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A Vision of the New Deal Unfulfilled? Soil and Water Conservation Districts and Land Use Regulation

by

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A VISION OF THE NEW DEAL UNFULFILLED?

SOIL AND WATER CONSERVATION DISTRICTS AND LAND USE REGULATION

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I. INTRODUCTION

In February of 1937, President Franklin Delano Roosevelt sent this message to the governors of the then forty-eight states:

> The dust storms and floods of the last few years have underscored the importance of programs to control soil erosion. I need not emphasize to you the seriousness of the problem and the desirability of our taking effective action, as a Nation and in the several States, to conserve the soil as our basic asset. The Nation that destroys its soil destroys itself.[2]

Roosevelt had long recognized the scope of the erosion problem and now urged state legislatures to implement the provisions of the newly proposed Standard State Soil Conservation Districts Law.[3] This model law sought to "decentralize" the federal government's soil erosion control efforts by authorizing the creation of local Soil and Water Conservation Districts (SWCDs), but federalism concerns prevented the national government from doing so directly.[4] As a result, the states had to authorize the establishment of conservation districts. These early districts were to provide guidance on local conservation issues, encourage participation in conservation activities, as well as enact land use regulations to ensure landowner compliance with district objectives.[5] By pooling the funding and the technical assistance of the Soil Conservation Service (SCS) with

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2. D. HARPER SIMMS, THE SOIL CONSERVATION SERVICE 75–76 (1970).

3. *See id.* at 75; Sarah Phillips, *FDR, Hoover, and the New Rural Conservation, 1920–1932*, *in* FDR AND THE ENVIRONMENT 107, 107–08 (Henry L. Henderson & David B. Woolner eds., 2005) (explaining the development of the Roosevelt administration's agro-environmental mindset).

4. Philip M. Glick, *The Soil and the Law I*, 20 J. OF FARM ECON. 430, 435 (1938) (explaining that "[n]ature has divided the United States into 76 major drainage basins or watersheds. An excellent case can be made, therefore, for organizing each of these drainage basins into a single soil conservation district. [H]owever, [there is] a high likelihood that the courts would conclude that the proposed statute does not . . . fall within the powers which Congress may exercise.").

5. SIMMS, *supra* note 1, at 76.

the knowledge and labor of area landowners, policymakers hoped an effective force to counter soil erosion would be established.[6]

This district program would be a profound break from the traditional view of the independent farmer—that of a farmer well equipped to deal with the exigencies of any emergency—a deeply engrained component of the collective American mentality.[7] Although voluntary programs and some state efforts had previously given aid to the farm sector, most farmers to this point had little, if any, interaction with the federal government.[8] The unprecedented pressures on the rural sector brought about by the Great Depression forever shattered this traditional view of farmer independence—bringing farmers and the national government into an ongoing dialogue which resulted in a form of "cooperative federalism,"—a blending of federal, state, and local elements.[9] It seems clear, however, that the drafters of the Standard Law did not envisage the modern state of agriculture, where much of the vitality of this economic sector depends on federal support.[10] Rather, the vision of the drafters was for an "innovative partnership," and one which heavily relied on the individual districts for the obtainment of national and local objectives—and is important to not underestimate to what degree this current action was a break from past agricultural policies.[11]

To gain results from such an innovative partnership, the Standard Law proposed that state legislatures delegate broad power to the districts though the use of both "project" and "regulatory" power.[12] Project power gave local districts the power to carry out conservation measures with the assistance of federal funding and technical oversight.[13] The delegation of this authority was essentially unopposed by the states and has been the primary mechanism utilized by districts to address soil erosion.[14] In stark contrast, the delegation of regulatory power

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6. HENRY CLEPPER, ORIGINS OF AMERICAN CONSERVATION 97 (1966).

7. *See generally* DOROTHY SCHWIEDER, IOWA: THE MIDDLE LAND 257–59 (1996) (showing farmer independence, even militancy, in the context of the "Cow War"—resistance to forced testing for bovine tuberculosis in 1932).

8. Phillips, *supra* note 2, at 117 (explaining one of the few earlier programs—the land utilization movement).

9. *See* Interview by Douglas Helms with Philip Glick, in Chevy Chase, Maryland (May 12, 1983) at 14–15 [hereinafter Glick Interview].

10. *Id.*

11. *See id.* at 25.

12. *Id.* at 41. Policymakers also discussed granting districts the power to levy a taxes, but considered this too controversial, especially since most districts would be reluctant to tax themselves. *Id.* at 28.

13. *Id.* at 43.

14. *Id.* at 46; R. NEIL SAMPSON, FOR LOVE OF THE LAND: A HISTORY OF THE NATIONAL ASSOCIATION OF CONSERVATION DISTRICTS 30–31 (1985).

was extremely controversial.[15] Many states elected not to delegate this authority to the conservation districts, and even in the states that did delegate this power, actual usage has been extremely rare.[16] Regulatory power was, however, an essential component of the original district concept—of "[having] anywhere from 1,000 to 3,000 districts [trying to] enforc[e] land use regulations."[17] This authority, however, has seemingly been relegated to little more than a historical footnote —forgotten or ignored within state conservation titles.[18]

Seventy years later, SWCDs continue to ignore the potential environmental benefits that regulatory authority could provide.[19] The purpose of this Note is to analyze why the Standard Act's vision of having thousands of districts able to enact land use regulations has never materialized and to assess the potential benefits that its expanded use could provide. First, this Note briefly discusses the nature and history of the soil erosion problem in the United States. Next, this Note focuses on the historic underpinnings of the district concept—as the drafting of the enabling legislation, state debates over authorization, and district referendums all had profound influence on the eventual use of regulatory power by districts. Then, this Note addresses past and present use of the regulatory power in the districts and explores the factors preventing more widespread use. Finally, this Note evaluates the potential for future use of regulatory power by conservation districts and examines whether its expanded use could legislatively create a duty of land stewardship—finally allowing districts to fulfill the New Deal vision behind their creation.

II. A HISTORIC PROBLEM

Historically, Americans have been little concerned with soil erosion.[20] To the founding generations, the agricultural potential of the American continent

15. SAMPSON, *supra* note 13, at 31–32.

16. *Id.* at 31.

17. Glick Interview, *supra* note 8, at 46.

18. *Id.* at 49–50.

19. *See generally* National Association of Conservation Districts, http://www.nacdnet.org (last visited Sept. 8, 2006) (providing information about individual districts across the nation and current programmatic objectives).

20. DONALD C. SWAIN, FEDERAL CONSERVATION POLICY 1921–1933 144 (1963). While this statement is generally true, several early American agriculturalists attempted to address soil erosion problems at the local level. As early as 1794, Thomas Jefferson attempted to address soil erosion problems "by a system of crop rotations, including legumes, by using fertilizers, and by several cultural practices such as deep plowing, and, later, contour farming." *See also* H. H. BENNETT, SOIL CONSERVATION 506 (1939) ("Washington informed his overseer in 1795 that immediate profit was not so much an objective as the bringing of worn-out and gullied fields into condition to produce grass.") [hereinafter BENNETT, SOIL]; CLEPPER, *supra* note 5, at 92.

seemed "limitless and inexhaustible."[21] Farmers "mined [the soil] for corn and wheat and cotton. . . . No matter if they wore out a farm completely. There was more land farther west."[22] As a result of this mindset, the United States was slow to recognize the growing scope of the soil erosion problem.[23] By the early twentieth century, however, soil erosion was finally recognized as a major threat.[24] According to H.H. Bennett, Director of the Soil Erosion Service—"[a]t least three billion tons of soil material are washed out of the fields and pastures of America every year. To load and haul away this incomprehensible bulk of rich farm soil would [have] require[d] a train of freight cars long enough to encircle the earth thirty-seven times at the equator."[25] Despite this recognition, two obstacles blocked the conservation effort: 1) a lack of public awareness, and 2) a corresponding lack of reliable scientific data as far as understanding both the scope and possible solutions for this national problem.[26]

Informing the public about the soil erosion problem was a necessary first step in the soil conservation movement.[27] Before Bennett's educational cam-

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21. SWAIN, *supra* note 19, at 144; *but see* STEVEN STOLL, LARDING THE LEAN EARTH 71–73, 80–84 (2002) (explaining the differences in the New England region as compared to the South as far as farming practices and population pressures—leading to higher land values in the North and also influencing environmental stewardship priorities).

22. H. H. BENNETT & WILLIAM C. POWELL, THIS LAND WE DEFEND 25 (1942) [hereinafter BENNETT, THIS LAND]; *see also* STOLL, *supra* note 20, at 19 (detailing that "Americans who cultivated the soils of the seaboard spent the balance down. In a common pattern, farmers who had occupied land for only twenty or thirty years reduced the fertile nutrients in their soils until they could no more than subsist.").

23. *See* SWAIN, *supra* note 19, at 144; *see also* BENNETT, SOIL, *supra* note 19, at 96 (explaining that Bennett recognized soil erosion as a national problem as early as 1911); Edwin B. Ferguson, *Nation-Wide Erosion Control: Soil Conservation Districts and the Power of Land-Use Regulation*, 34 IOWA L. REV. 166, 166 (1949) (listing the environmental consequences of soil erosion including "the sedimentation of stream channels and reservoirs, severe and increasing floods, the overwash of rich lands by subsoil, the silting of spawning beds, the abandonment of land, the shriveling up of the tax base, and the impoverishment of the people.").

24. *See* BENNETT, THIS LAND, *supra* note 21, at 96; *see also* SWAIN, *supra* note 19, at 145.

25. H.H. Bennett, *Soil Erosion—A National Menace*, *in* THE SCIENTIFIC MONTHLY, Nov. 1934, at 385.

26. SWAIN, *supra* note 19, at 144–145.

27. *Id.* at 144; Phillips, *supra* note 2, at 121. This lack of concern was due to:

> the abundance of land in America, to man's familiarity with erosion since the start of intensive farming, to uninformed leaders, to inexperienced and untrained operators, to lack of surplus capital with which to adopt improved methods and equipment, to the failure of agricultural or other scientists to recognize land as a complex resource and to the American custom of 'waiting until you're sick before checking with the doctor.'

CLEPPER, *supra* note 5, at 95.

paigns, there was "no general interest in this problem because to the average farmer erosion did not seem to be doing much damage. . . [e]ven in the case where tiny gullies formed between rows of inter-tilled crops, there was not much alarm because these gullies disappeared when the land was cultivated."[28] "[Sheet erosion]—the recurring and usually inconspicuous loss of thin layers of surface soil—was not recognized as a problem."[29] Bennett and the SCS were able to educate the public about this "invisible" erosion at lectures across the nation,[30] and in articles explaining the true extent of the environmental damage.[31] In 1934, the Soil Erosion Service conducted a reconnaissance survey of the nation's soil resources and "[t]he startling findings as to the severity of erosion of land damages over the country, coupled with the awesome dust storms" to capture the public's attention.[32]

The environmental consciousness of the general public was also increased through the establishment of demonstration stations. Demonstration stations implemented model conservation practices on huge tracts of land—"some . . . were 30,000 acres or more," with the idea that "concerned people [would be] attracted to the scene, impressed by the logic and value of what they see, and motivated to incorporate the activity into their own operations."[33] While a program demonstrating the merits of soil conservation had great merit in theory, practice did not bear much by way of actual results. During the Great Depression, most farmers could not afford to implement such programs and as a result, the practices demonstrated at the stations were largely not incorporated at the farm level.[34] Although the demonstration stations may have been a failure as far

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28. Robert D. Williams, A Brief Study of the Origin and Development of Conservation Districts in Iowa (Aug. 1950) (unpublished M.A. thesis, Drake University) (on file with Cowles Library, Drake University).

29. SIMMS, *supra* note 1, at 7; *see also* ROBERT J. MORGAN, GOVERNING SOIL CONSERVATION: THIRTY YEARS OF THE NEW DECENTRALIZATION 5 (1965) (discussing the H.H. Bennett's recognition of the difference between "geologic erosion" and the "accelerated erosion" caused by agriculture).

30. Phillips, *supra* note 2, at 108-09 (noting that the actions of the SCS are not entirely a New Deal creation and detailing the important groundwork put into place during the Hoover administration).

31. CLEPPER, *supra* note 5, at 95; *see also* MORGAN, *supra* note 28, at 5 (discussing the impact of Bennett's first work on the subject—*Soil Erosion: A National Menace* in 1928).

32. Ferguson, *supra* note 22, at 166.

33. SAMPSON, *supra* note 13, at 8–9.

34. *Id.* at 15; *see also* Glick Interview, *supra* note 8, at 13 (explaining that "the farmers come to look . . . . Then they go home and they've got all they can handle on their own farm. They say to themselves, 'Oh yeah, it's easy for those guys to build terraces. All they've got to do is call out some of these high paid bureaucrats . . . . Well, where am I going to get the money for that kind of equipment?").

as "the spread[ing] of practices," the stations did play an important role in educating the public about the need for and benefits from conservation practices.[35]

The early SCS also needed to obtain reliable scientific information.[36] The 1934 reconnaissance survey was a watershed report, but even before this survey efforts were underway to collect data at experiment stations established for this purpose across the nation.[37] The early experiment stations would eventually record over 300,000 observations related to the levels of soil and water loss on lands utilized in various cropping patterns.[38] These studies provided the data necessary to convince the public that a problem truly existed and allowed researchers to propose solutions to the soil erosion problem.[39] In the end, the campaign to educate and inform the public galvanized enough support for Congress to pass the Soil Conservation Act of 1935, which both created the Soil Conservation Service and endowed this agency with broad power to address erosion-related issues.[40]

III. FORMING THE DISTRICTS

After gathering the necessary information and fully cognizant of the relative failure of both voluntary and educational programs, policymakers began working to develop an apparatus for contracting or working with local farmers to achieve the desired environmental objectives. Initially, the SCS directly contracted with farmers within designated demonstration project areas to engage in conservation activities.[41] A typical agreement would have the farmer agree to carry out conservation practices for five years, while the SCS would provide the technical assistance and labor necessary to actually implement the practices.[42] This method was unwieldy, and "involved relatively heavy federal expenditures, which would have reached astronomical proportions if every farm and ranch in

35. SAMPSON, *supra* note 13, at 15.

36. SWAIN, *supra* note 19, at 145.

37. SIMMS, *supra* note 1, at 9 (charting the growth in the number of experiment stations after the establishments of Bennett's initial station in 1929); SWAIN, *supra* note 19, at 151. The experiment stations also dispelled many misconceived notions about the nation's soil. For example, "[t]he Missouri station discovered that the Shelly Loam of Missouri and Iowa lost eight times as much soil. . . as did the notorious red soil of the southern Piedmont . . . ." *Id.* at 154.

38. CLEPPER, *supra* note 5, at 95.

39. *Id.*

40. SIMMS, *supra* note 1, at 15–16. This source relates Bennett's testimony before the Senate Committee on Public Lands. During his testimony on the dangers of soil erosion, a huge dust storm hit the capital city darkening the sky. "The incident undoubtedly helped crystallize support for the proposed legislation." *Id.* at 16.

41. *See id.* at 17.

42. *Id.* at 17–18

the country were serviced in this manner."[43] Past voluntary programs had also failed to obtain meaningful results.[44] Policymakers began to look for a way to delegate authority to local organizations and increase the effectiveness of the program.[45] M.L. Wilson, Assistant Secretary of Agriculture, "wanted [to form] locally established soil conservation districts" to meet this challenge.[46] Wilson was strongly against using any pre-established governmental unit to carry out this program, as he wanted focused attention given to soil erosion.[47] Wilson quickly made the determination that the SCS "will never be able to control erosion on millions of farms . . . out of an office in Washington D.C.," and in turn, the challenge would be to create a standard state law and urge states to adopt its provisions.[48]

A. *Creating a Standard State Soil Conservation Districts Law*

To create such a model law, a balance had to be found between the political realities of the 1930s and the goals the district program hoped to further.[49] The concerns of other governmental units fearful of encroachment upon their authority by the federal government had to be addressed, and in many states the provisions of the model law would not be entirely enacted in the face of this interagency opposition.[50] Additionally, the presence of this program as an attack on the traditional independence of farmers would also lead many to challenge the program's motives.[51] As a result, the drafters were both cautious and thorough in developing the conservation district program.[52] The model law first established the procedure for creating a district upon a majority vote of all "land occupiers in

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43. *Id.* at 18.

44. Ferguson, *supra* note 22, at 180–81.

45. SIMMS, *supra* note 1, at 18–19.

46. Glick Interview, *supra* note 8, at 26–27; Phillips, *supra* note 2, at 119–20 (detailing M.L. Wilson's background and unique qualifications for this position).

47. SAMPSON, *supra* note 13, at 22–23 (detailing why the extension service was not chosen to administer the conservation district program as well as their ensuing political opposition to this program); James L. Arts & William L. Church, *Soil Erosion—The Next Crisis?*, 1982 WIS. L. REV. 535, 590–91 (1982) (explaining the reasons this authority was given to special use districts rather than existing municipal or county authorities).

48. Glick Interview, *supra* note 8, at 14.

49. *Id.* at 42 (explaining the districts "would be a sensitive issue in each one of the state legislatures and in each state in relations with the Office of Experiment Stations.").

50. *Id.* at 26 (discussing the effort "to win over the state extension directors without having them feel that SCS and the districts were planning on taking over the responsibility of county agents); *see also infra* Part IIIB.2 (discussing the opposition of the Farm Bureau and county extension programs to the district concept).

51. Glick Interview, *supra* note 8, at 26.

52. *Id.*

the district," or those having a direct stake in the farming of the land.[53] The Model Act also created an organizational structure for the districts, and the other procedural mechanisms necessary to create and manage district activities.[54] Beyond procedural requirements, the Standard act proposed giving districts two types of authority: project power and regulatory power.[55]

1. *Project Power*

The Standard State Soil Conservation Districts Law delegated broad project powers to the proposed districts.[56] These powers included the ability to conduct research and establish demonstrational projects, to carry out preventive measures on farmsteads, to work in cooperation with other agencies, to purchase and acquire property, to make available expertise and equipment, to construct and maintain structures, to develop comprehensive land use plans, and to administer soil conservation projects.[57] Of these provisions, the ability "to make available to land occupiers[58] within the district agricultural and engineering machinery and equipment . . . needed to assist the land occupiers to carry on the operations upon their lands for the conservation of soil resources" was recognized as the most important part of the legislation, and in time it also would become the most utilized provision.[59] These proposed project powers would allow districts to carry out localized conservation measures, and to channel government assistance directly to those farmers willing to voluntarily carry out conservation measures.[60]

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53. A STANDARD STATE SOIL CONSERVATION DISTRICTS LAW 13 (U.S.D.A., 1936) (allowing for a vote of all land occupiers in the district) [hereinafter STANDARD SOIL LAW]. A "'[l]and occupier' or 'occupier of land' includes any person, firm, or corporation who shall hold title to, or shall be in possession of, any lands within a district . . . whether as owner, lessee, renter, tenant, or otherwise."). *Id.* at 4.

54. *Id.* at 7–10 (outlining the "creation of soil conservation district process.").

55. Glick Interview, *supra* note 8, at 41.

56. STANDARD SOIL LAW, *supra* note 52, at 15–18.

57. *Id.*

58. Glick Interview, *supra* note 8, at 33 (discussing the creation of the term "land occupier" as a way to offer programs to the individual most responsible for caring for the land—whether owner, tenant, or sharecropper).

59. *Id.* at 43.

60. John B. Braden, *Some Emerging Rights in Agricultural Land*, 64 AM. J. OF AGRIC. ECON. 19, 20 (1982); DON MUHM, IOWA SOIL CONSERVATION 1939–1979 86–87 (1984). From the beginning, conservation districts were aggressive at utilizing the project power. For example, in 1942 "soil conservation boosters in Mills County in southwest Iowa came up with the idea of staging a Plow-Terrace Building Contest. J.F. Wearin, Jr. and Ray Jones, a long-time S.C.S. official in Mills County reported that the event held in 1946 near Glenwood, Iowa drew 20,000 people." *Id.*

2. *Regulatory Power*

The Standard Law also intended the districts to have the power to adopt land use regulations.[61] It was realized that this would be a highly contentious issue in the states debating the Standard Law, as it could be seen as an intrusion by the federal government into the authority of the states.[62] As a result, much care was given to the drafting and development of the procedures through which the land use regulations could eventually be enacted by districts—if the district so elected.[63] As a result, the Standard Law addressed three major procedural issues: enactment of regulations, enforcement, as well as providing for reasonable flexibility within enacted regulations.[64]

a. *Adoption of Land Use Regulations*

The Standard Law hoped to ensure that land use regulations would only be enacted with the full knowledge and support of land occupiers and envisioned a rather egalitarian approach to the implementation of conservation regulations—achieving the democratic nature that the SWCD drafters so earnestly desired to capture.[65] The Model Law also provided that "the supervisors shall not have authority to enact such proposed ordinance[s] into law unless at least a majority of the votes in such [a] referendum shall have been cast for approval . . . ."[66] Even after this vote, "the supervisors must then reexamine the question of the desirability and need for the proposed conservation ordinance, and then determine whether or not to put the ordinance into effect," which provided an additional check on any proposed regulation.[67] The Standard Law also required that the district inform land occupiers and provide notice before a referendum vote was proposed.[68] This rigid process was created to allay the concern "that there may

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61. STANDARD SOIL LAW, *supra* note 52, at 15–18; Braden, *supra* note 59, at 19, 20 ("Land use regulation was viewed by the U.S. Department of Agriculture (USDA) as an important ingredient of conservation programs from their inception.").

62. Glick Interview, *supra* note 8, at 48–49.

63. *Id.* at 45–46 (explaining the efforts required to train county agents to address questions regarding the land use regulations).

64. *See generally* STANDARD SOIL LAW, *supra* note 52, at 18–25.

65. Glick Interview, *supra* note 8, at 46.

66. STANDARD SOIL LAW, *supra* note 52, at 19. Most districts now allow all residents to vote, and the South Carolina DNR has indicated that for a district to enact a land use ordinance in South Carolina this section would likely need amendment. Email from Von Snelgrave, Chief of the Conservation Districts Section, South Carolina Dep't of Natural Resources to author (Mar. 2, 2006, 10:54:57 CST) (on file with author).

67. Glick Interview, *supra* note 8, at 46.

68. STANDARD SOIL LAW, *supra* note 52, at 18.

be a very small turnout of voters . . . [t]herefore, the results of [an] referendum may not at all be indicative of the attitudes . . . of the occupiers throughout the district." [69] As a result, this process intended that all enacted land use regulations truly be indicative of the needs and desires of the district.

b. *Enforcement of Land Use Regulations*

Policymakers also realized if the regulations were to have real effect districts had to have a method to enforce the land use regulations.[70] However, during the 1930s "any public fine on farmers sounded quite horrendous" and was not likely to be implemented or enforced by state legislators let alone local magistrates or courts.[71] The drafters settled upon a "compromise"—district supervisors could go to court and ask permission to go on to offending lands and perform the necessary conservation work, later collecting the costs through tax assessments.[72] SCS officials also made clear that this enforcement power was only to be used on the "key lands, the ones that have to be brought under control if the program is [going] to succeed . . . ."[73] By making clear the limited scope of this enforcement power, drafters also sought to weaken the opposition of landowners leery of an increase in the involvement of the federal government within agriculture.[74]

c. *Modification of Land Use Regulations*

Policymakers also realized that regulations do not properly apply in all situations and in some situations flexibility would be needed to avoid a policy backlash.[75] As a result, a solution was borrowed from zoning theory—allowing for a board of adjustment.[76] Boards of adjustment provided a process where landowners could file petitions "alleging that there are great practical difficulties or unnecessary hardship in the way of his carrying out upon his lands the strict letter of the land-use regulations . . . ."[77] As a result, this board would eliminate any

69. Glick Interview, *supra* note 8, at 46.
70. *Id.*
71. *Id.*
72. STANDARD SOIL LAW, *supra* note 52, at 21; *see also* Ferguson, *supra* note 22, at 178 (explaining that many states "also make violation of land-use regulations a misdemeanor punishable by a fine.").
73. Glick Interview, *supra* note 8, at 47.
74. *Id.*
75. *See id.*
76. *Id.*
77. STANDARD SOIL LAW, *supra* note 52, at 23.

problems arising from the unfair application of a land use regulation and allow for a more functional district program.

B. *State Enactment of the Standard State Soil Conservation Districts Law*

1. *State Enabling Legislation*

Almost immediately after President Roosevelt sent the Standard Act to the states for consideration, states began enacting the legislation—twenty-seven in the first year alone.[78] Gradually even more states approved the measures.[79] By 1947, all of the states, as well as the territories of Hawaii and Alaska, had approved the creation of local SWCDs.[80] This shows the considerable support behind the district concept, but the district movement was also spurred by Secretary of Agriculture Henry A. Wallace's decision "that after July 1, 1937 . . . . all erosion-control work on private lands, including new demonstration stations, [shall] be undertaken by the Soil Conservation Service only through legally constituted soil conservation associations" which provided substantial incentive for states to approve the Standard Act.[81]

When enacting the Standard Act, state legislatures were largely in favor of granting the districts project powers—especially in light of the fact that this would allow conservation dollars to flow to local farm sector.[82] Many states as expected, however, were reluctant to provide for regulatory authority.[83] In the

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78. SAMPSON, *supra* note 13, at 26.

79. *Id.* at 26, 29.

80. *Id.* at 29 (discussing state efforts to pass enabling legislation).

81. *Id.* at 21. This source also brings up another important point—prior to this time many states had created their own conservancy districts, varying largely in nature and quality. An important contribution of the Standard State Soil Conservation Act was in providing some measure of uniformity to these efforts.

82. *See* SIMMS, *supra* note 1, at 78–79; *see also* Glick Interview, *supra* note 8, at 48–49 (explaining that the projects power provided an effective conservation tool, while regulatory power largely did not).

83. Glick Interview, *supra* note 8, at 48; Williams, *supra* note 27, at 31–33. In Iowa, a survey of County Agricultural Planning Committees, Farmers' Union Locals, and individual farmers was asked the following question: "Do you think that some form of enabling legislation, which would provide a means of cooperative action an which would set forth a procedure for establishing an area with definite authority, powers and procedure for soil conservation purposes would be desirable?"

early years, states were strongly encouraged to provide districts the ability to regulate land use in order to receive higher state SCS funding.[84] Until 1942, the SCS "divided states into three categories according to the adequacy of state soil conservation district laws" and distributed conservation funds accordingly.[85] Districts with stringent state conservation districts laws would receive more benefits, and "[t]he adequacy of land-use regulations was an important criterion in the decision where a state fell."[86] As a result, states would often authorize regulatory authority, but did so without real enthusiasm or intention of ever having districts utilize this power which limited the potential impact of the conservation program.

Thirty-three states eventually allowed districts regulatory authority, but this high number is somewhat deceiving.[87] Several states did allow districts to propose land use regulations, but then required as high as 90% approval before a regulation could actually be enacted—an almost insurmountable barrier to a district ever using this authority.[88] Additionally, when the SCS stopped tying funding to the adequacy of conservation laws in 1942, states essentially stopped providing regulatory power to the districts by statute—thwarting the potential for locally enacted district regulations to become a valuable part of federal conservation program.[89]

Items:	Percent	
	Yes	No
County Agricultural Planning Committees (91)	94	6
Farmer's Union (11)	10	90
Township by Individuals (231)	48	39
Township Survey by Individuals—Yes, but not compulsory	9	

Id. This source indicates that "[p]ressure from the Farmer's Union, Farm Bureau, and other groups would certainly have caused the bills defeat [in Iowa] had the land-use regulation been left in, and was undoubtedly responsible for the omission of the regulation as passed in 1939." *Id.* at 35.

84. CHARLES M. HARDIN, THE POLITICS OF AGRICULTURE: SOIL CONSERVATION AND THE STRUGGLE FOR POWER IN RURAL AMERICA 74 (1952).

85. *Id.*

86. *Id.*

87. Glick Interview, *supra* note 8, at 48; Ferguson, *supra* note 22, at 177. Out of the then forty-eight states—fifteen did not allow districts to enact land use regulations from the first instance: Arizona, Connecticut, Delaware, Indiana, Idaho, Iowa, Maine, Massachusetts, Missouri, Michigan, New Hampshire, New York, Ohio, Pennsylvania, and Rhode Island. Indiana, Michigan, and Pennsylvania did authorize such authority but would quickly repeal this power. *Id.* at n.53.

88. Glick Interview, *supra* note 8, at 41; Ferguson, *supra* note 22, at 177 n.54 (explaining that the 90% requirement was enacted in Kansas, Kentucky, Oklahoma and Texas). Kentucky also mandated that "the favorable voters must also represent a certain percentage of the acreage in the district." *Id.*

89. HARDIN, *supra* note 83, at 74.

2. *District Referendums*

The battle over the district concept and providing regulatory authority was also fought at the county level.[90] The districts were "opposed vigorously by the state extension services and the Farm Bureau" in many states.[91] As a result, referendums to establish SWCDs were hotly contested.[92] Despite such opposition, most counties eventually did vote to establish a SWCD.[93] A study reveals how pervasive districts would become as there were over "3,107 districts in operation [and] 99 per cent of all farms and ranches" were located under district authority by 1969.[94] Results from individual district referendums were also often as one-sided, although the percentage of landowners actually voting often was surprisingly low for such an important enactment.[95] The voting in Switzerland County, Indiana is an example of a typical referendum: 1,357 votes for enactment with only fifty-two against such action—showing widespread farmer

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90. SAMPSON, *supra* note 13, at 26–27.

91. *See id.* at 26; *see also* HARDIN, *supra* note 82, at 71–72 (thoroughly detailing the resistance of some state extension services to the district concept).

92. *See* HARDIN, *supra* note 82, at 72–73. This source also provides an example of a handbill in opposition of a district (in this case likely paid for by a hostile state extension service office):

FARMERS—FARM OWNERS
STOP—LOOK—LISTEN

Do you remember?
1. When Henry Wallace drowned all the little pigs?
2. When Henry Wallace made us get permits to sell our wheat?
He also got the pet idea about us using soil districts.
What may a soil district bring to Perry County?
1. Two to five high-priced white collar men working in the county.
2. Higher taxes.
3. Centralized Washington control.
4. Dictatorship, bureaucratic control.
5. Strangle free enterprise:
(a) Force local contractors out of business.
(b) Kill individual initiative on the farm.

Id. at 72 n.4.

93. Williams, *supra* note 27, at 114–16 (showing that in Iowa only two counties had not organized SWCD by 1951—Howard and Mitchell Counties).

94. SIMMS, *supra* note 1, at 81.

95. Williams, *supra* note 27, at 115 (In Mills County, Iowa (consisting of 1,729 land occupiers) only 173 voted in the referendum—or about 10% of those land occupiers eligible to vote).

support for the enactment.[96] Although districts would eventually be formed, the political battles over this formation affected the political power of the district—especially the power to enact land use regulations.

IV. USE OF DISTRICT REGULATORY POWER

A. *Early Utilization of District Regulatory Authority*

Despite apparent support for the district concept, districts seldom utilized regulatory authority—a vital component of the overall theory or vision behind their creation.[97] By 1967, only a handful of districts in three states had implemented land use regulations—namely "several districts in Colorado, one in North Dakota, and one in Oregon."[98]

Districts in Colorado were the most aggressive in attempting to utilize regulatory authority and were often quite innovative in developing solutions to local environmental problems.[99] From the onset, Colorado districts attempted to address numerous problems such as "regulat[ing] grazing, plowing up sod land, and the handling of land subject to wind erosion" through land use ordinances.[100] By 1945, at least thirteen districts had enacted land use ordinances when the Colorado legislature "set aside all such ordinances except those repassed within 45 days by a 75 per cent majority of landowners affected."[101] This legislative decision coupled with the Second World War's role in shifting attention away from the conservation movement effectively combined to halt any momentum behind land use regulation efforts in Colorado.[102]

As a result, the Colorado land use ordinances were only able to achieve limited objectives. The "[e]arly grazing ordinances were held unconstitutional by the attorney general; later ones were not vigorously enforced and lapsed in

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96. HARDIN, *supra* note 82, at 79 n.17. *See also* Williams, *supra* note 27, at 63 (stating the results of the June 21, 1941 Montgomery County, Iowa referendum approving formation of a SWCD "with a vote of two hundred and sixty-eight for and thirty-nine against formation of a district."). This source also shows the voting totals in all Iowa counties—approval rates range from 68% in Lucas County to 100% in Polk County. *Id.* at 114–16.

97. SAMPSON, *supra* note 13, at 30–31.

98. *Id.* at 31.

99. *Id*; HARDIN, *supra* note 83, 74–75.

100. HARDIN, *supra* note 83, at 74–75; *see also* Ferguson, *supra* note 22, at 180 (discussing early legal challenges to the Colorado districts).

101. HARDIN, *supra* note 83, at 74; *see also* People *ex rel.* Cheyenne Soil Erosion Dist. v. Parker, 192 P.2d 417, 420 (Colo. 1948) (upholding the validity of this legislative action).

102. Arthur C. Bunce, *War and Soil Conservation*, J. OF LAND & PUBLIC UTLITY ECON., May 1942 (discussing the reaction of government in the conservation planning context to the added production needs triggered by the onset of the Second World War).

1945" when the legislature required that the measures be re-passed.[103] Additionally, the sod land ordinances were also highly controversial and directly caused the legislature to require supermajority approval of proposed regulations.[104] The reason given for legislative hostility was that legislators were primarily concerned with the "poor administration" or application of the regulations.[105] Districts "basing regulations upon objective physical determinations of erosion hazard . . . rather than upon the opinion of the supervisors" had greater overall success and avoided the backlash faced by many ordinances.[106] The most successful land use ordinances were the "'[b]low-land' ordinances [enacted] to check wind erosion," as in 1951 the Colorado legislature essentially made this ordinance applicable at the state level.[107]

After the 1945 decision requiring supermajority approval of ordinances, only eight districts re-passed land use regulations meeting the new requirements.[108] The new regulations were rarely enforced—although in the early 1980's some districts tried to once again enforce these provisions.[109] As a result, it is apparent that the main value of Colorado's experience with land use regulation is as an example of the range of issues that land use regulations could address, and the potential role of districts as "laboratories" in creating innovative conservation regulations.[110] This "laboratory concept" was pervasive throughout the FDR's New Deal programs as a local entity could "experiment with solutions to an economic problem in one party of the country, see if it works, compare it to experiments in other parts of the country, and eventually work out a solution."[111] Colorado was able to experiment with land use regulations in different regions of the state and develop viable policy solutions to common problems—such as the "blow-lands ordinance" which was later adopted at the state level.[112] Such experimentation is one principal benefit which the district program could provide to the agro-environmental movement.

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103. HARDIN, *supra* note 83, at 75.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*; *see also* Ferguson, *supra* note 22, at 183 ("The Colorado problem was one of absentee landowners venturing speculatively—on the chance of a wet year—into wheat growing on land which if cultivated was a severe wind erosion hazard to the entire area.").

108. HARDIN, *supra* note 83, at 75.

109. SAMPSON, *supra* note 13, at 31.

110. HARDIN, *supra* note 83, at 75.

111. John F. Sears, *FDR, Grassroots Democracy: FDR and the Land, in* FDR AND THE ENVIRONMENT 7, 14 (Henry L. Henderson & David B. Woolner eds., 2005) (discussing the influences behind FDR's land programs).

112. HARDIN, *supra* note 83, at 75.

Other early use of regulatory authority outside of Colorado—in North Dakota and Oregon—was limited to but one district in each state.[113] In North Dakota, the Cedar District "regulated grazing by issuing permits according to determination of the carrying capacity of the land . . . ."[114] In 1949, the Washington Dune District in Oregon imposed a land use requirement that "owners control sand-drifting."[115] These few scattered land use ordinances constitute the entire usage of the regulatory power by individual districts during the first years of the program.[116] Although some local benefits were obtained, it is clear land use regulations historically were a non-factor in the fight against soil erosion.

B. *A Second Wave of Land Use Regulation*

In the late 1970's, a second wave of SWCDs once again began implementing land use regulations to address the issue of non-point source pollution.[117] Districts in three states—New Jersey, Montana, and Wisconsin attempted to regulate erosion through their regulatory authority.[118] New Jersey's Camden County Soil Conservation District issued soil and sediment regulations in 1975,[119] while the Lewis and Clark District of Montana passed a similar enactment through a public referendum.[120] Wisconsin was even more active, after a legislative amendment allowed for the "adoption [of referendums] by a simple majority and to broaden the law's application to soil and water resources."[121] After this amendment, the Vernon County SWCD was also able to adopt land use regulations aimed at sediment control.[122] Despite this small "revival," use of regulatory authority was still not common among districts.

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113. *Id.* at 74 n.8.

114. *Id.*; *see also* Ferguson, *supra* note 22, at 183 ("The North Dakota district faced a situation in which outside grazing interests brought their cattle onto district rangeland and created an overgrazing problem, which seriously increased erosion as well as deprived resident ranchers of essential range for current operations.").

115. HARDIN, *supra* note 83, at 74 n.8.

116. SAMPSON, *supra* note 13, at 30–31.

117. Mary M. Garner, *Regulatory Programs for Nonpoint Pollution Control: The Role of Conservation Districts*, JOURNAL OF SOIL AND WATER CONSERVATION, Sept.– Oct. 1977, at 202.

118. *Id.*

119. N.J. STAT. ANN. § 4:24–39 (West 2005). This section allows conservation districts to pass land use regulation without going through the referendum process, through a form of "notice and comment rulemaking." *Id.*

120. Garner, *supra* note 116, at 202.

121. *Id.*

122. *Id.*

C. *Modern Use of District Regulatory Power*

The regulatory authority of local SWCDs continues to be largely under utilized. According to at least one commentator, "[a]s regulatory entities, conservation districts were, and remain, a joke."[123] While this opinion may have merit, districts continue to sporadically enact land use regulations.[124] In 2004, the Rosebud Conservation District of Montana was able to pass by referendum a regulation addressing coal-bed methane mining—designed to control the adverse environmental effects caused by this production.[125] The type of ordinance passed by the Rosebud Conservation District may signal a future purpose for regulatory power—to address issues of local environmental concern unaddressed by national or state regulatory authority.

V. FACTORS LIMITING DISTRICT USE OF REGULATORY AUTHORITY

Roughly every ten years, district regulatory authority is "re-discovered" and efforts are made to encourage districts to finally utilize this power.[126] Districts, however, continue to ignore this invitation.[127] The failure to use regulatory authority can be directly attributed to five factors: 1) the traditional district focus on the use of the project power; 2) political opposition to regulatory authority; 3) the misconception that districts are unable to address environmental problems; 4) the use of alternative mechanisms by the districts; and 5) legislative modification limiting or modifying district authority.

A. *Regulatory Power is Not the Focus of District Activity*

Aldo Leopold addressed the problem of district focus in his famous essay, *The Land Ethic*:

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123. Christopher S. Elmendorf, *Ideas, Incentives, Gifts, and Governance: Toward Conservation Stewardship of Private Land, in Cultural and Psychological Perspective*, 2003 U. ILL. L. REV. 423, 499 (2003).

124. Rosebud Conservation District, http://www.rosebudcd.org/LandUseOrdinance.html (last visited Sept. 11, 2006).

125. *See id.*

126. Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 231–33 (1993); Garner, *supra* note 116, at 200–02; Philip M. Glick, *The Coming Transformation of the Soil Conservation District*, JOURNAL OF SOIL AND WATER CONSERVATION, Mar.– Apr. 1967, at 52–53.

127. *See supra* discussion Part III (detailing the past use of the regulatory power by SWCDs); *see also* Ferguson, *supra* note 22, at 181 (explaining initial inaction was caused by the fear of governmental involvement, initial farmer caution, and the Second World War).

> Nearly all the counties promptly organized to accept the proffered help, but after a decade of operation, *no county has written a single rule.* . . . The farmers, in short, have selected those remedial practices which were profitable anyhow, and ignored those which were profitable to the community, but not clearly profitable to themselves. . . . The District is a beautiful piece of social machinery, but is coughing along on two cylinders because we have been too timid, and too anxious for quick success, to tell the farmer the true magnitude of his obligations.[128]

As in Leopold's day, districts continue to emphasize conservation projects and landowner education without giving any thought to utilizing regulatory authority.[129] Philip Glick, author of the Standard State Soil Conservation Districts Act, felt that a lack of resources allocated to districts also prevented districts from implementing land use regulations as "[t]he districts naturally choose to stretch all their resources to satisfy these [landowner] requests, leaving them no time, or motivation, to deal with the enactment and enforcement of ordinances" as all available resources were directed at carrying out voluntary conservation projects.[130] Additionally, SWCDs have been largely controlled by farmers, who have a vested interest in obtaining and channeling the benefits of conservation programs toward their own lands.[131] These farmers are not, however, as interested in regulating their own farming practices, which helps explain why district activity has traditionally skewed toward the project power and has almost ignored the other primary power with which the district is endowed—the ability to regulate district land use.[132]

B. *Regulating Land Use at the District Level Has Been Politically Unacceptable*

Districts have also been reluctant to impose land use regulations on uncooperative landowners. Glick, in particular, felt that the lack of funding made it politically difficult to create regulations as landowners attempting to address environmental problems, but not receiving federal aid and therefore financially unable to do so, would be punished along with those genuinely unwilling to comply with the regulations.[133] As a result, until enough funding could be se-

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128. ALDO LEOPOLD, *The Land Ethic, in* A SAND COUNTY ALMANAC 208–09 (1949).

129. *See* MORGAN, *supra* note 28, at 263 (explaining that "a review of the present activities of conservation districts shows that they generally perform the educational function almost to the exclusion of the other[s] . . . .").

130. SAMPSON, *supra* note 13, at 31.

131. *See* LEOPOLD, *supra* note 127, at 208–09.

132. *Id.*

133. Glick Interview, *supra* note 8, at 49; Ferguson, *supra* note 22, at 182 (explaining that "a more potent present-day factor seems to be a prevalent feeling that land-use regulations are a last-resort device to be tried only after the voluntary program has reached all the farmers in the district who want to take advantage of it.").

cured to finance the activity of all voluntary participants, it would be difficult to punish anyone for non-compliance with district mandates.[134] It is also difficult for anyone to take legal action against friends and neighbors, and it would be especially difficult in close-knit rural communities. Additionally, "the attitude of most supervisors, and probably [most] farmers, that compulsion is 'un-American'" made locally established regulations unlikely.[135] Regulation, in general, is not popular in the farm sector and efforts to restrict the "independence" of farmers have been met with severe hostility from the farm lobby, lowering the likelihood a district will take this action.[136] In short, a lack of governmental support for the programs coupled with the traditional aversion to the regulation of the farm sector realistically limited the possibility of this program's success.

Institutional issues may also have impacted the use of regulatory authority. Today, few districts limit the right to vote to landowners alone, and a referendum vote could potentially create a conflict between land occupiers and urban dwellers.[137] Although several states have imposed supermajority requirements, the Colorado Supreme Court has held these restrictions unconstitutional; eliminating (at least in Colorado) another "control" land occupiers could impose on this process.[138] As land occupiers have typically led conservation districts and as a result have maintained control over conservation activities, there was (and is) little motivation on the part of the farmers to regulate land usage through a process that can be readily influenced by non-land owners.

C. *The Perception that District Regulations Cannot Address Soil Erosion Issues*

The historic misconception that district regulatory authority is limited in its ability to address land use issues has also prevented its more widespread use. One reason was the view "that rules [must] be uniform throughout the district."[139] The model law, however, seems to indicate otherwise, as "Section 9 of the Standard Act . . . authorizes the Boards of Supervisors to 'provide regulations varying with the type or class of land affected.'"[140] Others seemed to regard the regulatory authority of SWCDs "as no greater than that of an ordinary zoning dis-

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134. Glick Interview, *supra* note 8, at 49–50.

135. MORGAN, *supra* note 28, at 362.

136. SAMPSON, *supra* note 13, at 31.

137. Elmendorf, *supra* note 122, at 499.

138. *Id.*; *see also* Olinger v. People, 344 P.2d 689, 691 (Colo. 1959) (holding supermajority requirements in district referendum votes unconstitutional).

139. Comment, *Legal Techniques for Promoting Soil Conservation*, 50 YALE L.J. 1056, 1062 (1941) (footnote omitted).

140. *Id.*

trict."[141] Early commentators also tried to dispel this notion by stating that "[t]his restrictive definition, which ignores the specific grant power to issue affirmative construction orders, has permitted soil depletion by a minority of uncooperative landowners to continue unchecked," but these misconceptions undoubtedly influenced early district decision-making and have had profound lingering effects on the current status of the regulatory authority.[142]

Even today, individuals argue that SWCDs cannot effectively govern soil erosion because they have been primarily established at the county level and are unable to address the problems of the larger watershed.[143] The drafters of the Standard Act originally suggested that "[t]he district boundaries should be defined so far as possible over natural watersheds, subwatersheds, small watershed areas, because many erosion problems spill . . . over state lines" but this invitation was largely ignored.[144] Focusing on conservation at a watershed level, however, has still not been accomplished outside of a few states, and the influence of pre-existing political subdivisions has been difficult to overcome.[145] As a result, "owners of eroding farms have little motive to collectively self-regulate, at least in the absence of contractual arrangements with the government or downstream communities—contractual arrangements for which the conservation district enabling acts do not provide."[146] However, the fact that a district cannot address all of the problems of a watershed through a land use regulation does not mean that an attempt should not be made, although motivational concerns have clearly limited actual district action. Additionally, if a state restructures districts on the arguably more relevant watershed basis, these jurisdictional problems could be alleviated—by allowing districts to address the environmental problems of an entire region.

D. *The Districts Have Found Other Mechanisms for Controlling Land Use*

Districts have also found alternative methods to address the erosion problem—obviating some of the need for the district to enact regulations. Histori-

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141. *Id.*

142. *Id.*

143. *See* MORGAN, *supra* note 28, at 335 (explaining that "[m]any of the earliest districts to be formed . . . were organized on watersheds, but this effort was soon abandoned."); *see also* Ferguson, *supra* note 22, at 183 n.77 (expressing this early view: "for example, with most districts organized along county rather than watershed lines, the power will be of no use to a district whose problem source lies higher [than] the watershed.").

144. Glick Interview, *supra* note 8, at 27.

145. *See* CONN. AGENCIES REGS. § 22a-315-11 (2003) (providing for the restructuring of Connecticut's eight county-based districts into five watershed based districts).

146. Elmendorf, *supra* note 122, at 499.

cally, voluntary participation by farmers in conservation programs has been the primary method used to address soil erosion.[147] Voluntary participation has been an important component of district plans, but the presence of these programs does not eliminate the need for land use regulation.[148] Land use regulations were intended to address only "key lands, the ones that have to brought under control if the program is going to succeed," and generally those lands controlled by non-complying landowners that voluntary programs cannot reach.[149] In reality, although voluntary programs traditionally did struggle to get at some of these "key lands," strong economic incentives to ensure some conservation activity occurs on Highly Erodible Lands (HEL) were provided starting with the 1985 Farm Bill.[150] This effort has, in recent years, decreased the importance of the intended role of land use regulations.

Districts have also been able to cooperate or work in tandem with other governmental bodies to promote conservation objectives.[151] While not directly implementing the ordinance in such an instance, districts "have for years provided counties and other local governments with technical assistance in the development of erosion and sediment control requirements for land subdivision, zoning, building, and other ordinances related to land disturbing activities."[152] Most ordinances of this type "provide that a permit for any earthmoving activity be issued only when there is a plan approved by the local conservation district for the control of erosion and sedimentation."[153] Essentially, the districts although not actually implementing the ordinances, are helping other political units achieve similar results through alternative mechanisms—which has had the net effect of limiting the role for the conservation districts to play in this area.

E. *The Nature of District Power Has Been Altered*

Many states have imposed mandatory duties to encourage more direct results and have altered the traditional authority granted under the Standard Act. In New Jersey, the conservation district law was altered to empower conservation districts to require all activity subject to a construction permit to obtain erosion

147. BENNETT, SOIL, *supra* note 19, at 314 ("National conservation action must spring from the people on the land, and to a large extent, be advanced by them as individuals, with the help of the government."); Ferguson, *supra* note 22, at 176 (discussing the voluntary nature of erosion control).

148. Ferguson, *supra* note 22, at 182.

149. Glick Interview, *supra* note 8, at 47.

150. Hamilton, *supra* note 125, at 233–34.

151. Garner, *supra* note 116, at 202.

152. *Id.*

153. *Id.*

control plan certification prior to beginning construction.[154] This allows New Jersey districts to directly influence and control construction projects to minimize the related environmental harm.[155] Since 1976, 102,702 permits have been issued on projects involving over 771, 086 acres.[156] These permitted lands are now subject to ongoing conservation plans—showing the widespread impact of the New Jersey program.

Iowa has also adopted an alternative approach to district regulatory authority. Iowa currently requires "all conservation districts to establish soil loss limits and submit these limits to the State Soil Conservation Committee for approval."[157] A soil loss limit is "the maximum amount of soil loss due to erosion by water or wind, expressed in terms of tons per acres per year, which the commissioners of the respective soil and water conservation districts determine is acceptable."[158] To meet these soil loss limits, the conservation district is empowered to implement regulations, and require the completion of conservation work to meet targeted goals within this loss limit framework.[159] While this statue makes clear the authority of the district to address soil loss issues, this authority does not extend to other areas of environmental concern, effectively limiting overall district power. Even this seemingly broad power of the commissioners to enact regulations addressing soil erosion has, however, been diminished by not allowing for the imposition of any conservation measures without providing additional public funding to offset implementation costs.[160] Additionally, Iowa has not been overly aggressive at enforcing soil loss limits and as a result, this modified regulatory power has provided little actual benefit.[161]

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154. N.J. STAT. ANN. § 4.24-39–55 (West 2006).

155. E-mail from James Sadley, Executive Secretary, New Jersey State Soil Conservation Committee, to Author (Feb. 16, 2006, 10:26:11 CST) (on file with author).

156. *Id.*

157. Garner, *supra* note 116, at 203.

158. IOWA CODE § 161.A42 (2005).

159. *Id.* § 161.A44; *see also* Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276 (Iowa 1979) (explaining the statutory power of conservation districts to enforce soil loss limit standards upon landowners).

160. IOWA CODE § 161.A48. This restriction would seemingly restrict the likelihood that a district "takeover" could occur or would at least limit what this takeover could accomplish. Conservationists in Iowa attempting to gain control of a district would be limited to those regulations that could be partially funded by the district.

161. See *Ortner*, 279 N.W.2d at 277 for a rare example of district enforcement action in Iowa.

VI. POTENTIAL FOR FUTURE DISTRICT USE OF REGULATORY POWER

Despite the limited role regulatory authority has played historically, this authority can still be an important tool in the fight against soil erosion. The recent experience of Montana's Rosebud Conservation District serves as a paradigm example and shows how districts can regulate local environmental hazards—neglected or ignored by larger political units.

A. *The Rosebud Conservation District—A Case Study*

The Rosebud Conservation District in South Central Montana illustrates the role regulatory authority can play in the context of contemporary environmental policy. The Rosebud District is vitally concerned about the future environmental impact that Coal Bed Methane (CBM) production could have in their district.[162] CBM is the methane gas found within coal seams—a form of natural gas which currently accounts for about 7% of total natural gas production in the United States.[163] CBM "travels with ground water in coal seams, [and] extraction involves pumping available water from the seam . . . allowing it to be piped out of the well separately from the water."[164] CBM mining has many environmental impacts—including adding high amounts of sodium and salt to the soil when the well is discharging excess water—especially to the areas around the reclamation ponds.[165] Several Montana districts, including the Bighorn Conservation District (directly to the southeast of the Rosebud Conservation District) have already experienced a great deal of CBM production.[166] The Bighorn District's experience with CBM production—an array of environmental problems coupled with a general inability to meaningfully regulate production and environmental harm—has greatly concerned the Rosebud district leadership.[167] As a result, the Rosebud commissioners decided to take a proactive approach and regulate CBM production before CBM production actually entered the district by enacting a land use ordinance.[168]

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162. JIM ROGERS, WHY A LAND USE ORDINANCE?, http://www.rosebudcd.org/files/ Evolution_of_a_ Land_Use_Ordinance.pdf (last visited Sept. 11, 2006).

163. KEITH ET AL., MONTANA STATE UNIVERSITY-BOZEMAN & MONTANA BUREAU OF MINES AND GEOLOGY, FREQUENTLY ASKED QUESTIONS COAL BED METHANE 1 (2003), *available at* http://waterquality.montana.edu/docs/methane/cbmfaq.pdf.

164. *Id.* at 3.

165. *Id.* at 8; 50 Op. Mont. Att'y Gen. 9 (2004) ("The environmental threats to soil and water conservation from the development of coal bed methane are generally recognized.").

166. Telephone Interview with Jim Rogers, District Supervisor, Rosebud Conservation District (Mar. 8, 2006) [hereinafter Rogers Interview].

167. *Id.*

168. *Id.*

CBM production in Montana currently is subject to some state regulation. In 2001, the Montana Legislature enacted the Coal Methane Protection Act,[169] which provided up to $50,000 to each affected landowner for reclamation projects around CBM impoundments.[170] The nature of land ownership in Montana makes this type of program necessary, as land is often held in "split" estates—meaning a rancher may own the land, but the sub-surface mineral rights (and CBM production rights) may belong to a mining company not necessarily concerned about the future condition of the "surface" estate.[171] Despite this funding, it is unlikely that Montana's provision would cover the costs of a major reclamation project as "[i]n Wyoming, a recent reclamation of a CBM well location consisting of [just] five reservoirs cost $450,000."[172] As Rosebud officials estimate the district eventually "could have over 4000 wells and 200 ponds associated with CBM [production]," it is clear the funding currently provided by the legislature is woefully inadequate as far as addressing the long term impact of CBM production within the conservation district.[173] District attempts to change this policy and provide for more stringent state legislation have uniformly failed.[174] One supervisor summarized the reason for this failure as "Helena [the capital] is a ways from here" and the lack of clout wielded by the somewhat isolated conservation district.[175] The district decided that to avoid potentially huge environmental recovery costs immediate action was required.[176] This led district supervisors to consider an alternative course—implementing the first land use ordinance aimed at addressing the environmental impact of CBM production.[177]

After exhausting other political options, the Rosebud Conservation District began laying the foundation for the eventual enactment of a land use regulation. Many, however, questioned whether the district had the authority to enact

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169. MONT. CODE ANN. § 76-15-901 (2005).

170. *Id.* § 76-15-905(6).

171. Mike Stark, *Split Estate, Divided Views: Coalbed Methane Creates a Stir Above Ground and Below*, BILLINGS GAZETTE, Jan. 7, 2004, *available at* http://www.billingsgazette.com/newdex.php?display=rednews/2004/01/08/build/state/30-cbm.inc (explaining Wyoming's problems with split estate issues and possible legislative remedies).

172. JIM ROGERS, IS THIS REALLY PROTECTION?, http://www.rosebudcd.org/files/IS_THIS_REALLY_PROTECTION.pdf (last visited Sept. 11, 2006).

173. *Id.*; JIM ROGERS, COAL BED METHANE PONDS, http://www.rosebudcd.org/files/PONDS.pdf (last visited Sept. 11, 2006) (explaining that the future amount of land affected "appears to be a minimum of 200 ponds at 5 acres in size, or 1000 acres of pond site in Rosebud CD.").

174. Rogers Interview, *supra* note 165.

175. *Id.*

176. *Id.*

177. *Id.*; *see also* MONT. CODE ANN. § 76-15-706 (2005) (providing the district the authority to propose and enact land use regulations at the district level).

such an ordinance.[178] As a result, the supervisors first obtained an opinion from the Montana Attorney General which confirmed that the district did have the power to regulate CBM production through a land use ordinance.[179] The opinion noted that as the scientific community had recognized the long term environmental effects from CBM production addressing the adverse environmental impacts would be a valid exercise of district authority.[180] After receiving this opinion, supervisors became concerned with the drafting of the ordinance and addressing the major areas of concern to district residents.[181]

The drafters intended to accomplish three main objectives with this ordinance: 1) to require CBM producers to post a reclamation bond before beginning production; 2) to require producers to create a conservation plan for the affected area; and 3) to provide that no accumulation of sodium salts or soluble salts would occur by regulating actual CBM production practices (requiring the lining of impoundments and imposing monitoring requirements).[182] Most provisions are relatively uncontroversial, but the bonding requirement has worried some in the CBM industry, who may avoid the Rosebud District's rich methane beds until other available sources have been utilized.[183] In sum, the regulations are an attempt to ensure that when CBM production inevitably arrives the district will be able to require that proper environmental procedures are followed and that local residents are not left to bear the external costs associated with this production.[184]

After drafting the ordinance, the Rosebud Conservation District prepared to actually place the referendum on the ballot. All residents of the district were able to vote on this issue, and prior to the vote, the district conducted an extensive educational campaign to ensure that all voters were informed—complying with the statutory provisions regulating referendum procedure.[185] On November

178. Rogers Interview, *supra* note 165.

179. 50 Op. Mont. Att'y Gen. 9 (2004).

180. *Id.* (This opinion by the Montana Attorney General confirmed that the regulatory authority granted to conservation districts under Montana law extended to the regulation of CBM production); *see also* Rogers Interview, *supra* note 165.

181. Rogers Interview, *supra* note 165.

182. Rosebud Conservation District Ordinance 1 (Nov. 4, 2004).

183. Rogers Interview, *supra* note 165 (discussing how the bonding requirement has likely scared some producers away from the Rosebud Conservation District as other districts with less stringent requirements also have untapped CBM resources).

184. JIM ROGERS, ROSEBUD CONSERVATION DISTRICT LAND USE ORDINANCE, http://www.rosebudcd.org/files/Rosebud_Conservation_district_land_use_ordinance2.pdf (last visited Sept. 11, 2006).

185. *See generally* Rosebud Conservation District, http://www.rosebudcd.org/index.html (last visited Sept. 11, 2006) (providing educational material used in the referendum drive).

2, 2004, the referendum was finally held.[186] In the end, voters in the Rosebud Conservation District overwhelmingly approved the CBM ordinance—in fact, out of the 2,625 votes cast only 521 voted against its enactment.[187] To date, this regulation has not faced legal challenge or been applied to a CBM producer, but it is likely that both events will occur over the next several years and the resulting challenge should provide an even stronger statement of support for district regulatory authority.[188]

The Rosebud ordinance illustrates that the regulatory authority granted to the districts is still viable. This ordinance also provides an example of when this power can be best utilized—when a SWCD recognizes a local environmental concern, and is unable to rally the other levels of government to address the problem. In this sense, the true purpose behind the SWCD concept can be realized—local action driven by local environmental concerns—a vision too infrequently obtained.

B. *The Current Situation and the Future of District Regulatory Authority*

Although the Rosebud ordinance illustrates the benefits district regulatory authority can offer, it is unlikely that other districts even in Montana will readily follow their example. Districts are not oblivious to the fact that they have this power, and despite periodic urging from scholars or conservation-minded individuals, districts have almost uniformly failed to heed this call.[189] For example, in Arkansas when an Associate General Counsel for the Natural Resources Commission asked those with "'institutional memory,' if they recalled any districts passing land use regulations. . . . [n]o one recalled this power ever being exercised" despite being aware of this statutory authority.[190] Additionally, it may be argued that regulatory authority is not be well suited to deal with a problem such as soil erosion—a problem of such universal nature. The CBM production faced by the Rosebud Conservation District is relatively simple to address through regulation as the threat is easily identifiable and located, the costs are

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186. Becky Bohrer, *Montana Voters Approve Methane Ordinance*, CASPER STAR TRIBUNE.NET, Nov. 4, 2004, http://www.casperstartribune.net/articles/2004/11/04/news/regional/3789c4ed05e1723787256f4200035ad9.txt (reporting on the successful enactment of the Rosebud CBM ordinance).

187. Rosebud Conservation District, Land Use Ordinance Index, http://www.rosebudcd.org/LandUseOrdinanceIndex.html (last visited Sept. 11, 2006); Bohrer, *supra* note 185.

188. Rogers Interview, *supra* note 165.

189. *See* discussion Section V (detailing the factors limiting district use of regulatory authority).

190. Email from Crystal Phelps, Associate General Counsel, Arkansas Natural Resources Commission, to Author (Feb. 17, 2006, 13:19:55 CST) (on file with author).

largely concentrated on outsiders, and there are clear solutions that provide strong environmental benefit. The problem of soil erosion, however, has proven to be more intractable. It may also be difficult to tailor a district-wide land use regulation capable of addressing such an endemic problem and this has been the view of many district supervisors. As a result, it seems that the possibility of districts taking action at this point in their history without additional incentive is very low indeed.

Despite these obstacles, at least seventeen states do retain their historic ability to regulate land use at the SWCD level.[191] Other states have altered the authority of districts, but still allow the district to exert some influence on land use decisions.[192] Districts in all of these states could potentially use this authority to achieve positive environmental benefits through the enactment of local regulations. Regulatory authority could provide districts another tool to address those "problem" lands within a watershed that cannot be reached through voluntary programs. Even if such an effort is not made, the Rosebud District serves as a reminder that this authority can reach local environmental problems that would go otherwise unaddressed.

VII. CONCLUSION

It should be remembered that today's necessity for public action is the outgrowth of yesterday's failure to look more carefully to our land. Hindsight is easy; but foresight during the last century when our present land-use picture was in the making, would have produced a different result. Today we are simply re-

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191. The following state statutes provide for regulatory authority: ALA CODE § 9-8-26 (2005) (Alabama); ARK. CODE ANN. § 14-125-303 (2005) (Arkansas); FLA STAT. § 582.01 (2004) (Florida); 70 ILL. COMP. STAT. ANN. 405/23 (2004) (Illinois); LA. REV. STAT. ANN. § 3:1209 (2004) (Louisiana); MD. CODE ANN., AGRIC § 8-307 (LexisNexis 2002) (Maryland); MISS. CODE ANN. § 69-27-37 (1999) (Mississippi); MONT. CODE ANN. § 76-15-706 (2005) (Montana); NEV. REV. STAT. ANN. § 548.410 (2005) (NEVADA); N.J. STAT. ANN. § 4:24-23 (West 2000) (New Jersey); N.C. GEN. STAT. § 139-9 (2003) (North Carolina); N.D. CENT. CODE § 4-22-27 (2005) (North Dakota); OR. REV. STAT. § 568.640 (2005) (Oregon); S.C. CODE ANN. § 48-9-1510 (1976) (South Carolina); TENN. CODE ANN. § 43-14-219 (1997) (Tennessee); TEX. AGRIC. CODE ANN. § 201.121 (Vernon 2005) (Texas); VT. STAT. ANN. tit. 10, § 724 (2005) (Vermont); WYO. STAT. ANN. § 11-16-111 (2003) (Wyoming).

192. *See* IOWA CODE § 161.A (2005) (Iowa); NEB. REV. STAT. § 51-2406 (2005) (Nebraska); S.D. CODIFIED LAWS § 38-8A-3 (2005); VA. CODE ANN. § 10.1-562 (1999). These are examples of states altering power or allowing rules to be promulgated by notice and comment rulemaking.

tracing our steps across this land in an effort to correct past mistakes in the interest of the future.[193]

Although this argument was made in 1938, this message could just as easily be directed toward a modern audience. In this speech, Hugh Bennett, Director of the SCS, explained why conservation districts were necessary to address the problems of the Dust Bowl and why granting districts regulatory authority was a vital part of this program. At this time, it is unlikely that the framer's vision of "[having] anywhere from 1,000 to 3,000 districts trying to enforce land use regulations" will ever fully materialize.[194] Districts have made the conscious choice, driven by economic and social considerations, to focus district resources on providing assistance to local farmers, and on conducting voluntary conservation projects and educational programs.[195] Although the full potential of district regulatory authority seems elusive, there is still a role for this authority. Districts, encountering problems similar to the Rosebud Conservation District's situation with CBM production (where an environmental problem is recognized and no other governmental unit is willing to address the problem) should be willing and ready to exercise this power. Regulatory authority may have difficulty solving problems of widespread application or where a solution is not readily available, but as the Rosebud CBM ordinance has demonstrated, land use regulations can still play a meaningful role. Additionally, districts in creating land use regulations can serve as important laboratories for experimentation in the search for more effective environmental regulations. In so doing, districts enacting land use ordinances can fulfill, in small part, the New Deal vision of a denationalized regulatory program concerned with conservation on agricultural lands. Land use regulations can empower citizens to address the environmental issues most directly affecting their local area. Encouraging expanded use of this authority will allow the district concept to emerge from the shadow of history and provide another tool in the never-ending fight against soil erosion and other environmental degradation.

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193. H.H. Bennett, Chief, Soil Conservation Serv., Address to the American Association for the Advancement of Science (Dec. 29, 1938), *available at* http://www.nrcs.usda.gov/about/history/speeches/19381229.html.

194. Glick Interview, *supra* note 8, at 49.

195. BENNETT, SOIL, *supra* note 19, at 314 ("National conservation action must spring from people on the land, and to a large extent, be advanced by them as individuals, with the help of government.").