Sagebrush and Seaweed Robbery: 
State Revenue Losses From 
Onshore and Offshore Federal 
Lands

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INTRODUCTION

One-third of the nation's land, over 750 million acres, is owned by the federal government, and the majority of the holdings are situated in the Western states.1 In addition, the federal government controls over one billion acres of submerged lands on the outer continental shelf (OCS).2 Much of this federally-owned land generates significant revenues for the federal government.3 The billions of dollars in bonuses, rents, royalties, and other revenues owed to the federal government for offshore oil and gas, and onshore minerals, timber, and other federal land resources represent the second largest source of revenue the federal government receives, exceeded only by federal income taxes.4 Federal law

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1. See Davis, Wilen & Jergovic, Oil and Gas Royalty Recovery Policy on Federal and

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requires a substantial share of this federal land revenue to be shared with states; generally, the primary beneficiaries are the counties and school districts in which the federal lands are located.5

States received almost $500 million from the U.S. Department of the Interior's onshore mineral leasing programs in 1983,6 and about $225 million from U.S. Forest Service programs in 1984.7 Counties burdened with federal tax-exempt property received over $100 million as payments in lieu of taxes in 1984.8 Furthermore, the Department of the Interior recently offered a number of coastal states over $270 million to settle disputes concerning the proper allocation of OCS revenues.9 Despite the enormity of the funds at stake, relatively little attention has been paid to revenue sharing issues in the national debates over the management of federal lands.

In recent years, Western states have attempted to control the use of federal land through the "Sagebrush Rebellion" (the struggle to secure state ownership of federal lands)10 and the "Seaweed Rebellion" (the conflict between coastal states and the federal government over offshore development).11 The states have voiced concern over major federal land

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5 See the discussion of federal land revenue sharing laws, infra notes 37-43 and accompanying text.
6 PUBLIC LAND STATISTICS, supra note 1, at 194, 204-05.
7 Counties Receive Final Payments, supra note 3, at 2.
9 Clark Stands Firm on Offer to States for Offshore Oil and Gas Revenues, Sacramento Bee, Dec. 21, 1984, at A18, col. 1 [hereinafter cited as Clark Stands Firm on Offer]. The $270 million is to be divided by five states including California. Texas and Louisiana are seeking through litigation to share a portion of another $3.6 billion. Id. See infra notes 187-88 and accompanying text.
use policies such as "privatization" (the federal government's proposal for the massive sale of federal lands to private interests to reduce the national debt)\(^ {12}\) and "firesale leasing" (a major expansion and acceleration of federal mineral leasing).\(^ {13}\) These skirmishes over federal land ownership, disposal and development, which are beyond the scope of this Article, have obscured the problem of the federal government's fiscal raids on state revenue shares guaranteed under federal land laws.

Western states are losing, or are threatened with the loss of, hundreds of millions of dollars of federal land revenues as a result of several federal government actions. These actions include the federal government's refusal to provide states with a "fair and equitable" share of offshore oil and gas revenues as required by the Outer Continental Shelf Lands Act,\(^ {14}\) its mismanagement of federal onshore mineral royalties,\(^ {15}\) its mineral leasing lottery practices,\(^ {16}\) its proposal to "undervalue" federal land gas production,\(^ {17}\) its illegal deductions of federal "windfall profits" taxes from state revenue shares,\(^ {18}\) its proposal to reduce the states' share of revenues from national forest timber harvesting,\(^ {19}\) and its use of appropriation bills to circumvent federal land laws requiring state revenue sharing.\(^ {20}\)

Part I of this Article briefly describes the background and evolution of federal land revenue sharing programs. Parts II-IV discuss major problems causing or threatening to cause revenue losses for state and


\(^{14}\) See infra notes 173-96 and accompanying text.

\(^{15}\) See infra notes 47-85 and accompanying text.

\(^{16}\) See infra notes 86-108 and accompanying text.

\(^{17}\) See infra notes 109-18 and accompanying text.

\(^{18}\) See infra notes 119-32 and accompanying text.

\(^{19}\) See infra notes 138-64 and accompanying text.

\(^{20}\) See infra notes 133-36 and accompanying text.
local governments from onshore mineral leasing (Part II), national forest development (Part III), and offshore oil and gas production (Part IV). The Article addresses the national effects of these revenue sharing problems, while focusing on the effects on one state, California. Finally, the Article suggests strategies, particularly litigation, for protecting the states' interest in federal land revenues.

I

DEVELOPMENT OF FEDERAL LAND REVENUE SHARING PROGRAMS

A. Congressional Power Over Federal Lands

The Property Clause and Jurisdiction Clause of the U.S. Constitution grant Congress broad authority to manage federal lands. In conjunction with the Constitution's Supremacy Clause, they afford the federal government paramount authority over federal lands.

State authority over federal lands is superseded, however, only if Congress chooses to exercise its constitutional authority in a preemptive manner. While Congress has the constitutional power to displace state authority over federal land, it has rarely chosen to exercise this power for the exclusive benefit of the federal government. Rather, over the years...

24. U.S. CONST. art. VI, cl. 2.
27. See generally Engdahl, State and Federal Power Over Federal Property, 15 ARIZ. L. REV. 283 (1976). In recent years, there has been a growing debate concerning the degree to which states can control the management of federal lands. See Kleppe v. New Mexico, 426 U.S. 529 (1976) (federal power to manage wildlife on federal lands preempts state authority); Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979) (federal Mineral Leasing Act preempts state authority over federal oil and gas leasing activities), aff'd mem., 445 U.S. 947 (1980); but see Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361 (N.D. Cal. 1984) (upholding state jurisdiction over hard rock mining activities on national forest lands), appeal filed, No. 84-2146 (9th Cir. June 20, 1984); Gulf Oil Corp. v. Wyoming Oil & Gas Conservation Comm'n, No. 84-82, 693 P.2d 227 (Wyo. 1985) (upholding state jurisdiction over federal oil and gas leasing activities; distinguishing Ventura County, supra, on the basis that the Wyoming case involved reasonable regulation and not prohibition of federal leasing activities). See also Masouredis & Barbieri, State Environmental Regulation of Private Mining on Federal Lands, [Winter 1985 Commentary] WESTERN NAT. RESOURCES LITIGATION DIG. (Conf. of Western Att'y's Gen.) 27 (discussing Granite Rock). See generally Shapiro, supra note 26.

In the absence of constitutional authority to control federal land activities, public land states have fallen back on the intergovernmental consultation, coordination, and consistency provisions of federal planning and management statutes to influence federal land decisions. State and local governments are granted various degrees of influence over federal lands under the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1982), the National
Congress has produced a patchwork of federal land revenue sharing measures which have provided state and local governments with a significant financial stake in federal lands.28

B. History of Federal Land Revenue Sharing

During the greater part of the nineteenth century, the federal government routinely transferred public lands to private ownership to encourage the development of the nation's frontier.29 This national policy of public land disposal began to shift at the close of the nineteenth century as substantial amounts of federal acreage in the West were withdrawn for the creation of national forests and national parks.30 With growing support for a conservation movement, federal policy evolved throughout the twentieth century to favor permanent retention of federal lands.31 This new policy was finally formalized in 1976 with the passage of the Federal Land Policy Management Act.32

State and local governments are prohibited from taxing federal lands.33 They are, however, often burdened by activities on federal lands, which can generate development pressures, resulting in increased demands for transportation, education, police and fire protection, and other public services.34 By the turn of the century, the emergence of a national policy of federal land retention coupled with the inability of state and local governments to tax or otherwise generate revenues from federal lands is beyond the scope of this Article, which is limited to federal land revenue sharing issues.

28. See infra notes 29-46 and accompanying text.
31. See generally, P. GATES, supra note 29, at 531-634, 771-72; PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 1 (1970) [hereinafter cited as PLLRC REPORT]. This federal land retention policy is now being undermined by the Reagan Administration's "privatization" program. See supra note 12 and accompanying text.
34. PLLRC REPORT, supra note 31, at 235-36.
lands began to strain relations between the federal government and Western states.

State and local concerns over the denial of tax revenues and the additional expenditures required to provide services for federal property were minimized as long as the federal government observed a policy of federal land disposal. The withdrawal of federal lands in the West for the creation of huge national forests, however, significantly aroused state and local concerns over the long-term fiscal implications of large scale retentions. As the permanence and magnitude of federal land ownership became clear, state and local demands for compensation increased. In response, Congress began enacting federal land revenue sharing programs.

A first step in federal land revenue sharing was taken in 1906 when Congress provided that the states should receive, for schools and roads, 10% of the funds derived from national forest timber production and user fees. In 1908, Congress raised the states’ share of national forest revenues to 25%, where it has remained since.

In 1920, Congress passed the Mineral Leasing Act which provided states with 37.5% (raised to 50% in 1976) of the revenues derived from the production of onshore minerals. Soon thereafter, Congress passed the Taylor Grazing Act of 1934 which provided counties with 12.5% of revenues obtained from grazing district fees, and 50% of revenues generated from isolated grazing tracts. Over time similar federal land revenue sharing legislation was passed to add to this patchwork.
In 1976, a unique Payment in Lieu of Taxes (PILT) program was adopted to supplement other federal land revenue sharing programs. The PILT program was intended to increase federal land revenue sharing, to compensate certain communities that did not derive revenues from federal lands within their boundaries because those lands were non-producing (e.g., wilderness areas), and to help stabilize fluctuating revenues received by communities benefiting from revenue producing federal lands.

The Public Land Law Review Commission was established by Congress to conduct a comprehensive review of public land laws and regulations, and to provide recommended revisions to the President and the Congress. In its report, the Commission summarized the rationale for federal land revenue sharing, stating:

If the national interest dictates that lands should be retained in Federal ownership, it is the obligation of the United States to make certain that the burden of that policy is spread among all the people of the United States and is not borne only by those states and governments in whose area the lands are located.

The Commission endorsed federal land revenue sharing as essential to compensate state and local governments burdened by federal ownership of lands within their borders.
The federal government's long-standing obligation to provide federal land revenue sharing payments to state and local governments is now being undermined. The remainder of this Article reviews the most significant federal government actions that now, or soon may, deprive states of federal land revenue sharing payments.

II

STATE LOSS OF FEDERAL ONSHORE MINERAL REVENUES

A. Mineral Royalty Fraud and Mismanagement

Under the Mineral Leasing Act of 1920, the Department of the Interior is authorized to lease federal fuel deposits such as oil and gas, coal, and non-fuel minerals including sodium, phosphate, and potash. Under section 35 of the Act, 50% of the sales, bonuses, royalties and rentals related to the production of these minerals are payable to the state in which the leased lands are situated.

In 1983, the Bureau of Land Management received over $1 billion in bonuses, rents, and royalties derived from onshore mineral leasing. The bulk of these funds were generated from oil and gas leasing activities. The states' share of the 1983 revenues exceeded $500 million; California received over $25 million. These revenues, however, are less than they should be. As a result of federal government royalty mismanagement, theft, and industry fraud, the government has failed to collect hundreds of millions of dollars annually in oil and gas royalties, resulting in up to a 14% royalty shortfall each year. This has been enormously costly to public land states because half of every uncollected dollar is money owed to the states.

In 1981, in response to widespread reports of theft of federal oil, industry failure to report oil production, and federal agency mismanage-
ment of onshore minerals royalty collection, the Department of the Interior established the Commission on the Fiscal Accountability of the Nation's Energy Resources, chaired by Mr. David Linowes. The Commission's task was to review the charges against the federal government's royalty management system and to propose remedial measures. The following year the Commission issued a report which identified serious royalty management deficiencies, including the government's failure to verify production data, to maintain adequate accounting records, to impose penalties for underpayments, and to conduct sufficient audits. The Commission recommended a strengthened royalty management system involving, among other reforms, increased coordination with states.

The Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA) established such a framework for efficient royalty management and provided a basis for federal-state coordination. The Act provides for cooperative federal-state audit agreements, delegation to states of federal royalty management authority, compensation for state cooperative agreements and delegations, and state authority to sue industry for underpayments if the federal government fails to act expeditiously.

Following passage of FOGRMA, the Department of the Interior estimated that its strengthened royalty management system would result in the collection of an additional $600-700 million between 1983 and 1987. As of September 1984, the total mineral royalty underpayments billed as a result of cooperative federal-state audits slightly exceeded $33 million. From this amount, $11.8 million has been distributed to the states as revenue sharing payments. In light of initial estimates, pro-

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56. See Davis, Wilen & Jergovic, supra note 4, at 393 n.6 (noting reports of multi-billion dollar scandals involving oil and gas operations on federal lands in as many as twelve states).
58. Id.
59. LINOWES COMMISSION REPORT, supra note 53, at 15.
60. Id. at 210-23.
63. Id. § 1735.
64. Id. § 1735(f).
65. Id. § 1734.
66. Sant, Haspel & Boldt, supra note 4, at 429.
67. Letter from the Western Governors' Association to Secretary of the Interior William Clark (Feb. 26, 1984) [hereinafter cited as Western Governors' Association Letter]; memoranda from Jean Abadie, California State Controller's Office to Michael Shapiro (Oct. 11, 1984 and Dec. 13, 1984) [hereinafter cited as Abadie Memoranda]. The total actually collected from lessees was just under $30 million. Id.
68. Abadie Memoranda, supra note 67. To date, California has received almost $1.5 million as a result of royalty audit billings, and in October 1984 the state filed a claim for an
progress to date has been poor.\textsuperscript{69}  
A number of states have participated in cooperative audit efforts with the Department of the Interior,\textsuperscript{70} but thus far only California has received federal reimbursement for its auditing costs,\textsuperscript{71} and this only after the state filed a lawsuit. In \textit{California v. Watt},\textsuperscript{72} Western states supporting California's claim argued that the federal government owes a fiduciary duty to states receiving a share of federal land revenues to ensure that all past royalties are accurately accounted for and collected.\textsuperscript{73} The Secretary of the Interior urged dismissal of the suit, denying any federal obligation to states containing federal lands other than to distribute 50\% of whatever amount was collected from producers,\textsuperscript{74} and arguing that neither the language of the Mineral Leasing Act nor its legislative history evidences a duty to the states to collect all revenues owed by lessees.\textsuperscript{75} The court never reached the issue of the federal government's obligation to states because the lawsuit was voluntarily dismissed following an agreement by the Department of the Interior to reimburse California for $500,000 towards the expenses of a cooperative audit.\textsuperscript{76} The issue thus remains unsettled.

Rather than establishing a constructive working relationship between the states and the Department of the Interior, cooperative auditing

\textsuperscript{69} As recently as December 1984, a congressional study charged that the Department of the Interior's royalty management system has grown worse despite promises of reform. See \textit{Mineral Rights Report Puts Losses in Millions}, N.Y. Times, Dec. 16, 1984, at 33, col. 6 (citing \textit{HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 98TH CONG., 2D SESS., FEDERAL MINERALS ROYALTY MANAGEMENT (Comm. Print 1984)}).

\textsuperscript{70} Davis, Wilen & Jergovic, supra note 4, at 402. Informal cooperative efforts commenced prior to passage of FOGRMA. \textit{Id}.

\textsuperscript{71} See Western Governors' Association Letter, supra note 67.


\textsuperscript{74} Western States Amicus Brief, \textit{supra} note 73, at 8.

\textsuperscript{75} \textit{Id}.

efforts have generated disputes. State auditors have discovered unrecorded oil and gas producing wells, late payments without interest paid, supposedly shutdown wells in production, proposals to write off royalty balances under $100,000, and other costly deficiencies. The states have accused the federal government of frustrating state attempts to collect past due accounts, and have complained that the Department of the Interior's Minerals Management Service is not sharing information as required by FOGRMA. States have also charged the Department of the Interior with inordinate delay in implementing a program to delegate authority for royalty management to states, as authorized by FOGRMA.

Although FOGRMA authorizes full state reimbursement for auditing costs, new federal royalty management regulations require the federal government to pay not more than 50% of state costs incurred pursuant to cooperative audit revenue agreements. States will be forced to pay their remaining auditing costs out of their revenue sharing re-

77. See Western Governors' Association Letter, supra note 67. See also Res. No. 84-23, Western Legislative Conference (Sept. 19, 1984) (urging a greater state role in the management and collection of oil and gas royalties from federal lands) [hereinafter cited as Western Legislative Conference Resolution].

78. Western Governors' Association Letter, supra note 67; see also HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 98TH CONG., 2D SESS., FEDERAL MINERALS ROYALTY MANAGEMENT 2-6 (Comm. Print 1984) [hereinafter cited as HOUSE REPORT]. Despite the passage of time since the 1982 enactment of FOGRMA, the Department of the Interior's royalty management system is still "plagued by inefficiency, inadequate management and a general lack of effectiveness." Mineral Rights Report Puts Losses in Millions, N.Y. Times, Dec. 16, 1984, at 33, col. 6 (quoting HOUSE REPORT, supra); see HOUSE REPORT, supra, at 2-6 (identifying continuing problem areas including failure to collect interest owed, lack of on-site production verification, failure by the Mineral Management Service to account for all royalty payments, failure to accomplish genuine reconciliation of the royalty accounting system's account balances, and lack of a complete, accurate lease inventory).

79. Western Legislative Conference Resolution, supra note 77, at 1; see also HOUSE REPORT, supra note 78, at 3 (pointing out that the Mineral Management Service has failed to adequately communicate and coordinate with states and arguing that it should play a more constructive role in joint audits).

80. See HOUSE REPORT, supra note 78, at 3 ("Although the FOGRMA requires the Secretary to provide reports supporting the payments made to the states and Indian tribes, the MMS [Minerals Management Service] is not doing so. While the MMS is providing reports to the states and Indian tribes, such reports do not contain sufficient information to permit them to validate the royalty payments made."). See generally 30 U.S.C. §§ 1732(b), 1733 (1982) (requiring the federal government to share royalty management information with states). The Minerals Management Service has been accused of refusing to provide states with information because it would be too costly and time consuming to compile. See Western States Still Dissatisfied with Royalty Shares, Oil Daily, July 23, 1984, at 1.

81. Western Legislative Conference Resolution, supra note 77, at 1; see also HOUSE REPORT, supra note 78, at 3.

82. 30 U.S.C. § 1732(a), (c) (1982).

receipts. Thus, in effect, the states will augment the federal budget by providing free auditing assistance.84

The Western states have a significant financial interest in assuring proper implementation of the Department of the Interior's mineral royalty management responsibilities. If federal government mismanagement and resistance to state participation continues, resulting in major losses in state revenue shares, the Western states should consider reinstituting litigation to protect their legally authorized royalty shares.85

B. Mineral Leasing Lottery Losses

Under the Mineral Leasing Act (MLA), the federal oil and gas leasing process varies, depending on whether the minerals for lease are considered part of a "known geologic structure" (KGS) or are undesignated.86 KGS areas are leased only through competitive bidding.87 Lands that lie outside a KGS are generally leased through a non-competitive, over-the-counter (first-come-first-served) procedure or by lottery.88 To be eligible for the lottery system, a party must submit a $75 entry fee and the first year's annual rental charge, which, for lottery leases, is set at $1 per acre.89 In 1983, over 95% of all onshore mineral leasing was noncompetitive;90 and 63% of all oil and gas leases were won in the lottery.91

A major problem with non-competitive leasing and the lottery is that they allow the leasing of minerals for less than fair market value,

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84. The Western states have argued that all state royalty management expenses should be reimbursed from the 10% royalty share allocated to the federal government for administrative costs. Western Legislative Conference Resolution, supra note 77, at 2; see also Davis, Wilen & Jergovic, supra note 4, at 407.

85. A related dispute between states and the federal government concerns the 1985 appropriations requested by the Department of the Interior to fund cooperative audits and state delegations. Only $1.5 million was sought in fiscal year 1985 to pay for both cooperative audits and delegations. Abadie Memoranda, supra note 67. The requested funds appear to be meager when compared to state needs, suggesting that full and effective state participation is not welcomed. See Letter from Kenneth Cory, California State Controller to Congressman Jamie Whitten, Chairman, House Committee on Appropriations (June 28, 1984) (arguing that the Interior Department's royalty management appropriation request could support no more than token state compliance) [hereinafter cited as Cory Letter]. California requested over $600,000 for 1985 to perform on-site audits; however, the California Controller's Office expects to receive only $163,000 from the $1.5 million appropriated. Abadie Memoranda, supra.

86. See discussion of California v. Watt, supra notes 72-76 and accompanying text.


88. Id. § 226(b)(1).

89. Id. § 226(c).


91. Id. at 124. During fiscal year 1983, 601 competitive mineral leases were issued with bonus bids totalling $62,108,265; for the same period 12,349 noncompetitive mineral leases were issued. Id. at 121. In California, there were no competitive oil and gas leases issued in 1983, id. at 122; 95 leases were won in the lottery and 208 were secured over-the-counter. Id. at 124.
which deprives the federal treasury and state governments of substantial amounts of money. Errors in KGS determinations have cost states millions of dollars. For example, in 1983, 339 valuable mineral tracts were improperly placed in the lottery system. In one case, the Bureau of Land Management (BLM) used the lottery system to lease eighteen tracts in the Amos Draw area of Wyoming. The tracts were adjacent to valuable, producing oil wells. Two-thirds of the leases were then reassigned by the lessees to energy companies for a bonus estimated to be up to $100 million. Had the federal government used a competitive bidding system instead of the lottery, it would have received that bonus value, and 50% of that value would have gone to the State of Wyoming through revenue sharing.

A similar KGS error cost the State of Arkansas over $30 million. BLM noncompetitively leased twenty tracts of valuable oil and gas lands in Fort Chaffee for $1 per acre. Adjacent tracts were being sold competitively for up to $4000 per acre. In Arkla Exploration Co. v. Watt, Arkansas successfully sued BLM to cancel the leases, arguing that BLM had breached its obligation to protect the state's 50% share of revenues by failing to lease the valuable tracts competitively. The Arkla decision was a major victory for states because it rejected the federal government's position that states lack standing to challenge federal government leasing decisions that adversely affect revenue sharing.

A public and congressional outcry over extensive fraud and abuse...
led to a temporary suspension of the lottery in October 1983.\textsuperscript{101} The Congressional Budget Office has concluded that the federal government could substantially increase its mineral revenues by eliminating the lottery and switching entirely to a competitive bidding system.\textsuperscript{102} The Budget Office estimated that under an all competitive leasing system, net receipts would increase by $700 million over a five-year period, with over 90% of the increase in revenues going to the states.\textsuperscript{103} Federal legislation was introduced in 1983 to eliminate the lottery, but was defeated by opposition from the Reagan Administration.\textsuperscript{104}

Another serious problem with the lottery is that the filing fees received by BLM, which total about $90 million a year, are not shared with states under the 50% MLA formula.\textsuperscript{105} Under the lottery system, states only share in the $1 per acre annual rental.\textsuperscript{106} BLM argues that the filing fees cover administrative costs and are not subject to the statutory revenue sharing requirement.\textsuperscript{107} The states argue that the fees greatly exceed administrative costs and appear to circumvent the MLA's revenue sharing requirement, thereby enhancing federal revenues at the expense of the states.\textsuperscript{108} If the lottery system continues to be utilized, litigation by Western states might be successful in securing a share of these fees.

\textbf{C. Undervaluation of Federal Gas Production}

In 1980, natural gas accounted for 56% of all energy mineral royal-

\textsuperscript{101} 48 Fed. Reg. 49,703 (1983); Comment, supra note 93, at 537, 542. The lottery was resumed in early 1984.

\textsuperscript{102} CONG. BUDGET OFFICE, REPORT TO THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES 1 (1982) (concerning a bill to require all onshore federal oil and gas leases to be leased competitively) [hereinafter cited as CBO REPORT]. See also Comment, supra note 93, at 546-47.

\textsuperscript{103} CBO REPORT, supra note 102, at 1. The Congressional Budget Office estimated that states would receive $660 million from the added $700 million. The $700 million figure is based on the computation that gross receipts would increase by $1.3 billion over five years, but that the increase would be offset by the loss of $600 million in lottery filing fees, which go exclusively to the federal government. \textit{Id.} See infra notes 105-08 and accompanying text.


\textsuperscript{108} \textit{Id.}
ties, and the figure is expected to reach 75% by 1990.\textsuperscript{109} The Linowes Commission Report concluded that federal government undervaluation of natural gas is a serious royalty management problem and recommended that the Department of the Interior issue special valuation guidelines to help prevent gas royalty underpayments.\textsuperscript{110} To the dismay of states, however, the federal government has issued draft guidelines for valuing natural gas production that will in fact reduce royalties owed by federal land lessees.\textsuperscript{111} States are concerned that implementation of the proposed guidelines could cost them hundreds of millions of dollars in future royalty revenues.\textsuperscript{112}

To a great degree, the draft guidelines base gas valuation on contract price, a price theoretically arrived at by the lessee through arms length negotiations with gas purchasers, and thus reject the current regulatory practice of using the highest gas price at nearby wells in the same production area.\textsuperscript{113} The majority of gas contracts, however, are not arms length agreements, but are agreements between commonly-owned exploration companies and refining concerns.\textsuperscript{114} Thus, contract price is often

\textsuperscript{109} See Linowes Commission Report, supra note 53, at 64; ABA Task Force Report, supra note 53, at 757.

\textsuperscript{110} See Linowes Commission Report, supra note 53, at 23, 67; ABA Task Force Report, supra note 53, at 811. In its report on Federal Minerals Royalty Management, the House Committee on Interior and Insular Affairs noted that at least 85% of all royalty underpayments were caused by improper product valuation reporting, criticized the Mineral Management Service for failing to publish final product valuation guidelines, and charged that “[i]n the meantime, the MMS oftentimes accepts without question the amount the payor considers to be the product value.” House Report, supra note 78, at 3.


\textsuperscript{112} Schrinar, supra note 111, at 19. Schrinar points out that if the difference between the contract price for gas, the basis of valuation under the proposed guidelines, and the adjacent field price for gas, the basis of valuation under current regulations, is only 50 cents per million cubic foot, the federal government can expect to lose $2.5 billion on future production royalties in Wyoming alone, with the state losing its 50% share of those revenues. Id. at 21. See infra note 113 and accompanying text.

\textsuperscript{113} Schrinar, supra note 111, at 20. Current federal regulations establish a presumption that the highest price in the area represents fair market value:

The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the Associate Director, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, to the price received by the lessee, to posted prices and to other relevant matters. . . . In the absence of good reason to the contrary, value computed on the basis of the highest price per barrel, thousand cubic feet, or gallon paid or offered at the time of production in a fair and open market for the major portion of like-quality oil, gas, or other products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value. 30 C.F.R. § 206.103 (1984) (emphasis added).

\textsuperscript{114} Schrinar, supra note 111, at 20. A survey of gas sales contracts conducted by the federal government indicates that only 10% of all gas sales contracts for onshore gas are arms length contracts. Id.; ABA Task Force Report, supra note 53, at 757-58.
set by parties that share an interest in keeping the price of the gas low. The proposed guidelines shift the burden to the government to prove that the contract price does not reflect fair market value; if the government fails to carry that burden, contract price prevails. Under the draft guidelines, both the federal government and the states stand to lose tremendous amounts of money.

The Western Governor's Association has asked the Department of the Interior to reconsider the proposed guidelines. Rulemaking to implement the guidelines is long overdue. If the final regulations on gas valuation reduce the amount of royalties companies must pay for natural gas production on federal lands, the Western states should give serious consideration to challenging the regulations in court.

D. Windfall Profits for the Federal Government

In passing the Crude Oil Windfall Profits Tax Act of 1980 (COWPTA), Congress attempted to establish a system to recoup from oil companies excess profits resulting from both the deregulation of oil production and the significant increases in world-wide oil prices caused by past energy crises. The windfall profits tax is imposed on royalties owed by oil companies to the federal government from the production of crude oil on federal lands. The federal government deducts the tax paid from the gross receipts before calculating the states' revenue share. This accounting practice deprives states of the full 50% share of federal mineral receipts promised by the MLA.

The State of New Mexico filed a lawsuit, New Mexico v. Regan, challenging the government's accounting practice, arguing that the deduction of the tax from the gross revenues impermissibly diminishes the

115. Schrinar, supra note 111, at 20-21. Under current regulations, contract price is only to be considered if the lessee can show that the highest price in the area does not fairly represent the true market value. See supra note 113.
117. Letter from William D. Bettenberg, Director, Minerals Management Service to James D. Maddy, Executive Director, Western Governors' Association, at 2 (May 25, 1984) (stating that rulemaking will occur in the near future) [hereinafter cited as MMS letter].
118. See generally Schrinar, supra note 111, at 21.
state's 50% entitlement guaranteed under the MLA. The state argued that neither the MLA nor its implementing regulations provide for a revenue allocation adjustment based on production taxes, and that since the COWPTA is silent on the interplay between it and the MLA, the plain language of the MLA is controlling. The federal government countered that in passing the COWPTA, Congress intended to amend the MLA royalty allocation formula. The trial court agreed with the state, holding that the MLA requires the Department of the Interior to provide states with 50% of all revenues derived from the production of crude oil on federal leased lands, undiminished by the windfall profits tax. On appeal, however, the district court decision was vacated for lack of jurisdiction. The court of appeals transferred the case to the U.S. Court of Claims where it is currently under consideration. The issue thus remains unsettled.

To compound the COWPTA accounting problem, auditors in several Western states recently discovered that the federal government has been overestimating windfall profits taxes, and thus has "overwithheld" in excess of $50 million, improperly identified as tax revenues, from the revenue sharing program. As a result, states have been deprived of over $26 million; California's shortfall equals about $1.25 million. After being sent their refund checks, states complained that they received no accounting data to substantiate the amounts reimbursed. The New Mexico litigation ultimately may require the federal government to simplify the accounting system and to give the states their revenue share from gross receipts prior to the deduction of the windfall profits tax.

124. New Mexico v. Regan, slip op. at 9.
125. Id. at 15.
126. Id. at 7.
127. Id. The court's decision would require the federal government to assume the entire burden of the tax in its share of the royalties. Id. at 15.
128. 745 F.2d 1318, 1320-23 (10th Cir. 1984). The court determined that the district court lacked jurisdiction over a claim for money damages against the federal government. Id. See 28 U.S.C. § 1631 (1982).
129. 745 F.2d at 1323. On January 7, 1985, the State of New Mexico filed a petition for certiorari to the U.S. Supreme Court seeking to overturn the Tenth Circuit's decision that the district court lacked jurisdiction over the case. 53 U.S.L.W. 3551 (U.S. Feb. 5, 1985) (No. 84-1105).
131. Id.
132. Western States Still Dissatisfied with Royalty Shares, Oil Daily, July 23, 1984, at 1, col. 1. State disbursements were made in a lump sum with no breakdown of leases, wells, or royalty rates. Id.
E. Backdoor Federal Appropriation Maneuvers

In federal fiscal years 1984 and 1985, the Department of the Interior attempted through the budget process to deduct its administrative costs for royalty management of onshore revenues prior to distributing the states' 50% share. Under the Department's proposal, states would have received 50% of net rather than gross revenues. In effect, through appropriation language, the Interior Department sought to amend indirectly the MLA's revenue sharing formula. These budget maneuvers would have reduced state revenues by about $15 million, with California losing about $1 million. Thus far Congress has rejected these proposals, and the states are continuing to voice their opposition. However, a new threat to state MLA revenue shares has been announced in the President's fiscal year 1986 budget.

It is apparent that state revenue sharing funds associated with federal onshore mineral leasing are being seriously threatened by the cumulative effects of the various federal actions discussed above. To guard against the further erosion of their statutorily authorized share of royalties, Western states must continue to focus attention, and litigation, on this area. As discussed in the next two sections of this Article, however, other federal land revenue sharing problems are arising and should be of equal concern to the Western states.

III

PROTECTING THE STATES' SHARE OF NATIONAL FOREST REVENUES

A. National Forest Revenue Sharing

Under current federal law, 25% of national forest revenues are distributed to states for expenditure on roads and schools in the counties producing the revenues. In federal fiscal year 1984, national forest revenues totalled $900 million nationally. The states' share of these

133. See Sant, Haspel & Boldt, supra note 4, at 431; Cory Letter, supra note 84; MMS Letter, supra note 117, at 2.
134. Cory Letter, supra note 84.
135. It is worth noting that FOGRMA, 30 U.S.C. §§ 1701-1757 (1982), does not include a provision to permit subtraction of federal royalty management costs from mineral lease revenues prior to distributing the states' share. See Sant, Haspel & Boldt, supra note 4, at 431.
136. See Western Governors' Association Letter, supra note 67; Western Legislative Conference Resolution, supra note 77, at 2. Similarly, the Western states have opposed the federal government's unsuccessful attempts to fund the Payment in Lieu of Taxes (PILT) program from gross mineral leasing royalties, which would also result in a reduction of the states' revenue share. See Western Legislative Conference Resolution, supra note 77, at 2; see also supra notes 42-43 and accompanying text.
137. Under the 1986 budget proposal, states would lose even more revenues, possibly over $400 million. See infra note 207.
139. Counties Receive Final Payments, supra note 3.
revenues equalled $225 million; California received $44 million.\textsuperscript{140} Under the current national forest service revenue sharing formula, states receive a share of gross revenues.\textsuperscript{141} Credits provided to purchasers of national forest timber for the cost of building roads and reforestation are deducted only from the federal government's portion of the revenues.\textsuperscript{142}

\section*{B. U.S. Forest Service Tax Equivalency Proposal}

The states' share of national forest revenues may be threatened by an Administration proposal to modify the existing revenue sharing system. The President's proposed fiscal year 1985 budget calls for legislation to eliminate the 25\% revenue sharing formula and replace it with a system permitting individual counties to assess and tax the federal government on its timber holdings.\textsuperscript{143} Under the proposal, federal lands would be treated as private holdings, and local assessors would appraise the value of national forest lands and apply state and local tax laws.\textsuperscript{144}

Timber harvesting counties fear that under such a tax equivalency system, they may receive only a fraction of the total money they currently receive.\textsuperscript{145} The proposal attempts to address this concern by providing that no county would receive less than the average amount it was paid between 1977 and 1983, thus creating a safety net.\textsuperscript{146} During the proposed 1977-1983 base period, however, the forest products industry suffered from a severe industry recession which reduced timber production to its lowest level in the post-World War II period.\textsuperscript{147} Thus, from the states' perspective, the base period is the worst period in recent history to use as a benchmark. Furthermore, if the base amount guaranteed to each county is fixed, its value will decrease over time with inflation. In

\begin{footnotes}
140. \textit{Id.} In the Pacific Southwest Region, which includes California, timber sale receipts and related credits comprise 94\% of the national forest revenue base. \textit{Id.}
141. ACIR \textsc{Report}, supra note 36, at 21.
142. \textit{Id.}; see also Forest Service, U.S. Dep't of Agriculture, Description of a Proposal to Revise the Manner by which National Forest System Receipts Are Shared with the States and Counties, at 2 (Apr. 20, 1984) (memorandum from Forest Service to Forest Service Regional Foresters) [hereinafter cited as Forest Service Memo].
143. U.S. Dep't of Agriculture, Proposed Changes to National Forest Receipts Sharing, News Release (Feb. 8, 1984); Forest Service Memo, supra note 142, at 1.
145. \textit{Timber Payment Change Opposed}, Record Searchlight (Redding, California), Sept. 15, 1984, at A1, col. 1 (describing a meeting where local officials in California complained about the tax equivalency proposal to the Department of Agriculture's Assistant Secretary for Natural Resources and Environment); see also ACIR \textsc{Report}, supra note 36, at 131 (reviewing arguments against tax equivalency approach).
146. Forest Service Memo, supra note 142, at 4-5.
\end{footnotes}
contrast, timber values and county expenses will continue to rise as a result of inflation.

The Administration argues that the tax equivalency system would be beneficial because it would eliminate year-to-year revenue fluctuations, create greater equity between counties with active timber harvesting and those counties with forest lands that do not generate significant revenues, and provide more local spending discretion by the removal of school and road earmarking requirements.\textsuperscript{148} The proposal's advantages are dubious. In the past, counties have been able to manage national forest revenue fluctuations,\textsuperscript{149} and revenue sharing inequities among national forest land counties are already factored into the national Payments In Lieu of Taxes program.\textsuperscript{150} With regard to earmarking limitations, the schools and roads limitations can easily be eliminated without modifying the 25% revenue sharing formula.\textsuperscript{151}

Furthermore, the proposed tax equivalency system would generate serious administrative problems. Currently, county receipts are determined by a simple, percentage revenue sharing formula.\textsuperscript{152} In contrast, the new system would require the Forest Service to work with thousands of county assessment jurisdictions for its implementation.\textsuperscript{153} Also, counties would have to assume the added local costs incurred in mapping and appraising the millions of acres of national forest lands.\textsuperscript{154}

The Administration's proposal is further complicated by the fact that state and local tax laws for forest lands often differ from tax methods applied to other private lands.\textsuperscript{155} A growing number of states use lower than full market value when assessing forest lands so as to encourage sound forest management practices.\textsuperscript{156} California, for example, replaced its \textit{ad valorem} tax on timber with a special Timber Yield Tax which imposes a severance tax on the volume of timber harvested on both private and public lands, including national forest lands.\textsuperscript{157} The Administration's proposal would create serious administrative problems, as counties would have to map and appraise the millions of acres of national forest lands on a regular basis.

\textsuperscript{148} Forest Service Memo, \textit{supra} note 142, at 1, 4, 6; \textit{Timber Payment Change Opposed}, \textit{supra} note 145.
\textsuperscript{149} \textit{See Timber Payment Change Opposed, supra note 145} (remarks of local government officials).
\textsuperscript{150} \textit{See supra} notes 42-43 and accompanying text.
\textsuperscript{151} \textit{See ACIR REPORT, supra note 36, at 8; Muys, A View of the PLLRC Report's Recommendations Concerning Finances, 6 LAND \& WATER L. REV. 411, 417 (1970)}.
\textsuperscript{152} 16 U.S.C. § 500 (1982).
\textsuperscript{153} \textit{ACIR REPORT, supra note 36, at 50; Forest Service Memo, supra note 142, at 5-6.}
\textsuperscript{154} \textit{See Timber Payment Change Opposed, supra note 145.}
\textsuperscript{155} \textit{See ACIR REPORT, supra note 36, at 47-50.}
\textsuperscript{156} \textit{Id. at 47, 131.}
tion's tax equivalency proposal provides no advantage to California because California's modest timber severance tax receipts are far less than the funds received under the current revenue sharing formula.\footnote{In fiscal year 1983, the California Timber Yield Tax generated almost $12.2 million. Memorandum from Paul Crebbin, Timber Tax Division, California Board of Equalization, to Michael Shapiro (Dec. 5, 1984). Of that amount, $4.6 million came from federal and state lands with the remainder from private lands. (The California Board of Equalization accounts do not distinguish between federal and state government jurisdictions.) Id. In comparison, the state received $44 million in federal fiscal year 1984 under the current revenue sharing formula. Counties Receive Final Payments, supra note 3.} Under the Administration proposal, the state would have to rely on the guaranteed, recession era, safety-net allocation.\footnote{See supra notes 146-47 and accompanying text.}

The Administration's proposal could ultimately lead to higher state and local taxes on forest lands. Under the proposed tax equivalency system, the only way states and local governments can gain additional revenues from the federal government is by increasing property and severance taxes applied to forest lands. This fiscal temptation may eventually outweigh the forest management benefits gained by keeping the tax burden low on forest lands.\footnote{See supra note 36, at 131.} Thus, under the proposed system not only might taxes increase on forest lands, but forest management practices might suffer following the removal of tax incentives.

The Administration has retreated from its plan to introduce implementing legislation immediately. Instead, it has conducted a study to assess the impact of the proposal in forty counties nationwide, including five California counties.\footnote{Forest Service, U.S. Dept' of Agriculture, Payment to States: A Comparison of Tax Equivalency and Receipt Sharing Programs (June 12, 1984) (study plan).} The results have not yet been publicized.\footnote{Id. at 4 (final report was to have been published Sept. 1984).} If and when the report is released,\footnote{This revenue sharing reform proposal may have been superseded by the President's 1986 budget initiative to establish a net profit sharing formula for national forest revenue sharing. See infra note 207 and accompanying text.} the states should examine it carefully to ensure that this form of fiscal federalism does not simply reduce state and local revenues under the guise of program reform.\footnote{Under the Reagan Administration's "new federalism," federal revenue sharing reforms are generally tied to decreased payments to states. See generally Futrell, \textit{Environmental Law and Policy Developments in the Reagan Administration}, ENVTL. F., Dec. 1982, at 40. In 1984, the California legislature passed a resolution urging President Reagan and the Secretary of Agriculture not to proceed with legislation to implement the national forest tax equivalency proposal. S.J. Res. 50, \textit{filed} July 12, 1984 (to be reported in 1984 Cal. Stat. Res. Ch. 90).}

IV

THE BATTLE OVER OUTER CONTINENTAL SHELF REVENUES

A. Historical Claims to Lands Offshore

Another major federal land management conflict between the fed-
eral government and states concerns the ownership of the nation's off-shore submerged lands. For many years, coastal states assumed that they owned the submerged lands beyond their tidelands.\textsuperscript{165} California, in fact, has been authorizing the production of oil and gas resources from submerged lands since 1896.\textsuperscript{166} As the enormous value of offshore resources became apparent, disputes arose between coastal states and the federal government over ownership and control of submerged lands.\textsuperscript{167} The crisis culminated in 1945 with President Truman's Proclamation and Executive Order asserting exclusive federal jurisdiction over the entire continental shelf.\textsuperscript{168}

To resolve the conflict over ownership of submerged lands, Congress passed the Submerged Lands Act of 1953, which generally grants coastal states ownership of the seabed and related marine resources out to the three-mile limit of the territorial sea.\textsuperscript{169} In the same year, Congress enacted the Outer Continental Shelf Lands Act (OCSLA), which claims exclusive federal control over the outer continental shelf (OCS) and its resources beyond the states' three-mile limit.\textsuperscript{170} This legislation generated a new controversy over the allocation of revenues derived from federal leases which draw oil and gas from fields straddling the federal-state marine boundary line. Congress intervened again and passed the OCSLA Amendments of 1978,\textsuperscript{171} adding section 8(g) to the OCSLA.\textsuperscript{172}

\textbf{B. Allocating OCSLA Section 8(g) Revenues}

Section 8(g) of the OCSLA gives coastal states a right to a "fair and equitable" share of federal bonuses, royalties, and other revenues derived from oil and gas tracts leased within three miles of a state's seaward boundary when those tracts contain geological structures (pools of oil)

\begin{itemize}
  \item \textsuperscript{166} U.S. \textsc{Geological Survey}, \textit{Pacif\textsc{ic} \textsc{Summary Report} 2, \textit{OCS O\textsc{il} and \textsc{Gas Information Program}}, at v (1982) (Open File Report 82-21) [hereinafter cited as \textit{Pacific Summary Report}].
  \item \textsuperscript{167} Gross, \textit{supra} note 165, at 639-43.
  \item \textsuperscript{169} Submerged Lands Act of 1953, ch. 65, 67 Stat. 29 (codified as amended at 43 U.S.C. §§ 1301-1315 (1982)). For historical reasons, Texas and Florida received a grant of three marine leagues, or approximately nine miles. \textit{See Pacific Summary Report, supra} note 166, at 1.
  \item \textsuperscript{170} Outer Continental Shelf Lands Act of 1953, ch. 345, 67 Stat. 462 (codified as amended at 43 U.S.C. § 1331-1343 (1982)).
  \item \textsuperscript{172} 43 U.S.C. § 1337(g) (1982).
\end{itemize}
common to both federal and state submerged lands.\textsuperscript{173} If the Department of the Interior and a coastal state governor cannot reach a negotiated settlement on the division of these revenues, the Department of the Interior may proceed with leasing, but it is required to place into escrow OCS revenues from the section 8(g) zone tracts until an agreement is reached or a federal district court determines the allocation of funds.\textsuperscript{174}

Since 1978, the Interior Department has been negotiating with California, Alaska, Alabama, Mississippi and Florida, and has been litigating with Texas and Louisiana over the allocation of section 8(g) funds.\textsuperscript{175} In the meantime, OCS section 8(g) escrow accounts nationwide have grown to total over $5.3 billion;\textsuperscript{176} California's escrow account exceeds $1.3 billion.\textsuperscript{177}

In 1979, Texas became the first coastal state to seek a court determination of what constitutes a "fair and equitable" distribution of OCS section 8(g) revenues.\textsuperscript{178} In \textit{Texas v. Secretary of the Interior}, the Department of the Interior argued that section 8(g) of the OCSLA only entitles states to compensation for drainage of state oil and gas reserves by adjacent federal leases.\textsuperscript{179} Texas responded that during the debate on the 1978 OCSLA Amendments, Congress refused to adopt a standard of compensation based on extent of drainage as recommended by the Department of the Interior, and instead endorsed the more flexible "fair and equitable" standard.\textsuperscript{180} Texas maintained that under this flexible rule, state section 8(g) revenue shares should reflect all relevant factors, particularly the extent to which the value of federal leases have been enhanced by information generated by adjacent state leasing.\textsuperscript{181}

\textsuperscript{173} \textit{Id.}\ § 1337 (g)(1), (2).
\textsuperscript{174} \textit{Id.}\ § 1337 (g)(3), (4).
\textsuperscript{175} \textit{States Offered Sixteen Percent of Offshore Income}, L.A. Times, Aug. 9, 1984, at 7, col. 4. \textit{See also Update, Interior Meeting with Representatives of Seven States on 8(g) Issue, Pacific Outer Continental Shelf Current Events, Dec. 1984-Jan. 1985, at 1 (newsletter published by Pacific OCS Region, Minerals Management Service, U.S. Dep't of the Interior) [hereinafter cited as \textit{Section 8(g) Update}].
\textsuperscript{176} \textit{Section 8(g) Update, supra} note 175; \textit{see also States Offered Sixteen Percent of Offshore Income, supra} note 175.
\textsuperscript{177} \textit{California State Lands Comm'n, An Assessment of the Provisions of Section 8(g) Outer Continental Shelf Lands Act Amendments of 1978 on California's Share of Bonuses, Royalties and Other Revenues} 2 (1984) [hereinafter cited as SLC Report].
\textsuperscript{179} 580 F. Supp. at 1199, 1205; \textit{see Kever, A Fair and Equitable Division of Federal OCS Revenues: The 8(g) Chapter, [Summer 1984 Commentary] Western Nat. Resources Litigation Dig. (Conf. of Western Att'ys Gen.)} 19. Drainage of state reserves occurs when a federal lessee taps into an oil field that extends beyond federal boundaries into adjacent state lands.
\textsuperscript{180} 580 F. Supp. at 1206-22; \textit{see Kever, supra} note 179, at 20.
\textsuperscript{181} 580 F. Supp. at 1216-17; \textit{see Kever, supra} note 179, at 20-21. Geologic information is crucial to the evaluation and exploitation of oil and gas reserves. The availability of this infor-
In 1984, the district court endorsed Texas' position and awarded it a 50% share of the enhanced OCS bonus revenues, plus interest. This sum amounted to $335 million, or approximately 27% of the more than $1.2 billion in bonus bids at stake in the litigation. The court concluded that the section 8(g) "fair and equitable" standard was not limited to the concept of drainage, but instead authorized consideration of all facts and circumstances surrounding OCS lease sales.

According to the California State Lands Commission, under the Texas precedent, California has a good case for securing a portion of enhanced OCS bonus revenues derived from federal OCS leases off the California coast. Previous California oil and gas development activities on state submerged lands have generated valuable geologic information about nearby federal lands, thereby increasing the value of those federally leased tracts.

Following the decision in Texas v. Secretary of the Interior, the Secretary of the Interior offered five coastal states, including California, one-sixth (16.67%) of the escrowed OCS bonuses and rental payments, plus interest, as a compromise on the division of section 8(g) revenues. Under this proposal, California would receive about $216.8 million. The Interior Department's offer did not subject royalties to the percentage offer; instead they were to be allocated under the Department's earmark enhances the value of an oil lease. In its lawsuit, Texas argued that prior state leasing activity resulted in valuable information about adjacent federal tracts. 580 F. Supp. at 1216-17; see Kever, supra note 179, at 20-21.

182. 580 F. Supp. at 1223.
183. Id. at 1221; see Kever, supra note 179, at 17 n.3; Letter from Frank Richardson, Solicitor, Dept of the Interior, to James Trout, California State Lands Commission, at 2 (Aug. 22, 1984) [hereinafter cited as DOI Letter].
184. 580 F. Supp. at 1207. A Louisiana federal district court recently followed the reasoning of the Texas court and entered partial summary judgment in favor of Louisiana's § 8(g) claim. Louisiana v. Department of the Interior, Civ. No. 79-2965 (E.D. La. May 16, 1984); see Kever, supra note 179, at 17 n.2.
185. SLC REPORT, supra note 177, at 8.
186. Id. at 9. The State Lands Commission assessment points out that California has a long history of submerged lands leasing for oil and gas resources and that the federal leasing program has focused on tracts adjacent to state leases. Preliminary state estimates indicate that federal lease bonuses may have been enhanced by as much as $800 million as a result of state leasing activities. Id. In addition, the State Lands Commission believes that the Department of the Interior has improperly retained about $500 million, plus interest, from the California § 8(g) escrow account. Id. at 2, 13. A similar attempt to withdraw funds from the Texas escrow account was enjoined. Id. at 12-13.
187. Section 8(g) Update, supra note 175, at 2-3. Alaska, Alabama, California, Florida, and Mississippi received offers. Because of continuing litigation over the issue, neither Texas nor Louisiana formally received an offer. Id. at 2.
188. U.S. Dept of the Interior, Draft Memorandum on Proposed Distribution to States of 8(g) Escrow Funds (Aug. 24, 1984). The proposed distribution to other states is as follows: Alabama—$38.0 million; Alaska—$22.0 million; Florida—$16,100; and Mississippi—$8.8 million. Id. Texas and Louisiana are litigating over the division of $3.6 billion. See Clark Stands Firm on Offer, supra note 9.
lier proposal which gave states a royalty share only from oil and gas determined to have been “drained” from state submerged lands.\textsuperscript{189} In addition, the offer contained provisions that could inhibit state challenges to the size of future federal offshore lease sales.\textsuperscript{190} This inhibition, in turn, could remove important checks on overzealous “fire sale” leasing by the federal government, thus flooding the market with OCS tracts and generating low bids.\textsuperscript{191}

After representatives from the affected coastal states met to discuss the offer, it was generally condemned as inadequate and was rejected.\textsuperscript{192} The Department of the Interior has indicated that the 16.67\% revenue sharing proposal is not a negotiating figure, but a final offer.\textsuperscript{193} Texas and other coastal states have charged that the Department of the Interior is refusing to negotiate in good faith, and have asserted that a “fair and equitable” division of section 8(g) revenues would provide states with about 50\% of the disputed funds.\textsuperscript{194}

One of the unique aspects of the OCS section 8(g) controversy is that Congress has invited states to pursue their claims through the courts if necessary.\textsuperscript{195} The California State Lands Commission has recommended that if negotiations do not progress satisfactorily, California should pursue its OCS section 8(g) claims through a combined strategy of litigation and negotiation.\textsuperscript{196} It may soon be time for California, and other affected states, to exercise the litigation option.

\begin{footnotes}
\item[190] Draft § 8(g) Agreement, \textit{supra} note 189, at 3 \[giving the Secretary of the Interior sole discretion to determine the size of the lease sales under §§ 18 and 19 of OCSLA as amended, 43 U.S.C. §§ 1344, 1345 (1982)\].
\item[191] \textit{See Oil Firms Still Optimisitic, supra} note 13, at 2293 \[discussing the Reagan Administration’s OCS “fire sale” leasing program and recent reductions in lease bids\].
\item[192] \textit{See Clark Stands Firm on Offer, supra} note 9; Texas Governor Mark White, News Release, at 1 (Sept. 5, 1984). All affected coastal states joined in refusing the offer outright, with the exception of California. The representative from California took no position on the offer. It is noteworthy that California is the only affected coastal state with a governor of the same political party as the President.
\item[193] \textit{Section 8(g) Update, supra} note 175, at 3; \textit{but see Clark Stands Firm on Offer, supra} note 9 \[Department of Interior spokesperson indicates that the Department is willing to enter into further discussions, but awaits reasonable counteroffers from the states\].
\item[194] The governors of all affected coastal states, except California, have asked Secretary Clark for a 50\% share of OCS § 8(g) revenues. \textit{Clark Stands Firm on Offer, supra} note 9. On January 24, 1985, Representative John Breaux (D-La.) introduced H.R. 641, 99th Cong., 1st Sess., which would amend § 8(g) of OCSLA to provide states with 50\% of OCS revenues. After further negotiations, all the affected coastal states, again except California, offered to compromise the dispute based on a formula giving states a 37.5\% share of the OCS lease bonuses, rentals, royalties and taxes. \textit{L.A. Times}, Apr. 18, 1985, at 3, 35.
\item[195] \textit{See 43 U.S.C. § 1337(g)(3), (4) (1982)\].
\item[196] SLC Report, \textit{supra} note 177, at 2.
\end{footnotes}
C. New OCS Revenue Sharing Legislation

In 1985, federal OCS oil and gas revenues are expected to reach $6 billion. Recently, the Administration opposed and helped defeat a new OCS revenue sharing program. The program would have provided all coastal states with up to 4% of OCS revenues, with a ceiling of $300 million a year, for block grants to fund state and local programs for ocean and coastal research, education, planning, management, and development activities. If the proposed program were established, California's share would be about $25 million annually, based on an allocation formula related to coastal population, shoreline mileage, presence of coastal energy facilities, and proximity to actual and proposed OCS leasing and production.

Coastal states have argued that an OCS revenue sharing program is necessary because the federal government has reduced or eliminated funding for state ocean and coastal management programs, while simultaneously accelerating and expanding its OCS leasing program, thereby placing an even greater management burden on the states. Supporters of OCS revenue sharing legislation point out that as a matter of fairness and equity, OCS revenue sharing would bring coastal states into partial conformity with states that receive a share of onshore federal...
oil and gas revenues under the Mineral Leasing Act. Coastal states, however, will have a difficult time securing OCS revenue funds because, in this instance, they have the burden of securing congressional and presidential approval to establish a new revenue sharing program. In contrast, in most other current federal land revenue sharing disputes, the burden is on the federal government to justify reduction of state funds provided under existing programs.

CONCLUSION

Federal land revenues have become an increasingly important source of income for the Western states as state and local government expenditure levels and revenue requirements have greatly increased over the years. Western states have grown dependent on these revenues, relying on the legislative histories of federal land revenue sharing laws, which clearly reflect a commitment to continue payments to states as compensation for the fiscal burdens and tax immunity, as well as increased federal controls, associated with federal lands. However, this long-standing financial pledge is now being seriously undermined by federal government mismanagement and intentional federal initiatives to reduce state and local shares of federal land revenues.

The threat of continued federal land revenue sharing losses becomes even more serious as the federal government seeks to reduce the national debt at the expense of state and local governments. The federal government is shifting from a national policy of revenue sharing to "deficit-sharing," and federal land revenues are included in this new fiscal federalism. The Office of Management and Budget, for example, has received the Administration's approval to propose reductions in state and local government's share of federal land mineral revenues by over $1.2 billion during fiscal years 1986, 1987 and 1988.


203. PLLRC REPORT, supra note 31, at 236.

204. See generally id.; see also supra note 46.


When the President's proposed budget to Congress was released, it included a recommendation to slash national forest revenue shares provided to counties and school districts. The
Western states must focus immediate attention on federal land revenue sharing programs to prevent serious erosion of these funds. For the most part, states have been successful in persuading Congress to honor its commitment to provide adequate federal land revenue sharing funds. These efforts must be reaffirmed, particularly at this time when the federal government is seeking to modify significantly the existing revenue sharing system.

The Attorney General of California recently stated, “Regardless of what Congress has decided . . ., there lurks in these great federal agencies a vestigial will to fight fiercely to retain what they have come to think of as their lands, their revenues, and their plenary power over both of them.” The Reagan Administration’s efforts to undermine executive action the existing federal land revenue sharing framework pose a critical threat to state revenue shares. In response, states have gone beyond congressional lobbying and have begun litigating to protect their interests. The states have achieved some success. Cases such as California v. Watt and Arkla Exploration Co. v. Watt have given states standing in federal court and have established a cause of action to challenge the federal government’s land management activities when those activities seriously jeopardize the states’ revenue share. In addition, New Mexico v. Regan may have set the stage for overruling the federal government’s efforts to dilute the states’ 50% share of Mineral Leasing Act revenues by deducting federal windfall profits taxes from gross roy-

Office of Management and Budget projected that under the budget’s proposed “net profit sharing” formula, states would receive $67 million in 1986 as opposed to estimates of $423 million under the current system. California could lose as much as $25 million in 1986 if the budget proposal is adopted. See Schools, Roads in State’s Timber Areas Would Suffer, Sacramento Bee, Feb. 4, 1985, at A12, col. 1.

Shared funds from federal mineral leasing also would be severely reduced if the budget is adopted as proposed. It has been estimated that in 1986, states would receive $77 million under the President’s budget proposal as opposed to $479 million under the existing revenue sharing formula. California’s share of mineral receipts could drop from $34 million to $5.2 million. Id.


208. See, e.g., supra note 135 and accompanying text.
209. See, e.g., supra note 135 and accompanying text.
211. See, e.g., supra note 105 and accompanying text (lottery filing fees); supra note 111 and accompanying text (proposed gas valuation guidelines); supra note 122 and accompanying text (windfall profits tax deduction); and supra notes 187-90 and accompanying text (offshore energy revenues proposal).
212. See supra notes 72-76 and accompanying text.
213. See supra notes 99-100 and accompanying text.
214. See supra notes 123-29 and accompanying text.
alty receipts. Finally, *Texas v. Secretary of the Interior*215 and *Louisiana v. Department of the Interior*216 indicate that states are willing to accept Congress' invitation to sue the Department of the Interior to secure their share of offshore energy revenues when faced with an administration that is unwilling to offer states a "fair and equitable" share of the funds.217

The Western states have learned that they must act aggressively to protect their federal revenue shares against the federal government's new version of fiscal federalism. Additional state litigation will undoubtedly be necessary in the future to ensure that the states continue to receive their statutorily authorized share of federal land revenues.

215. See supra notes 178-84 and accompanying text.

216. See supra note 184.

217. See supra note 173-95 and accompanying text. Another example of a congressionally authorized right for states to sue for underpaid federal land revenues is contained in 30 U.S.C. § 1734 (1982), which permits suits against federal mineral lessees for royalty underpayments if the federal government fails to initiate revenue recovery proceedings. See supra note 65 and accompanying text.