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ENERGY DEVELOPMENT IN THE WEST: CONFLICT AND COORDINATION OF GOVERNMENTAL DECISION-MAKING*

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INTRODUCTION

The last two years have seen increasing concern over the nationwide decline in energy supplies. Whether this insufficiency will be remedied by energy conservation or by increased energy development

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* The analysis, conclusions and opinions contained in this article are those of the authors and do not necessarily represent the analysis, conclusions or opinions held by the employers or clients of the authors.

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remains a hotly debated issue. In the meantime most federal government and industry leaders have begun to emphasize development of the energy resources of the western United States, a region where environmental concern has made only a recent appearance. These western energy resources (coal despsits, oil and gas fields, oil shale formations, geothermal regions and uranium deposits) are found primarily in the "energy breadbasket" of Montana, North Dakota, Wyoming, Nevada, Utah, Colorado, Arizona, and New Mexico.

Although many, if not most people, believe that such development is the concern of the federal government alone, many state and local officials have yet to be convinced. Many of them simply do not believe that the destiny of the West should depend on federal and industry decisions. Colorado's governor, Dick Lamm, has said, "We won't become the nation's slag heap."[1]

"States' rights," a term long repugnant to civil libertarians, has again become popular. Its popularity is limited, however, to those who seek to restrain the exercise of federal power. Those taking this position feel that the western state governments and their political subdivisions, rather than federal administrators, are best able to control the potentially destructive land use practices which follow large-scale energy development:

> Westerners will have to design new ways to handle growth and to turn a boom into a stable economy. They will have to set priorities for allocating their scarce water, upgrading urban growth, using land sensibly, and reclaiming land that has been mined. Businessmen, public officials, and environmentalists will have to compromise and learn to work together as never before. At stake is not only the West's environment and appealing life-style, but much of the nation's future energy supply. Over the next few years, the West is going to be a laboratory for energy development. What it learns about how to harmonize the objectives of vigorous economic development with those of environmentalists who want to leave the land as it is may serve as a national model.
>
> Energy development will bring sweeping changes to the mountain states, which include Colorado, Idaho, Montana, New Mexico, Utah, Wyoming, and the eastern parts of Nevada and Arizona as well.
>
> New communities with thousands of residents will spring up in sparsely populated areas to meet the employment needs for mining and gasification complexes. Vast tracts will be disturbed as development goes forward.
>
> New people, new jobs, new capital, and new urban growth are just over the horizon.[2]

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1. BUSINESS WEEK, Jan. 27, 1975, at 108.
2. *Id.*

I. SOURCES OF GOVERNMENTAL POWERS.

Before turning to the governmental pushing and shoving that is in store for the West, it may be worthwhile to review briefly the powers that the various levels of government possess. No matter what level of government seeks to control land use by direct or indirect means, the control device must be supported by one or more of those powers which that government may exercise.

A. GENERAL SUMMARY.

The federal government may exercise only those powers which are enumerated in the Constitution of the United States. Conversely, state governments have retained all other governmental powers and have, in some instances, delegated those powers to local levels of government, such as counties, municipalities, and special districts. Local governments are political subdivisions of the state and, as such, may exercise only those powers which have been delegated to them by the state. The delegation of state powers to localities is done by state constitutional provisions or by state enabling legislation. In addition, intrastate regions are emerging in many states as a new level of government. Such a region typically derives its powers from participating local governments which pass on to the regional government some of the powers which they have received directly from the state.

B. SOURCES OF FEDERAL POWERS.

Because the United States is a government of enumerated powers, it may act only within the areas of its stated authority. It appears, however, that as a result of broad interpretation of these powers by the U.S. Supreme Court "virtually any conceivable measure reasonably intended to protect the environment can readily be sustained under one or more of the grants of authority to Congress."[3] The following survey describes several of those powers upon which the federal government may base its efforts to protect the environment or stimulate energy resource development in the West.

1. *Commerce Power.*

Probably the most far-reaching of congressional powers is the power "to regulate commerce . . . among the several states."[4] The

3. Rosenthal, *Federal Power to Preserve the Environment: Enforcement and Control Techniques, in* ENVIRONMENTAL CONTROL: PRIORITIES, POLICIES, AND THE LAW 218, 219 (1971). *See also* E. DOLGIN & T. GILBERT, FEDERAL ENVIRONMENTAL LAW 21-22 (1974).

4. "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

commerce clause encompasses three main areas of regulation,[5] allowing Congress to: prevent the misuse of channels of commerce, protect the instrumentalities of commerce, and regulate certain activities "affecting" commerce.

The phrase "affecting commerce" has been very broadly interpreted in cases such as *United States v. Wrightwood Dairy Co.*, where the Court wrote:

> The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution. . . . Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.[6]

In *Wickard v. Filburn* the Supreme Court further developed the *Wrightwood Dairy* opinion in determining what intrastate activity "affected" commerce. The Court stated:

> That appellee's own contribution may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution taken together with that of any other similarly situated is far from trivial.[7]

Because other decisions show that Congress' social motive in passing legislation are irrelevant so long as the necessary relationship to commerce is established,[8] application of these interpretations of the commerce clause to energy-related environmental and land use concerns "results in a picture of congressional power that appears pratically unbounded at least as far as concerns control over the typical areas of pollution."[9]

For example, in *United States v. Bishop Processing Co.*,[10] the district court adopted the theory that, since "ambient air" cannot

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5. *See* Perez v. United States, 402 U.S. 146 (1971).

6. 315 U.S. 110, 119 (1941).

7. 317 U.S. 111, 127-28 (1942).

8. *See* Perez v. United States, 402 U.S. 146 (1971); Katzenbach v. McClung, 379 U.S. 294 (1964); Gooch v. United States, 397 U.S. 124 (1936); Hoke v. United States, 227 U.S. 308 (1913); Champion v. Ames, 188 U.S. 321 (1903).

9. FEDERAL ENVIRONMENTAL LAW, *supra* note 3, at 24.

10. 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir. 1970), *cert. denied*, 398 U.S. 904 (1970).

be confined to one state, air pollution particles themselves are articles moving in interstate commerce and are therefore subject to federal regulation. This unusual identity of particles of noxious gases as articles of commerce could, of course, have been avoided by reliance on other earlier cases[11] sustaining the federal regulation of articles despite "an apparent lack of commercial value."[12] The *Bishop* decision is of particular interest since the court considered that it was irrelevant that the polluter did not intentionally direct pollution across state lines.[13]

Instead of making strained categorization of pollutant particles as "articles of commerce," other courts have freely upheld federal pollution controls on the basis that pollution has a "substantial effect" on interstate commerce.[14] In addition, under the *Wickard v. Filburn* approach, Congress may also regulate the manufacturing process itself, "either as an incident of its control over the interstate movement of the manufactured product, or on the grounds that the maufacturing process itself affects interestate commerce."[15]

The commerce clause also gives Congress control over navigable waters. Court decisions have expanded the concept of navigable waters far beyond those navigable in fact. Navigability now includes waters which are navigable in part,[16] streams that *might* be made navigable with reasonable improvement,[17] and to otherwise non-navigable tributaries that affect navigable streams.[18] In addition, congressional control may extend to the emission of water pollutants even when the pollutant does not directly affect navigation.[19] Any finding that particular waters are not in fact navigable, even under the broad determination outlined above, would not necessarily limit congressional power of control in an environmental contest. Congress would still be free to make a determination that activities polluting those waters have a "substantial effect" on commerce.

The powers of the commerce clause, including the power to control navigable waters, gives Congress the power to regulate pesticides, solid wastes, noise, and other pollution, and land use problems as well as air and water pollution related to energy development. "The interrelationship of environmental problems . . . with the pos-

11. *See* cases cited in note 8 *supra*.
12. FEDERAL ENVIRONMENTAL LAW, *supra* note 3, at 24.
13. 287 F. Supp. 624, 629 (D. Md. 1968).
14. *See, e.g.*, Oklahoma *ex rel.* Phillips v. Atkinson Co., 313 U.S. 508, 525-26 (1941); Zabel v. Tabb, 430 F.2d 199, 204 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).
15. FEDERAL ENVIRONMENTAL LAW, *supra* note 3, at 25. *See also* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).
16. United States v. Holt State Bank, 270 U.S. 49 (1926).
17. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).
18. Oklahoma *ex rel.* Phillips v. Atkinson Co., 313 U.S. 508, 528 (1941).
19. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

sibility of competitive havens if 'intrastate' activities are excepted from control—all combine to present an extremely broad commerce clause base for congressional control of pollution wherever and however it occurs."[20]

Aside from the commerce clause, several other bases of federal authority affecting energy development do exist.

2. *Power to Tax and Spend.*

Although Congress may use its *spending* powers only for the "general welfare,"[21] environmental protection would seem to satisfy that requirement.[22] By establishing conditions for the receipt of federal funds, the federal government has been and will be able to achieve what it would not be able to under its enumerated power; *i.e.*, exert substantial control over state and local land use regulations.[23]

Congress' *taxing* power is equally broad:[24] "Even if a tax is more a camouflaged regulation than a revenue raising measure a successful challenge to it is still unlikely."[25] This results from the Supreme Court's willingness to accept the justification given by Congress and to accept the revenue-raising nature of the tax at face value.[26] Even if the Court were to view the "tax" as a regulation, the revenue measure would still be sustainable under another of Congress' enumerated powers such as its power over interstate commerce.[27]

3. *Power over Federal Property.*

Art. IV, § 3, clause 2 of the Constitution is the basis of congressional authority to manage and regulate federal lands. This is of particular interest to those involved in mineral and energy power development in the western states since the "United States is the owner of fifty percent of the land area of the eleven western states.

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20. FEDERAL ENVIRONMENTAL LAW, *supra* note 3, at 27.

21. United States v. Butler, 297 U.S. 1, 65 (1936).

22. Rosenthal, *The Federal Power to Protect the Environment: Available Devices to Compel or Induce Desired Conduct*, 45 S. CAL. L. REV. 397, 403 (1972).

23. *See, e.g.*, HUD "701" REGS. § 600, 40 FED. REG. 36856 (1975). Consider also the effect on local land use of the National Flood Insurance Act of 1968, as amended by the Flood Disaster Protection Act of 1973, 42 U.S.C.A. §§ 4001-4127 (Supp. 1976), and regulations promulgated thereunder, 24 C.F.R. § 1910 (1975).

24. *See* Hock, *Constitutional Considerations Associated with Pollution Taxes*, 7 NAT. RES. LAWYER 97, 97-114 (1974).

25. Rosenthal, *supra* note 22, at 403.

26. *See, e.g.*, United States v. Kahriger, 345 U.S. 22, 26-31 (1953); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548 (1869). *But cf.* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

27. "The power of taxation, which is expressly granted, may of course be adopted as a means to carry into operation another power also expressly granted." United States v. Butler, 297 U.S. 1, 69 (1936).

Federal ownership ranges from approximately 29 percent in the State of Washington to more than 85 percent in the State of Nevada."[28]

Tennessee v. United States[29] confirmed the federal power to regulate its land in such a way as to protect the environment within those lands. In *Hunt v. United States*,[30] federal regulations were justified as a means of protecting the lands of the United States from serious injury from overgrazing in spite of state game laws.[31]

Of interest to westerners is the theory that the federal government's authority over federal lands, combined with the necessary and proper clause, may also provide a basis for the federal imposition of restrictions on the use of nonfederal lands which adjoin federal lands.[32]

C. SOURCES OF STATE POWER.

1. *Police Power.*

In general, the "police power" allows a state to regulate for, *inter alia*, the comfort, health, safety, and welfare of its people. In the eyes of the United States Supreme Court, state police powers "are nothing more or less than the powers of government inherent in every sovereign to the extent of its dominions."[33] It is one of the least limitable of governmental powers[34]—limited only by provisions in the federal or state constitution.[35] For example:

> The typical state pollution control act would seem in theory to present a classic example of a legitimate exercise of the police power: protection against significant danger to public health and welfare.[36]

On the other hand, the proper exercise of the police power must meet certain requisites.

First, it must be for a proper "object," which means that the end sought to be achieved must be one of which the "law deems sufficient to justify protection [of] . . . public health, safety, morals and welfare."[37] Expansion of this list comes about by enu-

28. Phipps, *The Public Land Law Review Commission--A Challenge to the West*, 1 LAND AND WATER L. REV. 355 (1966).
29. 256 F.2d 244, 258 (6th Cir. 1958). *See also* 36 OPS. ATTY. GEN. 527, 530 (1932).
30. 278 U.S. 96 (1928).
31. *Id.* at 100.
32. *See* the discussion in FEDERAL ENVIRONMENTAL LAW, *supra* note 3, at 31.
33. License Cases, 46 U.S. (5 How.) 504, 583 (1847).
34. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); District of Col. v. Brooke, 214 U.S. 138 (1909).
35. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905); Shelby v. Cleveland Mill & Power Co., 155 N.C. 196, 200, 71 S.E. 218, 220 (1911).
36. Rosenthal, *supra* note 22, at 408. For cases upholding state pollution control acts, *see, e.g.*, Huron Portland Cemet Co. v. Detroit, 362 U.S. 440, 442 (1960); Soap & Detergent Ass'n. v. Offutt, 3 ERC 1117 (S.D. Ind., Aug. 31, 1971); Hatcher v. Board of Supervisors, 165 Iowa 197, 145 N.W. 12 (1914).
37. Garton, *Ecology and the Police Power*, 16 S.D.L. REV. 261, 264 (1971).

merating items contained in the category of "welfare," such as peace, order, economic wellbeing, convenience, comfort, prosperity, and financial security of the community.[38]

Second, the police power regulation must bear a reasonable relation to the attainment of the proper object,[39] an area in which courts give legislators wide latitude.[40] "The test is . . . whether the legislative body could have determined upon any reasonable basis that the legislation is necessary or desirable for its intended purpose."[41]

Third, the specific application of police power regulation may not be arbitrary or unreasonable:

> The most commonly accepted view is that "reasonableness" is determined on the basis of a balancing test: If the "good" to be achieved by the regulation justifies the burden placed upon the person whose activity or property is being regulated, then the enactment is a valid exercise of the police power.[42]

In the narrower area of land use regulation:

> Reasonableness must exist in the way that subjects are classified for regulatory treatment, and in the way a regulatory measure seeks to accomplish its objective. Satisfying these requirements, the police power may be used without constitutional objections.[43]

In the familiar decision of *Village of Euclid v. Ambler Realty Co.*,[44] the Supreme Court found land use regulation to be an appropriate means of attaining police power objects. Courts have since allowed states or their political subdivisions to exercise the police power so as to restrict such things as billboards in a residential district,[45] to provide for open-space zoning under subdivision controls,[46] to require "harmonious architectural appeal" as a criterion for building permits,[47] and to preserve open space by restricting land to agricultural and residential uses only—even though the land then would have no appreciable economic value.[48]

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38. *Id.*
39. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962); Euback v. Richmond, 226 U.S. 137 (1912); Thain v. City of Palo Alto, 207 Cal. App. 2d 173, 24 Cal. Rptr. 515 (1962).
40. Block v. Hirsh, 256 U.S. 135 (1921).
41. Adams v. Shannon, 7 Cal. App. 3d 427, 433, 86 Cal. Rptr. 641, 645 (1970).
42. Garton, *supra* note 37, at 264. *See also* Goldblatt v. Hempstead, 369 U.S. 590 (1962).
43. Netherton, *Implementation of Land Use Policy: Police Power v. Eminent Domain*, 3 LAND & WATER L. REV. 33, 38 (1968).
44. 272 U.S. 365 (1926).
45. Grant v. Mayor & City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957).
46. Chrinko v. South Brunswick Twp. Planning Bd., 77 N.J. Super. 594, 187 A.2d 211 (1963).
47. State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217 (1955), *cert. denied*, 350 U.S. 841 (1955).
48. Consolidated Rock Products Co. v. City of Los Angeles, 20 Cal. Rptr. 638, 370 P.2d 342 (1962), *appeal dismissed*, 371 U.S. 36 (1962).

2. *Eminent Domain.*

Eminent domain or condemnation, the power to take private property for public use, is also inherent in state sovereignty, requiring no express constitutional recognition.[49] The implied grant of eminent domain arises from the fifth amendment and similar state constitutional provisions. For example, in *Kohl v. United States*[50] the Supreme Court wrote: "The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?"[51]

Although the idea of compensation is not inherent in the concept of eminent domain itself, the fifth and fourteenth amendments impose a requirement of "just compensation" on the states in exercising their power of eminent domain.[52] Eminent domain is also bound by a "public-purpose" limitation.[53]

Early eminent domain doctrine required that land could be taken only for a "public use." Most restrictively, "public use" required that any property taken would be actually used by the public.[54] In the landmark 1954 case of *Berman v. Parker*,[55] the less stringent "public purpose" was articulated. Consequently, a public purpose has been found where more land was condemned than was actually needed for a public project in order to protect the improvement by surrounding the project with open land.[56] A New York court has allowed the bluffs above the Hudson River to be condemned, protecting the beauty along the parkway.[57] Public use can mean public advantage, convenience, benefit—perhaps anything which tends to contribute to the general welfare and prosperity of the whole community.[58]

3. *Taxation.*

"With the exception of exports, imports, and tonnage, and such things as are held by the United States Government, where its rights might be impaired if its property were taxed by the states,"[59] the

49. Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).
50. 91 U.S. 367 (1876).
51. *Id.* at 372-73.
52. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 572 (1972).
53. *Id.* at 588.
54. Bloodgood v. Mohawk & Hudson R.R., 28 N.Y. Comm. L. (18 Wend.) 9, 56-62 (1837).
55. 348 U.S. 26 (1954).
56. Note, *Aesthetic Considerations in Land Use Planning*, 35 ALBANY L. REV. 126, 132 (1970).
57. Bunyan v. Commissioners of Palisades Interstate Park, 167 App. Div. 457, 153 N.Y.S. 622 (1915).
58. *See, e.g.*, Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906); Clark v. Nash, 198 U.S. 361 (1905); Tanner v. Treasury Tunnel Mining & Reduction Co., 35 Colo. 593, 83 P. 464 (1906).
59. 71 AM. JUR. 2D *State and Local Taxation* § 82 (1973).

power of taxation exists in the states as a pleanary, essential attribute of sovereignty.[60] State and federal taxing powers are concurrent and may be applied to the same items of private property.[61] A state may determine the persons, property, and privileges to be taxed,[62] the nature and amount of the tax,[63] the allocation of revenue between the state and its political subdivisions,[64] and the methods of enforcement.[65] A tax found to be invalid as an exercise of the taxing power nevertheless may be upheld as a regulatory measure if its primary purpose was the regulation[66] of some activity and if the legislature has not acted in an arbitrary or unreasonable manner.[67]

The basic limitation on the states' power to tax is that it be exercised for a valid "public purpose." Conversely, a tax not for a public purpose may be a taking of property without due process of law.[68] The term "public purpose" is difficult to define. Its application is often dependent on the specific facts and circumstances of a particular case. Because of changing conditions, an activity may be considered to have a public purpose today that it would not have had in the past.[69] The public purpose sufficient to validate taxation includes whatever is necessary to preserve the public health and public safety.[70]

While taxation has not been traditionally thought of as a land use or an environmental control measure, the limits to such a use of taxation are so broad that the power of taxation is becoming increasingly popular. For example, Vermont, Illinois, and Oregon have felt comfortable enacting pollution taxes.[71] In *Chicago Allis Manufacturing Co v. Metropolitan Sanitary District of Greater Chicago*,[72] the Illinois Supreme Court upheld the Illinois industrial waste surcharge statute since it could be upheld as a regulation under the police power.

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60. Ohio Oil Co. v. Conway, 281 U.S. 146 (1930).
61. Frick v. Pennsylvania, 268 U.S. 473 (1925).
62. *See, e.g.*, Green v. Frazier, 253 U.S. 233 (1920); Leigh v. Green, 193 U.S. 79 (1904); Natural Gas Pipe Line Co. v. State Comm'n. of Revenue & Taxation, 155 Kan. 416, 125 P.2d 397 (1942).
63. *See, e.g.*, Kentucky Union Co. v. Kentucky, 219 U.S. 140 (1911); *In re* Simpon's Estate, 43 Cal. Rptr. 2d 594, 275 P.2d 467 (1954).
64. *See, e.g.*, Memphis & Charleston Ry. Co. v. Pace, 282 U.S. 241 (1931); General American Tank Car Corp. v. Day, 270 U.S. 367 (1926); Kelly v. Pittsburgh, 104 U.S. 78 (1881).
65. *See, e.g.*, Kentucky Union Co. v. Kentucky, 219 U.S. 140 (1911); Lane County v. Oregon, 74 U.S. (7 Wall.) 71 (1868).
66. Lowell v. Boston, 111 Mass. 454 (1872); Donnelly v. Decker, 58 Wis. 461, 17 N.W. 389 (1883).
67. Mirick v. Gims, 79 Ohio St. 174, 86 N.E. 880 (1908).
68. Green v. Frazier, 253 U.S. 233 (1919).
69. Laughlin v. Portland, 85 N.J.L. 728, 90 A. 318, 320 (Ct. of Errors & Appeals 1914).
70. *E.g.*, Beach v. Bradstreet, 85 Conn. 344, 82 A. 1030 (1912); Jamieson v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954).
71. Hock, *supra* note 24, at 115.
72. 52 Ill. 2d 320, 288 N.E.2d 436 (1972).

In a similar case, *City of Pittsburgh v. Alclo Parking Corp.*, the United States Supreme Court upheld a tax on the gross receipts of certain parking lots. Because of resulting increased parking rates, the tax would have forced the automobile commuter to pay the tax or use other transportation and would have forced some private lots out of business.

> The claim that a particular tax is so unreasonably high and unduly burdensome as to deny due process is . . . recurring, but the Court has consistently refused either to undertake the task of passing on the "reasonableness" of a tax that otherwise is within the power . . . of state legislative authorities, or to hold that tax is unconstitutional because it renders a business unprofitable.[73]

The Court found that the tax was a legitimate revenue-raising measure and that the city was "constitutionally entitled to put the automobile parker to the choice of using other transportation or paying the increased tax."[74]

A number of states have enacted statutes allowing for tax exemptions where lands are put to certain specified uses, for example: in Iowa, up until 1975 unplatted agricultural land within any municipal corporation was exempt from real estate taxes;[75] in Idaho, property-tax exemptions are given to irrigation districts for irrigation works;[76] in New York, statutes authorize a 20-year exemption on substantial improvements on at least a block-wide basis of physically deteriorated buildings;[77] in North Carolina and Pennsylvania, varying exemptions are given to encourage use of private land for parks, drives, and playgrounds.[78] Other states have mineral severance taxes such as Montana's, which is described later in some detail.

D. SOURCES OF LOCAL POWER.

As the states' political subdivisions,[79] local governments (counties, special districts, organized townships, home-rule municipalities, statutory municipalities, etc.) usually have only those powers which may be delegated to them by constitutional provision or enabling legislation.[80] Consequently, localities can enjoy no other powers,

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73. City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 373 (1974).
74. *Id.* at 379.
75. IOWA CODE ANN. § 404.15 (Supp. 1975-76), *repealed by* ch. 1088, § 199, [1972] IOWA GEN. ACTS 288.
76. IDAHO CODE § 63-105J (1976).
77. N.Y. TAX LAW § 56 (McKinney 1966) (now repealed but exemptions given under the law are still valid--N.Y. REAL PROP. TAX LAW § 1602(3) (McKinney 1972).
78. N.C. GEN. STAT. § 160-491 (1972); PA. STAT. tit. 72, § 5020-204 (1968).
79. Board of County Comm'rs v. City & County of Denver, 150 Colo. 198, 372 P.2d 152 (1962), *appeal dismissed*, 372 U.S. 226 (1963); Dineen v. City & County of San Francisco, 38 Cal. App. 2d 486, 101 P.2d 736 (1940).
80. Moorehead v. Dyer, 518 P.2d 1105 (Okla. 1974); Lutz v. City of Longview, 83 Wash.

and probably a great deal fewer than does their parent state.

Although prevalent local enabling legislation is described later, there are three concepts which should be mentioned here. First, courts tend to construe enabling legislation strictly.[81] While grants of power to localities may be made in general terms, each grant must contain an express delegation of the power to act.[82]

Next, the local government must act in substantial conformity with the procedural requirements contained in the enabling legislation.[83] For example, if enabling legislation for hazard area zoning requires public notice and hearing before adoption, then the notice must be given and the public hearing must be held.

Finally, local enactments generally are blessed with a rebuttable presumption of validity.[84] Consequently, if authorized and if adopted correctly, local land use controls are almost impregnable in litigation.

E. SOURCES OF INTRA-STATE REGIONAL POWER.

Regional governments seldom assume the dignity of power or permanency. They usually are created by several local governments in one of two ways. First, by cooperative agreement, local governments may form statutorily-authorized bodies such as regional planning commissions[85] or regional health departments.[86] Second, local governments may delegate some of their powers to a regional body under the auspices of state statutes authorizing general intergovernmental cooperation.[87] The movement toward regional governments in recent years has been prompted by the need for area-wide clearing house review under OMB Circular No. A-95, last revised at 40 *Fed. Reg.* 47960 (October 10, 1975).

When dealing with regional governments, the underlying contract

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2d 566, 520 P.2d 1374 (1974); State *ex rel.* Fire Fighters Local 274, 518 P.2d 831 (Wyo. 1974). Local governments have only those powers delegated to them by constitutional provision or statute. City of Aurora v. Bogue, 176 Colo. 198, 489 P.2d 1295 (1970); City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958).

81. City of Aurora v. Bogue, 176 Colo. 198, 489 P.2d 1295 (1971); Farnik v. Board of County Comm'rs, 139 Colo. 481, 341 P.2d 467 (1954).

82. Acker v. Baldwin, 101 P.2d 505 (Cal. Dist. Ct. of App. 1940); Garel v. Board of County Comm'rs, 167 Colo. 353, 447 P.2d 209 (1968); Carter v. Board of County Comm'rs, 518 P.2d 142 (Wyo. 1974).

83. Acker v. Baldwin, 101 P.2d 505 (Cal. Dist. Ct. of App. 1940); Holly Development, Inc. v. Board of County Comm'rs, 145 Colo. 95, 342 P.2d 1032 (1959); State *ex rel.* Miller v. Cain, 40 Wash. 2d 216, 242 P.2d 505 (1952).

84. Sundance Hills Homeowners Ass'n. v. Board of County Comm'rs, ——Colo.——, 534 P.2d 1212 (1974); Multnomat County v. Howell, 9 Ore. App. 374, 496 P.2d 235 (1972).

85. COLO. REV. STAT. ANN. § 30-28-105 (1973); NEB. REV. STAT. § 84-131 (1971); NEV. REV. STAT. ch. 278 (1975); N.D. CENT. CODE § 54-34.1-01 (1974), ch. 11-35 (Supp. 1975); OKLA. STAT. ANN. tit. 19, § 886.1 (Supp. 1975-76); TEX REV. CIV. STAT. ANN. art. 1011m (Supp. 1975-76).

86. COLO. REV. STAT. ANN. § 25-1-708 (1973); *See, e.g.*, N.D. CENT. CODE § 11-11-56 (Supp. 1975).

87. COLO. REV. STAT. ANN. §§ 29-1-201 to -204 (1973); S.D. COMPILED LAWS ANN. § 11-2-5 (1969), §§ 11-2-7, 8 (Supp. 1975); WYO. STAT. ANN. §§ 9-18.13 to .20 (Supp. 1975).

between the participating local governments is the most important document to review. Without specific delegation of local powers in the contract, the region simply does not have them.[88] Next, one should examine the enabling legislation for statutorily-authorized bodies such as regional planning commissions or regional boards of health. The provisions of that legislation may further define the duties of the regional government.

II. STATE AND LOCAL GOVERNMENTAL ACTIONS AFFECTING ENERGY RESOURCE DEVELOPMENT IN THE WEST.

To maintain the life-style cherished by westerners, states and localities have enacted innumerable measures which will have both direct and indirect effects on energy development. What follows is a very brief discussion of how land use control powers are being exercised in the west.

A. STATE STATUTORY LAND USE CONTROLS.

1. *The General Situation.*

Although traditional land use control has been exercised at the local level, a cursory[89] review shows an increasing state role in the West.[90] While some states have enacted separate statutes to deal with environmental problems such as air quality,[91] water quality,[92] noise,[93] and disturbed land reclamation,[94] others have adopted a single comprehensive enactment vesting one state agency with broad environmental regulatory power.[95] In legislation patterned after

88. COLO. ATT'Y. GEN. OP. No. 74-0036 [Opinion of September 30, 1975].

89. The citations which follow are illustrations only and not all inclusive.

90. Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wyoming.

91. *E.g.*, ARIZ. REV. STAT. ANN. §§ 36-770 to -791 (1974); CAL. HEALTH & SAFETY CODE §§ 39000 to 43834 (West Supp. 1976); COLO. REV. STAT. ANN. §§ 25-7-101 to -129 (1973); NEV. REV. STAT. §§ 445.401 to .446 (1973); N.M. STAT. ANN. §§ 12-41-1 to -13 (1953); N.D. CENT. CODE §§ 23-25-01 to -10 (1970); OKLA. STAT. ANN. tit. 63, §§ 2001 to 2008 (1973); S.D. COMPILED LAWS ANN. §§ 34-16A-1 to -63 (1967); TEX. REV. CIV. STAT. ANN. art. 4477-5 (Supp. 1974); UTAH CODE ANN. §§ 26-24-1 to -18 (1953); WASH. REV. CODE ANN. §§ 70.94.011 to .911 (1975).

92. *E.g.*, ARIZ. REV. STAT. ANN. §§ 36-1851 to -1869 (1974); COLO. REV. STAT. ANN. §§ 25-8-101 to -704 (1973); MONT. REV. CODES ANN. §§ 69-4801 to -4819 (1947); N.M. STAT. ANN. §§ 75-39-1 to -12 (1953); N.D. CENT. CODE §§ 61-28-01 to -08 (Supp. 1975); OKLA. STAT. ANN. tit. 82, §§ 901 to 939 (1970); S.D. COMPILED LAWS ANN. §§ 46-25-23 to -109 (Supp. 1975); UTAH CODE ANN. §§ 73-14-1 to -14 (1953); WASH. REV. CODE ANN. §§ 90.48.01 to .900 (1962).

93. *E.g.*, CAL. HEALTH & SAFETY CODE §§ 39800 to 39880 (West 1973); COLO. REV. STAT. ANN. §§ 25-12-101 to -108 (1973); N.D. CENT. CODE §§ 23-01-17 (1970); WASH. REV. CODE ANN. §§ 70.107.010 to .910 (1975).

94. *E.g.*, KAN. STAT. ANN. §§ 49-401 to -424 (Supp. 1975); MONT. REV. CODES ANN. §§ 50-1034 to -57 (Supp. 1975); N.D. CENT. CODE §§ 38-14-01 to -13 (1972); OKLA. STAT. ANN. tit. 45, §§ 721 to 738 (Supp. 1975); WASH. REV. CODE ANN. §§ 78.44.010 to .930 (Supp. 1974); WYO. STAT. ANN. §§ 35-502.1 to .56 (Supp. 1975).

95. *E.g.*, IDAHO CODE ch. 39-1 (Supp. 1975); ORE. REV. STAT. ch. 468 (1974); WYO. STAT. ANN. §§ 35-502.1 to .26 (Supp. 1975).

NEPA, generally referred to as SEPA's or little NEPA's, several states require environmental impact statements for major state actions.[96]

In addition to dealing with traditional areas of natural resources, states have recently exerted control over newer concerns such as geothermal resources[97] and weather modification.[98]

The increased state role in more traditional land use matters is evidenced by legislation creating state-level land use planning agencies or coordinators with varying degrees of enforcement powers,[99] authorizing open space acquisition,[100] establishing state scenic and recreational trail systems,[101] planning and regulating solid waste disposal,[102] preserving of wild and scenic rivers,[103] as well as wilderness, natural, and scientific areas,[104] requiring a state "certificate of environmental compatibility" for construction of utility plants and transmission facilities,[105] regulating critical areas,[106] providing for state involvement in coastal zone conservation and management,[107] and establishing state control over plant or industrial siting.[108]

Finally, states are beginning to use their taxing powers to create incentives for land use activities such as reforestation of commercial forest lands,[109] preservation of open space land,[110] conduct of conservation research,[111] and retention of agricultural land.[112]

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96. *E.g.*, CAL. PUB. RES. CODE §§ 21000 to 21176 (West. Supp. 1976); MONT. REV. CODES ANN. ch. 69-65 (Supp. 1975); S.D. COMPILED LAWS ANN. ch. 11-1A (Supp. 1975); WASH. REV. CODE ANN. ch. 43.21C (Supp. 1974).

97. *E.g.*, ARIZ. REV. STAT. ANN. §§ 27-651 to -666 (Supp. 1973); CAL. PUB. RES. CODE §§ 3700-76 (West 1972); COLO. REV. STAT. ANN. §§ 34-60-101 to -123 (1973); IDAHO CODE ANN. §§ 42-4001 to -4015 (Supp. 1975); MONT. REV. CODES §§ 81-2601 to -2613 (Supp. 1975); TEX. CIV. STAT. art. 54215 (Supp. 1975); WASH. REV. CODE ANN. §§ 79.76.010 to .900 (Spec. Pamphlet 1974).

98. *E.g.*, COLO. REV. STAT. ANN. §§ 36-20-101 to -126 (1973); KAN. STAT. ANN. §§ 82a-1401 to -1424 (Supp. 1975); MONT. REV. CODES ANN. §§ 89-310 to -331 (Supp. 1975); N.M. STAT. ANN. §§ 75-37-1 to -15 (1953); N.D. CENT. CODE §§ 2-07-01 to -13 (1975).

99. *E.g.*, ARIZ. REV. STAT. ANN. §§ 37-161 to -163 (1974); COLO. REV. STAT. ANN. § 24-65-103 (1973); NEB. REV. STAT. § 84-131 (1971); NEV. REV. STAT. § 321.640 (1973); N.D. CENT. CODE §§ 54-34.1-01 to -15 (1974); ORE. REV. STAT. §§ 215.505 to .535 (1974); UTAH CODE ANN. §§ 63-28-1 to -10 (1953); WYO. STAT. ANN. §§ 9-160.19 to .39 (Supp. 1975).

100. *E.g.*, MONT. REV. CODES ANN. §§ 62-601 to -09 (1947).

101. *E.g.*, COLO. REV. STAT. ANN. §§ 33-42-101 to -112 (1973); N.M. STAT. ANN. §§ 4-9A-1 to -10 (1953); OKLA. STAT. ANN. tit. 74, §§ 3451 to 3458 (Supp. 1975); ORE. REV. STAT. §§ 390.950 to .990 (1974); WASH. REV. CODE ANN. §§ 67.32.010 to .140 (Supp. 1974).

102. *E.g.*, ARIZ. REV. STAT. ANN. § 36-132.01 (1974); OKLA. STAT. ANN. tit. 63, §§ 2251 to 2265 (1973); ORE. REV. STAT. §§ 459.005 to .995 (1974); TEX. CIV. STAT. ANN. art. 4477-7, 1 to 10 (Supp. 1975).

103. *E.g.*, CAL. PUB. RES. CODE § 5093.50 (West Supp. 1975).

104. CAL. PUB. RES. CODE §§ 5093.30 to .40 (West Supp. 1976); KAN. STAT. ANN. §§ 74-6601 to -6613 (Supp. 1975); MONT. REV. CODES ANN. ch. 81-27 (Supp. 1975); OKLA. STAT. ANN. tit. 29, §§ 7-701 to -706 (1976); WASH. REV. CODE ANN. ch. 79.70 (Supp. 1974).

105. ARIZ. REV. STAT. ANN. §§ 40-360 to -360.28 (1974).

106. NEV. REV. STAT. §§ 321.660 (1975).

107. CAL. PUB. RES. CODE §§ 27000 to 27650 (West Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 5415 (1962).

108. CAL. PUB. RES. CODE §§ 800 to 801 (West 1972); WASH. REV. CODE ANN. ch. 80.50 (Supp. 1974).

109. IDAHO CODE ch. 38-2 (Supp. 1975).

110. CAL. REV. & TAX CODE § 214.02 (West Supp. 1976).

111. WASH. REV. CODE ANN. § 84.36.260 (Supp. 1974).

112. 21 ENVIRONMENTAL COMMENT 1 (May, 1975).

2. *Current Developments.*

a. Wyoming.

(1) State Land Use Planning Act.[113]

The Wyoming State Land Use Planning Act, passed in 1975, *requires* the development of state and local land use plans and establishes the State Land Use Commission composed of nine members appointed by the governor. Within fifteen months the Commission is to adopt, following public hearings, statewide land use goals, policies, and guidelines.

(a) Local Land Use Plans.

Twelve months later, all counties must submit preliminary land use plans, including the land use plans of cities and towns within the county. The local land use plans are defined as written land use policies, goals, and objectives which explain methods for implementation but which need not include provisions for zoning. If the local land use plan is not submitted to or is not approved by the State Land Use Commission within six months after its submission (or within twelve months if the Commission grants an extension), the Commission itself must develop an appropriate local land use plan based upon goals established by the local governmental units.

(b) Areas of State Interest.

The Commission is to identify, after public hearing, those areas in the state determined to be of critical or more than local concern and establish developmental guideines for such areas. Areas of critical or more than local concern are defined as areas designated by the Commission: (1) where uncontrolled or incompatible large-scale public or private development could result in damage to the environment, life, or property, or (2) where the short-or long-term public interest is of more than local significance.

Such areas may include fragile or historic lands, natural hazard lands, renewable resource lands, and new-town lands as well as such additional areas as the Commission determines to be of more than local concern. Before designation, at least one public hearing must be conducted within the physical boundaries of the area to be so designated.

(c) State Land Use Plan

The Commission is to develop a state land use plan after public hearings held throughout the state within two and one-half years

113. Ch. 131, [1975] SESS. LAWS OF WYO. —— (codified at WYO. STAT. ANN. §§ 9-849 to -862 (Supp. 1975)).

after the adoption of statewide land use goals, policies, and guidelines. The state plan is to include a summary of the policies, goals, and objectives of each county-wide plan.

(d) Application of the Land Use Planning Act.

Wyoming has now provided grants to numerous counties to develop the preliminary land use plan as required under the act. Preliminary plans will be due one year after rules, regulation, and land use guidelines are promulgated by the commission. Recent information is that the required rules, regulations, and guidelines will be promulgated about June 30, 1976. While some counties already have comprehensive land use plans, none can fully comply with the Act until the regulations are promulgated. It therefore remains to be seen how useful the Act will be in initiating the land planning process at the county level. Once the county plans are in place, several potential areas of conflict may appear. The extent of state enforcement authority for the county plan is unclear at this point. Will counties have the sole power to force compliance with the plan, when adopted, or will state authority step in if counties default in the enforcement of the plan? A second conflilct may arise with regard to federal land. The planning act applies to all lands within the state—including federal public domain land. To date there have been few problems with application of a local land use plan to federal lands within the counties. The reason for the lack of conflict is either that the counties had no land use plan, or that the plan was consistent with Bureau of Land Management or other agency use of the land in question. With the adoption of plans for all counties, and with an increasing push for coal development on and off federal land, it can be anticipated that some county plans will conflict with contemplated uses of federal lalnds. At that point there may well be a test of county or state authority to force compliance with local land use laws as applied to federal lands.[114]

(2) The Industrial Development Information and Siting Act.[115]

The Wyoming Industrial Development Information and Siting Act, passed in 1975, requires all major energy generating and conversion plants *and* all industrial facilities with an estimated construction cost of fifty million dollars or more to obtain a permit from the newly-created State Industrial Siting Council. The Council is composed of

114. The substance of much of this paragraph is derived from conversation with an assistant Wyoming Attorney General, particularly an interview on January 29, 1975.

115. Ch. 169, [1975] SESS. LAWS OF WYO. —— (codified at WYO. STAT. ANN. §§ 35-502.75 to .94 (Supp. 1975)).

seven members appointed by the governor with the advice and consent of the senate.

(a) Application for a Permit.

An applicant for a permit must pay an initial application fee of one-half of one percent of the estimated construction cost or one hundred thousand dollars, whichever is less. The application must include information concerning environmental, economic, and social impacts of the proposed facility. Notice and public hearings are required to be held in a community as close as practicable to the proposed facility. Within sixty days after the date of a public hearing on the application, the Council must either approve the application without condition, approve the application conditioned upon specified changes in the application, or reject the application pending further study.

(b) Further Study.

If further study is required by the Council, the applicant must pay an additional applilcation fee to cover the cost of an intensive study and evaluation of the proposed facility. The additional fee shall be based on the estimated cost of the facility, provided that the total application fee paid for any one facility shall not exceed one million dollars. Further study and investigation must proceed according to a study design plan which may specify areas for additional investigation such as land use, water resources, air quality, solid waste disposal, radiation, noise, and social and economic impacts. After completion of the additional study, another public hearing is required.

(c) Required Findings.

The Act requires that the Council shall not issue a permit if it finds, *inter alia,* that:

1. The estimated emissions or discharges of the proposed facility will exceed state or federal standards.

2. The locale of the facility conflicts with or violates state, interstate, regional, county, and local land use plans.

(d) Revocation of Permit.

Once issued, a permit may be revoked or suspended for failure to comply with the terms and conditions of the permit after notice and reasonable opportunity to correct such failure.

(e) Violations.

The Act provides civil penalties of not more than ten thousand dollars for each day a facility is under construction without obtain-

ing a permit or for each day a facility having first obtained a permit is not in specific compliance with the permit.

(f) Exceptions.

Permits are not required for construction of railroads, coal slurry pipelines, or construction or operation of oil and gas producing, drilling, and field processing operations.

(g) Rules and Regulations Under the Industrial Siting Act.

On September 30, 1975, the Industrial Siting Council promulgated rules and regulations to implement the act. Significant portions include the following:

(i) Definitions.

An Industrial Facility, subject to the Act, is an energy generation or conversion plant which is designed to produce 100 megawatts of electricity, one hundred million cubic feet of synthetic gas per day, 50,000 barrels of liquid hydrocarbon products per day, or 500 pounds of U_{308} per day. A facility is also covered if it is designed to extract, mine, process, handle, or manufacture raw materials, so long as the construction costs exceed $50 million.[116] The state has thus far construed this latter provision to include coal mines, if the cost of equipment needed to mine exceeds $50 million. A new mine for which equipment costs were $47 million was granted a certificate of insufficient jurisdiction (see explanation below) upon application and hearing.[117] In the future, if a coal mine operator is required to obtain a permit under the Industrial Siting Act, or if an operator fails to apply for a certificate of insufficient jurisdiction, it would be reasonable to expect litigation as to whether coal mines are properly subject to the requirements of the Act.

(ii) Insufficient Jurisdiction.

The regulations provide that any person who intends to construct an industrial facility may submit an application for a certificate of insufficient jurisdiction, for a declaration that the proposed facility is not subject to the Act. After notice, hearing, and review of the information submitted, the Industrial Siting Council may grant or deny the application.[118]

(iii) Information Required.

The information required to be submitted with an application for

116. WYO. INDUS. INFO. & SITING RULES & REG'S. ch. I, § 2 (September 30, 1975).
117. Interview with Ass't. Atty. General for Wyoming, January 30, 1976.
118. WYO. INDUS. INFO. & SITING RULES & REG'S. ch. I, § 2 (September 30, 1975).

a permit is extensive. For example, the applicant must provide detailed information on the following topics: (1) site location and affected areas; (2) graphic description, with site plans and maps; (3) description of the operating nature of the facility, with data on plant life, raw material sources, and materials analysis; (4) inventory of all materials flowing out of the facility; (5) estimate of construction time and costs; (6) estimates of employment impacts for both construction and operating phases; (7) state or local land use plans in effect; (8) evaluation and proposals to alleviate the social, economic, or environmental impacts of the facility upon local government, with extensive data requirements in the social, economic, and environmental areas.[119] This list is illustrative, not exhaustive. A critical, though unresolved issue, is whether and to what extent the Council can require enactment of impact alleviation proposals submitted by an applicant. It is at least conceivable that the Council could condition a permit upon a limitation of the number of construction workers at any given time. Whether the Council has authority to go further, and require affirmative alleviation action, is uncertain at this time.[120]

(iv) Initial Determination.

The Council will approve an application if the applicant demonstrates that:

> (1) the proposed facility will comply with all applicable law; (2) the proposed facility will not pose a threat of serious injury to the environment, the social and economic conditions of the present inhabitants, or the social and economic condition of the expected inhabitants; and (3) the proposed facility will not substantially impair the health, safety or welfare of the inhabitants. If the applicant is not able to demonstrate to the Council that these requirements are met, the Council shall reject the application pending additional study.[121]

The demonstration of (1), (2), and (3) above requires substantial research, study, and attention to additional definitions and requirements under the regulations.

(v) Additional Study and Further Determination.

If a permit is denied, the Council shall specify additional factors for study and evaluation.[122] After such study is completed, the Council shall grant a permit if it finds the following: (1) The nature of the probable environmental impact is acceptable; (2) by the de-

119. *Id.* at § 5.
120. Interview with Ass't. Att'y. General for Wyoming, January 30, 1976.
121. WYO. INDUS. INFO. & SITING RULES & REG'S. ch. I, § 6 (September 30, 1975).
122. *Id.* at § 7.

sign and location of the proposed facility adverse impacts are reduced to an acceptable extent; (3) the proposed facility is compatible with public health and safety, and with state, regional, county, and local land use plans; (4) the facility is designed in compliance with applicable state and local laws; (5) the facility, or its cumulative effects, will not violate state and federal standards and implementation plans; (6) the facility represents an acceptable impact upon the environmental, social, and economic well being of the municipalities and people within the area of site influence; (7) the cumulative effect of the facility on environmental, social, and economic conditions, in conjunction with other facilities, will not impair the health, safety, and welfare of affected people, even if (6) above is satisfied.[123]

It should be noted that the criteria for granting or denying a permit differ considerably depending upon whether the application is an initial effort or whether it is resubmitted after further required study. There is no obvious explanation for the difference, and even careful analysis of the regulations does not permit a comprehensible description of how great the differences are or how the application of one set of criteria over the other would affect the result.

As of this writing, the state of Wyoming has received only three applications pursuant to the Siting Act. One permit was granted, one certificate of insufficient jurisdiction was issued, and one application is pending.[124] Therefore it still remains to be seen how various problems in application of the regulations will be resolved.

(3) Wyoming Environmental Quality Act.

In 1973 the Wyoming legislature passed an Environmental Quality Act.[125] The Act was amended in 1974 and 1975.[126] The land quality section of this Act, and the regulations thereunder, are the basic regulatory authority for control of all mining activity. No mining is permitted except in accordance with the Act, of which the more significant provisions are described below:

(a) Establishment of Standards.

The Act directs the Environmental Quality Council to establish reclamation standards, as set forth in the act, and by regulation. The following are some of the areas to be covered by the standards:

1. The highest previous use of the affected lands, the surrounding terrain and natural vegetation, surface and subsurface flowing

123. *Id.* at § 8.
124. Interview with Ass't. Att'y. General for Wyoming, January 30, 1976.
125. Ch. 250, § 1, [1973] SESS. LAWS OF WYO. 615 (codified at WYO. STAT. ANN. §§ 35-502.1 to .56 (Supp. 1975)).
126. Ch. 14, [1974] SESS. LAWS OF WYO. 13; ch. 178, [1975] ——.

or stationary water bodies, wildlife and aquatic habitat and resources, and acceptable uses after reclamation including the utility and capacity of the reclaimed lands to support such uses;

2. Backfilling, regrading or recontouring to assure the reclamation of the land to a use at least equal to its highest previous use;

3. A time schedule encouraging the earliest possible reclamation program consistent with the orderly and economic development of the mining property;

4. Revegetation of affected lands including species to be used, methods of planting and other details necessary to assure the development of a vegetative cover consistent with the surrounding terrain and the highest prior use standards set out in 1. above;

5. Stockpiliing, preservation and reuse of topsoil for revegetation, unless it can be demonstrated to the satisfaction of the administrator that other methods of reclamlation or types of soil are superior;

6. Prevention of pollution of waters of the state from mining operations, substantial erosion, sedimentation, landslides, accumulation and discharge of acid water, and flooding, both during and after mining and reclamation.[127]

Additional and detailed standards are provided in the regulations.[128]

(b) Permit and Information Requirements.

No mining is permitted without a valid mining permit.[129] An application for a permit must contain, among other requirements, a general discription of the land, including wildlife, rainfall, vegetative cover, and water data. The application must contain a complete and comprehensive reclamation plan, which describes the effect of the mining on the land, the proposed future use, and the means the operator will use to reclaim the land to such use. Total reclamation costs must be estimated and soil segregation methods detailed. The reclamation plan must also contain a consent to the mining and reclamation plan from the surface owner. If consent cannot be obtained, the Act provides for a procedure for an order in lieu of consent, if the council finds, among other things, that the proposed use does not substantially prohibit the operations of the surface owner.[130]

Grounds for denial of a mining permit are specified in the Act. They include the following substantive grounds: (1) irreparable harm to a unique, historical, scenic, or archaeological area; (2) un-

127. WYO. STAT. ANN. § 35-502.21 (Supp. 1975).
128. WYO. LAND QUALITY RULES & REG'S. (1975).
129. WYO. STAT. ANN. § 35-502.23 (Supp. 1975).
130. WYO. STAT. ANN. § 35-502.24(b)(x) to (xii) (Supp. 1975).

lawful water pollution; (3) revocation of prior mining permit, or revocation of bond; (4) public nuisance or danger to public health, safety, and welfare; (5) a showing that reclamation cannot be accomplished.[131]

(c) Annual Report.

The operator must file an annual report, detailing among other things, the extent of mining, the progress on reclamation, changes from prior application or annual reports, and time schedule for the next year. Adjustment of yearly bond is based upon evalauation of the annual report.[132]

(d) Duties of Operator

The operator must segregate, protect, and preserve topsoil; bury or dispose of toxic materials; contour the land to the use set out in the reclamation plan; replace vegetation with native or superior self-regenerating vegetation; prevent water pollution, and reclaim the land in conformity with the reclamation plan.[133]

(e) Practical Applications.

While the Wyoming Act appears complete and thorough, it does not displace or override any federal law on the same topic. Mine operators are subjected to both state and federal requirements for mining permits and bonding. Aside from these requirements, federal officials have usually left supervision and enforcement of mine reclamation to state officers, even on federal land.[134] Generally speaking, federal officials have written the requirements of state law into the federal mining plan and conflict between state and federal law has not often arisen. Although federal reclamation standards are now proposed[135] there have in the past been no federal standards to conflict with those such as described in the Wyoming Environmental Quality Act. The question of what reclamation standard will apply on federal land is treated elsewhere in this paper.

b. Other States.

The recently enacted Wyoming statutes and regulations relating to energy development, land planning, and control have been examined in detail above. Space does not permit a similar analysis for all the western states affected by energy development. A brief dis-

131. WYO. STAT. ANN. § 35-502.24(g) (Supp. 1975).

132. WYO. STAT. ANN. § 35-502.28 (Supp. 1975).

133. WYO. STAT. ANN. § 35-502.32 (Supp. 1975).

134. Statements by Chief of Wyoming Land Quality Division, Department of Environmental Quality, December 2, 1975.

135. DEPARTMENT OF INTERIOR Proposed Coal Mining Operating Reg's, §§ 211 & 3041, 40 FED. REG. 41124-38 (1975).

cussion of particularity of developments in North Dakota and Montana has been set out below with the other important state developments being treated by table in Appendices A and B.

(1) Montana.

In 1975, Montana's Senate Bill No. 13 provided for a severance tax on coal based on a percentage of the value of coal produced. After finding, *inter alia*, that:

> (a) coal is the only mineral which can supply energy while being easily found in abundance in Montana;
>
> . . .
>
> (d) coal in Montana is subject to regional and national demands for development which could affect the economy and environment of a larger portion of the state than any other mineral development has done;[136]

the legislature imposed a severance tax on coal produced according to the following schedule:

Heating quality (BTU per pound of coal):	Surface Mining	Underground Mining
Under 7,000	12 cents or 20% of value	5 cents or 3% of value
7,000-8,000	22 cents or 30% of value	8 cents or 4% of value
8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
Over 9,000	40 cents or 30% of value	12 cents or 4% of value

> The formula which yields the greater amount of tax in a particular case shall be used at each point on this schedule. "Value" means the contract sales price.[137]

(2) North Dakota.

In 1975,[138] North Dakota adopted its Energy Conversion and Transmission Facility Siting Act,[139] which requires:

1. utilities[140] annually to prepare[141] broad and general ten-year

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136. MONT. REV. CODE ANN. § 84-1312 (Supp. 1975).
137. MONT. REV. CODE ANN. § 84-1314 (Supp. 1975).
138. Ch. 436, [1975] LAWS OF N.D. 1199.
139. N.D. CENT. CODE ch. 49-22 (Supp. 1975).
140. "Utility" means any person engaged in and controlling the generation, manufacture, refinement, or transmission of electric energy, gas, or liquid hydrocarbon products, including, but not limited to, electric power generation or transmission, coal gasification, coal liquefaction, petroleum refinement, uranium enrichment, and the transmission of coal, gas, liquid hydrocarbon products, or water from or to any energy conversion facility.
N.D. CENT. CODE § 49-22-03(12) (Supp. 1975).
141. N.D. CENT. CODE § 49-22-04 (Supp. 1975).

plans;[142]

2. the Public Service Commission to continuously inventory[143] potential energy conversion facility[144] sites and transmission facility[145] corridors;[146]

3. the Public Service Commission to develop criteria and standards for use in preparing the above inventory and to guide the site suitability and selection process described below;[147]

4. utilities to submit specific facility development plans[148] five

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142. *Id.* Section 49-22-04 reads in part:
The ten-year plan may be appropriate portions of a single regional plan or may be jointly prepared and submitted by two or more utilities and shall contain the following information:
1. A description of the general location, size, and type of all facilities to be owned or operated by the utility during the ensuing ten years, as well as those facilities to be removed from service during the planning period;
2. A description of the efforts by the utility to coordinate the plan with other utilities so as to provide a coordinated regional plan for meeting the utility needs of the region;
3. A description of the efforts to involve environmental protection and land-use planning agencies in the planning process, as well as other efforts to identify and minimize environmental problems at the earliest possible stage in the planning process;
4. A statement of the projected demand for the service rendered by the utility for the ensuing ten years and the underlying assumptions for the projection, with such information being as geographically specific as possible, and a description of the manner and extent to which the utility will meet the projected demand; and
5. Any other relevant information as may be requested by the commission.

143. N.D. CENT. CODE § 49-22-05(2) (Supp. 1975).

144. "Energy conversion facility" means any plant, addition, or combination of plant and addition, designed for or capable of:
a. Generation of fifty thousand kilowatts or more of electricity;
b. Manufacture or refinement of one hundred million cubic feet or more of gas per day;
c. Manufacture or refinement of fifty thousand barrels or more of liquid hydrocarbon products per day; or
d. Enrichment of uranium minerals.
N.D. CENT. CODE § 49-22-03(5) (Supp. 1975).

145. "Transmission facility" means:
a. An electric transmission line and associated facilities with a design of two hundred kilovolts or more;
b. An electric transmission line and associated facilities with a design of sixty-nine to two hundred kilovolts, if the facility does not follow quarter section lines, section lines, property lines, roads, highways, or railroads; or
c. A gas or liquid transmission line and associated facilities designed for or capable of transporting coal, gas, liquid hydrocarbon products, or water from or to an energy conversion facility described in subsection 5.
N.D. CENT. CODE § 49-22-03 (11) (Supp. 1975).

146. " 'Corridor' means the general location of a transmission facility." N.D. CENT. CODE § 49-22-03(4) (Supp. 1975).

147. N.D. CENT. CODE § 49-22-05(1) (Supp. 1975).

148. N.D. CENT. CODE § 49-22-06 (Supp. 1975) reads in part:
The plans may be appropriate portions of a single regional plan or may be jointly prepared and submitted by two or more utilities, and shall contain the following information:
1. A description of the general size and type of all energy conversion facilities and transmission facilities to be owned and operated by the utility;
2. An identification of all existing facilities to be removed from service upon completion of construction of such energy conversion facilities or transmission facilities; and

years in advance;[149]

5. utilities to apply for[150] certificates of site compatibility from the Public Service Commission prior to construction of an energy conversion or transmission facility.[151] The sites of the proposed facility sites and transmission corridors must be among those in the Commission's inventory or be evaluated under the Commission's criteria and standards;

6. the Public Service Commission to designate in accordance with its criteria and standards suitable sites or corridors (after study, evaluation, and hearings) as proposed by the utilities or as selected from the Commission's inventory;[152]

7. the Public Service Commission to issue a certificate of site compatibility, after designation of the site or corridor;[153]

8. the utilities to apply for and receive from the Commission a permit for the construction of any transmission facility within the designated corridor.[154]

B. LOCAL LAND USE CONTROLS.

1. *Background.*

a. Discretionary.

The western states have delegated substantial land use control

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8. An identification of the location of the tentative preferred site and at least one alternative site for all energy conversion facilities, and the tentative preferred corridor and at least one alternative corridor for all transmission facilities on which construction is intended to be commenced, and the preliminary indication of the potential impact of the planned facilities on existing environmental values, and how potential adverse effects on such values will be avoided or minimized with the least detriment to the environment and the welfare of the public. Such site and corridor identification shall be made from the inventory published by the commission pursuant to section 49-22-05 or from sites or corridors offered by the utility. In the event a utility identifies a site or corridor not contained in the commission's inventory of potential sites and corridors, the utility shall set forth the reason for such identification and shall make an evaluation of such identified sites and corridors using the commission's facility siting and routing criteria.

149. *Id.*

150. Pursuant to N.D. CENT. CODE § 49-22-08 (Supp. 1975), the application is to contain the following information:

a. A description of the size and type of facility;
b. A summary of any studies which have been made of the environmental impact of the facility;
c. A statement explaining the need for the facility;
d. An identification of the location of the preferred site and at least one alternative site for any energy conversion facility;
e. An identification of the location of the preferred corridors and at least one alternative corridor for any transmission facility;
f. A description of the comparative merits and detriments of each location identified, and a statement of the reasons why the preferred location is best suited for the facility; and
g. Such other information as the applicant may consider relevant or the commission may require.

151. N.D. CENT. CODE § 49-22-07 (Supp. 1975).
152. N.D. CENT. CODE § 49-22-10 (Supp. 1975).
153. *Id.*
154. N.D. CENT. CODE § 49-22-11 (Supp. 1975).

powers to local governments, giving them *discretionary* power to do such things as engage in comprehensive planning,[155] legislate against public nuisances,[156] adopt zoning regulations and zoning maps[157] (including planned unit developments)[158] as well as subdivision regulations[159] and building codes,[160] adopt solid waste management plans and regulations therefore,[161] acquire open space,[162] adopt floodplain management regulations[163] and envorionmental controls,[164] and establish housing or redevelopment commissions or authorities.[165]

b. Mandatory.

In addition to delegating the power for localities to adopt land use controls in their discretion, some states now require localities to take certain affirmative acts such as adopting subdivision regulations,[166] appointing planning commissions,[167] protecting commercial mineral deposits,[168] adopting permit systems for individual sewage disposal systems,[169] adopting general zoning,[170] engaging in comprehensive planning,[171] developing solid waste management systems,[172]

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155. ARIZ. REV. STAT. ANN. §§ 9-461 to -461.12 (Supp. 1975); COLO. REV. STAT. ANN. §§ 30-28-107, 31-23-201 to -213 (1973); IDAHO CODE ANN. §§ 67-6501 to -6529 (Supp. 1975); KAN. STAT. ANN. §§ 12-701 to -735 (1975); MONT. REV. CODE ANN. §§ 11-3801 to -3855 (1947); NEB. REV. STAT. ANN. §§ 14-403, 23-114 to -114.05 (1943); NEV. REV. STAT. §§ 278.010 to -828 (1973); N.M. STAT. ANN. §§ 14-18-1 to -12 (Supp. 1975); WASH. REV. CODE §§ 35.63.010 to -.120 (1965); WYO. STAT. ANN. § 15.1-72 (1957), § 18-289.2 (Supp. 1975).

156. S.D. COMPILED LAWS ANN. §§ 21-10-1 to -24 (1967).

157. ARIZ. REV. STAT. ANN. §§ 9-461 to -461.12 (Supp. 1975); CAL. GOV'T. CODE ANN. § 65800 (West 1966); COLO. REV. STAT. ANN. §§ 30-28-111, 31-23-201 to -213 (1973); KAN. STAT. ANN. § 12-707 (1975); NEB. REV. STAT. ANN. §§ 14-403, 15-237 (1943); N.M. STAT. ANN. §§ 14-18-1 to -12. (Supp. 1975); N.D. CENT. CODE §§ 11-33-01 (1960); OKLA. STAT. ANN. tit. 11, § 401 (1959), tit. 19, § 863.44 (Supp. 1975); S.D. COMPILED LAWS ANN. §§ 11-2-13, 8-2-9, 11-4-1 (1967); UTAH CODE ANN. §§ 10-9-19, 17-27-1 (1953); WYO. STAT. ANN. § 15.1-83 (1957).

158. COLO. REV. STAT. ANN. art. 24-67 (1973); NEV. REV. STAT. ANN. §§ 280A-010 to -580 (1973).

159. ARIZ. REV. STAT. ANN. §§ 9-461 to -461.12 (Supp. 1975); COLO. REV. STAT. ANN. §§ 31-23-112 to -116 (1973); KAN. STAT. ANN. §§ 12-701 to -706a (1975); N.M. STAT. ANN. § 14-18-1 (1968); S.D. COMPILED LAWS ANN. § 11-2-11 (Supp. 1975), § 11-2-17, ch. 11-3 (1969); WYO. STAT. ANN. § 15.1-79 (1965).

160. ARIZ. REV. STAT. ANN. §§ 9-461 to -461.12 (Supp. 1975); COLO. REV. STAT. ANN. §§ 30-28-201 to -209 (1973).

161. COLO. REV. STAT. ANN. §§ 30-20-101 to -115 (1973); ORE. REV. STAT. ch. 459 (1974); TEX. REV. CIV. STAT. ANN. art. 4477-7 (Supp. Pamphlet 1974-75).

162. ARIZ. REV. STAT. ANN. § 9-464 (Supp. 1975); MONT. REV. CODES ANN. ch. 62-6 (Supp. 1975).

163. ARIZ. REV. STAT. ANN. §§ 9-461 to -461.12 (Supp. 1975); MONT. REV. CODES ANN. chs. 89-33, 89-35 (Supp. 1975).

164. ARIZ. REV. STAT. ANN. § 9-1221 to -1230 (Supp. 1975); COLO. REV. STAT. ANN. §§ 25-1-506, -708, 25-7-125 (1973); NEB. REV. STAT. art. 81-15 (1971); S.D. COMPILED LAWS ANN. § 34-16A-41 (1972); WASH .REV. CODE § 70.94.011 (1975).

165. CAL. HEALTH & SAFETY CODE §§ 34110 to 34112 (West 1973); COLO. REV. STAT. ANN. §§ 29-4-501 to -509, 31-25-101 to -114, 29-4-201 to -232, 29-43-01 to -314, 29-4-401 to -403 (1973).

166. COLO. REV. STAT. ANN. § 30-28-113 (1973); MONT. REV. CODES ANN. §§ 11-8859 to -8876 (Supp. 1975).

167. COLO. REV. STAT. ANN. § 30-28-112 (1973).

168. COLO. REV. STAT. ANN. § 34-1-301 to -305 (1973).

169. COLO. REV. STAT. ANN. § 25-10-101 to -112 (1973).

170. ORE. REV. STAT. §§ 215.505 to .535 (1973).

171. CAL. GOV'T. CODE §§ 65300 to 65306 (West 1966); ORE. REV. STAT. §§ 215.505 to .535 (1973).

172. NEV. REV. STAT. §§ 444.440 to .630 (1975); WASH. REV. CODE ch. 70.95 (1975).

adopting open space plans and open space zoning ordinances,[173] adopting building codes,[174] and preparing environmental impact statements.[175]

2. *Current Developments.*

a. Colorado.

(1) Areas and Activities of State Interest.[176]

On May 17, 1974, the Governor of Colorado signed House Bill 1041,[177] recognizing present shortcomings of existing land use planning and opening a new era in Colorado for local-state relations in land use regulation.

Although the statute is not intended to impair individual property rights, it is a distinct shift in the manner in which the State of Colorado may exercise and delegate its police power over land use activities and developments. In the past, with few exceptions, this power was delegated to the local units, manifesting itself in the forms of zoning, subdivision regulations, public nuisance ordinances, etc.

The emphasis of House Bill 1041 is to leave primary land use control at the local government level but to regulate important developments and activities, through permits issued by local government. Permits are issued after the locality designates and provides for administration of "matters of state interest," which include *developments within areas* of state interest as well as *activities* of state interest. Except where formally requested by the Land Use Commission (LUC) and sustained by judicial review, designation and administration of matters of state concern are discretionary with the local government.

Within the text of House Bill 1041, the Colorado General Assembly itself established twenty-one areas and activities of state interest as determined by local governments. These include, *inter alia*: mineral resource areas; natural hazard areas; areas containing, or having a significant impact upon, historic, natural, or archaeological resources of statewide importance; areas around key facilities; location, construction, and extension of major "domestic water and sewage treatment systems;" site location and development of solid waste disposal sites; site selection of airports; site selection of certain rapid or mass transit facilities; site selection of certain highways and interchanges; site selection and construction of major fa-

173. CAL. GOV'T. CODE § 65910 (West Supp. 1976).
174. WASH. REV. CODE ch. 19.27 (Supp. 1974).
175. CAL. PUB. RES. CODE §§ 21000 to 21176 (West Supp. 1976).
176. Excerpted and adapted from WHITE, COLORADO LAND USE LAW (1976) with permission of publisher.
177. Ch. 80, [1974] SESS. LAWS OF COLO. 335.

cilities of a public utility; site selection and development of new communities; efficient utilization of municipal and industrial water projects; and conduct of nuclear detonations.

The locality *may*, after public hearings, designate matters of state interest and adopt guidelines and regulations for the *administration* of such matters. Although the guidelines for administration are to be consistent with statutory criteria for administration, local guidelines as well as any implementing regulations thereunder may be "more stringent" than the statutory criteria. The local government is "encouraged" to finish designation procedures by June 30, 1976.

The local government is to submit its designation and guidelines to the Colorado Land Use Commission. Within thirty days after receipt of the materials, the Land Use Commission must review their contents and either accept them or recommend their modification. After receipt of the specific written modifications suggested by the Land Use Commission, the local government has thirty days to modify its order and resubmit it to the Land Use Commission or to notify the Land Use Commission that its recommendations are rejected.

Once a matter of state interest has been designated by the local government or once the Land Use Commission has issued its formal request, no person shall engage in development in an area of state concern and no person shall engage in an activity of state concern without a permit issued by the locality.

To obtain such a permit, a person must apply to the county on a form prescribed by the Land Use Commission and pay a reasonable fee. The county shall hold a public hearing on the application and shall approve it only if the proposed development or authority complies with the county's guidelines and regulations.

(2) Local Government Land Use Enabling Act.[178]

In May of 1974, the Local Government Land Use Control Enabling Act, commonly referred to as House Bill 1034,[179] became law in Colorado. House Bill 1034 did not receive the widespread attention given to the previously-described House Bill 1041. Yet, its potential impact, although yet untested, could be substantially farther reaching.

The statute purports to give each local government the authority to plan for and regulate the use of land by a number of specific and general methods. This grant of power, however, is prefaced by the phrase "without limiting or superseding any power or authority

178. Excerpted and adapted from WHITE, COLORADO LAND USE LAW (1975) with permission of publisher.
179. Ch. 81, [1974] SESS. LAWS OF COLO. 353.

presently exercised or previously granted." Whether this provision is a limitation on House Bill 1034 powers or whether it simply protects other local powers remains to be seen. It seems that the latter is the correct interpretation since it is unlikely that the General Assembly would enact laws intended to have no effect.

Local governments are given the specific authority to plan for and regulate the use of land by:

1. regulating development and activities in *hazardous areas;*

2. protecting lands from activities which would cause immediate or foreseeable material danger to significant *wildlife habitat* and where an activity would endanger a *wildlife species;*

3. preserving areas of *historical and archaeological importance;*

4. regulating the establishment of certain *roads on public* lands;

5. regulating the location of activities and developments which may result in significant *changes in population* density;

6. providing for *phased development* of services and facilities;

7. regulalting the use of land on the basis of the *impact* thereof on the community or surrounding areas.

In addition, local governments are given the *general* authority to plan for and regulate the use of land by *otherwise* planning for and regulating the use of land so as to provide planned and orderly use of land and protection of the environment in a manner consistent with constitutional rights.

b. Montana.

Chapter 498, Montana Session Laws 1975 (H.B. 666), amended Montana's existing subdivision enabling legislation to require that new subdivisions (which attend most significant energy development) be "in harmony with the natural environment" and to require both counties and cities to weigh eight new criteria in considering proposed subdivisions, specifically, the need for the subdivision, and the expressed public opinion, and the effect of the proposed subdivision upon local services, the natural environment, wildlife and wildlife habitat, agriculture, taxation, and public health and safety.

III. FEDERAL AUTHORITIES AFFECTING ENERGY DEVELOPMENT IN THE WEST.

It is nearly impossible to catalog all applicable federal statutes and regulations relating to energy development in the West; it is clearly inappropriate to do so here. A recent state and federal joint

study has unearthed twenty federal agencies with some responsibility in this area.[180]

Although there are numerous federal agencies involved in energy development, the three preeminent agencies are the Departments of Interior and Agriculture and the Environmental Protection Agency. Other major federal energy agencies, such as ERDA (Energy Research and Development Administration) or FEA (Federal Energy Administration) have little or nothing to do with the development, control, or disposition of lands in the West.[181] Although both ERDA and FEA have major responsibilities for energy development, these responsibilities are generally for scientific research or for administration of existing energy programs, not directly related to energy and land in the West.

A. DEPARTMENT OF AGRICULTURE—FOREST SERVICE.

The Department of Agriculture was created in 1862[182] and the Forest Service was created in 1905 by transfer of federal forest lands from the Department of Interior to the Department of Agriculture.[183] Generally speaking, the Forest Service is concerned only with land management aspects of mineral development. It should be noted that almost 25 percent of all federal land is within the National Forest System of National Forests, National Grasslands, and Land Utilization Projects.[184]

The General Mining Laws of 1866 and 1872[185] are the basic authorities for location and patenting of mining claims on the public domain, including Forest Service lands. However, the only energy related minerals so covered are thorium and uranium. Persons entering national forests for the purposes of prospecting, locating, and developing mineral resources must comply with the rules and regulations covering National Forests.[186] After 1955, mining claims are to be used only for prospecting, mining, or processing operations and uses reasonably incident thereto, and rights under such claims are subject to the right of the United States to manage and dispose of the vegetative surface resources and to manage the other surface resources.[187] The Department of Agriculture has recently promulgated

180. HANDBOOK OF FEDERAL AND UTAH STATE LAWS ON ENERGY/MINERAL RESOURCE DEVELOPMENT (Jan., 1975).

181. *See, e.g.*, The delineation of authority and responsibility to the ERDA in the act creating the ERDA. 42 U.S.C.A. §§ 5901-15 (Supp. 1976).

182. Act of May 15, 1862, ch. 72, 12 Stat. 387.

183. 16 U.S.C. § 472 (1970).

184. BUREAU OF LAND MANAGEMENT, DEPARTMENT OF INTERIOR PUBLIC LAND STATISTICS tables 7, 10, 11 at 10, 31-32 (1974).

185. 30 U.S.C. §§ 21-49 (1970).

186. 16 U.S.C. § 551 (1970).

187. 30 U.S.C. § 612 (1970).

regulations to cover uses of Forest Service land under the General Mining Laws,[188] which have been described as follows:

> The regulations generally require that prospectors and miners submit a notice of intention to operate where their activities might cause disturbance of surface resources. If the District Ranger determines that such operations will likely cause significant disturbance, the operator must file a plan of operations. The plan of operations must include the name of claimant, location information, description of the proposed operations, and a statement of the measures to be taken to meet the environmental requirements of the regulations. A description of construction operations related to access must also be included in the plan of operations.
> The regulations provide a plan approval mechanism, bonding requirements, and procedures for environmental impact appraisal. In addition to the notice of intent-plan of operations requirements, the regulations include specific environmental protection and safety requrements, and equipment and structure removal and site clean up requirements. An appeals procedure is provided with a final administrative decision at the Regional Forester level. The regulations became effective on September 1, 1974.[189]

In addition, a 1957 interagency agreement gives some added authority to the Forest Service in this regard:

> Mining law administration, while the primary responsibility of the Department of the Interior (BLM) is conducted on National Forest lands in accordance with a 1957 Memorandum of Understanding between the BLM and Forest Service. Mining claims are examined by professional mineral examiners in the Forest Service and recommendations transmitted to BLM for final action.[190]

Most energy-related minerals are covered by the two mineral leasing acts. The Mineral Leasing Act of 1920[191] is the basic document for leasing of National Forest public domain lands for energy minerals such as coal, oil, gas, oil shale, and tar sands. General authority for all such action is in the Secretary of Interior.[192] However, the 1957 agreement referred to above does allow the Forest Service to recommend issuance or denial of entry and request surface protection stipulations.[193]

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188. 36 C.F.R. §§ 252.1 to .15 (1975).
189. Dempsey, *Forest Service Regulations Concerning the Effect of Mineral Operations on Surface Resources*, 8 NAT. RES. LAWYER 401 (1975).
190. HANDBOOK OF FEDERAL AND UTAH STATE LAWS ON ENERGY/MINERAL DEVELOPMENT 4 (Jan., 1975).
191. 30 U.S.C. §§ 181-263 (1970).
192. 30 U.S.C. § 181 (1970).
193. HANDBOOK OF FEDERAL AND UTAH STATE LAWS ON ENERGY/MINERAL DEVELOPMENT 12 (Jan., 1974).

As to Forest Service acquired lands, subject to leasing under the Mineral Leasing Act for Acquired Lands,[194] the Secretary of Interior is required to obtain consent of the Secretary of Agriculture before issuing leases for oil, gas, coal, oil shale, etc. Leases and permits are subject to such conditions as the Secretary of Agriculture may prescribe to insure adequate utilization of lands for primary purposes for which they were acquired or are being administered.[195]

B. DEPARTMENT OF INTERIOR—BUREAU OF LAND MANAGEMENT.

The Department of Interior was created in 1849,[196] and the BLM formed in 1946 by consolidation of the General Land Office and the Grazing Service.[197] In broad terms, the BLM is entrusted with the stewardship of the public lands:

> The Bureau of Land Management's objective is to manage or to dispose of public lands, all in a manner to provide the maximum benefit for the general public.
>
> To do this, the Bureau will:
>
> 1. Protect the lands, resources, and public values therein from avoidable destruction, abuse and deterioration.
> 2. Manage, develop and dispose of public lands to help meet the people's need for the lands and their resources, and to contribute to the stability and orderly growth of dependent users, industries, communities and regions.[198]

The authority for BLM management of federal lands is diverse and unconsolidated, with statutory authority scattered throughout the federal statutes. As to energy resource development in the West, the most significant authorities are briefly described below.

The single-most important source of BLM authority is the Mineral Leasing Act of 1920.[199] Under this and subsequent acts, BLM issues leases, permits, and licenses for exploration and mining of oil and gas, oil shale, coal, and other minerals. Coal lands—the subject of the most intense development pressure in the West in the last few years—may be leased by competitive bidding or otherwise, and prospecting permits may be issued, subject to limitations and regulations.[200] Any lease reserves to the Secretary of Interior the right to permit use of such surface not necessary to the lessee.[201] Leases

194. 30 U.S.C. §§ 351-59 (1970).
195. 30 U.S.C. § 352 (1970).
196. Act of March 3, 1849, ch. 108, 9 Stat. 395.
197. Reorg. Plan No. 3 of 1946, § 403, 60 Stat. 1100.
198. HANDBOOK OF FEDERAL AND UTAH STATE LAWS ON ENERGY/MINERAL DEVELOPMENT 20 (Jan., 1975).
199. 30 U.S.C. §§ 181-263 (1970).
200. 30 U.S.C. § 201 (1970).
201. 30 U.S.C. § 186 (1970).

may be cancelled by an appropriate proceeding in the U.S. District Court where the property is located, for noncompliance with the Mineral Leasing Act, the lease, or applicable regulations.[202] Coal leases are for indeterminate periods, upon a condition of diligent development and continued operation. Royalty provisions are to be specified in the lease. The Secretary may, "if in his judgment the public interest will be subserved thereby" provide for an annual advance royalty in lieu of continuous operation, which cannot be less than $1 per acre per year for every year after the first five years.[203] BLM also has extensive authority as to leasing and regulation of lands for oil and gas production, but these provisions are not reviewed or considered here.

In recent years the Department of Interior, and particularly BLM, has come under heavy criticism for its administration and regulation of the public domain. Debate has centered around alleged weak policies and lax enforcement in regard to western coal lands.[204] Apparently as a result of widespread congressional and public criticism, and pressure from measures recently introduced in Congress to amend the Mineral Leasing Act,[205] the Department of Interior has now indicated an intention to revamp policies in regard to western coal. In September, 1975, new proposed regulations were issued which establish more stringent reclamation standards and preclude issuance of new leases unless reclamation is "attainable and assured."[206] Proposed new "due diligence" and "continuous operation" requirements were promulgated in December, 1975.[207] Most importantly, the Secretary of Interior announced an entire new federal coal leasing policy in January, 1976.[208] The new policy will include the following steps:[209]

1. adoption of the Energy Minerals Activity Recommendation System (EMARS), which requires careful analysis to determine need for coal and to minimize environmental impacts;

2. adoption of a totally competitive leasing system, under which no new coal prospecting permits will be granted;

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202. 30 U.S.C. § 188 (1970).

203. 30 U.S.C. § 207 (1970).

204. FTC, REPORT TO FEDERAL TRADE COMMISSION ON FEDERAL ENERGY LAND POLICY: EFFICIENCY, REVENUE, AND COMPLETION chs. 5 & 7 (Oct., 1975); GAO REPORT, FURTHER ACTION NEEDED ON RECOMMENDATIONS FOR IMPROVING THE ADMINISTRATION OF FEDERAL COAL LEASING PROGRAM (April, 1975); GAO REPORT, IMPROVEMENTS NEEDED IN ADMINISTRATION OF FEDERAL COAL LEASING PROGRAM (March, 1972).

205. *E.g.*, S. 391 & S. H.R. 6721, 94 Cong., 2d Sess. (both introduced in 1975 and still pending as of February, 1976).

206. 30 C.F.R. § 211 (1975); 43 C.F.R. § 3041.0-1 (1975).

207. 43 C.F.R. §§ 3500.0-5, 3522.2-1 (1975).

208. The final environmental impact statement on the proposed policy revisions was issued in September, 1975.

209. Press release of Secretary of Interior Thomas Kleppe, January 26, 1976.

3. development of final regulations governing conditions under which mining operations and post-mining reclamation must take place;

4. preparation of regional environmental impact statements, wherein groups of coal and coal-related actions are proposed in a defined geographical area;

5. continuation, until the new coal leasing system has been implemented, of the short-term leasing criteria that has been in effect since February, 1973, to allow leasing for ongoing mining operations or to meet nearterm reserve requirements;

6. promulgation of effective diligent development standards;

7. establishment of a firm definition for commercial quantities to determine whether leases will be issued to preference right lease applicants under the Mineral Leasing Act; and,

8. removal under controlled conditions of the federal coal leasing moratorium that has been in effect since early 1971.

The precise contents of the above steps must await promulgation of new regulations which are expected in early 1976. Operational success of the new policy is difficult to predict at this time. In addition to the Mineral Leasing Act of 1920, there are other statutes which affect BLM regulation of energy and mineral development on the public domain. The Mineral Leasing Act for Acquired Lands[210] applies the provisions of the 1920 act to land acquired by the United States which was not originally within the public domain. The Taylor Grazing Act empowers the secretary to preserve the land and its resources from destruction or unnecessary injury[211] but specifically provides that nothing in the Act shall be "construed or administered in any way to diminish or impair any right to the possession and use of water for mining. . . ."[212] BLM administers the General Mining Law of 1872 for certain solid (hardrock) minerals on the public domain. Under the terms of the Multiple Mineral Development Act, land classified and known to be valuable for coal is also open to location and entry under the mining laws for locatable minerals occuring in a seam or deposit of lignite.[213] The Geothermal Steam Act of 1970 provides for the leasing of federal geothermal lands. Competitive or preference leasing rights are defined, and rent and royalty provisions established. Beneficial production or use of the geothermal produce is required, if possible.[214]

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210. 30 U.S.C. §§ 351-59 (1970).
211. 43 U.S.C. §315(a) (1970).
212. 43 U.S.C. § 315(b) (1970).
213. 30 U.S.C. § 541 (1970).
214. 30 U.S.C.A. §§ 1001-25 (Supp. 1976).

C. DEPARTMENT OF INTERIOR—GEOLOGICAL SURVEY.

The Geological Survey's energy related concerns in the West encompass lands administered by the Bureau of Land Management and Forest Service land. The survey:

> 1. Defines leasing areas subject to competitive bidding.
> 2. Reviews noncompetitive lease applilcations and applications for prospecting permits; reports to BLM whether lands applied for should be leased by competitive bidding or whether noncompetitive lease applications or prospecting permits should be issued.
> 3. Supervises conduct of oil and gas and mining operations performed by private industry under prospecting permits or leases to prevent waste of resources, to prevent pollution, to minimize surface damage, and to assure compliance with all lease terms.
> 4. Determines, before a well is drilled, worked over, or abandoned, whether an oil and gas or geothermal lessee is employing equipment, material and operating practices that conform to orders of the GS supervisor and to standards established by regulations issued by the Secretary of the Interior.
> . . . .
> 12. Provides to NRC expertise and evaluations on the geologic and seismologic aspects of nuclear installation sites.
> 13. Prepares environmental analyses on oil and gas exploration, development, and mining plans to determine if an Environmental Impact Statement is necessary.[215]

D. ENVIRONMENTAL PROTECTION AGENCY

The Environmental Protection Agency was established in 1970[216] and is charged with the primary responsibility for protecting the public health and welfare from pollution.[217] Since energy production, energy facilities, and energy use all may produce air emissions, water effluents, and other production residuals, nearly all energy-related facilities are subject to some sort of EPA review or control. The two most significant EPA authorities are the Clean Air Act of 1970[218] and the Water Pollution Control Act Amendments of 1972.[219]

1. *Air Quality.*

Under the Clean Air Act, EPA establishes primary and secondary national ambient air quality standards for air pollutants.[220]

215. HANDBOOK OF FEDERAL AND UTAH STATE LAWS OF ENERGY/MINERAL DEVELOPMENT 46 (Jan., 1975).
216. Reorg. Plan No. 3 of 1970, 84 Stat. 2086.
217. *Id.*
218. 42 U.S.C. § 1857 (1970).
219. 33 U.S.C.A. §§ 1251-76 (Supp. 1976).
220. 42 U.S.C.A. § 1857-4 (Supp. 1976).

Standards are to be achieved with state implementation plans, providing for implementation and enforcement of the federal or a higher state standard.[221] If the state fails to develop an EPA-approved implementation plan to meet the national standards, EPA may enforce the standards in that state.[222] EPA also establishes new source emission standards,[223] emission limitations for hazardous air pollutants,[224] and motor vehicle emission standards.[225]

The connection between air quality control and landbased energy development is becoming painfully obvious. For example, EPA approval of state implementation plans may be based on the availability of

> such other measures as may be necessary to insure attainment and maintenance of . . . primary [and] secondary standard[s], including but not limited to, *land-use* and transportation controls.[226]

Three specific areas are worth additional consideration in this regard: nondegradation, indirect source review, and Air Quality Maintenance Areas.

a. Nondegradation.

One of the purposes of the Clean Air Act is to *protect and enhance* the quality of the nation's air resources."[227] Consequently, in June, 1972, the EPA was enjoined from approving state implementation plans which allowed "significant deterioration" of existing air quality and was ordered to issue regulations prohibiting such "significant deterioration."[228] The resulting regulations[229] limit any increase in concentrations of particulate matter and sulfer dioxide in amounts[230] over the appropriate "baseline air quality concentration," which is the level existing during 1974, plus additions resulting from new sources approved prior to January 1, 1975.[231]

The regulations apply to areas where existing air quality is better than one or more of the secondary standards.[232] The regulations classify all such areas as Class II,[233] allowing modest increases in

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221. 42 U.S.C.A. 1857c-2 (Supp. 1976).
222. 42 U.S.C.A. § 1857c-5(c) (Supp. 1976).
223. 42 U.S.C.A. § 1857c-6 (Supp. 1976).
224. 42 U.S.C.A. § 1857c-7 (Supp. 1976).
225. 42 U.S.C.A. § 1857f (Supp. 1976).
226. 42 U.S.C.A. § 1857c-5(a)(2)(B) (Supp. 1976) (emphasis added).
227. 42 U.S.C. § 1857(b)(1) (1970) (emphasis added).
228. Sierra Club v. Ruckelshaus, 2 ELR 20262, 4 ERC 1205 (D.D.C. 1972), *aff'd by equally divided court sub nom.*, Fri v. Sierra Club, 412 U.S. 541 (1973).
229. 40 C.F.R. § 52.21 (1975).
230. *Id.* at § 52.21(c).
231. *Id.* at § 52.21(b)(1).
232. *Id.* at § 52.21.
233. *Id.* at § 52.21(c)(3)(i).

ambient concentrations.[234] States may propose redesignations[235] such areas to Class I, allowing minimal increases,[236] or to Class III, allowing concentrations no greater than secondary standards,[237] only after certain hearings and notice. In this regard:

> The proposed redesignation is based on the record of the state's hearing, which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and states, and (3) any impacts of such proposed redesignation upon regional or national interests.[238]

The regulations further allow states to propose redesignation of federally-owned lands within the state. As of this writing, however, there have been no redesignations, leaving the entire country in Class II.

b. Indirect Source Review.

EPA regulations[239] which have become a part of all state implementation plans, require review of new or modified "indirect sources."[240] "Indirect sources" do not pollute by themselves, but they do encourage other activity which does pollute, such as automobile traffic, which in turn might cause violation of a national ambient air quality standard. As they now stand, however, the EPA regulations limit the applicability of indirect source review to certain highways and airports.[241]

c. Air Quality Maintenance Areas.

Air Quality Maintenance Areas (AQMA's), areas in which the national ambient air quality standards are now being exceeded or may be exceeded during the next ten years, are to be designated by the states by July 1, 1976.[242] After designation, plans are to be developed by the states to prevent violation of the national standards. Once completed, the plan could be enforced by the state or by local land use agencies. Although there have been no designations at this writing, twenty-three AQMA's in Region VIII, EPA, are under investigation:

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234. *Id.* at § 52.21(c)(2)(i).
235. *Id.* at § 52.21(c)(3)(ii).
236. *Id.* at § 52.21(c)(2)(i).
237. *Id.* at § 52.21(c)(2)(ii).
238. *Id.* at § 52.21(c)(3)(ii)(d).
239. *Id.* at § 52.22(b)(3).
240. *Id.* at § 52.22(b)(1)(i).
241. *Id.* at § 52. *See also* Energy Supply and Coordination Act of 1974, Pub. L. No. 93-319, § 4(b), 88 Stat. 246 (1976) (codified at 42 U.S.C.A. § 1857c-5(c)(2) (Supp. 1976)).
242. 40 C.F.R. § 51.12 (1975).

Colorado:

District 2: Larimer and Weld Counties.

District 3: Adams, Arapahoe, Boulder, Clear Creek, Denver, Douglas and Jefferson Counties.

District 4: El Paso County.

District 7: Pueblo County.

Colorado-Utah Interstate: Garfield, Mesa, Moffat and Rio Blanco Counties, as well as the Utah Counties described below.

Montana:

Kalispell: Flathead and Lake Counties.

Missoula: Missoula County.

Helena: Lewis and Clark County.

Anaconda-Butte: Deer Lodge and Silver Bow Counties.

Billings: Sweet Grass, Stillwater, Carbon, Yellowstone and portion of Big Horn Counties.

Montana Coal Resource: Treasure, Rosebud, Custer, Powder River, Fallon, Carter and a portion of Big Horn Counties.

North Dakota:

McLean-Mercer-Oliver: McLean, Mercer and Oliver Counties.

Cass: Cass County.

South Dakota:

Sioux Falls: Minnehaha and Lincoln Counties.

Black Hills: Meade, Lawrence, Pennington and Custer Counties.

Utah:

North Central: Weber, Morgan and Davis Counties.

Salt Lake City: Salt Lake County.

Provo: Summit, Wasatch and Utah Counties.

Southwestern: Beaver, Iron, Washington, Kane, and Garfield Counties.

Wayne: Wayne County.

Southeastern: Carbon, Emergy, Grand and San Juan Counties.

Colorado-Utah Interstate: Duchesne, Daggett and Uintah Counties, as well as the Colorado counties described above.

Wyoming:

Powder River Basin: Campbell and Converse Counties.

Sweetwater: Sweetwater County.

2. *Water Quality.*

Under the Federal Water Pollution Control Act,[243] EPA is to establish effluent limitations which specify the maximum permissible effluent discharge[244] In addition, states are to establish ambient water quality standards and submit them to EPA for approval. If approval is not given, EPA may establish standards for the state.[245] Enforcement of both the effluent discharge limitations and the ambient water quality standards is by permit for point sources.[246] States with EPA approved programs may issue federal permits, subject to an EPA veto.[247] As of this writing, the following states in Region VIII, EPA, now have their own approved permit programs: Colorado, Wyoming, North Dakota and Montana.

Two other aspects of water quality control which are intimately related to energy development are water quality plans and dredge and fill permits, both of which are discussed briefly below.

a. Water Quality Management Plans.

Two key planning provisions of the Federal Water Pollution Control Act are beginning to have major impacts on energy development in the West.

(1) Section 303.

Under § 303, Water Quality Management Plans, each state must develop a continuing planning process to insure that water quality standards are met. These plans have already been prepared, either in draft or approved form, for most major drainage basins in Region VIII, EPA. The most important ingredient of the § 303 plans is the establishment of waste load allocations for various stream segments. For those stream segments where application of technology-based effluent standards to local *point* source discharges will not by themselves achieve the applicable ambient stream standards, the state is to adopt total maximum daily loading requirements for pollutants[248] which are then allocated among the various point source dischargers and incorporated in the terms of their discharge permits. Because of the existence of nonpoint source pollution problems, waste load allocation alone will not achieve water quality standards; section 208 is addressed to this problem.

(2) Section 208.

Under § 208, a designated planning agency is to produce plans

243. 33 U.S.C.A. §§ 1251-1376 (Supp. 1976).
244. 33 U.S.C.A. § 1311b (Supp. 1976).
245. 33 U.S.C.A. § 1313 (Supp. 1976).
246. 33 U.S.C.A. § 1341 (Supp. 1976).
247. 33 U.S.C.A. § 1342b (Supp. 1976).
248. Identified by EPA as suitable for such limitations.

that anticipate municipal and industrial waste treatment needs, establish priorities for construction of new waste treatment facilities, regulate the modification, construction, and siting of waste treatment facilities, and establish *land use controls* to regulate *nonpoint sources* of pollution, such as agriculture, *mining*, and construction. In most of the western states, the planning agencies are located at the regional level for designated areas and, in all states, at the state level for the remainder of the state. Within Region VIII, EPA, twenty-three § 208 areas have been designated:

Colorado:

Colorado West: Garfield, Mesa, Moffat and Rio Blanco Counties.

Denver Area: Adams, Arapahoe, Boulder and Jefferson Counties.

Colorado Springs: El Paso and Teller Counties.

Pueblo Area: Pueblo County.

Northwest Colorado: Eagle, Grand, Jackson, Pitkin and Routt Counties.

Weld-Larimer: Weld and Larimer Counties.

Montana:

Yellowstone-Tongue: Carter, Custer, Fallon, Powder River, Rosebud and Treasure Counties.

Middle Yellowstone: Big Horn, Carbon, Stillwater, Sweet Grass and Yellowstone Counties.

Gallatin Valley: Gallatin and a portion of Madison Counties.

Flathead Drainage: Flathead and Lake Counties.

North Dakota:

Southcentral: Burleigh, Emmons, Grant, Kidder, McLean, Mercer, Morton, Oliver, Sheridan, Sioux, and a portion of Dunn Counties.

Fargo-Moorhead: Cass, Clay (Minnesota), Ransom, Richland, Sargent, Steele and Traill Counties.

South Dakota:

Black Hills: Butte, Custer, Fall River, Harding, Lawrence, Meade and Pennington Counties.

Sioux Falls: Clay, Lincoln, McCook, Minnehaha, Turner and Union Counties.

Utah:

Weber-Davis: Weber and Davis Counties.

Salt Lake: Salt Lake County.

Provo Area: Summit, Utah and Wasatch Counties.

Uintah Basin: Daggett, Duchesne and Uintah Counties.
Southeastern Utah: Carbon, Emery and Grand Counties.
Five County: Beaver, Garfield, Iron, Kane and Washington Counties.

Wyoming:
Powder River Basin: Campbell, Johnson and Sheridan Counties.
Jackson Hole: Teton County.
Green River Basin: Lincoln, Sweetwater, and Uinta Counties.

The various regional planning agencies are presently involved in various stages of planning development. While some are relatively advanced in their planning processes, being engaged in data-gathering and actual plan formulation, other agencies are still engaged in organizing their respective planning efforts.

A recent federal court decision, *Natural Resources Defense Council, Inc., v. Train,*[249] held that the states themselves are now obligated to undertake the same type of planning activities in nondesignated areas as is presently required of designated regional planning agencies under § 208. As yet, in most states there has been no formal designation of the state agency responsible for § 208 plan development in the nondesignated areas.

(3) Consolidation of § 208 and § 303 Planning.

Regulations recently promulgated by EPA[250] have consolidated the planning processes under §§ 208 and 303. It is EPA's intention that this consolidation of the requirements of § 208 and § 303 will establish a single, statewide process which fulfills all applicable requirements for water quality management planning and implementation under the FWPCA.

b. USACE Regulations for Dredge and Fill Permits.

Under § 404 of the Federal Water Pollution Control Act Amendments of 1972, the Corps of Engineers is to issue permits for the discharge of dredged or fill material into the waters of the United States, including most Colorado lakes, streams, and rivers. Under *Natural Resources Defense Council, Inc., v. Calloway,*[251] the Corps was ordered to issue permit regulations which recognized the full extent of the Corps' authority over all "waters of the United States" rather than only those waters meeting the classical test of navigability. In May, 1975, the Corps published four alternative proposed regu-

249. C.A. 14851 (D.D.C. 1975).
250. EPA WATER QUALITY REG'S, § 130, 40 FED. REG. 55334 (1975).
251. 392 F. Supp. 685 (D.D.C. 1975).

lations and received voluminous comments.[252] In July, 1975,[253] the Corps issued *interim* final regulations which were open for comment until late October, 1975. The final regulations have not yet been issued.

The *interim* final regulations are lengthy and complex. Suffice it to say that, with a few exceptions such as some agricultural activities, a permit is required before any material may be placed in lakes (five acres or greater) or in streams and rivers up to their headwaters (having a normal of less than 5 c.f.s.), or beneath the ordinary highwater mark (land inundated 25% of the time) of those bodies of water.

The *interim* final regulations also establish a schedule which gradually increases the necessity for a permit:

1. Phase I, now in effect, requires permits for discharges into only those waters which meet the classical test of navigability, as determined by the Corps.

2. Phase II, after July 1, 1976, will require permits for discharges into classically navigable waters as well as their primary tributaries.

3. Phase III, after July 1, 1976, will require permits for discharges into all other waters covered by the regulations.

In September, 1975,[254] the EPA issued its interim final guidelines under § 404, which gives EPA a veto over issuance of permits by the Corps if the proposed discharge of dredged or fill material will violate water quality standards.

c. Effect on Federal-State Relations.

In the context of federal-state relations, the Clean Air Act and the Federal Water Pollution Control Act broke new ground by providing for a cooperative system. As noted elsewhere in this paper, it is possible that the future will hold more such cooperative schemes.

> In the 1972 Amendments to the FWPCA, Congress gave a great deal of attention to the proper function of the states in administering the regulation of water pollution. What emerged was a regulaltory structure under which the Federal Government sets the standards, and the state governments, under federal supervision, apply the standards through the issuance of discharge permits. By coupling this cooperative federal-state system with a broad definition of jurisdiction coverage, Congress rejected the old notion that the proper way to divide jurisdiction as between the states and the Federal Government was to designate some waters as "state" and others as "federal." Now, instead of a crude geographical division

252. 40 FED. REG. 19766 (1975).
253. 40 FED. REG. 31320 (1975).
254. 40 FED. REG. 41292 (1975).

of waters between two systems of regulation, essentially all significant waters have been brought under a single system, with the state and federal governments playing complementary functions in the operation of the single system. Thus a new and more sophisticated concept of federal-state relations in the pollution control field has emerged in the 1972 Amendments.[255]

IV. CONFLICTS BETWEEN LAND USE CONTROLS EXERCISED BY LEVELS OF GOVERNMENT.

In light of the extensive environmental and land use controls now being exercised by state and local governments, conflict between such controls and governmental encouragement of energy development is inevitable. As a result, during the last two years, a state/federal jurisdictional battle has developed which promises to be of enormous proportions.

A. CONFLICTS BETWEEN STATES AND THE FEDERAL GOVERNMENT

The Wyoming Land Use Enabling Act provides:

> [The Land Use Commission shall] cooperate with federal agencies and with other states, provided that such cooperation is performed in such a manner as to assure that *no federal intervention or control* shall take place in the initial or continuing state or local land use planning process.[256]

In Colorado regulation of land use is delegated to local entities by the local Government Land Use Control Enabling Act, which provides:

> Each local government . . . has the authority to plan for the and regulate the use of land by: . . . regulating, with respect to the establishment of, roads on public lands administered by the federal government; this authority includes authority to prohibit, set conditions, or require a permit for the establishment of any road authorized under the general right-of-way granted to the public by 43 U.S.C. 932 (R.S. 2477) but does not include authority to prohibit, set conditions, or require a permit for the establishment of any road authorized for mining claim purposes by 30 U.S.C. 21 et seq., or under any specific permit or lease granted by the federal government. . . .[257]

The cardinal rule to keep in mind when evaluating state-federal conflicts is that the supremacy clause of the Constitution clearly states that the Constitution and legitimate federal enactments are the supreme law of the land[258] so long as the enactments are based

255. FEDERAL ENVIRONMENTAL LAW, *supra* note 3, at 692-93.
256. WYO. STAT. ANN. § 9-853(a)(xii) (Supp. 1975) (emphasis added).
257. Ch. 81, [1974] SESS. LAWS OF COLO. 353.
258. U.S. CONST. art. VI, cl. 2.

on enumerated powers as opposed to proprietary powers. Consequently, the question is not who has priority in cases of conflict, but is rather a question of whether conflict actually exists:

> Where state legislation enacted pursuant to its police powers affects [interstate] commerce a potential for conflict arises in two contexts. First, where Congress has not exercised its overlapping power in the same area the question whether such power is vested exclusively in Congress, potentially barring state attempts at regulation is presented. Second, where where Congress has acted, one must determine how much room, if any, has been left for further legislation in the same area by the states.[259]

Normally, the term "preemption" applies only to the second question. Courts appear to use parallel reasoning, however, in deciding whether the commerce clause alone invalidates state regulation.[260]

1. *State Power When Congres Has Not Acted—The Commerce Clause.*

Under its constitutional authority to regulate interstate commerce, Congress can

> enact legislation that it determines will further the general welfare . . . Unless there is no rational basis for the congressional determination that the pollution sought to be regulated affects interstate commerce, the balance struck by Congress in enacting antipollution legislation is very likely to withstand judicial scrutiny.
>
> If the national legislature fails to act [however] should a state legislature attempt to fill the vacuum the validity of its action depends on more than its rationality; the statute may not exceed the state's power, circumscribed by the Constitution and the requirements of the federal system, to enact laws which affect interstate commerce. Underlying the determination of whether a given state regulation violates the commerce clause is the fundamental question of which level of government should regulate the matter. Although answering that question involves complex considerations, a basic issue is whether the particular problem calls for a uniform solution or for a diversity of solutions . . . Generally, the rule is that the regulation will be upheld only if it is rationally related to a legitimate state purpose and the resultant burden on interstate commerce is outweighed by the state interest involved.[261]

The traditional test of whether a state can validly regulate in-

259. FEDERAL ENVIRONMENTAL LAW, *supra* note 3, at 78.
260. Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 219-20 (1959).
261. Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 HARV. L. REV. 1762-64 (1971).

terstate commerce, absent congressional consent, was established in *Cooley v. Board of Warden.*[262] The test is whether the subject matter of the state legislation is in its "nature national, or admits only of one uniform system, or plan of regulation."[263] If so, only Congress may legislate on the matter. The *Cooley* test was relaxed in *Parker v. Brown,*[264] where the court announced a more flexible balancing test to resolve the conflicting demands of state and national interests, as illustrated in a 1970 Supreme Court decision:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted or will with a lesser impact on interstate activities.[265]

The following cases are illustrative of the application of the balancing test:

Huron Portland Cement Co. v. Detroit[266] upheld a local regulation controlling smoke pollution, as applied against tugboats, even though the tugboats had been inspected, and licensed, by the federal government. The court found that the strong local interest in protecting the health of its citizens made the "burden" on interstate commerce acceptable.

In *Soap and Detergent Ass'n v. Chicago,*[267] a federal district court, in effect, found that the burden imposed on commerce by Chicago's prohibition of the sale of phosphate detergents was "excessive in relation to the putative local benefit." Since sale of the detergent was area wide rather than city wide, this would have had a substantial effect on commerce. In addition, since it was found that, even if no one within Chicago's municipal limits used phosphate detergents, the water system would still contain twenty-five times more phosphate than nuisance algae could use, the local benefit would be slight if at all.

Palladio, Inc., v. Diamond[268] upheld a New York law that prohibited the sale of products made from the skins of certain animals which were in danger of extinction, none of which were indigenous

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262. 53 U.S. (12 How.) 299 (1851).
263. *Id.* at 319.
264. 317 U.S. 341 (1943).
265. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
266. 362 U.S. 440 (1960).
267. 357 F. Supp. 44 (N.D. Ill. 1973).
268. 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1319 (2d Cir. 1971), *cert. denied,* 404 U.S. 983 (1971).

to New York. Since the federal Endangered Species Conservation Act of 1969 imposed penalties for transporting wildlife "in violation of any law or regulation of any State," the court found that, even if this were meant to apply only to indigenous wildlife, it did show that Congress was not particularly concerned over varying state laws. On balance, therefore, the New York statute could be upheld since New York could rationally prohibit sale of these animal skins products as its only effective way of promoting conservation.

American Can Co. v. Oregon Liquor Control Commission[269] upheld an Oregon statute requiring a minimum refund value on beverage containers. The court held that Oregon's interest in preserving the environment by controlling solid waste disposal outweighed the additional financial burdens the regulations would impose on manufacturers and hence on interstate commerce. The court found that, since the state had shown that a large proportion of its litter problems came from disposable beverage cans, the state had chosen a suitable method for dealing with the problem.

2. *Preemption—Where Congress Has Acted.*

a. Self-Executing Statutes.

Congress may, if it chooses, expressly allow concurrent federal/state legislation in a given area. Where Congress specifically notes that it is preempting the field, however, federal regulation prevails. The difficulty is, of course, that Congress is too often silent as to its intent, whereupon the courts must determine whether Congress intended to preempt the field.

In the past courts have used a number of tests to determine if preemption has occurred. These include: whether the nature of the scheme of federal regulation is so pervasive as to lead to the conclusion that preemption was intended;[270] whether the field is one in which federal interest is so dominant that the federal statute may be presumed to preclude enforcement of state laws on the same subject;[271] whether the state regulation is indeed in conflict with the objective of the federal statute;[272] and whether or not the area has traditionally been one of state and local control.[273] The last consideration is bolstered by a strong judicial presumption of validity given to state and local regulalations.[274]

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269. 15 Ore. App. 618, 517 P.2d 691 (1973).

270. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

271. Hines v. Davidowitz, 312 U.S. 52 (1941).

272. Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

273. Rive v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1974). *See also* Rancho Palos Verdes Corp. v. City of Laguna Beach, 390 F. Supp. 1004, 1005-06 (C.D. Cal. 1975).

274. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973) (dissenting opinion); Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 275 (1943).

b. Administrative Action.

While the above tests may be sufficient for dealing with self-executing federal statutes, additional analysis is necessary when determining whether there has been preemption because of federal *administrative* action under non-selfexecuting statutes.[275]

When and insofar as an agency actively and actually regulates an area of commerce placed

> in its jurisdiction by Congress the courts have found no difficulty in applying the supremacy clause, just as in the case of self-executing statutes. In such a case the only real question becomes whether the agency does, in fact, have power over the area and if so whether it is actively and legitimately exercising it. If these tests are met the agency's regulation is normally seen by courts as an extension of the Congress' will and power. . . . Contrary state regulation would contravene the expressed intent of Congress that the agency have power over the field.[276]

Under the "principle of fair accommodation,"[277] courts attempt to interpret agency action in the same way as they construe statutory language, by trying to avoid finding a conflict that would preempt state action unless such conflict is inherent in the character of the federal action.

During the interval after Congress delegates authority to an agency and before the agency issues its implementing rules, states may use their police powers to make regulations in the area, *if* by its "silence" the agency means not to regulate. This requires a finding by the court, based on relevant facts and circumstances, that agency silence is really an intent not to regulate and is, in effect, regulation by doing nothing—in which case preemption may be imposed.[278]

c. Illustrative Cases.

In the environmental context, the Supreme Court has decided several cases on the basis of preemption. In *Northern States Power Co. v. Minnesota,*[279] the state's own radiation emission standards, which were stricter than federal standards imposed by the Atomic Energy Commission, were invalid. The preemption was based on the pervasiveness of the federal regulatory scheme, the need for exclusive federal regulation in this area, and the potential for state inter-

275. Wallach, *Whose Intent? A Study of Administrative Preemption: State Regulation of Cable Television,* 25 CASE W. RES. L. REV. 258 (1975).
276. *Id.* at 265-66.
277. Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 132 (1945).
278. Wallach, *supra* note 275, at 267. *See also* Bethlehem Steel Co. v. New York Labor Relations Bd., 330 U.S. 767, 774 (1947).
279. 405 U.S. 1035 (1972), *aff'g* 447 F.2d 1143 (8th Cir. 1971).

ference with a federal purpose. In *City of Burbank v. Lockheed Terminal, Inc.*[280] the Supreme Court found that federal regulation of noise control was vested in the EPA and the Federal Aviation Administration to such an extent as to preempt state or local control.

In *Askew v. American Watereway Operators, Inc.*,[281] however, the Supreme Court found that a Florida statute dealing with oil spills was not an unconstitutional intrusion in the federally-preempted maritime domain. The Court said:

> To rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the states over oil spillage—an insidious form of pollution of vast concern to every coastal city or port. . . .[282]

The Court found that even though there was a pervasive scheme of federal regulation there was no showing that the Florida law actually conflicted with it.

3. *Federal Lands.*

Another area in which the issue of preemption arises is in whether the state may regulate private activities on federal lands within the state's boundaries.

a. Legislative v. Proprietary.

The threshold determination when dealing with federal lands is whether the United States holds such lands in its legislative jurisdiction or in its proprietary capacity.

1. Areas in which the United States holds legislative jurisdiction, includes such federal enclaves as federal courthouses, federally-financed housing units, post offices, etc., also known as "Article I Land."[283]

2. For all other lands, the United States holds title in a proprietary capacity only. Such land is often called "Article IV Land."[284] It should be noted at the outset that the terms of the article IV

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280. 411 U.S. 624 (1973).
281. 411 U.S. 325 (1972).
282. *Id.* at 328-29.
283. U.S. CONST. art. I, § 8, provides that among its enumerated powers the Congress is authorized:
> To exercise exclusive legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings. . . .

284. U.S. CONST. art. IV, § 3 provides:
> The 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; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular state.

clause are comprehensive and that all article I property will also come within article IV. The reverse, however, is not true.

b. Article I Land.

As of June, 1973, the United States owned—under either article IV or article I—760,999,173.3 acres of land.[285] Because there are substantial differences as to the jurisdiction on each type of land, it is crucial at the outset to determine what land is "Article I" property and what land is "Article IV" property. Article I lands are generally referred to as federal enclaves,[286] but this term is not determinative by and of itself. In order to be classified as article I land, the property must first be utilized for "Forts, Magazines, Arsenals, Dock Yards, and other Medical Buildings."[287] Secondly, the state must have consented or ceded jurisdiction over the property. If no consent or cession appears, then the property cannot be article I property. It should be noted, however, that a cession or consent does not automatically mean the property is article I property, for states at times ceded jurisdiction, all or part, over article IV property. The best examples of this are the national parks.[288] While it is necessary to be aware of the distinction between article I and article IV federal property, almost all federal land upon which energy development will be allowed is article IV "public domain" land. Of the 761 million acres of federal land, 704 million falls under the article IV "public domain" classification.[289] A second reason to bypass a full discussion here of federal or state jurisdiction over article I land is the complex and often confusing state of the law.[290] Since state energy, land use, and related laws will not generally be an issue with regard to post offices, military bases, and Washington, D.C., we pass on to a discussion of article IV property.

c. Proprietary or Article IV Land.

The second and more important class of federally-owned land, proprietary land, is the battlefield of the future in land use control. On those lands, as well as the millions of acres of mineral interests

285. BUREAU OF LAND MANAGEMENT, DEPARTMENT OF INTERIOR, PUBLIC LAND STATISTICS table 7, at 10 (1974).

286. D. ENGDAHL, PLOWSHARE TECHNOLOGY ASSESSMENT STUDIES vol. II, at 145 (NTI No. PB-231-015).

287. *Id.* at 206-09, 244.

288. *Id.* at 196-08, 244-45. *See also* D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE § 8.04 (1974).

289. BUREAU OF LAND MANAGEMENT, DEPARTMENT OF INTERIOR, PUBLIC LAND STATISTICS table 7, at 10 (1974).

290. Several chapters of both Engdahl books are devoted to tracing and unraveling this confusion. *See* D. ENGDAHL, PLOWSHARE TECHNOLOGY ASSESSMENT LEGAL STUDIES vol. II, at 174-82 (NTI No. PB-231-015); D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE § 8.11 (1974).

retained by the United States, is located a disproportionate amount of energy resources. Among the "energy breadbasket" states, the statistics are as follows:[291]

	Public Domain	*Percentage of Total*
Arizona	32,129,982 acres	44.2%
Colorado	23,120,200 acres	34.8%
Idaho	33,071,381 acres	62.5%
Montana	25,190,968 acres	27.0%
Nevada	60,568,567 acres	86.2%
New Mexico	24,812,797 acres	31.9%
North Dakota	213,009 acres	0.5%
Utah	34,551,540 acres	65.6%
Wyoming	29,437,421 acres	47.2%

In very general terms, federal administrators and some industrial executives take the position that the decision to develop energy resources on federal proprietary lands is for the owner alone, the federal government. The states, on the other hand, feel that exclusive federal decision-making leaves the states unable to plan energy development and leaves them in the position of simply reacting to the off-site impacts created by development on federal lands. As a result, the states now are asserting that they are not excluded from regulating activities on federal land such as mined land reclamation. For example, a 1975 brief for the state of Wyoming concludes that "Congress has specifically reserved to the states the authority to regulate the development, surface reclamation, and environmental impact of federal coal leases."[292] Consider also a recent Attorney General's opinion from South Dakota which concludes "South Dakota may regulate surface mining activities on all national forest land within its borders."[293]

(1) Political Sentiment.

Politically, the issue was succinctly framed in July, 1975, during a Santa Fe meeting of the western governors in a reported exchange between Governor Thomas Judge of Montana and William Lyons, a deputy undersecretary of Interior:

> At one point in the meeting, Judge told Lyons the state of Montana wants veto power over federal decisions.
> "The final decision, by law," Lyons responded, "would rest with the Secretary of the Interior."
> Judge said, after the meeting, he isn't satisfied with the In-

291. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 331 (1970).
292. Brief for State of Wyoming, Franklin Real Estate v. Kerr McKee & Wyoming, Civil No. 7842, at 35 (Wyo. Dist. Ct. of Campbell County).
293. OPINION OF ATT'Y GEN. OF S.D. (September 4, 1975).

> terior Department's offers of cooperation. "I'd like the final say and the turndown and be able to say where mining should and shouldn't take place," he said.[294]

A similar sentiment was expressed by Harris Sherman, Exeuctive Director of the Colorado Department of Natural Resources. During a recent interview, regarding oil shale development, in response to the question, "What about state energy policy vs. federal policy?", Sherman replied:

> Colorado intends to manage its own future. We believe state regulations and laws will control energy development with respect to such factors as air quality, water quality, the administration of water rights, land use, taxation and reclamation—*both on and off federal lands*. Inherent in this position is a deep belief that Colorado can best determine its future. At the same time, we want to work in a spirit of cooperation with the federal government. There is no reason why we cannot do so. Colorado should make an important contribution to national energy needs but as part of a sensible federal energy policy. We have yet to see such a policy from the federal government. We are hopeful one will be forthcoming in the near future.[295]

(2) Administrative Treatment.

A quick survey of several of the western states indicates that there is general agreement among state administrators that state land use requirements apply to activities on federal lands. Specifically, with regard to state disturbed land/reclamation statutes:

> *Colorado*[296] requires a permit for all privately-owned operations —even those on federally-owned lands. Federal operations per se, state operations and county-owned operations are not required to obtain a permit; however, the state highway department voluntarily complies with the permit system. For privately-owned operations on federally-owned lands, the state does consult the federal agencies involved—such as the BLM or Forest Service. The agency may completely veto mining operations on their land. However, once the federal agency allows an operation, it must first comply with state requirements.
>
> *Idaho*[297] requires "approval" of reclamations plans for all operations (including federal agencies) on all lands, including federally-owned lands.
>
> *Montana*[298] requires a permit for all operations (including those

294. The Denver Post, July 30, 1975, p. 3.
295. 1 SHALE COUNTY No. 8, at 19 (Aug. 1975) (emphasis added).
296. COLO. REV. STAT. § 34-32-109 (1973).
297. IDAHO CODE ch. 47-15 (Supp. 1975).
298. MONT. REV. CODE ANN. §§ 50-1034 to -1057, ch. 50-12, ch. 50-16, ch. 60-126 (Supp. 1975).

of federal agencies) on all lands, including federally-owned lands.

New Mexico[299] requires permits for private operations on federal lands but accords somewhat special treatment to operations on Indian lands.

Oregon[300] requires a permit for "mixed operations or pure commercial operations" from which the operator sells ore to anyone but a federal agency alone. If, however, the operator is strictly a contractor for a federal agency, no permit is required.

Washington, on the other hand, does not require a permit for operations on federal lands.

(3) Legal Analysis.

Although far from settled, the law appears to be that, in areas held only in the federal government's proprietary capacity, host states may regulate land use activities so long as the specific ambit of regulation has not been preempted, using the same considerations of preemption discussed previously.[301]

Based on the report of the interdepartmental committee for study of jurisdiction over federal areas within the states, it has been suggested that state and local governments do have the authority to regulate at least *private*[302] land use activities which take place on proprietary lands, subject to the limitation that authorized federal governmental functions themselves may not be interfered with.[303] Under the property clause,[304] the United States may:

> fix the terms under which its property may be used by private citizens and may take such action as is necessary to enforce such terms. But once such terms have been contractually fixed, the United States is thereby bound. Unlike a state, the United States is without pleanary power in the legislative jurisdictional sense to regulate a class of private land using activity that would contravene such privately held property interests as it itself has established.[305]
>
> [Furthermore, states] have the authority and responsibility of a sovereign to regulate such private activities as may be needed to promote the public health, safety, and welfare.[306]

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299. N.M. STAT. ANN. § 63-34-6 (1974).

300. ORE. REV. STAT. § 517.790 (1973).

301. Landstrom, *State and Local Government Regulation of Private Land Using Activities on Federal Lands*, NAT. RESOURCES LAWYER 77, 78 (1974).

302. With respect to purely federal activities, *see* Comment, *Local Control of Pollution from Federal Facilities*, SAN DIEGO L. REV. 972 (1974).

303. Landstrom, *supra* note 301, at 78-79.

304. U.S. CONST. art. IV, § 3, ch. 2.

305. Landstrom, *supra* note 301, at 79, *citing*, Light v. United States, 220 U.S. 523, 536 (1911); West Virginia Pump and Paper Co. v. United States, 109 F. Supp. 724 (Ct. Cl. 1953); McNeil v. Seaton, 281 F.2d 931 (D.C. Cir. 1960).

306. Landstrom, *supra* 301, at 80.

At an early date the United State Supreme Court struck down the assertion that state regulation of activities of private individuals on public domain was preempted by the application of the property clause.[307] Even when Congress has acted under the authority of the property clause to regulate activities on the public domain, preemption need not always be inferred. Such was the case in *United States v. Hatahley*,[308] which was an action to recover for the "unlawful" seizure of horses on Taylor grazing lands under the Utah "abandoned horse" statute. There it was argued that, by the enactment of the Taylor Grazing Act, the United States undertook complete control and supervision of its own lands to the exclusion of the state and its regulations. The court rejected this argument, finding "there is no indication under the Taylor Grazing Act that Congress intended that the entire field of law and management of the public domain was to be preempted by the United States."[309]

The most recent application of these legal principles is found in *Texas Oil and Gas Corp v. Phillips Petroleum Co.*[310] The case involved enforcement of Oklahoma's forced pooling provisions to federal oil and gas lessees under the Mineral Leasing Act. Texas Oil and Gas argued that, under the Act, exclusive control over said lands resided in the United States to the exclusion of the state. The court, citing *Hatahley*, stated that the property clause does not place exclusive control over the federal public domain in the United States Government. It only confers this power on Congress and leaves to Congress the determination of when and where and to what extent this power will be exercised.[311]

The court went on to ascertain whether Congress intended to preempt the field of oil and gas mining under the Mineral Leasing Act and found that it had not. The court drew support for its conclusion from the two sections of the Act which provides: "Nothing in this chapter shall be construed or held to affect the rights of the states or other local authority to exercise any rights which they may have. . . ."[312] and with respect to the lease terms: "None of such provisions shall be in conflict with the laws of the state in which the leased property is situated."[313]

All of the above notwithstanding, however, it must be remembered that preemption is not the only ground on which state control of federal lands may be precluded. As noted above, the com-

307. Allen v. Bailey, 91 Colo. 284, 14 P.2d 1087 (Colo. 1932).
308. United States v. Hatahly, 220 F.2d 666 (10th Cir. 1955), *rev'd on other grounds*, 351 U.S. 173 (1956).
309. *Id.* at 671.
310. Texas Oil & Gas Corp. v. Phillips Petroleum Co., 277 F. Supp. 366 (W.D. Okla. 1967), *aff'd*, 406 F.2d 1303 (10th Cir. 1964), *cert. denied*, 396 U.S. 829 (1969).
311. *Id.* at 368.
312. 30 U.S.C. § 189 (1970).
313. 30 U.S.C. § 187 (1970).

merce clause precludes states from taking action that will "substantially affect" interstate commerce. If a state regulation of activities on federal land should be viewed as substantially burdening commerce without a sufficiently compelling state interest, the state regulation would be invalid.

B. STATE v. LOCAL CONFLICTS.

1. *General.*

All municipalities and counties are subdivisions of the state, which may exercise only those powers deleglated to it by the sovereign.[314] This is so whether the local government is a home-rule[315] or statutory[316] municipality or a county.

2. *Statutory Municipalities and Counties.*

Statutory municipalities and counties possess only those powers which are expressly conferred by statute or constitutional provision (generally by statute) or those which can be fairly implied therefrom.[317] Any doubt concerning the power of a statutory municipality or a county must be resolved against the municipality.[318] Since statutory municipalities have no power to act independently of state enabling legislation or to predict their acts upon any independent, local charters, no problem of preemption arises between their acts and state legislation. The only question is whether their acts are permitted by state law.

3. *Home-Rule Municipalities.*

Home-rule municipalities remain subdivisions of the state despite their somewhat independent status and can exercise only those powers delegated by the sovereign. Generally the state will permit

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314. City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958); Munro v. Albuquerque, 48 N.M. 306, 150 P.2d 733 (1943); City of Sapulpa v. Land, 101 Okla. 22, 223 P. 640 (1924); State *ex rel.* Bayer v. Funk, 105 Ore. 134, 209 P. 113 (1922); Brown v. City of Cle Elum, 145 Wash. 588, 261 P. 112 (1927).

315. City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958).

316. City of Aurora v. Bogue, 176 Colo. 198, 489 P.2d 1295 (1971).

317. City of Glendale v. White, 67 Ariz. 231, 194 P.2d 435 (1948); Egan v. City and County of San Francisco, 165 Cal. 576, 133 P. 294 (1913); City of Aurora v. Bogue, 176 Colo. 198, 489 P.2d 1295 (1971); City of Pocatello v. Fargo, 41 Idaho 432, 242 P. 297 (1924); State *ex rel.* Mitchell v. City of Coffeyville, 127 Kan. 663, 274 P. 258 (1929); Gagnon v. City of Butte, 75 Mont. 279, 243 P. 1085 (1926); Hagerman v. Town of Hagerman, 19 N.M. 118, 141 P. 613 (1914); Hoffman v. City of Minot, 77 N.W.2d 850 (N.D. 1956); City National Bank v. Town of Kiowa, 109 Okla. 161, 230 P. 894 (1924); Seafeldt v. Port of Astoria, 141 Ore. 418, 16 P.2d 943 (1932); Wangness v. McAlpine, 47 S.D. 472, 199 N.W. 478 (1924); Anderson v. City of San Antonio, 123 Tex. 163, 67 S.W.2d 1036 (1934); Bohn v. Salt Lake City, 79 Utah 121, 8 P.2d 591 (1932); State *ex rel.* Seattle v. Superior Court, 93 Wash. 267, 160 P. 755 (1916).

318. City of Aurora v. Bogue, 176 Colo. 198, 489 P.2d 1295 (1971); City of Pocatello v. Fargo, 41 Idaho 432, 242 P. 297 (1924); *In re* Pryor, 55 Kan. 724, 41 P. 958 (1895); O'Neill v. Consumers Public Power Dist., 180 Neb. 463, 143 N.W.2d 741 (1966); Stern v. City of Fargo, 18 N.D. 289, 122 N.W. 403 (1909); Marth v. City of Kingfisher, 22 Okla. 602, 98 P. 436 (1908); Seafeldt v. Port of Astoria, 141 Ore. 418, 16 P.2d 943 (1932); Hesse v. City of Watertown, 57 S.D. 325, 232 N.W. 53 (1930); Anderson v. City of San Antonio, 123 Tex.

municipalities to adopt charters governing all local or municipal matters or affairs.[319] Under their charters, home-rule municipalities possess every power possessed by the state legislature as to local and municipal matters.[320] Problems of preemption arise when the municipality attempts to legislate concerning a matter of state concern or a matter of "mixed" state and local concern.

In a matter of *purely* local and municipal concern, the ordinance of a home-rule city generally will supersede a state statute on the same matter only if:[321] (1) the matter is one of *purely* local concern or (2) the statute and ordinance are in conflict. A statute and ordinance will be held in conflict where the ordinance attempts to authorize what the statute prohibits or attempts to forbid what the statute permits.[322] Note that, in Colorado at least, if the two-pronged test set out above is not met, the state statute will apply in home-rule cities even if the matter is of purely local concern.[323]

When dealing with a matter of mixed local and state concern, the local ordinance will be valid barring some conflict between local ordinances and state statutes, conflict being measured by the above test.[324]

Where a state has preempted an area or where a matter is of purely state concern, a home-rule city is without power to legislate on the matter at all.[325] To determine whether the state has preempted a legislative area, the court will look for an express or implied intent to preempt in the state statute, although its mere enactment will not be considered automatic premption by the state of the subject matter of the statute.[326]

Finally, the definition of local and municipal concern is dynamic. It is recognized that matters once considered to be of local concern may be preempted by subsequent constitutional amendment or by expression of public policy.[327] Alternatively, the concept of municipal concern may broaden.[328]

163, 67 S.W.2d 1036 (1934); State *ex rel.* Seattle v. Superior Court, 93 Wash. 267, 160 P. 755 (1916).

319. Service Oil v. Rhodus, 179 Colo. 335, 500 P.2d 807 (1972); State *ex rel.* Burns v. Linn, 49 Okla. 526, 153 P. 826 (1915); COLO. CONST. art. XX.

320. Roosevelt v. City of Englewood, 176 Colo. 576, 492 P.2d 65 (1971); Lehman v. City and County of Denver, 144 Colo. 109, 355 P.2d 309 (1960).

321. Vela v. People, 174 Colo. 465, 484 P.2d 1204 (1971).

322. *Id. See also* Ray v. City and County of Denver, 109 Colo. 74, 121 P.2d 886 (1942).

323. Vela v. People, 174 Colo. 465, 484 P.2d 1204 (1971).

324. City of Aurora v. Martin, 181 Colo. 72, 507 P.2d 868 (1973); Michelson v. City of Grand Island, 154 Neb. 654, 48 N.W.2d 769 (1951); City of Portland v. Welch, 154 Ore. 286, 59 P.2d 228 (1936); City of Beaumont v. Fall, 116 Tex. 314, 291 S.W. 202 (1927); City of Sapulpa v. Land, 101 Okla. 22, 223 P. 640 (1924).

325. *E.g.*, City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958). *See, e.g.*, City of Aurora v. Martin, 181 Colo. 72, 507 P.2d 868 (1973); Retallack v. City of Colorado Springs, 142 Colo. 214, 351 P.2d 884 (1960).

326. *E.g.*, Retallack v. City of Colorado Springs, 142 Colo. 214, 351 P.2d 884 (1960).

327. *See, e.g.*, City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958); Shean v. Edmonds, 84 Cal. App. 2d 315, 200 P.2d 879 (1949).

328. *See, e.g.*, Roosevelt v. City of Englewood, 176 Colo. 576, 492 P.2d 65 (1971) (holding that zoning is now a matter of local and municipal concern in Colorado).

4. *Recent Developments.*

The above principles were recently applied in *Louricella v. Planning & Zoning Board of Appeals,*[329] where the provisions of a municipal zoning ordinance (requiring a special exception for development in a tidal wetlands area) came in conflict with state administration of tidal wetlands. A special exception was denied by the municipality and, although the property sought to be developed had been excluded from state control pursuant to statute, the court found the local ordainance to be invalid since control of tidal wetlands had been preempted by the state since municipal control was inconsistent with the state's decision not to regulate.

The obvious solution to such state/local conflicts is for the state legislative body to specifically address the question of preemption. In the North Dakota Energy Conversion and Transmission Facility Siting Act,[330] the Legislative Assembly established the following principles:

> A certificate of site compatibility for an energy conversion facility shall not supersede or pre-empt any county or city land-use, zoning, or building rules, regulations, or ordinances and no site shall be designated which violates local land-use, zoning, or building rules, regulations, or ordinances. A permit for the construction of a transmission facility within a designated corridor may supersede and pre-empt any county or city land-use, zoning, or building rules, regulations, or ordinances upon a finding by the commission that such rules, regulations, or ordinances, as applied to the proposed route, are unreasonably restrictive in view of existing technology, factors of cost or economics, or needs of consumers whether located in or out of the county or city. Without such a finding by the commission, no route shall be designated which violates local land-use, zoning, or building rules, regulations, or ordinances.[331]

C. FEDERAL V. LOCAL CONFLICTS.

Since local governments are political subdivisions of the state, conflicts between federal and local land use controls are simply federal/state conflicts and may be resolved under the same principles set out earlier in this paper.

V. THE LOCAL QUANDRY—RIO BLANCO COUNTY'S OIL SHALE EXPERIENCE.[332]

During early 1974, the Department of Interior invited bids for the opportunity to lease 5,000-acre tracts in Wyoming, Utah, and Colo-

329. 32 Conn. Sup. 104, 342 A.2d 374 (1974).
330. N.D. CENT. CODE ch. 49-22 (Supp. 1975).
331. N.D. CENT. CODE § 49-22-16(2) (Supp. 1975).
332. The contents of this section are based on the personal experience and knowledge of

rado as part of its Prototype Oil Shale Leasing Program.[333] Successful bidders paid bonuses of $210,305,600 and $118,000,000, to be paid in five equal installments, for leases on two tracts in Rio Blanco County, Colorado. The first installment was paid at the time of the lease, with the other four installments being due annually thereafter. As encouragement to begin operations as soon as possible after the initial two-year period of environmental baseline data-gathering, the lessees may credit against the fourth and fifth bonus installments any expenditures directly attributable to development operations during the third and fourh years, respectively. In addition, of course, the lessees are also required to pay annual rentals on oil shale and other minerals extracted from the tracts for processing or sale.

Although the lessees were given strong economic encouragement to begin development operations as soon as possible, the lessees appear to have made no investigation as to local land use restrictions which might restrict operations on the tracts, in spite of the following language appearing in each lease:

> The lessee shall conduct all operations under this lease in compliance with all applicable Fderal, State and local water pollution control, water quality, air pollution control, air quality, air pollution control, air quality, noise control, and land reclamation statutes, regulations, and standards.

If the lessees had done their homework, however, they would have found that Rio Blanco County zoning placed the two tracts in an "A-Agricultural" district. The uses permitted in the district do not include either surface mining or large-scale underground mining.

When the county brought this minor irregularity to the lessees' attention, the response from the lessees and the Department of Interior was immediate: county zoning was not "applicable" to federal lands and would, as a result, have no effect on the lessees' activities.

Nevertheless, the county persisted, emphasizing that it was not attempting to stop oil shale development altogether but that it was trying to plan and coordinate that development so as to reduce its local impacts. The county has begun to draft zoning amendments which would create "floating zones" for the agricultural district which would accomodate both underground and surface extraction of oil shale. During the drafting of these yet unadopted amendments, the lessees have been quite concerned that the county's performance standards appear to be more restrictive than those contained in the federal leases.

Michael D. White, one of the authors, who is Special Counsel for land use and environmental matters to Rio Blanco County, Colorado.

333. For a discussion of the program, *see* DEPARTMENT OF INTERIOR, FINAL ENVIRONMENTAL STATEMENT FOR THE PROTOTYPE OIL SHALE LEASING PROGRAM (1973).

In the meantime, the county also pointed out that the preliminary but very extensive exploration and environmental data-gathering being conducted on the tracts were also in violation of county zoning. In a spirit of cooperation, the lessees then submitted applications for "conditional uses" for "mineral research sites" in the A-Agricultural district. The applications, which expressly reserved the question of county jurisdiction, were so voluminous that the county asked for state assistance. The State of Colorado then furnished a distinguished panel of experts from state government and Colorado's universities giving the applications painstaking review. After considering the findings of the review panel, the county planning commission and, subsequently, the county commissioners approved the applications. In addition to being valid for only a two-year period and being revocable at any time by the county, the approval was subject to federal environmental standards *then in existence.*

With a two-year breathing space established, the parties began a careful but cordial series of negotiations, which were carefully monitored by Colorado's attorney general. Although none of the parties was anxious to litigate the question of jurisdiction, the negotiations made little progress. Consequently, direct contracts were made between the county commissioners and Bureau of Land Management personnel. Based on these contacts, discussions began as to the desirability of a cooperative agreement between the county and appropriate governmental agencies. At this writing, these negotiations remain largely confidential but are expected to be concluded within the next few months.

Soon after the leases were executed, the lessees contributed $80,000 to the county for preparation of a comprehensive plan. The county selected a consultant and began a two-year effort to develop and adopt a plan. Ironically, the first issue to be addressed by the plan concerned a BLM tentative proposal which would have placed the routes of utility corridors to the two tracts almost exclusively on private land. To the consternation of the lessees who are paying for development of the plan, the jurisdictional issue again raised its ugly head. Since no one has challenged the county's authority to regulate activities on private lands, the county planning commission adopted a portion of the master plan which would favor the exclusion of all oil shale utility corridors from private lands and place them instead on federal lands.

VI. A COORDINATED RESPONSE FROM THE REGION—THE WESTERN GOVERNORS' REGIONAL POLICY OFFICE, INC.

On April 23, 1975, the governors of ten western states (Arizona, Colorado, Montana, Nebraska, Nevada, New Mexico, North Dakota,

South Dakota, Utah, and Wyoming) took a major step toward formulating a regional response to energy development: The "Western Governors' Regional Energy Policy Office, Inc.," (WGREPO) was incorporated for the following purposes:

> 1. To foster interaction and cooperation among the participating State governments with respect to the economic development aspects of energy-related issues;
> 2. To foster the enunciation, both within and without the ten State region, of common economic development problems and policies of the participating States;
> 3. To encourage the ten participating States to exercise their full authority in developing multi-state economic development programs and projects, including unified policies, criteria, standards, methods, and processes for dealing with prospective western energy development;
> 4. To facilitate the role of the ten participating States in working with the Federal Government on energy policies;
> 5. To do any and all such further acts and things and to execute any and all such further powers as may be necessary, appropriate, or desirable to carry out the above purposes.[334]

The directors of the nonprofit corporation are the governors of the ten participating states, the first chairperson being Governor Apodaca of New Mexico. The WGREPO offices are presently located in Denver,[335] and William L. Guy, former governor of North Dakota, serves as the first staff director.

Funding for WGREPO comes from the Four Corners and Old West Regional Commissions, and initial fiscal year funding totals $321,000. Staff consists of eight professionals: staff director, resource economist, ecologist, science and research advisor, resources attorney, legislative analyst, information director, and planner. Generally speaking, the staff is considered to be an extension of the staff of each of the ten governors. The organization is not, by itself, a lobbying group, and nearly all information generated by the office is funneled through the offices of the governors.

While it is clearly premature to make final judgments about the Western Governors' Regional Energy Policy Office, several comments are appropriate. After six months of operation, WGREPO has had significant success performing two separate functions. As a catalyst, WGREPO has brought states together with each other, and with selected federal agencies, and has enabled states to take common positions on various policy issues. Secondly, WGREPO has provided a variety of technical advice to the states, thereby enabling

334. Articles of Incorporation, filed in the Office of the Secretary of State of the State of Colorado, April 23, 1975.
335. 4730 Oakland Street, Denver, Colorado 80239.

some states to react more effectively to federal proposals or enabling them to deal more effectively with energy matters within the state.

In terms of energy development, land use, and conflict of state and federal intentions, WGREPO has had some success both at catalyst and technical advisor. For example, in the fall of 1975, Senator Jackson attached a rider to an ERDA authorization bill[336] which would have granted up to six billion dollars in loan guarantees for the development of synthetic fuels (gas from coal, liquid fuels from coal and oil shale). The proposed bill cleared the Senate without any hearings at all, and it raised a number of significant issues for western states which would be affected by massive commercialization of synthetic fuel. Through the efforts of WGREPO, the ten governors were alerted to the fact that the proposed bill made no provisions to deal with the socio-economic impacts of the six-billion-dollar program. The bill did not clearly define areas of state or federal jurisdiction, particularly as to land use, utility siting, taxation, or reclamation. Finally, and perhaps more importantly, the Jackson proposal made no provision for ongoing state and local participation, approval, or review of a program which would have an extremely significant and long-lasting effect on the western environment and economy.

With the assistance of The National Governors Conference, The WGREPO states were able to halt the swift passage of the ERDA bill through the House Conference Committee in order that hearings could be held on the matter. The WGREPO staff prepared comprehensive review materials based on several synthetic fuel studies, including a massive four-volume study by the federal government.[337] The review included technical, environmental, economic, and legal considerations and suggestions. With the staff review completed, WGREPO delegates met in Denver in mid-October to hammer out common positions and recommendations. In late October, Governors Lamm (Colorado), Link (North Dakota), and Herschler (Wyoming), testified in Washington on the state concerns and recommendations for the synthetic fuel program.[338] Written comment was submitted by the WGREPO states collelctively and by several states individually.

As a result of the intense effort by the Western Governors' Regional Energy Policy Office, and by the synfuel subcommittee of the National Governors Conference, section 103 of S. 598 was considerably altered. In its final form, the bill included all the significant

336. S. 598, 94 Cong., 1st Sess. (1975).
337. SYNFUELS INTER-AGENCY TASK FORCE REPORT TO THE PRESIDENT'S ENERGY RESOURCES COUNCIL, SYNTHETIC FUEL COMMERCIALIZATION REPORT (June, 1975).
338. Testimony of October 22, 1975, before the House Committee on Science and Technology.

changes requested by the western states: guaranteed applicability of state laws;[339] concurrence of state government in proposed projects; guaranteed impact aid for local communities; state and local involvement in planning and review; and stipulation that the projects would be no larger than necessary to demonstrate commercial viability. Ultimately, the bill failed to pass the House.[340] However, it is expected that the bill will be revived in 1976[341] and that, ultimately, some form of incentive for synthetic fuel development will be provided by Congress. When that happens, there is ample precedent for consideration of the wishes and concerns of those states who will be significantly affected by such a bill.

A second illustration of WGREPO efforts as a catalyst in the energy-land use field is WGREPO involvement in the Department of Interior's proposed coal regulations. In September, 1975, Interior published new regulations intended to establish reclamation performance standards for the surface mining of federal coal.[342] The regulatory scheme was at least a partial response to the unsuccessful efforts by Congress to override Presidential vetoes of significantly more strict and comprehensive strip mine legislation.[343] Upon publication of the proposed regulatory reclamation standards, WGREPO staff reviewed the proposed regulations and asked the states for review and comment. Numerous meetings and conferences with state delegates and reclamation officers followed, resulting in comprehensive recommendations and comments submitted to Interior by the WGREPO states on December 22, 1975.[344] Several meetings with Washington-based Interior officials were held to discuss the state concerns, particularly the overriding concern that state reclamation laws, if as stringent as the proposed federal standards, be applied to federal land and enforced by state officials. As a result of these intensive efforts by WGREPO staff and WGREPO states, it appears that the final regulations (when promulgated in early 1976) will specifically provide for the application of state law and will provide a mechanism for enforcement by state officials on federal land.[345]

In the case of both the coal regulations and the synthetic fuel

339. For a discussion of the substance of this provision, see Section III of this article *infra*.

340. The House voted 263-140 on December 11, 1975 to delete section 103 from the ERDA bill (S. 598). The balance of the ERDA bill was passed and sent to the President for signature.

341. *See* H.R. 9723; H.R. 9749; H.R. 10559; S. 2869, all introduced early in 1976, 94th Cong., 2d Sess.

342. DEPARTMENT OF INTERIOR Proposed Coal Mining Operating Reg's, §§ 211 & 3041, 40 FED. REG. 41124-38 (1975).

343. President Ford withheld his signature from S. 425, passed by Congress in late 1974. Ford vetoed a similar provision, H.R. 25, on May 20, 1975, and the override attempt failed on June 10, 1975.

344. Letter from W. L. Guy to Secretary of Interior Thomas Kleppe.

345. For a detailed discussion of the substance of this issue, see section VII of this article *infra*.

bill, it is apparent that WGREPO performed a very useful function by bringing concerned states together, providing technical assistance, and allowing a forum whereby the states could speak with one voice. The leverage, power, and influence of a ten-state group is proving to be substantially greater than that of one state or of ten states acting separately. In this sense, WGREPO has served as the focus point for federal contact and has been the mechanism through which the states establish their common concern and raise their unified voice.

In addition to the catalyst role, WGREPO has been able to provide some technical assistance to the involved states. Reference has already been made to the comprehensive staff review of the various synthetic fuel proposals and the coal reclamation regulations. In each case, the WGREPO staff, acting as an extension of the governors' staffs, performed functions that states were unable to perform, because of time or manpower limitations. In addition, several other technical projects in the energy-land use area have been undertaken. The staff economist has reviewed the mineral taxation policy and law in each of the ten states and made a number of estimates of effects of different tax rates on mineral production and state revenues.[346] This study will allow state executives to put their mineral taxation policies in perspective and may assist them in formulating changes or new tax policies. The WGREPO planner is assessing each state's institutional mechanisms for dealing with energy development impacts, with a view toward highlighting those state institutions or agencies in the region which most effectively deal with impact problems. The WGREPO resources attorney has produced a briefing paper for the states which sets forth the extent of state authority over federal land. In each instance, these WGREPO technical papers are designed to assist the governors in reacting to federal initiatives, or in establishing policy within the state itself. While the future course of the organization is unclear, it is apparent that the first six months have produced some result in the attempts to resolve federal and state conflicts over energy development in the West.

VII. RESOLUTION OF FEDERAL-STATE CONFLICTS.

Previous sections have set forth come of the statutory materials, state and federal regulations, and overriding concerns and interests of federal, state, and local government in energy development in the West. As the push for development of coal, oil shale, uranium, geothermal, and solar resources intensifies, the concern of all levels of government will be evident by the introduction of even more legis-

346. WGREPO, TAXATION OF COAL MINING: REVIEW WITH RECOMMENDATIONS (prepared by WGREPO staff economist L. Brander, Jan., 1975).

lation to deal with problems of environment, land use, reclamation, mineral taxation, etc. Since each political jurisdiction considers itself to be and to some extent is unique, there are innumerable opportunities for overlapping, conflicting, and duplicating efforts in planning and management of energy development. In most instances, when conflicts arise they will be resolved by litigation or negotiation, on a case-by-case basis. However, the authors sense an increasing tendency of both federal and state governments to anticipate conflict and to deal with it through specific statutory or regulatory provisions. While not all conflicts may be forseen, several which have been are discussed below.

A. RESOLUTION OF CONFLICTS BY LEGISLATIVE DIRECTIVE—THE "NEW FEDERALISM".

There is growing concern in the West that the federal government not take over areas which are traditionally the concern of states.[347] Recognition of these concerns by the federal government has been labeled the "new federalism,"[348] a concept contained in several recent legislative actions specifically providing for deference to state policy or law.

1. *Deepwater Port Act of* 1974.

The Deepwater Port Act of 1974[349] states that one purpose of the Act is to

> protect the rights and responsibilities of States and communities to regulate growth, determine land use, and otherwise, protect the environment in accordance with law.[350]

Under the provisions of this bill, each state is given a virtually unqualified veto over the construction of a deepwater port off its coast. There can be no deepwater ports without a license from the Secretary of Transportation and:

> The Secretary shall not issue a license without approval of the Governor of each adjacent coastal state. . . . If the Governor notifies the Secretary that an application, which would otherwise be approved pursuant to this paragraph, is inconsistent with State programs relating to environmental protection, land and water use, and coastal zone management, the Sec-

347. *See, e.g., Western States and The Role of Federal Government*, New York Times, July 31, 1975, at 20; Speech of Gov. Richard Lama (Colo): *States Rights v. National Energy Needs*, American Bar Association, Montreal, Canada, August 12, 1975.

348. Statement by Asst. Secretary of Interior Jack Horton to Western Governors Conference, Billings, Montana, April 1, 1975.

349. Pub. L. No. 93-627, 88 Stat. 2126 (codified at 43 U.S.C.A. § 1333(a)(2); 33 U.S.C.A. §§ 1501-24 (Supp. 1976)).

350. 33 U.S.C.A. § 1501(a)(4) (Supp. 1976).

retary shall condition the license granted so as to make it consistent with such State programs.[351]

2. *Coastal Zone Management Act of* 1972.

In a somewhat similar fashion, the Coastal Zone Management Act of 1972[352] encourages state planning for the coastal zone, through the development and implementation of management programs to achieve wise use of the land and water resources. The Act specifies that there can be no license or permit by the federal government for any type of activity in the coastal zone, until the applicant certifies, and the state concurs, that the activity will be consistent with state coastal zone management programs. A license may be granted without state concurrence only if deemed by the Secretary to be necessary in the interest of national security.[353] Major amendments to this act are currently before Congress.[354]

3. *Outer Continental Shelf Management Act (proposed).*

Both the Deepwater Port Act and the Coastal Zone Management Act, as well as the proposed Outer Continental Shelf Management Act,[355] evidence a desire by Congress to involve state government in energy development matters. Each of these legislative revisions of the leasing and development process provides coastal states with some authority in the developmnt and operation of energy matters in the coastal zone or outer continental shelf. By giving governors a veto power,[356] or a right to concur with development plans,[357] or the right to establish an advisory board with quasi-binding powers of recommendation,[358] Congress may have avoided direct conflicts of state and federal interest in the development of outer continental shelf energy resources.

4. *Surface Mining Control and Reclamation Act of* 1975 *(vetoed).*

Another example, directly related to energy development in the West, is H.R. 25, the proposed Surface Mining Control and Reclamation Act of 1975. Although the legislation was vetoed by the President,[359] it made major concessions to state reclamation policy and law. Congress found:

because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to min-

352. Pub. L. No. 92-583, 86 Stat. 1280, *amended,* Pub. L. No. 93-612, 88 Stat. 1974 (1975) (codified at 16 U.S.C.A. §§ 1451-64 (Supp. 1976)).
353. 16 U.S.C.A. § 1456(c)(3) (Supp. 1976).
354. S. 586, 94th Cong., 1st Sess. (1975) (pending before House in 1976).
355. S. 521, 94th Cong., 1st Sess. (1975) (pending in House in 1976).
356. 33 U.S.C.A. § 1508(b)(1) (Supp. 1976).
357. 16 U.S.C.A. § 1656(c)(3) (Supp. 1976).
358. Proposed OCS Management Act, S. 521, 94th Cong., 1st Sess., § 24 (1975).
359. *See* note 343 *supra.*

> ing operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this act should rest with the state.[360]

According to the findings, Congress adopted a basic scheme under which the federal reclamation standard, as a minimum standard, may be exceeded by the states. Consequently, if state laws are as stringent as the federal standard, then state reclamation laws would still apply to all lands (including federal) within the state:

> Each state in which there is or may be conducted surface coal mining operations, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations . . . shall submit to the Secretary . . . a state program which demonstrates that such State has the capability of carrying out the provisions of this Act. . .[361] Any provision of any State law of regulation . . . which provides for more stringent land use and envoronmental controls and regulations of surface coal mining and reclamation operations than do the provisions of this Act . . . shall not be construed to be inconsistent with this Act.[362]

5. *ERDA 1976 Authorization Billl (faileld).*

Yet another example of potential federal deferral to matters of great state interest is section 103 of S. 598, the Emergency Research and Development Administration fiscal authorization bill for fiscal 1976.[363] Section 103 would have authorized up to $6 billion for synthetic fuel development—mostly in the West. After conncerted efforts by western states to influence the language and terms of section 103, the House committee listened carefully to the expressed concerns of western states.[364] Not only did the committee wish to avoid a political or policy conflict with the states over such matters as the size of demonstration projects or federal aid to impacted states and communities, the committee also worked to avoid a direct conflict of federal and state law. One primary concern of states was the *state* utility siting, reclamation, taxation, and land use planning laws apply to federal land. The original draft of section 103 was silent on this subject. The final version of the bill, however, provided that:

> (u) Nothing in this section shall be construed as affecting the obligations of any borrower receiving a guarantee pursuant to this section to comply with Federal and State environmen-

360. H.R. 25, 94th Cong., 1st Sess., Findings § e (1975).
361. H.R. 25, 94th Cong., 1st Sess., § 503(a) (1975).
362. H.R. 25, 94th Cong., 1st Sess., § 505(b) (1975).
363. Section 103 of S. 598, 94th Cong., 1st Sess. (1975) was deleted from the bill by the full House on December 11, 1975. *See* note 340 *supra.*
364. For a full discussion of these negotiations and the role of the WGREPO, see Section IV of this article *supra.*

> tal, land use, water, and health and safety laws and regulations or to obtain applicable Federal and State permits, licenses, and certificates.[365]

The language of the bill clearly did not go so far as to say that state law would apply to any facility built under the Act: all it did was say that the Act would not change the application of any existing laws. The conference committee report, however, went a bit further in explaining the intention of the draftsmen of the revised section 103:

> It is the intent of this section that the granting of a guarantee would neither exempt a borrower or a project from such legal obligations which would otherwise apply or to extent any obligation which otherwise would not apply.
>
> . . . .
>
> In response to the concerns expressed by Western governors, the Conferees considered those situations in which demonstration facilities which are assisted by loan guarantees were located upon Federal lands. As would be the case elsewhere, it is the intent of this measure that a loan guarantee would not in any way change or extend the applicability of any and all Federal, State, and local laws and regulations which would otherwise apply to the demonstration facility absent such loan guarantee.
>
> . . . .
>
> The Conferees recognize the valid concern of the Western governors that major energy demonstration facilities which may be encouraged to come into being on the public lands by loan guarantees under this Act will conform to the standards established by the State for similar facilities elsewhere provided the State standards are more stringent than Federal standards, as provided for in such Federal statutes as the Clean Air Act and Regional Water Pollution Control Act. The conferees have incorporated into the Act provisions for early notice to the Governor of consideration of any loan guarantee within the State, and for close coordination with the Governor during development of the proposal. Prior to approval of any guarantee, by the Administrator, the Governor is also provided a right to express disapproval of the project.
>
> The conferees expect that during the consideration of any proposal which contemplates siting upon the public lands, the Governor will make known to the Administrator any provisions of State law regarding energy facilities siting or surface mine reclamation which he believes should be applicable to the demonstration facility.
>
> The Administrator, in consulation with the Secretary of the Interior and the Administrator of the Environmental Protection Agency and such other Federal officials as the Administrator may deem to have relevant expertise or authority, will determine if such provisions are superior to the provisions of

365. S. 548, 94th Cong., 1st Sess., § 103 (1975).

> Federal law or regulation which would otherwise apply. If they are, the conferees expect that to the extent possible, ERDA and Interior will incorporate similar provisions into the Federal permits, leases, rights-of-way, guarantees, or other appropriate documents governing the demonstration facility.[366]

It is apparent, however, from a reading of both the bill and the report that many questions remain concerning the application of state law to federal lands, upon which are located projects underwritten by federal guarantees. In any case, the revised portions of the bill must be viewed as a legislative attempt to resolve possible conflict, with the resolution intended to favor the application of state law.

B. RESOLUTION OF CONFLICTS BY REGULATION.

In at least one recent instance, there has been an attempt to resolve direct federal/state conflicts over application of law by promulgation of regulations. In September, 1975, the Department of Interior promulgated proposed regulations which established federal surface mine reclamation standards for the first time.[367] Prior to the promulgation of proposed regulations, states had uniformly proceeded to enforce their reclamation laws on federal lands or on federal coal. In many instances, the state reclamation standard was written into the federal mineral lease, or the lessee was otherwise required to conform with state law. The regulations proposed a change in this scheme:

> Sec. 211.74 *Application of State laws, regulations, practices, and procedures as Federal law by Federal officers.*
>
> (a) Upon request of the Governor of any State, the Secretary shall promptly review the laws, regulations, administrative practices and procedures in effect, or due to come into effect, with respect to reclamation of lands disturbed by surface mining of coal, subject to the jurisdiction of that State, to determine whether such controls may appropriately be applied as Federal law to operations relating to coal owned by or subject to the jurisdiction of the United States. He shall take into account all relevant constructions and applications of such controls by competent State and local judicial and regulatory authorities, the desirability and practicability of uniformity between Federal and State controls, and the public policy of the State regarding the development of coal resources located therein.
>
> (b) After such review, the Secretary may, by order, direct that all or part of such State laws, regulations, practices, and

366. Conference Report to accompany H.R. 3474, 94th Cong., 1st Sess. 1975 [companion bill to S. 598] No. 94-696, at 66-67 (Dec. 8, 1975).

367. DEPARTMENT OF INTERIOR, Proposed Coal Mining Reg's, §§ 211 & 3041, 40 FED. REG. 41124-38 (1975).

> procedures shall be applied as Federal law by the authorized officers of the Department with respect to coal within that State owned by or subject to the jurisdiction of the United States, if he determines that such application would (1) effectuate the purposes of this Part; (2) result in protection of environmental values which is at least as stringent as would otherwise occur under exclusive application of Federal controls; and (3) would be consistent with the interest of the United States in the timely and orderly development of its coal resources.[368]

The western states uniformly opposed such changes in the status quo. Furthermore, the Western Governors' Regional Energy Policy Office, in assisting the states in these matters, determined after careful legal research that the Department of Interior was constitutionally incapable of preempting the application of state reclamation law to federal lands.[369] The essence of the constitutional argument is described in Section V, above.

From numerous discussions among participants, it was obvious that the states felt that they had nonexclusive authority[370] to control reclamation on federal lands; the Interior Department felt that it could exercise exclusive control if it so desired. Without either party conceding the ultimate constitutional issue as to the extent of state or federal jurisdiction over the public domain, a negotiated agreement was reached. While the final version of the proposed regulations is still unknown, it is expected that the regulations will provide that the state reclamation laws will apply if they are as stringent as the federal standards promulgated in the proposed regulations. The Secretary of Interior may decide not to apply the state standards if the state law unreasonably and substantially prevents the mining of federal coal and if the application of such state law is contrary to the overriding national interest. Furthermore, the Secretary will enter into state-by-state agreements for the administration and enforcement of the applicable reclamation standard, with a presumption in favor of state administration and enforcement.

The compromise version of the proposed regulations on the application of state reclamation law to federal land will not end a major constitutional conflict, but it is further evidence of a desire to avoid or ameliorate the federal/state conflict in energy development, land planning, and control in the western states.

C. *Cooperative Arrangements.*

Statutory provisions which provide for joint cooperation between

368. *Id.* at § 211.74.
369. D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE § 8 (1974).
370. Nonexclusive, because as a proprietor, the federal government could require a more stringent standard, as a condition of any lease or permit.

federal and state governments are quite numerous. There are a variety of arrangements ranging from fairly informal consultation to quote formal detailed legal mechanisms. There are a number of such agreements in effect which affect energy development and land planning and control in the West. The samples listed below do not purport to be a complete listing and are intended only as examples of the form. It should be noted at the outset that, unlike legislation or regulation, a cooperative agreement cannot alter applicable law; direct legal conflicts will rarely be altered by a cooperative agreement. However, political and policy differences between state and federal entities can be minimized by agreements which stress interaction, cooperation, and communication.

1. *Oil Shale Environmental Advisory Panel.*

The Oil Shale Environmental Advisory Panel (OSEAP) was established by USDI under the Federal Advisory Committee Act[371] to advise the Secretary of Interior "in the performance of functions in connection with the supervision of oil shale leases." OSEAP recommendations have included selection of sites to be leased. OSEAP is composed of representatives from federal agencies, state government, county government, and citizens' groups. The Federal Advisory Committee Act provides that the function of advisory committees should be advisory only and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved "[u]nless otherwise specifically provided by Statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government."[372] The Act also stipulates that a federal officer or employee must attend or chair each advisory committee meeting. He is authorized, whenever he determines it to be in the public interest, to adjourn any meeting and meetings cannot be held unless he calls them and approves the agenda.

2. *Coal Leasing (EMARS).*

The Department of Interior has proposed a comprehensive revision of federal coal leasing policies.[373] According to the Department, substantial effort will be devoted to cooperative arrangements with

371. Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972).

372. Pub. L. No. 92-463, § 9(b), 86 Stat. 770, 774 (1972).

373. *See* Proposed Federal Coal Leasing Program, Final Environmental Impact Statement (Oct., 1975).

state and local government. The revised policy is denominated EMARS (Energy Mineral Activity Recommendation System):

> Federal, State, and Local Government Input—With a growing concern for statewide, county and municipal impacts resultant from a Federal coal program, and with a need to integrate all available geologic and environmental data into the BLM planning system, close coordination with appropriate Federal, State, county and municipal agencies will be maintained. This coordination occurs in many phases of the proposed coal program—in the preparation of environmental and resource inventories, at public meetings, in the analysis of industry and public nominations, and in monitoring rehabilitation projects and activities of rehabilitation potential, research on rehabilitation methods, and surveillance of rehabilitation operations. The new Federal coal program is designed to avoid unnecessary duplication between State, county, municipal, and Federal legislation by incorporating all information directly into the decisionmaking process of the Bureau planning system. This positive approach coordinates State and local agencies into selecting environmentally satisfactory sites and allows for adequate rehabilitation stipulations to be contained within the lease itself.
>
> The complex nature of land and mineral ownership patterns in the West often shows up in State lands interspersed with Federal lands. Federal land development, including leasing of National Forest, may impact this land, and vice versa. Furthermore, in order to acquire a contiguous reserve block and to make the most efficient use of the coal resource, it may be necessary to develop State and Federal land contemporaneously. To assure adequate planning, environmental protection, and resource use, particularly at the tract selection phase of the new coal leasing program, it is of paramount importance that State (e.g., Montana Bureau of Mines and Geology, Wyoming Geological Survey) and Federal agencies (e.g., BLM, USGS, Bureau of Mines, Forest Service) maintain close coordination between their programs.
>
> . . . .
>
> Cooperative agreements between State agencies or the Governor's Office and the BLM will be arranged by BLM State Offices with concurrence from the Director, BLM. Local government working relationships with the Bureau concerning proposed coal leasing will be initiated at the District Office level of BLM with agreements approved at the BLM State Office level.
>
> The establishment of working relationships and formal agreements between Federal, State and local Governmental units regarding resource data collection, assimilation, and analysis and environmental safeguards is an important part of the overview function of the nominations and programming phase of EMARS.[374]

374. Press Release of Secretary Kleppe, January 26, 1976, announcing implementation of these proposals.

3. *BLM—USFS—Utah.*

On May 13, 1974, the Department of Interior (Bureau of Land Management), the Department of Agriculture (Forest Service), and the State of Utah entered into a cooperative agreement. The authority for such an agreement is contained in Utah law[375] and the federal Multiple Use Sustained Yield Act.[376] and the Public Land Administrative Act.[377] The agreement provides Utah with funds for the purpose of assembling information and conducting inventories and socio-economic and environmental studies associated with mineral energy planning and development. The agreement also makes some BLM or Forest Service personnel available for clarification of land use planning data. The agreement recognizes the overlapping responsibilities of each entity and acknowledges the benefits of cooperation:

> WHEREAS, BLM and FS have the responsibility of managing the Federal energy minerals and Federal lands in Utah in a manner which takes into account National, Regional, State, and local objectives; and
>
> WHEREAS, in Utah, BLM and FS are responsible for issuing permits and leases for federally owned energy mineral reserves involving a complex pattern of private, State, and Federal surface ownership and their land use planning processes are the basis for determining the appropriateness of leasing reserves condisering national energy needs, environmental protection requirements, and State and local socio-economic goals; and
>
> WHEREAS, it is the policy of the Departments of Agriculture and the Interior to provide whatever assistance possible to State and local units of government in areas of mutual concern.

3. *Northern Great Plains Resources Program.*

A further cooperative arrangement is the relatively well-known Northern Great Plains Resources Program. The program was a joint effort of five states (Montana, Nebraska, Wyoming, North Dakota, South Dakota) and three federal agencies (Department of Interior, EPA, Department of Agriculture). The purpose of the program was to provide a focal point for the collection, coordination, and communication of knowledge of the natural resources of the Northern Great Plains and the relationship of human activities to the resource.[378] The final interim report of the program examines the effect of coal development in the Northern Great Plains, spotting major issues and consequences at different rates of development.

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375. UTAH CODE ANN. § 63-45-5 (Supp. 1975).
376. 16 U.S.C. §§ 528-31 (1970).
377. 43 U.S.C. §§ 1361-83 (1970).
378. NORTHERN GREAT PLAINS RESOURCES PROGRAM, FINAL INTERIM REPORT preface (June, 1975).

> The primary objective of the NGPRP is to provide information and a comprehensive analysis that will place in perspective the potential impacts of coal development and thereby assist the people of the NGP and the Nation to wisely manage the natural and human resources of this region. The NGPRP is a communication and coordination link among concerned organizations and individuals, so that they function more efficiently and effectively in dealing with the resource problelms of the region.
>
> The involvement and interest of the participants in the study are manifold. The Department of the Interior, Department of Agriculture, and the Environmental Protection Agency are responsible for such tasks as managing the Federal land and water and mineral resources, protecting the quality and quantity of the air and water, studying reclamation potential, and providing certain services. The States' responsibilities are similar; the work of the county and municipal governments is at a more local level.[379]

5. *Observations.*

In concluding the discussion about cooperative arrangements and conflict resolution, it seems necessary to point out that, although there are numerous conflicts among federal/state and local interests, policies, and laws, there are also ample avenues for coordination and cooperation to ameliorate many of these conflicts. If cooperative agreements are combined with legislative and regulatory efforts to recognize and solve some of the conflicts, then energy development in the West can proceed more smoothly and with less delay resulting from state, federal, and local friction.

VIII. A SUGGESTION FOR INTERIM COMPROMISE.

At some time in the near future, industry and all levels of government must realize that the jurisdictional issue is secondary to the central problems faced in the West:

1. The necessity for the western states to contribute the use of their resources to the solution of national energy problems, and

2. The need to minimize the immediate and long-term environmental, social, and economic impacts of energy development on the western states.

Permanent solutions can be reached only by federal legislation or through case-by-case litigation. Unfortunately, however, comprehensive remedial federal legislation is not an immediate prospect. Litigation, with all its uncertainties for all parties, is inordinately time-consuming and is enormously wasteful of an increasingly valuable

379. *Id.* at 3.

resource, money. The problem is immediate and so must be the solution.

The federal government is generally conceded to be the arbiter of national interest and it is probable that future cooperative agreements will leave to it many decisions as to where and when energy development is going to occur. State and local governments, however, must be given participation in and veto power over such decisions when the development is so designed as to create substantial impacts on matters of state and local concern.[380]

380. Such matters include: schools; law enforcement; fire protection; road, street, and highway construction and maintenance; public recreation areas and facilities; social services; sewerage and sanitation; water supply; hospitals; medical, dental, and mental health care; solid waste disposal; storm drainage; air quality; water quality; soils and geology; vegetation; noise; wildlife; housing; gas and electric utility service; parking; traffic; historical; prehistorical and archaeological resources; flooding; odor; etc.

APPENDIX A

Non-Analytic Summary of State Laws On Energy Resources Through 1975

SUBJECT	ARIZONA	COLORADO	MONTANA	NEVADA
Surface Mining Reclamation		Colorado Open Mining Land Reclamation Act —C.R.S. 1963, 92-13-1 —1969 —Limestone for construction, coal, sand, gravel, quarry aggregate	The Montana Strip Mining and Reclamation Act —R.C.M. 1947, 50-1034 —1973 —Coal, uranium Strip Mining Siting Act —R.C.M. 1947, 50-1601	
Mineral/ Energy Taxation	9% of preceding year's gross value	7/10 of 1c per ton of coal	S.B. 13 (1975) 30% of value of surface-mined coal over 9,000 BTU/lb.; 20% if 7,000 BTU/lb. or less. Lesser rates for underground mining.	4% of gross income
Air Pollution Control	A.R.S. 36-770, et seq. S.B. 1098 (air pollution permits) 1975 H.B. 2313 (vehicle emissions inspection) 1975	C.R.S. 1963, 66-29-2	R.C.M. 1947, 69-3901	N.R.S. 445.401, A.B. 480 (1975) A.B. 708 (moratorium of air pollution standards to utilities)
Siting for Energy Facilities	Special Inter-Agency Committee S.B. 1259 (1975) (industrial development projects)	1974 H.B. 1041	Montana Utility Siting Act —R.C.M. 1947, 70-801 —H.B. 581 (1975) (expands siting act)	State Land Use Act (S.B. 333 of 1973) Utility Environmental Protection Act of 1971, Amended 1973

Water Pollution Control	A.R.S. 36-1851, et. seq. H.B. 2205 (authority to establish water quality standards)	C.R.S. 1963, 66-28		R.C.M. 1947, 69-4801	N.R.S. 445.131, et seq.
Nuclear/ Atomic Energy Control	State Atomic Energy Commission —A.R.S. 30-653 (1972)	Radiation Control Agency —C.R.S. 1963, 66-26 —Citizen's Initiated Referendum passed November 5, 1974, requiring voter approval for nuclear detonations		Radiation Control Act —R.C.M. 1947, 69-5801	Radiation Control —N.R.S. 459.010, et seq.
SUBJECT	NEW MEXICO	NORTH DAKOTA	SOUTH DAKOTA	UTAH	WYOMING
Surface Mining Reclamation	Coal Surface Mining Act —N.M.S.A. 1953, 63-34-1 —1972 —Coal	Reclamation of Strip-Mined Lands —1970 —All minerals	Surface Mining Reclamation Act —S.D.C.L. 45-6A —1971 —All minerals except oil	H.B. 323 (1975) Mined Land Reclamation Act	Wyoming Environmental Quality Act —W.S. 1957, 35-487.20 —1973 —Any mineral —SEA-72 (SF-68) Amendments to State Env. Quality Act of 1973
Mineral/ Energy Taxation	S.B. 258 (1975) taxation on exported electric energy	50c per ton on coal, with inflation escalator, Ch. 562-A2, 1975.	4% of net profits	None on Coal	4% of gross value of coal, oil shale, gas. HEA 115 (1975) Severance excise tax on coal; graduate to 2% in 5 years. Used for coal imports. HEA 118 (1975)

Air Pollution	N.M.S.A. 1953, 12-14-1	N.D.C.C. 23-25, et seq.	S.D.C.L. 34-16A	U.C.A. 1953, 26-24-1 S.B. 84, Air Pollution and its control	W.S. 1957, 35-487.16
Control Siting for Energy Facilities	Under Study by Energy Task Force	Energy Conversion and Transmission Facility Siting Act N.D.C.C. Ch. 49-22 (1975)		Under Study by Governor's Staff	HEA-108 (H.B. 125A) Industrial Development Information and Siting Act (1975)
Water Pollution Control	N.M.S.A. 1953, 75-391 S.B. 269 (1975) S.B. 347 (Water Research, Conservation & Development Act)	N.D.C.C. 61-28, et seq.	S.D.C.L. 46-25	U.C.A. 1953, 73-14-1	W.S. 1957, 35-487.18 SEA-73 (S.F. 157) Wyoming Water Development Program
Nuclear/ Atomic Energy Control	Improvement Environmental Agency Monitors Nuclear Materials	State Radiation Control Agency —S.B. 202 of 1965	Radiation Exposure Control Act —S.D.C.L. 34-21	Radiation Protection Act —U.C.A. 1953, 26-251	

APPENDIX B
Non-Analytic Summary of State Land Use Regulations and Studies Through 1975

SUBJECT	ARIZONA	COLORADO	MONTANA	NEVADA
State Land Use Policy Legislation	Study by Office of Environmental Planning 1975 H.B. 2027 (Floodplains)	1974 H.B. 1041	Bills being drafted by Land Use Advisory Commission	State Land Use Planning Act (S.B. 333 of 1973) SCR-36 (1975) SB-290 (1975)
Subdivision Regulations	Urban Environment Management Act of 1973	C.R.S. 1963, 106-2	HB-672 (1975) 1973 S.B. 208 1973 S.B. 455 H.B. 666 (1975) –	N.R.S. 278.370 H.B. 375 (1975)
Environmental Quality Act			R.C.M. 1947, 69-1501	
State Land Use Plans and Studies	Recommendations by Arizona Environmental Planning Commission	Land Use Commission	–Dept. of Planning & Economic Development –State Environmental Quality Council	State Land Use Planning Act (S.B. 333 of 1973)
Present Regional Planning	6 COGS	12 Districts, 11 Staffed (701)	Local Agreements	Tahoe Regional Planning Agency California-Nevada Tahoe Regional Planning Agency 3 COGS

SUBJECT	NEW MEXICO	NORTH DAKOTA	SOUTH DAKOTA	UTAH	WYOMING
State Land Use Policy Legislation	Under Study by Land Use Advisory Council	Under Study by the Legislative Council	Under Study by the Interim Legislative Committee on Land Use Planning		Under Study by the Wyoming Conservation and Land Use Study Commission
Subdivision Regulations	N.M.S.A. 1953, 70-5-1 & 14-18-1	Enabling Legislation Exists	Enabling Legislation for Cities Exists		
Environmental Quality Act			Environmental Impact Statements Required for State and Local Public Projects —S.D.C.L. 11-1A		W.S. 1957, 35-502.1
State Land Use Plans and Studies	State Planning —N.M.S.A. 1953, Advisory Council —Ch. 299, Laws of 1973		Interim Legislative Committee on Land Use Planning	State Planning	W.S. 1957, 9-160
Present Regional Planning	7 Districts, 8 COGS (701 and State Funds)	8 Rural Community Development Agencies	6 Sub-State Districts for Technical Assistance to Local Government	7 Districts (701 & State Funds)	Voluntary Districts