

University of Colorado Law School

Colorado Law Scholarly Commons

The Future of Natural Resources Law and Policy
(Summer Conference, June 6-8)

2007

6-6-2007

Federalism and Natural Resources Policy [outline]

Robert L. Fischman

Follow this and additional works at: <https://scholar.law.colorado.edu/future-of-natural-resources-law-and-policy>



Part of the [Administrative Law Commons](#), [Animal Law Commons](#), [Biodiversity Commons](#), [Climate Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Energy and Utilities Law Commons](#), [Energy Policy Commons](#), [Environmental Law Commons](#), [Environmental Policy Commons](#), [Forest Management Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), [Jurisdiction Commons](#), [Land Use Law Commons](#), [Law and Society Commons](#), [Legal Education Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Litigation Commons](#), [Natural Resource Economics Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Oil, Gas, and Energy Commons](#), [Oil, Gas, and Mineral Law Commons](#), [Peace and Conflict Studies Commons](#), [President/Executive Department Commons](#), [Property Law and Real Estate Commons](#), [Science and Technology Law Commons](#), [State and Local Government Law Commons](#), [Sustainability Commons](#), [Torts Commons](#), [Urban Studies and Planning Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

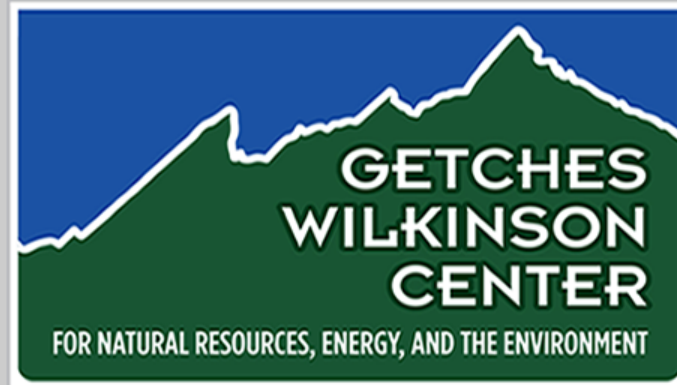
Citation Information

Fischman, Robert L., "Federalism and Natural Resources Policy [outline]" (2007). *The Future of Natural Resources Law and Policy (Summer Conference, June 6-8)*.
<https://scholar.law.colorado.edu/future-of-natural-resources-law-and-policy/21>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



William A. Wise Law Library
COLORADO LAW
UNIVERSITY OF COLORADO BOULDER



Getches-Wilkinson Center Collection

Robert L. Fischman, *Federalism and Natural Resources Policy* [outline], in *THE FUTURE OF NATURAL RESOURCES LAW AND POLICY* (Natural Res. Law Ctr., Univ. of Colo. Law Sch. 2007).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

Federalism and Natural Resources Policy

Robert L. Fischman
Indiana University School of Law–Bloomington

June 6, 2007

Outline of Presentation

I. Distinctive Aspects of Natural Resources Federalism

A. Land use connection

B. Proprietary control

II. Distinctive Types of Natural Resources Federalism

A. Place-based collaboration:

Tailoring to a region rather than imposing uniform approach

B. State favoritism in federal process:

Direct avenue and enhanced weight for participating in federal decision-making

C. Federal deference to state process:

Federal agency employs state preference adopted pursuant to federal standards

III. Policy Directions

Enlisting state and local interests has been official policy at least since the New Deal, especially in watersheds (basins).

U.S. agencies can pick and choose state/tribal partners who agree with federal preferences

Cooperative conservation in the Bush (II) years

IV. Legal Directions: The Meaning of Savings Clauses

(e.g. 16 U.S.C. 668dd(m), “Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System. Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans.”)

A. A taxonomy of savings clauses

B. The interpretation of savings clauses

1) Weak versions: *Riverside Irrig. Dist.*

General policy statement.

Statute does not mean to occupy entire field: preempt just what statute is specific about.

2) Strong versions:

Chevron-type interpretive rule: use savings clause to tilt toward state in interpreting
ambiguous language.

Heightened scope of review of record (*Wyoming*).

V. Case Study: Elk Management in the National Elk Refuge

VI. The Future

A. Uniformitarianism *vs.* catastrophism: present is key to understanding the past, and the past is key to understanding the future *vs.* challenge of climate change demands entirely new approaches.

B. Beware of optimism about a golden era of good feelings approaching.

C. Money is central: as an inducement for cooperation, as an issue of equity.

D. Is federalism something more than politics?