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March 1996

### Federalism without Preemption: A Case Study in Bioregionalism

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#### Recommended Citation

A. D. Tarlock, *Federalism without Preemption: A Case Study in Bioregionalism*, 27 *Pac. L. J.* 1629 (1996).  
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# Federalism Without Preemption: A Case Study in Bioregionalism

A. Dan Tarlock\*

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## I. INTRODUCTION: BIODIVERSITY AND FEDERALISM

This Article examines the practice and jurisprudence of federalism through the lens of biodiversity protection in California.<sup>1</sup> Important intergovernmental biodiversity protection experiments are underway in southern California as well as in other parts of the country which neither fit easily into conventional political theories of federalism nor into the Supreme Court's federalism jurisprudence. Federal, state, and local governments are cooperating with property owners and

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1. This Article is an expansion of some of the themes raised in an earlier article exploring the emerging federalism issues in a variety of on-going biodiversity protection experiments. See A. Dan Tarlock, *Biodiversity Federalism*, 54 MD. L. REV. 1315 (1995).

other stakeholders to implement a bioregional biodiversity protection strategy.<sup>2</sup> These experiments are characterized by the federal government's attempts to protect biodiversity without the actual displacement of state law and the central importance of actors with no formal status in federalism jurisprudence, local units of government,<sup>3</sup> in the formulation and implementation of biodiversity protection strategies. In short, for a variety of reasons, we are seeing federalism without preemption.<sup>4</sup>

This emerging pattern of federalism is initially surprising to students of natural resources and environmental law. The displacement of state law was the central issue in natural resources federalism from the New Deal to the 1960s. The most interesting issue was whether the federal government had the power to displace state law. If the federal government had the power, it followed that the state law should be displaced to further an important national interest. In areas such as water administration, states were so hostile to federal proprietary and administrative claims that displacement of state law seemed like the only effective way to vindicate federal interests frustrated by state and local opposition.<sup>5</sup> For example, writing in 1964, a distinguished California water lawyer chastised the states for continuing to argue that the federal government lacked the power to enforce the 160-acre limitation or claim federal reserved rights because "[t]he vice of this line of argument is that it still conceives the states and the United States as jealous rivals bent on mutual frustration."<sup>6</sup> Preemption of state law has been less of an issue in environmental regulation because the basic pollution control programs allow state standards that exceed federal ones,<sup>7</sup> but federal preemption has been frequently asserted by both the government and regulated

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2. Bioregionalism is a synthesis of European regional geography, modern ecological thinking, and the growing attachment of the idea of a sense of place. The basic idea is to define regions which share common ecological and cultural characteristics and use this area as a basis for the development and implementation of more environmentally sensitive resource development and management strategies. See Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 ENVTL. L. 973, 1000-03 (1995); Keane Callahan, *Bioregionalism: Wiser Planning for the Environment*, LAND USE & ZONING DIGEST, Aug. 1993, at 3. For further discussion, see also *infra* note 9 and accompanying text.

3. See *Community Comm. Co. v. City of Boulder*, 455 U.S. 40, 53-54 (1982).

4. Stephen A. Gardbaum, in *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994), argues that, contrary to conventional thinking, the displacement of state law under the Supremacy Clause and preemption have separate constitutional justifications. Preemption is an exercise of the Necessary and Proper Clause because it arises "only where the states and the federal government have concurrent power." *Id.* at 770. The biodiversity protection experiments described in this Article raise preemption issues under this definition.

5. There is a lively continuing debate about the legacy of western water development, and one persistent theme in the debate is that local irrigation districts exercised too much control over federal water allocation at the expense of social equity and environmental protection. Compare ARTHUR MASS & RAYMOND L. ANDERSON, ... AND THE DESERT SHALL REJOICE: CONFLICT, GROWTH, AND JUSTICE IN ARID ENVIRONMENTS (1978) with DANIEL WORSTER, RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST (1985).

6. B. Abbott Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 1, 37 (1964).

7. See, e.g., *United States v. Akzo Coatings of America*, 949 F.2d 1409, 1443-44 (6th Cir. 1991); *Homestake Mining Co. v. United States EPA*, 477 F. Supp. 1279, 1283 (D.S.D. 1979).

parties.<sup>8</sup> Like everything in the 90s, modern natural resource and environmental management issues are not as simple as they once were. They raise complex federalism issues beyond the proper allocation of exclusive authority, and thus, it is ultimately not surprising that preemption plays a less important role than it once did. If there is to be any effective biodiversity protection, it will be accomplished through cooperation and blended authority rather than conflict and the delineation of exclusive spheres of competence.

Biodiversity protection raises especially complex federalism problems because of its site specific nature and the refusal of ecosystems and bioregions<sup>9</sup> to conform to political boundaries. In the past five years, the protection of biodiversity has emerged as one of the major objectives of environmental law. Biodiversity protection is particularly acute in California because so many people share a biodiversity hot spot with the flora and fauna. The leading proponent of biodiversity protection, Edward O. Wilson, identifies 18 global biodiversity hot spots in his influential book, *The Diversity of Life*.<sup>10</sup> The California floristic province "stretching from southern Oregon to Baja, California and recognized by botanists as a separate evolutionary center . . . contains one fourth of all the plant species found in the United States and Canada combined."<sup>11</sup> This landscape is shared with some thirty-two million humans and thus biodiversity loss through habitat destruction is acute,<sup>12</sup> and human settlement patterns that consume sensitive habitats are extremely difficult to modify.

Biodiversity protection in California also has an international dimension, which is important in southern California because the bioregion extends into Mexico. International law does not mandate that the United States take additional biodiversity protection measures, but the entry into force of the 1992 Biodiversity

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8. See cases cited *infra* note 21.

9. As previously discussed, bioregionalism proceeds from the assumption that natural units such as river basins or other ecosystems have an integrity which must be respected by humans. Thus, the history of adaptation is not the traditional one of the triumph over hostile environments but a study of the consequences of the respect and disrespect for the region displayed over time by human users. Australia is pioneering the use of this technique to develop new biodiversity protection management initiatives to cope with systemic drought and land degradation. See generally J. M. POWELL, *THE EMERGENCE OF BIOREGIONALISM IN THE MURRAY-DARLING BASIN* (1994).

10. EDWARD O. WILSON, *THE DIVERSITY OF LIFE* (1992).

11. *Id.* at 261. The uniqueness of the California Floristic Province was recognized by the state's early scientists. A study of California's pioneer scientists concludes that: the region's scientists had spent a generation trying to convey . . . that the view of nature most beneficial to humanity was one in which nature was not treated as a commodity and humans were seen as the center of creation-not because humans were less important than the rest of nature, but because the prevailing anthropocentric vision of the earth as a marketplace was a distorted and ultimately self-destructive way of interpreting the dynamics of the biosphere.

MICHAEL L. SMITH, *PACIFIC VISIONS: THE CALIFORNIA SCIENTISTS AND THE ENVIRONMENT 1859-1915* 192-93 (1987).

12. See *LIFE ON THE EDGE: A GUIDE TO CALIFORNIA'S ENDANGERED NATURAL RESOURCES: WILDLIFE* (Carl G. Thelander & Margo Crabtree eds., 1994).

Convention reinforces existing United States domestic initiatives<sup>13</sup> and provides an additional rationale to err on the side of protection in the face of the usual high level of scientific uncertainty. For example, commentators assert that a precautionary principle is emerging out of recent regional and global agreements<sup>14</sup> such as the ozone convention and regional hazardous waste treaties. The precautionary principle posits that states have a duty to take "remedial action even in the absence of provable environmental harm, simply on the evidence of significant risk thereof."<sup>15</sup> The principle is still vague and it is not well integrated with the law of state responsibility for transboundary environmental damage. But, the precautionary principle has been extended from pollution prevention to biodiversity conservation and is incorporated into the preamble of the Biodiversity Convention, although the burden of proof issue is unresolved.

As the global climate change debate illustrates, the allocation of the burden of proof is essential to the implementation of the precautionary principle. The logic of the principle suggests that the burden should be placed on the party alleging that there is insufficient evidence to justify precautionary regulation. However, the higher the uncertainty, the easier it should be to shift the burden to the party imposing the regulation. The Convention can be characterized as a recognition that a nation has a duty to practice sustainable development for internal as well as external reasons. However, at the present time, this is too radical an extension of the precautionary principle. At most, a nation probably has a duty to avoid foreseeable, significant risks to other states.<sup>16</sup> Thus, at present the Convention reinforces a state's discretion to err on the side of caution in the face of the usual high level of scientific uncertainty.

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13. See *United Nations Conference on Environment and Development: Convention on Biological Diversity*, 31 INT'L LEGAL MATERIALS 818, 882 (1992). The Convention entered into force on December 29, 1993. President Clinton has signed the Convention, but as of June 1996, Congress had not ratified the Convention. For a good discussion of the Convention, see PHILLIPE SANDS, 1 PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 381-87 (1995) and Catherine Tinker, *Responsibility for Biological Diversity Conservation Under International Law*, 28 VAND. J. TRANSNAT'L L. 777 (1995).

14. See Ellen Hey, *The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution*, 4 GEO. INT'L ENVTL. L. REV. 303 (1992); Tinker, *supra* note 13, at 797-98.

15. Gunther Handl, *Environmental Security and Global Change: The Challenge to International Law*, in ENVIRONMENTAL PROTECTION & INTERNATIONAL LAW 59, 99 (1991).

16. See Tinker, *supra* note 13, at 798.

## II. THE POLITICAL AND LEGAL LANDSCAPE OF DIMINISHED FEDERAL CAPACITY

### A. *The Decline of National Authority in an Era of Limits*

Biodiversity protection is habitat protection,<sup>17</sup> and thus it is extremely difficult to implement in areas of human settlement because land use regulations infringe on both public and private choices about the exploitation and use of public and private land and related water resources. Habitat protection requires some combination of the dedication of significant amounts of land to habitat reserves, adaptive management of private and public land and new management initiatives for public lands dedicated to commodity production such as mining, timber harvesting and livestock grazing. Effective protection equally requires new controls on private land suitable for urban development as well as on existing agricultural lands and unprecedented levels of intra-agency and intergovernmental cooperation. Single use public land management must be reoriented to accommodate biodiversity conservation.<sup>18</sup> However, the federal government's considerable powers under the Property<sup>19</sup> and Commerce<sup>20</sup> clauses and the Court's

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17. There are exceptions to this repeated truism such as the need to reduce sensitive species exposure to pesticides and other toxins.

18. See JIM ROBBINS, *LAST REFUGE: THE ENVIRONMENTAL SHOWDOWN IN YELLOWSTONE AND THE AMERICAN WEST* 101-32 (1993).

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

20. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 314, 329-30 (1981) (holding that the Commerce Clause allows Congress to regulate local land uses pursuant to the Surface Mine Control and Reclamation Act). The Supreme Court's decision, in *United States v. Lopez*, 115 S. Ct. 1624 (1995), undermines some of the assumed Commerce Clause justification for biodiversity protection. *Lopez* invalidated the Gun Free Zones Act of 1990, Pub. L. No. 101-647, § 1702(b), 104 Stat. 4844, 4844-49 (codified at 18 U.S.C.A. § 922(q)), because it did not regulate economic activity that affected interstate commerce. *Lopez*, 115 S. Ct. at 1630-34. Biodiversity protection requires land use controls, and federal legislation that directly or indirectly could be characterized as the regulation of noncommercial interstate activities. See *Hodel*, 452 U.S. at 329-30. Thus, cases such as *Hodel*, that upheld the Surface Mine Control and Reclamation Act because coal moved in interstate commerce and coal mining reduced the utility of land for commercial, industrial, and agricultural activities that could effect interstate commerce, and that was approved in *Lopez*, might not apply to the Endangered Species Act, the cornerstone of biodiversity protection. See John P. Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 ELR NEWS & ANALYSIS 10421, 10428-30 (1995). Compare *id.* with Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996). Gardbaum offers an alternative approach to the limits of federal power over local activities affecting interstate commerce. In brief, he argues that, informed by the "hard look" doctrine developed in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-17 (1971), and the European Community principle of subsidiary, the Necessary and Proper Clause can be read to police congressional exercises of preemption. This approach would allow cooperative biodiversity protection initiatives, backed by the threat of federal preemption, because Congress would likely meet his test that Congress affirmatively determine that national regulation is required after affording full weight to the states' interest in autonomy.

refusal to develop a Tenth Amendment jurisprudence of exclusive state competence<sup>21</sup> are not as helpful as they are in other contexts because the full exercise of the constitutional power of the national government to achieve this objective is perceived as an unacceptable intrusion on state and local sovereignty.<sup>22</sup>

To further complicate the problem, neither federal power nor federal environmental laws are well adapted to the goal of biodiversity habitat preservation for two primary reasons. First, biodiversity preservation does not fit neatly into either the resource preservation or command and control pollution control paradigms on which federal environmental law is built. Second, current biodiversity protection experiments, driven by the Endangered Species Act (ESA), illustrate a paradox which is a result of the historical refusal to delegate land use and water allocation authority to the national government. The ESA's primary objective is the preservation of individual species by listing them as threatened or endangered. Listed species are protected against federal activities which jeopardize their survival<sup>23</sup> or state, local, and private activities which threaten to take the species. Under the ESA and Clean Water Act,<sup>24</sup> the federal government has asserted the authority to preempt state land and water laws to protect endangered species and prevent water pollution, but the exercise of preemptive power is difficult if not impossible to sustain because the success of these experiments depends on state and local cooperation.<sup>25</sup> Ultimately, the federal government has had to defer to

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21. Federal environmental regulation, especially land use control, has often been challenged as a violation of the 10th Amendment after the Court resurrected the 10th Amendment as a judicial limitation on federal regulatory power in *National League of Cities v. Usery*, 426 U.S. 833, 842-43 (1976), but soon interred it again in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985). Thus, the 10th Amendment has never served as a limitation on federal environmental regulatory authority. See, e.g., *Hodel*, 452 U.S. at 330. However, the Court is once again moving to revive the 10th Amendment as a source of exclusive state power. For example, *New York v. United States*, 505 U.S. 144, 161 (1992) holds that the federal government cannot compel the states to implement a federal program. The Court's most recent opinion, *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1123-24, cert. denied sub nom. *Alabama v. Poarch Band of Creek Indians*, 116 S. Ct. 1415 (1996), articulates the need for the expanded protection of exclusive state competence. Regardless of the merits of the Court's much disputed effort to reverse 60 plus years of constitutional practice, the revived 10th Amendment has little direct implication for bioregional experiments because they are based on inter-governmental cooperation rather than compulsion or the direct exercise of federal authority. The European Union, in contrast, recognizes the principle of subsidiarity which posits that, where possible, regulation should take place at the national rather than community level. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 338-44 (1994).

22. See J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555, 672 (1995).

23. Section 7 of the Endangered Species Act (ESA), 16 U.S.C.A. § 1536 (West 1986 and Supp. 1996), requires that all federal agencies or their permittees consult with the Fish and Wildlife Service if a federally funded or authorized activity, such as a road through a national forest or a dam, would jeopardize the continued survival of the species. If the Service issues a jeopardy finding, the duty to protect the species is absolute unless exempted by a cabinet level "God Squad."

24. 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1996).

25. See *infra* Section III.

state and local governments and rely on loosely structured cooperative partnership agreements to achieve these objectives.<sup>26</sup>

History also complicates biodiversity preservation. Many of the actual federalism patterns that are emerging continue the legacy of state and local opposition, especially in the west, to all federal resource management initiatives.<sup>27</sup> The federal government's power to manage land and water resources, even on federal lands, required considerable deference to state and local interests and thus the full extent of federal power was seldom asserted. This is often because Congress refused to fund the necessary management institutions.<sup>28</sup> There are, however, some important differences between the present and past political and legal landscapes. Today, three factors shape biodiversity federalism.

*First*, the federal government no longer wields the power of the budget to induce states to comply. In fact, Congress often uses the power negatively by refusing to fund programs in order to encourage state non-compliance.<sup>29</sup> The comparative lack of resources available to the federal resource management agencies often makes them facilitators rather than the governors of a system. For example, the United States Department of the Interior has the complete power to allocate the water from the Colorado River in times of shortage,<sup>30</sup> but the major manager of the system is the Metropolitan Water District. With the blessing of the United States Department of the Interior, it negotiated a cost-sharing arrangement with the Southern Nevada Water Authority (SNWA). The two districts will share the costs of lining the All-American Canal and SNWA will pick up 30,000 acre feet of Colorado River Water.<sup>31</sup>

*Second*, the effective exercise of federal power is less than its actual power because the consequences of full exercise of the power may be too costly to agencies because it erodes the agencies' political bases. The most dramatic example of this problem is enforcement of the Endangered Species Act. Under the ESA, the federal government has the power to veto the exercise of state water rights or

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26. For the most extensive theoretical discussion of the tension between local and national biodiversity control and the new forms of cooperative management that are emerging in this area, see Lee P. Breckenridge, *Reweaving the Landscape: The Institutional Challenges of Ecosystem Management for Lands in Private Ownership*, 19 VT. L. REV. 363 (1995).

27. See, e.g., WORSTER, *supra* note 5, at 329-30.

28. Congress has increasingly used the budget process to indirectly repeal federal programs by refusing to fund them or funding them at low levels. For a discussion of this practice on habitat conservation plans, see Albert C. Lin, *Participant's Experiences With Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 ECOLOGY L.Q. 369, 404-05 (1996).

29. For a critical analysis of the current efforts to undermine environmental protection in the name of federalism, see Robert L. Glicksman, *Regulatory Reform and (Breach of) Contract With America*, 5 KAN. J. L. & PUB. POL'Y 1, 13-14 (1996).

30. See *Arizona v. California*, 373 U.S. 546, 592-94 (1963).

31. See Morris Newman, *New Deals for Colorado River Water Called 'Landmark': Vegas-MWD, San Diego-Imperial Deals Cause Controversy*, CAL. PLAN. & DEV. REP., Feb. 1996, at 1 (copy on file with the *Pacific Law Journal*).



local land use entitlements which threaten to "take" a listed species. Federal power was extended in 1995 when the United States Supreme Court upheld Department of the Interior regulations which define the taking of a species to include habitat modification.<sup>32</sup> But the aggressive exercise of this power will trigger intense political opposition and takings challenges.<sup>33</sup> There is a long standing tension between national articulation of resource management goals and local efforts to promote unrestricted access to natural resources for economic exploitation. The tradition of local resistance to national conservation is well into its second century; the current manifestation of this tension is the wise-use movement which seeks to tie all regulation to statutory compensation in excess of that required under federal or state constitutional law.<sup>34</sup> For political and administrative reasons, the Department of the Interior is now seeking cooperative species protection programs.<sup>35</sup>

*Third*, the management of biodiversity is different from traditional natural resources management issues for three reasons: (1) Biodiversity conservation is not a simple negative spillover prevention problem that calls for national regulation to adequately internalize social costs;<sup>36</sup> (2) there are no national uniform standards that can be applied to potential reserve areas; and (3) the protection of habitat not found on public lands requires the exercise of federal powers that are the most ill-adapted to habitat protection, fragmented and subordinate to state implementation.<sup>37</sup>

32. See *Babbitt v. Sweethome Communities for Greater Oregon*, 115 S. Ct. 2407, 2416-18 (1995).

33. Courts have rejected takings claims for damages caused by protected species. See, e.g., *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1428-31 (10th Cir. 1986); *Christy v. Hodel*, 857 F.2d 1324, 1334-35 (9th Cir. 1988). The takings issues raised by the Act are discussed in Susan Shaheen, *The Endangered Species Act: Inadequate Species Protection in the Wake of Destruction of Private Property Rights*, 55 OHIO ST. L.J. 453 (1994); Paula C. Murray, *Private Takings of Endangered Species As Public Nuisance: Lucas v. South Carolina Coastal Council and the Endangered Species Act*, 12 UCLA J. ENVTL. L. & POL'Y 119 (1993); and Michael A. Yuffee, Note, *Prior Appropriations Water Rights: Does Lucas Provide a Takings Action Against Federal Regulation Under the Endangered Species Act?*, 71 WASH. U. L.Q. 1217 (1993). Both the Endangered Species Act, 16 U.S.C.A. §§ 1531-1544 (West 1986 & Supp. 1996) and section 404 of the Clean Water Act, 33 U.S.C.A. § 1344 (West 1986 & Supp. 1996) create regulatory water rights. See, e.g., *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1133-34 (E.D. Cal. 1992); A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT 728-48 (1993).

34. For a modern example of a "wise use" legal victory, see *Catron County Bd. of Commissioners v. United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1436 (10th Cir. 1996). Catron County, New Mexico is the leader of the modern western interposition movement to slow (stop) the designation of critical habitat for listed species located in the county; it convinced the Tenth Circuit to hold that the designation of such habitat under the Endangered Species Act requires an Environmental Impact Statement (EIS). The better reasoned position adopted by the Ninth Circuit, in *Douglas County v. Babbitt*, 48 F.3d 1495, 1507-08 (9th Cir. 1995), cert. denied, 116 S. Ct. 698 (1996), is that the designation of critical habitat is the functional equivalent of an EIS.

35. See *infra* notes 81-84 and accompanying text.

36. See Susan Rose-Ackerman, *Environmental Policy and Federal Structure: A Comparison of the United States and Germany*, 47 VAND. L. REV. 1587, 1598 (1994).

37. In addition, as discussed in notes 51-53, the Supreme Court is developing a neo-dual federalism jurisprudence which limits federal power to direct the state to manage natural resources. For example, the use of state agencies to implement federal policy is constitutionally suspect because it interferes with state

The crux of the problem is the attempted integration of ecosystem management into real landscapes. Ecosystem management is creating a paradox in federal-state relations: the achievement of effective biodiversity protection efforts relies on unexercised rather than exercised federal power. Ecosystem management collapses conventional political and property boundaries, and the integration of public and private lands into a single functional unit makes local rather than state governments much more important, especially for land use issues. As a result, the importance of the science of conservation biology is magnified. Science is the source of both substantive management principles, such as the dedication of viable patches of habitat linked by biological corridors,<sup>38</sup> and the possibility for consensus. Conservation biology seeks to understand relationships between species extinction and habitat fragmentation in order to develop models to map on the ground management minimum habitat reserves for endangered species.<sup>39</sup> As a consequence, resource management generally is shifting from preservation as the dominant biodiversity strategy to preservation as an integral component of ecosystem restoration and adaptive management.<sup>40</sup>

The bottom line is that at best, ecosystems can be managed rather than restored or preserved, and management will be a series of calculated risky experiments.<sup>41</sup> “[N]ature moves and changes and involves risks and uncertainties and . . . our own judgments of our actions must be made against this moving target.”<sup>42</sup> The basic management objective is to manage nature to mimic natural systems. For example, adaptive management is now seen as the primary strategy because it increases the possibility for consensus and makes possible the creation of

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autonomy. See *New York v. United States*, 505 U.S. 144, 166 (1992). For a defense of limits on the federal government's power to compel state agencies to enforce federal regulatory programs, see Deborah J. Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1573-79 (1994).

38. See Rebecca W. Thomson, *Ecosystem Management: Great Idea, But What Is It, Will It Work, and Who Will Pay?*, 9 NAT. RESOURCES & ENV'T 42, 44 (1995); James Drozdowski, Note, *Saving an Endangered Act: The Case for a Biodiversity Approach to ESA Conservation Efforts*, 45 CASE W. RES. L. REV. 553, 592 (1995).

39. See REED NOSS, *SAVING NATURE'S LEGACY* 50-54 (1995). For a useful short review of the early literature, see Bruce A. Wilcox & Dennis D. Murphy, *Conservation Strategy: The Effects of Fragmentation on Extinction*, 125 AM. NATURALIST 879, 879-80 (1985).

40. For an examination of the impact of this paradigm shift on public lands policy, see Joseph L. Sax, *Proposals for Public Land Reform: Sorting Out the Good, the Bad and the Indifferent*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 187 (1996) and Joseph L. Sax, *Nature and Habitat Conservation and Protection in the United States*, 20 ECOLOGY. L.Q. 47, 55-56 (1993).

41. The notion that ecosystem management is an experiment is deeply disturbing to landowners and government agencies because it frustrates the achievement of certainty. See *infra* notes 58-60 and accompanying text. But, the notion of political life as an experiment is deeply embedded in our constitutional tradition. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

42. DANIEL B. BOTKIN, *DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY* 190 (1990).

processes with self-correction mechanisms.<sup>43</sup> The net result is that the search for a permanent exclusive regulatory authority—the essence of federalism jurisprudence—is counterproductive. National standards are replaced by “place-driven” ones<sup>44</sup> in which cooperation requires the subordination rather than the exercise of federal authority.

*B. Classic Federalism Doctrines Do Not Help*

Classic federalism doctrines are rapidly becoming dysfunctional or irrelevant as all levels of government move from a single media or species approach to cooperative ecosystem approaches to biodiversity management. Federalism exacerbates tension between local and national “prerogatives” because the essence of a federal system is the division of power between the national sovereign and lesser sovereign units. This division either is based on a constitutional scheme of power fragmentation or is justified as a means to match problems with competent jurisdictions.<sup>45</sup> In our constitutional system, the emphasis has been on the establishment of negative liberties or the location of regulatory competence. Federalism, as interpreted by a narrow majority of the current Supreme Court, is erroneously thought to require that allocations of power between the federal government and the state be exclusive to protect the states from the federal government.<sup>46</sup>

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43. A recent National Research Council-National Academy of Sciences study captures the essence of adaptive management:

Adaptive planning and management involve a decision making process based on trial, monitoring, and feedback. Rather than developing a fixed goal and an inflexible plan to achieve the goal, adaptive management recognizes the imperfect knowledge of interdependencies existing within and among natural and social systems, which requires plans to be modified as technical knowledge improves.

COMMITTEE ON RESTORATION OF AQUATIC ECOSYSTEMS: SCIENCE, TECHNOLOGY, & PUBLIC POLICY ET AL., *RESTORATION OF AQUATIC ECOSYSTEMS: SCIENCE, TECHNOLOGY, & PUBLIC POLICY* 357 (1992) (copy on file with the *Pacific Law Journal*).

44. See Thomas W. Jackson & Joshua S. Wyner, *The New Hot Doctrine: Ecosystem Management*, NAT'L L.J., Dec. 5, 1994, at C6. In a more general survey of environmental federalism, Professor Breckenridge reaches the same conclusion. Lee P. Breckenridge, *Fractal Federalism: Evolving National State Relations in U.S. Environmental Law*, in *GOVERNMENT STRUCTURES IN THE U.S.A. AND THE SOVEREIGN STATES OF THE FORMER U.S.S.R.* (James E. Hickey, Jr. & Alexej Ugrinsky eds., forthcoming 1996).

45. See Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1225-31 (1977) (writing before *National League of Cities v. Usery*, 426 U.S. 833 (1976) was overruled in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), and identifying the three bases for national pollution control regulation: (1) The promotion of intrastate welfare, (2) the prevention of interstate spillovers, and (3) the implementation of national moral ideals).

46. See, e.g., *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1117-33, *cert. denied sub nom. Alabama v. Poarch Band of Creek Indians*, 116 S. Ct. 1415 (1996); *New York v. United States*, 505 U.S. 144, 166-67 (1992); see also Gardbaum, *supra* note 20, at 796.

The Supreme Court's federalism jurisprudence is problematic from a biodiversity perspective for three reasons. First, biodiversity protection is at best an indirect goal of a federal system, and thus the Supreme Court's decisions are often irrelevant. Second, Supreme Court federalism jurisprudence is an abstract and backward-looking doctrine that seeks an ideal diffusion of power without a clear articulation of the values sought to be advanced by this objective, which makes it difficult to develop functional doctrines adapted to resource management needs.<sup>47</sup> Third, judicial federalism is problematic for biodiversity protection, which seeks permanent, scientifically driven solutions, because the balance of power between the national and state governments can change in response to shifts in political opinion. Thus, it is difficult to predict future doctrine and to know if the expectations built into long term solutions will be frustrated in the future.

Federalism jurisprudence continues to oscillate between radically different views of the merits of a strong national government. Contemporary views range from the theory that states are the central guardians of liberty<sup>48</sup> against the Leviathan to the view that they are historical accidents and thus the displacement of state law (or states) by Congress raises "no normative principle . . . that is worthy of protection."<sup>49</sup> Prior to the New Deal, the constitutional assumption was that regulatory power or competence must be exclusive either to the national government or to the states in order to protect individual liberty through the diffusion of regulatory power.<sup>50</sup> However, the Court's rigid dual federalism subordinated the Marshallian notion of a strong national government to deal with new problems. During the New Deal, dual federalism was replaced with a presumption of the necessity for federal regulation and the gradual realization that political rather than judicial federalism was the best means to achieve the constitutionally contemplated balance between the states and the national govern-

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47. See Erwin Chemerinsky, *Rehabilitating Federalism*, 92 MICH. L. REV. 1333, 1334 (1994) (reviewing SAMUEL H. BEER, *TO MAKE A NATIONAL: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993)). This incoherence is symptomatic of the Burger-Rehnquist Court's retreat from constitutional adjudication which articulates the national experience to arid scholasticism. See Morton J. Horowitz, *The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 32, 98 (1993) (observing that current Supreme Court opinions reflect "hardly a trace of wisdom concerning the meaning of the American past or the possibilities of its future[,] . . . no picture of American ideals or destiny[,] . . . no recognition that the world is rapidly changing[,] and that the Court's understanding of the role of law may be growing dangerously out of touch with American society").

48. Professor Akhil Reed Amar is a leading proponent of this view. See Akhil R. Amar, *Five Views of Federalism: "Converse- 1983" in Context*, 47 VAND. L. REV. 1229, 1232 (1994); Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1519 (1987).

49. See Edward L. Rubin & Malcom Feeley, *Federalism: Some Notes on A National Neurosis*, 41 UCLA L. REV. 903, 909 (1994).

50. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1561-62 (1988) (locating the "checking" function of federalism in both classic republican and pluralist political theory); see also Amar, *supra* note 49, at 1492-1519 (arguing that the purpose of federalism is to create inter-governmental competition to protect individual rights grounded in popular sovereignty).

ment. The fruit of this non-dual federalism was the theory of cooperative or "marble cake" federalism,<sup>51</sup> which underlies the law of pollution reduction. In cooperative federalism, the states become the agents of the national government.<sup>52</sup> The principal focus of constitutional law shifted from concern about the infringement of reserved state authority to an inquiry into the congressional intent behind the preemption of state regulatory authority.<sup>53</sup>

The immediate consequence of the shifting nature of federalism jurisprudence for biodiversity protection is that post-New Deal federalism has in turn decayed into a fragile and often dysfunctional balance between national and subordinate authority. Cooperative federalism has proved better in theory than in practice,<sup>54</sup> and the New Deal faith in the need for national solutions has rapidly eroded in the past twenty years.<sup>55</sup> Instead of cooperative or "marble cake" federalism, we now have either prefectorial federalism, characterized by federal mandates without the necessary financial incentives to induce state compliance with them, or neo-dual federalism,<sup>56</sup> which seeks to compartmentalize governmental functions which should in fact be shared. Both result in incomplete solutions to problems, especially resource management problems. Prefectorial federalism would require

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51. The term was coined by Morton Grodzins. See MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 8-9 (1966).

52. See *New York*, 505 U.S. at 166-69 (rejecting cooperative federalism except in limited circumstances where the federal government preempts state regulation).

53. The tradition of concern for state prerogatives, however, endures. See Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for the A Third Century*, 88 COLUM. L. REV. 1, 17-22 (1988) (expressing support for state rights and maintenance of the federalist structure); Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 107-09; see also Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1923-24 (1995) (discussing the impact of *Lopez* on Congress's Spending Clause powers). See generally Symposium, *Federalism's Future*, 47 VAND. L. REV. 1205 (1994) (addressing the future roles of state and federal governments).

54. The debate over the failure of New Deal federalism has centered on whether federal programs become captured by the regulated or benefited community, or whether the efforts to isolate them from capture make them excessively cumbersome and costly to implement. See PAUL E. PETERSON ET AL., *WHEN FEDERALISM WORKS* 7-10 (1986); see also Hope M. Babcock, *Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models From Other Laws Save Our Public Lands?*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 193, 207-08 (1996).

55. This decay can be traced in the Supreme Court's preemption jurisprudence which has evolved from a weak to a strong formal preference for concurrent regulatory authority. Compare *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 *rev'd sub nom. Rice v. Board of Trade of City of Chicago*, 331 U.S. 247 (1947) (ruling that absent a conflict with federal law, states may regulate matters not regulated by a federal act) with *Pacific Gas & Elec. Co. v. California State Energy Resources & Dev. Comm'n*, 461 U.S. 190, 211-212 (1983) and *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 153-54 (1986) (allowing for concurrent regulation). The Court's application of the presumption remains hopelessly incoherent. Compare *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 616 (1991) (holding that federal pesticide law does not preempt local regulation of pesticide application) with *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 108-09 (1992) (holding that the Occupational Safety and Health Act preempts state hazardous waste licensing scheme).

56. See JOHN E. THORSON, *RIVER OF PROMISE, RIVER OF PERIL: THE POLITICS OF MANAGING THE MISSOURI RIVER* 116 (1994).

states to comply with federal mandates but not fund the compliance costs or provide other incentives to comply, while a neo-dual federalism re-delegates power to the states with minimal federal controls.<sup>57</sup>

### III. THE EMERGENCE OF PARTNERSHIP FEDERALISM

Several ambitious experiments are underway in southern California, Texas, and other places to protect biodiversity through the creation of a system of reserves. These experiments are part of a world-wide trend to move toward the creation of bioregions as the appropriate management framework for sustainable development.<sup>58</sup> Habitat destruction is the major cause of the loss of biodiversity, and thus the creation of habitat reserves is the best strategy to conserve biodiversity. Reserve creation is extremely difficult because of the conflict between the scientific imperatives of ecosystem dynamics and institutional barriers. Ecology teaches that whole ecosystems should be managed to promote their long term sustainability, but the fragmented ownership and jurisdictional patterns that are the legacy of settlement history make this a formidable challenge. Reserve creation of public lands is difficult because lands within a single ecosystem are often managed by different federal and state agencies with different management mandates. Coordination is usually indirect. The management agencies have great discretion to define biodiversity and to decide how it should be protected. For example, they have no duty to protect biodiversity through the creation of reserves.<sup>59</sup> The problems on private lands are even greater because we have consistently rejected direct federal land use controls.<sup>60</sup> Public and private land management must be coordinated but neither the federal government nor the state (except in a few states with statewide land use controls) can compel local units of government to implement a reserve strategy.

The basic mismatch between law and conservation biology is our *narrow* focus on permitting and procedure. The permit approach—be it endangered species or wetlands—leads to a focus on individual species or small geographical areas and is entirely reactive. The procedural approach, illustrated by review

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57. Modern examples of neo-dual federalism decisions related to biodiversity include *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 114 S. Ct. 1900, 1914 (1994) (state can regulate releases from a FERC licensed facility to protect downstream water quality); *Granite Rock Co. v. California Coastal Comm.*, 480 U.S. 572, 584 (1986) (state can impose environmental conditions on mineral extraction in national forest); and *California v. United States*, 438 U.S. 645, 672-74 (1978) (state can impose environmental conditions on use of water from federal reservoir as long as federal purposes are not frustrated).

58. See Powell, *supra* note 9.

59. The leading case of *Sierra Club v. Marita*, 46 F.3d 606, 624 (7th Cir. 1995), holds that the Forest Service has the discretion to decide how to implement that National Forest Management Act's mandate to provide for biodiversity. See 16 U.S.C.A. § 1604(g)(3) (West 1996). For a criticism of *Marita*, see Walter Kuhlmann, *Wildlife's Burden*, in *BIODIVERSITY AND THE LAW* 189 (William J. Snape III ed., 1996).

60. See John R. Nolon, *National Land Use Planning: Revisiting Senator Jackson's 1970 Policy Act*, *LAND USE & ZONING DIG.*, May 1996, at 3.

under the California Environmental Quality Act, leads to case by case mitigation deals that lack an ecosystem perspective.<sup>61</sup> From a biodiversity perspective, both the geographic and legal interpretation of permit-based programs can frustrate necessary protection. Geographically, the net result is the approval of a permit with mitigation conditions which can produce dysfunctional and poorly maintained habitats.<sup>62</sup> Permit programs were not intended to operate on large geographic scales, they were intended to insure site-specific compliance with standards or administrative regulations. Because the environmental movement began as a reaction to administrative discretion which attached little or no weight to environmental protection, the emphasis has been on holding agencies to strict compliance with statutes, especially procedural requirements. As the discussion of the California NCCP program in section III.B. illustrates,<sup>63</sup> the success of biodiversity preservation often depends on the injection of some flexibility into the interpretation of an agency's statutory authority in order to induce the requisite stakeholders to cooperate to achieve an environmental objective.

The difficulty of adapting rigid legal frameworks to new realities is not confined to biodiversity protection. New York City's recent afford to use industrial zoning to foster small scale mixed use development in lower Manhattan and other boroughs illustrates the demands that a rigid system places on market adaptation and the need for some degree of "prosecutorial discretion" in interpreting a statute.<sup>64</sup> In 1974, New York City zoned more than 20,000 acres for industrial use to preserve the city's eroding manufacturing base. Even New York City could not stop global economic trends and the city lost two-thirds of its manufacturing base in the next twenty years. But, many industrial areas are thriving because New York has deliberately decided to allow developments contrary to those mandated in the ordinance. The "creative" interpretation of "small retail store," the use classification intended to allow only modest secondary commercial use to preserve industrial space, illustrates the adaptation of a old regulatory scheme to

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61. See, e.g., *Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1382-83, 43 Cal. Rptr. 2d 170, 187 (1995). In a multiple California Environmental Quality Act (CEQA) challenge to California Gnatcatcher and Stevens's Kangaroo Rat protection plans, the court, found, *inter alia*, that the Gnatcatcher mitigation requirements were adequate. The objector produced a biologist from University of California, Riverside, who testified that the mitigation measures were inadequate, but the court concluded that there was no fair argument, as required by CEQA, to support the conclusion, largely because no independent scientific evidence was introduced to corroborate the biologist's conclusion. A different conclusion was reached for the kangaroo rat mitigation plan. The city approved off-site mitigation through the payment of fees and eventual implementation of a local Habitat Conservation Plan (HCP). However, the city had not become part of the Riverside Kangaroo Rat HCP and had not committed itself to do so. This was insufficient mitigation because the city's own biological report indicated that the payment of fees without an HCP would be insufficient. The same point is made about the ESA as an ecosystem protection act. See Adler, *supra* note 2, at 1054-56.

62. See Alyson Flounoy, *Preserving Dynamic Systems: Wetlands, Ecology, and Law*, DUKE ENVTL. L. & POL'Y FORUM (forthcoming 1996) (copy on file with the *Pacific Law Journal*),

63. See *infra* notes 85-108 and accompanying text.

64. This paragraph is drawn from Kirk Johnson, *Where a Zoning Law Failed, New York Finds Seeds of a Revival*, N.Y. TIMES, Apr. 21, 1996, at 1.

changed conditions. Only small retail stores are allowed in industrial zones, but large supermarkets have been allowed by legally viewing them as a cluster of separate retail stores, each under 10,000 square feet, the threshold that would trigger exclusion under the ordinance. The growing Bed and Bath franchise was allowed because it was classified as *sui generis* and thus not positively prohibited.

A. *The Bay-Delta Framework Convention*

The recent agreement between the federal government and the State of California (styled "Club Fed")<sup>65</sup> to manage the San Francisco Bay-Delta illustrates the structural, as well as political limits of federal authority. For over fifty years, California has been studying the impact of diversions on the fresh-to-salt water balance in the Delta but declined to address the problem because it would threaten the continued enjoyment of vested water rights.<sup>66</sup> Increased flows to maintain critical aquatic habitats are the major water-related environment issue in the state. A 1994 California Department of Water Resources Planning Document<sup>67</sup> estimates that three million additional acre feet of water will be needed by 2000 to protect endangered species. In 1986, the issue came to a head when a California appellate court held that state law requires the integration of water quality and quantity allocation, in essence that the Delta cannot be allowed to deteriorate.<sup>68</sup> State efforts to augment Delta flows had been initially blocked by San Joaquin and southern California water users. In the early 1990s, the federal government threatened to "run" the Delta under the Clean Water and Endangered Species Acts by setting water quality standards and listing species. However, in 1994 the federal government and the state reached a framework agreement on the principles for the future management of the Delta.<sup>69</sup>

The Agreement is analogous to the United Nations Framework Convention on Climate Change which commits the parties to stabilize greenhouse gases at a level that prevents dangerous antropogenic change<sup>70</sup> but defers the hard questions of stabilization levels and north-south wealth and technology transfers until the future. The Bay-Delta Agreement commits the federal government and the state

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65. This is the State Resources Agency's term for the various federal agencies which agreed not to exercise immediately their full regulatory powers and joined together to allow the state to develop a Bay-Delta plan.

66. See JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 590-96 (1991).

67. CALIFORNIA DEPARTMENT OF WATER RESOURCES, *CALIFORNIA WATER PLAN UPDATE: BULLETIN* 160-93 (1994) (copy on file with the *Pacific Law Journal*).

68. *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 119, 227 Cal. Rptr. 161, 179-80 (1986).

69. For a detailed discussion of the principles, see A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 5.19[8] (1995) and Elizabeth A. Rieke, *The Bay-Delta Accord: A Stride Toward Sustainability* 70 U. COLO. L. REV. 341 (1996).

70. See Cynthia L. Koehler, *California's Bay-Delta Agreement: A Model for Cooperation*, RIVERS, Jan. 1995, at 46.



to a long-term cooperative management experiment within the context of state water law and existing federal environmental protection mandates.<sup>71</sup> Its success depends on the establishment of long-term cooperation between state and federal agencies and on the ability of both sides to develop ecosystem management strategies based on sound continuously acquired scientific information. The strategies must provide adequate environmental flows in periods of drought within existing water entitlement allocations and permit a more flexible interpretation of federal law.

Cooperation rather than preemption is required, moreover, to assemble the necessary financial resources to achieve the objectives of the Agreement. Both federal and non-federal funds are necessary to solve the problem by flow augmentation during periods of drought. The Agreement was facilitated by three factors: (1) The Central Valley Project Improvement Act of 1992 (CVPIA);<sup>72</sup> (2) the policy of Secretary of the Interior Babbitt to seek cooperative federal-state ecosystem management strategies to achieve the objectives of the Endangered Species Act and other federal environmental mandates without imposing undue burdens on existing property right holds; and (3) the willingness of the Metropolitan Water District of Southern California to guarantee a three-year \$10 million annual commitment for non-flow strategies such as improved fish screens.<sup>73</sup> The CVPIA enabled the federal government to shoulder the major burden of meeting Delta water quality demands with the additional Central Valley Project water. All Central Valley Project water will be credited against an 800,000 acre-foot block dedicated by Congress to fishery restoration in 1992, with any additional water needs met through the purchase of existing entitlements.<sup>74</sup> Thus, California avoided—at least for the foreseeable future—quantifying and curtailing a large portion of the state's water rights, although the state must "immediately thereafter initiate water right proceedings to implement the adopted plan."<sup>75</sup> For example, by 1998, the state must allocate the responsibility among water right holders in the San Joaquin basin for seasonable flows to protect Chinook Salmon.<sup>76</sup>

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71. *Id.*

72. *See* Central Valley Project Improvement Act of 1992 (CVPIA), Pub. L. No. 102-575, 106 Stat. 4707 (codified as amended in scattered sections of 16 U.S.C.A.).

73. *See* TARLOCK, *supra* note 69, § 5.19[8].

74. *See id.*

75. *Id.*

76. The crux of the Agreement is a seasonable Delta water export cap tied to the run-off of an eight-river index. The Agreement expresses the hope that no new species will be listed until 1998 and that "[c]ompliance with the take provisions of the biological opinions under the Federal . . . ESA is intended to result in no additional loss of water supply annually within the limits of the water quality and operational requirements of these Principles." *Id.* If additional species are listed for "unforeseen circumstances," no additional Delta flows will be required. *See id.*

*B. Region-Wide Habitat Biodiversity Protection Plans*

The Clinton Administration has recently negotiated several similar agreements to resolve bitter land use disputes that have arisen under the Federal Endangered Species Act. Such state-local-federal ongoing multi-species protection partnerships dramatically illustrate the emergence of a new federalism model which is gradually replacing the threat of preemption with the promise of no additional regulatory burdens. The Federal Endangered Species Act<sup>77</sup> prohibits government actions that jeopardize species that have been listed as threatened or endangered. The Fish and Wildlife Service of the United States Department of the Interior is authorized to list both individual species and the minimum critical habitat necessary to sustain the species.<sup>78</sup> This portion of the Act primarily applies to federal activities that occur on federal public land or to federally licensed activities, although many states, including California, have adopted similar programs.<sup>79</sup> But, other sections of the Act extend its coverage to both public and private land. Section 9 of the ESA makes it a violation of the Act to “take” an endangered species by destroying its habitat at least when there is a reasonable causal chain between the habitat modification and the risk of species extinction.<sup>80</sup> Section 9 makes every land development activity in an area that contains listed species subject to the ESA.

The extension of the endangered species protection to private land was an unexpected consequence of the legislation, and it has required a new local-federal land use approval process to deal with land development and related activities in areas with a listed species. In 1982, Congress added section 10 to the federal ESA.<sup>81</sup> Section 10 authorizes the federal government to approve local land use regulatory programs as Habitat Conservation Plans (HCP). If the Fish and Wildlife Service finds that development outside the reserve will not “appreciably reduce the likelihood of survival and recovery of the species in the wild,” development done pursuant to an approved HCP is an incidental take under section 9.<sup>82</sup> The first generation of HCPs were single species plans adopted to allow development to proceed. Local governments and developers basically

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77. 16 U.S.C.A. §§ 1531- 1544 (West 1985 & Supp. 1996).

78. See 16 U.S.C.A. § 1533 (West 1985).

79. CAL. FISH & GAME CODE §§ 2051-2052 (West 1994).

80. See *Babbitt v. Sweet Home Chapter of Communities for Great Or.*, 115 S. Ct. 2407, 2409-10 (1995). The Supreme Court of New South Wales, Australia, has reached the same result. *Corkill v. Forestry Comm'n of New S. Wales*, 73 A.L.G.R. 126, *aff'd* 73 A.L.G.R. 247 (1991).

81. 16 U.S.C.A. § 1539 (West 1985).

82. 16 U.S.C.A. § 1539(2)(B)(iv) (West 1985). A California Court of Appeal has held that California's failure to include a provision similar to § 10 in its Endangered Species Act, California Fish and Game Code §§ 2051-2192 (West 1984), deprives the state of the authority to authorize incidental takes pursuant to habitat conservation agreements. See *San Bernardino Audubon Soc'y v. City of Moreno Valley*, 44 Cal. App. 4th 593, 603, 51 Cal. Rptr. 2d 897, 903 (1996).

agreed to finance a habitat reserve scheme to preserve the species.<sup>83</sup> Developers conveyed land to a public entity, and the city raised money for additional habitat reserves either by generation obligation bonds or by exactions on new land development. HCPs continue the species by species approach and thus provide no protection to developers and local communities that subsequently discovered species will not require the conservation of a new and different habitat.

Conservation biology teaches that multiple-species reserves should be created to preserve ecosystems, not individual species. This is an application of the theory of island biology. This concept can be attractive to local communities and developers if a reserve system will cover future as well as presently listed species. The second generation of habitat conservation plans is distinguished by ambitious objectives beyond the conservation of a threatened or endangered species. First, the plans are multiple rather than single species oriented.<sup>84</sup> Second, as the California program described below illustrates, the geographic scale of the protection effort is much broader. New programs encompass more scientifically functional boundaries such as a watershed or bioregion. Third, these new programs are prophylactic rather than reactive. The hope is that a sufficiently large reserve will avoid the necessity to list additional species in the region because the reserve will ensure their viability.

### *1. Multiple Species Habitat Protection in Southern California*

California is pioneering the second generation HCP process. To avoid listing a threatened song bird in southern California under the state<sup>85</sup> and federal endangered species acts, California passed the Natural Community Conservation Act in 1991.<sup>86</sup> This Act provides a framework for voluntary local government and private landowner participation in the preparation of Natural Community Conservation Plans (NCCPs) for the protection of those natural areas that provide habitat for a variety of rare and other species.<sup>87</sup> These plans are to be large scale,

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83. The importance of a city either establishing a reserve or participating in a county or region habitat conservation is illustrated by *Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1421-22, 43 Cal. Rptr. 2d 170, 212-13 (1995) (holding that off-site mitigation plan for Stevens' Kangaroo Rat prepared under California Environmental Quality Act (CEQA) violated CEQA because the city did not participate in the Riverside County Kangaroo Rat HCP).

84. See Lindell L. Marsh, *Conservation Planning Under the Endangered Species Act: A New Paradigm for Conserving Biological Diversity*, 8 TUL. ENVTL. L.J. 97, 115 (1994).

85. For an analysis of differences between the CESA and the Federal ESA and the ways in which the CESA can be adapted to the NCCP process, see Lynn E. Dwyer & Dennis D. Murphy, *Fulfilling the Promise: Reconsidering and Reforming the California Endangered Species Act*, 35 NAT. RESOURCES J. 735 (1995).

86. CAL. FISH & GAME CODE §§ 2800-2840 (West Supp. 1996).

87. The Act authorizes any person or governmental agency to prepare a Natural Community Conservation Plan (NCCP) pursuant to an agreement with, and guidelines written by, the Department of Fish and Game. *Id.* §§ 2810, 2820, 2825 (West Supp. 1996). Each such plan is to promote "protection and perpetuation of natural wildlife diversity, while allowing compatible and appropriate development and growth." *Id.* § 2805 (West Supp. 1996). Once the Department of Fish and Game approves an NCCP, the Department

multi-species equivalents of existing Habitat Conservation Plans authorized under the Federal Endangered Species Act.<sup>88</sup> They are intended to cover a larger geographical area and to include listed and unlisted species. The hope is that a sufficiently large reserve will avoid the necessity for local governments and land owners to undertake additional mitigation measures should additional species be listed in the future. The Act allows the state to authorize takes if it determines an approved NCCP program provides adequate conservation and management for identified species.<sup>89</sup>

To implement the NCCP program, the State Resources Agency selected as a pilot project the "coastal sage scrub" terrain of Orange and San Diego Counties in southern California, a region that had already witnessed a number of troublesome conflicts under the existing endangered species legislation. The objective is to study and resolve conflicts at an early stage in the process by the people with the most expertise in the relevant areas. The on-going southern California NCCP process is both biologically and legally interesting. The legal interest comes from the efforts to adapt the federal ESA multi-species protection. The ESA is not primarily a habitat conservation statute,<sup>90</sup> but the Act is being adapted to this objective to avoid the exercise of the section 10 implied power to preempt state and local land use controls when a listed species is potentially present within the jurisdiction.<sup>91</sup> The Department of the Interior has relied on the special listing rules under section 4(d).<sup>92</sup> Section 4(d) allows the Department to list a species as threatened (but not endangered), but to use state or local land use authority as the

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may authorize developments that might otherwise be found to have an adverse impact on listed or candidate species if they are consistent with the NCCP. *Id.* §§ 2081, 2825(c), 2835 (West Supp. 1996).

88. See Jason M. Patlis, *Biodiversity, Ecosystems and Species: Where Does the Endangered Species Act Fit In?*, 8 TUL. ENVTL. L.J. 33, 59-61 (1994).

89. CAL. FISH & GAME CODE § 2835 (West Supp. 1996). A court of appeal has held that the state ESA does not authorize takes because there is no HCP approval process, but the court did not consider the applicability of the NCCP Act. *San Bernardino Audubon Soc'y v. City of Moreno Valley*, 44 Cal. App. 4th 593, 602-05, 51 Cal. Rptr. 2d 897, 903-04 (1996).

90. Only 16% of federal ESA listings are accompanied by critical habitat designation and a habitat may be excluded for economic reasons or because the designation will encourage destruction. See Oliver A. Houck, *The Endangered Species Act and Its Implementation By the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 302 (1993). The failure to designate a habitat does not preclude a jeopardy finding. See *United States v. Glenn Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1135 (E.D. Cal. 1992). However, the failure to designate makes it easier to find no jeopardy. See *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy*, 898 F.2d 1410, 1421 (9th Cir. 1990); *National Wildlife Fed'n v. Coleman*, 529 F.2d 359 (5th Cir. 1976).

91. The limits of this power have not been tested but the on-going litigation to curtail pumping from the Edwards Aquifer between Austin and San Antonio, Texas, may test the limits of federal power when the state and local agencies do not cooperate to carry out the mandates of the ESA. See *Sierra Club v. Lujan*, 1993 U.S. Dist. LEXIS 3361 (W.D. Tex. Feb. 1, 1993).

92. 16 U.S.C.A. § 1533(d) (West 1985).

protection mechanism.<sup>93</sup> The basic theory is that plans prepared pursuant to the NCCP will be approved by the United States Fish and Wildlife Service and the California Department of Fish and Game as section 10(a) permits and that these plans will be treated as adequate HCP's for any subsequently listed species.<sup>94</sup>

Initially, the agencies selected a Scientific Review Panel of conservation biologists to develop a set of conservation biology guidelines for a workable NCCP for the coastal sage scrub.<sup>95</sup> Much of the recent research on planning methodologies for habitat protection has concentrated on the design of "reserves," which would be large areas that would be managed to maintain or recreate natural habitat conditions.<sup>96</sup> Ideally, the reserves should cover the entire bioregion, but this is impossible in a densely populated area such as southern California. These methodologies have been used for rare species, such as the desert tortoise, and northern spotted owl, that occupied large areas of public land desired for uses inconsistent with habitat maintenance. For the coastal sage scrub, however, neither the federal nor the state governments can assemble significant funds for true bioregional habitat acquisition, and only a small proportion of the remaining habitat is located on public land. Although land acquisition authority is lacking, the statute does authorize the state to use permitting authority to enforce approved NCCPs,<sup>97</sup> but the pilot program contemplated that the actual application of the planning methodology would be undertaken by the local agencies and private coalitions that would prepare the NCCPs pursuant to the scientists' guidelines and would be enforced by local government through consistency requirements.<sup>98</sup>

An initial scientific review panel was convened to suggest conservation guidelines. The actual construction of the reserve was, however, an exercise in the possible. The initial 37,000 acre reserve for Orange County reflects a cellular design; there are two initial unconnected large coastal sage scrub subregions, one clustered between Irvine and Laguna Beach and the other at the base of the Santa Ana Mountains in Orange County. Some environmentalists have criticized the

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93. The Department of the Interior has proposed a complex 4(d) rule, Endangered and Threatened Wildlife and Plants; Proposed Special Rule for the Conservation of the Northern Spotted Owl on Non-Federal Lands, 60 Fed. Reg. 9484 (1995) (to be codified at 50 C.F.R. pt. 17), to protect the spotted owl on non-federal lands in California and Washington State and to lift the blanket prohibitions against "takes" imposed by federal injunctions.

94. See Memorandum of Understanding By and Between the California Department of Fish and Game and the United States Fish and Wildlife Service Regarding Coastal Sage Scrub Natural Community Conservation Planning in Southern California, Dec. 4, 1991 (copy on file with the *Pacific Law Journal*).

95. See, e.g., Peter F. Brussard, *The Role of Ecology in Biological Conservation*, 1 *ECOLOGICAL APPLICATIONS* 6 (1991); Michael E. Gilpin & Michael E. Soulé, *Minimum Viable Populations: Processes of Species Extinction*, in *CONSERVATION BIOLOGY: THE SCIENCE OF SCARCITY AND DIVERSITY* (Michael E. Soulé ed., 1986); Reed F. Noss, *Protecting Natural Areas in Fragmented Landscapes*, 7 *NAT. AREAS J.* 1 (1987).

96. See Michael E. Soulé, *Land Use Planning and Wildlife Maintenance: Guidelines for Conserving Wildlife in an Urban Landscape*, 57 *J. AM. PLAN. ASS'N* 313, 313-15 (1991).

97. See CAL. FISH & GAME CODE §§ 2081, 2825(c), 2835 (West Supp. 1996).

98. See DANIEL J. CURTIN, JR., CALIFORNIA LAND-USE AND PLANNING LAW 26-28 (1991).

cells for lack of scientific review and connectivity,<sup>99</sup> but on April 16, 1996, the Orange County Board of Supervisors formally approved the Central/Coastal Orange County Subregion of the Coastal Sage Scrub Natural Community Conservation Program.<sup>100</sup>

Multiple species conservation plans have an inherent tension between the federal government's power to protect species on a case by case basis and to revise existing permits and land owners' desire for a reserve and other protection duties which will not be revised in the future. The existing ESA gives the federal government power to revise existing permits and to require new permits in the future should conditions change or new species be listed. The Agreement attempts to adapt the section 10 species plan by species plan HCP process to the creation of a permanent reserve and adaptive management program that creates land owner incentives by providing a high but not absolute level of immunity from additional mitigation duties for future listed species or errors in the initial reserve designs.

The key to the resolution of this tension is the 1994 Department of the Interior Assurances Policy.<sup>101</sup> The policy, popularly known as the "no surprises" policy, is premised on legislative history which gives the Department the authority to protect unlisted as well as listed species.<sup>102</sup> The Assurances Policy goes to the limits of the basic constitutional doctrine that the sovereign cannot contract away the police power<sup>103</sup> by promising that once a Habitat Conservation Plan is approved, no new reserve dedications or other mitigation measures will be allowed except in "extraordinary circumstances."<sup>104</sup> As further refined in the Orange County Implementing Agreement, the Fish and Wildlife Service may still list additional species and issue section 10(a) permits for them, but it promises to condition a section 10(a) permit on the dedication of additional land only if alter-

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99. See Deborah Schoch, *37,000-Acre Preserve Finds Its Place in O.C.*, L.A. TIMES, Apr. 17, 1996, at A1.

100. See IMPLEMENTATION AGREEMENT REGARDING THE NATURAL COMMUNITY CONSERVATION PLAN FOR THE CENTRAL/COASTAL ORANGE COUNTY SUBREGION OF THE COASTAL SAGE SCRUB NATURAL COMMUNITY CONSERVATION PROGRAM (1996) [hereinafter IMPLEMENTATION AGREEMENT] (copy on file with the *Pacific Law Journal*).

101. U.S. DEPARTMENTS OF THE INTERIOR AND COMMERCE, NO SURPRISES: ASSURING CERTAINTY FOR PRIVATE LANDOWNERS IN ENDANGERED SPECIES ACT HABITAT CONSERVATION PLANNING (1994) (Joint Statement of Secretaries of the Interior and Commerce) [hereinafter ASSURING PRIVATE LANDOWNERS] (copy on file with the *Pacific Law Journal*).

102. See H. R. REP. NO. 97-835, at 30-31 (1982).

103. The doctrine rests on the principle that the federal government cannot be estopped to exercise the police power. See *Stone v. Mississippi*, 101 U.S. 814, 817 (1879). For an analysis of the federal government's possible legal obligations, see Eric Fisher, *Habitat Conservation Planning Under the Endangered Species Act: No Surprises & the Quest for Certainty*, 67 U. COLO. L. REV. 371, 391-97 (1996).

104. ASSURING PRIVATE LANDOWNERS, *supra* note 101, at 208.

native protection mechanisms, such as recovery plans,<sup>105</sup> have been exhausted. The additional land is necessary to avoid jeopardy to the species, and the proposed additional mitigation measures are the least burdensome to the landowners.<sup>106</sup> This policy should, along with other incentives, encourage more public and private participation in multiple species protection plans because local land use plans define the substantive protection mandates. San Diego County and the Department of the Interior recently agreed to a set of principles which will allow the NCCP to go forward in that county.<sup>107</sup> It provides that participants “will be given assurances that a ‘deal is a deal,’ and that no additional financial obligations will be imposed to conserve species that are identified and covered by the plan.”<sup>108</sup>

## 2. *The Balcones Canyonlands*

A similar experiment is underway in the Hill Country southwest of Austin, Texas. The Balcones Canyonlands are a state and perhaps national biodiversity “hot spot” due to the fact that Austin did not become a major city until the 1970s. To resolve an especially protracted dispute in the Hill Country around Austin after the county voted down a bond issue in 1995 to finance habitat acquisition,<sup>109</sup> Secretary Babbitt agreed to open land to development under a plan which creates marketable mitigation certificates to finance a 30,000 acre habitat reserve for two songbirds and six cave bugs.<sup>110</sup> Developers may purchase “Participation Fee Certificates” from governments who have contributed land or funds to a reserve program to mitigate capital improvements.<sup>111</sup> The hope is that the \$2750 to \$5500 per acre cost of the certificates will be cheaper than the \$9000 per acre that has historically been spent on mitigation in the Balcones Canyonlands. Landowner participation is voluntary,<sup>112</sup> and the details on local government implementation

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105. Recovery plans, which include translocation of a species, are an increasingly used protection strategy, see Federico Cheever, *The Road to Recovery: A New Way of Thinking About the Endangered Species Act*, 23 *ECOLOGY L.Q.* 1, 32 (1996), and may be mandatory when a species is at extreme risk and previous protection efforts have not succeeded, see *Sierra Club*, 1993 U.S. Dist. LEXIS at \*45-49.

106. See IMPLEMENTATION AGREEMENT, *supra* note 100, at 101.

107. CITY OF SAN DIEGO, ET AL., MULTIPLE SPECIES CONSERVATION PROGRAM (1996) (copy on file with the *Pacific Law Journal*).

108. *Id.* at 2.

109. See Ruhl, *supra* note 22, at 17. For a pessimistic assessment of the habitat conservation efforts in Austin, Texas, see CHARLES C. MANN & MARK L. PLUMMER, NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES 176-211 (1995).

110. U.S. DEPARTMENT OF THE INTERIOR, BALCONES CANYONLANDS CONSERVATION PLAN (BCCP): SHARED VISION (1995) (draft version) (copy on file with the *Pacific Law Journal*).

111. See *id.*

112. Individual landowners may still seek section 10(a) permits. See *id.*

are “in process,”<sup>113</sup> but the project displays a surprising ability to endure in the face of hostile opposition. As of early 1996, 21,000 out of 30,000 acres had been acquired by public purchase, developer donation and Nature Conservancy purchases.<sup>114</sup>

#### IV. CONCLUSION

The net result of these biodiversity protection experiments is an attempt to encourage partnership federalism. In contrast to previous models of cooperative federalism, partnership federalism, which allows state and local governments to define the content of federal mandates, is increasingly characterized by multi-party agreements and federal waivers of power rather than preemption. The Orange County Implementation Agreement defines the location of the reserves and special linkage areas, creates a future governance mechanism, creates a mitigation option for nonparticipating landowners, and tries to create sufficient landowner incentives that encourage them to give often, but not too often. If it works, the federal ESA will have been transformed from a centralized permit program to a federal performance standard program similar to the Coastal Zone Management Act.<sup>115</sup>

In the end, however, partnership federalism still rests on latent federal supremacy, but as a recent evaluation of a similar California program that seeks to promote voluntary public and private biodiversity conservation programs concludes:

In order for this approach to work, the threat of an endangered or threatened species listing must be close enough to motivate landowners to participate in a voluntary effort to conserve habitat, but not so close that species might actually be listed before the voluntary program can get off the ground . . . .<sup>116</sup>

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113. On February 7, 1995, the Texas Capital Area Builders Association withdrew from the task force studying the plan because they hope to repeal or substantially weaken the ESA. See Amy Smith, *Builders Walk From BCCP*, AUSTIN BUS. J., Feb. 10, 1995, at 1. See generally TIMOTHY BEATLEY, HABITAT CONSERVATION PLANNING: ENDANGERED SPECIES AND URBAN GROWTH 173-93 (1994).

114. See William K. Stevens, *Texas Balancing Act Is Succeeding*, N.Y. TIMES, Feb. 27, 1996, at C4.

115. See Ruhl, *supra* note 22, at 643-71.

116. Jon Welner, *Natural Communities Conservation Planning: An Ecosystem Approach to Protecting Endangered Species*, 47 STAN. L. REV. 319, 346 (1995). Professor Breckenridge's study of the Northern Forest Lands Council, a six-year U.S. Forest Service exploration of ecosystem management in upper New York State and northern New England, reached a similar conclusion. "Partnerships for managing ecosystems are best seen as attempts to develop new hybrid forms of decision-making, a 'third way,' that is decentralized and 'private' enough to allow diverse, semi-autonomous action, but at the same time centralized and 'public' enough to achieve coordination on a region-wide basis." Breckenridge, *supra* note 26, at 409.



The limited ability of the federal government to protect biodiversity both on its own public lands and on private property has forced the federal government to induce state and local cooperation to implement national objectives.<sup>117</sup> A more functional and less abstract concept of federalism can support this experiment.<sup>118</sup> Courts can encourage state and local biodiversity initiatives that do not conflict with congressional policies by sanctioning constitutionally-supported national biodiversity protection responses.

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117. This is a world-wide trend. *See* KENTON R. MILLER, *BALANCING THE SCALES: GUIDELINES FOR INCREASING BIODIVERSITY'S CHANCES THROUGH BIOREGIONAL MANAGEMENT* 56-58 (1996).

118. *Cf.* Barry Friedman, *Federalism's Future in the Global Village*, 47 *VAND. L. REV.* 1441, 1480 (1994) ("as people find government farther away and less accessible, they may seek to find mechanisms of governance more accountable and closer to home").