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Federal-State Relationships in Federal Land and Resource Management

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FEDERALISM

FEDERAL-STATE RELATIONSHIPS IN FEDERAL LAND AND RESOURCE MANAGEMENT

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I. HISTORICAL OVERVIEW OF FEDERAL AND STATE POWERS

Our nation was founded by thirteen independent states, each of which, in the larger national interest, voluntarily submitted to federal supremacy in certain defined and limited areas of policy. The residual sovereignty rests in the states and they may perform any acts of government which are not precluded by their own or by the Federal Constitution.

The Federal Government, with limited and defined powers, must seek a basis in the Constitution for any actions or programs it undertakes. The bases for affirmative federal programs regarding natural resources, the environment, and energy are varied. Early water resource and regulatory policies rested on the commerce clause; national defense, public health, and the public welfare underlie many other federal policies. With respect to federal lands and resources, these underpinnings are firmly buttressed by the "property clause."[1]

In recent years, the complexity, breadth, and cost of social welfare and environmental protection and resource development programs have dictated both a public demand for, and an inevitable movement toward, federal action in policy areas formerly reserved to the states by practice and tradition. Through the use of financial assistance, technical advice, and control over information, implicit notions of federal policy have been implemented as a part of federal law without explicit discussions of their Constitutional basis, or their historical tradition.

As the division between state and federal authority and responsibility has blurred—both in fact and in the minds of the public—coordination between the levels of government has become an increasingly difficult problem. Ambiguity and conflict

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[1] U.S. CONST. art. IV, § 3, cl. 2.

among policies and delay of important public actions have resulted.

There is a growing need to bring together the viewpoints of the states with the technical and financial strengths and the national concerns of the Federal Government regarding vital public policy issues related to energy, natural resources, and the environment. Both sets of viewpoints are critical to Americans in all states; all citizens share in national problems and in efforts to resolve them.

II. THE NEED FOR ACCOMMODATION TO SERVE BOTH STATE AND FEDERAL INTERESTS

The past decade has seen the emergence of a new set of national issues involving federal lands and resources which are imposing serious strains on the fabric of state-federal relationships.

Those with the highest current visibility involve the role of state government in federal programs and proposals to increase domestic energy self-sufficiency through the development of federally-owned energy resources. For the longer term, all these issues assume constitutional dimensions and involve fundamental questions concerning institutional arrangements for regional and national planning, balancing environmental concerns with developmental requirements, national, regional, and state allocation of costs and benefits, and the manner in which state concerns and interests are to be reflected and accommodated in national policies and decisions. They usually involve multi-state or national interests which go beyond the jurisdiction or the financial and technical capabilities of single state governments. Examples include:

> (1) regional environmental problems such as damage resulting from Outer Continental Shelf development, air pollution in the southwestern region, pollution of the Great Lakes, dedication of limited western water resources to industrial uses, and increasing salinity in the Colorado River and its tributaries;
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> (2) development of regional energy resources such as western coal reserves, Alaska oil and gas, oil shale, and the Outer Continental Shelf for national purposes; and
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> (3) the social, economic, and environmental impacts which affect particular states or regions disproportionately such as the impact of using one region's resources for the benefit of other regions

and the siting of nuclear and fossil fuel power plants, refineries and strip mines.

These problems pose severe challenges, but also present great opportunities for our federal-state system of government.

At present, no comprehensive or satisfactory set of institutional arrangements has been developed to facilitate a coordinated federal and state governmental response to these issues. Traditionally, when the national consequences of particular developmental programs are discovered, a national program or policy is prepared in response. To the extent that the impacted states and regions are able to make their views known at the federal level—whether through public opinion, congressional influence, or legal obstruction of particular federal proposals—accommodation of state interests is made on a case-by-case or issue-by-issue basis.

When the traditional approach to accommodation of state interests fails, proposals for federal preemption are advanced often without a genuine effort to resolve or accommodate potentially divergent federal and state interests.

Neither of these approaches—federal preemption or case-by-case resolution—is satisfactory. Both create uncertainty, invite conflict, and impede orderly and logical planning at the federal and state levels. Neither directly addresses the difficult question of how best to resolve energy, natural resource, and environmental controversies which place national requirements in conflict with the economic, social, and environmental objectives of individual states.

Without greater cooperation between federal, state, and local levels of government to accommodate truly divergent needs and objectives, the likelihood of creative and enduring programs addressing the energy, natural resource, and environmental challenges of the years ahead is greatly diminished. Moreover, it is increasingly apparent that the country has neither the luxury of unlimited time, or unlimited resources, in which to develop these programs. The responsibility for devising the kinds of procedures and institutions necessary to accommodate the economic, social, and environmental interests of both state and federal government rests with all public officials, at both levels of government.

When these problems involve the use of federal lands and

resources, the Congress has a special responsibility. The challenge is also a great opportunity for progress.

III. ISSUE AREAS AND RECENT DEVELOPMENTS

A. *Federally-Owned Energy Resources—Overview*

The confrontation between the federal and state governments is perhaps most intense in matters concerning federally-owned energy resources. Controversies over development of federal coal, oil shale, Outer Continental Shelf oil and gas, and location of pipelines and transmission lines which cross state and private lands have become increasingly obvious. State and local governments are now seeking an active role in decisions which traditionally have been made exclusively by the Federal Government with little and, in some cases, no input from state and local government. Conversely, other matters are now seen as overriding national concerns in which state and local interests were previously paramount, even when federally-owned resources were involved.

The Federal Government owns over fifty percent of the fossil fuel energy resources in the United States. These resources are on the public lands, the offshore area known as the Outer Continental Shelf (OCS), and in reserved mineral interests underlying private lands.

No one knows precisely how much the public owns, but recent estimates of energy resources indicate that the Federal Government holds, of the total national endowment: sixty percent of the crude oil and natural gas, fifty percent of the coal, eighty percent of the oil shale, fifty percent of the recoverable geothermal energy, and fifty percent of the uranium. The management of these public resources is perhaps the most important energy policy responsibility of the Federal Government.

Federally-owned energy resources belong to all the people of the United States. The Federal Government has the basic responsibility to assure that they are developed in a manner which benefits all the people. At the same time, there is growing recognition of the need for the Federal Government to consider the special impacts of federal energy resource development on the people living in areas which will be directly impinged upon by such development. We need a national policy which balances the national interest in federal energy resource development and the

real concerns of state and local government regarding the social, economic, and environmental impacts of such development.

B. *Outer Continental Shelf Oil and Gas*

During the next decade, development of conventional oil and gas from the United States Outer Continental Shelf may well provide the largest single source of increased domestic supply. Despite the intense and justified concern of many Americans over the potential social, environmental, and economic impacts of OCS oil and gas development on the ocean, its resources, and onshore, there is increasing evidence that, if done properly, OCS development may be more acceptable environmentally than development of any other potential domestic energy resources.

The major policy issues raised by the states concerning OCS oil and gas development are (1) the rate and location of development, (2) environmental safeguards, (3) impacts on coastal states, (4) the resource allocation system (*i.e.*, the method of bidding, etc.), (5) information disclosure to potential competitors, government (federal and state), and the public, (6) the role of Federal Government, as owner of the resources, in exploration and development, (7) separation of exploratory and developmental rights in lease terms, and (8) the disposition of bonus and royalty revenues.

The ninety-fourth Congress addressed these issues in two major bills. One (S. 586) became law as the Coastal Zone Management Act Amendments of 1976.[2] This Act makes it clear that OCS leasing activity and onshore development must be consistent with a state's approved coastal zone management program.[3] The new law also established a "coastal energy impact program." Under this program, coastal states and local governments can receive federal loans or grants for planning or public facilities needed as a result of OCS leasing and certain other federal actions.[4]

The other major bill was the Outer Continental Shelf Lands Act Amendments of 1976 (S. 521).[5] It narrowly missed being

[2] 16 U.S.C.A. §§ 1451-1456 (West Supp. 1977).
[3] *Id.* § 1456(c)(3)(B).
[4] *Id.* § 1456a.
[5] S. 521, 94th Cong., 1st Sess. (1976).

passed when the House of Representatives failed to adopt the conference report in the last week of the ninety-fourth Congress. Passage of very similar legislation (S. 9)[6] is likely this year. Among other things, S. 9 gives coastal states a formal advisory role in the OCS leasing program.[7]

C. *Coal*

The Federal Government owns about half of the estimated recoverable coal reserves in the United States. In the past, production of these resources has been very limited. Now, however, there is great interest in development of federal coal deposits, which are located primarily in the Western States. But many of these states have expressed great concern over the potential impact of large-scale strip mining on their environments and lifestyle; they fear a "boom and bust" cycle.

Congress has reacted to these concerns in several different ways. The action of greatest significance to date was the enactment, over President Ford's veto, of the Federal Coal Leasing Amendments Act.[8] This Act established many new policy guidelines for leasing. These include a requirement that the Secretary consider the impacts of mining on the surrounding area including "impacts on the environment, on agricultural and other economic activities, and on public services."[9]

The 1976 leasing law also increased the share of mineral leasing revenues paid to the states from 37.5% to 50%. The additional 12.5% is to be used by the states with "priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this Act for (1) planning, (2) construction and maintenance of public facilities, and (3) provision of public services . . . ."[10]

The long-sought surface coal mining legislation also addresses the question of federal-state relationships. In its twice-vetoed form the bill asserted exclusive federal jurisdiction over

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[6] S. 9, 95th Cong., 1st Sess. (1977), 123 CONG. REC. 163 (1977).

[7] *Id.*

[8] 30 U.S.C.A. §§ 181-352 (West Supp. 1977).

[9] Pub. L. No. 94-377, § 3(3)(c), 90 Stat. 1083 (amending 30 U.S.C. § 201(a) (1970)). 30 U.S.C.A. § 201(a)(3)(C) (West Supp. 1977).

[10] Pub. L. No. 94-377, § 9(a), 90 Stat. 1083 (amending 30 U.S.C. § 191 (1970)).

regulation of strip mining of federal coal.[11] There were, however, express provisions for cooperative agreements between the Secretary of the Interior and the states which could lead to single agency (federal or state) regulation of mining of federal, state, or private coal.[12]

In 1976 and early 1977, former Interior Secretary Kleppe entered into agreements with several states which allow them to regulate, under state law, mining of federal coal. Under these agreements, the Department, in effect, adopts state reclamation laws as a federal regulation. The states, as one might expect, take the position that state reclamation laws apply to federal lands in any event. The Department has always rejected that position. To the best of my knowledge, the issue has not been resolved by the courts.

The latest Senate version of the surface mining bill (S. 7)[13] expressly provides that states with approved reclamation programs may elect to regulate all surface coal mining within their borders, including mining of federal coal. This provision has been hailed by western governors.

D. *Oil Shale*

The Federal Government owns eighty percent of the nation's estimated oil shale reserves. Most of this is located in the Piceance Basin in Colorado, Utah, and Wyoming. The Department of the Interior started a prototype leasing program in 1974.

The potential social and environmental problems associated with oil shale development are so severe and the economics so uncertain that, even at present cartel prices of oil, the oil industry is reconsidering its planned investments. A major research and development program is needed to find new, environmentally acceptable ways of extracting oil from the shale. The most recent federal legislation (S. 419)[14] designed to determine the commer-

[11] Pub. L. No. 94-377, § 2, 90 Stat. 1083 (amending 30 U.S.C. § 201(a) (1970)).

[12] Pub. L. No. 94-377, § 3, 90 Stat. 1083 (amending 30 U.S.C. § 201(a) (1970)) (submission of lease proposals to state's governor before approval); 90 Stat. 1084 (state public hearing when non-federal interests are involved); 90 Stat. 1085 (exploration license subject to federal, state, and local laws); Pub. L. No. 94-377, § 9, 90 Stat. 1083 (amending 30 U.S.C. § 191 (1970)) (increasing the percentage of rentals going to states for benefit of impacted areas).

[13] S. 7, 95th Cong., 1st Sess., 123 CONG. REC. 161 (1977).

[14] S. 419, 95th Cong., 1st Sess., 123 CONG. REC. 1185 (1977).

cial viability of oil shale technology and measure the social and environmental impact of oil shale development contains express provisions for financial aid to communities impacted by the projects. These include federal guarantees of state and municipal bonds and of payment of state or local taxes by the demonstration facilities.

E. *Geothermal Energy*

The Geothermal Steam Act of 1970 (P.L. 91-581)[15] and the Geothermal Energy Research, Development and Demonstration Act of 1974[16] established the framework for harnessing the significant energy potential of the nation's geothermal resources for the generation of electric power, process heat, and other purposes. The resource is most immediately available in the west and is of special interest to the western states. Geopressured areas have also been identified offshore in the Gulf of Mexico and are generating considerable interest among coastal states. Since these resources are located on federal lands in the west, offshore, and on state and private lands subject to state leasing and control, they are of vital joint interest to federal, state, and local governments. Effective federal-state cooperation will be required. To date, the geothermal leasing program authorized by the 1970 Act has lagged seriously, as have authorized geothermal research and development activities. A review of that Act is in order and will be undertaken during the present Congress. The issues will include proposals designed to accelerate the leasing program, enlargement of the Act to include offshore geopressured resources, incentives to private industry, and the coordination of federal and state leasing programs and regulations. Federal research and development programs under the 1974 Act must be coordinated with state and local governments to assure the definition of project priorities of maximum benefit to state and local programs.

F. *Energy Facility Siting*

Over the last years, Congress has been increasingly concerned with the issue of energy facility siting which frequently involves federal lands. The most recent manifestation of this con-

[15] 30 U.S.C. §§ 1001-1025 (1970).
[16] *Id.* §§ 1101-1164 (Supp. IV 1974).

cern is the 1974 Deepwater Ports legislation.[17] Two of the more critical issues in federal-state energy relations are the questions of who should determine the location of these facilities and what considerations should be involved in the siting decisions. Federal preemption without state participation is unacceptable, because the states must be assisted to do their own planning without the threat of federal preemption, and, secondly, comprehensive planning is far superior to single purpose, utilitarian planning. A permanent preemptive, functional bias in planning—be it for energy, transportation, or land preservation—renders impossible the ability of government and citizens to plan for and balance *all* competing social, economic, and environmental concerns. Congress will again be considering a Land Resource Planning Assistance Act[18] which assists the states to undertake comprehensive planning for critical areas and uses—of which energy facility siting is only one component—in order to avoid federal second-guessing of state decisionmaking. The states can and must be given a meaningful opportunity to develop their own land use programs before federal siting is mandated.

IV. Federal Resources—Overview

The United States in recent years has experienced continuing exponential growth of nearly all sectors of the economy. Simultaneously, new public values have evolved which may be summarized as an environmental ethic, encompassing a very broad rejection of strictly economic measures of progress. The combination of growing pressures upon finite natural resources coupled with new policy constraints upon development have brought about confrontations and impending shortages throughout the range of renewable natural resources, as well as finite energy resources.

Federal resources are often located within one or a few states, although their development and use may be of vital national consequence. In the foreseeable future, national needs and concerns will force the Federal Government to adopt resource policies in the national interest which may be inconsistent with the preferences or even the best interests of the localities where natural

[17] 33 U.S.C. §§ 1501-1524 (Supp. IV 1974).

[18] H.R. 2226, 95th Cong., 1st Sess., 123 Cong. Rec. 482 (1977).

resources are found, or where they are used. It will be essential, however, to adequately reflect diverse state requirements in federal decisionmaking, to recognize and provide for mitigation of the disproportionate impacts of some policies on some states, and to assist all of the states in coping with the impacts of federal policies.

In 1976, three major new laws were enacted which, among other things, deal with these issues. The Federal Land Policy and Management Act of 1976[19] is the most significant of these. Although frequently referred to as the "BLM Organic Act," this law applies, in some degree, to the national forests and other large areas of federal lands as well as to all lands administered by the Bureau of Land Management.[20] It contains numerous requirements for coordination of federal resource management plans and programs with state and local land use plans.[21] It provides new opportunities for state and local governments to acquire federal lands needed for public purposes, frequently at little or no cost.[22]

The new Act directs the federal agency to cooperate with local law enforcement personnel and to pay for their services.[23] It adds a provision to the revenue sharing provisions of the Federal Coal Leasing Amendments Act[24] for federal loans to state and local governments to meet mineral development impacts in advance of obtaining fifty percent of the receipts.[25] The law also calls for establishment of right-of-way corridors on federal lands which must consider state land use policies.[26]

Although the National Forest Management Act of 1976[27] was originally designed primarily to establish guidelines for timber harvesting on national forests, it also contains several provisions dealing with federal-state relations. State and local governments must review forest management plans.[28] The state and local gov-

[19] 43 U.S.C.A. §§ 1701-1782 (West Supp. 1977).
[20] *Id.* §§ 1701, 1712.
[21] *Id.* §§ 1712(c)(9), 1712(f), 1720, 1721(c)(1).
[22] *Id.* §§ 1713, 1721.
[23] *Id.* § 1733(c)(1).
[24] 30 U.S.C.A. §§ 181-352 (West Supp. 1977).
[25] 43 U.S.C.A. § 1747 (West Supp. 1977).
[26] *Id.* § 1763.
[27] 16 U.S.C.A. §§ 1600-1614 (West Supp. 1977).
[28] *Id.* § 1604(a).

ernment share of timber sale receipts was set at twenty-five percent of gross receipts, rather than net as had been the previous rule.[29] This will increase such payments by an estimated sixty million dollars in the first year.

Finally, county governments achieved a longstanding goal when Congress enacted a payments-in-lieu-of-taxes act (P.L. 94-565).[30] The Act supplements the various existing revenue-sharing laws and assures that each county will receive a minimum payment from the federal treasury each year simply because the Federal Government owns land within the county.[31] It also provides for additional "transition" payments for five years after lands on the property tax rolls are acquired for the National Park or National Forest Wilderness Systems.[32]

A. *Water*

There appears to be no immediate prospect of new major federal policy initiatives in the area of water resources. Federal-state coordination in water resources planning, although not ideal, is probably closer and more consistent than in other policy areas.

There are two major areas of potential concern regarding water resources. First, there is a widespread belief that water resource limitations may impose constraints upon the development of domestic coal and oil shale. Although the facts do not appear to support such a contention, there is no doubt that uncontrolled preemption of the most readily available water supplies by energy industries could impose serious local dislocations upon other water users, particularly agriculture. In view of this potential conflict, national water policy initiatives ostensibly justified by the energy crisis must be limited to constructive and realistic proposals.

Second, the general lack of support for water resource programs by the executive branch during the last eight years threatens to erode the existing competence in the field. Specifically, planning grants to the states, research and training programs,

[29] *Id.* § 500.
[30] 31 U.S.C.A. §§ 1601-1607 (West Supp. 1977).
[31] *Id.* § 1602.
[32] *Id.* § 1603.

and federal support for data collection and comprehensive planning must be continued at effective levels. Otherwise, the nation's ability to respond to future water resource problems will be lost.

B. *Minerals*

The oil embargo and the quadrupling of oil prices imposed by OPEC have served to call attention to the fact that the United States is heavily dependent on imported minerals.

State and local governments need to become more aware of the impact of local and state land use decisions on potential sites for extraction of essential minerals and construction materials. Failure to preserve good sites close to urban areas consistent with environmental and land use requirements will push up the cost of such materials.

Federal decisions to allow development of federal minerals can have drastic impacts on the states. Federal policy in this area, particularly "hardrock" mineral development under the Mining Law of 1872,[33] lags far behind state and local policy.

There is a critical need for comprehensive land use planning regarding mineral development. Most people are willing to compromise and allow "undesirable" uses such as mining. However, it is difficult to see tradeoffs in the case-by-case decisionmaking process. Comprehensive planning, however, clearly indicates existing alternatives and competing values, thereby allowing intelligent analysis and decisionmaking.

Environmental protection must be provided for in all mineral extraction plans and activities in order to prevent or minimize the degradation of the nation's landscape. Sacrifice of some resources to realize others is not limited to mining; it is characteristic of any intensive use. However, the Mining Law of 1872 fails to have internal controls for weighing the value of these sacrifices. It contains no general requirement for consideration of the other resource values of the lands involved. This is the critical weakness of the 1872 Mining Law. It puts the land use decision entirely in the hands of the miner. He decides that mineral development is

[33] 30 U.S.C. §§ 21-54 (1971). "Act of May 10, 1872, ch. 152, 17 Stat. 91, is the foundation of the existing system for acquiring rights in public mineral lands . . . ." *Id.* § 22, n.1.

the best use of public lands regardless of other values, with no rehabilitation and no evaluation of alternatives. Revision of the 1872 Mining Law is going to be a high priority of the ninety-fifth Congress. Absent such reform, much mineral development could take place on federal lands without regard to state or local plans.

C. *Parks and Wilderness Areas*

Parks and wilderness issues are largely but not exclusively dependent upon national goals for outdoor recreation. Inadequate implementation of existing programs such as the HUD 701 Open Spaces program and the Land and Water Conservation Fund[34] have resulted in (1) the inability of federal programs to accomplish or approximate their avowed goals; (2) enormous losses in open space land in urban areas, estuarine and flood plain lands in open space land in urban areas, and of historic urban properties, since state and local governments receive little material federal support to withstand development pressure for suburban expansion or urban renewal; and, for this reason, (3) increasing pressure on the Federal Government to acquire, develop, and maintain areas and properties of admittedly significant local concern but of minimal national significance.

The critical recreation needs, however, are at the regional, state, and local levels. Historic properties are being lost to development for want of either, or both, (1) funds to acquire and renovate the structures in question and (2) alternative uses for them (museums, low cost housing, stores, etc.) which could stave off the incursion of "modern" development. Open space lands in and out of urban areas also are being given over to intensive commercial development in order to increase the tax base, or because no authority exists to prevent such development.

The creation of Wilderness Areas and new units of the National Park System can provide significant recreational opportunities, but often at the cost of the withdrawal of commercial timber or mineral production, grazing on public lands, or commercial and residential development from private lands. Increased tourist income and psychic and aesthetic satisfaction must be balanced

[34] 16 U.S.C.A. §§ 460*l*-6a, 460*l*-8 (*as amended by* 16 U.S.C.A. §§ 480*l*-8 (West Supp. 1976)), 460*l*-10(a) (West 1974).

against necessary job displacement and revenue loss. Important legislative priorities at both the federal and state levels include: (1) the inventory of significant cultural and historic properties to be preserved; (2) analysis of population trends and demand for outdoor recreation facilities; and (3) sufficient integration of federal, state, and local policies and actions for addressing these two activities.

D. *Impact of the National Environmental Policy Act*

The National Environmental Policy Act[35] (NEPA) has proved to be a highly significant instrument in protecting both environmental interests and the interests of state and local government, although several federal programs have been exempted from its requirements. NEPA possesses another attribute which makes it of critical importance to the states; it contains perhaps this nation's best freedom of information law.[36] NEPA requires an agency taking any action with a substantial effect upon the environment to make explicit the rationale for its decision.[37] In doing so, it tends to expose all the facts behind a governmental decision. As a result, NEPA often serves as a brake against precipitous federal action in contravention of state policies and programs.

V. ALASKA'S FEDERAL LANDS: A SPECIAL PROBLEM OF NATIONAL CONCERN

A. *Background of Statehood and Native Claims*

Alaska and its resources have for decades been a focal point for fiercely competing resource protection and development demands. These contests are of growing national importance as citizens of all states become increasingly dependent on the development of Alaska's energy resources—first, oil, then natural gas, and finally, perhaps, its coal. Simultaneously, as Americans become increasingly aware of Alaska's superb scenic and recreational resources, they have also demanded the protection of these resources. Clearly, the Federal Government will be heavily involved in this decisionmaking. An opportunity exists for pioneering a creative new partnership between federal and state government. In its absence, the mixture of development and preserva-

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[35] 42 U.S.C. §§ 4321-4347 (1973).

[36] 42 U.S.C. § 4332, *as amended by* Act of Aug. 9, 1975, Pub. L. No. 94-83.

[37] *Id.* § 4332(c).

tion that emerges is sure to be profoundly unsatisfactory both to local and to national interests.

Under the Statehood Act[38] and the Native Claims Settlement Act,[39] the Federal Government must participate in decisions to deed 103 million acres of federal land to the state[40] and 40 million acres to Alaskan native groups,[41] and to set aside 80 million acres as national parks, forests, and refuges.[42] It must make decisions concerning the Outer Continental Shelf adjacent to Alaska which constitutes sixty percent of the United States' shelf areas and which holds one of the world's most productive fisheries. The Federal Government must also make decisions regarding the transportation system to bring natural gas from the North Slope to the continental United States and the possible development of coal resources and of Alaskan deepwater ports. These decisions must be made with both a recognition of the national interest and a sensitivity to the impacts upon and the concerns of a state whose citizens have long felt themselves beleaguered by "outside" interests, federal and private.

The Alaska Native Claims Settlement Act[43] and corresponding state legislation[44] created a pioneering concept for coordinating federal and state planning, the Joint Federal-State Land Use Planning Commission.[45] While the Commission's effectiveness has not necessarily fulfilled the most optimistic expectations projected for it at its inception, its experience may provide a foundation for further innovation in joint planning and decisionmaking machinery between the two levels of government.

B. *Natural Gas Pipeline*

Huge reserves of natural gas on Alaska's North Slope have stimulated three competing proposals for the construction of a transportation system connecting them with markets in the lower forty-eight states. One proposal (Arctic Gas), by a consortium of

[38] 48 U.S.C. § 21 (1970).
[39] 43 U.S.C. §§ 1601-1627 (1973 Supp.).
[40] 48 U.S.C. § 21(6)(a) (1970).
[41] 43 U.S.C. §§ 1610-1615 (1973 Supp.).
[42] 48 U.S.C. § 21(6)(e) (1970).
[43] 43 U.S.C. §§ 1601-1627 (1973 Supp.).
[44] ALASKA STAT. § 10.05.005 (Supp. 1976); §§ 44.25.030-.038 (1976).
[45] 43 U.S.C. § 1616 (1973 Supp.).

Canadian and United States companies, calls for the construction of a pipeline through Canada with a capacity of over three billion cubic feet per day, to connect with existing natural gas transmission facilities (which would be expanded) serving the Pacific Northwest, the Midwest, and the Northeast. The second proposal (El Paso) would carry a somewhat smaller quantity of gas via a pipeline roughly paralleling the trans-Alaska oil line. At the pipeline terminals the gas would be liquified and shipped via specially constructed tankers to West Coast ports. Gas supplies to midwestern and eastern markets might be increased to the extent that Alaskan gas could displace and make available to those markets part or all of the gas now flowing to California and the Pacific Northwest from fields in Texas, Oklahoma, and Louisiana. The third proposal (Alcan) would follow the oil pipeline and the Alcan Highway bringing the gas across Canada and then tie into existing lines. The State of Alaska sees its interest best served by the "all-American" route. This system would provide more jobs in Alaska and an assured gas supply. It also could increase the state's revenues as an owner of some of the gas. The Federal Government undoubtedly owns large Alaskan gas reserves. Furthermore, the Federal Government must assure that gas from Alaska is available to meet national needs. Thus, the national interest may well be very different from the state's. This is a classic federal-state confrontation and is one of the reasons that the Alaska Natural Gas Transportation Act of 1976 mandates that both the President and the Congress decide on the appropriate route.

C. *Relations with Canada*

At the present time Canada is one of the United States' most important foreign sources of energy. The Canadians, however, have clearly enunciated a policy that will, absent unanticipated new discoveries, result in a phased reduction of both oil and natural gas exports to this country. In the meantime, the Canadian government has taken certain steps, including the imposition of a substantial export tax on oil, to insulate Canadian consumers from some of the dislocations resulting from the rapid escalation of world oil prices. These actions have been the source of some friction and misunderstanding with the United States. Nevertheless, it is apparent that the real issues between the two nations are not with respect to the direction of Canadian policies, but

rather with regard to the mechanics and schedule of their implementation.

The fact that two of the three routes by which it is proposed to bring Alaskan gas to the lower forty-eight states (and a possible second oil pipeline from Northern Alaska) involve transit of Canada raises a much more fundamental issue. The Canadians are very sensitive to the inflationary impact that the construction of such pipelines might have on their economy and uncertain with respect to the benefits they might receive from such facilities. The Federal Government owns large oil and gas resources in Alaska (onshore and on OCS) and lands over which any oil or gas transportation system must cross. Some states fear that this could influence the Federal Government's actions with respect to any agreements with Canada. They see a possible "conflict of interest" between the United States as land and resource owner and the United States as the sovereign negotiating with another sovereign.

VI. Toward a New Federal-State Relationship

A. *Brief Review of PLLRC Recommendations*

The Public Land Law Review Commission's (PLLRC) report, "One Third of the Nation's Land,"[46] pointed out that there are several "publics" which, in the aggregate, make up the general public with respect to policies for the federal lands.[47] It identified state and local government as one of these "publics." The Commission stated its view that in making public land decisions, the Federal Government should consider the interests of state and local governments within which the lands are located.[48]

The Commission's overriding recommendations on planning future public land use fleshed out this view. The Commission stated its conviction that "effective land use planning is essential to rational programs for the use and development of the public lands and their resources." Recommendations thirteen, fourteen, and fifteen specifically stated that (1) state and local governments should have an effective role in federal land planning; (2)

[46] Public Land Law Review Commission, One Third of the Nation's Land (1970) [hereinafter cited as PLLRC Report].

[47] *Id.* at 6.

[48] *Id.* at 7.

the states should get federal funds to help them do better planning; and (3) federal-state regional land use planning commissions should be established where possible.[49]

The report also recommended that state standards for environmental quality should be used on federal lands, if they have been adopted under federal law.[50] Other portions of the PLLRC Report indicated specific federal-state coordination requirements for wildlife habitat management (Recommendation 60).[51]

B. *Current Approaches to Federal Decisionmaking*

As has been seen, there are several current approaches to the state role in federal land and resource planning and decisionmaking. These include (1) federal-state consultation and coordination, (2) state veto over federal decisions, (3) federal preemption, and (4) joint planning.

C. *Current Approaches to Federal Land and Resource Management*

The traditional approaches to federal land and resource management have been (1) concurrent federal and state control on lands over which the United States has proprietary jurisdiction with state laws regulating conduct of private users of federal lands and (2) exclusive federal control on lands over which the United States has exclusive legislative jurisdiction. Recent legislation has, in some instances, attempted to modify or blur these traditional control distributions. The "federal consistency" requirements of the Coastal Zone Management Act,[52] for example, tend toward state control over federal agency actions on federal lands. On the other hand, the twice-vetoed surface coal mining bills provided for exclusive federal regulation on federal lands, even over federally-owned coal underlying privately owned surface. It seems clear that Congress is willing to encourage close coordination of planning but very hesitant to surrender federal control over federal lands.

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[49] *Id.* at 9-10.
[50] *Id.* at 10.
[51] *Id.* at 12.
[52] 16 U.S.C. §§ 1451-1464 (Supp. II 1970).

D. *A Proposed Approach for the Future*

In the future, several policy options could be considered to improve federal-state cooperation in federal land and resource planning and management.

The traditional approach draws on a variety of approaches upon an issue-by-issue basis. This is the way in which current federal policymaking is proceeding, and probably will continue, unless serious efforts are made to bring about a comprehensive approach.

Alternatively, some entirely new federal-state relationship could be established by a comprehensive policy statement. In the past, major restatements of the relationship have been effectuated by legislation and by financial policies such as block grants or revenue sharing. Modern energy and economic issues might justify a broad reexamination of federal-state roles in federal land policymaking. However, this kind of revolutionary change seems unlikely.

There is a more modest alternative available that is based on the recommendations of the Public Land Law Review Commission. This alternative recognizes that our national land and resource base is finite and that land use decisions on federal, state, and private lands affect us all.

Past failures to anticipate and accommodate competing demands for our finite land base have precipitated many of the most crucial problems and conflicts facing all levels of government including those related to the protection of environmental amenities; siting of energy facilities and industrial plants; design of transportation systems; provision of recreational opportunities, water and sewage facilities, police and fire protection, and other public services; and development and conservation of natural resources. We must not perpetuate these failures by continuing to indulge in the ad hoc, short term, case-by-case, crisis-to-crisis land resource decisionmaking so prevalent in the past.

There is a growing consensus favoring the idea that none of us has a right to abuse the land and that, on the contrary, society as a whole has a legitimate interest in proper land use. Basically, we are drawing away from the idea that land's only function is to enable its owner to make money. This principle has been applied to all ownerships. Remember that federal lands were used

to raise cash for government operations or to reward soldiers and subsidize internal growth by railroad or canal construction. The new concept recognizes land as both a resource and a commodity.

We now recognize that public land policy must extend beyond the production of traditional commodities—wood, food, fiber, and minerals. We are moving toward Aldo Leopold's view that "[w]e abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect. There is no other way for land to survive the impact of mechanical man."[53]

Federal land and resource planning and management must be consolidated (at least in part) under some form of general land use planning. Presumably, a major federal-state effort to rationalize and coordinate land use decisionmaking would have to address a broad range of federal and state policies regarding both environmental management, energy facilities siting, and mineral and fuels development. As state land use planning proceeded with federal assistance and participation, a great many policy issues could be addressed within the forums and institutions established for land use planning. Essentially this approach envisions the joint federal-state consideration of an issue and the joint development of a policy response to reflect both state and federal concerns in a manner which assures support from both state and federal government when it is implemented.

There are serious obstacles to the fullest participation of states in federal decisionmaking. The legal and political structures of federal government tend to compartmentalize governmental responsibility and sovereignty regarding critical decisions, making both state and federal parties reluctant to accept compromises for which they must be accountable within their respective political systems. Furthermore, although full state participation in planning may be invited, the relative lack of manpower, technical expertise, and funding at the state level often serves to reduce the actual state participation possible. The states are, in effect, implicated in decisions when they have in reality been only observers in the decisionmaking process.

The Water Resources Planning Act of 1965[54] set in motion an

[53] A. LEOPOLD, A SAND COUNTY ALMANAC (1966).
[54] 42 U.S.C. §§ 1962 to 1962d-14 (1970).

important experiment in federal-state cooperative planning. The River Basin Commissions which have been established in some regions are an example of intimate cooperation between federal and state agencies in developing an approach to water resource management.[55] Several similar interstate commission arrangements, with federal participation, have been established. In general, both state and federal parties have approached such arrangements gingerly and there has been a long learning period. The best of these experiments, however, show promise of integrating state viewpoints into federal policymaking.

As the PLLRC recommended, we need a federal program to encourage improvement in state and local land resource decisionmaking—decisionmaking which considers, balances, and where possible, accommodates all competing demands for the land—economic and noneconomic—in an open manner with the full participation of landowners and the public.[56]

This program would provide federal grants to the states to assist them to inventory their land resources, retain competent professional staff, develop planning and institutional procedures both to avoid, where possible, and resolve unavoidable land resource conflicts, and to develop and implement land resource programs for critical areas and uses of more than local concern. It would provide the states with a better handle on federal activities within their borders by requiring that federal activities which significantly affect land use in states receiving grants under the proposal be consistent with the state land resource programs except in cases of overriding national interest as determined by the President.

The legislation should authorize experimentation with federal-state regional land use planning commissions. These Commissions would serve as the focal point for all federal-state land and resource planning. These could build on the experience of the Joint Federal-State Land Use Planning Commission for Alaska established by the Alaska Native Claims Settlement Act of 1971[57] and of the River Basin Commissions under the Water

[55] *Id.* § 1962b-6.
[56] PLLRC REPORT 61.
[57] *See* note 39 *supra.*

Resources Planning Act of 1965.[58] Only by such a mechanism can we achieve a truly coordinated national land use policy, and meet the objective stated by the Commission: "[F]eeling the pressures of an enlarging population, burgeoning growth, and expanding demand for land and natural resources, the American people today have an almost desperate need to determine the best purposes to which their public lands and the wealth and opportunities of those lands should be dedicated."[59]

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[58] *See* note 54 *supra.*

[59] PLLRC REPORT 1.