

1-1-2008

Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models From Other Laws Save Our Public Lands?

Hope M. Babcock

Follow this and additional works at: https://repository.uchastings.edu/hastings_environmental_law_journal



Part of the [Environmental Law Commons](#)

Recommended Citation

Hope M. Babcock, *Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models From Other Laws Save Our Public Lands?*, 14 *Hastings West Northwest J. of Env'tl. L. & Pol'y* 449 (2008)

Available at: https://repository.uchastings.edu/hastings_environmental_law_journal/vol14/iss1/13

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in *Hastings Environmental Law Journal* by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Dual Regulation, Collaborative Management, or Layered Federalism: Can Cooperative Federalism Models from Other Laws Save our Public Lands?

Hope M. Babcock*

Few would assert that the current governance model for managing the nation's public lands,¹ which grants exclusive authority to the federal government, has protected the natural resource values of those lands or provided a framework for the harmonious resolution of conflicts over their use.² Dissatisfaction is apparent from recurrent proposals to privatize public lands³ or to develop their ownership to the states.⁴ The emergence of the

* Professor Babcock is an Associate Professor of Law at Georgetown University Law Center. This article is an outgrowth of the author's presentation at the Natural Resources Law Center of the University of Colorado School of Law conference, Challenging Federal Ownership and Management: Public Lands and Public Benefits (Oct. 11-13, 1995), and on testimony she gave before the U.S. Senate Energy and Natural Resources Subcommittee on Forests and Public Lands Management, on November 2, 1995. The author would like to thank Peter Byrne, Vicki Jackson, Richard Lazarus, and Doug Parker for their insightful comments on earlier drafts of this article, and Barbara Rich, the author's research assistant, for her invaluable assistance and attention to detail in preparing this article for publication.

1. The meaning of the term "public lands" has varied greatly. While the term is most frequently used to mean all land owned by the United States, at various points in time, the phrase has been synonymous with the term "public domain lands," the provenance and meaning of which is also a matter of some confusion and ambiguity. This article uses the terms public lands and public domain lands interchangeably to refer only to the lands managed by the Bureau of Land Management (BLM). See George C. Coggins, PUBLIC NATIONAL RESOURCES LAW § 1.102[1] (1990) for further explication of the meaning of these and other comparable terms.

2. The Western historian Patricia Limerick refers to this conflict as an "infinitely sustainable boxing match." Patricia Limerick, *A History of the Public Lands Debate*, Natural Resources Law Center of the University of Colorado School of Law conference, Challenging Federal Ownership and Management: Public Lands and Public Benefits (Oct. 11-13, 1995) (paper in the possession of the author.).

3. James L. Huffman, *Public Lands Management in an Age of Deregulation and Privatization*, 10 PUB. LAND. L. REV. 29 (1989) (urging abandonment of presumption favoring public management in favor of examination of institutional alternatives,

"wise use" and "county supremacy" movements directly challenges the authority of the federal government to manage its land.⁵ While this new state and local assertiveness is not without historical basis nor completely without merit,⁶ its proponents have yet to offer a workable solution other than complete ouster of the federal sovereign.⁷

Emerging theorems in conservation biology and ecology which are changing our view of the natural landscape are placing additional strains on the current model. What once was a highly localized decision about how a specific piece of land within a fixed geo-political boundary should be managed, has gained regional (even global) implications.⁸ Ecologists are convincingly demonstrating that effective natural resources management implicates more than one governing authority in the management task, requiring consultation and coordination among political jurisdictions.⁹

such as private control). *But see* Joseph L. Sax, *The Legitimacy of Collective Values in the Case of Public Lands*, 56 U. COLO. L. REV. 537 (1985) (preferring collective values to atomistic individual ones).

4. For a comment highly critical of delegating to states a role in managing national natural resources such as Yellowstone National Park, see Richard Schneebeck, Comment, *State Participation in Federal Policy Making for the Yellowstone Ecosystem: A Meaningful Solution or Business as Usual?*, 21 LAND & WATER L. REV. 397 (1986) (explaining that serious deficiencies in state legislation, limited state jurisdiction and national interests require retained federal control).

5. The wise use and county supremacy movements are well-organized efforts in the West opposing increased environmental protection on federal lands and the acquisition by the federal government of more public lands for preservation purposes. *See* Anita P. Miller, *All is Not Quiet on the Western Front: The Battle for Public Lands*, 25 URB. LAW. 827 (1993) (describing and analyzing legal basis of wise use, county supremacy movements); Rene Erm II, *The 'Wise Use' Movement: The Constitutionality of Local Action on Federal Lands Under the Preemption Doctrine*, 30 IDAHO L. REV. 631 (1993-94) (concluding that county land use plans requiring federal agencies to include county governments in their management and planning processes are a valid constitutional response to preservationist policies).

6. Sally K. Fairfax, et al., *Federation and the Wild and Scenic Rivers Act: Now You See It, Now You Don't*, 59 WASH. L. REV. 417 (1984); Richard H. Cowart & Sally K. Fairfax, *Public Lands Federalism: Judicial Theory and Administrative Reality*, 15 ECOLOGY L.Q. 375 (1988).

7. *Cf.* Bernard Shanks, *THIS LAND IS YOUR LAND* (1984) (arguing for retention of federal ownership).

8. Judy L. Meyer, *The Dance of Nature: New Concepts in Ecology*, 69 CHI.-KENT L. REV. 875 (1994).

9. Robert B. Keiter, *NEPA and the Emerging Concept of Ecosystem Management on the Public Lands*, 25 LAND & WATER L. REV. 43 (1990); Reed F. Noss, *Some Principles of Conservation Biology, as They Apply to Environmental Law*, 69 CHI.-KENT L. REV. 893, 907 (1994) (explaining that ecosystem management requires cooperation among

Ecologists and conservation biologists are also teaching us that chaos and diversity are more appropriate biological goals than equilibrium and single specie restoration.¹⁰ The contemporary ecological paradigm recognizes that natural systems are open and not necessarily in equilibrium and that the focus of the paradigm should be on process or the "trajectory of change," rather than on the final endpoint.¹¹ If, as conservation biologists contend, a landscape is composed over time, then decisions about the management of these systems must include the capacity to adapt to new information and unanticipated systemic changes.¹²

To realize the goals of conservation biology and ecosystem management, the institutions that govern these systems must be able to work together harmoniously, across political boundary lines and into a biologically uncertain future.¹³ The rigidity of the current public lands model creates substantial barriers to the achievement of these goals.¹⁴

The era of special interest dominance of public lands policy may be over as well. To cattle and timber barons and hard rock miners who have ruled the public lands under a battery of nineteenth-century laws and

agencies and landowners and coordination of inventory, research, monitoring, and management activities).

10. Fred P. Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI.-KENT L. REV. 847, 869-71 (1994) (stating that resource management has become a grand and "risky" experiment, in which human change is viewed as just one more "flux").

11. Meyer, *supra* note 8, at 877.

12. Meyer, *supra* note 8, at 881-82. See also Professor William Rodgers who contends that conservation biology has undermined the present legal superstructure, because that structure is based on a preference for static legal conservation techniques like acquisition of fee simple absolute title to land, removal of resident human populations from condemned lands, parcel-by-parcel evaluations, and what he labels an "ark" configuration (management of species by isolation within impermeable boundaries). William H. Rodgers, Jr. *Adaptation of Environmental Law to the Ecologists' Discovery of Disequilibria*, 69 CHI.-KENT L. REV. 875, 887 (1994).

13. The need to create institutional and process harmony in the management of these natural systems is illustrated by the rapid development of private and state-owned lands surrounding our national parks. This development is decreasing the cushioning effect those lands once had for the public resources, eroding the federal land manager's ability to protect the federal portion of transboundary ecosystems. Robert B. Keiter, *Taking Account of the Ecosystem on the Public Domain: Law and Ecology in the Greater Yellowstone Region*, 60 U. COLO. L. REV. 923 (1989).

14. Joseph L. Sax. *Nature and Habitat Conservation and Protection in the United States*, 20 ECOLOGY L.Q. 47 (1993) (criticizing what he labels the historic "enclave strategy" approach to public lands management).

policies, Charles Wilkinson's "lords of yesterday,"¹⁵ are giving way to multiple public lands "communities".¹⁶ The West is now a variegated landscape of diverse communities loosely bound together in a patchwork of shared interests, occupations, and geographic locations, not by a single philosophy of commodity extraction.¹⁷ Governance institutions and procedures designed to accommodate bipolar conflicts among powerful special interests over the consumption of natural resources are ill-suited for conflicts in this new polycentric world.¹⁸

This article's working premise is that unless the current governance structure for the management of public lands changes, the political conflicts over their use and management will continue to blight their future, just as it has marred their past.¹⁹ Further, failing to adapt the management of public lands to our changing perceptions about the nature and needs of the biological and social communities that depend upon them will only engender a new generation of conflicts and further diminish the vitality of

15. Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* 17 (1992).

16. Sarah F. Bates, *Public Lands Communities: In Search of a Community of Values*, 14 *Pub. Land. L. Rev.* 81 (1993). For an even earlier exposition of the ideas contained in Bates' article, see Joseph L. Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 *U. Pitt. L. Rev.* 499 (1984).

17. For example, Raymond Rasker reports that the Rocky Mountain West has added over 2 million new jobs from 1969 to 1991, most of which were in "service-related" occupations. Again, according to Rasker, in 1969, over 11% of all direct employment resource industries (mining, farming, ranching or lumber); by 1991, these combined industries represented less than 6% of all employment and less than 5% of all personal income, while the service industries, in 1991, represented over 81% of employment and 68% of labor income. Raymond Rasker, *A New Look at Old Vistas: The Economic Role of Environmental Quality in Western Pacific Lands*, 65 *U. Colo. L. Rev.* 369, 377 (1994). See also SARAH F. BATES ET AL., *SEARCHING OUT THE HEADWATERS: CHANGE AND REDISCOVERY IN WESTERN WATER POLICY* (1993); Cowart & Fairfax, *supra* note 6; Bates, *supra* note 16. For an even earlier exposition of the ideas contained in Bates' article, see Sax, *supra* note 16.

18. Conservation biology's "adaptive management" approach with its emphasis on diversity and flux may offer a useful prism through which to view these new public land communities as well.

19. The article assume that the present public lands management model is too broken to be fixed with minor changes to existing public lands laws and institutions, and that the current paradigm cannot be saved. Therefore, the models discussed in this Article are presumed to be substitutes for, not amendments or supplements to, that model.

those communities.²⁰ Nowhere are these conflicts more intense and the risks and consequences of failure higher than on the "public domain" lands; those lands managed by the Bureau of Land Management (BLM) under the authority of the Federal Land Policy & Management Act (FLPMA).²¹

The purpose of this article is to determine whether there are alternatives models of federalism, which might improve the management of public domain lands.²² None of the models discussed here, however, proposes complete rescission of federal authority over public lands; rather they offer an enhanced role for states in the federal decision-making process.²³ A continuing federal presence is assumed to be necessary to prevent inter-state distribution inequities from arising or economic discrimination from occurring. Only the federal government can correct market failures when they occur and uniformly protect national norms, such as our natural heritage.²⁴ And even if the Western states are becoming more

20. According to Rasker, community stability can best be assured by economic diversity. Rasker, *supra* note 17, at 391. Rasker goes on to make the point that the cornerstone of an economic diversity strategy is the creation of a favorable business climate and the protection of the cultural, social, and environmental qualities that make a community a pleasant place in which to live and do business. *Id.*

21. 43 U.S.C. § 1701-84 (1994).

22. This article looks at "federalism" as an organizing principle of American government, as a theory of institutions, in which what is most important is the allocation of power between federal and state governments. Phrases used in this Article, like "federalism structure" or "federalism model" refer to the apportionment of day-to-day management authority over public domain lands between the federal and state governments. The focus of the Article is on the very practical problems that that apportionment must solve. Less doctrinal and more theoretical questions about "principled" notions of federalism, derived from the constitutional debates over our federal structure of government or from more modern prudential concerns, and their application to the allocation of power on the nation's public lands, while beyond the scope of this Article, are currently under examination by the author. For a more in depth exposition of this distinction, see H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993). For a closer look at the complexity of how power is distributed between the political institutions of state and federal governments in the latter part of the twentieth century, see Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

23. The Article does not address the question of who should own the public lands. Therefore, issues of state or county devolution and privatization are not discussed, nor is the validity of the normative goals set out in the public lands laws, since none of the models requires their change.

24. Professor A. Dan Tarlock sets forth many of these rationales in his article. A. Dan Tarlock, *National Power, State Resource Sovereignty and Federalism in the 1980s: Scaling America's Magic Mountain*, 32 KAN. L. REV. 111, 121-22 (1983). A more refined look at the

supportive of these norms as some assert,²⁵ serious questions would remain about the ability of those states to take on sole responsibility for management of these lands without an infusion of new funds.²⁶

question than is offered here might also examine the purpose for which the land is being managed and the conflicts that might arise from that management, the strength of the federal interest in the particular land or resource being managed, the impact of the decision on local interests, the extent of parity between the competing jurisdictional interests, and the irreversibility of the consequences.

25. Some find this a dubious assumption and question whether an enhanced state role on public lands can be consistent with environmental protection. *See, e.g.*, Schneebeck, *supra* note 4. *But cf.* Cowart & Fairfax, *supra* note 6; Jeffrey L. Beyle, A Comparison of the Federal Consistency Doctrine Under FLPMA and the CZMA, 9 VA. ENVTL. L.J. 207, 217 (1989). The courts have found no such inconsistency, supporting what might be called a "rejuvenated federalism" - an enhanced state role in the administration of environmental programs, in general, and on public lands, in particular. John D. Leshy, Granite Rock and the States' Influence Over Federal Land use, 18 ENVTL. L. 99 (1987); *New York v. United States*, 505 U.S. 144 (1992); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987).

A strong theoretical argument can also be made that states should play some role in management of these lands. These arguments are based on the recognized role states play in our federal system of government. Core federalism values commonly associated with the states include preservation of liberty, civic participation and diversity. For further exposition of this thought and its consequences, see *The Federalist* Nos. 10, 45 (James Madison) (Clinton Rossiter ed., 1961); Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335 (1990) (arguing that the very factions Madison feared at the local level, necessitating a strong federal sovereign, have taken over government at the national level); Powell, *supra* note 22, at 681-88. *See also* Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993) (convergence on normative principle that federalism is important because it protects rights of citizens).

One could also argue from the vantage of political expediency that maintaining some measures of state control over management of these lands will enhance the legitimacy of that management, and from the vantage of administrative efficiency that the complexity of land use issues of this nature suggests that effective regulation and enforcement should be grounded in knowledge of specific local conditions. *See* James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 529-30 (1994) (applying this reasoning to advocate on behalf of a consistency model for land use planning under which local governments maintain a strong presence subject to state oversight).

26. Cowart and Fairfax argue that growth in the states' capacity to manage environmental resources is a critical component in the push to devise a new scheme of public land management. Cowart & Fairfax, *supra* note 6.

The article examines three models of governance ("dual regulation," "collaborative management" and "layered federalism") found in other areas of environmental law to determine whether their application to public domain lands might lessen the federalism tensions inherent in the current model and enhance the land manager's ability to make decisions that are both ecologically sound and reflect the new voices populating these lands.²⁷ Achieving rational ecosystem management and a more democratic mode of decision-making may be of greater importance than attaining non-fractious governance. Intergovernmental friction may be a necessary, unavoidable, even welcome byproduct of our "compound republic" form of government; a transaction costs of a federal structure that relies on overlapping and sometimes conflicting jurisdictions of governance to safeguard those liberties not protected by the explicit constitutional guarantees.²⁸ No such benefit accrues from the other two problems.²⁹

27. There are models which change the basic constructional federalism design (such as might be suggested by English land use law), create new governmental entities (public corporations), or make use of interstate agreements (interstate compacts), which might solve some or even all of the problems associated with management of public domain lands. How far our institutions and systems of governance should be restructured in the search for a solution to the public lands' dilemma, however worthwhile an inquiry, is beyond the scope of this Article. Therefore, while the models examined here each shifts the balance of power and realigns the working relationships between the three levels of government, none restructures that basic framework. The author also recognizes that any acceptable substitute paradigm would, in addition, have to avoid unsettling long-held public and private expectations, creating unnecessary costs, or fostering distributional inequities. However, such an analysis of the extent to which each of the models might avoid these impacts is also beyond the scope of this Article.

28. Dave Froymayer, *A New Look at Federalism: The Theory and Implications of Dual Sovereignty*, 12 ENVTL. L. 903, 912 (1982). Indeed, the Federalists envisioned that friction between the central government and the several states might even come to a show of force, which they countenanced because of the importance of the states in protecting the rights of the people. *See, e.g.*, The Federalist No. 26 (Alexander Hamilton) (states are to "sound the alarm" if the conduct of the national rules appeared improper and serve not only as the voice but the "Arm" of the people's discontent), and The Federalist No. 46 (James Madison) (stating that opposed to the United States would be "a militia amounting to near half a million citizens with arms in their hands . . . fighting for their common liberties and united and conducted by governments possessing their affections and confidence"). The Federalist (Clinton Rossiter ed., 1961) *quoted in* Kramer, *supra* note 22, at 1515-17.

29. This article does not disaggregate complaints about the management of public lands that reflect only the self-interests of single user groups from those who champion a broader public cause and maximization of the public's share of the

The structure of the article is straightforward. Part II examines the current federalism model on public domain lands and concludes, despite some of its virtues, the model has caused inter-governmental friction and created barriers to rational ecosystem management and community-based participation in the decision-making process. Part III describes and then critiques each of the alternative federalism designs against the same three criteria. The article concludes by suggesting which, if any of the models holds the greatest promise for resolving the problems besetting public lands management. While the author recognizes that these problems may be too complex, diverse and endogenous to the public lands experience or a specific geographic area to enable a "single size fits all solution," she hopes that the analytical exercise of examining these models may enrich the storehouse of ideas we draw from in the search for solutions.

II. The Prevailing Federalism Or "Dominant Federal" Model

The current governance model on public domain lands grants the federal government legal primacy or dominance over those lands.³⁰ The salient feature of the "dominant federal" model is that the federal government administers resource management programs on public domain lands by itself. There is no statutorily mandated management role for the states. BLM issues grazing permits, mining patents, oil, gas, coal, and geothermal leases, and off-road vehicles permits, not the state land management agency. The state has no legal authority to manage the natural resources that are the subject of these authorizations, even when their management directly implicates the state's vital interests.³¹

There have been experiments with more "cooperative" or reciprocal models of federalism on public lands at various points in our history,³² but

distributional benefits from these lands. In the author's opinion, the former should be entitled to little deference in any discussion about managing public resources, and should not by themselves cause any changes in the present federalism model.

30. For greater information about the application of this precept to rangeland, see George C. Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandates*, 14 ENVTL. L. 1 (1983).

31. The rigidity and absurdity of this arrangement is perhaps best illustrated in the case of so-called "checkerboard lands," an eponymous pattern of Western Land ownership reflective of the historic public lands disposition practices of the nineteenth century, where each jurisdiction manages its squared subpart of the renewable and nonrenewable resource in accordance with its management goals and directives.

32. See, e.g., Brown Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 ENVTL. L. 863 (1987). Cowart & Fairfax, *supra* note 6, at 421-39 (discussing a variety of administrative techniques that have been utilized

none of these has significantly changed the balance of power between the federal government and the states.³³ Laws like the National Environmental Policy Act³⁴ and the Endangered Species Act³⁵ require little more than consultation with state agencies, giving the states no power over federal agency decisions. FLPMA's "consistency" provisions³⁶ stop well short of giving states and local communities a land use planning-based veto over activities on public domain lands.³⁷ On public domain lands, the federal government is, as the model's title implies, "dominant."

by state, local and federal resource managers to manage public domain resources cooperatively).

33. Cowart & Fairfax, *supra* note 6, at 408 (historical, physical and fiscal realities have led federal and state governments to share de facto management of public lands). For a more theoretical exposition of the same conclusion, see Kramer, *supra* note 22 (political parties, structure of administrative state, exit rights, and cultural commonalities link fortunes of federal and state office holders in a reciprocal dependence requiring each to pay attention to needs of others).

34. 42 U.S.C. §§ 4321-70d (1994). *See id.* § 4332 (preparation of environmental impact statements); Cowart & Fairfax, *supra* note 6, at 415 n.211 (discussing the extent to which NEPA Guidelines have been incorporated in BLM planning regulations).

35. 16 U.S.C. §§ 1531-44 (1994). *See id.* § 1536. *See also id.* § 1535 (state cooperative agreements).

36. FLPMA § 202(c)(8) requires that the Secretary's land use plans shall provide for compliance with federal and state pollution control laws. 43 U.S.C. § 1712(c)(8) (1994). FLPMA § 202(c)(9) imposes a consistency obligation on those plans to "the maximum extent [the Secretary] finds consistent with Federal law and the purposes of this Act." 43 U.S.C. § 1712(c)(9) (1994). These requirements have been interpreted by BLM as requiring "consideration" of resource-related plans and policies of state and local governments." 43 C.F.R. § 1610.3-2(e) (1995); Cowart & Fairfax, *supra* note 6, at 417.

37. Leshy, *supra* note 25. Even Cowart and Fairfax, who cite the consistency language in FLPMA as providing a statutory basis for more cooperative federal-state-local management of public lands, admit that the importance of these provisions is "probably more political and symbolic than legal," noting the language does not give the states a veto over federal programs or initiatives and that the federal land manager has ultimate authority to determine whether federal programs are consistent with state and local priorities and even to over-ride those priorities to achieve federal objectives. Cowart & Fairfax, *supra* note 6, at 418. *See also* Beyle, *supra* note 25, at 220-21 (noting that under FLPMA's coordination mandate, "[t]here are no structural guarantees that views of state and local governments or the public will be taken into account" as the Act does not define what is meant by "meaningful public participation").

While the "dominant federal" model, with its unitary sovereign, provides some assurances that national norms will be met and that distributional inequities between regions will be minimized, the model has caused problems for public lands governance. The model's dependence upon centralized, coercive control over state action is responsible for much of the tension and frustration fueling the "county supremacy" and "wise use" movements.³⁸ By offering only a single target for takeover, the model allowed special interests to capture federal land management agencies³⁹ with calamitous results for the natural resource base.⁴⁰ And, by largely excluding states from the management exercise, the model has done little to encourage states to develop their own natural resource management capabilities, perpetuating the myth of state inability and unwillingness to assume a more active management role over these resources.⁴¹

38. Miller, *supra* note 5; Anita P. Miller, *The Western Front Revisited*, 26 URB. LAW. 845 (1994). For an interesting perspective on the context and history of the comparable, earlier Sagebrush Rebellion, see Cowart & Fairfax, *supra* note 6.

39. Wilkinson, *supra* note 15; Coggins, *supra* note 30.

40. While the condition of the BLM rangeland has improved, in 1991 35% was still classified by the Council on Environmental Quality as poor or fair, compared to 82% in 1936. Council on Environmental Quality, *Environmental Quality: The Twenty-Third Annual Report of the Council on Environmental Quality*, fig. 24b, at 346 (1992). For an analysis of the impact of grazing on public lands, see Myles J. Watts & Jeffrey T. LaFrance, *Cows, Cowboys, and Controversy: The Grazing Fee Issue*, in MULTIPLE CONFLICTS OVER MULTIPLE USE, POLITICAL ECONOMY RESEARCH CENTER 59 (Terry L. Anderson ed., 1994). See also Huffman, *supra* note 3, at 49, Wilkinson, *supra* note 15; Coggins, *supra* note 30.

41. Fairfax, *et al.*, assert that state environmental management capabilities (*i.e.*, the political and legal authority authorizing states to administer natural resource laws, the states' institutional capacity to implement these laws and the availability of a relevant information-base) have improved as a result of experience administering pollution control laws and interacting with federal government under multiple-use statutes. Fairfax, *et al.*, *supra* note 6. Others argue that the experience under the multiple-use statutes has been too limited to give states comparable expertise in the natural resource management area. Schneebeck, *supra* note 4 (state legislation rarely addresses issues like establishing priorities between competing uses of natural resources, is frequently fragmented between different state agencies and few, if any mechanisms for requiring coordination between interested agencies exist at the state level); Melinda Bruce & Teresa Rice, *Controlling the Blue Rash: Issues and Trends in the State Land Management*, 29 LAND & WATER L. REV. 1 (1994) (modifications must be made in existing state land use management practices for long-term sustainability of the resources on those lands); C. Maison Heidelberg, Note, *Closing the Book on School Trust Lands*, 45 VAND. L. REV. 1581 (1992) (modification of the framework governing management of state school trust lands is warranted).

The "dominant federal" model's dependence upon political boundary lines and single-use designations⁴² defies well-accepted precepts of conservation biology⁴³ and biodiversity protection,⁴⁴ as well as notions of "sustainability."⁴⁵ The model rests upon the notion that species can be protected in perpetuity through management in isolated preserves, even though the preserve's boundaries are permeable, its conditions and residents always in flux.⁴⁶ The model's reliance upon a commodity stability strategy, which emphasizes commodity extraction as the sole interest of public lands communities, conflicts with and threatens the emerging amenity-based foundation of the new western economy.⁴⁷ Regional

42. Public lands law virtually zones public lands for various uses. For example, if a mining claim for a hard rock mineral is filed, the land is dedicated to hard rock mineral development regardless of the other present or future uses it might sustain. 30 U.S.C. § 22-39 (1994). Even public domain lands, which are to be managed under a multiple-use sustained yield standard, Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-31 (1994), which implies some co-existence of different uses, are, in fact, managed to achieve either range use values, public recreational values or wilderness values, but not all of these values at one time, because the managers lack the tools and the will to reconcile the resulting conflicts. Coggins, *supra* note 30, at 63-65.

43. Noss, *supra* note 9 (conservation biology's adaptive management practices are at odds with recognizing law's need for boundary certainty).

44. Biodiversity protection also requires site-specific decentralized decision-making. However, devolution of these functions to local government offers the potential of even greater habitat fragmentation and more intense controversies about prospective land use. Local governments additionally lack the regulatory authority and revenue to do the job. A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555 (1993).

45. For further discussion of the effect of notions of sustainability on the management of public lands, see Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293 (1994); Keiter, *supra* note 13; J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different*, 66 U. COLO. L. REV. 555 (1995); General Accounting Office, Pub. No. GAO/RCED-94-111, *Ecosystem Management Additional Actions Needed to Adequately Test a Promising Approach* (1994).

46. Rodgers, *supra* note 12, at 890 (stating that natural systems resist law-sanctioned boundaries between jurisdictions, between private and public property holders, and between historically sanctioned entitlements and future needs).

47. Rasker, *supra* note 17, at 397. According to Bates, the National Forest Services commodity stability policy which emphasizes commodity extraction as the sole interest of public lands communities, ignores the multiplicity and diversity of these communities. See Bates, *supra* note 16.

demographic changes⁴⁸ underlying this new economy are also undermining the model's legal systems and institutions that cater to commodity extraction interests.⁴⁹

The process by which decisions are made about the management and allocation of public resources on public lands has remained largely closed to broad-based citizen participation and heavily weighted toward special interests with their greater resources. The formalism of this process, together with its bipolar and essentially adversarial structure,⁵⁰ imposes multiple barriers to participation by inchoate, diversified communities. The common practice of land managers under the "dominant federal" model to record the voices from these diverse communities as "little more than chits on a tally sheet"⁵¹ is contributing to the crisis in public confidence in the ability of the federal government to manage public domain lands.⁵²

48. Such changes include increasing urbanization, the growing political power of recreationists and preservationists, and the appearance of multiple public lands communities. Rasker writes about the "footloose techno-yuppies with portable computers" or "modem cowboys," who have made policies of multiple-use sustained-yield begin to lose their meaning." Rasker, *supra* note 17, at 396. Cowart and Fairfax note that these changes are also providing an impetus for states to affect greater interest in increasing state fiscal and environmental controls over public lands resources. See Cowart & Fairfax, *supra* note 6.

49. Wilkinson also describes at great length the extent to which the legal system, upon which the dominant federal model is based, has sustained a set of practices and policies that have historically favored large, single interests which are now asynchronous with modern values. See Wilkinson, *supra* note 15.

50. Marcus E. Ethridge comments that the administrative process, with its procedures designed under the influence of legal values and doctrines, is clearly "better suited to producing effective adversarial arrangements with appropriate protection of private rights than to creating avenues for public involvement in policy making." Marcus E. Ethridge, *Procedures for Citizen Involvement in Environmental Policy: An Assessment of Policy Effects*, in CITIZEN PARTICIPATION IN PUBLIC DECISION MAKING 115, 128-29 (Jack DeSario & Stuart Langton eds., 1987).

51. Rasker, *supra* note 17, at 393 (quoting Sarah F. Bates, *Discussion Paper: The Changing Management Philosophies of the Public Lands*, in W. LANDS REP. NO. 3 (1993)). Rasker goes on to point out that this "head-counting" approach to conflict resolution actually foments polarization and conflict, and according to Wilkinson, is exploited by the federal land management agencies so that they can be seen as a "compromising, reasonable, middle of the road entity." *Id.* (quoting Charles F. Wilkinson, *Toward an Ethic of Place*, in BEYOND THE MYTHIC WEST 71, 74 (1990)).

52. Both Rasker and Flournoy write about the need for natural resource managers to adopt different analytical techniques to account for the ever-increasing complexity of our relationship to the natural environment; techniques, which are predicated upon the existence of many different public lands communities and are

The "dominant federal" model causes significant tensions on the nation's public lands. The model also presents substantial barriers to rational ecosystem management and enhanced community-based involvement in the decision-making process affecting these lands. These problems undermine the model's positive features, namely the theoretical prospect that its application will achieve national norms and prevent interstate distributional inequities. But, do models proposing a more cooperative mode of governance offer any better prospect?

III. Alternative Models of Cooperative Federalism

The article examines three "cooperative federalism" models found in other areas of environmental law.⁵³ The first is the "dual regulation" or "state primacy" model, under which states are administratively delegated regulatory primacy to enforce federal laws through existing state laws and institutions. The second is the "collaborative management" or "consensus-based" model, under which a joint federal, multi-state institution is created for the sole purpose of developing consensus derived plans that will be used by the various jurisdictions to manage federal designated natural resources. The final model is the "layered federalism" or "consistency" model, under which individual states develop and administer natural resource management plans with which proposed federal activities must be consistent.⁵⁴ An analysis of each of these models shows that at least two of

responsive to their needs. Rasker believes that the market-based approach merits serious attention as an additional management tool to be applied selectively as a supplement to the scientific and public participation models of management. Rasker, *supra* note 17, at 393-96. While Flournoy favors the "multiple alternative-multiple attribute analysis developed by a working group convened by the federal government for the systematic identification and assessment of the values affected by wetlands alterations. Alyson C. Flournoy, *Coping with Complexity*, 27 *LOV, L.A. L. REV.* 809, 817-19 (1994). One of the advantages, Flournoy notes in the multiple alternative-multiple attribute model is that it provides not only decision-makers, but members of the public with a clear view of the policy choices to be made, making regulatory decisions more accessible to the public and therefore, more democratic, which, in turn, may increase public acceptance of regulatory decisions. *Id.* at 823.

53. While it will be quickly apparent, even from the abbreviated descriptions of the three alternative models set forth in the text above, that each contains features of the other and even of the "dominant federal" model, they are still sufficiently different from each other and the existing model to warrant the comparative analysis undertaken in the Article.

54. For a discussion of the perils of using either the "dual regulation" or "layered federalism" models to regulate the conversion of wetlands, see Oliver A.

them offer some advancement over the existing "dominant federal" model and thus suggest some direction for improvements to it.⁵⁵

A. "The State Primacy" or "Dual Regulation" Model

The first model is the state primacy or "dual regulation" model used by the federal pollution control laws. Under this model, federal regulatory authority is administratively delegated to states with federally approved programs giving the states *de jure* primary regulatory authority to implement federal directives.⁵⁶ Federal funds are granted annually to offset the costs of administering the federal program.⁵⁷

The "dual regulation" model, at least facially, offers substantial enhancement of the state role in administering federal law, as state agencies, laws and courts replace their federal equivalents. However, although states develop, implement and enforce their own regulatory programs under this model, these programs must be consistent with (at least as stringent as) their federal counterpart.⁵⁸ To assure this result, the

Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242 (1995).

55. It is difficult to ascertain to what extent the problems identified in both the current "dominant federal" model and three alternative models are attributable to defects in the models themselves or to the individuals working within the models. As such an analysis would move this Article far beyond its intended purpose, this confounding factor is merely noted here as one warranting further examination before the "chairs are rearranged on the decks of the Titanic."

56. The classic example of this model can be found in § 402 of the Clean Water Act (CWA), 33 U.S.C. § 1342 (1994) (national pollution discharge elimination system permits).

57. See, e.g., CWA § 106, 33 U.S.C. § 1256 (1994) (grants to states and interstate agencies to assist them in administering programs for the prevention, reduction and elimination of pollution, including enforcement directly or through appropriate state law enforcement officers or agencies).

58. See, e.g., CWA § 510, 33 U.S.C. § 1370 (1994) (states may not adopt or enforce standards, which are "less stringent than" federal standards). Stewart chafes at this dictating of conduct within other institutions and recommends instead the use of indirect methods, such as transferable pollution credits, to achieve the desired "strategic coupling" of the institution's decision with national norms and goals. Stewart, *supra* note 25, at 352-53. To the extent that this arrangement might also be viewed as "commandeering" the legislative and administrative processes of state governments, the specter of *New York v. United States*, 505 U.S. 144, 156, (1992), must be countered with. See Powell, *supra* note 22 (criticizing the Court's historical analysis); Althouse, *supra* note 25 (exploring recent evolution in Court's

federal government closely oversees state compliance with federal standards⁵⁹ and retains authority to reassert federal jurisdiction, restrict or condition federal funding of the state program, or enforce directly, if state performance is deemed derelict.⁶⁰ Although the "dual regulation" model has some positive features, chief among which is the prospect that its insistence on uniform standards will achieve national norms and avoid inequities among the states, the model has some serious deficiencies making its application to public domain lands problematic.⁶¹

The first of these problems is its uneasy historical fit with the public lands experience, despite the fact that both models rest on a presumption of federal authority to regulate the activities proscribed by Congress.⁶² The very practical reasons behind delegating primary jurisdiction to implement pollution control laws to the states, i.e., the nation's size and geographic diversity, the close relationship between pollution and land use (long considered a local prerogative),⁶³ the federal government's limited resources, and the states' previous experience administering laws of this type, only

federalism jurisprudence revealing its points of convergence, but ultimate divergence over its meaning).

59. See, e.g., CWA § 402(d), 33 U.S.C. § 1342(d) 91994) (federal review of state-issued national pollution discharge elimination system permits).

60. See, e.g., CWA § 402(c), 33 U.S.C. § 1342(c) (1994) (criteria for withdrawal of federal approval of state national pollution discharge elimination system permit programs).

61. This feature is of particular importance in the field of pollution control, where the concern is that the absence of a strong federal presence will result in "an uneven playing field dotted with pollution havens." Houck & Rolland, *supra* note 54, at 1299-1300.

62. The extent to which states may be compelled to implement federal directives premised on Commerce Clause jurisdiction has been thrown into question by several recent U.S. Supreme Court decisions. See, e.g., Seminole Tribe of Florida v. Florida, 64 U.S.L.W. 64 (March 26, 1996) (holding Congress lacks power under Indian Commerce Clause to abrogate states' Eleventh Amendment immunity from suit in federal court); Lopez v. United States, 115 S. Ct. 1624 (1995) (striking down the Gun Free School Zone Act on the ground it exceeded Congress' Commerce Clause authority since possession of a gun in a local school zone is not an economic activity substantially affecting interested commerce). New York v. United States, 505 U.S. 144 (1992) (holding unconstitutional "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 to the extent it "commandeered" the legislative processes of the states).

63. Wickersham, *supra* note 25 (dominant model of land use regulation in this country is local control of land use through "Euclidean" zoning).

partially resonate with the public lands experience.⁶⁴ Although there is diversity among the types of public domain lands and their acreage is vast, the "dominant federal" model requires fewer federal resources to administer than are required for the administration of pollution control programs regulating millions of individual sources.⁶⁵ Further, no argument for state primacy on public lands based on experience or local prerogative can be made, because the prevailing "dominant federal" model excluded (and still excludes) the states from any meaningful management role. Thus, the state experience administering pollution control laws at the state level before the 1970s was significantly more substantial, although less felicitous,⁶⁶ than the state experience managing resources on state public⁶⁷ and school trust lands.⁶⁸

64. It is interesting to note that these reasons resulted in state regulatory primacy to administer pollution control programs, even though there was a sense with regard to federal regulatory and social programs in general that the national government's performance would be superior to that of the states and that federal programs were correctives for state and local neglect and local entrenchment of privilege. Stewart, *supra* note 25, at 340.

65. To give the reader an idea of the enormity of the regulatory universe administered by the states, the U.S. Environmental Protection Agency collects information under various federal pollution control laws about more than 30,000 abandoned or uncontrolled hazardous waste sites, 328 toxic chemicals released to the air, water and land from more than 17,000 manufacturing facilities, and has a database for water quality information alone that contains over 170 million data points on surface and groundwater quality, sediments, streamflow, and fish tissue contamination, which provides information on which regulatory programs principally administered by the states are based. Council on Environmental Quality, *supra* note 40, at 260-61.

66. Marc Melnick & Elizabeth Willes, *Watching the Candy Store: EPA Overfilling of Local Air Pollution Variances*, 20 *ECOLOGY L.Q.* 207, 253-54 (1993) (noting reluctance of state and local districts to enact stringent environmental regulations).

67. According to a 1970 survey conducted by the Public Land Law Review Commission, states administer about 4% of the total land mass of the United States. These lands include approximately 20 million acres of lands designated as forests and 13% of the lands used for grazing under government (federal or state) control. Excluding Alaska, state agencies control nearly as much land as federal agencies dedicated to propagation of fish and wildlife, but a significantly smaller fraction of the total land dedicated to public park use. PUBLIC LAND LAW REVIEW COMMISSION, *STATE LAND RESOURCES AND POLICIES*, at S-1, S-2 (1970). More recent information about the acreage administered by the states can be found in Western State Land Commissioners Association, 1991-92 Directory, tbl. 1 (1992) (states hold more than 45 million acres), *quoted in* Bruce & Rice, *supra* note 41, at 2. *See also* Sally K. Fairfax et

The "dual regulation" model also has some serious design deficiencies which might lessen its effectiveness when applied to the nation's public domain lands. First, the model tries unsuccessfully to synthesize two inherently conflicting goals - state primacy and the achievement of national norms. This tension often emerges in matters involving state enforcement of federal pollution control mandates. States generally prefer a more cooperative, flexible approach toward environmental enforcement than allowed under the federal law. State agencies want to accommodate local industries and are sensitive to local political pressure. Federal agencies, mindful of federal mandates that specifically disallow "local" considerations,⁶⁹ walk a tightrope between the state's desire for flexibility and the national need for uniformity and consistency.⁷⁰

Further, a governance design, in which one jurisdiction takes the lead in developing policies the other has primary responsibility for implementing, is bound to cause conflict.⁷¹ Indeed, the federal-state

al., *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 832 (1992) (41 million acres managed as grant lands).

68. For example, Fairfax *et al.*, find in state management of school trust lands, models and approaches to public resource management that might "enrich discussions of public resource management now dominated by desiccated and polarized issues arising at the federal level." Fairfax *et al.*, *supra* note 67, at 803. See also Cowart & Fairfax, *supra* note 6. For critical views of state land management, see heidelberg, *supra* note 41, at 1582 (current framework governing management of state school lands should be modified); Bruce & Rice, *supra* note 41, at 23-26 (land management polices of western states is lagging behind times because states view public lands primarily as income source and believe their resources are perpetual).

69. Melnick & Willes, *supra* notes 66, at 235.

70. James Elder, former Director, EPA Office and Water Enforcement and Permits, has described this relationship as "EPA's tightrope walk between the need for national consistency and state flexibility in implementation." James R. Elder, *Regulation of Water Quality: Is EPA Meeting its Obligation or Can the States Better Meet Water Quality Challenges?*, in AMERICAN BAR ASSOCIATION, FEDERAL VERSUS STATE ENVIRONMENTAL PROTECTION STANDARDS: CAN A NATIONAL POLICY BE IMPLEMENTED LOCALLY? 20 (1990).

71. See generally E. Donald Elliott, *Federal Versus State Environmental Protection Standards: Can a National Policy Be Implemented Locally? Keynote Presentation: Making the Partnership Work*, 22 ENVTL. L. REP. (Envtl. L. Inst.) 10,010 (1992); Melnick & Willes, *supra* note 66; General Accounting Office, Pub. No. GAO/RCED-95-64, *EPA and the States: Environmental Challenges Require a Better Working Relationship* (1995). For a more salutary view of the ameliorative effects of this conflict, see Houck and Rolland who label as "accidental genius" the dual agency review model of the federal wetlands permitting program, the protective qualities of which are further enhanced by the participation of other federal and state agencies as well as the public. They attribute to the model a "creative tension" that helps offset the power of money,

relationship in the "dual regulation" model has been burdened almost to the point of disability by allegations of inconsistent federal oversight and micro-management of state programs, wasteful duplication of effort, delayed and conflicting decision, and lack of finality.⁷²

The "dual regulation" model, with its reluctant sharing of power with the states, has not productively synthesized the conflicts between the two jurisdictions.⁷³ The model's concentric, overlapping power sharing structure reflects an inherent distrust of state performance, a distrust almost as great as that reflected in the "dominant federal" model that grants states no role at all in the administration of federal land management programs. A model that is premised on distrust of the state partner and results in strained inter-

influence and private property rights and warn that "[a]ny regulatory program that vests decision-making authority exclusively in one agency runs the great risk of failure." Houck & Rolland, *supra* note 54, at 1312.

72. General Accounting Office, *supra* note 71. The states additionally complain that federal funds and technical assistance are insufficient to offset the burden of being the primary regulatory authority. For an analysis of EPA overfilling of local air pollution variances, including the reasons why EPA engages in this practice, see Melnick & Willes, *supra* note 66. Yet complete absence of federal oversight would be as inappropriate on public lands as it would be under the pollution control laws given the need in both situations for national uniformity to avoid industry forum shopping and inequity among the several states. Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

73. This concept of "sharing power" with the states might have been baffling to the Framers of the Constitution, who, although they shared the assumption that sovereignty was unitary and exclusive and, therefore either the national Congress or state legislatures had to predominate, during the course of the debates grew to accept the idea that both the central (or national) government and the states could exercise sovereignty in their separate spheres. Consistent with that vision, Madison argued that the greatest sphere of government activity would be at the state level. However, anti-Federalists feared the effect of Madison's vision of federalism would be to reduce states to the status of towns, retaining only the power to levy taxes, and to create a consolidated national government. Powell, *supra* note 22, at 656 n.117. See generally *id.* at 652-64. According to some scholars, power sharing is a natural outgrowth of the structural, administrative, cultural, and political forces at play in the twentieth century. Kramer, *supra* note 22. For a modern-day affirmation of Madison's view of where the most relevant political authority would reside for citizens, see *id.* at 1504 (stating that the law that most affects people in their daily lives is still overwhelmingly state law).

governmental relationships would be no improvement over the "dominant federal" model.⁷⁴

In addition, the political unpopularity of federal oversight "sticks"⁷⁵ and limited federal resources supporting their use results in uneven, often ineffective federal oversight. Ineffective federal oversight of state performance curtails the federal government's capacity to counter-balance excessive state responsiveness to local political and economical pressure. This puts at risk the model's ability to achieve national norms and avoid distributional inequities among the several states, undermining the theoretical advantages of the model.⁷⁶ At the same time, the pressure to maintain national norms makes the federal government uneasy about approving experimentation and diversity in state regulatory programs.⁷⁷ Therefore, the "dual regulation" model might inhibit federal land managers from responding to the need for regional variations in natural resource management strategies.

The "dual regulation" model does not correct the problems caused by the fragmentation of natural systems by political boundaries, since it preserves the state as the decision-making unit.⁷⁸ The "dual regulation"

74. Although the "dual regulation" model appears to disperse power more than the "dominant federal" model, reducing the capture possibilities, in actuality there is no difference. BLM administers its programs through field offices in the several states and thus presents as dispersed a target as the state natural resource or land management agencies.

75. See, e.g., CWA § 402(c), 33 U.S.C. § 1342(c) (1994) (resumption of federal primacy); CWA § 106(f)(2), 33 U.S.C. § 1256(f)(2) (1994) (conditioning or reduction of federal grants); Clean Air Act (CAA) § 179(a), 42 U.S.C. § 7509 (1994) (highway funds are cut off for non-attainment areas).

76. For example, as Melnick and Willes point out revocation of state enforcement authority under the CAA would be unwise because the states do 70% to 90% of all enforcement under that law. Melnick & Willes, *supra* note 66, at 246.

77. Various mechanisms in the "dual regulation" model allow for site-specific adjustments to national standards (e.g., state water quality standards and state implementation plans under the CAA) and local experimentation (variances) and provide some accommodation between local needs and national standards. Some commentators criticize these devices because the over-arching goals of a program (i.e., its national norms) tend to get lost in ad hoc process of examining the equities in individual cases. Melnick & Willes, *supra* note 66, at 254.

78. For a discussion of how insensitive and inadequate the pollution control laws are with respect to preserving biodiversity, see Jon D. Holst, *The Unforseeability Factor: Federal Lands, Managing for Uncertainty, and the Preservation of Biological Diversity*, 13 PUB. LAND. L. REV. 113 (1992). See also General Accounting Office, Pub. No. CAO/RCED096-42, *Water Pollution: Differences Among the States in Issuing Permits Limiting the Discharge of Pollutants* (1996) (explaining that variations in discharge

model allows states to develop regulatory regimes that reflect a state's priorities with respect to use of the ambient environment.⁷⁹ These regimes can bisect an inter-state resource like a river or an airshed, artificially dividing the ambient environment at the state's boundary.⁸⁰ Only rarely does the model allow for regional planning or standard setting⁸¹ opening only a very small window for implementing the cross-jurisdictional, landscape-oriented protection favored by conservation biologists.⁸²

Further, as principally a creature of the administrative state, the content and contours of the "dual regulation" model, even more than those of the "dominant federal" model, are formed, shaped and reformed through the formalism of the administrative process.⁸³ This formalism, together with the bipolar and adversarial nature of administrative proceedings and their dependence on "specialized scientific knowledge, technical jargon,"⁸⁴ and

limits or in standards and procedures used to derive these limits, have been the source of concern, particularly when neighboring jurisdictions share water bodies).

79. This is the concept behind the CAA's state implementation plan (SIP). 42 U.S.C. § 7410 (1994). *See* *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976). Allowing states to localize national standards also underlies the concept of state water quality standards found in the CWA. 33 U.S.C. § 1313 (1994). *See also* 33 U.S.C. § 1311(b)(1)(C) (1994) (water quality based on effluent limits).

80. *See, e.g.,* *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). *See also* General Accounting Office, *supra* note 78 (explaining that variations in discharge limits or standards and procedures used to derive these limits, have been the source of concern, particularly when neighboring jurisdictions share water bodies). Another example of states being unable to manage a resource collectively can be found in the debates over the adoption of the zero emission vehicle (ZEV) as the standard for emissions of ozone precursors in the Northeast. Susan Bruninga, *Air Pollution: OTC Reaffirms Support for 49-State Car, States Rights*, DAILY ENV'T REP., Mar. 1, 1995; Jennifer Silverman, *Air Pollution: Individual States Remain Adamant About ZEV Mandate, Despite Big Three Letter*, DAILY ENV'T REP. July 13, 1995; *Air Pollution: Decision on Auto Plan for Northeast Delayed Until Mid-December Agency Says*, DAILY ENV'T REP., Nov. 18, 1994.

81. *See, e.g.,* 33 U.S.C. § 1319(g) (1994) (convening of interstate management conference to address interstate water quality problems); *Id.* § 1288 (area-wide waste treatment management plans); *Id.* § 1289 (river basin plans).

82. Holst, *supra* note 78, at 133.

83. For examples of this formalism in the CWA, see CWA §§ 402(b)(3), (c)(3), 33 U.S.C. §§ 1342(b)(3), (c)(3), (1994) (state program delegation and federal resumption of regulatory jurisdiction, respectively). *See also* CWA § 309(g)(4), 33 U.S.C. § 1319(g)(4) (1994) (enforcement).

84. Thomas L. Van Valey & James C. Petersen, *Public Service Centers: The Michigan Experience*, in *CITIZEN PARTICIPATION IN PUBLIC DECISION MAKING* 39 (Jack DeSario & Stuart Langton eds., 1987).

lawyers, creates multiple barriers to public participation,⁸⁵ especially by inchoate, fragmented community-based interest groupings.⁸⁶ Studies have shown that elaborate administrative procedures have had little success in democratizing administrative decision-making.⁸⁷ What public access is produced is systematically unrepresentative of the public interest and favors interests that are already influential.⁸⁸ For example, public hearings, when they do occur, often occur late in the decision making process, at inconvenient times (i.e., during working hours), are inhibiting in format, and frequently pit ordinary citizens against technical experts from the agency or applicant.⁸⁹ The agencies administering these proceedings have neither the flexibility nor resources to respond, other than in the most superficial way, to the cacophony of voices heard in typical public hearing or formal written submission.⁹⁰ The process responds best to the entrenched, familiar voices that collect around unified positions.⁹¹

85. Jurisdictional barriers, such as standing, and the need to develop a persuasive administrative record impose real costs on participants in the administrative process. Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1624 (1985). For a general discussion of the administrative process, see James T. Harrington & Barbara A. Frick, *Opportunities for Public Participation in Administrative Rulemaking*, 15 NAT. RESOURCES LAW, 537 (1983).

86. The administrative and judicial processes require participant to distill their interests into highly focused, oppositional statements or positions. Although one may be able to identify discrete public lands communities, these communities are made up of many people with different interests and values which cannot easily be reduced to single, unitary positions. Bates, *supra* note 16. See also Reich, *supra* note 85, at 1624.

87. Ethridge, *supra* note 50, at 115, 122. Ethridge goes on to say "citizen participation encouraged by formal hearing procedures has not often contributed to the 'complicated, creative balancing of conflicting interests in controversial areas.' Instead, it has frequently served to make discussions of public policies more ideological, more difficult, and less representative of the broader public interest." *Id.* at 124.

88. Ethridge, *supra* note 50, at 115, 129 (quoting Walter A. Rosenbaum, *The Paradoxes of Public Participation*, *Administration and Society* 8:3:355-83 (1976)).

89. Jurisdictional standing to secure judicial review of administrative decisions, the technicality and complexity of the record, costs, and other procedural formalities create barriers to public participation under this model. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1073-78 (1984); Melanie Rowland, *Bargaining for Life: Protecting Biodiversity Through Mediated Agreements*, 22 ENVTL. L. 503, 519 (1992).

90. See *supra* note 54 and accompanying text. See also Bates, *supra* note 16, at 91 (noting that most public hearings are arranged to impede community consensus).

91. Reich, *supra* note 85, at 1624.

There is little reason to expect, therefore, that transferring the "dual regulation" model to public domain would eliminate problems with the "dominant federal" model. The model might even exacerbate existing federal-state tensions on public domain lands and lead to further erosion of national norms despite the theoretical promise of the reverse result. The model does nothing to eliminate the existing politically fragmented natural landscape, and its complete dependence on the administrative process for making decisions may erect additional barriers to diversified, community-based public participation in the public lands management decision-making process.

B. The "Federal-State Consensus" Or "Collaborative Management" Model

The second model is the federal-state consensus or "collaborative management" model employed by the Clean Water Act's National Estuary Program.⁹² Under this model, the federal government funds and facilitates the development of an institution to develop a plan to address the environmental and resource depletion problems caused by unregulated human activities in the estuary.⁹³ There is much to commend in this model for the management of public domain lands.

First, estuaries and public domain lands share common historical predicates. Both are multi-jurisdictional and have historically functioned as unregulated commons.⁹⁴ Federal land holdings in many parts of the West are neither unified nor integrated, but inter-mixed with state and private

92. 33 U.S.C. § 1330 (1994). The progenitor of the federal-state consensus model found in the National Estuary Program is the interstate management plan developed by Maryland, Virginia, Pennsylvania, and the District of Columbia to restore and protect the Chesapeake Bay. For a detailed chronology of the development of that plan and the Chesapeake Bay program, see Marjorie A. Hutter, *The Chesapeake Bay: Saving a National Resource Through Multi-State Cooperation*, 4 VA. J. NAT. RESOURCES L. 186 (1985).

93. Agricultural, industrial, municipal, recreational, and other activities on the land can both directly and indirectly affect estuarine water quality and hydrodynamics. Both atmospheric and land based pollutants can concentrate in and be retained by an estuary. Robert D. Hayton, *Reflections on the Estuarine Zone*, 31 NAT. RESOURCES J. 123, 136 (1991). According to Hayton, these problems have brought on a crisis of global proportions. *Id.* at 125.

94. The estuarine zone is not sharply delineated, but like any ecosystem is a dynamic, sometimes turbulent, and often extensive region. Thus, many states may find themselves in the estuarine zone even though their citizens may not directly benefit from its existence. For a description of the estuarine (or interface) zone and the value of the estuarine systems, see *id.*

holdings.⁹⁵ Further, development on public lands is often tied to development on nearby state and private lands.⁹⁶ This checkerboard pattern of intermingled land holdings continues today making integrated management of public domain lands and multi-jurisdictional challenge.⁹⁷

Public domain lands have also historically functioned as an unregulated commons, susceptible to Hardin's "tragedy."⁹⁸ Although public domain lands may not be a "true" or "legal" commons, as they are subject to laws regulating their use and access, they function as a *de facto* commons, because these laws have not been consistently enforced.⁹⁹ Unauthorized use and access to these lands occurred historically and continues to occur today.¹⁰⁰ Therefore, the public domain lands experience appears to be more

95. As pointed out by Cowart and Fairfax, surface title is not the only complexity in the pattern of western land ownership as a result of the federal practice of retaining subsurface mineral rights when it deeded away land to homesteaders and ranchers. Cowart & Fairfax, *supra* note 6, at 410-12.

96. *Id.* at 410 (noting particularly the contentiousness of access to federal lands surrounded by state or private lands.)

97. Again, according to Cowart and Fairfax, the reality of western land ownership patterns invites (some might say requires) some level of state and local involvement in the management of public domain lands and resources. *Id.* The theoretical framework for these observations can be found in the work of Grodzins and others. MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* (1966), *cited in* Fairfax et al., *supra* note 6, at 420 n.17. For further explication of this theoretical framework and its progenitors, see Kramer, *supra* note 22.

98. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968), *reprinted in* *Managing the Commons* (Garrett Hardin & James Baden eds., 1977) (where many actors share the same resource, rational choice leads to the resource's eventual destruction, because an individual's short term gain exceeds her harm and the harm to the resource can be dispersed among its many users).

99. James Huffman, *The Inevitability of Private Rights in the Public Lands*, 65 *U. COLO. L. REV.* 241, 259 (1994). Huffman argues that well into the twentieth century most non-commodity resources, like wildlife, hiking, camping, and boating, were free for the taking. *Id.* at 260. These unauthorized uses were then legitimized by the preemption laws. *Id.* at 259 (discussion of preemption laws). Huffman goes on to argue that unlimited equal access will lead to the tragedy of the commons and its destruction, and while limiting equal access may alleviate distributional and degradation problems, this can only be accomplished at an unacceptably high cost to average individual welfare. *Id.* at 271.

100. For example, the failure of BLM to control access by cattle to public domain lands makes the public lands a commons for that purpose and, according to most experts, is the reason for the loss of hundreds of millions of acres of arid and semi-arid land in the western United States. George C. Coggins, *Livestock Grazing on the Public Lands: Lessons from the Failure of Official Conservation*, 20 *GONZ. L. REV.* 749 (1984-85);

congruent with the "collaborative management" model than with the "dual regulation" model.

The multi-jurisdictional and un-regulated commons characteristics of estuaries resulted in the formulation of a collaborative, non-directive governance model, quite different in approach from "dominant federal" or "dual regulation" models.¹⁰¹ The National Estuary Program's "collaborative management" model establishes an institutional framework and process for preparation of a multi-state plan to restore and maintain the ecological integrity of designated estuaries.¹⁰² The plan is prepared under the aegis of a "management conference" composed of representatives from all affected political jurisdictions (i.e., federal, state and local governments and interstate governmental entities) and interests in the estuarine zone.¹⁰³ Management plans can only be approved by the federal government upon

Coggins et al., *The Law of Public Rangeland Management 1: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535 (1982); Myra Klockenbrink, *The New Range War Has the Desert as a Foe*, N.Y. TIMES, Aug. 20, 1991, at C-4.

101. Under our constitutional system of government, one state has no power to control another; and the federal sovereign has neither the political will nor the resources to force a federal solution on the states in an historically unregulated, multi-state commons. For examples of unsuccessful attempts by states to control water pollution in adjacent states, see *Arkansas v. Oklahoma*, 503 U.S. 91 (1992); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). For a discussion of some other examples of regional planning by states, see Paul D. Banker, Jr., Note, *the Chesapeake Bay Preservation Act: The Problem with State Land Regulation of Interstate Resources*, 31 WM. & MARY L. REV. 735, 739-44 (1990).

102. As part of the plan development process, the management conference assesses trends in the estuary's water quality, the viability of its natural resources and designated uses, collects and analyzes data on the causes of the estuary's decline, and provides for the coordinated implementation of the plan by federal, state and local agencies. 33 U.S.C. § 1330(b) (1994). The Conference also has the authority to determine the extent to which federal projects and programs are consistent with the plan.

103. States, federal agencies, regional and international authorities, educational institutions, and interested members of the public in the designated "estuarine zone" form the membership of the Management Conference. 33 U.S.C. § 1330(c) (1994). Given the breadth of the statutory definition of the term "estuarine zone," (includes "associated aquatic ecosystems and those portions of tributaries draining into the estuary up to the historic height of migration of anadromous fish or the historic head of tidal influence, whichever is higher," 33 U.S.C. § 1330(k) (1994)), it is not unreasonable to conclude that the intent of the drafters was to include as many jurisdictions in the planning process as possible.

concurrence by the affected states' governors.¹⁰⁴ Once approved, any federal action must be consistent with the plan.¹⁰⁵

The "collaborative management" model, on its face, provides for significant reductions in federalism tensions. The parties operate in a non-hierarchical (i.e., the requirement for state concurrence), cooperative effort to design a solution to what is perceived to be a shared problem.¹⁰⁶ This contrasts sharply with the hierarchical, non-parity, directive federal-state relationship in both the "dominant federal" and "dual regulation" models. Under the "collaborative management" model, the federal government functions as a facilitator, not an overseer, of state and local participation, as opposed to performance, and as a provider of technical and financial resources to aid in plan development. Acceptance of the plan at the local level is enhanced because of direct participation in plan design by state and local governments and the increased likelihood such participation has resulted in a document more sensitive to state and local concerns.

However, the consensus process can also generate substantial transaction costs¹⁰⁷ and result in a compromised final product.¹⁰⁸ There are

104. 33 U.S.C. § 1330(f) (1994).

105. 33 U.S.C. § 1330(b)(7) (1994). The effect of the consistency mechanism under the "collaborative management" model is less clear than under the "layered federalism" model. Only those programs which are listed in the Catalog of Federal Domestic Assistance are covered by § 320(b)(7), 33 U.S.C. § 1330(b)(7) (1994), and the mechanism is tied into a review process triggered by Executive Order 12,372, *reprinted as amended*, 31 U.S.C. § 6506 (1994). While the Executive Order blocks implementation of inconsistent federal programs, the Order is not codified in the statute and is thus subject to modification by subsequent presidents.

106. On the topic of inter-state cooperation and federalism see Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842 (1989). The author's analysis of the National Association of Attorneys General vertical restraint guidelines demonstrates how interstate cooperation preserves the core values of federalism (liberty, civic participation, and diversity).

107. The model requires the creation of a separate, new institution (the management conference), multiple public hearings, and extensive information gathering and analysis. 33 U.S.C. § 1330 (1994). Reflecting the additional time it takes to create a document by committee, most of the plans developed under this model have taken in excess of four years to complete. HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 215-55. *See also* LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 10-15 (1987) (identifying some of the questions raised by negotiating public disputes).

108. Fiss, *supra* note 89, at 1073-78; Rowland, *supra* note 89, at 519. *See also* Frank P. Grad, *Alternative Dispute Resolution in Environmental Law*, 14 COLUM. J. ENVTL. L. 157, 184 (1989) (ADR's "win-win" trade-off is deceptive because if everyone gains, it is likely that someone not involved in the trade will have to pay and, in the

no controlling norms guiding federal approval of the plan, no requirement that the plan even meet federal standards, unlike the "dual regulation" model.¹⁰⁹ Therefore, there is no way of assuring that distribution inequities between estuaries in different parts of the country will not be created. Further, plan implementation depends upon the voluntary cooperation of affected jurisdictions and must await separate action by state and local governments conforming their laws to whatever new standards or procedures are required by the plan.¹¹⁰ The management conference has no continuing function once the plan is approved.

The "collaborative management" model, however, does a significantly better job than either the "dominant federal" or "dual regulation" models of removing the barriers to rational ecosystem management, because it offers a trans-political boundary institutional framework (the management conference) for managing a regional resource. The goal of the model's planning process is to synthesize and rationalize differences among the affected states in how they manage the natural system; in other words, to eliminate the artificial differences caused by political boundaries. Most plans also provide for future plan adjustments, allowing for conservation biology's adaptive management.¹¹¹

The structure of the "collaborative management" model's management conference, with its many different participants and its use of a consensus, collaborative approach to decision-making (i.e., the planning process), encourages diversity of views. A consensus approach is more open to different communities than the formal bi-polar, adversarial approach of the "dominant federal" and "dual regulation" models.¹¹² The democratic, more

environmental field, the loser may well be the public interest in preserving environmental resources for the future).

109. See 33 U.S.C. § 1330(f) (1994) (approval procedures for the estuary plan requires inclusion of priority corrective actions and compliance schedules to meet the CWA's aspirational goals).

110. The CWA relies on the prospect of federal financial assistance to encourage plan implementation. 33 U.S.C. § 1330(f)(2) (1994). As an ultra-jurisdictional solution to a multi-state problem, unless states voluntarily incorporate the directives of a management plan, the plan's implementation and enforcement is totally dependent upon individual state enforcement authority, which cannot transcend political boundaries.

111. Included in the plan are normative guidance (statutory and regulatory standards) and shared aspirational goals, which may reduce future conflicts. 33 U.S.C. § 1330 (1994); 40 C.F.R. §§ 35.9000-35.9070 (1995).

112. Reich, *supra* note 85, at 1624 (discussing how current practice policymaking ignores the views and interests of poor and diffused groups). The author suggests that public deliberation is beneficial to these groups as it brings

transparent nature of the planning process levels the playing field between community-based interests and special interests. The participation of community-based interests in the process also validates and strengthens the interests they represent, increasing public confidence in the final product.¹¹³

While the "collaborative management" model harbors some significant risks, such as transaction costs, the possibility of a compromised final product and sacrificed national norms as well as implementation uncertainty, it offers a means to overcome the federalism frictions now present on public domain lands as well as the ecosystem management and public participation problems inherent in both the "dominant federal" and "dual regulation" models. The shared historical predicates with the "dominant federal" model may also make the imposition of this consensus driven model on public domain lands an easier fit than the "dual regulation" model.

C. "Federal Consistency" Or "Layered Federalism" Model

The third, and final model is the "federal consistency" or "layered federalism" model found in the Coastal Zone Management Act (CZMA).¹¹⁴ Under this model, a state develops and administers a federally funded coastal resource management program that meets uniform federal standards.¹¹⁵ Federal activities (both within and outside the program area) must be consistent with the state's program to the "maximum extent practicable" unless contrary to the national interest.¹¹⁶ Like the "collaborative management" model, the "layered federalism" model has much to commend it.

The historical experience underlying the "layered federalism" model, however, is significantly different from the public lands' experience; closer to that underlying the "dual regulation" model. The states' ability to manage coastal areas was considered superior to that of the federal government, because the states already had the necessary resources, administrative machinery, enforcement powers, constitutional authority, and experience to

them together where they are able to recognize common interests and jointly create new public values. *Id.* at 1635-36.

113. In addition, a consensus approach, in contrast to the formalistic or adversarial approach of the "dominant federal" or "dual regulation" models, by encouraging examination of assumptions, inclusive thinking and a means for finding common ground among various interests, provides the ideal environment in which to recognize different communities. Bates, *supra* note 16.

114. 16 U.S.C. §§ 1451-64 (1994).

115. For a recitation of those standards, see 16 U.S.C. § 1455(d) (1994).

116. 16 U.S.C. § 1456(c) (1994); *Secretary of the Interior v. California*, 464 U.S. 312 (1984).

do the job;¹¹⁷ historical predicates quite different from the states' experience on public domain lands.¹¹⁸ Further, federal funds and the clear power shift to the states was perceived as a means to correct past distributional inequity in the coastal zone, where the nation as a whole had received the benefits of coastal development and the impacted states bore all of the costs.¹¹⁹ Perceived distributional inequities on public lands have historically been corrected or offset by federal funds, not by a redistribution of power.

While consistency between federal and state programs is not an unfamiliar concept in the public lands context, the public lands version is much weaker than that employed in the "layered federalism" model, more aspirational than controlling.¹²⁰ Under the "layered federalism" model, states can veto a proposed federal initiative that is inconsistent with the states program, giving the states considerable leverage against the federal government. Under FLPMA, the federal planning process is merely to be informed by state and local concerns.¹²¹ BLM, not the states, makes the consistency finding and BLM can reject a state or local standard, if the interests of the federal government are not adequately preserved by that standard.¹²² Reserving this authority in the federal government reflects

117. Beyle, *supra* note 25. According to Houck and Rolland, the CZMA "presumes" coastal land use is primarily a state affair, and provides funding with only limited, programmatic federal review of state performance. Houck & Rolland, *supra* note 54, at 1289.

118. See *supra* note 41 and accompanying text.

119. Martin J. LaLonde, Note, *Allocating Burden of Proof to Effectuate the Preservation and Federalism Goals of the Coastal Zone Management Act*, 92 MICH. L. REV. 438 (1993).

120. Leshy, *supra* note 25, at 109.

121. 43 U.S.C. § 1712(c)(9) (1994) ("[T]he Secretary shall, to the extent he finds practical, keep apprised of State, local and tribal land use plans.") Congress intended, among other things, for FLPMA to increase the opportunities for state and local governments as well as the general public to participate in land management decisions. The Public Land Law Review Commission, whose recommendations contributed to much of the content of FLPMA, noted many reasons for increasing the role of state and local governments in the public land decision making process, including the need to allow for more effective resolution of problems such as depressed local tax revenues due to property tax immunity of federal lands and zoning and pollution control problems on non-federal lands caused by uses of contiguous federal lands. For a further discussion of this and other related points, see Beyle, *supra* note 25, at 216.

122. 43 U.S.C. § 1712(c)(9) (1994) (land use plans shall be consistent with state and local plans to the maximum extent the Secretary finds consistent with federal law and the purposes of the Act.) See also Beyle, *supra* note 25, at 216. Under the CZMA, state or local authorities determine the consistency of federal programs with state coastal zone management plans. 16 U.S.C. § 1456(c) (1994).

congressional belief that the integrity of the governing federal laws and congressional policies should not be compromised by conflicting local concerns,¹²³ a finding substantially at odds with the congressional findings underlying the "layered federalism" model.¹²⁴

Although the "layered federalism" model sounds similar in some respects to the "dual regulation" model, there are significant differences of particular relevance to this analysis. The "layered federalism" model is more truly a state-lead design than the "dual regulation" model. The model envisions a strong role for state and local governments in the program area. The state administers its coastal zone program without federal intrusion or even participation.¹²⁵ Although states must consider federal interests in their individual draft plans and conform to national criteria, they are largely left free to develop and administer their programs without the federal government second-guessing them.¹²⁶ And, while the federal government can restrict or condition federal funding¹²⁷ and withdraw plan approval,¹²⁸ just

123. Beyle, *supra* note 25, at 222 n.116 (quoting H.R. Rep. No. 1724, 94th Cong., 2d Sess. 58 (1976)). Beyle writes of the contradictory desire of Congress to bring states and local governments into the federal land management process more which was tempered by an even stronger desire that federal primacy and control over public lands was still considered essential given the prevailing state record on management of their own lands. *Id.* at 216-17.

124. A key to more effective protection and use of the land and water resources of the coastal zone is to encourage states to exercise their full authority over the lands and waters in the coastal zone. 16 U.S.C. § 1451(i) (1994). Because of their proximity to and reliance upon the coast and its resources, the coastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of coastal states in all federal programs affecting such resources. *Id.* § 1451(m).

125. In contrast, under CWA § 402(d) each state with delegated authority to administer the national pollution discharge elimination system permit program must submit to EPA a copy of each permit application received by the state. 33 U.S.C. § 1342(d) (1994). The state cannot issue a permit until 90 days have passed without EPA noting its objection to the permit.

126. The Secretary of Commerce cannot approve any state management plan unless the views of federal agencies principally affected by the plan have been adequately considered, 16 U.S.C. § 1456(a) (1994), the plan provides for adequate consideration of national interests involved in siting of energy facilities which are of greater than local significance, *id.* § 1455(d)(8), and lands which are held in trust by or subject solely to the discretion of the federal government are excluded from the definition of "coastal zone," *id.* § 1453(1). *See*, Beyle, *supra* note 25, at 211-12.

127. 16 U.S.C. § 1458(c) (1994) (suspension of federal assistance if coastal state failing to adhere to management program or grant terms).

like it can in the "dual regulation" model, federal oversight of state performance under this model is considerably less objectionable to the states, because the traditional federal "sticks" on the "dual regulation" model are substantially offset in the "layered federalism" model by the federal consistency provision.¹²⁹

Further, since local concerns are elevated under the model as a result of states being encouraged to tailor their plans to meet local needs,¹³⁰ the federal consistency model, like the collaborative management model, should also produce a product that is sensitive to these needs, and, therefore, supported by the local communities. Thus, the friction inherent in the "dual regulation" model's heavy reliance on federal oversight to achieve desired state performance is not a significant factor in the "layered federalism"

128. *Id.* § 1458(d) (approval shall be withdrawn if coastal state fails to cure defects in its compliance with its management program or grant terms).

129. State program authority to condition or reject outright certain types of federal and federally-supported development has been upheld against claims of preemption and interference with interstate commerce. Houck & Rolland, *supra* note 54, at 1297. *See also* Michael A. Wolf, *Accommodating Tensions in the Coastal Zone: an Introduction and Overview*, 25 NAT. RESOURCE L.J. 7 (1985).

130. 16 U.S.C. § 1455(d) (1994). Another example of the extent to which the coastal zone management program is, at least, structured to be sensitive to local concerns can be found in § 306(d)(2)(B) in which states are enjoined not only to establish an "effective mechanism" for continuing consultation with local governments to assure their full participation in implementing the state's coastal zone management program, but the mechanisms themselves must provide for an opportunity for comment by local governments in any situation where implementation of any management program decision would conflict with any local zoning ordinance. 16 U.S.C. § 1455(d)(2)(B) (1994).

model.¹³¹ In fact, criticisms of the program have less to do with its governance model than its limited financial resources and overly broad scope.¹³²

The reduction in federalism tensions, however, is not without cost. A state-lead program without clear national standards and federal oversight, features of the "dual regulation" model can create substantial differences and inequities among the states and be an invitation to industry forum shopping.¹³³ By allowing each state unfettered authority to "resolve for its own coastal area basic choices among competing uses for finite resources,"¹³⁴ no particular result in favor of any resource can be assured, jeopardizing the achievement of national norms favoring protection of those resources.¹³⁵

The "layered federalism" model's effectiveness at controlling coastal development and limiting environmental damage, just like the "dominant federal model," depends on coordination between the various layers of

131. Supervision of state performance and enforcement of the Act by the federal government, although of a continuing nature and comprehensive in scope, generally leads only to non-binding suggestions for state program improvement. Mandatory recommendations, according to Houck and Rolland, are restricted to process-oriented improvements. The Secretary's only oversight stick is to suspend federal funding, if a state fails to adhere to an approved program, and then only after an elaborate process, which, again according to Houck and Rolland, serves as both a shield against federal attempts to de-fund aggressive state programs and against complaints of program violations in favor of development interests. The CZMA provides no private federal cause of action against states, local governments or private parties claimed to be in violation of state coastal management programs, therefore, citizen oversight over state program performance is limited as well. *See generally* Houck & Rolland, *supra* note 54, at 1294-99.

132. *See* Richard Hildreth & Ralph W. Johnson, *CZM in California, Oregon, and Washington*, 25 NAT. RESOURCES J. 103 (1985) (program's broad scope and federal resource limitations threaten to enervate program or turn it into a one-issue program).

133. Inequities are also created among applicants as a result of the enhancement of the states' powers and the dominance of state and local concerns over national concerns. The states' ability to impose more stringent requirements can cause non-uniform changes in regulatory burdens imposed on applicants by federal laws, regulatory differences between coastal and non-coastal states, and higher transaction costs. Scott C. Whitney et al., *State Implementation of the Coastal Zone Management Consistency Provisions - Ultra Vires or Unconstitutional?*, 12 HARV. ENVTL. L. REV. 67 (1988); *cf.* Beyle, *supra* note 25 at 214 (experience has shown CZMA dispute resolution mechanism and the scheme of shared federal-state control have acted to inhibit such strategic behavior).

134. *Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225, 1247 (D. Del. 1986).

135. Houck & Rolland, *supra* note 54, at 1299.

government as well as among agencies within each layer.¹³⁶ Yet, the consistency mechanism can be its own cause of conflict between the various layers of government despite the fact its use should trigger intra-state jurisdictional negotiations and offer a way to eliminate inconsistent regulatory requirements among the different jurisdictions within a state.¹³⁷ Experience with the model reveals that the different layers of government operate independently of each other, with "tunnel vision" and a myopic sense of territoriality.¹³⁸ This behavior can result in duplicate programs, programmatic conflict, turf wars, and less environmental protection, sounding remarkably like the experience under both the "dominant federal" and "dual regulation" models.¹³⁹ However, these problems are experienced most keenly at the state and local level. State-local tensions replace the federal-state tensions of the "dominant federal" and "dual regulation" models, turning the model into a battleground for conflicting philosophies over the distribution of power between state and local governments.¹⁴⁰

Although, the "layered federalism" model is limited by state boundaries, like the "dominant federal" and "dual regulation" models, the model holds somewhat more promise for achieving rational ecosystem management than might be expected. The power to find parochial federal programs inconsistent with broader state natural resource goals and the importance of local concerns create an opportunity for making rational ecosystem decisions in an ecologically defined area within a state.¹⁴¹ In addition, the planning approach underlying the "layered federalism" model, as it underlies the "collaborative management" model, and the absence of binding, uniform standards, a feature of the "dual regulation" model, allows

136. Ronald J. Rychlak, *Coastal Zone Management and the Search for Integration*, 40 DEPAUL L. REV. 981 (1991).

137. For a discussion of the dispute resolution mechanisms in the Coastal Zone Management Act, see Beyle, *supra* note 25, at 212-14.

138. Rychlak, *supra* note 136, at 995. See also Whitney, et al., *supra* note 133 (providing another highly critical view of the federal consistency provision).

139. Rychlak, *supra* note 136, at 996.

140. Rychlak, *supra* note 136. While there is some reason to expect that the same dynamic might happen in the "collaborative management" model with local jurisdictions vying for power with their states, the presence of non-governmental participants in the planning process and the federal government as a facilitator may act to lessen the likelihood of this happening in that model.

141. This feature of the "layered federalism" model can be a double edged sword with respect to protecting natural resources of nationally recognized value like wetlands, as states can use this authority to stop environmentally protective federal actions as well as destructive ones.

for state experimentation and innovation,¹⁴² and for conservation biology's adaptive management principles to be applied.¹⁴³

The model is less inclusive of diverse public voices than might be anticipated from its emphasis on planning. Broad public participation is invited in state plan formulation¹⁴⁴ and state plans must include procedures for public participation in the permitting process as well as consistency determinations.¹⁴⁵ However, once the plan is approved, the process becomes less inviting and inclusive and more hierarchical and formal, replicating the barriers to participation by diverse public communities found in the "dual regulation" model.¹⁴⁶

Although the historical predicates behind the federal consistency or "layered federalism" model are less compelling when applied to the public domain lands than the "collaborative management" model, the "layered federalism" models does offer some benefits. The model appears to reduce federal-state tensions, although, in practice, it may merely transfer those tensions down a layer to state and local governments. The model also offers some potential for rational ecosystem management within a state and diversification of public participation in the decision-making process. The model, however may cause high transaction costs for third parties, and does not assure the fulfillment of national norms with respect to protection of natural resources or prevent distributional inequities from occurring among the several states.

IV. Conclusion

This discussion should make clear that no single model discussed in this article offers a complete panacea to the federalism tensions, ecosystem

142. Houck and Rolland emphasize the "pliable" nature of not only the federal standards governing approval of state coastal programs, but also in how states structure their management programs and define the extent of their coastal jurisdiction. Houck & Rolland, *supra* note 54, at 1294-95.

143. According to critics of the "layered federalism" model, the ad hoc, fragmented decision-making approach fostered by the model is the antithesis of rational ecosystem decision-making. Oliver A. Houck, *Ending the War: A Strategy to Save America's Coastal Zone*, 47 MD. L. REV. 358, 361 (1988). See also Rychlak, *supra* note 136, at 944-99.

144. 16 U.S.C. § 1455(d)(4) (1994) (state must hold public hearings in development of management plan).

145. *Id.* § 1455(d)(14).

146. For a description of the dispute resolution mechanisms of the CZMA showing both the formalism of those mechanisms as well as their effectiveness at averting conflict and delay, see Beyle, *supra* note 25, at 212-16. For a contrary view of the provision's conflict avoidance effectiveness, see Whitney et al., *supra* note 133.

management irrationality and lack of community inclusivity afflicting public lands management today as a result of the application of the "dominant federal" model. The least curative approach, and thus the least appealing substitute for the current paradigm, is that offered by the "dual regulation" model. Experience with the first model reveals that its theoretical promises are largely chimerical.

The "collaborative management" and "layered federalism" models, on the other hand, do offer some advancements over the "dominant federal" model. Enhanced state roles under these models have led to a lessening of federal tensions as well as a greater opportunity for rational ecosystem management and more inclusive decision-making. At the same time, application of these more cooperative models of governance may make more problematic the achievement of national norms and, at least with regard to the "layered federalism" model, the avoidance of distributional inequities. Therefore, none of these models warrants wholesale relocation to public domain lands without careful weighing of what is gained and lost in the substitution process.

If changes to the current public lands governance model are going to be made, however, it may be more important to resolve the ecosystem management and public participation problems of the "dominant federal" model than its federalism tensions. Friction in our federal system of government has been in existence since the formation of the republic. The mere fact that these tensions exist at all on public lands, where there is no institutional role for either state or local governments, is a testament to the endemic and persistent nature of the problem under our system of government. Examination of the three federalism models shows, at most, a lessening of these tensions, but not their complete disappearance. To hope for more, in the case of public domain lands, therefore, may be to hope for too much.

The same cannot be said, however, with respect to overcoming the political and institutional barriers preventing rational ecosystem management and democratic decision-making on public domain lands. Unless these problems can be solved, the biological and social communities that depend upon those lands will wither and die. Therefore, features of the three models examined in this article that remove these barriers should be looked at seriously in the redesign process, even if the models' other attributes are not so promising.