

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Publications

Colorado Law Faculty Scholarship

---

1982

### Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands

Charles F. Wilkinson

*University of Colorado Law School*

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Dispute Resolution and Arbitration Commons](#), [Environmental Law Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), [Jurisdiction Commons](#), [Legal History Commons](#), [Natural Resources Law Commons](#), and the [State and Local Government Law Commons](#)

---

#### Citation Information

Charles F. Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 UCLA J. ENVTL. L. & POL'Y 145 (1982), available at <https://scholar.law.colorado.edu/faculty-articles/1067>.

#### Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact [rebecca.ciota@colorado.edu](mailto:rebecca.ciota@colorado.edu).

# HEINONLINE

Citation:

Charles F. Wilkinson, Cross-Jurisdictional Conflicts:  
An Analysis of Legitimate State Interests on Federal  
and Indian Lands, 2 UCLA J. Envtl. L. & Pol'y 145, 168  
(1982)

Provided by:

William A. Wise Law Library

Content downloaded/printed from [HeinOnline](http://heinonline.org)

Fri Oct 27 11:51:04 2017

-- Your use of this HeinOnline PDF indicates your acceptance  
of HeinOnline's Terms and Conditions of the license  
agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from  
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope  
of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to  
your smartphone or tablet device

# Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands

*Charles F. Wilkinson\**

## INTRODUCTION

During the last fifteen years the stakes have steadily gone up in the combat among the state, tribal and federal governments on federal and Indian lands. Tensions have been aggravated by the familiar exertions of too many bureaucrats from various governments seeking to shoehorn their jurisdiction into every available vacant hollow. The conflict in the American West has also involved increasingly big money. Leaving aside the private fortunes to be made, so sallow a phrase as "jurisdiction" sets the ground rules for the annual distribution of billions of dollars of tax revenues and in-lieu payments.<sup>1</sup>

But the emotional stakes may be higher yet. We have seen it in the eyes of those westerners watching the helicopter lifts of wild horses and burros out of sage and juniper canyons—in the eyes of people like Wild Horse Annie, who have expended so much of their souls to provide some measure of benevolence to these animals, and in the eyes of ranchers who view the same animals as pests that steal valuable forage from cows and sheep and that

---

\* Professor of Law, School of Law, University of Oregon; during the writing of this article Visiting Professor of Law, School of Law, University of Minnesota. Ellen Guerin and Valerie Lind Hedquist made major contributions toward the publication of this piece. I dedicate this article to Prof. Ralph W. Johnson of the University of Washington School of Law, who has as good a mind and spirit as the public and Indian lands know, or are likely to know.

1. See, e.g., ADVISORY COMM. ON INTERGOVERNMENTAL REL., PAYMENTS IN LIEU OF TAXES ON FEDERAL REAL PROPERTY (1981); U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESS: ASSESSING THE IMPACT OF FEDERAL AND STATE TAXES ON THE DOMESTIC MINERALS INDUSTRY (1981); ADVISORY COMM. ON INTERGOVERNMENTAL REL., THE ADEQUACY OF FEDERAL COMPENSATION TO LOCAL GOVERNMENTS FOR TAX EXEMPT FEDERAL LANDS (1978).

erode away hillsides with their clumsy, plate-sized hoofs.<sup>2</sup> We have heard the essence of the conflict in the blaring horns of hardworking California North Coast loggers who organized noisy caravans of log trucks to drown out equally impassioned pleas of environmentalists at congressional hearings on an expanded Redwood Park.<sup>3</sup> The California State Director of the Bureau of Land Management (BLM) is quite confident that he both saw and heard the millennial conflict when he stood on a sand dune in the Southern California desert during the hottest days of the off-road-vehicle conflict and saw the members of the Desert Lily Lovers Society coming up one side of his sand dune and, coming up the other, the stalwarts of the Barstow Bombers.<sup>4</sup>

The level of emotional intensity has been at least as high over Indian issues, though there are fewer people and acres involved: while the United States owns over thirty percent of all land in the country, Indians own about two and one-half percent of all the nation's land, or fifty-two million acres.<sup>5</sup> The recent but already historic fishing rights dispute of the Pacific Northwest brought us vivid memories of good fishers, Indian and non-Indian, who had much in common but who saw themselves left with no alternative but to wage a seemingly ceaseless campaign of sit-ins, fish-ins, and resistances to arrest in order to preserve their respective livelihoods, traditions, and, in the case of the Indians, religions.<sup>6</sup> Ironically, they fought each other while knowing full well that the

---

2. Trueblood, *Disaster on the Western Range*, FIELD AND STREAM, January 22, 1975, at 14; Weiskopf, *Wild West Showdown*, SPORTS ILLUSTRATED, May 5, 1975, at 87; see generally Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1976); Note, *Constitutionality of the Free Roaming Wild Horses and Burros Act: The Ecosystem and the Property Clause in Kleppe v. New Mexico*, 7 ENVTL. L. 137 (1976).

3. See generally Fraker & Lubenow, *Redwood Protest: Loggers' Demonstration Against Major Expansion*, NEWSWEEK, Apr. 25, 1977, at 30; *Giant Battle in Redwood Country*, BUS. WEEK, Apr. 25, 1977, at 30; *Logger Outcry Obscures Slow Death of Ancient Park Redwoods*, NAT'L PARKS & CONSERVATION MAG., June, 1977, at 22. For the Redwood Park litigation, see *Sierra Club v. Department of the Interior*, 424 F. Supp. 172 (N.D. Cal. 1976); *Sierra Club v. Department of the Interior*, 398 F. Supp. 284 (N.D. Cal. 1975); *Sierra Club v. Department of the Interior*, 376 F. Supp. 90 (N.D. Cal. 1974); Hudson, *Sierra Club v. Department of Interior: The Fight to Preserve Redwood National Park*, 7 ECOLOGY L.Q. 781 (1979).

4. Jim Ruch (California Director for the Bureau of Land Management), untitled address, reprinted in THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCES LAW AND MANAGEMENT: CONFERENCE PROCEEDINGS 204 (H.C. Dunning ed. 1981).

5. For Indian land statistics, see U.S. DEP'T OF COMMERCE, FEDERAL AND STATE INDIAN RESERVATIONS (1975). For public land holdings, see BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 10 (1977).

6. AMERICAN FRIENDS SERVICE COMMITTEE, UNCOMMON CONTROVERSY 108-13 (1970).

depletion of the fish runs was caused by decades of poor logging practices, overdevelopment of the watersheds, and collections of dams. Taken together, these actions clouded, warmed, and throttled most of the great salmon and steelhead streams from the Klamath River in California north to the Canadian border.<sup>7</sup> The Indian fish wars leave us with even more disturbing memories of state officials who sought figuratively to stand astride Puget Sound and the Columbia River in a manner all too reminiscent of the way in which Orville Faubus literally stood astride a schoolhouse threshold in Arkansas two decades earlier.<sup>8</sup>

Indian-state conflicts raise questions that may be even more elusive of resolution than the resource dilemmas. Exactly who, for example, should decide adoption and guardianship of young Indian children whose parents have by any standard gone awry—progressive, well-educated state social workers, typically with ample compassion for Indian people, or new tribal judges and newer-yet tribal social workers, who understand the traditions and needs of their people but typically lack formal education in the weighty task of assigning young children to new homes and new parents?

One can quickly see, then, that bland words like jurisdiction, regulation and governmental authority fail to alert us to the real nature of the struggles on federal and Indian lands. These phrases

---

7. See, e.g., A. NETBOY, *THE COLUMBIA RIVER SALMON AND STEELHEAD TROUT: THEIR FIGHT FOR SURVIVAL* 142-147 (1980).

8. This comparison was expressly made by the Ninth Circuit Court of Appeals in language approved by the Supreme Court. Quoting from *Puget Sound Gillnetters Ass'n v. United States Dist. Court*, 573 F.2d 1123, 1126 (9th Cir. 1978), the Court made this observation concerning the conduct of Washington state officials:

The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.

*Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 n.36 (1979) (citations omitted). See also *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), where the concurring opinion stated:

The record in this case, and the history set forth in the *Puyallup* and *Antoine* cases, among others, make it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court. This responsibility should neither escape notice nor be forgotten.

502 F.2d at 693 (Burns, J., concurring).

all obscure a deeper well-spring: whether one group will be allowed to impose its ideology on others. Wild Horse Annie, the western rancher, the long-time Redwood Park hiker, the admirer of the mariposa lily, the Barstow Bomber, the Indian fisher, the steelheader, the tweed-jacketed professional social worker, the tribal elder, and scores of other groups and individuals have each found that a particular government—state, federal or tribal—holds out the best hope for furthering their own deeply-held ideologies. To all of them the fulfillment or frustration of their ideologies is a deadly serious business. The Sagebrush Rebellion is one, but not the only, result.

In this article, I will first summarize the legal and policy structure that allocates jurisdictional prerogatives and limitations—the balance of ideology—on and near the federal and Indian lands in the West. I will then assess the legitimate interests of the states on federal and Indian lands. The question of legitimate interests is pivotal: the fulfillment of those interests should be, and I think will be, at the center of the continuing debate over whether, and how, to alter the allocation of finances and ideology in this field.

## I.

### FEDERAL AND INDIAN JURISDICTION OVER ADJACENT PRIVATE LANDS

Both the federal and Indian governments have authority to exercise jurisdiction on adjacent private lands as an incident of their power to regulate their own lands. The United States has infrequently regulated off the federal lands to further public lands policy but, where it has, federal power has been upheld.<sup>9</sup> Such

---

9. *E.g.*, *Camfield v. United States*, 167 U.S. 518 (1897) (upholding a statutory prohibition against fences on private lands that limit access to public lands). Federal control over non-federal lands may also be achieved by administrative regulations, rather than by express action in a statute, if the regulations are adopted pursuant to delegated authority from Congress. *United States v. Brown*, 552 F.2d 817 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977) (prohibition of hunting by Park Service); *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979) (prohibition of fires by Forest Service).

Private activities can also be affected—though not, technically, regulated—by the establishment of federal reserved water rights. *Cappaert v. United States*, 426 U.S. 128 (1976). Federal reserved rights for purposes other than Indian reservations generally appear to be limited in scope. See *United States v. New Mexico*, 438 U.S. 696 (1978), and the authorities cited *infra* in notes 16 and 17.

The most recent court case involved a 1978 statute prohibiting motorized vehicles on some non-federal holdings within the Boundary Waters Canoe Area Wilderness in Minnesota. *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 102 S. Ct. 1645 (1982) (upholding congressional prohibition of motorboats and snowmobiles within designated areas of the Boundary Waters Canoe Area Wilderness). See *gener-*

authority seems plainly to exist under the Property Clause, which gives Congress broad powers to legislate over, and protect, federal lands.<sup>10</sup> The limits, as opposed to the existence, of Property Clause power over adjacent lands, may in the future pose more difficult questions. We may reasonably wonder, for example, what Congress and federal land managers can do to protect migratory wildlife whose habitat is primarily on federal lands or to preserve the peace and quiet on public lands in the face of noise, traffic, signs, and other activities on adjacent non-federal lands.<sup>11</sup> But such questions have just begun to come to the fore in the past few years and are not likely to be asserted by the current administration, which seems little interested in those kind of activist management practices.

Indian tribal governments have similar powers over private land holdings within their reservations. In March 1981 the Supreme Court, while recognizing that such tribal authority exists, seemed to impose fairly tight strictures on the power: activity on non-tribal lands must directly affect some significant tribal interest or the tribe is without power.<sup>12</sup> The tough cases—those involving pollution and migratory animals that use tribal lands as part of

---

ally Gaetke, *The Boundary Waters Canoe Area Wilderness Act of 1978: Regulating Non-Federal Property Under the Property Clause*, 60 OR. L. REV. 157 (1981).

10. The Property Clause of the Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." U.S. CONST. art. IV, § 3, cl. 2. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (upholding the Wild and Free Roaming Horses and Burros Act on the ground that the Property Clause authorizes Congress to protect wildlife living on public lands).

11. For a discussion of the power of Congress and, more specifically, the Park Service, to regulate private lands adjacent to the national parks, see Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976). See also *supra* the Redwood Park opinions, note 3. The Park Service has attempted, although not always successfully, to eliminate "aesthetic nuisances" adjacent to the parks. See, e.g., *United States v. Arlington County*, [12 Decisions] ENV'T REP. (BNA) 1817 (1979) (Arlington Tower); cf. *New Jersey Builders Ass'n v. Dep't of Envt. Protection*, [13 Decisions] ENV'T REP. (BNA) 1541 (1979) (Pine Barrens). See generally Gaetke, *Congressional Discretion Under the Property Clause*, 33 HASTINGS L.J. 381 (1981).

12. *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (no tribal authority to regulate fishing by non-Indians on non-Indian land where the tribe was not historically a fishing tribe and where the tribe had long acquiesced to state regulation of fishing by non-Indians). A subsequent case stands for considerably broader tribal powers than suggested by *Montana*, although tribal regulation over non-Indians lands was not directly involved. *Merrion v. Jicarilla Apache Tribe*, 102 S. Ct. 894 (1982). Four circuit court opinions since *Montana* have upheld tribal authority over non-Indians. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, 102 S. Ct. 657 (1981); *Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen*, 665 F.2d 951 (9th Cir. 1982); *Cardin v. De La Cruz* 671 F.2d

their habitat—have not yet reached the Supreme Court. But they soon will, since tribal governments, unlike federal officials now in power, are avid to establish control over nearby lands when activities there affect tribal interests. In my judgment it is still too early to define the contours of those tribal interests that will be sufficient to allow tribal regulation of non-Indians on non-Indian land within reservation boundaries.

Indian child custody, adoption and similar proceedings present a dramatic departure from the principles just discussed. Tribes have often resolved those kinds of issues for on-reservation children. With Congress' express sanction in the Indian Child Welfare Act of 1978, most tribes now have jurisdiction over these critical issues even though the children may reside off the reservations.<sup>13</sup> The 1978 Act is surely constitutional even though it reaches into a sensitive subject matter historically committed to state jurisdiction.<sup>14</sup> To date, it is perhaps Congress' furthest reach into state authority under the Indian Commerce Clause and demonstrates the sweeping power of Congress to vest regulatory authority in tribal governments, even outside of Indian country.

Indian reserved hunting and fishing rights, Indian reserved water rights, and, to a much lesser extent, federal reserved water rights also affect private lands, though they do not normally involve regulation per se.<sup>15</sup> These rights are extraterritorial to Indian and federal lands, because persons on private land may be required to allow anadromous fish or water to remain in the stream even though they would be allowed to take the fish or capture the water under state law were it not for the reserved right. *United States v. New Mexico*<sup>16</sup> makes it clear that most federal

---

363 (9th Cir. 1982); *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982).

13. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (Supp. I 1981). See generally Guerrero, *Indian Child Welfare Act of 1978*, 7 AM. INDIAN L. REV. 51 (1979).

14. E.g., *In the Matter of the Guardianship of D.L.L. and C.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980). Congressional power under the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, is very broad. See, e.g., *United States v. John*, 437 U.S. 634 (1978); *United States v. Antelope*, 430 U.S. 641 (1977); *United States v. Kagama*, 118 U.S. 375 (1886). The Supreme Court has never found a congressional action to be beyond the reach of congressional power under the Indian Commerce Clause.

15. Some tribes, however, have sought to directly regulate non-Indian water rights on private land. See, e.g., *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, 102 S. Ct. 657 (1982) (upholding tribal and federal authority).

16. 438 U.S. 696 (1978) (holding that the federal reservation of the Gila National Forest did not impliedly reserve a minimum instream flow for "aesthetic, environ-



lands carry only minimal reserved water rights.<sup>17</sup> But the probable limited impact of federal reserved rights does not apply to Indian resource rights. The Indian fishing cases, of course, have made their mark during the 1970's on non-Indian commercial and sport fishing and on the public consciousness.<sup>18</sup> A major resource issue in the 1980's and 1990's is likely to be attempts by tribes to exercise their superior reserved water rights in the American West, a region characterized by its geographic aridity and by its contemporary water crisis.<sup>19</sup>

## II.

### STATE JURISDICTION ON FEDERAL AND INDIAN LANDS

In spite of the potential significance of federal and tribal jurisdiction on private lands, most of the emotions alluded to earlier have been vented over the reverse situation, state jurisdiction on federal and Indian lands. The subject has also been characterized by a number of misconceptions. We need to divide the inquiry into three separate kinds of lands: federal enclaves, federal resource lands, and Indian lands.

---

mental, recreational, or 'fish' purposes"). However, the majority opinion stated in dictum: "Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water." *Id.* at 702.

17. Exceptions include some low-elevation wildlife refuges established early in this century, which may force cutbacks in irrigation on adjacent private lands. Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation & the Bureau of Land Management, 86 Interior Dec. 553, 602-04 (1979) (Solic. Op.).

18. See, e.g., Jones, *Clamor Along the Klamath*, SPORTS ILLUSTRATED, June 4, 1979, at 30; Nash, *Chippewas Want Their Rights: Disputes Over Hunting and Fishing Regulations on Reservations in Michigan and Minnesota*, TIME, Nov. 26, 1979, at 54; Starnes, *New Indian Ripoff*, OUTDOOR LIFE, Oct. 1979, at 15.

19. See generally Back & Taylor, *Navajo Water Rights: Pulling the Plug on the Colorado River?*, 20 NAT. RESOURCES J. 71 (1980); DuMars and Ingram, *Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or a Mirage?*, 20 NAT. RESOURCES J. 17 (1980); Note, *Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Montana Water Use Act*, 41 MONT. L. REV. 73 (1980); Note, *Indian Reserved Water Rights: the Winters of Our Discontent*, 88 YALE L.J. 1689 (1979); Pelcyger, *The Winters Doctrine and the Greening of the Reservations*, 4 J. CONTEMP. L. 19 (1977).

Popular attention has also focused on the issue of Indian water rights. See, e.g., Gebhart, *Who Owns the Missouri?*, PROGRESSIVE 44 (1980); N.Y. Times, Dec. 17, 1980, at 15, col. 1; see also, Boslough, *Rationing a River*, SCIENCE '81, June 1981, at 26.

### A. Federal Enclaves

Most federal enclaves were established in earlier eras when a need was perceived to create jurisdictional islands under exclusive federal control so that specified federal activities could be conducted without interference from the states. "Federal enclave" too often is wrongly used as a generic term to describe all public lands and even Indian lands. In fact, enclaves comprise only about six percent of all federal lands. They were created by agreements between states and the federal government in which the state in question expressly transferred its jurisdiction to the United States.<sup>20</sup> Enclaves include most post offices and federal office buildings, all military bases, some national parks, and other miscellaneous holdings. Almost without exception, resource development on federal enclaves is not an issue.

They are not making many federal enclaves today<sup>21</sup> but the ones in existence continue to operate under so-called exclusive federal jurisdiction. It is an outmoded kind of installation. Recent cases have shown that the United States has ample protection from the states by virtue of its sovereign immunity, its superior sovereignty, and its ability to pass specialized laws to oust state jurisdiction when necessary.<sup>22</sup> Further, "pure" federal enclaves could often result in clumsy and ambiguous arrangements in the many situations where no federal law is applicable and state law could not be invoked due to the exclusivity of federal law. Congress has sought to ameliorate the inconvenience by voluntarily limiting federal exclusive jurisdiction to allow the operation of specified state regulatory laws and tax laws.<sup>23</sup> This "assimilation"

---

20. On federal enclaves, *see generally* G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 144-60 (1981).

21. In 1940 Congress curtailed the establishment of federal enclaves:

[T]he flood of transfers of legislative jurisdiction was stayed, by an amendment to section 355 of the Revised Statutes of the United States which eliminated the presumption of Federal acceptance [40 U.S.C. § 255 (1977)] . . . This ended a period of 100 years during which the Federal Government, with relatively minor exceptions, acquired legislative jurisdiction over substantially all of its land acquisitions within the States.

U.S. DEP'T OF JUSTICE, *FEDERAL LEGISLATIVE JURISDICTION* 49-50 (1969).

22. *E.g., infra* notes 25 & 26.

23. Enclaves are said to be under "exclusive" federal jurisdiction but in fact state laws have considerable effect in enclaves. Federal jurisdiction in an enclave can be less than exclusive if the state reserved regulatory jurisdiction when the installation was created. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938). Criminal cases arising in enclaves go to federal court, but state substantive criminal law applies if no federal statute is on point. 18 U.S.C. § 13 (1976); *United States v. Sharpnack*, 355 U.S. 286 (1958). National parks often incorporate state fishing laws and state

of state law into enclaves is good lawmaking because the federal government is not equipped to exercise the broad range of authority we call the police power: health, safety, wildlife, criminal, civil, and commercial laws are all the business of the states, which have comprehensive codes to regulate such matters. In addition, cash payments are made to the states in lieu of taxation of federal enclave lands.<sup>24</sup> Thus, even in federal enclaves, states exert considerable legal influence and receive substantial revenues.

## B. Resource Lands

For lack of a better term, all federal lands other than federal enclaves can be lumped under the category of resource lands. Unlike federal enclaves, states generally need no invitation or permission to extend their laws onto the approximately 700 million acres of resource lands. True, the states cannot directly tax or zone federal land but that intergovernmental immunity of the United States is narrow.<sup>25</sup> True, the United States can preempt (or override) state laws, but preemption requires affirmative action by Congress.<sup>26</sup> In the meantime, state law governs.<sup>27</sup>

The result, contrary to the popular perception, is that state laws have extensive application on federal resource lands. That is exactly as it should be, for—as noted above—the states' business is to promulgate and enforce a comprehensive police power.

States have influence over, and receive benefits from, federal resource lands even in those areas where their laws do not control. As is the case with federal enclaves, Congress has voluntarily made adjustments to accommodate the states. Numerous statutes require the federal government to consult extensively with the af-

---

fishing licenses are required. The Buck Act allows states to collect income, gasoline, sales, and use taxes in federal enclaves. 4 U.S.C. §§ 104-110 (1976). Congress also has provided that state unemployment and workers' compensation laws apply. 26 U.S.C. § 3305(d) (1976); 40 U.S.C. § 290 (1976). A wide range of other laws apply, including divorce, motor vehicle, child custody, and voting provisions. Impact Aid is provided to some local school systems. *See generally* Evans v. Cornman, 398 U.S. 419 (1970).

24. *See* the reports of the Advisory Commission on Intergovernmental Relations, *supra* note 1.

25. *E.g.*, United States v. County of Fresno, 429 U.S. 452 (1977) (upholding California tax on federal employees on their possessory interests in housing owned and supplied to them by the federal government as part of the employees' compensation).

26. *E.g.*, Kleppe v. New Mexico, 426 U.S. 529 (1976) (upholding federal preemption of state laws relating to wild horses and burros).

27. *See generally* Wilkinson, *The Field of Public Land Law: Some Connecting Threads and Future Directions*, 1 PUB. LAND L. REV. 1, 19-23 (1980).

fects states over resource development and land-use planning matters.<sup>28</sup> And finances have hardly been ignored: recognizing the states' inability to impose a property tax on federal lands, Congress makes voluntary payments to the states. These payments totalled over two billion dollars in 1979, the last year for which figures are available.<sup>29</sup>

But there is more, and we now move toward some mighty irony. July 2, 1981 may prove to have been a fateful day in the history of the American West. On that date the Supreme Court handed down its opinion in *Commonwealth Edison Co. v. Montana*,<sup>30</sup> upholding Montana's thirty-percent severance tax on coal extracted in the state, including coal on the federal resource lands. This enormous (that is Justice Blackmun's phrase<sup>31</sup>) source of revenue may generate as much as twenty billion dollars for Montana alone through the year 2010.<sup>32</sup> I say there is powerful irony here because the Sagebrush Rebels' complaints over the burdens western states must endure because of the presence of the public lands now begin to ring a bit hollow. Indeed, there are many who have begun calling the western states the "haves" and the remaining states the "have nots" in the critical area of energy, due to the concentration of easily accessible, low-sulphur federal coal and other fuel minerals in the West.<sup>33</sup>

### C. Indian Lands

The law regarding state jurisdiction on Indian lands is markedly different because state jurisdiction is much more circumscribed, especially when Indians themselves are involved. For most, but not all, purposes state law does not operate within the boundaries of Indian reservations because of the long-standing

---

28. *E.g.*, Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1720, 1721(c), 1733(d), 1747, 1765(a) (1976); National Forest Management Act of 1976, 16 U.S.C. § 1612 (1976); Fish and Wildlife Coordination Act, 16 U.S.C. § 661 (1976); Intergovernmental Cooperation Act of 1968, 42 U.S.C. §§ 4231-4233 (1976). State wildlife laws have pervasive application on federal resource lands. Coggins, *The Law of Wildlife Management on the Federal Public Lands*, 60 OR. L. REV. 59 (1981).

29. ADVISORY COMM. ON INTERGOVERNMENTAL REL., PAYMENTS IN LIEU OF TAXES ON FEDERAL REAL PROPERTY, *supra* note 1, at 47.

30. 453 U.S. 609 (1981).

31. *Id.* at 641 (dissenting opinion of Justice Blackmun).

32. *Id.*

33. *E.g.*, SCIENCE AND PUBLIC POLICY PROGRAM, UNIVERSITY OF OKLAHOMA, ENERGY FROM THE WEST: A TECHNOLOGY ASSESSMENT OF WESTERN RESOURCE DEVELOPMENT (1981).

federal commitment to protect tribal self-government.<sup>34</sup> The courts have been fairly quick to find that federal laws have occupied the field and that state laws are excluded, especially when non-Indians are doing business with Indians.<sup>35</sup> When no specific federal law is controlling, various results in favor of or against state jurisdiction have been reached depending on whether the application of state law would "infringe upon tribal self-government."<sup>36</sup> Where only Indians are involved, the courts have been extremely reluctant to allow any state or local jurisdiction because the application of a state law to a tribe or reservation Indian normally has some impact on tribal self-government.<sup>37</sup> The only state laws that have been upheld against Indians in Indian country during the modern era are requirements that Indians collect state taxes when sales of cigarettes are made to non-Indians; sales to Indians, however, are exempt from taxation.<sup>38</sup> States receive financial revenues from Indian reservations in a variety of ways.<sup>39</sup>

---

34. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973). See generally F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 270-79 (1982 ed.).

Under "Public Law 280," states have civil and criminal judicial, but not regulatory, jurisdiction over designated reservations. See Act of Aug. 15, 1953, ch. 505, § 7, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. §§ 1360, 1360 note). For a detailed analysis, see Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975). The Act allows state judicial jurisdiction over private causes of action on affected reservations but does not extend state tax or regulatory laws into Indian country. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

There are special complex, statutory provisions for criminal cases on reservations not covered by "Public Law 280." See generally Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976); F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 286-308 (1982 ed.).

35. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965).

36. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (state not allowed to tax non-Indian logging company doing business with tribe); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) (state allowed to tax sales of cigarettes by Indians to non-Indians); *Kennerly v. District Court*, 400 U.S. 423 (1971) (state court not allowed to assert jurisdiction over contract action by non-Indian against Indian); *Williams v. Lee*, 358 U.S. 217 (1959) (same). Cf. *Montana v. United States*, 440 U.S. 544 (1981) (state allowed to regulate fishing by non-Indians on facts of case).

37. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Fisher v. District Court*, 424 U.S. 382 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973).

38. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). Outside of Indian country, state law presumptively applies to Indians. E.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

39. F. COHEN, *HANDBOOK OF INDIAN LAW* 676-77 (1982 ed.).

The restrictive nature of state jurisdiction in Indian country is due to a number of legal and historical factors. The central reason is that Indian treaties were, at their essence, not just a guarantee of a tribal land base but also a promise of a tribal jurisdictional base. The treaties were intended to make jurisdictional islands of Indian reservations where the tribes could govern themselves and be free of local non-Indian pressures.<sup>40</sup> Those notions have been eroded somewhat and are not absolute today, but they continue to explain why the courts and Congress have generally been stingy in allowing state jurisdiction in Indian country.

### III.

#### LEGITIMATE INTERESTS OF THE STATES

The preceding discussion is a summary of the law as it is. I would like to spend some time now evaluating it in very general terms. The ultimate question is whether the existing structure substantially recognizes and fulfills the legitimate interests of the states.

To begin the discussion I must allude to the Sagebrush Rebellion. This movement is not new. It is a continuation of sentiments that were heartfelt when the first settlers cut over the Appalachians into the Ohio Valley: administrators in far-away Washington should not control settlers on the furthest reaches of the continent. That concern—variously phrased as local rights or states rights—raged in Alabama and Missouri in the 1830's, in Texas and Wisconsin in the 1840's, in California and Oregon in the 1850's, in Nevada and Colorado in the 1860's, and so on.<sup>41</sup> And it rages today. But that general concern for local control needs to be parsed. Some elements of that broad concern are legitimate and some are not.

The Sagebrush Rebellion is bankrupt on an essential issue. The most expansive claim of the Sagebrush Rebels is that the states are entitled as a matter of law to have the public lands in the West, or most of them, transferred to the western states. The Rebels usually argue that the original thirteen states do not have large blocs of federal lands within their boundaries and that the western states, as a matter of constitutional law and fairness, should be

---

40. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Merrion v. Jicarilla Apache Tribe*, 102 S. Ct. 894 (1982).

41. See generally Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C.D. L. REV. 317, 317-329 (1980).

similarly situated.<sup>42</sup> This is misleading as a matter of history and law.

The original thirteen states owned—under settled principles of American property law—most of the land within their boundaries after the American Revolution. When they entered the union they refused to relinquish that ownership to the new federal government.<sup>43</sup> That was their prerogative, as property owners.

Then the United States acquired vast areas of land. The young nation negotiated the Louisiana Purchase with France, the Northwest Compromise with Great Britain, the Treaty of Guadalupe Hildalgo and the Gadsden Purchase with Mexico, the Alaska Treaty with Russia, and others.<sup>44</sup> The United States acquired that land in fee simple absolute—as complete owner—subject only to a small number of perfected private titles and to the rights of Indians to reside upon the land.<sup>45</sup> There were no states to claim ownership.

The United States began to create territories, then states, out of its public domain. Whenever a state was to be carved out of a territory, the United States made a bargain with the representatives of the territory. The bargaining for land was always fierce. In addition to smaller grants for specific purposes, the early states received grants for schools of one section in each township, roughly 1/36th of the land within the state. Later states normally were granted two school sections in each township. Utah, Arizona, and New Mexico received more and Alaska, in 1959, received more yet.<sup>46</sup> But it was always a bargain with explicit rules crafted by American property law;<sup>47</sup> the United States owned the land and states obtained whatever they were able to bargain for. After each

---

42. The Rebels' position is summarized in Note, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 UTAH L. REV. 505, 516-25. See also Note, *The Property Power, Federalism and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980).

43. Although the original states retained title to lands within their borders, they agreed to cede to the United States their claims to lands beyond their western boundaries. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 49-57 (1968).

44. *Id.* at 75-86.

45. In treaties providing for acquisition of land from foreign nations, the United States agreed that grantees of land from those nations would retain title to their property. B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 23-25 (1965). On the rights of the United States *vis-a-vis* the Indian tribes, see *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

46. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 285-318 (1968).

47. The Supreme Court has analogized statehood transactions to contracts between private parties. *E.g.*, *Andrus v. Utah*, 446 U.S. 500, 507 (1980); *Stearns v. Minnesota*, 179 U.S. 223, 249-50 (1900).

statehood transaction most land in the region remained in federal ownership, just as it had been before the transaction. Most western states expressly agreed to "forever disclaim all right and title to the unappropriated public lands" within the state and to leave federal lands "at the sole and entire disposition of the United States."<sup>48</sup>

A few cases during the mid-nineteenth century suggested, always in dictum, that the United States retained its land with the idea that it would later be transferred away to the states or private parties.<sup>49</sup> The Supreme Court was paraphrasing—with considerable accuracy—the nature of Congressional policy at that time. Congressional policy has since changed, just as any property owner has the right to consider selling its property and then to recant when circumstances change. The general language in those two or three court opinions has never been a rule of law, has not been followed, and has been discredited in a modern context.<sup>50</sup>

The United States owns the land. The states have no legitimate claim to ownership. But the existence of federal ownership does not settle policy issues of how much control the western states should have over land owned by the federal government within their boundaries.

Plainly state control cannot be justified simply by saying that federal land should be subject to state regulation because private land within state boundaries is subject to state law. This analysis

---

48. Act of Mar. 3, 1975, 18 Stat. 474, 475 (Colorado Enabling Act). *See also, e.g.*, Act of Mar. 21, 1864, 13 Stat. 30, 31 (Nevada Enabling Act); Act of July 16, 1894, 28 Stat. 107, 108 (Utah Enabling Act). Earlier statehood acts had disclaimed state ownership over public lands with different language, but with the same legal result. *See, e.g.*, Act of Sept. 9, 1850, 9 Stat. 452, 452-53 (1850) (California Statehood Act); Act of Feb. 14, 1859, 11 Stat. 383, 384 (Oregon Statehood Act). *See generally* Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C.D. L. REV. 317, 324-25 (1980).

Of the western states, only Texas and Hawaii depart from the pattern outlined in the text. Texas, as an independent Republic at the time of statehood, retained title to lands within its state boundaries. P. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 80-83 (1968). Therefore, there was never public domain land in Texas and all public lands in that state have been acquired by the United States since statehood. In Hawaii there was no unalienated public domain land remaining by the time of statehood in 1959. *Id.* at 316.

49. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 221-24 (1845). *See also* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

50. A unanimous Supreme Court has squarely held that the federal government exerts sovereign authority over the public lands. *Kleppe v. New Mexico*, 426 U.S. 529 (1976). *See generally* Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C.D. L. REV. 269, 278-80, 305-06 (1980) and the authorities cited there.



first ignores the fact that in our federal system the United States is a sovereign superior to local, county, and state governments—a superiority born of necessity after the quantum of local power under the Articles of Confederation had proved too cumbersome.<sup>51</sup> That essential supremacy is rooted in the Constitution and subject to no serious debate today. The unacceptable scattering effect of fifty superior governments is evident. Second, claims to state control must recognize that the ultimate owners of the public lands are literally all of the citizens of the United States. United States citizens in the West may be specially affected by the public land—for good and for bad—but all citizens have a stake in the western public lands and their resources: energy, hard rock minerals, timber, beef, water, recreation, and wilderness.

Nevertheless, citizens of western states can claim a special interest in public lands management. Because they live there, they may use, or be affected by uses on, the public lands to a disproportionate degree. Public lands policy more often and more directly affects their businesses and jobs; their hiking trails and snowmobile runs; their air, water, and vistas; and their tax rates.

Recognizing, then, a somewhat more diffuse national interest and a somewhat more direct western interest, how can we articulate the legitimate interests of the state governments on the federal lands? First, there is, in my view, an absolute right to economic equity. Federal installations cause local and state governments economic burdens (the costs of some roads, police and court systems, water and sewer service, and other services) and also economic benefits (federally constructed roads, fire protection, landing strips, and others). State and local governments should be made whole for the net costs of these financial burdens. This is no easy task. It is a tremendously technical and complex matter. As noted, the financial burdens imposed on the states by public lands policy are addressed by an extensive, shifting matrix of statutes.<sup>52</sup> Federal policy and law in this area should be continually re-evaluated as conditions change to be certain that the states are receiving economic equity.

What of the right asserted by the Sagebrush Rebels to control activities on public lands? There is sound basis for a state interest in regulating some conduct by private persons on the public lands; activities there may have impacts on private lands and, as noted,

---

51. *E.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 321-24 (1978).

52. *See supra* notes 23, 24, 28 & 29.

states have functioning systems to exercise the full range of police powers. But it flows irresistably from the fact of federal ownership and from the superior constitutional federal sovereignty that federal programs should not be subject to interference by the states. Thus states have a second broad legitimate interest, the right to exercise the police power over activities by private persons on the public lands up to the point that an ongoing federal program is thwarted. To give an example in resource development, it seems to me that a state should legitimately be able to regulate and control the environmental impacts of hardrock mining or mineral leasing but that it should not be able to zone federal land so as to prohibit that kind of activity outright.

Even in those areas of federal policy not directly subject to state control, the western states continue to have a legitimate interest in being heard and responded to when federal concerns do not rationally outweigh local concerns.<sup>53</sup> Though the eastern states' voice in public land policy can be adequately met by representation in Congress, that level of participation is insufficient for western states: access to Congress alone would not recognize the special western interest in the public lands and would not be sufficiently site-specific. It would not insure sufficient influence over on-the-ground decisions. The right of affected western governments to be heard must be expressly recognized by statutes and must be implemented in the land-management agencies. As noted, there is in place a range of statutory provisions that require federal land managers to consult with state and local interests and, where practical, to conform federal programs to state and local requirements.<sup>54</sup> Like the western interest in economic equity, the right to be heard should be continually evaluated and improved so that those western interests specially affected have a truly effective statutory right to be heard—early and at length. This would allow those often-conflicting state and local views to be meshed with more general (and also often conflicting) national considerations.

---

53. The Public Land Law Review Commission, in acknowledging that state and local interests have special concerns in public lands management, identified six categories of interests that should be recognized in making public lands policy: (1) the national public; (2) the regional public; (3) the Federal Government as sovereign; (4) the Federal Government as proprietor; (5) state and local governments; (6) the users of public lands and resources. PUBLIC LAND LAW REVIEW COMM., ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 6 (1970).

54. See *supra* note 28.

Thus I would catalogue three legitimate interests of the states on the federal lands: the right to economic equity; the right to impose the police power where it is not inconsistent with federal programs; and the right, even when programs are outside the police power, to have special notice and an opportunity to be heard.

The legitimate interests of state and local governments are different with regard to Indian land. First, the federal role is not the same as with federal lands: Indian lands are held by the United States pursuant to a special trust relationship, not for the general public, but for Indian tribes and individuals.<sup>55</sup> Therefore, Indian lands are not public lands.<sup>56</sup> Federal policy, properly reacting to views of Indians expressed during treaty negotiations and ever since, has been to protect Indian tribes from state and local interests—to provide a buffer between Indians and racism, economic sharp dealing, and, more abstractly but no less real, ethnocentric views of non-Indians on how Indians should behave.<sup>57</sup> Further, the presence of tribal governments makes the states' responsibilities more modest in Indian country, where there are operating tribal legislatures, courts, police, natural resource agencies, social service bureaus, and often schools. Just as the burdens on the state in Indian country are markedly less, so are their powers. That diminished role flows directly from the special place of Indian lands in our history, law, and policy.<sup>58</sup>

55. *E.g.*, *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977); *Seminole Nation v. United States*, 316 U.S. 286 (1942).

56. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 209 n.19 (1982 ed.).

57. Early federal policy imposed a wide range of restrictions, most of which remain in effect today, on persons engaging in trade with Indians. *See generally* F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: INDIAN TRADE AND INTERCOURSE ACT, 1790-1834* (1962). In the mid-1800's, reservations were set aside for tribes. S. TYLER, *A HISTORY OF INDIAN POLICY* 71-88 (1973). Large blocs of land were lost to Indians as a result of the allotment policy of the late 19th century, D. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* (F. Prucha ed., 1973), and the termination policy of the mid-20th century, Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 *AM. INDIAN L. REV.* 139 (1977). Since the early 1960's the Indian land base has actually expanded and Congress has adopted a policy of "self-determination" for Indian tribes. Israel, *The Reemergence of Tribal Nationalism and Its Impact on Reservation Resource Development*, 47 *COLO. L. REV.* 617 (1976); *Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976) ("Present federal policy appears to be returning to a focus upon strengthening tribal self-government [citations omitted].").

Two progressive pieces of recent legislation go further than protecting Indian resources and expressly seek to preserve Indian culture and religion. *See American Indian Religious Freedom Act of 1978*, 42 U.S.C.A. § 1996 (West Supp. 1981); *Indian Child Welfare Act of 1978*, 25 U.S.C. §§ 1901-1963 (Supp. III 1979).

58. A leading explication of the special legal status of Indian tribes is *Morton v.*

The states plainly have an absolute right to economic equity in Indian country, as they do on the public lands. But on Indian lands the states cannot lay claim to being a special constituency. The special constituency there is the Indian people. Thus, on Indian lands, the legitimate state interests in participating in Indian policy is akin to the role of non-Westerners in public lands policy: state officials should have representation in the making of Indian policy but access is most appropriate in Congress, where broad decisions are made.

Day-to-day decisions on Indian lands should be made primarily by tribal officials and secondarily by federal officials, with only the narrowest state encroachment allowed when activities on Indian lands have extraordinary impacts on essential state interests.<sup>59</sup> Tribal governments are small and they are young; traditional governments were smothered by federal policy during the nineteenth century and were not allowed to breathe again until the 1960's.<sup>60</sup> Like any small or young governments—whether they be developing nations, federal territories and states in the old American West, or cities and counties—Indian tribes will have their growth stunted if their responsibilities are borne by others. These concerns, the keynote of both old treaties and new statutes, burn brighter and hotter than the interests of the states.

#### IV.

##### EVALUATION OF CURRENT POLICY

And how do current policy and law comport with these legitimate interests of state and local governments? My own conclusion is that the public lands legislation of the 1970's, easily the

---

Mancari, 417 U.S. 535 (1974), upholding a hiring preference for Indians in the Bureau of Indian Affairs. The court recognized that numerous federal laws "single out for special treatment a constituency of tribal Indians living on or near reservations." *Id.* at 554. "This unique legal status is long standing, see *Cherokee Nation v. Georgia* 5 Pet. 1, 8 L. Ed. 25 (1831); *Worcester v. Georgia*, 6 Pet. 515, 8 L. Ed. 483 (1832), and its sources are diverse." *Id.* at 555.

59. The courts have recognized a state right to regulate special Indian rights in rare and extreme circumstances. Thus state regulation of Indian fishing is allowed for "conservation purposes." *E.g.*, *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 49 (1973); *Washington v. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 682 (1979). This state right is exceedingly narrow and is apparently triggered only on a showing that the tribes themselves are incapable of exerting sufficient governmental control and that the state has first prohibited all fishing by non-Indians. *United States v. Michigan*, 471 F. Supp. 192, 280-81 (W.D. Mich. 1980), *aff'd*, 653 F.2d 277 (6th Cir. 1981); *United States v. Washington*, 520 F.2d 676, 686 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

60. *See* F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* ch. 2 (1982 ed.).

most intense period of Congressional scrutiny in this field in the nation's history, fairly reflects these legitimate interests.<sup>61</sup> The laws of the modern era are characterized, above all, by careful compromise among the many interests.<sup>62</sup> The states are accorded broad police power over private conduct in federal territory when the United States has not asserted its supremacy.<sup>63</sup> In several instances state authority extends to resource development.<sup>64</sup> As they should be, the states are denied land ownership and policy control over those areas, mostly involving resource development, where the United States has legislated pursuant to its paramount authority. But in spite of superior federal constitutional power, the system now in place is struggling mightily to assure the western states financial equity<sup>65</sup> and policy influence<sup>66</sup> on a highly preferential basis. The existing corpus of legislation, much of it recently enacted, needs to be refined, a process that will be a continuing one.

61. On the recent legislation, *see generally* S. DANA & S. FAIRFAX, *FOREST AND RANGE POLICY* (2d ed. 1980); G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* (1981).

62. The two dominant statutes are the National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600-1614 (1976) and scattered sections of 16 U.S.C.) (NFMA) and the Federal Land Policy and Management Act of 1976 (codified at 43 U.S.C. §§ 1701-1782 (1976) and in scattered sections of 7, 16, 30 and 40 U.S.C.) (FLPMA). Both are umbrella laws that attempt to bring most of the basic authority of the Forest Service and the BLM, respectively, within their ambits. Lobbying was intense and both laws struck a middle course. On the NFMA, *see* the several articles in the symposium in 8 ENVTL. L. 239 (1978). A symposium on FLPMA is at 21 ARIZ. L. REV. 267 (1979). One can gain a sense of the six-year flow of trade-offs in FLPMA by reviewing the summary of its legislative history. SENATE COMM. ON ENERGY AND NATURAL RESOURCES, *LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976*, 95th Cong., 2d Sess. (Comm. Print 1978). *See also, e.g.*, *Rocky Mountain Oil & Gas Ass'n v. Morton*, 500 F. Supp. 1338, 1340 (D. Wyo. 1980), *appeal pending* ("FLPMA's policy directives clearly attempt to strike a balance between the development of mineral resources and environmental concerns."); *Utah v. Andrus*, 486 F. Supp. 995, 1002 (D. Utah 1979) ("FLPMA represents an attempt on the part of Congress to balance a variety of competing interests. . .").

63. *See supra* notes 23 & 27 and accompanying text.

64. State regulatory authority is especially broad over resource activities on the public lands in regard to water law, *e.g.*, *California v. United States*, 438 U.S. 645 (1978), *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); and hardrock mining, *e.g.*, 30 U.S.C. §§ 24, 26, 28, 28b, 38 and 43 (1976), *State ex rel. Cox v. Hibbard*, 31 Or. App. 269, 570 P.2d 1190 (1977). There is also room for state law to operate in other areas, such as mineral leasing, *e.g.*, *Texas Oil & Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir. 1969), but federal preemption of state and local regulatory activities is common, *e.g.*, *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), *aff'd* 445 U.S. 947 (1980).

65. *See supra* notes 23, 24, & 29-33 and accompanying texts.

66. *See supra* note 28.

But wholesale changes would be wrong; the present system, which respects local views while being premised on national supremacy, fairly reflects the overriding reality that these resources are national, not local, possessions.

Similarly, I would judge that the states' legitimate interests are being substantially achieved on Indian lands. Where no interests of the tribes or individual Indians are at stake, state police power can be exercised.<sup>67</sup> If there is some nexus with Indian interests, state law has a narrow ambit and tribal or federal law is likely to control. Unlike the states' broader role on the public lands, the states have no general statutory right to be consulted on decisions on Indian lands. This limited theatre for the states befits a situation where tribal governments can fill any governmental void: "The tradition in Indian country is tribal, not state, police power."<sup>68</sup>

In broadest terms, then, the comprehensive scheme of public lands statutes allows substantial financial returns to the states, a considerable residuum of state police power over private activities where the federal government has not preempted state law, and broad-based consultation in those areas where the United States has legislated. This might be called a "mixed police power—intensive consultation" model. The statutes and court cases in the Indian field allow significantly less state participation, a "tribal dominant" model. These schemes are preferable to the total exclusion of state law because such an approach would fail to meet the states' legitimate needs. Other models, "state ownership" (title to land in the states) and "state supremacy" (title to public land in the United States and title to Indian lands with Indian tribes, but paramount legislative authority in the states) are in turn inappropriate because state interests are outweighed by clearly-established supremacy, the need for a relatively uniform national development and conservation policy, and special Indian rights.

Yet another approach, tilted toward state control, is the "state law subject to federal veto" model found in the Coastal Zone Management Act.<sup>69</sup> That Act allows states, with federal funding, to develop plans for the coastal zone that go into effect upon approval by the Secretary of Commerce. But coastal zone planning, which is entirely appropriate in its own context, is fundamentally distinguishable because most lands in the coastal zone are not in

---

67. See *supra* notes 34-40 & 55-60 and accompanying texts.

68. F. Cohen, *HANDBOOK OF FEDERAL INDIAN LAW* 270 (1982 ed.)

69. 16 U.S.C. §§ 1451-1464 (1976 & Supp. IV 1980).

federal ownership so that the proper starting point is traditional state police power. Indeed, federal lands in the coastal zone are excepted from coverage under the Act.<sup>70</sup>

Calls for revamping the current system to allow for increased state control come from many sides—Sagebrush Rebels pressing to expand development opportunities,<sup>71</sup> non-Indian groups aiming to limit tribal powers,<sup>72</sup> even environmentalists seeking to curtail the authority of a development-oriented administration in favor of western states that show signs of becoming increasingly conservation-minded.<sup>73</sup> Policy-makers should take a larger view.

---

70. "Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." 16 U.S.C. § 1453(1) (1976). *See generally* Note, *Coastal Zone Management and excluded Federal Lands: The Viability of Continued Federalism in the Management of Federal Coastlands*, 7 *ECOLOGY L.Q.* 1011 (1979).

Although excluded from the Coastal Zone Management Act's definition of the coastal zone, activities on federal lands may be subject to the Act's consistency provisions, requiring that federal actions directly affecting the coastal zone be consistent with the state's federally-approved program to the maximum extent practicable, 16 U.S.C. § 1456(c), (d) (1976). *See generally* Deller, *Federalism and Offshore Oil and Gas Leasing: Must Federal Tract Selections and Lease Stipulations Be Consistent with State Coastal Zone Management Programs?* 14 *U.C.D. L. REV.* 105 (1980); *California ex rel. Brown v. Watt*, 683 F.2d 1253 (9th Cir. 1982). In some circumstances the Secretary of Commerce can override the consistency requirement upon a finding that the proposed federal action is consistent with the Act's objectives or otherwise necessary in the interests of national security. 16 U.S.C. § 1456(d) (1976).

The consistency provisions of the Coastal Zone Management Act have their counterparts in existing laws relating to the public lands. *See supra* note 28; *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 602-06 (9th Cir. 1981).

71. *E.g.*, 125 Cong. Rec. S11665 (daily ed. Aug. 8, 1979) (remarks of Sen. Orrin G. Hatch).

72. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 *STAN. L. REV.* 979, 980-82 (1981) (discussion of opposition to special separate status of Indian tribes).

73. Governor Bruce Babbitt of Arizona, who opposes the Sagebrush Rebellion and many of the resource development policies of the current administration, is studying various legislative approaches that would limit federal authority and increase state authority on the public lands. Though not committed to such an approach, Babbitt believes that the Coastal Zone Management Act, discussed *supra* in note 70, may provide a model preferable to current law. Babbitt's premise is that state preservation practices may well be superior to federal policies. Symposium, *Northwestern School of Law, Lewis & Clark School of Law, Portland, Or.* (Feb. 5, 1982) (unpublished address).

Babbitt's views are a reminder that it is overly simplistic to view the western states as being more development-oriented than the federal government during the modern era. In fact, there are numerous examples of attempts by states to halt or limit federal development activities on conservation grounds. *See, e.g.*, *Washington Dept. of Game v. FPC*, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954) (opposition by Washington to federal dam); *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955) (opposition by Oregon to federal dam); *South Dakota v. Andrus*, 614 F.2d 1190 (8th Cir. 1980) (opposition by South Dakota to issuance of mining patents);

Change should be made on principle, not in response to the personalities on the stage at a particular moment in time. Progressive, newly formulated policies have been conceived during a decade of intensive reflection and formulation. They should be given time to mature in an atmosphere substantially devoid of the disruptive effects of wholesale legislative restructuring.

Neither public land policy nor Indian policy, then, needs still more statutes and land transfers. The main outlines of the present system preserve vital prerogatives of the national public and Indian tribes while assuring fairness to the western states on both federal and Indian lands.

### CONCLUSION

Ultimately, we have learned from recent federal land and Indian policy that not all great experiments in the laboratory that is federalism occur at the state and local level. There are many examples of creative federal contributions, but a leading one is so bold and idealistic as to amount to an attempt to disprove the premise of the Turner thesis.<sup>74</sup> After the passage of the Alaska Lands Act in late 1980, we—who were the first nation in the world to experiment with legislatively-protected wilderness—now have some eighty million acres of land in wilderness.<sup>75</sup> That is four percent of all land in the country. You can add to it roadless land of a like quantity in national parks, forests, and wildlife refuges. This is not a frontier to *live* in, which is the point that Turner made. But it is a frontier to *be* in, so powerful a wild frontier as to

---

California v. Bergland, 483 F. Supp. 465 (E.D. Cal. 1980) (opposition by California to development on roadless areas in national forests); California *ex rel.* Brown v. Watt, 683 F.2d 1253 (9th Cir. 1982) (opposition by California to off-shore oil leases).

74. Turner based his analysis of the importance of the frontier in the nation's past, and its demise in the late nineteenth century, on the statement in the Eleventh Census that, as of 1890, "the unsettled area [of the United States] has been so broken into by isolated bodies of settlement that there can hardly be said to be a frontier line." F. TURNER, *THE FRONTIER IN AMERICAN HISTORY* 1 (1920).

75. On the United States' pioneering efforts in establishing official wilderness areas, see J. HENDEE, G. STANKEY & R. LUCAS, *WILDERNESS MANAGEMENT* 27-59 (1978). See generally R. NASH, *WILDERNESS AND THE AMERICAN MIND* (rev. ed. 1973); G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LANDS AND RESOURCES LAW* 766-839 (1981). After the addition of approximately fifty-seven million acres to the Wilderness Preservation System by means of the Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371 (codified in scattered sections of 16 U.S.C.), the system today includes approximately 79.8 million acres. Telephone conversation with Richard Joy, Wilderness Office, United States Forest Service, Washington, D.C. (Oct. 19, 1981).



enflame the minds of many of us though we be hundreds or thousands of miles from it.

Our Indian land policy, with all of its horror, is still considered the most progressive of any nation towards its aboriginal people.<sup>76</sup> Today there are still the Ye-be-chei dances on the Navajo Reservation, the Sun Dance in South Dakota, and the Grey Horse dances in Oklahoma. And there are still discrete groups to challenge the premises of the majority society, to stand as bastions against a world that is too fast, too rude, and too materialistic. This geographic and cultural diversity is one of the proudest elements of public land and Indian policy.

So, in sum, we risk a good many dangers when we fail fully and fairly to protect the legitimate interests of the state and local governments in the West. But we take risks, too, when we accord those governments more than their legitimate interests. No, the public and Indian lands are not a burden on the American West. They are the hallmark of the American West. They are perhaps the most distinctive and positive and glorious elements of the way of life in the West. Without them, the American West really would pass on.

Perhaps our descendants in misty generations hence will have to answer tragic questions: How much was it worth to have lost the frontier? How much was it worth to have lost the culture of another people? But I continue to hope and believe that these and similar questions are ones to which no American will ever be held to answer.

---

76. See generally Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947) and the several articles beginning at 27 BUFFALO L. REV. 617 (1978).

