Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs

Part 1

by

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TABLE OF CONTENTS

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During the past two decades, Congress has enacted significant legislative initiatives designed to reduce degradation of our environment. These initiatives have included special efforts to conserve our land resource. To preserve the appropriate balance of power between the federal government and the states, Congress has striven to avoid the appearance of federal land use "regulation."[1] For example, the legislative history of the conservation provisions in the Food Security Act of 1985[2] ("1985 Farm Bill") expressly notes that the "bill does not . . . regulate the use of private, or non-Federal land."[3] The government can readily control land uses, and avoid the complex issues arising when federal programs affect states' rights or private property rights, by purchasing full fee title to environmentally significant lands. However, purchasing full fee title is an expensive means of achieving conservation or preservation goals.[4] Thus, to protect environmentally significant aspects of the land resource, the government has shifted its focus to the acquisition of less costly easements from private landowners.[5]

Easements can be created to allow the federal government to restrict environmentally degrading uses of the land.[6] Because the easements are purchased from landowners who voluntarily agree to such restrictions, the government can influence land use without directly regulating it.[7] Easements have been highly praised by conservation and environmental interest groups as an ideal device to achieve conservation and preservation goals.[8] The political feasi-

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1. *See* discussion *infra* part II.A.

2. Pub. L. No. 99-198, 99 Stat. 1354, 1504-18 (1985) (codified as amended in scattered sections of Titles 7 and 16 of the United States Code).

3. H.R. Rep. No. 271, 99th Cong., 1st Sess., pt. 1, at 88 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1192. Similarly, the Farmland Protection Policy Act of 1981 expressly states that it does "not authorize the Federal Government in any way to regulate the use of private or non-Federal land, or in any way affect the property rights of owners of such land." 7 U.S.C.A. § 4208(a) (West 1988).

4. *See* Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 443-46 (1984) (noting that direct and indirect costs of purchasing fee title make purchasing servitudes an economically superior conservation technique).

5. Although the government historically has used easement acquisition programs for various purposes, the trend toward conserving or preserving diverse land resources through easements is evidenced by the multitude of recently established federal conservation programs which include easement acquisition provisions. *See* discussion *infra* part I.B.2.

6. *See infra* notes 23-27 and accompanying text.

7. *See generally* JOHN W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 11.02 (1988) (noting that the grantor of a conservation easement may use property for any purposes not inconsistent with the easement).

8. *See infra* notes 45, 51-55 and accompanying text (describing distinction between

bility of federal easement acquisition programs is aptly illustrated by the Food, Agriculture, Conservation and Trade Act of 1990[9] ("1990 Farm Bill"), which has greatly expanded the government's use of easements to protect environmentally significant lands, including wetlands, highly erodible croplands, forestlands, wildlife habitats, farmland, shelterbelts and windbreaks.[10] Landowner acceptance of easement acquisition programs is evidenced by the first year's response to the Wetlands Reserve Program[11] — 2,730 landowners indicated a willingness to enroll 466,000 acres in the program.[12]

Accordingly, it is important to determine how Congress can best utilize land use restriction easements to achieve lasting conservation and preservation of the land resource. Congress has called for an evaluation of federal conservation programs; specifically, Congress has sought to overcome obstacles to federal conservation goals.[13] One such obstacle is uncertainty in the law governing the duration of federal land use restriction easements. While the Forestry Title of the 1990 Farm Bill requires easements to be held in perpetuity and preempts state law limits on duration,[14] the Conservation Title of the 1990 Farm Bill incorporates state law to govern the maximum allowable duration.[15] No other acquisition program expressly addresses whether federal law overrides state limitations on duration.[16]

Use of state law to govern the maximum duration of easements will hinder the federal government's ability to advance conservation goals efficiently and effectively. In addition to the ineffi-

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conservation and preservation and discussing support among environmental interest groups for land use restriction easements).

9. Pub. L. No. 101-624, 104 Stat. 3359 (1990) (codified as amended in scattered sections of 7 U.S.C. and 16 U.S.C.).

10. *See* discussion *infra* part I.B.2.

11. 16 U.S.C.A. § 3837-3837f (West Supp. 1992); *see infra* notes 101-08 and accompanying text.

12. *Farmers Offer Acreage for Wetlands Restoration*, Indiana Agrinews, July 17, 1992, at 6; *see* Thomas Grier, *Conservation Easements: Michigan's Land Preservation Tool of the 1990's*, 69 U. DET. L. REV. 193, 197-98 n.47 (1991) (noting enrollment of four million acres of farmland under the Michigan Farmland and Open Space Preservation Act).

13. *See* 16 U.S.C.A. § 3846 (West Supp. 1992) (directing the Secretary of Agriculture to prepare a report evaluating conservation programs and policies).

14. 16 U.S.C.A. § 2103c(k)(2) (West Supp. 1992); *see also infra* note 216 and accompanying text.

15. 16 U.S.C.A. §§ 3837a(e)(2), 3839(a) (West Supp. 1992); *see also infra* note 215 and accompanying text.

16. *See* discussion *infra* part II.B.

ciencies of compliance with diverse state laws, state laws may preclude the acquisition of easements in perpetuity.[17] Even in those states which permit restrictive land use easements to be held in perpetuity, incorporation of state law may hinder federal programs because state law may place limits on qualified holders of easements or purposes for which easements may be created.[18] Further, incorporation of state law may permit a state to defeat federal programs simply by modifying its laws.[19]

Accordingly, federal programs should authorize acquisition of perpetual easements and preempt state laws regulating their duration. This policy will enhance conservation goals in programs which use easements to restrict harmful uses of the land resource.[20] However, federal imposition of these requirements raises fundamental federalism concerns. May the federal government acquire a property right that is not a cognizable aspect of the landowner's "bundle of rights" under state law? Even if the federal government may acquire a property right not recognized by state law, may the federal government convey that right to private nonprofit entities, along with the ability to enforce its terms? Certainly, if a federal law authorizing perpetual easements is a proper exercise of congressional powers, it will preempt state laws.[21] However, because state laws traditionally control the acquisition and transfer of property, and define the resulting rights and responsibilities,[22] federal preemption of state property law may be perceived as an intrusion on state sovereignty which violates constitutional limitations.

This article examines the constitutional and policy concerns surrounding federal use of perpetual land use restrictive easements to achieve conservation goals. Section I explains the use of easements for conservation or preservation purposes and provides an

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17. *See infra* notes 39-42, 457-61 and accompanying text.

18. *See infra* notes 462-65 and accompanying text.

19. States may be overly responsive to private interests dissatisfied with encumbrances on land use. *See infra* notes 471-73 and accompanying text.

20. This article uses the term "perpetual" to mean that the interest is intended to be continuous and of unlimited duration. BLACK'S LAW DICTIONARY 1140 (6th ed. 1990). However, the term can be used in conjunction with provisions permitting modification or termination of the interest under certain circumstances. *See infra* notes 485-87 and accompanying text.

21. U.S. CONST. art. VI, cl. 2.

22. The states' traditional control over property law is used to justify the incorporation of state law in the interpretation of federal legislation. *See infra* notes 225, 403-13 and accompanying text.

overview of their use in federal agricultural programs. Section II explains why easement acquisition programs are more appropriate than direct land use regulation as a means to conserve environmentally significant aspects of the land resource.

Section III analyzes federalism issues and concludes that federal preemption of state limitations on the duration of easements is a proper exercise of congressional spending and property power. Moreover, this exercise of congressional power does not violate constitutional limitations intended to protect state sovereignty. Finally, section IV crafts a framework for the policy decision. Even if the exercise of congressional power is constitutional, Congress should consider the policy questions before enacting legislation that intrudes into traditional areas of state authority. After examining the policy issues, the article concludes that federal law should require perpetual easements and preempt state limitations on duration.

I. OVERVIEW OF CONSERVATION EASEMENTS

A. Land Use Restriction Easements

Land use restriction easements ("LUREs") are an innovative application of the private land use arrangements traditionally recognized at common law.[23] An easement is a non-possessory interest in another's land, generally entitling the easement holder to use the land or to control its use.[24] An easement typically grants an affirmative right to the easement holder;[25] however, in the case of a LURE, the easement conveys a negative restriction on the landowner who grants the easement.[26] In other words, the landowner vol-

23. Private land use arrangements may take the form of easements, real covenants, or equitable servitudes. *See generally* GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS § 1.01 (1990) ("Easements, real covenants, and equitable servitudes are used to allocate non-possessory rights in the land of another."). While historically courts have viewed these interests differently, for this article the primary significance of such arrangements is the resulting land use restrictions imposed. *See id.* (noting that while courts have regarded easements, real covenants and equitable servitudes as independent areas of the law, recent scholarship has advocated unification of these doctrines). Rather than use common law nomenclature, this article adopts the more modern term "land use restriction easement." The acronym "LURE" is appropriate given the federal government's use of LUREs as an "incentive" to promote voluntary modification of land use.

24. RESTATEMENT (FIRST) OF PROPERTY § 450 (1944) [hereinafter RESTATEMENT].

25. *See id.* § 451 (an affirmative easement entitles the owner to enter upon or use the grantor's land for a prescribed activity).

26. For this reason, a LURE is deemed a negative easement. *See* Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L. J. 2,

untarily agrees to limit his use of the land to conserve its resources or preserve its unique character.[27]

The common law traditionally disfavored negative restrictions on land as unduly burdensome on free alienation.[28] Free alienability of land was an important tradition in post-feudal and pre-industrial England:[29] because a later easement holder might not be a party to the original transfer, and because there was no title registry, a later purchaser might have difficulty in discovering the existence of a negative easement.[30] In addition, common law courts are reluctant to enforce negative easements unlike those traditionally permitted, such as easements for light or air which clearly benefit the dominant estate.[31]

Further, LUREs are generally characterized as in gross, rather than appurtenant to an adjacent parcel of land.[32] Since a LURE does not benefit any identifiable land, it is more akin to a personal

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12-13 (1989) (noting that conservation easements are "fundamentally different" from affirmative easements because they disallow conduct by the landowner, rather than permit activity by the easement holder); Neil D. Hamilton, *Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief*, 35 DRAKE L. REV. 477, 484-85 (1985-86) (recognizing that a negative easement gives the holder the right to restrict the landowner's use of property).

27. *See* Korngold, *supra* note 4, at 435 ("Essentially, a conservation servitude is a negative restriction on land prohibiting the landowner from acting in a way that would alter the existing natural, open, scenic, or ecological condition of the land."); Kemble H. Garret, Note, *Conservation Easements: The Greening of America?*, 73 KY. L.J. 255, 256 (1984-85).

28. *See generally* Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928 (1988) (discussing traditional common law doctrine which disfavored benefits in gross to promote alienability of land).

29. *See* Olin L. Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 14-19 (1978) (reviewing the legal impediments erected by English courts to prevent "running" of land use restrictions and promote alienability of property).

30. *See* Ellen E. Katz, *Conserving the Nation's Heritage Using the Uniform Conservation Easement Act*, 43 WASH. & LEE L. REV. 369, 377 (1986).

31. *See, e.g.*, Petersen v. Friedman, 328 P.2d 264 (Cal. Ct. App. 1958) (compelling removal of television antennae and aerials which violated express easements of light, air and unobstructed view). Common law traditionally allowed only the following types of negative easements: (1) easements restricting the blockage of light and air to a building; (2) easements restricting removal of subjacent or lateral support for a building; and (3) easements restricting interference with the flow of an artificial stream. Dana & Ramsey, *supra* note 26, at 13. Modern courts have also recognized "view easements" and "solar easements." *Id.*

32. Hamilton, *supra* note 26, at 485. Appurtenant easements benefit a specific parcel of land, known as the dominant estate, usually adjacent to the burdened or servient estate of the easement grantor. RESTATEMENT, *supra* note 24, § 453. In gross easements benefit an individual personally, rather than as owner of an identified parcel of land. *Id.* § 454. Thus, LUREs possess the characteristics of negative or restrictive easements in gross.

agreement.[33] Traditionally, courts have restricted the assignment or transferability of easements in gross to protect innocent purchasers.[34]

Despite the common law tradition, LUREs have proliferated in recent years as a means of conserving or preserving historical and environmental aspects of real property. Recognizing growing public support for such efforts, several state legislatures have enacted statutes validating LUREs and vitiating issues raised by application of the common law.[35] Some state statutes are modeled after the Uniform Conservation Easement Act ("UCEA") promulgated in 1981.[36] The UCEA defines a "conservation easement" as:

> [A] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archeological, or cultural aspects of real property.[37]

Further, the UCEA states that a conservation easement is valid even though it is not appurtenant, is assignable, is not traditionally recognized at common law, imposes a negative burden, does not touch or concern real property, and is without privity of estate or contract.[38]

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33. *See* Katz, *supra* note 30, at 382.

34. Traditionally, American law has restricted the alienability of easements in gross, permitting assignability only when the easement is created for a "commercial" purpose. Susan F. French, *Toward A Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1268 (1981-82). A minority of states disfavor the transfer of all easements in gross. *See* Judith S.H. Atherton, *An Assessment of Conservation Easements: One Method of Protecting Utah's Landscape*, 6 J. ENERGY L. & POL'Y 55, 58 n.4 (1985) (surveying various state statutes governing transfer of easements in gross). The rationale for the restrictive view is that easements should be tied to another parcel of land so that the benefits of the easement flow to a later owner of adjacent property. *See* Katz, *supra* note 30, at 382.

35. *See infra* notes 456-59 and accompanying text; *see also* Atherton, *supra* note 34, at 86-87 (appendix listing state conservation statutes); Hamilton, *supra* note 22, at 525-27 (appendix listing state statutes permitting LUREs).

36. UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 70 (West Supp. 1992).

37. *Id.* § 1(1).

38. *Id.* § 4(1)-(7). Some of the issues vitiated stemmed from the common law doctrines of real covenants or equitable servitudes, in addition to common law easement doctrines. *See supra* note 23. *See generally* Katz, *supra* note 30, at 377-82 (discussing

Despite the effort to promote uniformity, state statutes authorizing LUREs for conservation or preservation purposes are diverse.[39] These statutes employ divergent provisions regarding various facets of LUREs including their creation, authorized purposes, qualified holders, acceptance, duration, enforcement, modification, and termination.[40] Thus, state statutes do not resolve all obstacles to judicial enforcement of LUREs, particularly LUREs held by the federal government or acquired pursuant to federal conservation programs.[41] Nonetheless, states which permit negative, in gross easements for conservation or preservation purposes utilize LUREs to achieve a variety of public goals.[42]

The use of LUREs to protect or preserve environmentally significant aspects of real property offers a number of advantages to both the landowner and the easement holder. Foremost, LUREs offer great flexibility. LURE agreements can be drafted with specificity regarding both the restricted and the allowed uses of the land.[43] The resulting capability of LUREs to accomplish either conservation or preservation goals offers a tremendous advantage in the protection of the diverse ecological aspects of our land re-

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common law requirements and limitations on in gross benefits in real covenants, equitable servitudes, and easements). Several state statutes use similar language. *See, e.g.*, N.Y. ENVTL. CONSERV. LAW § 49-0305(5) (McKinney Supp. 1992) (mirroring UCEA validity provisions for conservation easements); OR. REV. STAT. § 271.745 (1991) (same).

39. Atherton, *supra* note 34, at 62-63 (state conservation statutes vary in complexity and precision since they are tailored to meet particular states' needs). Even among states which substantially follow the UCEA, tailoring of the statute to meet the needs and goals of each state has produced a variety of diverse provisions. *See, e.g.*, IDAHO CODE § 55-2107 (1988) (revising UCEA to prohibit creation of conservation easements through eminent domain); KY. REV. STAT. ANN. § 382.850 (Baldwin 1989) (altering the UCEA to add special provisions concerning mining); ME. REV. STAT. ANN. tit. 33, § 476 (West 1988) (deleting stated UCEA purposes regarding preservation of historical, architectural or cultural aspects of real property and defining real property to include surface waters); WIS. STAT. ANN. § 700.40 (West Supp. 1992) (supplementing the express purposes of UCEA by adding the purpose to protect burial grounds).

40. *See* Atherton, *supra* note 34, at 62-67. In some cases, the divergent provisions of state statutes yield diametrically opposed results. *Compare* IDAHO CODE § 55-2109 (1988) (stating that conservation easements shall not affect assessed property value for tax purposes) *with* IND. CODE ANN. § 32-5-2.6-7 (West Supp. 1992) (requiring assessed property value to reflect the conservation easement for tax purposes).

41. *See infra* notes 455-64 and accompanying text.

42. *See, e.g.*, IND. CODE ANN. § 32-5-2.6-1 (West Supp. 1992) (containing a modified list of the five policy purposes supported by the UCEA, including protection of natural resources, enhancement of air and water quality, and protection of architectural, historical and cultural aspects of real property).

43. *See* Hamilton, *supra* note 26, at 486 (noting that conservation easements can be drafted to address land conditions and landowner needs).

source.[44] For example, while a wetland may need to be *preserved* to maintain its environmentally significant functions, highly erodible lands or forestlands may merely need to be *conserved.*[45]

Further, since less funds are required to purchase a LURE than the full fee interest, the conservation purpose is accomplished more efficiently.[46] Additionally, the management and possession of the realty remain with the landowner.[47] Because title remains with the landowner, the realty remains subject to local property taxes,[48] although property value may be reduced by the presence of a LURE.[49] Moreover, property owners who donate LUREs may qualify for a charitable deduction from federal income taxes.[50]

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44. Easements may be used to preserve the scenic or open-space values associated with the land, as well as to regulate uses of the land which are permitted. *See supra* note 26; *see also* BRUCE & ELY, *supra* note 7, ¶ 11.02 (stating that conservation easements protect open space, scenic views, wildlife habitats and outdoor recreation areas); R. Tim Willis, *The Use of Easements to Preserve Oregon Open Space*, 12 WILLAMETTE L.J. 124, 125-26 (1975) (explaining that an easement allows the landowner to continue to use the land, subject to the easement regulations).

45. The distinction between conservation and preservation should be noted, since these terms describe two different approaches to environmental land management. Conservation entails the use of science and technology to achieve efficient use of land resources. By contrast, preservation emphasizes the aesthetics of the land as its most important feature. Adherents of the latter view seek to preserve the land in its natural state, precluding any commercial use, efficient or otherwise. *See* SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY 189-198 (1959) (characterizing the conflict as between those who favor resource development and those who argue that wildlife areas should be preserved from commercial use); CURRENT ISSUES IN NATURAL RESOURCE POLICY 31 (Paul R. Portney et al. eds., 1982) (stating that the scientific management espoused by the conservationists conflicts with the objectives of preservationists who want lands left undisturbed). For purposes of this article, the important point is that LUREs can be used to achieve both conservation and preservation goals.

46. Hamilton, *supra* note 26, at 486. A LURE may not be cost effective if the device fails to protect the resource adequately. Dana & Ramsey, *supra* note 26, at 10 n.45.

47. Hamilton, *supra* note 26, at 486.

48. *Id.* Because federally owned property is not subject to local taxes, local residents shoulder an additional tax burden when the government protects land resources by acquiring full fee title. *See id.*

49. *See* Dana & Ramsey, *supra* note 26, at 9 (noting that reduction in property value due to LUREs may be offset by corresponding reduction in property taxes).

50. Section 170(h) of the Internal Revenue Code allows a deduction for donations of real property interests which have significant environmental value and which are given exclusively for conservation purposes. *See* I.R.C. § 170(f)(3)(B)(iii), (h)(1)-(5) (1988) (defining contributions which qualify for conservation deduction); *see also* Justin R. Ward & F. Kaid Benfield, *Conservation Easements: Prospects for Sustainable Agriculture*, 8 VA. ENVTL. L.J. 271 (1989) (discussing the problem of conservation deductions where gifts of "perpetual" easements are in fact of shorter duration); Timothy J. Houseal, Note, *Forever a Farm: The Agricultural Conservation Easement in Pennsylvania*, 94 DICK. L. REV. 527 (1990) (providing an in-depth analysis of the conservation deduction).

For these and other reasons, LUREs have become the vehicle of choice among private organizations for conservation and preservation of the land resource.[51] Private organizations engaged in land acquisition include the National Trust for Historic Preservation, the Nature Conservancy, American Farmland Trust, Trust for Public Land, and the Conservation Fund. These national organizations have protected nearly seven million acres of land.[52] In addition, the number of local land trusts has dramatically increased. In 1950, there were fifty-three such organizations; in 1990, there were 899.[53] Local land trusts have protected approximately 2.7 million acres.[54] Similarly, state and local entities are increasingly relying on easement acquisition programs as a means of protecting environmentally sensitive lands.[55]

Moreover, the Supreme Court's recent decision in *Lucas v. South Carolina Coastal Council*[56] may result in greater support for LURE acquisition programs at the state level. *Lucas* indicates that state regulation of land use may constitute a taking under the Fifth and Fourteenth Amendments unless the regulation is grounded in the common law of nuisance.[57] This decision may induce envi-

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51. The federal tax code permits the establishment of charitable organizations for the specific purpose of accepting donations of "qualified conservation contributions" as defined in § 170(h) of the Internal Revenue Code. Regulations prescribe that a qualified organization must satisfy the general requirements for tax exempt status, must have a commitment to protect the conservation purposes of the donation, and must have the resources to enforce the restriction. *See* Treas. Reg. § 1.170A-14(c)(1) (1988) (defining eligible donee requirements for conservation contribution).

52. Patricia P. Klintberg, *The Great Land Grab*, FARM JOURNAL, Dec. 1991, at 13 (1991).

53. *Id.*

54. *Id.*

55. *See generally* Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 ECOLOGY L.Q. 401 (1987) (discussing farmland protection programs in states attempting to balance urban growth and agricultural preservation); Grier, *supra* note 12 (surveying rise of land trusts and conservancies in Michigan); Houseal, *supra* note 50 (discussing amendment to Pennsylvania's Agricultural Security Act to provide revenue for conservation purposes).

The Indiana Heritage Trust Program, for example, authorizes the state Department of Natural Resources to purchase real property or interests in real property. Property eligible for the program is described as property that: "(1) is an example of outstanding natural features and habitats; (2) has historical and archeological significance; and (3) provides areas for conservation, recreation and the restoration of native biological diversity." Senate Enrolled Act of 1992, No. 387, § 3(1)(a) (to be codified at IND. CODE § 14-3-20-1). The program was enacted to ensure that Indiana's rich natural heritage is preserved or enhanced for succeeding generations. *Id.* § 1(b).

56. 112 S. Ct. 2886 (1992).

57. *Id.*; *see infra* notes 180-82 and accompanying text.

ronmental interest groups to favor LUREs over lobbying for enhanced land use regulations.

Like the states, the federal government has had extensive involvement in acquiring less-than-fee interests for conservation purposes. One of the oldest and most frequently used LURE programs is the Migratory Bird Conservation Act of 1929[58] ("MBCA"). The MBCA was expanded in 1958 to permit the acquisition of interests in small wetland or pothole areas such as waterfowl breeding habitats.[59] The federal government has also used LUREs to protect specific wildlife resources,[60] access to outdoor recreation,[61] and scenic vistas along national highways.[62]

In particular, the 1990 Farm Bill has greatly expanded the federal government's use of LUREs for conservation purposes. To assist in understanding the flexibility of LUREs and their ready use by the federal government to attain conservation goals, it will be helpful to review the variety of LURE acquisition programs established by federal agricultural legislation.

B. The Use of LUREs in Federal Agricultural Legislation

Recently, federal use of LUREs has been incorporated into agricultural legislation to conserve and preserve farmland and forestland. This legislation reflects societal awareness of the environmentally significant and sensitive nature of wetlands and other riparian areas, wildlife habitats, and windbreaks and shelterbelts, predominantly found on lands which are or could be used for agricultural purposes. As cropland is lost to urban development and other uses, farmers must develop new croplands from natural lands, often thereby destroying wetlands and other riparian areas as well as other environmentally significant aspects of the land resource.

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58. The MBCA authorizes the federal government to acquire areas of land and water suitable for migratory waterfowl, or the "interests therein." 16 U.S.C. §§ 715a, 715d (1988). The "interests" purchased by the federal government in such land are usually LUREs.

59. Pub. L. No. 85-585, §§ 2-3, 72 Stat. 486, 487 (1958) (codified at 16 U.S.C. § 718d(c) (1989)).

60. *See, e.g.*, 16 U.S.C. §§ 696, 698, 698f, 698n (1988) (authorizing various wildlife and ecological preserves established by acquiring fee and easement interests).

61. *See id.* §§ 460l-4 to -11 (providing for state and federal acquisition of land and water areas through Land and Water Conservation Fund to preserve quality and quantity of outdoor recreation resources).

62. *See* 23 U.S.C. § 319 (1988). *See generally* Roger A. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DEN. L.J. 167 (1968) (examining the use of scenic easements to implement the Highway Beautification Program).

Between 1954 and 1975, eighty-seven percent of the 13.8 million wetland acres lost were converted to agricultural uses.[63] Thus, recent Congressional action protecting these environmentally sensitive lands has come largely through agricultural legislation implemented by the United States Department of Agriculture ("USDA") and its many agencies.[64]

1. The Early Use of LUREs for Conservation

The federal government first enacted conservation legislation to combat soil erosion on agricultural lands during the Great Depression.[65] However, early federal programs were limited because participation was voluntary and their only benefits were technical assistance and cost-sharing.[66] Reluctant to impose direct controls on privately owned land, Congress worked in partnership with the agricultural community to maintain the voluntary aspect of conservation legislation. The use of LUREs in federal conservation programs continues this cooperative approach. Since LUREs provide flexibility to accommodate diverse circumstances, they provide Congress with the ability to broaden federal conservation programs and increase the incentives for participation.

Congress began using LUREs in a 1973 agricultural program, the Rural Environmental Conservation Program ("RECP").[67] As originally enacted, the RECP authorized the Secretary of the USDA

63. U.S. DEP'T OF AGRICULTURE, AGRICULTURE AND THE ENVIRONMENT 6 (1991). In addition to the need for new cropland to offset the encroachment of urban areas, some farm policies encourage farmers to increase production needlessly. *See* B.J. Wynne III & Carol A. Bradley, *Is the 1990 Farm Bill the Opening Shot in a "Quiet Revolution?"*, 44 SW. L.J. 1383, 1390 (1991) (arguing that the deficiency payment program encourages higher production to maximize eligibility for program benefits regardless of market demand).

64. These agencies include the Agricultural Stabilization and Conservation Service ("ASCS"), the Extension Service ("ES"), the Forest Service ("FS"), the Soil Conservation Service ("SCS"), and the Farmers Home Administration ("FmHA"). U.S. DEP'T OF AGRICULTURE, AGRICULTURE AND THE ENVIRONMENT 37 (1991).

65. Soil erosion threatens agricultural productivity. In the early 1930s, when a great extent of society was agrarian, soil erosion caused by droughts contributed to economic depression and the problem of high unemployment. Linda A. Malone, *The Renewed Concern Over Soil Erosion: The Current Federal Programs and Proposals*, 10 J. AGRIC. TAX'N & L. 310, 317 (1988).

66. *Id.* at 318; Linda A. Malone, *A Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbusting, Swampbusting, and the Conservation Reserve*, 34 KAN. L. REV. 577, 579 (1986).

67. *See* Agricultural and Consumer Protection Act of 1973, Pub. L. No. 93-86, §§ 1001-1010, 87 Stat. 221, 241-46 (codified as amended at 16 U.S.C. §§ 1501-1510 (1988 & Supp. II 1990)).

("Secretary") to purchase perpetual LUREs for soil conservation or wetlands preservation, as well as to promote sound use and management of flood plains, shorelands, and aquatic areas of the nation.[68] The 1985 Farm Bill amended the RECP by replacing the provision requiring perpetual LUREs and authorizing LUREs "for a term of not less than 50 years."[69]

The 1985 Farm Bill also initiated an innovative use of LUREs in conjunction with farm debt restructuring.[70] The bill authorized the Secretary to acquire and retain LUREs on certain lands, for a term of not less than fifty years, as a means of debt restructuring on Farmers Home Association ("FmHA") loans made before December 23, 1985.[71] In addition, to promote conservation purposes the bill authorized the FmHA to grant or sell LUREs held on farmland to a unit of state or local government or to a private nonprofit organization.[72] Besides allowing LUREs to protect farmland, this provision is distinctive because it permits the federal government to transfer LUREs to local governments or private third parties.[73]

Although other conservation programs initiated in the 1985

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68. *Id.* § 1001, 87 Stat. at 241-42, *amended by* Food Security Act of 1985, § 1318(b)(2), Pub. L. No. 99-198, 99 Stat. 1354, 1531.

69. Food Security Act of 1985, Pub. L. No. 99-198, sec. 1318(b)(2), § 1001, 99 Stat. 1354, 1531 (codified at 16 U.S.C. § 1501 (1988)).

70. The debt restructuring program was touted as allowing the farmer to stay on the farm while promoting conservation goals. *See, e.g., Preparation for the 1990 Farm Bill: Hearings on Conservation Issues and Agricultural Practices and Oversight on the Forestry Title of the 1990 Farm Bill Before the Subcomm. on Conservation and Forestry of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 101st Cong., 1st & 2d Sess. 427 (1990) [hereinafter *Senate Hearings*] (statement of Sen. Robert W. Kasten, Jr.).

71. 7 U.S.C. § 1997(b) (1988). The easement-for-debt restructuring is in the form of a "write-down" which reduces the borrower's debt. Farmer Programs Account Servicing Policies, 7 C.F.R. § 1951.906(c)(6) (1992). The debt restructuring program requires that: (1) the land must be either uplands, wetlands, or highly erodible lands; (2) the realty must be secured by an FmHA loan held by the Secretary and the borrower must have been unable to repay the loan in a timely manner; or (3) the realty must have been administered by the Secretary under the conservation title; and (4) the realty must have been row cropped for each of the three years preceding the bill's date of enactment (except in the case of wetlands or wildlife habitats). 7 U.S.C. § 1997(c) (Supp. II 1990). The 1985 Farm Bill was approved on December 23, 1985. 99 Stat. at 1660.

72. 7 U.S.C. § 1985(c)(1) (Supp. II 1990) (authorizing conveyance of "an easement, restriction, development rights, or the equivalent" held by the United States in certain farmland). Farmland in FmHA's inventory becomes eligible for sale to the public only when: (1) the Secretary has determined that the land is unsuitable for sale to persons who qualify for assistance under other farm programs; or, (2) no qualified person has purchased the land within twelve months after the land was first made available. *Id.*

73. *Id.*

Farm Bill were proving to be effective, conservationists and other interest groups were dissatisfied with the implementation of the FmHA LURE provisions. During Congressional proceedings on the 1990 Farm Bill, frequent calls were made to strengthen these provisions.[74] Witnesses pointed out that the debt-for-easement program had been used by the FmHA in fewer than five cases, even though the FmHA had forgiven more than 1.8 billion dollars of debt owed by approximately 9,600 borrowers.[75] Furthermore, it was noted that the FmHA had acquired LUREs on less than 200 of the more than 1,200 properties recommended for easement programs by the Fish and Wildlife Service.[76]

Following enactment of the 1985 Farm Bill, there was a growing recognition of LUREs as an ideal means to conserve or preserve environmentally sensitive lands. Much of the testimony on the conservation provisions of the 1990 Farm Bill supported greater use of LUREs by the federal government. The following passage is representative of statements made during congressional hearings:

> Greater attention needs to be given to using conservation easements to build a lasting conservation legacy. Conservation easements are a valuable tool for protecting wetlands, forest lands, or other environmentally sensitive lands in perpetuity. In designing authority for acquiring easements, opportunities to develop cooperative partnerships with states, such as establishing federal/state matching requirements for funding, should be considered.[77]

Congress heard the message. While the 1990 Farm Bill largely

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74. Witnesses asserted that the 1985 Farm Bill, and Presidential orders directing federal agencies to minimize destruction of wetlands, required the federal government to place LUREs on properties in FmHA inventories before those properties were resold, leased or transferred. *See, e.g., Formulation of the 1990 Farm Bill: Hearing Before the Subcomm. on Conservation, Credit, and Rural Development, House Comm. on Agriculture*, 101st Cong., 2d Sess., pt. XIII at 127 (1990) [hereinafter *House Hearings*] (statement of Eric W. Schenck); *see also* Exec. Order No. 11,988, 3 C.F.R. § 117 (1977) (as amended by Exec. Order No. 12,148, 3 C.F.R. § 412 (1979)); Exec. Order No. 11,990, 3 C.F.R. § 121 (1972) (as amended by Exec. Order No. 12,608, 3 C.F.R. § 245 (1987)).

75. *House Hearings*, *supra* note 74, at 127 (statement of Eric W. Schenck).

76. *Id.* In using his authority to acquire LUREs, the Secretary must consult the Fish and Wildlife Service in selecting eligible property, formulating the terms of LUREs, and enforcing the agreements. 7 U.S.C. § 1997(f) (1988). Critics of FmHA's efforts also charged that only 25,000 acres of land had been placed under permanent easements, when the program could have been used to protect over 500,000 acres of wetlands in FmHA's inventory. *Senate Hearings*, *supra* note 70, at 610 (statement of Peter A. Berle).

77. *House Hearings*, *supra* note 74, at 123 (statement of Eric W. Schenck).

reiterates policies in the 1985 Farm Bill,[78] the 1990 legislation greatly expanded the use of LUREs for conservation purposes. In addition, the 1990 Farm Bill expanded the types of land which federal LUREs may protect.

2. LURE Provisions in the 1990 Farm Bill

The LURE programs in the 1990 Farm Bill incorporate a number of common features. In general, the programs are available to eligible owners or operators of land with specific characteristics. Participants must agree to implement conservation or preservation measures in accord with approved plans.[79] The incentive for participation is usually a combination of cash payments and cost-sharing of conservation or restoration measures.[80] The cash payments may not exceed the difference in value between the unencumbered land and the land encumbered by the LURE.[81] Payments are generally disbursed in five to twenty annual installments.[82] Characteristics of the protected resource and variations in the LURE provisions distinguish the programs from each other.

a. The FmHA Provisions

The 1990 Farm Bill extends and broadens the provisions authorizing the FmHA to acquire LUREs in return for debt-restructuring.[83] LUREs may now be acquired before the farmer actually defaults on an FmHA loan.[84] The provision may be used if the exchange of an easement "better enables a qualified borrower to repay the loan in a timely manner."[85] In addition, the pre-Decem-

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78. David S. Cloud, *Senate 'Prairie Populists' Lose As Panel Approves Farm Bill*, CONG. Q. WKLY. REP., June 23, 1990, at 1953 (quoting Sen. Richard G. Lugar).

79. *See, e.g.*, 16 U.S.C. § 3837a(b) (Supp. II 1990) (describing requirements for wetland easement conservation plans under the Wetlands Reserve Program). The Wetlands Reserve Program requires effective restoration of wetlands through the use of inspections, improvements and repairs. *Id.* § 3837a(b)(1). The program prohibits the alteration of wildlife habitats or other features of the land, unless specifically authorized by the conservation plan. *Id.* § 3837a(b)(2). However, the land may be used for certain "compatible economic uses" consistent with the long-term protection of the wetland resource. *Id.* § 3837a(d). These uses include hunting and fishing, managed timber harvest, and periodic haying or grazing. *Id.*

80. *See, e.g., id.* §§ 3837a(f), 3837c(a)-(b) (describing compensation to owners and duties of the Secretary regarding cost-sharing and technical assistance).

81. *E.g., id.* §§ 3837a(f), 3839b(2)(B).

82. *E.g., id.* § 3837a(f).

83. *See* 7 U.S.C. § 1997 (1988 & Supp. II 1990).

84. *See* 7 U.S.C. § 1997(c)(3)(A)(ii) (Supp. II 1990).

85. *Id.*

ber 23, 1985, loan requirement was removed, allowing restructuring on all qualified loans.[86] The regulations prescribe that LUREs obtained through restructuring must be for periods of not less than fifty years; however, the LUREs may be longer or perpetual if justified.[87] Unfortunately, though, the 1990 Farm Bill did not resolve the noted failure of the FmHA to use LUREs as a means of debt restructuring.[88]

The 1990 Farm Bill did add a section requiring the FmHA to establish perpetual LUREs on wetlands in inventoried property.[89] However, the provisions are carefully crafted to limit adverse impacts on the marketability of productive cropland.[90] In particular, the statute limits the placement of LUREs to ensure that the property continues as the same basic enterprise[91] when sold or leased to qualified individuals.[92] Maintaining the voluntary aspect of agricultural conservation measures, this section requires the FmHA to notify borrowers considering easement-for-debt restructuring in writing that a LURE may be placed on their land.[93]

b. The Agricultural Resource Conservation Program

The 1990 Farm Bill also significantly expanded the Conservation Reserve subchapter, renaming it the Agricultural Resources Conservation Program.[94] As amended, two programs incorporate

86. *Id.* § 1997(c)(3)(A)(i). In a case involving a new loan which is not delinquent, the Secretary may treat up to 33 percent of the loan principal as prepaid in exchange for the grant of an easement. *Id.* § 1997(e)(1), (2)(B). In the case of new loan which is delinquent, the Secretary may only reduce the debt by the value of the land on which the easement is acquired, or the difference between the amount of the outstanding loan and the value of the land, whichever is greater. *Id.* § 1997(e)(1), (2)(A).

87. Farmer Programs Account Servicing Policies, 7 C.F.R. pt. 1951, subpt. S, exhibit H, § VI (1992). Justifications for perpetual LUREs include: a contribution to the protection of wildlife habitats; the protection of a significant historical site or groundwater recharge area; a benefit from removing the acreage from production; or the provision of a substantial investment of public funds to achieve conservation goals. *Id.* § VI(B), (E)-(F).

88. Current regulations leave the option of using LUREs as a means of debt restructuring to the farmer; the FmHA will act only if a borrower's application for loan servicing includes a specific request for the debt-for-easement option. Farmer Programs Account Servicing Policies, 7 C.F.R. § 1951.909(a) (1991).

89. 7 U.S.C. § 1985(g)(1) (Supp. II 1990).

90. *Id.* § 1985(g)(2).

91. The phrase "same basic enterprise" was explained as follows: "The Senate did not intend for the circumstance to arise where the amount and location of easements established on . . . a cotton or dairy farm acquired by the FmHA would prevent the property from being marketed as a cotton or dairy farm." H.R. CONF. REP. NO. 916, 101st Cong., 2d Sess. 1126 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5286, 5651.

92. *See, e.g.*, 7 U.S.C. § 1985(e)(1)(C)(ii), (g)(5)(A)-(B) (1988 & Supp. II 1990).

93. *Id.* § 1985(g)(6).

94. *See* 1990 Farm Bill, Pub. L. No. 101-624, § 1431, 104 Stat. 3359, 3576-77,

LUREs: (i) the Environmental Conservation Acreage Reserve Program, which expands the Conservation Reserve Program and creates the Wetlands Reserve Program; and (ii) the Environmental Easement Program.[95]

(i) The Conservation Reserve Conversions

The 1985 Farm Bill established the Conservation Reserve Program ("CRP") authorizing the Secretary to enter into installment contracts to retire 45 million acres of erosive cropland from production for ten year periods.[96] Mindful of the need to continue conservation of lands enrolled in the CRP beyond the initial terms of CRP contracts, Congress amended the CRP to encourage farmers to convert the lands to other conserving uses. An owner or operator enrolled in the CRP under a contract in effect on November 28, 1990, may extend the contract to a maximum term of fifteen years[97] if vegetative cover areas are devoted to hardwood trees, windbreaks, shelterbelts, or wildlife corridors.[98]

In addition, a qualified owner or operator may transfer into the Wetlands Reserve Program ("WRP") by restoring to wetlands areas of highly erodible cropland currently devoted to vegetative cover.[99] This conversion is conditioned on the owner's grant of a long-term or perpetual LURE to the Secretary.[100] The incentive of extended monetary payments to farmers under the new CRP provisions should readily increase the federal government's acquisition of LUREs.

(ii) The Wetlands Reserve Program

The WRP directs the Secretary to attempt to enroll one million

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amended by Act of July 22, 1992, Pub. L. No. 102-234, 106 Stat. 447 (to be codified at 16 U.S.C. §§ 3831(b)(4)(C), 3835a(a)(2)).

95. *See* 16 U.S.C.A. §§ 3830-3839d (West Supp. 1992), *amended by* Act of July 22, 1992, Pub. L. No. 102-234, 106 Stat. 447.

96. 16 U.S.C. § 3831 (Supp. II 1990), *amended by* Act of July 22, 1992, Pub. L. No. 102-324, § 1(a), 106 Stat. 447, 447.

97. Act of July 22, 1992, Pub. L. No. 102-234, § 1(b)(1), 106 Stat. 447, 447 (to be codified at 16 U.S.C. § 3835a(a)(2)(A)). The contract may only be extended if the original term of the contract was less than 15 years. *Id.*

98. 16 U.S.C. § 3835a(a)(1) (Supp. II 1990).

99. *Id.* § 3835a(b). The Secretary must permit the conversion if (1) the areas are prior converted wetlands, (2) there is a high probability that the area can be successfully restored to wetland status, and (3) the restoration otherwise meets the requirements of the WRP. *Id.* § 3835a(b)(1), (3)-(4). The Secretary may terminate or modify a CRP contract if the land subject to the contract is transferred to the WRP. *Id.* § 3837(f).

100. *Id.* § 3835a(b)(2).

acres of eligible land into the program by the end of the 1995 calendar year.[101] Land is eligible if it is determined to be a farmed wetland, or a wetland converted after December 23, 1985,[102] and if the "likelihood of the successful restoration . . . and the resultant wetland values merit inclusion of such land in the program taking into consideration the cost of such restoration."[103] To participate in the WRP, the owner of the eligible land must grant a long-term or perpetual LURE to the Secretary. The Secretary is directed to give priority to obtaining perpetual LUREs over those for shorter terms.[104] Perpetual LUREs qualify for cost-sharing of between seventy-five and one hundred percent of the eligible costs; otherwise, the government share is limited to between fifty and seventy-five percent of the eligible costs.[105] Further, a lump-sum payment is permitted only if a perpetual LURE is acquired.[106] The WRP thus encourages the acquisition of LUREs, particularly perpetual LUREs,[107] to protect wetlands.[108]

(iii) The Environmental Easement Program

The Environmental Easement Program ("EEP") directs the Secretary to acquire LUREs "in order to ensure the continued long-term protection of environmentally sensitive lands or reduction in

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101. *Id.* § 3837(b). Lands are enrolled in the WRP through the acquisition of a LURE by the Secretary. *Id.* § 3837(g).

102. *Id.* § 3837(c)(1).

103. *Id.* § 3837(c)(2). The Secretary may also include in the WRP:

> (1) farmed wetland and adjoining lands, enrolled in the conservation reserve, with the highest wetland functions and values, and that are likely to return to production after they leave the conservation reserve; (2) other wetland of an owner that would not otherwise be eligible if the Secretary determines that the inclusion of such wetland in such easement would significantly add to the functional value of the easement; and (3) riparian areas that link wetlands that are protected by easements or some other device or circumstance that achieves the same purpose as an easement.

16 U.S.C.A. § 3837(d) (West Supp. 1992).

104. *Id.* § 3837c(d).

105. *Id.* § 3837c(b).

106. Otherwise, the compensation may be paid in five to twenty annual installments. *Id.* § 3837a(f).

107. However, a sale of a LURE may be taxed as a capital gain. *See* I.R.C. § 1222(3) (1988). Thus, income tax consequences of a lump sum payment may influence grants of perpetual LUREs.

108. The Secretary has additional authority to purchase wetlands or interests in wetlands through the Wetlands Resources Chapter. 16 U.S.C. § 3922 (1988). The authorization permits the Secretary to acquire wetlands not protected under the Migratory Bird and Conservation Act and requires purchases to be consistent with the wetlands priority plan. *Id.* § 3921.

the degradation of water quality" on eligible farms or ranches.[109] The LUREs must be either perpetual or for the maximum duration permitted by state law.[110] Eligible lands include lands in the CRP,[111] lands covered by the Water Bank Act,[112] croplands containing riparian corridors, environmentally sensitive areas, or critical wildlife habitats.[113] To participate in the EEP, in addition to granting a LURE to the Secretary, a landowner must also agree to implement a natural resource conservation management plan.[114] However, the landowner may use the land for recreational activities such as hunting and fishing.[115] The EEP thus significantly expands the categories of land which may be protected by LUREs.

c. The Farms for the Future Act

The Farms for the Future Act ("Farms Act") promotes preservation of farmland resources on a national basis.[116] The legislation authorizes the Secretary, through the FmHA, to establish the Agricultural Resource Conservation Demonstration Program to provide federal guarantee and interest rate assistance for eligible loans to state trust funds.[117] The regulations utilize LUREs to achieve the program goals. The interim rule provides that guaranteed loans can be used to purchase "development rights easements, conservation easements, . . . and farmland in fee simple,"[118] and

109. 16 U.S.C. § 3839(a) (Supp. II 1990).

110. *Id.*

111. However, if the CRP land is likely to remain out of production and does not pose an off-farm environmental threat, the land is not eligible. *Id.* § 3839(b)(1). Further, if CRP land contains timber stands or pasture land converted to trees the land is also ineligible. *Id.* § 3839(b)(2).

112. 16 U.S.C. §§ 1301-1311 (1988).

113. 16 U.S.C. § 3839(b)(1)(A)-(C) (Supp. II 1990).

114. *Id.* § 3839a(a)(1). In addition, landowners are required to make appropriate deed restrictions, obtain written consent from holders of security interests, produce commodities which benefit wildlife, and refrain from grazing or harvesting practices which defeat the purpose of the easement. *Id.* § 3839a(a)(2)(A)-(B), (E)-(G).

115. *Id.* § 3839b(4). The Secretary is authorized to pay up to 100% of the cost of establishing conservation measures under this program. *Id.* § 3839c(b).

116. 1990 Farm Bill, Pub. L. No. 101-624, § 1465(b), 104 Stat. 3359, 3616, *amended by* Food, Agriculture, Conservation, and Trade Act Amendments of 1991, Pub. L. No. 102-237, sec. 203, § 1465(b), 105 Stat. 1818, 1848, *reprinted in* 7 U.S.C.A. § 4201 note (West Supp. 1992).

117. *Id.* § 1466(a). Eligibility requirements dictate, among other things, that a state must operate or administer a land preservation fund and assist local governing bodies or private nonprofit or public organizations in carrying out preservation measures. *Id.* § 1465(c)(3).

118. 57 Fed. Reg. 4336, 4338 (1992) (to be codified at 7 C.F.R. § 1980.910(a)(1)).

notes that the Secretary intends all LUREs to be perpetual.[119] Borrowers are required to prepare a State Farmland Preservation Plan[120] which must include a detailed description of the restrictions to be imposed by any easements.[121] Further, the borrower must then demonstrate the legal authority necessary to comply with provisions of the plan.[122] An important distinction from other uses of LUREs in the Conservation Title of the 1990 Farm Bill is that LUREs acquired under the Farms Act are purchased and held by the states through their trust funds rather than by the federal government.[123]

d. The Watershed Protection and Flood Prevention Program

The Watershed Protection Program ("Watershed program") was created in 1954 to protect and improve the nation's land and water resources.[124] Like the CRP, the program authorizes the Secretary to enter into agreements with landowners based on conservation plans carried out over ten year periods in return for cost-sharing by the federal government.[125] The 1990 Farm Bill expanded the Watershed program by authorizing cost-sharing for perpetual LUREs on wetlands or floodplains to perpetuate, restore, and enhance the natural capabilities of land and water resources.[126] Eligible project sponsors include state and local agencies, soil and water conservation districts, approved nonprofit irrigation and reservoir companies, and water users' associations.[127] Thus, like the Farms Act, LUREs acquired under this program are held by state or private nonprofit entities rather than by the federal government.

e. The Forest Legacy Program

The 1990 Farm Bill includes the Forest Stewardship Act,[128]

119. *Id.* (to be codified at 7 C.F.R. § 1980.918(a)(4)).

120. *Id.* (to be codified at 7 C.F.R. § 1980.918).

121. *Id.* (to be codified at 7 C.F.R. § 1980.918(a)(2)).

122. *Id.* at 4339 (to be codified at 7 C.F.R. § 1980.921(b)).

123. *See* 1990 Farm Bill, Pub. L. No. 101-624, § 1465(c)(2), 104 Stat. 3359, 3616, *amended by* Food, Agriculture, Conservation, and Trade Act Amendments of 1991, Pub. L. No. 102-237, sec. 203, § 1465(c)(2), 105 Stat. 1818, 1848, *reprinted in* 7 U.S.C.A. § 4201 note (West Supp. 1992) (describing eligibility requirements for loans to states, including protection of farmland).

124. Watershed Protection and Flood Prevention Act, Pub. L. No. 83-566, § 1, 68 Stat. 666, 666 (1954) (codified as amended at 16 U.S.C. § 1001 (1988)).

125. 16 U.S.C. § 1003(6) (Supp. II 1990).

126. *Id.* § 1003a(a). The Secretary must require project sponsors to provide up to 50% of the cost of acquiring the LURE. *Id.* § 1003a(b).

127. 16 U.S.C. § 1002 (1988 & Supp. II 1990).

128. 1990 Farm Bill, Pub. L. No. 101-624, §§ 1201-1224, 104 Stat. 3359, 3521-3542

authorizing the Secretary to cooperate with state forestry officials, nongovernmental organizations and the private sector in implementing federal programs affecting non-federal forestland.[129] One such program is the Forest Legacy Program ("FLP").[130] The FLP authorizes the Secretary, in cooperation with appropriate state and local governments,[131] to acquire LUREs or full fee interests[132] to protect environmentally important forest areas, riparian areas, and other ecological resources.[133]

Criteria for priority lands eligible for the FLP are established by the Secretary together with state advisory committees, subject to the purposes of the FLP.[134] However, where a state has not approved the acquisition of land under section 515 of title 16,[135] the FLP is necessarily limited to those lands within the state which have been approved for inclusion.[136] While the FLP is cooperatively established, title to the LUREs acquired under the program must be held exclusively by the federal government.[137] Further-

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(codified at 16 U.S.C. §§ 2101-2114 (Supp. II 1990)) (amending the Cooperative Forestry Assistance Act of 1978).

129. *See* 16 U.S.C. §§ 2101-2114 (1988 & Supp. II 1990) (detailing various programs in the Forest Stewardship Act). The 1990 Farm Bill also established the Forest Stewardship Program to bring 25 million acres of private forestland under voluntary management. 16 U.S.C. § 2103a(b) (Supp. II 1990). The Stewardship Incentives Program achieves the goal of encouraging stewardship by providing technical information and assistance. *Id.* § 2103b.

130. 16 U.S.C.A. § 2103c (West Supp. 1992).

131. The FLP requires the Secretary to cooperate with state, regional and other appropriate units of government. *Id.* § 2103c(a). The Secretary is also expected to coordinate with state or regional programs deemed consistent with the FLP. *Id.* § 2103c(b).

132. *Id.* § 2103c(c).

133. *See id.* § 2103c(a). The LUREs must require the landowner to engage in sound forest management practices, consistent with the purposes for which the land was entered in the FLP. *Id.* § 2103c(i). Although the LURE may permit hunting, fishing, and recreational uses on the protected land, the landowner is precluded from converting the property to other uses. *Id.* The Secretary must pay the fair market value of the LURE to the landowner and may require cost-sharing of up to 75%. *Id.* § 2103c(j).

134. 16 U.S.C.A. § 2103c(e) (West Supp. 1992). The committees are directed to consult with other agriculture and forestry committees and recommend priority lands for inclusion in the FLP. 16 U.S.C. § 2113(b)(2)(A), (D) (Supp. II 1990). Owners of eligible land may submit applications as prescribed by the Secretary. 16 U.S.C.A. § 2103c(f) (West Supp. 1992).

135. Section 515 directs the Secretary to locate and purchase "forested, cut-over, or denuded lands within the watersheds of navigable streams" if necessary to regulate the flow of navigable streams or for the production of timber. 16 U.S.C. § 515 (1988). Purchases under § 515 must be approved by the legislature of the state where the land lies. *Id.*

136. 16 U.S.C. § 2103c(g) (Supp. II 1990).

137. *Id.* § 2103c(c).

more, the FLP requires LUREs held under the program to be perpetual, despite state law limits on duration.[138]

In sum, the 1985 Farm Bill instituted the use of LUREs as an innovative conservation device.[139] The 1990 Farm Bill has greatly expanded the use of LUREs in federal conservation programs.[140] Originally viewed primarily as a means to protect wetlands, LUREs are now commonly employed throughout conservation programs to protect such diverse resources as farmland, forestland, windbreaks and shelterbelts.[141] In addition, farmers have indicated a willingness to work with the federal government to achieve conservation goals through voluntary land acquisition programs.[142] In the future, the use of LUREs may become an even more important feature of federal agricultural policies. However, due to the importance of our agricultural economy, and the impact of this economy on federal conservation goals, LUREs must be used in an efficient and effective manner.

II. ARE LURE ACQUISITION PROGRAMS AN APPROPRIATE FEDERAL MEANS TO ATTAIN CONSERVATION GOALS?

The greatly expanded use of LURE acquisition programs in the 1990 Farm Bill demonstrates the political acceptability of using LUREs as an incentive to achieve conservation and preservation goals. However, some commentators argue that the government should directly regulate the use of environmentally sensitive lands

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138. *Id.* § 2103c(k)(2). The provision states in full:

> Notwithstanding any provision of State law, no conservation easement held by the United States or its successors or assigns under this section shall be limited in duration or scope or be defeasible by —
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> (A) the conservation easement being in gross or appurtenant;
>
> (B) the management of the conservation easement having been delegated or assigned to a non-Federal entity;
>
> (C) any requirement under State law for re-recordation or renewal of the easement; or
>
> (D) any future disestablishment of a Forest Legacy Program area or other Federal project for which the conservation easement was originally acquired.

Id. Section 2103c(d)(1) specifies that easements acquired under the program may be held in perpetuity.

139. *See supra* notes 70-73 and accompanying text.

140. *See supra* notes 79-138 and accompanying text.

141. Many other types of land are also protected by LUREs under current federal land acquisition programs, including riparian areas, highly erodible lands, and wildlife corridors. *See supra* notes 99, 103, 113, 133 and accompanying text.

142. *See supra* note 12 and accompanying text.

rather than rely on voluntary agreements which impose conservation costs on the government.[143] Therefore, before addressing how to use LUREs most effectively, it is important to justify LURE acquisition programs as the most appropriate means for conserving and preserving environmentally important land resources located largely on lands which are or could be used for agricultural purposes. This section explores some of the constitutional and economic considerations surrounding the alternative of direct regulation of land uses.

A. Regulation versus Incentives

Constitutional authority for federal environmental regulations generally derives from the Commerce Clause, which empowers Congress to "regulate Commerce . . . among the several states."[144] In addition to the regulation of interstate activities, the broad interpretation of the commerce power in conjunction with the Necessary and Proper Clause[145] permits Congress to regulate intrastate activities if the impact of the regulation is the effectuation of commerce policies. For example, under the Commerce Clause, Congress generally cannot regulate a manufacturing process itself because it is not interstate commerce.[146] Yet labor conditions in manufacturing plants can be regulated if the particular regulation is a necessary and proper means of effectuating some congressional policy relating to interstate commerce.[147] Thus, even though the

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143. *See, e.g.*, William L. Church, *Farmland Conversion: The View From 1986*, 1986 U. ILL. L. REV. 521, 544 (noting the high costs of incentives as a means to preserve agricultural land); Steven L. Dickerson, *The Evolving Federal Wetland Program*, 44 SW. L.J. 1473, 1497 (1991) (advocating federal programs in which wetlands would be purchased directly through public financing); Renee Stone, *Wetlands Protection and Development: The Advantage of Retaining Federal Control*, 10 STAN. ENVTL. L. J. 137, 166 (1991) (opposing delegation to the states of federal regulatory control over wetlands and arguing in favor of an improved federal regulatory scheme).

144. U.S. CONST. art. I, § 8, cl. 3.

145. U.S. CONST. art. I, § 8, cl. 18.

146. *See* United States v. E.C. Knight Co., 156 U.S. 1, 14-15 (1895) (holding that suppression of monopoly in sugar manufacture is unconstitutional where monopoly does not implicate interstate commerce); *cf.* Swift & Co. v. United States, 196 U.S. 375, 396-98 (1905) (allowing Congress to suppress an agreement primarily affecting trade within a state because the secondary effects on interstate commerce were not remote or accidental).

147. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-42 (1937) (upholding regulation of intrastate labor relations as a necessary and proper means to protect interstate commerce from industrial strife). Although it is often stated that Congress may regulate an activity which "affects commerce," that is an inaccurate statement of the constitutional requirement. Congressional regulation of intrastate activity must advance an interstate commercial goal. While these same regulations may simultaneously further other,

production of agricultural products may be solely an intrastate activity, Congress may constitutionally regulate certain aspects of agricultural production if the regulation promotes interstate commerce policies.[148]

Further, under the Commerce Clause, the federal government may regulate to achieve extraneous ends which accomplish objectives not specifically entrusted to the federal government.[149] By employing a means within the scope of the commerce power, Congress may influence affairs beyond the scope of its enumerated powers and traditionally within the domain of the states.

Accordingly, the Commerce Clause empowers Congress to regulate activities causing air pollution, water pollution, and other environmental hazards to promote the general welfare, so long as the impact of the regulation promotes interstate commerce policies. For instance, congressional activities which may be upheld include: regulation of pollution that has effects in more than one state; regulations that protect or preserve the quality of waters used for navigation, industry or irrigation; regulations that protect waters which attract interstate travelers for recreational or scientific purposes or which attract migratory birds; or regulations that protect habitats for endangered wildlife species which draw interstate travelers.[150]

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non-commercial goals, the presence of an interstate commercial purpose is constitutionally required. *See* United States v. Darby, 312 U.S. 100, 103 (1941) (indicating the commerce power is measured by what it regulates, not by what it affects); *see also* David E. Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51, 59-61 (1973) (regulating labor conditions is permissible if it is a necessary and proper means of controlling interstate commerce); David E. Engdahl, *Some Observations on State and Federal Control of Natural Resources*, 15 HOUS. L. REV. 1201, 1206 (1978) (Congress may regulate intrastate activities only when the purpose of the regulation is to effectuate an interstate commercial policy).

148. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 127-29 (1942) (upholding regulation of wheat grown for personal consumption given the cumulative effect of private wheat production on interstate commerce).

149. The Supreme Court recognized that this type of legislation was constitutional in *Darby*, 312 U.S. at 114-17. In *Darby*, the Court held that even if Congress had enacted federal labor standards to address purely humanitarian ends, the legislation was nonetheless within the scope of the Commerce Clause because the means — a prohibition on shipment in interstate commerce of products manufactured under wage and hour conditions failing to meet statutory standards — was a regulation of commerce. *Id.* at 103. The Court deemed the regulation "indubitably a regulation of commerce" and held that regulations of commerce, whatever their motive and purpose, are within the plenary power conferred on Congress by the Commerce Clause. *Id.* at 113, 115.

150. *See, e.g.*, Utah v. Marsh, 740 F.2d 799, 803 (10th Cir. 1984) (finding that discharge of dredge or fill material into Utah lake could have substantial economic effects

Congress could use the commerce power to protect environmentally significant lands currently protected by the use of LUREs. Among other functions, wetlands perform an important role in the ecosystem by purifying waters flowing into aquifers which are frequently tapped for irrigation purposes.[151] Agricultural activities which affect wetlands could therefore be regulated. Similarly, activities which erode farmland or deplete private forestland could be regulated due to their adverse effect on our nation's ability to meet its food and timber needs.[152] Further, other riparian areas, wildlife corridors, windbreaks, and shelterbelts at least indirectly affect interstate commerce by virtue of their role in maintaining the balance of the ecosystems which generate marketable commodities and thus interstate movement.[153] Although more tenuously related, regulation of agricultural activities affecting such lands may similarly be within the scope of the Commerce Clause used in conjunction with the Necessary and Proper Clause.[154]

To date, however, Congress has elected to regulate directly

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on interstate commerce, including preventing travelers from observing animal life); United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1325-26 (6th Cir. 1974) (noting interstate effects of pollution in navigable streams); United States v. Bishop Processing Co., 287 F. Supp. 624, 629-32 (D. Md. 1968) (upholding congressional regulation of air pollution under commerce clause power), *aff'd*, 423 F.2d 469 (4th Cir.), *cert. denied*, 398 U.S. 904 (1970).

151. *See* 16 U.S.C.A. § 3901(a)(5) (West Supp. 1992) (wetlands enhance water quality and water supply by serving as ground water recharge areas, nutrient traps, and chemical sinks).

152. *See* Hodel v. Indiana, 452 U.S. 314, 324 (1981) (preservation of prime farmland is a federal interest that may rationally be addressed through the Commerce Clause); *see also* Margaret R. Grossman, *Prime Farmland and the Surface Mining Control and Reclamation Act: Guidance for an Enhanced Federal Role in Farmland Preservation*, 33 DRAKE L. REV. 209 (1983-84) (discussing role of federal government in preserving farmland).

153. *Cf.* Palila v. Hawaii Dep't of Land & Natural Resources, 471 F. Supp. 985, 994-95 (D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981) (finding endangered species of fish, wildlife and plants to have national aesthetic, ecological, educational, historical, recreational, and scientific value; programs which protect and improve these resources or their habitats preserve the possibilities of interstate movement of persons who come to observe or enjoy them). *See also* George C. Coggins & William H. Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?*, 61 IOWA L. REV. 1099, 1147 (1976) (Congress may regulate interstate trade in a particular species under the Commerce Clause).

154. The Necessary and Proper Clause may be exercised to attain an extraneous end as long as the means used bear *some* relation to the effectuation of an enumerated power. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (upholding congressional prohibition against racial discrimination in local motels as a necessary and proper means of preventing harmful effects on interstate commerce).

only those agricultural practices involving the application of inputs, such as pesticides and other agrichemicals, which are more readily perceived as being potentially harmful.[155] The basis for Congress' reluctance to regulate directly is at least threefold: Congress prefers to work in partnership with the agricultural industry; direct regulation of agricultural uses of land is more readily subject to challenges under the Fifth Amendment; and unique characteristics of the agricultural industry prevent society from absorbing its share of costs associated with regulation.

1. The Tension Between Private Ownership and Societal Rights

Although Congress has expressly recognized the need to conserve environmentally important land resources and "to assure their management in the public interest for this and future generations,"[156] Congress has declined to regulate directly against farmers' individual land use decisions. This restraint in federal regulation conflicts with the federal government's growing awareness of the public interest — or social rights — in privately held land. Social rights are those rights possessed by communities at large. Communities are generally more concerned about the rights of future generations than are individual persons. Therefore, as Professor Lynton Caldwell has noted, concerns for social rights in environmentally important land look to the future, and require managed land use to preserve for the future, rather than for the highest and best use of the land for the present.[157]

In large part, the reluctance to impose direct regulations on private land use stems from the common law concept of private ownership. Land use laws today, and the rights and obligations of landowners, are based on inherited values and beliefs. For over three hundred years, American culture has strongly linked ownership of real property with individual freedom.[158] The traditional

155. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §§ 136-136y (West 1980 & Supp. 1992).

156. 16 U.S.C.A. § 3901(a)(9) (West Supp. 1992).

157. Lynton K. Caldwell, *Land and the Law: Problems in Legal Philosophy*, 1986 U. ILL. L. REV. 319, 323 (1986); *cf.* Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations in Environmental Law*, 83 YALE L.J. 1315, 1327 & n.58 (1974) (stating that effective environmental policy can be shaped only through shared experiences and understandings which foster communal goals).

158. Caldwell, *supra* note 157, at 320; *see* J.G.A. POCOCK, VIRTUE, COMMERCE AND HISTORY 103 (Richard Rorty et al. eds., 1985) (finding that in the Western tradition property has been a means by which citizens achieve autonomy); *see also* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 129-30 (1988) (stating that many writers have suggest-

notion of private ownership permits the landowner to use the land as she pleases, so long as her use does not unreasonably affect another's enjoyment of her land. This notion of land ownership entails "no obligation for stewardship on behalf of the general society."[159] Landowners thus claim a right to use, deplete, and even destroy their land to achieve short-term gain.[160]

The tension between traditional aspects of private ownership and societal rights in private land is central to most contemporary land use issues.[161] As Professor Caldwell has aptly stated: "People committed to an ethic of . . . ecological sustainability continue to collide with those who make land use decisions upon a very different ethic, an ethic that regards economic development and monetary return as evidence of the land's highest and best use."[162] For better or worse, the traditional notion of private ownership is firmly ingrained in the agricultural community. Agricultural production makes direct use of the land resource. The decisions a farmer makes about how the land is used directly affect the success of the farming operation. Because agricultural regulation directly infringes on the farmer's freedom of choice with respect to land use, it is readily considered undesirable federal land use regulation.[163]

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ed the importance of property ownership lies not only in its material benefits, but also in the assistance property ownership provides in developing individual human autonomy).

159. Caldwell, *supra* note 157, at 324; *see also* Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1555 (1989) (calling for new limits on land ownership requiring more than simple restraint from land uses harming others); ALDO LEOPOLD, A SAND COUNTY ALMANAC (1966) (man's strictly economic relationship with the land entails privileges but no obligations; a "land-ethic" is required to guide man through ecological situations where the path of social expediency is not discernible).

160. Caldwell, *supra* note 157, at 324; *see* Freyfogle, *supra* note 159, at 1555 (arguing against protection of the landowner's expectation that he has the power to waste, destroy and leave fallow the land); *see also* Tribe, *supra* note 157, at 1347 (criticizing the myopic view often taken regarding the need for environmental protection policies).

161. Caldwell, *supra* note 157, at 325.

162. *Id.* at 329.

163. By contrast, most industrial production is much less dependent on land use decisions. Accordingly, Congress is able to achieve many environmental goals by regulating business conduct. While this business conduct takes place on privately held land, Congress can regulate the conduct itself without directly regulating the use of the land. However, distinguishing between regulation of business conduct and regulation of land use is often difficult. For example, a given environmental regulation may be so severe that a particular land use becomes commercially impractical. *See* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 587 (1987) (explaining that land use planning selects between alternative uses of the land, while environmental regulation limits damage to the land re-

The agricultural community generally considers itself a strong steward of the land. Farmers take great pride in their ability to manage a successful agricultural operation through independent land use decisions[164] and vigorously oppose perceived infringements upon private ownership rights.[165] However, a farmer's stewardship generally is not focused on the public's interest in the land; rather, the farmer focuses on his own private interest in making the highest and best use of the land.

Congress has realized that direct regulation of agricultural land use would interfere with the independent spirit of the American farmer and conflict with the farmer's perception of himself as a strong steward of the land. Avoiding the potentially adverse political ramifications, Congress has only taken minimal steps to provide legal protection for private land as a public resource. Although Congress has responded to the growing public support for protection of environmentally significant lands, Congress has declined to test its relationship with farmers by directly regulating agricultural land use decisions.[166] Instead, Congress has chosen to work in partnership with the agricultural community to achieve conservation goals. Control of the land through voluntary incentives neither challenges nor expands the core concept of land ownership. Therefore, the use of LURE acquisition programs permits Congress to maintain its tradition of indirect, non-confrontational control over agricultural land use decisions.

Furthermore, direct regulation of agricultural land use has been unnecessary because the agricultural community is generally responsive to incentive-based conservation programs.[167] This positive voluntary response is attributable to a unique aspect of an

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gardless of how it is used).

164. *See* Church, *supra* note 143, at 545 ("The heart of American agriculture is the independence and individual motivation of . . . landowning farmers.").

165. *See* Harry L. Pearson, *Your Basic Rights Being Challenged*, THE HOOSIER FARMER, Mar.-Apr. 1992, at 3 (noting that protection of private property rights is a high priority of the American Farm Bureau Federation).

166. Interestingly, in response to dissatisfaction from environmentalists regarding the use of incentives rather than direct regulation, Congress and the states often justify their inaction by arguing that land use regulation is a local matter — a sentiment negated by the ever-increasing federalization of land use controls. *See* Craig A. Arnold, *Conserving Habitats & Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development*, 10 STAN. ENVTL. L.J. 1, 2-3 (1991) (noting that the federal government exercises considerable control over land use decisions through such legislation as the Clean Air Act and the Clean Water Act).

167. *See supra* note 12 and accompanying text.

agricultural landowner's stewardship. While a farmer's view of "the best use of the land" includes short-term profitability, it may also include a long-term perspective, frequently deriving from a desire to pass on fertile land to children or grandchildren.[168] The "intergenerational equity" aspect of agricultural stewardship, though distinguishable from a recognition of "social rights" in the property, promotes the same concept of managed use of the land for the future.[169] Thus, farmers who oppose the firmer controls of direct land use regulation are generally receptive to incentives to preserve agricultural land.[170]

2. Direct Regulation May Constitute a Taking

Legislation which restricts particular uses of privately owned land is subject to constitutional scrutiny under the Fifth Amendment.[171] The Fifth Amendment prohibits the taking of private property for public use absent just compensation.[172] It is well established that although property may be regulated to some extent, physical appropriation of property constitutes a taking.[173] On the other hand, regulation which merely has an adverse effect on the landowner's "bundle of property rights" is a more difficult problem.

The Supreme Court has indicated that the takings analysis involves "essentially ad hoc, factual inquiries."[174] However, three

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168. Current statistics indicate that close to one half of the owners of agricultural lands are not the farmers of the land. *See* 1 BUREAU OF THE CENSUS, DEP'T OF AGRICULTURE, 1987 CENSUS OF AGRICULTURE, PART 51, UNITED STATES SUMMARY AND STATE DATA 49 (1989) (only 1,138,179 of the 2,082,759 farms in America are operated by those whose principal occupation is farming). Rather, farm operators run the farm on behalf of the owner. Because many landowners can rely on income not supplied by farming, the desire to generate high profit must compete with the desire to preserve future uses of the land. These landowners may be particularly receptive to incentive-based conservation programs.

169. Ronald D. Culler, General Counsel, Indiana Comm'r of Agriculture, Address at the Governor's Conference on the Environment (June 29, 1992) (on file with the *Case Western Reserve Law Review*).

170. *Id.*

171. *See* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

172. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-28 (1978) (describing jurisprudential factors surrounding the Fifth Amendment's prohibition against taking of property without just compensation); Hendler v. United States, 952 F.2d 1364, 1378 (Fed. Cir. 1991) (drilling of public wells on private land constitutes a taking requiring just compensation).

173. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922) (recognizing regulation preventing a landowner from mining coal on his land as a taking).

174. *Penn Cent. Transp. Co.*, 438 U.S. at 124; *see also* First English Evangelical Lu-

factors are particularly significant for this inquiry: (1) the economic impact of the regulation on the landowner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action (i.e., whether the regulation constitutes a physical invasion or occupation of real property).[175]

In addition, at least two categories of regulatory action are deemed takings without further inquiry. First, regulations that compel the property owner to suffer a permanent physical occupation of the property require compensation, no matter how minute the intrusion nor how weighty the public purpose.[176] Second, compensation is due when regulation denies all economically beneficial or productive use of the land.[177] The latter category may be available to some landowners as a result of regulation precluding agricultural uses of land.

Finally, the Supreme Court has justified some regulations as necessary exercises of the police power related to policies expected to produce widespread public benefits.[178] The imposition of such regulations may affect property values without invoking an obligation to compensate.[179] This principle was circumscribed by the Court's recent decision in *Lucas v. South Carolina Coastal Council*.[180] *Lucas* held that where regulation deprives land of all economically beneficial use, the state can avoid compensation only if it can identify principles of background nuisance or property law that similarly prohibit the use. In other words, the state must show

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theran Church v. Los Angeles County, 482 U.S. 304, 316 (1987) (while typical takings result from state condemnation under power of eminent domain, takings can also occur without formal proceedings); *Hendler*, 952 F.2d at 1373.

175. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

176. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (compelling acquiescence of landlords to placement of cable television facilities in apartment buildings is a taking despite the fact that cable equipment would only occupy one and one-half cubic feet of the property).

177. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (no taking occurs where a land use regulation does not deny an owner economically viable use the land).

178. *See Penn Cent. Transp. Co.*, 438 U.S. at 125, 133-34 (upholding land use regulations where the state reasonably concludes that the health, safety, morals, or general welfare will be protected); Golblatt v. Hempstead, 369 U.S. 590, 595-96 (1962) (upholding prohibition on mining operations in a residential area where ordinance would yield safety benefits); Hadacheck v. Chief of Police, 239 U.S. 395, 410-11 (1915) (upholding prohibition against manufacturing of bricks within city limits as a valid exercise of police power).

179. *Penn Cent. Transp. Co.*, 438 U.S. at 125, 133-34.

180. 112 S. Ct. 2886 (1992).

that the proscribed use was not part of the landowner's original title or bundle of rights.[181] Thus, a state's ability to avoid compensation for regulations which prohibit all productive uses of land has been diminished.[182]

The *Lucas* Court, however, did not resolve a critical issue underlying all regulatory takings cases; namely, the appropriate property interest to be evaluated in the regulatory takings analysis.[183] This underlying issue may be decisive in determining whether regulations precluding agricultural uses of certain lands constitute a taking. The divergent views regarding the appropriate definition of property in takings cases are aptly expressed in the majority and dissenting opinions in *Keystone Bituminous Coal Association v. DeBenedictis*.[184]

The *Keystone* majority reiterated that a taking may be found in a facial claim only if the regulation denies the landowner economically viable use of the land.[185] The majority stated that the appropriate test requires a comparison of the value that has been taken from the property as a whole and the value that remains with the property.[186] The majority rejected the petitioners' view that because they lost economically viable use of "certain segments" of their property, a taking had occurred as to those particular segments.[187] The dissenters accepted that proposition, however, and opined that the takings analysis may focus on an identifiable

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181. *Id.* at 2899.

182. Or, perhaps it is more accurate to say that a state may now be less inclined to regulate land uses directly because of the problematic issues which inevitably arise from the holding in *Lucas*, drawing the complex nuisance doctrine into the already difficult takings analysis.

183. "Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." *Id.* at 2894 n.7. The Court did not resolve this issue primarily because the lower court found that the regulation in question deprived Lucas of all economic value of his property. *Id.*

184. 480 U.S. 470 (1987).

185. *Id.* at 495. The test of a facial claim that statutory enactment constitutes a taking is whether the regulation denies an owner economically viable use of the land. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981) (distinguishing between a takings claim relating to the mere enactment of a statute and a claim relating to the individual impact of government action by rejecting a claim filed before enforcement of the statute).

186. *Keystone*, 480 U.S. at 497. The majority noted that the issue in the case was "whether there has been any taking at all when no coal has been physically appropriated, and the regulatory program places a burden on the use of only a small fraction of the property that is subjected to regulation." *Id.* at 499 n.27.

187. *Id.* at 496-97.

segment of property, particularly where that segment is severable and valuable in its own right.[188]

In *Keystone*, the regulation in question prevented the mining of fifty percent of the coal beneath certain structures to avoid problems associated with subsidence.[189] The majority noted that the regulation required the petitioners to leave in place only two percent of over 1.46 billion tons of coal, and that the petitioners had not claimed that any of their four mines had failed to be profitable.[190] In contrast, the dissent noted that the 27 million tons of coal required to be left in the ground constituted an identifiable and severable property interest.[191] Further, the dissent noted that unlike many property interests, the bundle of rights in coal is sparse: "'For practical purposes, the right to coal consists in the right to mine it.'"[192] According to the dissent, because the regulation completely destroyed the petitioners' interest in a segment of property required to be left in the ground, the regulation effectuated a taking.[193]

The resolution of this point is crucial in determining whether federal legislation precluding certain uses of agricultural land constitutes a taking. Environmentally significant lands, such as wetlands, riparian areas, highly erodible lands, windbreaks, shelterbelts, or wildlife corridors, generally constitute discrete segments of the overall acreage used by a farmer. Under the *Keystone* majority opinion, direct regulation precluding agricultural uses of environmentally significant segments of property will not constitute a taking if the landowner remains able to operate the farm profitably.

Like coal, however, the bundle of rights in agricultural property is sparse, consisting largely of the right to farm. Further, the Court in *Lucas* noted that the answer

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188. *Id.* at 517, 520 (Rehnquist, C.J., dissenting).

189. "[S]ubsidence is the lowering of strata overlying a coal mine, including land surface, caused by extraction of underground coal." *Id.* at 474. Subsidence is well recognized as an environmental concern. *See* F.T. LEE & J.F. ABEL, JR., U.S. DEP'T OF THE INTERIOR, SUBSIDENCE FROM UNDERGROUND MINING, GEOLOGICAL SURVEY Circular 876 at 1, 9, 12 (1983) (citing aquifer contamination and methane gas poisoning of animal and plant life as possible environmental harms due to subsidence).

190. *Keystone*, 480 U.S. at 496.

191. *Id.* at 517 (Rehnquist, C.J., dissenting).

192. *Id.* (quoting Commonwealth *ex rel.* Keator v. Clearview Coal Co., 100 A. 820, 820 (1917)).

193. *Id.* at 518.

> may lie in how the owner's reasonable expectations have been shaped by the State's law of property — i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.[194]

Both federal and state laws have recognized a landowner's right to farm.[195] Thus, under the dissent's view, regulation vitiating that right could constitute a taking affecting discrete segments of the land.

In essence, the determination that state action constitutes a taking requires the general public, rather than an individual owner, to pay the costs of regulating the property for a public purpose.[196] As noted previously, the purpose of congressional land use regulation is to promote stewardship on behalf of the general society and to protect societal rights in private lands.[197] For this reason, the Supreme Court affirmed the notion that private landowners should be compensated when they are called upon to sacrifice all economically beneficial uses of their property for the sake of the public good.[198]

However, the fact that legislation precluding certain land uses will trigger the Fifth Amendment does not mean that Congress cannot regulate. Rather, it only means that when Congress does regulate, compensation is due. Therefore, the financial implications of direct regulation are a significant concern for the federal government. If direct regulation constitutes a taking, the compensation due to a landowner, on an individual basis, is most likely equivalent to the cost of a LURE.[199] However, direct regulation may result in

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194. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992).

195. For example, the sodbuster and swampbuster programs in the 1985 Farm Bill allow the farm owner or operator to decide whether to farm protected lands. *See, e.g.*, 16 U.S.C.A. §§ 3811-3813 (West Supp. 1992) (providing that any person electing to produce an agricultural crop on erodible land shall become ineligible for various benefits such as price supports or crop insurance). Although the legislation is deprivative, farming activity itself is not expressly regulated; in effect, these provisions recognize a "right to farm." In addition, numerous states have enacted "right to farm" laws. *See* 13 NEIL E. HARL, AGRICULTURAL LAW § 124.01 (1991).

196. *Keystone*, 480 U.S. at 492.

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

198. *See Lucas*, 112 S. Ct. at 2895 (stating that there are good reasons for finding that a taking has occurred where a landowner loses use of the land for the common good).

199. *See supra* notes 80-81 and accompanying text (cash payments to farmers for LUREs are limited to the fair market value of the land without the LURE less the fair

affected landowners invoking inverse condemnation,[200] forcing the government to incur substantial expenses in an ad hoc manner. In contrast, the use of LURE acquisition programs enables the government to make annual decisions regarding the allocation of resources for regulation of land use.[201] Thus, the use of LUREs to accomplish regulatory goals is not only more politically acceptable, but also more fiscally manageable.

3. Market Based Considerations

In addition to the economic consequences of regulation with respect to the takings question, economic characteristics of the agricultural market should also be considered. Society cannot share the economic burden resulting from agricultural regulation in the same way that society absorbs the burden of other environmental regulations. The cost of compliance with direct environmental regulation is generally internalized by industry and passed to the consumer.[202] For example, the cost of obtaining permits under the Clean Air Act or the Clean Water Act can generally be reduced to dollar amounts and recouped from society through price mechanisms.[203]

The cost of compliance with agricultural land use regulations, in contrast, is not so readily recouped. First, it is more difficult to place a dollar value on restricted use of agricultural lands. The primary cost associated with protection of wetlands or other environmentally significant lands is reduced productivity in a given year.[204] Because external variables affect agricultural productivity

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market of the land encumbered by the LURE).

200. Inverse condemnation describes the manner in which a landowner recovers compensation for a taking of property when condemnation proceedings have not been instituted. *Agins*, 447 U.S. at 258 n.2.

201. The 1990 Farm Bill directed the Secretary to establish a wetlands priority conservation plan. *See* 16 U.S.C. § 3921 (1988). The plan must prioritize the types of wetlands and interests in wetlands for acquisition by federal and state governments. *Id.* § 3921.

202. *See* Arnold W. Reitze, *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 ENVTL. L. 1549, 1619 (1991) (noting that the cost of emissions controls contributes to higher prices paid by consumers).

203. *See, e.g., Agency to Seek Rate Hike for Air-Pollution Permits*, BUS. FIRST — Louisville, May 25, 1992, at 1 (noting that per ton emissions fees for operating permits under the Clean Air Act will require businesses to pay more); *Environmental Price Tags*, NATION'S BUS., Apr. 1992, at 36 (surveying small business efforts to pass on costs of environmental compliance through higher prices).

204. *See* J.W. LOONEY ET AL., AGRICULTURAL LAW: A LAWYER'S GUIDE TO REPRESENTING FARM CLIENTS 240-41 (1990) (economic factors bearing on a decision to implement conservation efforts include the cost of the measures and the loss of productivity

from year to year, the loss in productivity due to land use regulation is difficult to isolate and quantify.[205] Further, true costs are difficult to assess, since decreases in productivity may be offset by gains from maintaining a healthy ecosystem over the life of the farm.[206] Similarly, it is difficult to measure the ecological or societal benefits of wetlands, shelterbelts, wildlife corridors, or farmlands.[207] Indeed, many people would view the permanent loss of environmentally significant land characteristics as an immeasurable cost. Thus, the cost to ensure the continued existence of these lands may be too high to internalize and distribute through traditional pricing processes.[208]

Additionally, the agriculture industry is unique in that farmers are "price takers," not price setters.[209] In contrast to most industries, the market price for crops is determined by a complex marketing chain.[210] Therefore, farmers inquire what price they will be

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from idled land). *See also* JULIAN C. JUERGENSMEYER AND JAMES B. WADLEY, AGRICULTURAL LAW (1983).

205. Agricultural production is regularly subject to numerous uncontrollable factors such as weather, pests, disease, etc. *See* Orlando E. Deluge, *A Comprehensive State and Local Government Land Use Control Strategy to Preserve the Nation's Farmland is Unnecessary and Unwise*, 34 KAN. L. REV. 519, 530 (1986) (noting the "wide variety of factors" affecting overall farm output).

206. *See id.* at 531 (noting that the decrease in soil erosion has contributed to an increase in agricultural output over the last fifty years).

207. *See* Steven L. Dickerson, *The Evolving Federal Wetland Program*, 44 Sw. L.J. 1473, 1475-76 (1991) (the economic value of wetlands often goes unnoticed until, in their absence, the harmful effects of water pollution, lake eutrophication and land erosion are felt). Many farmland benefits actually occur off the farm. "[E]ven erosion control, which is typically perceived as benefiting the farmer by preserving the productibility of the soil, produces only minor on-farm benefits." George A. Gould, *Agriculture, Nonpoint Source Pollution, and Federal Law*, 23 U.C. DAVIS L. REV. 461, 487 (1990).

208. *See* Gould, *supra* note 207, at 487 (stating that only the "most saintly" farmer would internalize such costs).

209. Farmers are price takers because, unlike most industries, they do not establish the price for their products. *See id.* at 488 (noting that as price takers farmers have little ability to pass on production costs to consumers); *see also* C.B. Baker, *Structural Issues in U.S. Agriculture and Farm Debt Perspectives*, 34 KAN. L. REV. 457 (1986) (noting the burden of imposing prices on farmers); Gerald Torres, *Theoretical Problems with the Environmental Regulation of Agriculture*, 8 VA. ENVTL. L.J. 191, 206 (1989) (comparing the status of farmers as price takers to the paradigm of perfect competition where no producer can affect the price received for his goods single-handedly).

210. The Chicago Board of Trade, a commodities exchange, establishes a base price for agricultural commodities. The price paid for products at local grain elevators is generally calculated according to the current Board of Trade price and the elevator's "basis," which takes into account storage and other costs, as well as transportation costs to terminal markets. Telephone Interview with Ronald D. Culler, General Counsel, Indiana Comm'r of Agriculture (Aug. 1992). For a more detailed discussion of commodities trading, *see* NOR-

paid for the crop at the local grain elevator; they do not calculate the inputs invested and negotiate an appropriate selling price.[211] Farmers have little ability to pass on to consumers the added costs of production or the costs of lost opportunities.[212]

Direct regulation of agricultural land uses also impairs fair competition in the agricultural industry. Because the significance of wetlands, riparian areas, and highly erodible lands varies according to geographic location, direct regulation has a disparate impact on agricultural producers in different regions of the country. Unlike the manufacturing of goods, agriculture has no set rules for producing an abundant crop; farming practices must be readily adaptable and often change annually.[213] By contrast, a typical manufacturing process is likely to remain uniform nationally from year to year. Direct regulation restricting uses of environmentally significant lands would affect some farmers to a greater extent than others, depending on geographic characteristics of the cropland or production circumstances of a given year.[214] The potential result is that some agricultural producers may obtain an unfair competitive advantage.

Because society is not a ready partner in absorbing the costs of agricultural land use regulation, direct federal regulation of agricultural land is not economically justified, even if constitutionally valid. An alternative to direct regulation is encouraging conservation practices through incentives. The use of LUREs as an incentive to protect environmentally significant lands is politically acceptable, fiscally manageable, and economically justifiable. Unlike direct regulation, LURE acquisition programs are an appropriate means to attain conservation and preservation goals. However,

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MAN W. THORSON, COMMODITY FUTURES CONTRACTS § 5.21; *Hedging and Basis Trading*, *in* JOHN H. DAVIDSON, AGRICULTURAL LAW (1981 & Supp. 1989).

211. *See* Baker, *supra* note 209, at 460 (noting that "markets transmit prices to farmers who respond with decisions on what and how much to produce and with what combination of resources and production practices.").

212. *See* Gould, *supra* note 207, at 488; Daniel R. Mandelker, *Controlling Nonpoint Source Water Pollution: Can It Be Done?*, 65 CHI.-KENT L. REV. 479, 490 (1989) (noting that farmers are an unorganized production group and therefore have difficulty passing costs of land use controls to consumers).

213. *See* Deluge, *supra* note 205, at 526 (noting the signaling effect of agricultural prices which reflects changes in the agricultural economy and transmits this information to farmers, causing rational farmers to react quickly and efficiently).

214. *See* Gould, *supra* note 207, at 488 (noting the heterogeneous nature of the farm economy and the disparate impact of pollution control efforts on farmers).

LUREs are the better policy choice only if they achieve conservation goals in a cost-effective, efficient manner.

B. Incentives: The Better Policy Choice Only if Efficient and Effective

To assure that LURE acquisition programs achieve conservation goals, they must be structured to permit the acquisition of enforceable, perpetual LUREs efficiently and effectively. To maximize its return on the investment of scarce public funds, the federal government should be able to acquire LUREs with minimal research into each state's real property laws. In addition, the federal government should be able to enforce easement restrictions in perpetuity. Thus, a critical question is whether federal or state laws should determine the permissible duration of the easements. In resolving this question, Congress must choose from among two competing alternatives. Federal legislation may permit state law to determine the maximum duration of LUREs. Alternatively, federal legislation may preempt state law limitations on duration.

The 1990 Farm Bill answered this question with great inconsistency. On one hand, in the Conservation Title, the WRP and the EEP expressly permit state law to determine the maximum duration of the LUREs acquired by the federal government.[215] On the other hand, the FLP in the Forestry Title authorizes the federal government to acquire LUREs in perpetuity despite state law to the contrary.[216] While authorizing a number of programs relating to the purchase of LUREs, the 1990 Farm Bill does not conclusively resolve whether federal or state laws govern duration.

Besides these contradictory provisions, other LURE programs are ambiguous about whether federal or state laws govern duration.

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215. The WRP prescribes that "[a] conservation easement granted under this section . . . shall be for 30 years, permanent, *or the maximum duration allowed under applicable State laws*." 16 U.S.C. § 3837a(e)(2) (Supp. II 1990) (emphasis added). Similarly, the EEP provision states that: "The Secretary shall . . . carry out an environmental easement program . . . through the acquisition of permanent easements or easements *for the maximum term permitted under applicable State law* from willing owners of eligible farms or ranches in order to ensure the continued long-term protection of environmentally sensitive lands . . . ." *Id.* § 3839(a) (emphasis added).

216. *Id.* § 2103c(c), (d)(1), (k)(2) ("Notwithstanding any provision of state law, no conservation easement held by the United States . . . shall be limited in duration or scope."). The statute further provides: "Notwithstanding any provision of State law, conservation easements shall be construed to effect the Federal purposes for which they were acquired and, in interpreting their terms, there shall be no presumption favoring the conservation easement holder or fee owner." *Id.* § 2103c(k)(3).

These ambiguous provisions authorize the federal government to acquire perpetual LUREs, but they do not preempt contrary state law limitations on duration. For example, the RECP directs that LUREs acquired by the federal government must be for a term of at least fifty years.[217] While the 1985 amendments removed a perpetual duration requirement and substituted the current fifty year minimum, the government is still authorized to acquire LUREs for terms greater than fifty years, including LUREs of perpetual duration. However, the RECP provisions do not expressly preempt state limits on duration, nor do they expressly incorporate state laws governing duration.

Similarly, the CRP provisions do not preempt state law limitations on duration. The CRP provisions condition conversions to the WRP on the grant of a long-term or permanent LURE.[218] Although the conversion provisions are not explicit, LUREs acquired through conversion to the WRP presumably fall within the WRP provisions incorporating state law.

The FmHA LURE provisions require the Secretary to impose perpetual LUREs upon the disposition of specified properties in the federal inventory.[219] The LUREs established pursuant to this section may be held by state governmental entities, private nonprofit organizations, or the federal government.[220] The FmHA debt-servicing provisions require LUREs of at least 50 years, and specifically allow for longer terms under certain circumstances.[221] However, since the debt-servicing provisions do not incorporate state laws governing duration, it is unclear whether state laws can prohibit perpetual LUREs.[222] At the same time, the provisions do not expressly state that federal law will preempt contrary state laws limiting duration.

The Watershed program and the Farms Act authorize the feder-

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217. 16 U.S.C. § 1501 (1988) (authorizing the Secretary to purchase easements for a term of not less than 50 years).

218. 16 U.S.C. § 3835a(b)(2) (Supp. II 1990).

219. 7 U.S.C. § 1985(g)(1) (Supp. II 1990).

220. *Id.* § 1985(c)(1) (permitting the Secretary to convey non-possessory interests held by the United States to a unit of state or local government or to a private nonprofit organization, if a buyer who is eligible for assistance under other farm programs is not found within a specified period).

221. 7 C.F.R. pt. 1951, subpt. S, exhibit H, § VI (1992) (requiring terms of easements to be no less than 50 years and providing for longer easements in certain circumstances, such as to protect a species covered under international treaty).

222. However, the FmHA debt restructuring provisions provide a cooperative approach by using both federal and state officials as a part of an Easement Review Team.

al government to assist approved sponsors in the acquisition of perpetual LUREs.[223] Under both programs the federal government is not the holder of the LURE. The Farms Act regulations require the borrower to show that the LURE will be valid, perpetual and enforceable.[224] Regulations governing the Watershed program may use a similar approach. Although the programs do not expressly authorize LUREs to be perpetual notwithstanding state laws, only those states with laws permitting perpetual LUREs can benefit from these programs.

The uncertainty and inconsistency resulting from the LURE acquisition provisions in the 1990 Farm Bill hinder the effective use of LUREs by the federal government. The choice is between permitting state law to govern duration or expressly preempting state law limitations on duration. Selecting the latter approach will ensure that all LUREs acquired under federal conservation programs are perpetual. A policy decision should be made enabling the federal government to acquire perpetual LUREs and to enforce restrictions in perpetuity. By minimizing the need for research into individual state property laws, and by maximizing the return on investment of public funds, federal LURE acquisition programs will be permitted to function efficiently and effectively.

Importantly, the authorization of perpetual LUREs and the preemption of contrary state law limitations on duration raise fundamental federalism concerns. These concerns result from the condition rendering perpetual LUREs enforceable despite state laws to the contrary, rather than from the inherent use of voluntary easement acquisition programs. In other words, may the federal government acquire an enforceable property right from a landowner that is not part of the landowner's "bundle of rights" under state law? Further, even if the federal government is permitted to acquire a property right not recognized by state law, may it convey that right to private nonprofit entities or local governments, when private entities and local governments cannot obtain similar rights under state property laws?

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223. *See* 16 U.S.C. § 1003a(a) (Supp. II 1990) (providing for cost share assistance programs enabling sponsors of watershed protection projects to acquire conservation easements); 1990 Farm Bill, Pub. L. No. 101-624, § 1465, 104 Stat. 3359, 3616, *reprinted in* 7 U.S.C. § 4201 (Supp. II 1990) (establishing federal assistance program for state trust funds used to preserve farmland resources).

224. *See* Farms for the Future Act of 1990, 56 Fed. Reg. 48,116, 48,119 (1991) (to be codified at 7 C.F.R. § 1980.920) (requiring borrowers to obtain legal authority to acquire developmental rights easements and to enforce the easement terms in perpetuity).

If a federal law authorizing enforceable perpetual LUREs is a proper exercise of congressional power under the Constitution, the federal law will preempt contrary state laws. However, because state laws traditionally control the acquisition and transfer of property and define resulting rights and responsibilities,[225] the federal law may readily be seen as an intrusion on state sovereignty. Before engaging in a policy analysis of the alternative choices for LURE acquisition programs, it must first be determined whether the federal government may constitutionally require LUREs to be perpetual. Therefore, the next section examines whether federal legislation authorizing enforceable, perpetual LUREs is a proper exercise of congressional power despite constitutional protections of state sovereignty.

III. THE CONSTITUTIONALITY OF FEDERAL LEGISLATION AUTHORIZING PERPETUAL LUREs AND PREEMPTING STATE LAW LIMITATIONS ON DURATION

Congress has opted to pursue conservation and preservation of the land resource through the more politically acceptable, economically justifiable and fiscally prudent means of incentives. Therefore, the constitutional question is whether Congress may exercise the spending power and the property power to enact legislation authorizing the federal government to acquire enforceable, perpetual LUREs that preempt contrary state laws limiting duration.[226]

LURE acquisition programs authorize the federal government to purchase interests in realty from willing landowners so long as the landowners agree to certain restrictive terms.[227] It is well established that the federal government may use the property power to acquire property and interests in property through negotiated purchase. The federal government may use that property to attain any end within the scope of its enumerated powers.[228] Further, pursuant to the spending power, Congress may buy property from will-

225. This tradition is demonstrated by judicial application of state law to determine property rights, even when construing federal legislation. *See, e.g.*, Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 210 (1946) (allowing state definition of real property to control question of whether government property would be taxed, since the state definition did not run counter to terms of the federal act).

226. *See* New York v. United States, 112 S. Ct. 2408, 2419-20 (1992) (appropriate inquiry is whether, from among possible alternatives, Congress chose a permissible method to preempt state regulations governing low level radioactive waste).

227. *See* discussion *supra* part I.B.2.

228. *See infra* notes 338-40 and accompanying text.

ing landowners to promote the general welfare.[229] Thus, the constitutional issues examined in this article go beyond whether Congress has the power to enact LURE acquisition programs.

Rather, the more complex issue is whether federal LURE programs may subject the availability of funds to a condition that the LURE must be perpetual despite state laws to the contrary. Subissues include whether Congress can legislate that the federal government may acquire a property right that is not a cognizable aspect of the grantor's "bundle of rights" under state property law, and whether this property right will be enforceable when transferred to third parties. Arguably, the property right acquired by the federal government is inconsistent with a state's public policy as reflected in its property laws. The key question, then, is whether the federal spending program has — through a particular condition — overstepped the bounds of fundamental federalism.

The essence of federalism is that "states as states" have legitimate interests which the national government must respect even though federal laws, if constitutionally proper, are supreme.[230] Unfortunately, federalism concerns often go unappreciated. This is attributable in part to recent decisions of the Supreme Court and in part to the surprisingly large population of lawyers, including those in Congress, who lack a sufficient understanding of federalism.[231] While the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*[232] has tempered protection of state autonomy,[233] federalism concerns regarding the appropriate balance of powers between the states and the federal government are still relevant in assessing exercises of congressional power.[234]

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229. *See infra* notes 241-46 and accompanying text.

230. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985). *See generally* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1981).

231. *See, e.g.*, Engdahl, *supra* note 147, at 51-52 (noting academic view that Supreme Court decisions during the New Deal disposed of serious constitutional concern for federalism and allocated questions of governmental power to the political branches of government); Ben W. Heineman, Jr., *The Law Schools' Failing Grade on Federalism*, 92 YALE L.J. 1349, 1355 (1983) (although issues of federalism deserve detailed law school attention, they have largely been ignored and left to economists, think tanks, and public policy schools).

232. 469 U.S. 528 (1985).

233. *See id.* at 554.

234. *Id.* at 586 (O'Connor, J., dissenting); *see also* New York v. United States, 112 S. Ct. 2408, 2419 (1992) (although the scope of the federal government's authority with respect to states has changed over the years, the federal structure required by the Constitution remains unchanged).

State sovereignty has strong defenders on the Supreme Court: Chief Justice Rehnquist and Justice O'Connor have expressed their belief that the "Court will in time again assume its constitutional responsibility" to define the scope of protected state autonomy.[235]

Even if states do not object to federal legislation that infringes on their autonomy, the Supreme Court has still noted that federalism concerns must be addressed to uphold the fundamental purpose of our government's federal structure:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.[236]

The notion that federalism protects individuals is significant because, although some states have expressed concerns about the amount of federal land holdings within their boundaries,[237] many states are not likely to object to federal legislation authorizing perpetual LUREs. Most states recognize the importance of conserving or preserving environmentally significant lands, yet lack the requisite funds to operate effective state acquisition programs. Accordingly, before advocating federal legislation to authorize perpetual LUREs and preempt state limitations on duration, it is crucial to ensure that fundamental federalism precepts are maintained.

Legislation conditioning the availability of federal funds in exchange for a LURE on terms requiring the LURE to be perpetual is a conditional offer of federal funds. The use of such a conditional offer is a means within Congress' spending power.[238] Further, in cases where the federal government is the holder, the LURE creates enforceable rights in the federal government. In these cases, legislation authorizing the LURE is analogous to a rule respecting property interests belonging to the United States — a means within Congress' property power.[239] Therefore, the federal legislation can be characterized as an exercise of the spending power for the general welfare and as an exercise of the property

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235. *Garcia*, 469 U.S. at 589 (O'Connor, J., dissenting).
236. *New York*, 112 S. Ct. at 2431.
237. *See infra* note 299 and accompanying text.
238. *See infra* notes 248-51 and accompanying text.
239. *See* discussion *infra* part III.B.

power to create enforceable rights protecting the federal interest in conservation.[240] Within the appropriate doctrinal frameworks, this section will analyze the constitutionality of federal legislation authorizing enforceable, perpetual LUREs and preempting contrary state law limitations on duration.

A. The Spending Power Analysis

Article I of the Constitution provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."[241] The proper interpretation of this language was at one time a point of considerable debate.[242] However, in *United States v. Butler*,[243] the Supreme Court approved the theory that the clause should be construed as a grant of a distinct enumerated power to spend for the "general" welfare as distinguished from a local or particular purpose.[244]

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240. Although the "means" used by Congress through the LURE provisions are not within the scope of the commerce power, the "ends" or objectives of the LURE provisions in agricultural legislation can be characterized as an effectuation of congressional Commerce Clause policies. For example, environmentally important lands such as forestlands, farmland and highly erodible croplands, wetlands, riparian corridors and wildlife habitats directly or indirectly affect interstate commerce; by virtue of their important role in the ecosystems, these lands generate marketable commodities and hence interstate movement. *See* Hodel v. Indiana, 452 U.S. 314, 324 (1981) (prime farmland is a federal interest that Congress may address through the commerce power); *cf.* George C. Coggins & William H. Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?*, 61 IOWA L. REV. 1099, 1146 (1976) (arguing Congress has virtually unlimited power to set aside property for national parks and refuges to protect local wildlife).

Further, lands protected by LUREs may be used for fishing or hunting or for wildlife habitats. These uses of the land draw people for recreational or scientific purposes and may affect interstate movement. *See* United States v. Byrd, 609 F.2d 1204, 1210 (7th Cir. 1979) (holding that recreational and scientific use of inland lakes significantly affects interstate commerce). Accordingly, federal legislation permitting perpetual LUREs, and furthering commerce policies by assuring long-term protection, may also fall within the category of an exercise of the necessary and proper power to effectuate both a congressional policy within the scope of the commerce power, as well as extraneous ends. *See* discussion *supra* section II.A and *infra* section III.C.

241. U.S. CONST. art. I, § 8, cl. 1.

242. Madison asserted that the power to spend was limited to the legislative fields enumerated by the Constitution. Hamilton, on the other hand, maintained that the spending clause confers a power separate and distinct from the other enumerated powers. United States v. Butler, 297 U.S. 1, 65 (1935); *see* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1111-13 (1987) (surveying historical interpretations of the spending power).

243. 297 U.S. 1 (1935).

244. *Id.* at 66-67. The opinion in *Butler* reflects the Hamiltonian view that the words

Butler is instructive because in that case the Court implied that an agricultural subsidies program promoted the general welfare even though the program only benefitted farmers who set aside certain land.[245] Later decisions firmly established that federal spending for agriculture programs promotes the general welfare.[246] Because LUREs are an agricultural incentive program similar to the program in *Butler*, they may also be considered an exercise of the power to spend for the general welfare.

The scope of the spending power is expansive. It has been broadly construed to authorize spending that cannot be justified as an exercise of other enumerated powers.[247] Further, within certain limits, Congress may impose conditions on recipients of federal spending to compel or encourage conduct which could not be compelled through direct regulation.[248] The limits are twofold. First,

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"general welfare" are intended to limit and define the power to tax and spend. *Id.* at 65-66; *see also* Buckley v. Valeo, 424 U.S. 1, 90-91 (1976) (per curiam) (holding that public financing of presidential elections is a constitutional exercise of congressional power to spend for the general welfare).

245. *See Butler*, 297 U.S. at 66. However, the Agricultural Assistance Act of 1933 was invalidated because it encroached upon a subject reserved to the states. *Id.* at 68. It has been noted that the Court in *Butler* was still influenced by the theory of "dual federalism" which maintains that congressional exercises of legislative power must fall not only within specific enumerated powers, but also must not cross the line into realms traditionally reserved to the states. Rosenthal, *supra* note 242, at 1126 n.105. The theory of dual federalism and the corollary theory that the Tenth Amendment reduced the powers of the federal government were both rejected by the Supreme Court in United States v. Darby, 312 U.S. 100, 116-17, 123-24 (1941).

246. Ivanhoe Irrigation Dist. v. McCracken, 275 U.S. 275, 294 (1957); United States v. Gerlach Live Stock Co., 339 U.S. 725, 738 (1950).

247. *See, e.g.*, North Dakota v. Dole, 483 U.S. 203, 210 (1987) (limitation on the spending power is not a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly); *Buckley*, 424 U.S. at 90-91 (upholding establishment of the Presidential Election Campaign Fund as an expenditure to promote the general welfare). Since the *Butler* case, the Court has never held that an exercise of the spending power failed to meet the "general welfare" criterion. Rosenthal, *supra* note 242, at 1113.

248. *See* New York v. United States, 112 S. Ct. 2408, 2419 (1992) (as conventional notions of proper objects of government spending have changed, so has the ability of Congress to fix the terms on which it disburses federal funds); *see also* Steward Mach. Co. v. Davis, 301 U.S. 548 (1937). In *Steward Machine*, the Court upheld the unemployment insurance program provided in the Social Security Act. *Id.* at 585. The Act imposed a federal tax on employers, along with a 90 percent credit against the tax for employers in states that adopted their own unemployment compensation plans meeting federal standards. *Id.* at 574-76. Thus, the Court upheld the imposition of a condition intended to induce states to establish unemployment compensation plans — even though Congress could not directly require states to do so. *Id.* at 585; *see also* Fullilove v. Klutznick, 448 U.S. 448, 473-75 (1980) (holding Congress may constitutionally condition receipt of federal money on compliance with federal statutory and administrative directives); Lau v.

the spending power may not either directly[249] or indirectly[250] infringe upon individual liberties. Second, the Spending Clause does not empower Congress to overstep established federalism limitations.

The constitutionality of a conditional exercise of the spending power depends upon the propriety of the condition imposed.[251] Accordingly, although LURE acquisition programs inherently fall within the scope of the spending power, the condition that federal LUREs must be perpetual despite state laws to the contrary also must survive constitutional scrutiny.

In *South Dakota v. Dole*,[252] the Supreme Court set forth a four-part test to determine whether conditions imposed under federal spending programs are constitutional. According to the Court, conditions on an offer of federal funds must be: (1) in pursuit of the general welfare;[253] (2) unambiguous such that the election to participate is done knowingly;[254] (3) related to a federal interest in particular national programs;[255] and (4) unobstructed by any independent Constitutional bar.[256] The first three prongs of this test relate to whether a condition falls within the scope of the

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Nichols, 414 U.S. 563, 568-69 (1974) (holding Congress may constitutionally ban discrimination in state educational programs receiving federal financial assistance).

249. *See Buckley*, 424 U.S. at 23-38 (sustaining the grant of public funds for presidential candidates in part because the grant did not impinge on individual liberties).

250. *See Dole*, 483 U.S. at 210 (noting that a federal spending program may not condition the receipt of federal monies on terms requiring invidiously discriminatory state action or the infliction of cruel and unusual punishment).

251. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 20.11 (2d ed. 1992); *see also* Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 742 (1982) (criticizing the doctrine that the Constitution does not tolerate the "Hobson's choice" inherent in conditioning one constitutional right on the forfeiture of another).

252. 483 U.S. 203 (1987). The condition analyzed in *Dole* stemmed from a congressional directive to the Secretary of Transportation to withhold a percentage of federal highway funds from states which allowed persons less than 21 years of age to lawfully purchase alcoholic beverages. The condition was challenged as a violation of the Twenty-First Amendment to the U.S. Constitution. *Id.* at 205.

253. *Id.* at 207. The Court noted that the concept of the "general welfare" is largely shaped by Congress. *Id.* (citing Helvering v. Davis, 301 U.S. 619, 640-45 (1937)).

254. *Id.* at 207 (citing Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

255. *Id.* (citing Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)). It is still uncertain whether furtherance of a mere policy of the federal government will sustain conditional spending unless that policy may be carried out pursuant to one of Congress's enumerated powers. Rosenthal, *supra* note 242, at 1131.

256. *Dole*, 483 U.S. at 208 (citing Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256 (1985)); Buckley v. Valeo, 424 U.S. 1, 91 (1976).

spending power itself; the fourth prong relates to whether the condition violates any constitutional limitation intended to protect individual liberties or state sovereignty.

The offer of federal funds under the LURE provisions is an expenditure of federal money to ensure the continued viability of environmentally significant ecosystems and their aesthetic and recreational values.[257] Congress recognizes the importance of conserving and preserving important land resources for the public interest.[258] A condition requiring LUREs under federal conservation programs to be perpetual despite state law limitations on duration promotes the long-term benefits of the spending program. Under the broad construction of the spending power, the condition readily promotes the general welfare. Further, the condition is clearly related to the purpose of federal conservation programs and can be drafted unambiguously. Thus, the condition falls within the scope of Congress' spending power under the first three prongs of the test set forth in *Dole*.

However, it is less obvious that the condition meets the fourth prong of the *Dole* test, at least as to state sovereignty. Certainly, the condition does not infringe on individual liberties. An example of a breach of an independent constitutional bar protecting individual liberties would be a federal program conditioning a grant on a farmer's promise not to criticize the government's agricultural policies; the condition would be unconstitutional as an infringement of the farmer's freedom of speech under the First Amendment.[259] Since individual liberties are not at stake when a landowner voluntarily conveys a LURE subject to the condition that the LURE will be perpetual, the condition does not impede individual liberties.

In contrast, because state laws traditionally control the acquisition and transfer of property and define the resulting rights and responsibilities,[260] the condition may be perceived as an intrusion on state sovereignty. Although protection of state sovereignty derives primarily from the Tenth Amendment,[261] this limit on

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257. *See* discussion *supra* part I.B.

258. *See supra* note 156 and accompanying text.

259. ROTUNDA & NOWAK, *supra* note 251, § 20.11.

260. *See, e.g.*, United States v. Little Lake Misere Land Co., 412 U.S. 580, 591 (1973) (noting that most American property law is grounded in state statutory and common law); Reconstruction Fin. Corp. v. Beaver Co., 328 U.S. 204, 210 (1946) (noting that concepts of real property are deeply rooted in state customs, traditions, habits, and laws).

261. U.S. CONST. amend. X. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to

Congress' power is not derived from the text of the amendment itself.[262] Rather, the Tenth Amendment requires an examination of whether an incident of state sovereignty is protected by a separate and distinct limitation on an enumerated power.[263] For example, the Spending Clause does not empower Congress to require states to regulate because established Commerce Clause doctrine precludes such action as an infringement on state sovereignty.[264] Therefore, the inquiry under the fourth prong of the *Dole* test is whether a federal condition that LUREs be perpetual, despite contrary state laws, violates a limitation on the spending power, or any other enumerated power, intended to protect state sovereignty.

In *Dole*, the Court reiterated that the spending power doctrine provides little protection for state sovereignty.[265] The rationale for the lack of protection in the context of federal spending is that if states accept federal payments, they must also accept the federal conditions: "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty."[266] Thus, essential attributes of state and local government autonomy have received little protection in conditional spending cases. Courts have upheld deep intrusions into traditional state realms through conditional spending, including the redistribution of authority between a state's executive and legislative branches of government,[267] and the overriding of state laws concerning the use of federal funds.[268]

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the States respectively, or to the people." *Id.*

262. *See id.*

263. New York v. United States, 112 S. Ct. 2408, 2418 (1992).

264. *Id.* at 2429.

265. *Dole*, 483 U.S. at 210 (citing Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947)). In *Oklahoma*, the Court upheld a provision of the Hatch Act which conditioned receipt of federal funds on the removal of a state official whose employment was financed in part by federal funds due to the state official's political activities. 330 U.S. at 142-44.

266. Bell v. New Jersey, 461 U.S. 773, 790 (1983); *see also* Pennhurst State Sch. v. Haldermann, 451 U.S. 1, 17 (1981) (stating that Congress traditionally sets the terms upon which it disburses federal money to the states); King v. Smith, 392 U.S. 309, 333 n.34 (1968) (stating that unless barred by the Constitution, the federal government may impose conditions on disbursements to the states that preempt state law).

267. *See* Shapp v. Sloan, 391 A.2d 595 (Pa. 1978) (upholding legislation prohibiting a state treasurer from disbursing federal funds without a specific appropriation by the state legislature), *appeal dismissed sub nom.*, Thornburgh v. Casey, 440 U.S. 942 (1979); *cf. Oklahoma*, 330 U.S. at 142-44 (upholding condition requiring removal of a state officer who engaged in political activities prohibited by the Federal Hatch Act).

268. *See* Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 270 (1985) (up-

Nonetheless, the Court in *Dole* implied that the Tenth Amendment may preclude financial inducements offered by Congress that pass the point of "pressure" and become "compulsion."[269] Although the Court did not indicate where this point occurs, it found that the risk of losing five percent of federal highway funds did not render the condition an unconstitutional intrusion into state autonomy.[270] By analogy, federal conditions on LURE acquisitions cannot reasonably be considered "compulsion" because the state is not at risk of losing significant federal funds. Rather, the programs permit the state or its residents to benefit from a new source of federal funds by accepting federal conditions.

Of course, those spending power cases which address the extent of constitutional protection provided for state sovereignty generally involve conditional offers to states themselves. These conditional offers attempt to achieve state compliance with federal purposes where direct regulation may not be appropriate.[271] Of the LURE acquisition programs outlined in this article,[272] only the Farms Act and Watershed Program involve conditional offers to the states themselves. Yet even these programs are distinguishable because the conditional federal assistance in both programs may be invoked by private nonprofit entities as well.[273] However, because these programs require the holder to prove that LUREs acquired with federal assistance will be valid, perpetual and enforceable, each state may choose whether or not to permit its residents to obtain federal benefits in exchange for perpetual LUREs. Because the state may elect to enact legislation conforming to the condition in the federal spending program, this use of the spending power requires only a minimal extension of *Dole* to be found constitutional.

In contrast, the other federal LURE programs described in this article involve conditional offers to individual landowners who convey LUREs to the federal government.[274] The constitutionality

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holding legislation authorizing units of local government to use their share of federal funds more expansively for more purposes than permitted by state law).

269. *Dole*, 483 U.S. at 211.

270. *Id.*

271. *See, e.g., id.* at 211-12 (upholding the use of the spending power by Congress to coerce states, through the threat of reducing federal highway funds, to raise the minimum drinking age to twenty-one years to reduce automobile-related injuries and death).

272. *See* discussion *supra* part I.B.2.

273. *See supra* notes 123, 127 and accompanying text.

274. I.e., the CRP, WRP, EEP, FLP, RECP and the FmHA debt-restructuring program.

of a conditional offer to an individual which may result in the federal government acquiring a property right not recognized by state property law is less apparent. The *Dole* rationale limiting protection for state sovereignty in spending cases does not apply because a private landowner initiates the intrusive transaction without the state's knowledge.

States, however, are not politically powerless against federal intrusions initiated by individual landowners. In *Garcia v. San Antonio Metropolitan Transit Authority*,[275] the Court rejected the concept of discrete areas of traditional state sovereignty and concluded that participation in the national political process provides states with sufficient safeguards against federal intrusions.[276] Although the Court in *Dole* did not rely on *Garcia* to explain why state sovereignty receives little protection in spending power cases, federal spending programs will not be invalidated merely because they intrude into discrete areas traditionally reserved to states and thereby influence local activities.[277] This is true even though a state may be unaware of a particular intrusion. The national political process is equally available to moderate the federal legislation enabling such intrusions.[278]

The recent case of *New York v. United States*[279] further bol-

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See discussion *infra* part IV.B. The provision requiring the FmHA to place perpetual LUREs on properties in its inventory does not involve conditional spending at all. However, it falls squarely within the scope of the Article IV property power. *See supra* notes 89-93 and accompanying text and discussion *infra* part IV.B.2.

275. 469 U.S. 528 (1985).

276. *Id.* at 551-56. The concept of discrete areas reserved for states in a Tenth Amendment analysis had been set forth only 9 years earlier. *See* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by Garcia*, 469 U.S. at 528.

277. ROTUNDA & NOWAK, *supra* note 251, § 5.7.

278. It has been argued that the political process provides a less effective safeguard in the area of conditional spending because continued high levels of federal assistance are generally of great importance to state and local governments. Thus, states may elect to forego campaigning against certain conditions out of fear of hindering later efforts to obtain federal funds. Rosenthal, *supra* note 242, at 1141. That theory assumes that our nation's political process permits adverse ramifications. The Court in *Garcia* did leave open the possibility that some extraordinary defect in a procedural aspect of the political process may render congressional legislation invalid under the Tenth Amendment. 469 U.S. at 554. In South Carolina v. Baker, 485 U.S. 505, 513 (1988), the Court implied that a state's allegation that it was deprived of any right to participate in the national political process, or that it was singled out in a way that left it politically isolated and powerless, may constitute such a defect. A fear that participating in the process may hinder later efforts to obtain funds does not rise to the level of the procedural defects enunciated in *Baker*.

279. 112 S. Ct. 2408 (1992).

sters this conclusion. In that case the Court explained the constitutionally permissible methods of encouraging states to conform to federal policy under the Spending Clause.[280] The Court found that the ultimate decision to comply is bestowed upon the residents of the state, rather than the state itself.[281] Under our democratic system of government, a state's residents should determine whether federal policy is sufficiently contrary to local interests to decline participation in a federal program.[282]

Thus, that the conditional offer at issue may be invoked by individual landowners rather than the state does not violate spending power limitations intended to protect state sovereignty. However, before concluding that a particular condition of a federal spending program is constitutional, it is necessary to examine the established limitations of enumerated powers other than the spending power to determine whether the bounds of federalism have been overstepped.[283] As noted, a condition that LUREs acquired by the federal government be perpetual also falls within the enumerated property power.[284] Property power doctrine prescribes some limitations intended to protect state sovereignty. Accordingly, the issue becomes whether the property power provides an independent constitutional bar sufficient to render the condition unconstitutional under the fourth prong of the test set forth in *Dole*.

B. The Property Power Analysis

1. The Article I Property Power

Congressional power over federal property and property interests derives from two sources in the Constitution: the Article I and Article IV Property Clauses. Federal property interests acquired under LURE provisions in the 1990 Farm Bill do not fall within the scope of the Article I Property Clause. This clause provides that Congress shall have the power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the

280. *Id.* at 2424.
281. *Id.*
282. *Id.*
283. *See supra* notes 263-64 and accompanying text.
284. *See supra* note 239 and accompanying text.

> Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings . . . .[285]

Property covered by Article I is distinguished from other federal property by its use and by state consent to its acquisition. The phrase "other needful buildings" is very broad and has been construed to encompass "whatever structures are found to be necessary in the performance of the functions of the Federal Government."[286] However, the Supreme Court has stated that the phrase does not include tracts of federal land "used for forests, parks, ranges, wild life sanctuaries, flood control, and other purposes which are not covered by [Article I] Clause 17."[287] Accordingly, even if a state cedes complete governmental jurisdiction over such property to the United States,[288] that property must be regarded as falling under the Article IV clause alone.[289]

However, because the central issue is whether a particular federal condition violates a limitation on the exercise of the property power intended to protect state sovereignty, the concept of state consent or cession of state legislative jurisdiction should be considered. Although a state's cession of legislative jurisdiction is regarded as an integral aspect of the Article I property power,[290] a state may also cede legislative jurisdiction to the United States over

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285. U.S. CONST. art. I, § 8, cl. 17.

286. James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

287. Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 529-30 (1938).

288. Cession of complete governmental jurisdiction is the essence of state consent under the Article I Property Clause. For example, early cases held that the power conferred on the United States under Article I to exercise exclusive legislation carries with it the power of exclusive jurisdiction. *See, e.g., Dravo Contracting*, 302 U.S. at 141 (the United States has the power to exercise exclusive jurisdiction over land acquired under Article I); United States v. Cornell, 25 F. Cas. 650, 653 (C.C.D.R.I. 1820) (No. 14,868) (state has no jurisdiction over grounds of a fort located within its boundaries acquired by the United States under Article I); *cf.* Reily v. Lamar, 6 U.S. (2 Cranch) 344, 356-57 (1805) (residents of District of Columbia ceased to be residents of Maryland after Maryland ceded the land to the United States). However, later cases found that Article I property does not cease to be part of the state. *See, e.g.*, Evans v. Cornman, 398 U.S. 419, 426 (1970) (holding that persons residing on Article I property in Maryland could not be denied the right to vote in Maryland on ground that they were not residents of Maryland); Howard v. Commissioners of the Sinking Fund, 344 U.S. 624, 627 (1953) (holding that Article I does not "prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government").

289. *Yosemite Park*, 304 U.S. at 529-30.

290. *See supra* note 288 and accompanying text.

property that does not fall under Article I.[291] Cession of legislative jurisdiction to the United States would readily permit the federal government to enact legislation that may otherwise exceed limitations intended to protect state sovereignty.

Interestingly, the FLP, which expressly provides that perpetual LUREs shall not be limited in duration by contrary state laws,[292] also contains a provision regarding state consent. The FLP prescribes that if a state has not approved the acquisition of land under section 515, LUREs shall not be acquired on lands outside areas specifically designated as eligible for inclusion in the FLP.[293] Section 515 requires state consent before the Secretary acquires lands necessary for timber production or to regulate the flow of navigable waters.[294] The FLP provision thus empowers the Secretary to acquire LUREs under the program on lands approved for acquisition under section 515, as well as on lands eligible for inclusion in the FLP.

Further, the FLP directs that the establishment of eligibility criteria and the subsequent selection of areas which may be enrolled in the FLP are to be performed by the Secretary "in consultation" with state coordinating committees.[295] Yet, the responsibilities of state coordinating committees are limited to "making recommendations" to the Secretary concerning forest lands that should be included in the FLP.[296] Thus, although requiring cooperation between the federal government and the states, LUREs may be acquired under the FLP without state consent or cession of state jurisdiction.

Moreover, requiring state consent or cession of state jurisdiction before acquiring LUREs pursuant to the many federal conservation programs would hinder an important aspect of the programs — the ability of the federal government to enter into voluntary transactions with private landowners efficiently. Accordingly, it is important to determine the constitutionality of a federal condition that all LUREs be perpetual despite state law limitations on duration without reference to state consent.

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291. *Yosemite Park*, 304 U.S. at 528-30.
292. 16 U.S.C. § 2103c(k) (Supp. II 1989).
293. 16 U.S.C. § 2103c(g) (Supp. II 1990).
294. 16 U.S.C. § 515 (1988).
295. 16 U.S.C. § 2103c(e) (Supp. II 1990).
296. *Id.* § 2113(b)(2)(D).

2. The Article IV Property Power

The Article IV Property Clause provides: "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 . . . ."[297] Because it is recognized that the general language of the Article IV Property Clause encompasses all property owned by the United States, including personalty and intangible property as well as interests in realty,[298] federal property interests acquired under LURE acquisition programs readily fall within the scope of Article IV.

The purpose of the analysis in this subsection is to determine whether any limitations on federal property power provide an independent constitutional bar to a conditional offer of federal funds under the spending power. One aspect of the analysis is whether the legislation is within the enumerated property power: i.e., whether federal legislation authorizing enforceable, perpetual LUREs is a needful rule or regulation respecting a property interest belonging to the United States. The more refined issue for purposes of this article, however, is whether such a conditional offer violates a limitation on the exercise of the property power intended to protect state sovereignty.

Initially, however, because of divergent views regarding the "preemptive capability" of Article IV legislation, it is important to determine the supremacy of legislation enacted pursuant to the Article IV property power for the purpose of overriding contrary state laws. If federal laws enacted under Article IV lack preemptive capability, the federal condition requiring LUREs to be perpetual would be rendered unconstitutional by an independent constitutional bar making further analysis of the property power unnecessary.

a. The Supremacy of Article IV Legislation

The relative powers of the states and the federal government over federal property have generated much controversy through the

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297. U.S. CONST. art. IV, § 3, cl. 2.

298. *See, e.g.*, Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285, 294 (holding that under Article IV Congress may regulate the selling of milk on federal lands acquired under Article I); Ashwander v. TVA, 297 U.S. 288, 331 (explaining that the Article IV property power may be applied to regulate all personal and real property belonging to the United States); Nixon v. Sampson, 389 F. Supp. 107, 137 n.80 (D.D.C. 1975) (stating that under Article IV only Congress can dispose of the President's documents, papers, tapes and other materials belonging to the United States).

years.[299] Scholars have asserted varying theories about the scope of the Article IV property power.[300] The polar views stem from Supreme Court language noting that the power over federal property entrusted to Congress is "without limitations."[301] At the same time, other language implies that the powers of Congress over federal lands are akin to the rights of an ordinary proprietor.[302] Although the theories are diverse, the most relevant aspect of the controversy is whether the legislative power of the federal government over Article IV property is subordinate to state governmental legislation.[303] In other words, does a needful rule respecting federal property preempt state laws?

The divergent theories can be generally categorized as falling into either a restrictive or a broad view of the Article IV property power. Proponents of the restrictive view limit the role of Congress over Article IV properties, with certain exceptions, to that of an ordinary proprietor; accordingly, Article IV legislation can have no

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299. In the 1930s, coastal states objected to newly asserted federal jurisdiction over submerged lands over which the states had assumed ownership. Robert E. Hardwicke et al., *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398, 400-05 (1948). More recently, western states have sought increased ownership of federal lands within their boundaries. Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 848-49 (1982).

300. *See, e.g.*, Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of Public Lands*, 12 PAC. L.J. 693 (1981) (proposing that the federal government may not have a constitutional basis to control public lands for other than enumerated purposes); David E. Engdahl, *Federalism and Energy: State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976) (tracing the conceptual development of legislative jurisdiction over the various classes of federal property); Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617 (1985) (arguing that early precedents used by legal scholars to support a narrow construction of the Property Clause really support the Court's current broad construction of the Property Clause); Blake Shephard, *The Scope of Congress' Constitutional Power Under the Property Clause: Regulating Non-Federal Power to Further the Purposes of National Parks and Wilderness Areas*, 11 B.C. ENVTL. AFF. L. REV. 479, 533-38 (1984) (concluding that the Property Clause is a plenary grant of authority to Congress and that restraints upon the power should stem from the legislative process, not the courts); Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980) (discussing the limits of federalism and the equal footing doctrine on the federal government's power to regulate its land).

301. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529, 539 (1976).

302. *See* Paul v. United States, 371 U.S. 245, 264 (1963); Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 527 (1887).

303. Some scholars espouse an even more restrictive view — that the federal power under Article IV prevents the federal government from retaining property within the boundaries of the states except for Article I purposes. *See, e.g.*, Brodie, *supra* note 300, at 719-22; C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholdings*, 28 TEX. L. REV. 43, 58 (1949).

preemptive capability.[304] Scholars espousing the broader view do not differentiate the property power from other enumerated powers and therefore advocate that a constitutional exercise of the Article IV property power must preempt inconsistent state laws.[305]

In the landmark case of *Pollard v. Hagan*,[306] the Supreme Court enunciated the parameters of Congress' power pursuant to the Article IV Property Clause. Advocates of the restrictive view herald *Pollard* as establishing that the United States is precluded from exercising "general governmental jurisdiction" over federal property within the boundaries of a state unless the federal property constitutes Article I property.[307] However, the broader view of *Pollard* is that the Court did not construe the federal government's powers under the Article IV Property Clause as subordinate.

Close analysis of *Pollard* reveals that the broader interpretation is superior. That conclusion hinges on the Court's clarification of its intent in rendering the decision: the Court stated that it was "called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments, over the subject in controversy."[308] The subject in controversy was land below the usual high water mark of a navigable river in Alabama, shortly after Alabama had been admitted to the Union.[309] The Court noted that the language of the Georgia deed ceding the land to the United States was based on the doctrine of equal footing[310] — that the new state formed from the ceded lands would be admitted to the Union with the same rights of sovereignty, jurisdiction, and eminent domain as the original states.[311] The *Pollard* case focused on the right of eminent do-

304. *See, e.g.*, Engdahl, *supra* note 300, at 309-10.

305. *See, e.g.*, Gaetke, *supra* note 300, at 656.

306. 44 U.S. (3 How.) 212 (1845).

307. In other words, the United States is treated as having only limited power akin to that of an ordinary property owner. *See* Engdahl, *supra* note 300, at 293-96.

308. *Pollard*, 44 U.S. (3 How.) at 220.

309. A central issue in *Pollard* was whether the land belonged to the state or the federal government. If deemed "public land," the property would constitute Article IV property. *Id.* at 224.

310. The doctrine of equal footing derives from the Ordinance of 1787, which provided that the new states "shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever." *Id.* at 222. Virginia and Georgia enacted legislation ceding lands to the federal government which contained language to the same effect. *Id.* at 221-22.

311. *Id.* at 221-23. The doctrine of equal footing is an integral aspect of the restrictive Property Clause theories. *See supra* note 300.

main.[312] The precise issue was whether the United States had the right to transfer the land in controversy to the plaintiff through its right of eminent domain.

The Court stated that, pursuant to agreements between the ceding states and the United States, the United States had temporarily held "both national and municipal" right of eminent domain over the lands ceded.[313] The Court explained, however, that the "municipal" right of eminent domain was held in trust only for the new states.[314] Even if a stipulation had been inserted in the agreements which granted

> the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative: because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.[315]

Thus, *Pollard* stands for the proposition that the United States has no power to exercise "municipal" sovereignty over lands once those lands are transferred to the new states.[316]

However, the Court recognized that not all lands ceded to the United States would necessarily be transferred to new states. The Court expressly stated that the new state, Alabama, succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, "except so far as this right was diminished *by the public lands remaining in the possession and under the control of the United States.*"[317] As to

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312. The Court defined eminent domain as the "right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state." *Pollard*, 44 U.S. (3 How.) at 223.

313. *Id.* at 222. The municipal right of eminent domain includes the power to dispose of state lands for municipal purposes. *Id.* at 230. The national right of eminent domain only extends to territories or properties of the federal government. *Id.* at 224.

314. *Id.*

315. *Id.* at 223.

316. *Pollard* distinguishes cases involving Article I property as "the only cases . . . in which all the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists." *Id.* at 223-24. Thus, it is reasonable to conclude that the United States can exercise "municipal" sovereignty only over Article I property or over lands ceded to the United States before those lands become new states.

317. *Id.* at 223 (emphasis added).

such "public lands" within the boundaries of the new state, the Court expressly stated that the United States did not hold any "municipal" sovereignty; rather, the United States possessed the full power given to Congress "'to make all needful rules and regulations respecting the territory or other property of the United States.'"[318] In other words, the United States continued to hold the power of "national" sovereignty.

Specifically, the Court held Alabama was entitled to sovereignty and jurisdiction over all the territory within her limits to the same extent that Georgia possessed it before it was ceded to the United States.[319] Under the common law at that time, each state held the absolute right to all navigable waters and the soils under them within the boundaries of the state, subject only to the rights surrendered by the Constitution.[320] Thus, the land in controversy was not "public land," but belonged to Alabama.[321] Accordingly, a clause in the agreement between Georgia and the United States which declared that "all navigable waters within the state shall for ever [sic] remain public highways"[322] was deemed inoperative to the extent that the clause attempted to create a right of eminent domain in the United States for municipal purposes.[323] Because the challenged federal action was an attempt to transfer the property to an individual citizen, it was deemed an exercise of eminent domain for municipal purposes and was therefore void.[324]

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318. *Id.* at 224 (quoting U.S. CONST. art. IV, § 3)

319. *Id.* at 228-29.

320. *Id.* at 229.

321. Because the land was not "public land," the Court held that "the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof [pursuant to Article IV], conferred no power to grant to the plaintiffs the land in controversy." *Id.* at 230. It is this aspect of *Pollard's* holding which may be misunderstood by advocates of the restrictive view. For example, Professor Engdahl's view can be construed as indicating that he believes that the land in controversy in *Pollard* was "public land." *See* Engdahl, *supra* note 300, at 296.

322. *Pollard*, 44 U.S. (3 How.) at 229.

323. The Court held that the transfer was void even though the United States could have transferred the property via the commerce power. *Id.* at 229-30.

324. The Court aptly noted:

> To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all

Thus, *Pollard* does not support the restrictive theory that federal legislation under the Article IV Property Clause is subordinate to state laws. Rather, the case distinguishes federal power over lands which become state property when new states are formed from federal power over retained public lands within the boundaries of new states: the federal government may not exercise "municipal sovereignty" over lands which become state property, but may exercise its Article IV property power over public lands within the boundaries of new states.

Furthermore, later Supreme Court cases, especially the Court's holding in the case of *Kleppe v. New Mexico*,[325] seriously erode the restrictive view. In *Kleppe*, the Court stated that the "presence or absence of [legislative] jurisdiction has nothing to do with Congress' powers under the Property Clause."[326] Rather,

> [a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.[327]

Therefore, the broader view of congressional authority under the Article IV property power is more meritorious. Importantly, however, this article does not attempt to resolve the conflicting property power theories. Even proponents of the restrictive view recognize certain exercises of the Article IV property power as valid and capable of preemption. Since this article is concerned with whether the property power is an independent constitutional

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> her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, "and the laws which shall be made in pursuance thereof."

Id. at 230.

325. 426 U.S. 529 (1976).

326. *Id.* at 542-43. Proponents of the restrictive view see *Kleppe* as an erroneous decision. For instance, Professor Engdahl asserts the Supreme Court failed to recognize that the cases supporting the statement that the Property Clause power is a complete power involved the "creation of rights in federal land by transfer of title, lease, or license, or the validity of terms imposed by Congress as conditions of such grants." Engdahl, *supra* note 300, at 352. However, the Court's express statement that the presence or absence of legislative jurisdiction has nothing to do with the property power undermines the classic Property Clause theory, and indicates that the distinction would have been irrelevant to the Court's holding.

327. *Kleppe*, 426 U.S. at 543 (citations omitted).

bar to an offer of federal funds subject to the condition that LUREs be perpetual, it is sufficient to determine that: (i) the federal condition falls within the sphere of recognized preemptive Article IV power; and (ii) the federal condition does not overstep limitations intended to protect state sovereignty.

b. The Preemptive Exercises of Article IV Property Power

The Article IV Property Clause empowers Congress to regulate without limitation the disposition of interests in federal property.[328] Congress has an absolute right to prescribe the times, conditions, and mode of transferring interests in federal property, and to designate to whom the transfer shall be made.[329] This power is largely attributable to the express language of Article IV which contains no limitations regarding Congress' power to "dispose of" federal property.[330] Such power is akin to that held by any proprietor.[331]

However, congressional power also goes beyond that of an ordinary proprietor. Cases have held that state statutes of limitation, as well as state laws creating or disregarding equitable or inchoate rights, may be vitiated to the extent necessary to validate a conveyance by the federal government.[332] In addition, Congress may subject a conveyance of Article IV property to terms or conditions not otherwise permitted under state law.[333] Thus, Congress may readily promote policies not related to the federal property itself by

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328. Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1871).

329. *Id.*; *see also* Eugene R. Gaetke, *Congressional Discretion Under the Property Clause*, 33 HASTINGS L.J. 381, 384 (1981) (explaining that "[l]ike other proprietors, Congress may decide whether, when and on what terms to dispose of [federal] lands").

330. *See supra* note 297 and accompanying text.

331. Judicial deference to congressional judgment regarding the disposition of federal property is a necessary consequence of the proprietary nature of such decisions. Gaetke, *supra* note 329, at 391.

332. *See, e.g.*, *Gibson*, 80 U.S. (13 Wall.) at 103-04 (holding that occupation of land for period of time established by state law is not sufficient to defeat legal title subsequently conveyed to others by the United States); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 516 (1839) (asserting that state law deeming inchoate or imperfect title denied "perfect title as if a patent had issued" cannot defeat later conveyance by United States). However, the cases indicate that state laws may be vitiated only to the extent necessary to validate the conveyance.

333. *See, e.g.*, ASARCO, Inc. v. Kadish, 490 U.S. 605, 633 (1989) (when a state receives title to land previously held by the federal government, the state must use or transfer the land subject to any conditions attached to the transfer by the federal government); Broder v. Water Co., 101 U.S. 274, 276-77 (1879) (once title to public lands passes under federal laws, it is subject to state legislation only so far as that legislation is consistent with the vesting of title provided by federal laws).

inserting conditions in grants or other dispositions of the property.[334]

Congress also may enact preemptive Article IV legislation to regulate conduct on both federal and non-federal property in order to protect federal property from harm.[335] This represents an enlargement of the federal government's proprietary power.[336] All owners may invoke available remedies to protect their land, but the federal government can go further by legislatively creating remedies from potential harms. For example, the Court has upheld federal legislation that permitted killing deer threatening federal property even though state game laws prohibited such killings.[337]

Additionally, Article IV legislation is recognized as supreme where federal property is used to effectuate an enumerated power.[338] Even proponents of the restrictive view acknowledge this as a necessary consequence of federal authority conferred by the Necessary and Proper Clause.[339] The Necessary and Proper Clause justifies the federal government's right of eminent domain, which may be invoked to acquire property necessary to further the government's delegated powers.[340]

Finally, Congress may enact preemptive Article IV legislation to promote its policies regarding the use of the federal property.[341] Under Article IV, Congress may designate federal proper-

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334. *See, e.g.*, United States v. City & County of San Francisco, 310 U.S. 16, 29-30 (upholding a federal land grant to a city for water supply and for generating electricity conditioned on the requirement that all energy be sold to consumers rather than private utility companies) (1940).

335. *See, e.g.*, Hunt v. United States, 278 U.S. 96, 100 (1928) (upholding a federal statute authorizing killing of deer on federal property when the deer population threatened the federal property notwithstanding state game laws restricting the killing of deer); United States v. Alford, 274 U.S. 264, 267 (1927) (upholding a federal law punishing one who built and failed to extinguish a fire on private land which endangered federal lands); McKelvey v. United States, 260 U.S. 353, 359 (1922) (holding that Congress may prohibit conduct on federal land); Camfield v. United States, 167 U.S. 518, 528 (1897) (upholding a federal law forbidding enclosure of public land as a valid prohibition against building fences on non-federal land).

336. Engdahl, *supra* note 300, at 308-09.

337. *Hunt*, 278 U.S. at 100.

338. *See* Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 539 (1885) (Federal properties, "as instrumentalities for the execution of [federal] power, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed.").

339. Engdahl, *supra* note 300, at 299-300.

340. *See* Kohl v. United States, 91 U.S. 367, 372-73 (1875).

341. Gaetke, *supra* note 329, at 387. The Supreme Court has upheld legislation regulating conduct on federal and non-federal property as a means of promoting federal land