Federal Lands: Energy, Environment and the States

I. INTRODUCTION

Since 1973, the date of the first Arab oil embargo, it has become apparent that the world is in the midst of an energy crisis. In the past decade foreign oil prices have increased by some 1500% and can be expected to go still higher. Meanwhile, United States reserves[1] are steadily shrinking, forcing greater dependence on foreign imports.

There are, however, significant untapped fossil fuel resources. These resources are situated primarily beneath federal property in the western United States.[2] Conventional methods of drilling and pumping oil can recover only one tenth to one half of the oil in an underground reservoir.[3] Today, however, it is both technologically and economically feasible to *mine* much of the estimated 300 billion barrels which cannot be pumped.[4] Moreover, this figure does

1. Domestic reserves (estimated in standard forty-two gallon barrels) recoverable by conventional drilling and pumping methods are currently estimated to be thirty billion barrels. Dick and Wimpfen, *Oil Mining*, SCIENTIFIC AM., Oct. 1980, at 182 [hereinafter cited as Dick and Wimpfen]. Estimates, however, have been given as low as twenty-six billion barrels. R. Kahle, World Energy Problems 3 (Feb. 24, 1981) (unpublished presentation to Columbia University International Fellows).

2. Shapiro, *Energy Development on the Public Domain: Federal/State Cooperation and Conflict Regarding Environmental Land Use Control*, 9 NAT. RESOURCES LAW. 397, 398 (1976) [hereinafter cited as Shapiro]. According to Shapiro, the percentage of federally-owned land within each of the following states is as follows: Arizona—45%; Colorado—36%; Idaho—64%; Montana—30%; Nevada—86%; Oregon—52%; Utah—66%; Washington—29%; Wyoming—48%. *Id.*

3. Dick and Wimpfen, *supra* note 1, at 182. There remains in depleted United States oilfields and will remain in currently productive fields an estimated 300 billion barrels, approximately ten times the existing reserves. But as Dick and Wimpfen point out, "[i]n the days of cheap and plentiful oil inefficient extraction of this kind drew little notice." *Id.*

4. Oil can be exploited by excavating a series of tunnels either above or below oil deposits. The oil is then either pumped or drained into the tunnels. For a more complete explanation, *see* Dick and Wimpfen, *supra* note 1, at 183-85.

not take into account other known but less accessible United States deposits, most of which lie beneath federal lands.[5]

To some extent, all mining degrades the environment. *In situ* mining (traditional deep mining) is the least harmful in this respect,[6] but traditionally it has the potential for considerable environmental degradation due to mine waste[7] and geological subsidence.[8] As modified for hydrocarbon exploitation, however, this risk is slight.[9]

In contrast, surface mining has a severe environmental impact because a great deal of earth must be moved in order to extract minerals just below the surface. Surface mining takes one of three basic forms: 1) strip mining; 2) open-pit mining; or 3) terrace mining.[10] Although these techniques are safer and easier than *in situ* mining, "[g]as, dust and noxious odors can be expected near the mines. Both the overburden and the tailings from the processing plant . . . present substantial disposal problems."[11] The United States Bureau of Mines is currently undertaking a study to "identify and quantify such environmental problems and to suggest solutions to them."[12] Until these problems are solved, however,

5. The figure does not include known deposits of heavy crude, deposits of hydrocarbon-impregnated diatomaceous earth in California, or the tar sands of Utah, all of which taken together could yield another 200 billion barrels of oil. It also excludes the potential of the Green River oil-shale formation in Colorado, Utah and Wyoming; this formation alone represents an estimated reserve of 1.8 trillion barrels, of which some 400-600 billion barrels are believed to be presently recoverable. *Id.* at 183. Coal, another major energy source, is also located in large part on federal lands.

6. *Id.* at 185A.

7. *Id.*

8. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

9. The amount of excavated material brought to the surface and later disposed of is small compared with that brought up by conventional mineral extraction. The prospect of subsidence is also slight. Most of the material extracted from such a mine is the oil itself. For example, the amount of rock and water would be small, and the water could be reinjected into the oil reservoir, further minimizing the likelihood of subsidence.

Dick and Wimpfen, *supra* note 1, at 185A.

10. *Id.* at 185-87.

11. *Id.* at 188.

12. *Id.* Dick and Wimpfen detail the techniques involved in the three types of surface mining and the environmental impact of each.

Strip mining is capable of exploiting minerals to a depth of approximately 180 feet in relatively flat terrain. "The reclamation of strip-mined land involves the relatively simple process of flattening the piles of overburden, replacing the topsoil and replanting it. In many places in the Midwest strip-mined land is now routinely being returned to farming." *Id.* at 187.

exploiting the vast energy potential of the western states will place a severe burden on the environment.

Understandably, this situation has created a tension between the federal government's perceived need for rapid energy development and the western states' desire to protect the environment.[13] Western states have pressured the federal government to permit a sharing of responsibility in order to assure that an adequate balance is struck between environmental protection and energy development:[14]

> [b]asically, the Western States are determined to acquire additional control over developmental activities within their borders regardless of whether such development occurs on private, state or federal lands. State interest . . . has reached the point where, in absence of federal provisions authorizing states to participate in and affect management decisions respecting exploitation of resources on federal lands, the states are unilaterally seeking to assert jurisdiction over such lands.[15]

This note examines this conflict between state and federal governments over land use policy on the public domain. First, it briefly examines the history of federal-state relations regarding extractive activity on federal property. This is necessary to bring the conflict into proper historical perspective and to identify the recurrent themes of the federal-state dialogue. Second, it discusses the present case and statutory law concerning these relations. Finally, it suggests a basis for a rational coexistence and balancing of interests between the two levels of government.

Open-pit mining is feasible and efficient for irregular terrain or for deposits below 180 feet. Overburden and minerals are removed together and carted out of the pit by means of a system of haulage roads or conveyor belts. The mineral loads are taken to the processing plant while overburden is dumped distant to the pit. "[I]t is generally impractical to use the overburden to backfill the pit." *Id.*

Finally, terrace mining is a variation of open-pit mining employed when the mineral deposits cover an extended area but are relatively shallow. It is at base an outwardly spiralling strip mine network. The overburden, however, is trucked away and stored at least temporarily rather than being dumped directly back into the pit. "Because a terrace mine eventually includes a very large worked out area, however, some backfilling with overburden is usually practical." *Id.*

13. Western governors remain "keenly aware of the possible effects of . . . large-scale development and . . . [are] committed to minimizing them by careful planning. But many remain doubtful that such projects [exploitation of energy resources on the federal domain] and environmental quality can coexist." Leydet, *A Nation's Quandry: Coal v. Parklands*, 158 NAT'L GEOGRAPHIC 776, 783-84 (1980).

14. Shapiro, *supra* note 2, at 398.

15. *Id.*

II. WESTERN STATES AND THE FEDERAL GOVERNMENT

The dialogue between states and the federal government regarding regulation of federal lands has revolved principally around three interrelated issues. First is the question of federal supremacy and power to legislate concerning the public domain as granted by the Property Clause of the United States Constitution. Second is the problem of preemption and the right of states to pass reasonable regulations pursuant to their police power when such regulations do not conflict with federal legislation. Third is the problem of the extent of rights which the states possess under the Tenth Amendment. Each of these strands will be discussed in the context of the case and statutory law examined.

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."[16] The clause has been interpreted broadly.[17]

The United States Court of Appeals for the Eighth Circuit declared in *Griffin v. United States*, "[t]he power of Congress over the lands of the United States wherever situated is exclusive. When that power has been exercised with reference to land within the borders of a state neither the state nor any of its agencies has the power to interfere."[18] While the power of the federal government may not be restricted by state regulation, the states may prescribe reasonable police regulations insofar as those regulations do not conflict with congressional action and are thus preempted.[19] Once Congress has acted, however, such action overrides conflict-

16. U.S. CONST. art. IV, § 3, cl. 2.

17. With respect to controlled lands [i.e., federally-owned lands in the public domain and other lands controlled and supervised by the federal government, including trust lands—primarily Indian lands], R.M. Williams writes that "[t]here is, in fact, no conflict of authority between the states and Federal Government . . . . Except to the extent that the Federal Government may assent to regulation by the state, the authority of the Federal Government is exclusive." Williams, *Relationship Between State and Federal Government with Respect to Oil and Gas Matters*, 19 OIL & GAS INST. 239, 253 (1968) [hereinafter cited as Williams].

18. 168 F.2d 457, 460 (8th Cir. 1948).

19. 73 C.J.S. *Public Lands* § 3 (1967). As Justice Marshall stated in Kleppe v. New Mexico, 426 U.S. 529, 543 (1976):

> [a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. . . [citations omitted]. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws.

ing state laws. "A different rule would place the public domain of the United States completely at the mercy of state regulation."[20]

Until the mid-1970s the states largely acquiesced in this exercise of power over federal lands within their borders; when they did arise, conflicts were settled by cooperation rather than conflict. Justice Van Devanter summarized the situation in *Utah Power & Light Co. v. United States* in 1917: "[t]he States and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this Court its validity has been upheld and its supremacy over state enactment sustained."[21]

However, beginning in the 1920s, energy producing states enacted measures for the conservation and orderly production of petroleum and natural gas.[22] These enactments provided for prorationing, spacing of wells, and the pooling and unitization of land overlaying a single reservoir.[23] Conflict arose when a common source of supply underlay both private or state and federal lands.[24] The states felt that the conservation laws of the state in which the unit lay should govern, particularly in cases where state lands lay over the same pool.[25] Otherwise state attempts at regulation would be largely thwarted. The situation was resolved by federal deference to the states.

During the early days of drastic prorationing in Oklahoma, the Osage Indian Agency frequently appeared before the hearings of the Oklahoma Corporation Commission concerning allowables on controlled lands.[26] Although it steadfastly maintained its jurisdictional immunity, the Agency always abided by the orders of the Commission in the interest of conservation.[27] Likewise, the federal government acquiesced in the conduct of lengthy spacing hearings, under the laws of the state of Utah, concerning the Aneth Field which lay under federally controlled lands in that state, and has

20. Camfield v. United States, 167 U.S. 518, 526 (1897).

21. 243 U.S. 389, 404-05 (1917).

22. *E.g.*, OKLA. STAT. ANN. tit. 52, § 87.1 (West 1969 & Supp. 1980); WYO. STAT. § 30-5-109 (1977).

23. *Id.*

24. Williams, *supra* note 17, at 253-54; *see also* 1 R. MYERS, THE LAW OF POOLING AND UNITIZATION 390-91 (2d ed. 1967) [hereinafter cited as MYERS].

25. MYERS, *supra* note 24, at 389.

26. For a definition of controlled lands, *see* note 17 *supra*.

27. Williams, *supra* note 17, at 254.

since abided by all subsequent state decisions with regard to the field.[28]

Even today, although orders by state conservation commissions[29] must be approved by the Secretary of Interior if they involve controlled lands,[30] the Secretary, through his agent the United States Geological Survey, rarely fails to consent to any program adopted by state regulatory authorities.[31]

In the early 1970s, with a growing concern over degradation of the environment and an end to inexpensive, plentiful energy, the good will and cooperation between the two levels of government quickly disintegrated. In response to increasing pressure for both land and natural resource development, western states began enacting comprehensive land use legislation.[32] Aware than any effective land use system must include federal lands within their borders, the states undertook to legislate controls for such lands, drawing little or no distinction between them and private or state-held property.[33] The question quickly became "whether the Western State governments will be legally permitted to effectuate their plans for imposing state environmental protection requirements upon lands owned by the federal government which are being exploited for their energy wealth."[34]

In 1972, pursuant to authority granted under the Idaho Dredge and Placer Mining Protection Act of 1955,[35] the Idaho Board of Land Commissioners obtained a preliminary injunction against miners operating in the St. Joe National Forest.[36] The injunction prohibited the miners from conducting any dredge or placer min-

28. *Id.* at 255.

29. These are the agencies charged with regulatory enforcement of oil and gas production, *e.g.*, the Texas Railroad Commission (TEX. NAT. RESOURCES CODE ANN. tit. 3, § 81.051 (Vernon 1978)); the Oklahoma Corporation Commission (OKLA. STAT. ANN. tit. 52, §§ 86.1, 86.2 (West 1969)); the Wyoming Oil and Gas Conservation Commission (WYO. STAT. § 30-5-104 (1977 & Supp. 1981)).

30. MYERS, *supra* note 24, at 396.

31. Williams, *supra* note 17, at 254. Writing in 1968, Williams stated that the consent of the Secretary had never been denied. Generally this is still true although in rare instances consent has been witheld. For a specific instance, *see* Shapiro, *supra* note 2, at 431.

32. For a full discussion of these laws and state efforts to legislate concerning the public domain, *see* Shapiro, *supra* note 2, at 418-22.

33. *Id.* at 418-19.

34. *Id.* at 422.

35. IDAHO CODE §§ 47-1312 to -1324 (1977 & Supp. 1981).

36. Andrus v. Click, 97 Idaho 791, 794, 554 P.2d 969, 972 (1976).

ing operations because they had not obtained a permit from the Board as the Act required. The Act provided that a permit could be denied by the Board:

> on state land, stream or river beds, or on any unpatented mining claims, upon its determination that a dredge mining operation on the land proposed would not be in the public interest, giving consideration to economic factors, recreational use for such lands, fish and wildlife habitat and other factors which in the judgment of the state land board may be pertinent.[37]

Permit holders were required to restore land affected by mining operations to its original contours, replace topsoil, and replant grass, trees and other vegetation.[38] An Idaho trial court dissolved the injunction as conflicting with federal regulation.[39]

On appeal, the Supreme Court of Idaho reversed, finding the Act valid as applied to activities on federal lands. It found that "[n]either the requirement of obtaining a permit or of restoring the land render it impossible to exercise rights specifically granted by the federal legislation, although they may make it more difficult."[40] The court found no intent to preempt state regulation in the Act of May 10, 1872,[41] which laid the foundation of federal mining law.[42] Further, the court found the Idaho legislation in harmony with the policy of environmental protection enunciated in the National Environmental Policy Act.[43] It concluded that "state regulation which is more stringent than that under the federal legislation is not the type of conflicting legislation" which would be preempted.[44] In short, "the mere fact that federal legislation sets low standards of

37. IDAHO CODE § 47-1317(i) (1977 & Supp. 1981).
38. *Id.* § 47-1314.
39. Andrus v. Click, 97 Idaho 791, 794, 554 P.2d 969, 972 (1976).
40. *Id.* at 975.
41. 30 U.S.C. §§ 22-42 (1976).
42. Andrus v. Click, 97 Idaho 791, 798, 554 P.2d 969, 976 (1976).
43. *Id.* at 977. The National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1976), declares that:

> there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development. . . .
>
> The primary responsibility for implementing this policy rests with State and local governments.

Id. § 4371.
44. Andrus v. Click, 97 Idaho 791, 796, 554 P.2d 969, 974 (1976).

compliance does not imply that the federal legislation grants a right to an absence of further regulation."[45]

Less than a year later, a nearly identical question to that of *Andrus v. Click*[46] ("*Click*") came before another state court. In *Cox v. Hibbard*[47] ("*Cox*"), the Oregon Court of Appeal upheld the Oregon Fill and Removal Law,[48] requiring a permit prior to engaging in mining activity. The defendants, holders of leases on unpatented federal lands, contended that state regulation conflicted with federal rights in the public domain and was thus preempted. The Oregon court relied heavily upon *Click* in finding that there had been no intent in federal mining legislation to preempt state legislation.[49] Indeed, the statute explicitly recognized the state's right to impose additional requirements in certain areas.[50] The court stated that " 'the preservation of the environmental quality of its lands is a subject particularly suited to administration by the states,' "[51] because states are closer to the problems and in a better position to take into account the specific and unique characteristics and needs of land within their borders. Being further removed from the problem, the federal government could not account as easily for the need for diversity in regulation. It concluded that the existence of a federal permit to mine on federal lands did not preclude the requirement of a state permit mandating land restoration.[52]

At the close of its opinion,[53] the Oregon court took pains to distinguish a recent federal district court decision, *Ventura County v. Gulf Oil Corp.*[54] ("*Ventura County*"). In that case, the court held that local zoning ordinances could not be applied to federal lands. According to the court in *Cox*, Ventura County sought through its zoning ordinances to totally prohibit Gulf from conducting oil extraction activities on federal lands in the Los Padres National Forest even though the federal government had already approved the

45. *Id.*
46. 97 Idaho 791, 554 P.2d 969 (1976).
47. 31 Or. App. 269, 570 P.2d 1190 (1977).
48. OR. REV. STAT. §§ 541.605-.665 (1979).
49. Cox v. Hibbard, 31 Or. App. 269, 274, 570 P.2d 1190, 1193 (1977).
50. *Id.* (quoting Andrus v. Click, 97 Idaho 791, 798, 554 P.2d 969, 976 (1976)).
51. Cox v. Hibbard, 31 Or. App. 269, 274, 570 P.2d 1190, 1193 (1977) (quoting Andrus v. Click, 97 Idaho 791, 798, 554 P.2d 969, 976 (1976)).
52. Cox v. Hibbard, 31 Or. App. 269, 277, 570 P.2d 1190, 1195 (1977).
53. *Id.*
54. Ventura County v. Gulf Oil Corp., No. CV76-1723-ALS (C.D. Cal., filed April 7, 1977), *aff'd*, 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 100 S. Ct. 1593 (1980).

operation. *Cox* could be distinguished because Ventura County sought to totally bar all activity: "[r]equiring the holder of a permit to mine on federal lands to obtain a permit under a state environmental protection law . . . is not the same as the banning of all mining activity as was the case in *Ventura*."[55]

On the appeal of *Ventura County*, however, the United States Court of Appeals for the Ninth Circuit took a view of the facts of the case different from that of the *Cox* court and affirmed the District Court.[56] Judge Hufstedler expressed the court's view that Ventura County had merely attempted to require Gulf to obtain a permit or zoning variance before proceeding.[57] Although Ventura County and an amicus had argued that congressional enactments possessed generally no preemptive capabilities,[58] the court found the traditional view of federal power over the public domain, as evinced in cases such as *Griffin v. United States*[59] and *Kleppe v. New Mexico*,[60] dispositive.[61] Judge Hufstedler declared, "[t]he federal Government has authorized a specific use of federal lands, and Ventura cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress."[62] The court concluded that the requirement of a permit by the local government was an impermissible duplication of regulatory control[63] and conflicted with an identifiable federal policy, federal interest and "with achievement of a congressionally approved use of federal lands."[64]

The Ninth Circuit's affirmance in *Ventura County* casts doubt on the continued vitality of cases such as *Cox* and *Click* which upheld state rights to require additional permission to use federal land. It calls into question the overall ability of states to impose environmental controls on federal lands. Without the ability to gain control through permit systems like those in *Cox* and *Click*, states are effectively denied any control whatsoever.

55. Cox v. Hibbard, 31 Or. App. 269, 277, 570 P.2d 1190, 1195 (1977).
56. Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), *aff'd mem.*, 100 S. Ct. 1593 (1980).
57. *Id.* at 1082.
58. *Id.* at 1083.
59. 168 F.2d 457 (8th Cir. 1948). *See* text accompanying note 16 *supra*.
60. 426 U.S. 529 (1976).
61. Ventura County v. Gulf Oil Corp., 601 F.2d 1080, 1083 (9th Cir. 1979), *aff'd mem.*, 100 S. Ct. 1593 (1980).
62. *Id.* at 1084.
63. *Id.* at 1085.
64. *Id.* at 1086.

III. ATTEMPTING TO RESTORE THE BALANCE: FEDERAL LEGISLATION AND INTERGOVERNMENTAL COOPERATION

In the face of mounting discontent and dissension in the western states, the federal government moved to restore the federal-state cooperation which had previously existed in the area of environmental protection.

In 1971, the Secretary of Interior proclaimed a moratorium on the leasing of federal lands for coal mining until such time as controls for environmentally safe production could be developed.[65] On January 26, 1976, the Secretary lifted the moratorium but announced that leasing would not resume until the Energy Minerals Activity Recommendation System ("EMARS") could be implemented.[66] That system would require the Bureau of Land Management to cooperate with state governments in determining when and how coal should be offered for leasing.[67] The Interior Department also promulgated regulations covering federal coal lands already under lease.[68] Those regulations gave the Secretary discretion to adopt and apply state regulations if they were at least as stringent in the protection of the environment as the federal guidelines.[69] Under the regulations, exceptions to this occurred if 1) the Secretary determined that application of state laws would unreasonably and substantially prevent the mining of federal coal, and 2) the Secretary determined that an overriding national interest required production of such coal despite state objections.[70] State environmental protection legislation would be allowed as long as it did not stand in the way of energy production.

The last link in this chain of federal attempts to restore state cooperation was forged with the passage of the Surface Mining Control and Reclamation Act of 1977,[71] which incorporated many of the aforementioned federal regulations. The stated purpose of the Act is to assure a ready coal supply for the nation while, at the same time, striking a balance between environmental protection

65. Shapiro, *supra* note 2, at 403.
66. *Id.*
67. 41 Fed. Reg. 22,051 (1976). *See* Shapiro, *supra* note 2, at 403.
68. 30 C.F.R. § 211 (1980). *See* Shapiro, *supra* note 2, at 403.
69. 30 C.F.R. § 211.75(a) (1980).
70. *Id.*
71. 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

and energy needs.[72] Although the Act explicitly purports to preempt any conflicting state legislation,[73] it also provides that:

> [a]ny provision of any State law or regulation in effect upon August 3, 1977, or which may become effective thereafter, which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation than do the provisions of this chapter or any regulation issued pursuant thereto shall not be construed to be inconsistent with this chapter.[74]

Procedures are set forth whereby a state can submit to the Secretary an environmental program which if approved supersedes the federal program.[75] With regard specifically to federally owned lands, the Act provides that federal land programs shall take into account the diverse physical, climatological and other unique characteristics of the lands.[76] It further provides that where the lands are situated in a state with an approved state program the federal program shall, at minimum, include the requirements of the state program.[77]

Contemporaneous with the 1977 Act, the Mineral Lands Leasing Act[78] was amended.[79] The amendments provide that any proposal for a lease permitting surface coal mining within the boundaries of a national forest which the Secretary proposes to approve shall be submitted to the governor of the state involved.[80] Should the governor object to the proposed lease within sixty days, the lease shall not be issued for six months, during which time the governor can submit his reasons for objecting to the Secretary.[81] At that time, the Secretary will reconsider the lease in light of the objections raised by the governor.[82] The amendments further provide that licenses for exploration on covered lands "shall contain such reason-

72. 30 U.S.C. § 1202(f) (Supp. I 1977).
73. 30 U.S.C. § 1254(g) (Supp. I 1977).
74. 30 U.S.C. § 1255(b) (Supp. I 1977).
75. 30 U.S.C. §§ 1253, 1254(e) (Supp. I 1977).
76. 30 U.S.C. § 1273(a) (Supp. I 1977).
77. *Id.*
78. 30 U.S.C. §§ 181-263 (1976) (originally enacted as Act of February 25, 1920, ch. 85, 41 Stat. 437). Together with the Act of May 10, 1872, ch. 152, 17 Stat. 91, the Mineral Lands Leasing Act forms the foundation of federal mining law.
79. Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, 90 Stat. 1083 (1976).
80. 30 U.S.C. § 201(a)(2)(B) (1976).
81. *Id.*
82. *Id.*

able conditions as the Secretary may require, including conditions to insure the protection of the environment, and shall be subject to all applicable Federal, State and local laws and regulations."[83] Violation of any such conditions or laws is cause for revocation of the license.[84] Taken together, the amendments and the 1977 Act create a powerful system of federal-state cooperation in environmental protection.

In April, 1980, however, the United States District Court for the Western District of Virginia, in *Virginia Surface Mining and Reclamation Association, Inc. v. Andrus*[85] (*"Virginia Surface Mining"*), declared the Surface Mining Control and Reclamation Act of 1977 unconstitutional both as applied and on its face.[86]

The 1977 Act provides that strip-mined lands be returned to their approximate original contours.[87] Virginia is particularly affected by the legislation because ninety-five percent of that state's strippable coal reserves is located on slopes in excess of twenty degrees.[88] There is a great need for flat land in the area comprising Virginia's coal fields.[89] Before strip mining, the land is worth approximately $5 to $75 per acre; after the land is leveled by strip mining, it is worth $5000 to $300,000 per acre.[90] Restoring the land reduces its value back to the lower figures.[91] Judge Williams declared that "the Surface Mining Control and Reclamation Act of 1977 operates to 'displace the States' freedom to structure integral operations in areas of traditional governmental functions,' . . . [citation omitted] and, therefore, is in contravention of the Tenth Amendment."[92]

83. 30 U.S.C. § 201(b)(1) (1976).

84. *Id.*

85. 483 F. Supp. 425 (1980), *rev'd sub nom.* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. 2352 (1981). Ironically, Cecil Andrus, who as Governor of Idaho had gone to court to defend states' rights in land use planning in Andrus v. Click, found himself again in court as Secretary of Interior, this time defending federal power over state land use control.

86. Although the case does not deal with federal lands, it is worth consideration in view of the doubt it tends to cast upon the entire scheme of federal land use planning.

87. 30 U.S.C. § 1265(b)(3) (Supp. I 1977).

88. Virginia Surface Mining & Reclamation Ass'n v. Andrus, 483 F. Supp. 425, 434 (W.D. Va. 1980), *rev'd sub nom.* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. 2352 (1981).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 435. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 5-6 (1974) (power

Although only a year old, *Virginia Surface Mining* had already been widely distinguished by other courts across the country.[93] In July, 1981, the Supreme Court reversed the district court ruling and upheld the constitutionality of the Act.[94]

IV. Conclusions: A Search for Environmental Protection

Prior to the 1970s, although federal power over the public domain was largely unquestioned, the attitude of the federal government was primarily one of deference to and cooperation with the states. In the 1970s, as a result of an accelerated need for energy and a growing awareness of the environment, the federal land states of the West began to assert increasing control over federal lands through legislation and legal actions, such as those which led to the decisions in *Click* and *Cox*. The federal government responded with legislation and regulation designed to reassert federal jurisdiction and to restore the scheme of intergovernmental cooperation.

Although both *Click* and *Cox* remain good law, the Ninth Circuit decision in *Ventura County* and the 1977 Act call into question the continuing vitality of at least *Cox* and possibly *Click*.

Powerful reasons exist for promoting state input into the process of policymaking concerning federal lands. In the case of oil extraction, the federal government recognizes that federal non-adherence to a state drilling program can effectively emasculate the program, because heavy drilling on federal lands can drain more than that land's share of the oil in a common source of supply and thus impinge upon the rights of private landholders adjacent to the federal lands. Likewise, in passing legislation purporting to regulate the public domain, the states realize that to be effective any state land use program must cover federal lands as well. Extractive activity on federal lands often carries with it effects which are not limited to the federal lands alone, and this "spill over" can severely dam-

to adopt and enforce laws affecting land use traditionally within police power of states).

93. *See, e.g.*, Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839, 848 (E.D. Va. 1980); Oklahoma v. Energy Regulatory Comm'n, 494 F. Supp. 636, 657 n.36 (W.D. Okla. 1980); Marshall v. Conway, 491 F. Supp. 1123, 1126-27 (E.D. Pa. 1980).

94. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 101 S. Ct. 2352 (1981).

age state-owned or privately held lands. Further, the federal lands in question are often significant drawing cards for bringing visitors and tourists to the areas. Significant environmental degradation on those lands can markedly diminish state revenues.

As the court in *Cox* pointed out, states are particularly well-suited to administer regulations concerning environmental quality within their borders. They are closer to the problem and can account for diversity better than a centralized federal government. Problems such as those presented in *Virginia Surface Mining* could be avoided by the states. They are also in a better position to experiment with land use regulation and can respond more quickly to changes in conditions. Indeed, for these reasons, land use is a traditionally local function.

The closeness to the problems that makes the states seemingly ideal administrators for land use policy has a negative side as well. Because of their very closeness, state governments are more susceptible to local pressures for land development than the federal government. This could lead to greater damage to environmental quality than a totally federal scheme.

The best answer seems to be that presented by the Surface Mining Control and Reclamation Act of 1977. The most reasonable approach would be one by which states could have input and submit *state* programs for federal approval. Upon approval these programs would supplant a federal plan. With regard to the federal lands, the land use scheme would take the approved state program standards as minimum requirements above which *more stringent* requirements could be set by the federal government. This approach would account for the diverse needs of the various localities.

Through the 1977 Act and the contemporaneous amendments to the Mineral Lands Leasing Act, the federal government has aggressively moved to restore intergovernmental cooperation. However, the Reagan Administration is less concerned about the environment than its predecessor, and with the need for energy ever increasing as current reserves dwindle, the western states may again move to gain control over environmental management within their borders. This will inevitably lead them into conflict with the federal government and its power over the federal public domain.

Jace G. Weaver