moreover, the Court muddled but ultimately ducked one serious consequence of this judicial imagining: it suggested,<sup>526</sup> assumed,<sup>527</sup> and otherwise hinted that state land use planning is preempted on federal lands. But it did not explicitly say so and it did not discuss the issue. Since the distinction between land use planning and environmental regulation in the administration of the federal public lands appears wholly artificial, it cannot define clear lines or criteria for deciding when state regulations would be preempted. This presents significant questions for on-the-ground managers and for all others who must act and plan in the context of the decision.

A final shortcoming of the Court's opinion is that in the process of constructing the distinction between land use and environmental regulation, the Court brushed against a complex subject of great import to managers of public lands and other resources: the consistency provisions of the federal lands statutes and the planning practices of the federal agencies. Justice Powell argued that "the regulation of land use is more complicated than the Court suggests,"<sup>528</sup> whereas Justice Scalia argued that the issue is "simpler and narrower" than the land use/environmental regulation distinction suggests.<sup>529</sup> Nevertheless, all

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524. *Granite Rock*, 107 S. Ct. at 1427-29. A dissent called this distinction "ultimately irrelevant." *Id.* at 1438-39 (Scalia, J., dissenting). This alleged distinction strikes us as familiar old wine—the regulation but not prohibition theme—which in the Supreme Court's *Granite Rock* decision emerged in a particularly unenlightening new sack. The Court's distinction between land use planning and environmental regulation appears to depend on a simplistic and unrealistic notion of land use planning as equivalent to zoning. *See, e.g., id.* ("Land use planning in essence chooses particular uses for the land."). But even if a land use permit is only "a device for exacting environmental assurances, the power to demand *that permit* nevertheless hinges upon the State's power . . . to control land use." *Id.* at 1440 (Scalia, J., dissenting).

525. *Id.* at 1428.

526. "Federal land use statutes and regulations [may be seen as] arguably expressing an intent to pre-empt state land use planning . . ." *Id.* at 1431.

527. "For purposes of this discussion and without deciding this issue, we may assume that the combination of the [National Forest Management Act] and the [Federal Land Policy and Management Act] preempts the extension of state land use plans onto unpatented mining claims in national forest lands." *Id.* at 1427.

528. *Id.* at 1433 (Powell, J., dissenting).

529. Justice Scalia argued as follows:

three opinions confused the consistency issue without discussing or deciding the meaning of the cooperative planning and consistency provisions of NFMA and FLPMA.

Without much discussion the Court hinted that state and local land use plans were preempted by "the combination of the NFMA and the FLPMA."<sup>530</sup> This is a serious error. Section 202 of FLPMA does not preempt state and local plans. To the contrary, FLPMA establishes both a clear presumption *against* preemption and a clear duty for the Secretary of the Interior to conform federal land planning to state and local priorities unless doing so would violate a federal statute.<sup>531</sup> On BLM lands, FLPMA appears to limit federal preemption to those instances in which state or local priorities conflict with federal statutes.<sup>532</sup>

The consistency provisions reflect the intent of Congress to respect state and local plans and policies to the maximum extent possible. In a legal sense this is evidence of Congress' intent *not* to exercise the full reach of its property clause authority. In a political sense it offers substantial bargaining power to state and local efforts to influence the federal land planning process. Thus, sweeping statements from the Court—even in dissent—such as "FLPMA only requires the Secretary to listen to the States, not obey them,"<sup>533</sup> could seriously undercut the intent and prac-

It seems to me ultimately irrelevant whether state environmental regulation has been pre-empted with respect to federal lands, since the exercise of state power at issue here is not environmental regulation but land use control. The Court errs in entertaining the Coastal Commission's contention "that its permit requirement is an exercise of environmental regulation"; and mischaracterizes the issue when it describes it to be whether "any state permit requirement, whatever its conditions, [is] *per se* preempted by federal law." We need not speculate as to what the nature of this permit requirement was. We are not dealing with permits in the abstract, but with a specific permit, purporting to require application of particular criteria, mandated by a numbered section of a known California law. That law is plainly a land use statute, and the permit that statute requires Granite Rock to obtain is a land use control device. Its character as such is not altered by the fact that the State may now be agreeable to issuing it so long as environmental concerns are satisfied. Since, as the Court's opinion quite correctly assumes, state exercise of land use authority over federal lands is pre-empted by federal law, California's permit requirement must be invalid.

*Id.* at 1438-39 (Scalia, J., dissenting) (citations to majority opinion omitted).

530. *Id.* at 1427.

531. FLPMA § 202(c)(9), 43 U.S.C. § 1712(c)(9) (1982) ("[L]and use plans . . . shall be consistent with state and local plans to the maximum extent . . . consistent with Federal law and the purposes of this Act.").

532. This would appear to be an even stricter standard than that applied by the Court in *United States v. California*, 438 U.S. 645 (1978), which required the Bureau of Reclamation to adhere to state law unless it conflicts with federal law or policy. BLM would appear to be barred under FLPMA from electing a preemptive policy when alternatives in conformance with the state plans and programs exist. *Id.* at 674-75; see Foote, *Regulatory Vacuums: Federalism, Deregulation and Judicial Review*, 19 U.C. DAVIS L. REV. 113, 151 (1985).

533. *Granite Rock*, 107 S. Ct. at 1433 (Powell, J., dissenting). Given the deference shown Forest Service regulations in this decision, *id.* at 1426-27, the majority's lack of interest in BLM's interpretation of FLPMA's consistency regulations is puzzling. Moreover, the tendency of the Court to lump together FLPMA and NFMA in speaking about federal land

tice of consistency compliance without adequate analysis or understanding.

At bottom, much of the language in all the *Granite Rock* opinions evinces a serious misunderstanding by the Supreme Court of public lands history, policy, and law. In large measure, this misunderstanding results from the complexity of managing public lands resources and of the regulatory regimes that have been developed for their management. It also reflects the judicial tendency to elevate legal theory over administrative and environmental reality. In fact, elected officials, state and federal administrators, and resource users have developed a broad array of cooperative mechanisms for land and resource management. These mechanisms reflect administrative and political reality as much as preemption theory and offer the most productive solutions to continuing complex resource management problems.<sup>534</sup>

#### CONCLUSION

"Just as it has been truly said that the life of the law is not logic but experience, so may it be said that the life of the law is not political philosophy but experience."<sup>535</sup> This does not mean that philosophy and experience are incompatible, but that legal theory must acknowledge and be informed by the economic and social realities of the legal setting. This principle is no less true in the evolution of federalism than in traditional common law arenas.<sup>536</sup> In this Article we have examined the administrative experience of state, local, and federal resource managers who have found cooperative means to implement increasingly complex management regimes for natural resources on the public lands.

We have found that the Sagebrush Rebellion was not a narrow "ranchers' revolt" over the details of grazing management decisions. It was, rather, a broad movement among the Western public land states to enhance their control over the natural resources that are central to their economies, environments, and ways of life. This movement has found form not only in highly visible political action but also in the increasing

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management statutes is distressing, as these two statutes are significantly different on key aspects of the issue of how much cooperation with state law may be required of the agency.

534. One hopes that resource managers can sustain their cooperative agreements in spite of contradictory proclamations from the courts. Commenting on the *Granite Rock* decision, the BLM Associate Solicitor for Energy and Resources discounted the chance of any dramatic retreat from standard cooperative practice: "The decision ratifies the existing cooperative relationship which the Forest Service and the BLM have with many states for issuance of environmental permits." Memorandum to Director, BLM, Regarding California Coastal Commission v. Granite Rock Co., from William Murray, Assistant Solicitor, Branch of Onshore Minerals, Office of the Solicitor, Department of the Interior, Washington, D.C. (Mar. 25, 1987).

535. *California v. United States*, 438 U.S. 645, 648 (1978) (citing O.W. HOLMES, *THE COMMON LAW* 1 (1881)).

536. For example, *California* upheld the application of state water law to federal reclamation projects built under the Reclamation Act of 1902. *Id.*

competence and assertiveness of state and local managers in implementing increasingly sophisticated state resource management programs.

This increasing state assertiveness and competence has been acknowledged by the federal government in a variety of contexts: by Congress through primacy, cooperation, and consistency provisions in federal statutes; by federal agencies in the promulgation of regulations for coordination, consistency, and environmental review; and by federal land managers throughout the West. This acknowledgement only reflects administrative reality. Both federal and state administrators are aware of the legal, physical, and fiscal realities of modern public lands management. State and federal resource regimes are intertwined; mineral, land, water, and wildlife resources are physically intermixed; and the federal agencies are incapable of fully managing the far-flung public domain. For these reasons, state and federal administrators have developed a large number of mechanisms for cooperative management and dual regulation of public land resources.

Although these complex arrangements are widely accepted by policymakers and administrators, they remain vulnerable to judicial intervention. The courts can do real harm if they charge into the complicated matrix of diverse interests and expectations reflected in dozens of federal and state statutes and institutional arrangements. Simplistic legal distinctions—such as those between a single, supposedly superior federal purpose, and all others; between “regulation” and “prohibition”; or between environmental regulation and land use planning—make no sense in a field where the real challenge is to balance diverse, interdependent, and competing interests. A review of the public domain preemption cases reveals judicial approaches that are both overly simplistic and inconsistent. The Supreme Court’s opinions in *Granite Rock* do little to resolve this problem and fail to offer much meaningful guidance to legislators, administrators, and lower courts.

Part of the reason for the judicial confusion is the bare fact of the federal ownership of the land, as evidenced by Justice Powell’s dissent in *Granite Rock*. Referring to the property clause, he notes: “In light of this clear constitutional allocation of power, the location of the mine in a national forest should make us less reluctant to find pre-emption than we are in other contexts.”<sup>537</sup> Although he does not discuss the point further, it appears that the presumed “federalness”<sup>538</sup> of the public lands tempts

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537. *Granite Rock*, 107 S. Ct. at 1437 (Powell, J., dissenting).

538. Traditionally, these lands were known as the “public lands.” See, e.g., P. GATES, *supra* note 23. Only recently have courts, scholars, and politicians come to call them “federal lands.” Whatever they are called, it is essential to keep in view the clear constitutional distinction between federal enclaves held under the jurisdiction clause, U.S. CONST. art. I, § 8, cl. 17, and public domain lands held under the property clause in article IV. That the Constitution contains a separate provision granting the federal government exclusive jurisdiction over article I lands emphasizes that the states retain jurisdiction over article IV lands unless their

the courts to ignore the administrative realities of public lands management and Congress' repeated attempts to foster cooperative management regimes.

Federal ownership also appears to encourage a related tendency on the part of the courts to confuse state regulation of private activity on public lands with state regulation of the federal agency itself. Although direct state regulation of the federal agency undoubtedly would be preempted unless explicitly authorized,<sup>539</sup> that type of regulation was not at issue in any of the cases we have discussed. Rather, cases such as *First Iowa*, *Click*, *Ventura County*, and *Granite Rock* concern the attempted application of state law to private users of public resources.

An assumption that federal land ownership requires preemption would distort both constitutional law and sound principles of judicial preemption policy.<sup>540</sup> Contrary to Justice Powell's assertion, courts should be *less* willing to infer federal preemption of concurrent state regulation in the public lands context than in many other fields. Statutory preemption turns on the Court's interpretation of congressional intent. Interpretation is difficult enough when Congress has spoken in a single integrated statute interpreted by a single federal agency.<sup>541</sup> But public lands planning and management decisions are governed by numerous statutes focusing on competing goals, enacted at different times, and administered by a variety of federal agencies.<sup>542</sup>

In the absence of a clear congressional statement of preemptive intent in any of these statutes, determining whether a state program "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress"<sup>543</sup> depends entirely on which part of which statute the Court chooses to focus on. Where Congress has neither chosen among these competing goals nor clearly excluded concurrent state programs balancing them, it is certainly inappropriate for a court to impose its own policy choice on Congress, which has declined to choose, and on a state, which has made a contrary choice. In this complex statutory

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regulation is excluded by Congress. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976); see also text accompanying *supra* notes 397-418.

539. See *Hancock v. Train*, 426 U.S. 167 (1976).

540. Not only is such a legislative role fundamentally improper for the courts, it also is likely to lead to ill-informed policy choices. For example, on what basis could a court choose between the purposes of the Mining Act (to promote mining) and of NFMA (to protect renewable resources), when both apply to the same lands? The actual policy mix in most cases is much more complex than this, involving both state and federal statutes.

541. See, e.g., *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355 (1986) (Federal Communications Act); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) (both interpreting preemptive intent in the Atomic Energy Act).

542. A selection of the relevant statutes is set out in *Fairfax & Cowart*, *supra* note 172, at 10,280 n.63.

543. *Silkwood*, 464 U.S. at 248.

arena, both judicial policy and respect for the political branches and the states<sup>544</sup> commands adoption of a judicial “clear statement” rule, presumptively approving concurrent state regulation of private resource users unless Congress clearly has stated otherwise.

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544. A judicial rule of decision presumptively approving concurrent state regulation in the public lands context acknowledges the political safeguards of federalism. Because Congress is the final arbiter of preemption decisions within its authority, and because congressional delegations from the public lands states comprise only a minority of each house of Congress, courts should presume that Congress, when the national interest so requires, is capable of forbidding state regulation of public lands resources. The public lands are distributed so unevenly among the states—and are so critical to the affected states—that the courts should place the burden of producing clear statements of preemptive legislative intent on the representatives of the majority of the states, not on those of the minority.