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Coastal Zone Management and Excluded Federal Lands: The Viability of Continued Federalism in the Management of Federal Coastlands

Michael E. Shapiro*

INTRODUCTION

The Coastal Zone Management Act of 1972 (CZMA),¹ as amended, authorizes a national program for the management, beneficial use, protection, and development of the natural resources in the nation's coastal zone.² According to the Act, coastal states are the key to effective management and protection of coastal resources. Consequently, one goal of CZMA is to encourage coastal states to "exercise their full authority" over the land, air, and water resources in the coastal zone.³ To promote this result, CZMA authorizes federal funding to assist coastal states in developing⁴ and implementing⁵ comprehensive coastal management programs. Although CZMA designates coastal states as the primary actors responsible for managing the na-

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2. For information on all aspects of CZMA, see generally Hildreth, The Operation of the Federal Coastal Zone Management Act as Amended, 10 Nat. Resources Law. 211 (1977); Comment, Toward Better Use of Coastal Resources: Coordinated State and Federal Planning under the Coastal Zone Management Act, 65 Geo. L.J. 1057 (1977); Yahner, The Coastal Zone Management Act Amendments of 1976, 1 Harv. Envt'l L. Rev. 259 (1976); Hershman, Achieving Federal-State Coordination in Coastal Resources Management, 16 Wm. & Mary L. Rev. 747 (1975); and Zile, A Legislative-Political History of the Coastal Zone Management Act of 1972, 1 Coastal Zone Mgmt. J. 235 (1974).
4. Id. § 305(a), 16 U.S.C. § 1454(a).
5. Id. § 306(a), 16 U.S.C. § 1455(a).
tion’s coastal resources, the Act also provides for intergovernmental co-
ordination by requiring states to develop and implement their coastal management programs with full participation by affected federal agen-
cies.\textsuperscript{6}

Among the other requirements of CZMA is that each coastal state must identify the boundaries of the coastal zone which will be subject to the provisions of the state's management program.\textsuperscript{7} CZMA provides guidance to the states on this matter. Section 304(1) of the Act defines “coastal zone” to include coastal waters.\textsuperscript{8} For states adjacent to the ocean, the seaward boundary is the outer limit of the United States territorial sea.\textsuperscript{9} For states adjoining the Great Lakes, the water boundary terminates at the international boundary with Canada or the boundary with an adjacent state.\textsuperscript{10} The state’s coastal zone must also include an inland area extending uplands from the shoreline to the extent necessary to control those shorelands which have a direct and signi-
nificant impact on coastal waters. This inland area normally would include salt marshes, wetlands, estuaries, beaches, flood plains, watersheds, coastal towns, and other areas where development activities reason-
ably can be expected to have substantial effects on coastal resources.\textsuperscript{11}

In defining the term “coastal zone,” Congress included a signifi-
cant and controversial exception. Section 304(1) of CZMA contains the qualification that “excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.”\textsuperscript{12} By virtue of this exclusionary clause, each coastal state, as a condition precedent to re-
ceiving federal approval for its coastal management program, must ex-
clude from its coastal management boundaries all lands federally owned, leased, held in trust, or the use of which is otherwise subject by law solely to the discretion of the federal government.\textsuperscript{13}

A number of coastal states have argued vehemently that their abil-
ity to plan for and adequately manage their coastal resources has been

\begin{footnotes}
\footnote{6. See id. §§ 303(c), 306(c)(1), 307(a)-(d), (f), (h), 16 U.S.C. §§ 1452(c), 1455(c)(1), 1456(a)-(d), (f), (h). See also Hershman & Folkenroth, Coastal Zone Management and Inter-
governmental Coordination, 54 Ore. L. Rev. 13 (1975).}
\footnote{7. CZMA § 305(b)(1), 16 U.S.C. § 1454(b)(1) (1976).}
\footnote{8. Id. § 304(1), 16 U.S.C. § 1453(1).}
\footnote{9. Id.}
\footnote{11. Id. at 18,602 (to be codified in 15 C.F.R. § 923.31).}
\footnote{12. CZMA § 304(1), 16 U.S.C. § 1453(1) (1976) (emphasis added).}
\footnote{13. Final Coastal Zone Management Program Approval Regulations, supra note 10, at 18,602 (to be codified in 15 C.F.R. § 923.33).}
\end{footnotes}
seriously hampered by this exclusion of federal coastlands. In many coastal states, federal lands such as military reservations, national forests, and national parks represent a significant portion of the shoreline area. Elimination of these lands from coverage by the states' coastal zone management programs has been seen as a requirement that will undermine the effectiveness of comprehensive coastal management efforts. These states have persuasively argued that regional management initiatives will be frustrated unless all lands within a logical planning area are included, regardless of ownership status. In fact, state concerns over the possible adverse impact which may result from the exclusion of lands subject solely to federal discretion have produced an unfortunate strain on the intergovernmental coordination efforts undertaken pursuant to CZMA.

The purpose of this Article is to examine in detail the impact of the CZMA excluded federal lands provision to determine if this clause justifies the alarm it has kindled, or if, in fact, coastal states are suffering from fears more imagined than real. This Article will demonstrate that states, despite the exclusionary clause, can still exercise considerable control over excluded federal lands by adopting one or more of the following approaches. Under the federal consistency provisions of CZMA, a state may influence management of excluded federal coastlands to the extent federal land activities significantly affect resources within the state's coastal zone. When this authority does not reach far enough to permit adequate state control of activities on federal coastlands, the state may rely on one of two strategies. If a federal

14. These arguments have been repeatedly raised in discussions between federal and state agencies observed by the author during the development of coastal management programs.
16. See note 14 supra.
17. Concern regarding the interpretation of the CZMA excluded federal lands provision reached a peak in 1976 during the federal agency review of Washington State's coastal management program which had been submitted to the federal government for approval. Washington's program boundaries incorporated certain federal lands including national forest lands administered by the Department of Agriculture. In a letter dated February 27, 1976, the Acting Secretary of Agriculture wrote to the Secretary of Commerce seriously disagreeing with Washington's treatment of national forest lands. In a letter dated February 27, 1976, the Acting Secretary of Agriculture wrote to the Secretary of Commerce seriously disagreeing with Washington's proposal. The Department of Agriculture requested that the Secretary of Commerce seek to mediate the disagreement. Letter from John A. Knebel, Acting Secretary of Agriculture to Elliot L. Richardson, Secretary of Commerce (Feb. 27, 1976) [hereinafter cited as Department of Agriculture Letter]. See the CZMA mediation provisions, CZMA § 307(h), 16 U.S.C. § 1456(h) (1976). The Department of Agriculture further requested that approval of the Washington coastal management program be withheld pending resolution of the disagreement. The State of Washington finally agreed to withdraw management program coverage over federal lands until the disagreement was resolved. In return, the Department of Agriculture agreed to rescind its objection, thereby allowing federal approval and funding for Washington's management program to proceed.
18. See text accompanying notes 56-66 infra.
agency proposes to undertake the activity, a state may apply its laws controlling air and water quality, water appropriation, waste treatment, and all other pertinent state environmental laws which have been set free of federal facility immunity by congressional or executive waiver. If the activity on federal land is to be conducted by a private entity, the state need only determine whether Congress has expressly preempted state law, and in the absence of preemption, the state is free to exercise its reserved legislative jurisdiction, or congressionally delegated authority, to control the private activity. This Article will show that in combination, these tools form an extensive arsenal allowing coastal states to control activities occurring on those federal lands excluded from the coastal zone.

The Article first discusses the evolution and tentative resolution of disagreeing points of view on the CZMA exclusionary provision (Part I). Thereafter, the Article describes the manner in which the federal consistency provisions of CZMA apply to federal lands notwithstanding exclusion of these lands from the coastal zone (Part II). The third section presents general principles and specific examples concerning state power over federal lands with primary focus aimed at the constitutional authority possessed by federal and state sovereigns over such lands (Part III). The last section offers some observations on the viability of continued federalism in the management of federal coastlands (Part IV).

I

RESOLUTION OF THE DISAGREEMENT OVER THE INTERPRETATION OF THE CZMA EXCLUDED FEDERAL LANDS PROVISION

A. Conflicting Federal Agency Positions

As administrator of CZMA, the National Oceanic and Atmospheric Administration (NOAA) was called upon to interpret that portion of section 304(1) which excludes from the coastal zone federal lands "the use of which is by law subject solely to the discretion of the Federal Government . . . ." In construing this language, NOAA relied on the law of legislative jurisdiction—a term which describes the authority of a government entity to exercise legislative control over an area. NOAA initially adopted the position that excluded federal lands were limited to those lands held by the federal government under exclusive legislative jurisdiction. As for other federal lands where the

19. See text accompanying notes 82-109 infra.
20. See text accompanying notes 123-78 infra.
22. The Jurisdiction Clause of the Constitution provides that Congress has the power
United States acquired only concurrent or partial legislative jurisdiction, or merely acquired a proprietary interest with no federal legislative jurisdiction, NOAA determined that these lands could be subject to the requirements of a state's coastal management program. NOAA's reasoning was that since these lands were not subject to the exclusive discretion of the federal government, but rather were subject to some

"To exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings." U.S. Const. art. I, § 8, cl. 17 (emphasis added). In accordance with this provision, the federal government has acquired numerous areas within the nation with the consent of the states involved. While this practice was evolving, the Supreme Court held that the Jurisdiction Clause could be interpreted to permit a state to transfer land to the federal government subject to a reservation of legislative jurisdiction. Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 539 (1885). See also James v. Dravo Contracting Co., 302 U.S. 134, 146-49 (1937). As a consequence of this judicial construction of the Jurisdiction Clause, land transfers between states and the federal government have varied with respect to the amount of legislative jurisdiction acquired by the United States.

In some instances, the terms of an acquisition provide the federal government with exclusive legislative jurisdiction. In such cases, the United States has acquired all of the legislative authority over the area, with the state only reserving to itself the right to serve civil and criminal process in the area for activities which occur outside of the area. Next, there are transfers where the land has become subject to concurrent state and federal authority, with the state reserving the right to exercise the same legislative jurisdiction as the federal government. A closely related situation occurs when the federal government has received only partial legislative jurisdiction. In these cases, the state has ceded part of its legislative jurisdiction to the United States but has retained certain other legislative authority. Finally, there are lands which the United States has acquired as a proprietor. In these instances, none of the state's legislative jurisdiction has been transferred to the federal government—the United States simply has ended up holding some right or title to the property while the state has retained its full legislative authority which can be exercised in any manner which does not conflict with federal law. See Public Land Law Review Commission, One Third of the Nation's Land, Chapter 19 (1970) [hereinafter cited as PLLRC Report]; see also Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States, Jurisdiction Over Federal Areas Within the States, Part II, A Text of the Law of Legislative Jurisdiction (1957). This final category of federal proprietary land status holds critical significance for states because the bulk of federal areas are within this classification. Out of approximately 770 million acres of federally owned lands, the United States holds about ninety-five percent of the area in a proprietary capacity outside the bounds of any form of federal legislative jurisdiction. U.S. Department of Justice, Federal Legislative Jurisdiction 163-64 (1969).

Having analyzed section 304(1), 16 U.S.C. § 1453(1) (1976), of CZMA and the law pertaining to legislative jurisdiction, NOAA concluded that only federal lands held under exclusive federal legislative jurisdiction had to be excluded from a state's coastal zone boundaries, arguing that only such lands were "subject solely to the discretion of . . . the federal government." Then, NOAA published regulations which required each coastal state to identify and exclude all federally owned lands in the coastal zone over which the state did not exercise any legislative jurisdiction before a coastal management program could be approved. National Oceanic and Atmospheric Administration, Coastal Zone Management Program Approval Regulations, 40 Fed. Reg. 1683 (1975).

These regulations have since been revised and republished in final form. See Final Coastal Zone Management Program Approval Regulations, supra note 10, at 18,590-624 (to be codified in 15 C.F.R. Part 923).
degree of state legislative jurisdiction, they did not fit within the exclusionary clause.\footnote{23}

In addition to relying on the language of section 304(1) of CZMA and the law of legislative jurisdiction, NOAA also concluded that CZMA in general supported a narrow interpretation of the excluded federal lands provisions. NOAA pointed out that the policy of CZMA calls for the full exercise of state authority over coastal zone resources and that exclusion of federally owned lands over which the state retains legislative jurisdiction is inconsistent with promotion of this policy.\footnote{24} NOAA also argued that CZMA addressed federal agency concerns over the application of state coastal management programs to federal lands not by requiring a broad exclusion, but rather by providing intergovernmental coordination and mediation processes which could be applied to resolve federal/state differences.\footnote{25}

A number of federal agencies raised serious objections to the manner in which NOAA interpreted the excluded federal lands provision of CZMA.\footnote{26} The consensus among federal land-holding agencies was that section 304(1) of CZMA excluded from a state's coastal zone all lands used by the United States irrespective of legislative jurisdictional status.\footnote{27} Most of the federal agencies rested their case on the legislative history of CZMA, arguing that a reasonable analysis of this legislative history established that Congress did not consider the law of legislative jurisdiction as the criterion for excluding federal lands.\footnote{28} They noted

\footnote{23. NOAA's analysis and arguments are set forth in a memorandum sent by James W. Brennan, Deputy General Counsel at the Office of the General Counsel of NOAA to Antonin Scalia, Assistant Attorney General, at the Office of Legal Counsel, Department of Justice. Memorandum on Excluded Lands from Office of the General Counsel of NOAA to Office of Legal Counsel, Department of Justice 2-4, 6 (Feb. 13, 1976) [hereinafter cited as NOAA Memo].}
\footnote{24. Id. at 4-6; see also text accompanying note 3 supra.}
\footnote{25. Id. at 10-12; see also note 6 supra.}
\footnote{26. Memorandum on The Relationship of the Coastal Zone Management Act of 1972 to the Management of Public Lands from H. Gregory Austin, Solicitor, Department of the Interior to Assistant Secretary, Program Development and Budget, Department of the Interior (June 1, 1976) [hereinafter cited as Interior Solicitor's Memorandum]; Letter from General Counsel, Department of Transportation to Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Department of Justice (Apr. 19, 1976) [hereinafter cited as Department of Transportation Letter]; Department of Agriculture Letter, supra note 17.}
\footnote{27. Interior Solicitor's Memorandum, supra note 26, at 1-2; Department of Transportation Letter, supra note 26, at 5; Department of Agriculture Letter, supra note 17.}
\footnote{28. These agencies argued that the Senate Report, which includes the following, supported their position:}

The coastal zone is meant to include the non-Federal coastal waters and the non-Federal land beneath the coastal waters, and the adjacent non-Federal shore lands including the waters therein and thereunder. . . . All Federal agencies conducting or supporting activities in the coastal zone are required to administer their programs consistent with approved state management programs. However, such requirements do not . . . extend state authority to land subject solely to the discretion of the Federal Government such as national parks, forests and wildlife refuges, Indian reservations and defense establishments.
that since national forests, wildlife refuges, and the other federal land holdings cited in the legislative history are largely held under a proprietary status, the use of those examples evidenced a congressional intent to exclude all federal lands regardless of legislative jurisdiction status. The federal agencies concluded, therefore, that CZMA's reference to federal lands "subject solely to the discretion of . . . the Federal Government" was not synonymous with the concept of lands held under exclusive federal legislative jurisdiction.

The Department of the Interior advanced an additional argument against NOAA's interpretation of the exclusionary clause. The Department argued that the management of federal coastlands had to conform not only with the Jurisdiction Clause of the Constitution, but more importantly, also with the Property Clause. The Property Clause vests Congress with plenary authority to pass laws for the protection, management, and disposition of all federally-owned lands. The Department of the Interior conceded that when Congress does not assert its right to exercise full control over federal lands pursuant to the Property Clause, the states may exercise their reserved legislative jurisdiction over such lands so long as state action does not substantially interfere with Congress' scheme for use of the property. However, the Department of the Interior argued that since Congress may act at any time under the Property Clause to supersede such state action, the use of federal land is ultimately subject solely to the discretion of the fed-

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S. REP. NO. 753, 92d Cong., 2d Sess. 9, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4783. Federal agencies also pointed out that the CZMA Conference Report contained language reflecting a legislative intent to exclude all federal lands:

The Conference also adopted . . . the Senate language which made it clear that Federal lands are not included within a State's coastal zone. . . . [Those lands traditionally managed by the Department of Interior or the Department of Defense, such as parks, wildlife refuges, military reservations, and other such areas covered by existing legislation, were specifically excluded from the coverage of the bill.


29. See note 22 supra.

30. NOAA argued that the legislative history of CZMA pertaining to the exclusion of federal lands was too ambiguous and inconsistent to be relied upon in interpreting the plain language of the Act. NOAA Memo, supra note 23, at 12-15.


32. See Interior Solicitor's Memorandum, supra note 26, at 4-9, and Department of Transportation Letter, supra note 26, at 3-4.


34. U.S. CONST. art I, § 8, cl. 17. See also id. cl. 18 (the Necessary and Proper Clause).

35. The Property Clause of the Constitution states that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. Id. art IV, § 3, cl. 2.


eral government, and therefore, must be excluded from the coastal zone notwithstanding the existence of state legislative jurisdiction over the property. In other words, the Department maintained that CZMA's excluded federal lands provision applied in any case where Congress, pursuant to the Property Clause, had preemptive capability to set aside state authority. Not surprisingly, this test encompassed all federally-owned lands.

To resolve the conflict surrounding section 304(1), NOAA made a formal request to the Department of Justice for clarification of the legal question concerning the status of federal lands within a state's coastal zone. In making that request, NOAA committed itself to abide by the Justice Department's opinion.

B. Resolution of the Disagreement by the Department of Justice

Following its review of the conflicting agency positions, the Department of Justice issued an opinion concluding that "the [CZMA] exclusionary clause excludes all lands owned by the United States from the definition of the Coastal Zone." The Justice Department maintained that NOAA had improperly confused the concept of sole discretion in the use of federal land (the CZMA test for exclusion) with the concept of exclusive legislative jurisdiction. In effect, the Justice Department adopted the Interior Department's argument that the federal government's potential authority to exercise total control over the use of federal lands pursuant to the Property Clause was sufficient to satisfy the CZMA test for exclusion. The Justice Department supported its opinion with the CZMA legislative history previously discussed. Furthermore, the Justice Department noted that even if the statute and legislative history were considered ambiguous, all federal lands still should be excluded based upon the Supreme Court's holding that the principles underlying the constitutional concept of federal supremacy

38. Id.
39. Letter from James W. Brennan, Deputy General Counsel, NOAA to Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Department of Justice (Feb. 13, 1976)(cover letter to NOAA Memorandum, supra note 23).
40. Responding to a request for mediation by the Secretary of Commerce on the Washington State coastal management program, see note 17 supra. Secretary Richardson stated that the Department of Commerce, which includes NOAA, would "abide by the findings of the Attorney General" regarding the CZMA excluded federal lands provision. Letter from Elliot L. Richardson, Secretary of Commerce to Earl L. Butz, Secretary of Agriculture (Apr. 9, 1976).
41. Letter from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Department of Justice to William C. Brewer, Jr., General Counsel, NOAA, at 12 (Aug. 10, 1976) [hereinafter cited as Justice Department Letter].
42. Id. at 6-8, citing Utah Power & Light Co. v. United States, 243 U.S. 389, 404-05 (1917), and Kleppe v. New Mexico, 426 U.S. 529 (1976).
43. Justice Department Letter, supra note 41, at 9-11; see also note 28 supra.
require federal agencies to be left free from state authority in the absence of a clear and unambiguous waiver of federal immunity.\textsuperscript{44}

The Justice Department opinion emphasized that CZMA was not meant to work a "virtual revolution" in federal-state relations by vesting states with substantial authority over the use of federal coastlands.\textsuperscript{45} The opinion argued, rather, that all federal lands were to be excluded in order to preserve the federal government's independence in managing its lands. While the Justice Department noted that the legislative history expressed some congressional concern for the need to improve federal land use policies and practices, the opinion went on to conclude that comprehensive planning for such lands was addressed not by CZMA, but in separate federal statutory land management initiatives—e.g., national forest and national park legislation.\textsuperscript{46}

Subsequent to its initial opinion, the Justice Department expanded the Department of the Interior's argument. NOAA had interpreted the initial opinion as limited to federal lands owned by the United States. Nonetheless, other federal agencies disagreed with this interpretation and argued that the exclusion also covered all lands leased or otherwise used by the federal government. The Justice Department adopted this broader interpretation.\textsuperscript{47} As a result, all lands owned, leased, held in trust, or the use of which is otherwise by law subject solely to the discretion of the federal government, could not be made subject to direct control by a state pursuant to its coastal management program.

\textbf{C. NOAA's Qualified Acceptance of the Justice Department Opinion}

NOAA accepted the opinion of the Justice Department and thereafter issued regulations to implement the decision.\textsuperscript{48} To assure that the requirements of the Justice Department's decision were met, states were directed to seek assistance from federal land-holding agencies in order to identify and exclude such lands from the boundaries of the

\begin{enumerate}
\item\textsuperscript{44} Id. at 7, relying on Hancock v. Train, 426 U.S. 167, 8 ERC 2100 (1976), and EPA v. California, 426 U.S. 200, 8 ERC 2089 (1976). For a further discussion of these cases see text accompanying notes 87-94 infra.
\item\textsuperscript{45} Justice Department Letter, supra note 41, at 9.
\item\textsuperscript{46} Id. at 9-11.
\item\textsuperscript{47} See National Oceanic and Atmospheric Administration, Federal Consistency with Approved Coastal Management Programs, 42 Fed. Reg. 43, 586 (1977). The complete Justice Department interpretation is now embodied in Final Coastal Zone Management Program Approval Regulations, supra note 10, at 18,602 (to be codified in 15 C.F.R. § 923.33). See text accompanying note 13 supra.
\item\textsuperscript{48} Final Coastal Zone Management Program Approval Regulations, supra note 10, at 18,602 (to be codified at 15 C.F.R. § 923.33); National Oceanic and Atmospheric Administration, Federal Consistency With Approved Coastal Management Programs, 43 Fed. Reg. 10,510, 10,518 (1978) (to be codified at 15 C.F.R. § 930.20) [hereinafter cited as Federal Consistency With Approved Coastal Management Programs].
\end{enumerate}
“coastal zone” controlled by the management program.49

However, NOAA's acceptance of the Justice Department opinion did contain two critical qualifications. The first was that, notwithstanding the excluded status of federal coastlands, all federal activities including development projects and all federally permitted activities undertaken on such coastlands were subject to the federal consistency requirements of CZMA50 whenever such activities caused significant spillover effects on resources within the state’s coastal zone.51 As a second qualification, NOAA declared that a state, in excluding federal lands from its coastal zone for the purposes of CZMA, did not relinquish or impair any rights or authority that exist separate from the coastal management program which the state may have over federal lands.52 In other words, NOAA encouraged coastal states to rely on powers granted to them outside of the context of CZMA to share responsibility with federal agencies for the management of federal coastlands.53 The significance of these qualifications is explored in the remainder of this Article.

Despite NOAA’s qualifications, its adoption of the Justice Department opinion was not quietly accepted by the states. Shortly after promulgation of regulations implementing the decision, the State of Washington filed a lawsuit seeking a declaratory judgment and requesting a stay of the effective date and enforcement of the provisions in the regulations dealing with excluded federal lands.54 The State of

49. Id.
50. See text accompanying notes 56-66 infra.
52. Final Coastal Zone Management Program Approval Regulations, supra note 10, at 18,603 (to be codified at 15 C.F.R. § 923.33(c)(2)).
53. Hawaii was one of the first coastal states to take full advantage of NOAA’s two-pronged assault upon the excluded federal lands provision. In its coastal management program approved by to NOAA for review, the state declared:

Notwithstanding this exclusion of Federal lands, the Federal consistency provisions of Section 307 will remain applicable whenever activities conducted on excluded Federal lands have spillover impacts that significantly affect uses and resources within the State’s approved coastal zone management area. . . . The consistency of Federal actions with spillover effects from excluded lands is of particular importance to Hawaii where large-scale Federal holdings are numerous.

. . . Finally, it should be emphasized that the State will continue to exercise those rights and privileges in Federally-owned lands which it now possesses or may in the future possess separate from the National CZM Act although such lands are excluded from the CZM Program.

Washington argued that NOAA’s action was “contrary to the letter and intent of the Coastal Zone Management Act of 1972 in that it goes beyond the scope of the federal law to exclude from the coastal zone all lands . . . irrespective of whether the states retain any jurisdiction over such lands.”

These state concerns may prove to be unnecessary however. Assuming that NOAA’s adoption of the Justice Department opinion, and NOAA’s qualifications, are sustained following judicial review, coastal states still retain ample authority to integrate management of excluded federal lands with coastal zone management. The opportunities available to the states under these qualifications will be the focus of the following section.

II

STATE AUTHORITY OVER FEDERAL LANDS UNDER CZMA

A. Impact of the Federal Consistency Requirements

Included in CZMA is a unique set of provisions for encouraging states to join the national program. These provisions are usually referred to as the federal consistency requirements. In general, these provisions direct federal agencies to administer their activities, regulatory functions, and assistance programs in a manner consistent with federally approved state coastal management programs when such actions significantly affect resources within a state’s coastal zone. These provisions are unique because they provide states with additional authority over all forms of federal activities. Congress determined that states should be given such authority in return for their consideration of national interests in planning for and managing the use of coastal resources. Consideration of national interest concerns must be incorporated within a state’s coastal management program before it can receive federal approval.

The critical feature of the federal consistency requirements is that federal actions need not be situated within the boundaries of the coastal zone in order for the requirements to apply. Federal actions significantly affecting coastal zone resources are subject to the consistency provisions. In other words, the authority granted the states as a
result of these provisions is sufficient to require federal land-holding agencies to conduct or regulate activities on such lands in accordance with approved state coastal programs whenever the proposed federal actions will have significant spillover impacts within the boundaries of the coastal zone. As a consequence of the Department of Justice interpretation of the CZMA exclusionary clause, however, the consistency requirements do not apply to federal land activities whose

effect caused by . . . [Federal actions] . . . which is sufficient to trigger the responsibility for complying with the Federal consistency requirements of this part.
(b) The Federal actions cited in paragraph (a) of this section will meet the requirements of this section if the Federal agency . . . or the State agency . . . responsible for reviewing the actions determines that the actions cause significant:

(1) Changes in the manner in which land, water, or other coastal zone natural resources are used;
(2) Limitations on the range of uses of coastal zone natural resources; or
(3) Changes in the quality of coastal zone natural resources.

The significance of the changes or limitations caused by the Federal action must be considered in terms of the primary, secondary, and cumulative effects on the coastal zone. A Federal action which causes significant changes in or limitations on coastal zone natural resources meets the requirements of this section even when the action causes both beneficial and adverse coastal zone effects and, on balance, the effects are determined to be beneficial.

Federal Consistency With Approved Coastal Management Programs, supra note 48, at 10,518-19 (to be codified at 15 C.F.R. § 930.21).

60. NOAA found support for this position in the legislative history of CZMA where the Conferes stated that "[f]ederal lands are not included within a state's coastal zone. As to the use of such lands which would affect a state's coastal zone, the provisions of Section 307(c) would apply." H.R. REP. No. 1544, 92d Cong., 2d Sess. 12, reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4822 (emphasis added). In addition, the Department of Transportation justified its argument for a broad federal lands exclusion, in part, on the basis that state interests in federal coastland management would be adequately protected by the federal consistency requirements of CZMA. See Department of Transportation letter, supra note 26, at 4.

In the 1976 Amendments to CZMA, Pub. L. No. 94-370, 90 Stat. 1013, Congress developed a new federal consistency provision, subsection 307(c)(3)(B), 16 U.S.C. § 1456(c)(3)(B) (1976). The new provision directs Outer Continental Shelf (OCS) mineral lessees to provide coastal states with copies of OCS exploration, development, and production plans which describe in detail federal permit activities likely to significantly affect the coastal zone of states with approved coastal management programs. The lessee must provide the state with a certification and supporting information demonstrating that each activity described in detail in such plan will be conducted in a manner consistent with the state's management program. The state must concur or object in a fashion similar to that provided for in subsection 307(c)(3)(A) of CZMA. 16 U.S.C. § 1456(c)(3)(A)(1976). See Federal Consistency With Approved Coastal Management Programs, supra note 48, at 10,526-29, 10,531-32 (1978) (to be codified in 15 C.F.R. §§ 930.70-.86, 930.120-.134). This new provision highlights an important analogy between federal consistency respecting excluded federal lands and federal consistency for federal actions carried on outside of the coastal zone but not on excluded federal lands. The federal OCS is not excluded from the coastal zone as a result of the excluded lands provision of CZMA. Rather, federal OCS lands are outside of the coastal zone because the states' coastal zone boundary stops at "the three mile outer limit of the United States territorial sea." Final Coastal Zone Management Program Approval Regulations, supra note 10, at 18,602 (to be codified in 15 C.F.R. § 923.32). See text accompanying note 10 supra. Thus, application of the federal consistency provisions to the federal OCS is simply an explicit example of the concept that federal activities outside of the coastal zone, whether on excluded federal lands, on the OCS, or uplands from the coastal zone boundary, are subject to the federal consistency requirements when such activities have significant effects within the coastal zone.
significant impacts are confined within the boundaries of the federal coastlands.

There are two mechanisms under CZMA by which it is determined whether federal actions will be undertaken in a manner consistent with state requirements for coastal zone management. These mechanisms apply to federal actions both originating within a state's coastal zone or within excluded federal coastlands so long as coastal zone resources are significantly affected by the action. Under subsections 307(c)(1) and (2), federal agencies are responsible for determining which of their own activities, including development projects, significantly affect coastal zone resources. Those federal actions determined to have such an impact must be conducted in a manner consistent, to the maximum extent practicable, with federally approved coastal programs. In the event a coastal state disagrees with a federal agency's determination, and such disagreement cannot be informally resolved, CZMA offers a mediation service in which the Secretary of Commerce, in cooperation with the Executive Office of the President, will seek to resolve the serious disagreement. If mediation efforts fail or are not utilized, judicial review, where otherwise available by law, may be sought by the state to enforce its position that the federal agency is violating the consistency requirements of CZMA.

Under subsection 307(c)(3)(A) of CZMA, a federal permit applicant proposing a private activity which will significantly affect the coastal zone is required to provide the coastal state with a consistency certification and supporting information demonstrating how the proposal will be consistent with the state's approved coastal program. The state must concur with or object to the certification at the earliest practicable time. If the state concurs, the federal agency may issue the permit. However, if the state objects, CZMA compels the federal agency to deny approval. In the latter case, the applicant has a right of appeal to the Secretary of Commerce who may override the state's objection, thereby allowing the permit to be issued, if the proposal conforms to the objectives of CZMA or is necessary in the interest of national security.

A good example of how the federal consistency requirements can

61. See note 59 supra and accompanying text.
65. Id. See Regulations On Federal Consistency With Approved Coastal Management Programs, supra note 48, at 10,523-26, 10,531-32 (to be codified in 15 C.F.R. §§ 930.50-66, 930.120-.134). See note 68 infra. The Secretary's decision is itself subject to judicial review. Id. at 10,532 (to be codified in 15 C.F.R. § 930.130(d)). See also 5 U.S.C. § 704 (1976).
be applied to activities on excluded federal lands is provided by the Navy's development of a magnetic silencing pier for use by TRIDENT submarines during their refit cycle. On June 1, 1976, the State of Washington's coastal management program was approved by NOAA, thereby triggering operation of the federal consistency provisions of CZMA. Thereafter, the Navy proposed to build the pier facility on Washington shoreline owned by the federal government. The Navy indicated that external coastal zone effects would result from the pier construction—e.g., loss of shellfish and bottom organisms—but in other respects the facility would be operated in a manner which protected the resources and ecology of the state's shoreline. Following receipt of the consistency notification, the state agreed that the facility was consistent, to the maximum extent practicable, with the provisions of the state's coastal program.  

B. Continuing State Concerns

Despite NOAA's determination that the federal consistency requirements apply to excluded federal lands, a number of coastal states still expressed several major concerns. First, there were serious misgivings about the likelihood of federal agencies and states agreeing upon instances in which excluded federal land activities "significantly affected" coastal zone resources. These states were concerned that intergovernmental disputes regarding this threshold issue would arise similar to those which have arisen with the same phraseology, "significantly affecting," under the National Environmental Policy Act. Even if a federal agency were to agree that a federal action would have significant adverse effects upon the coastal zone, the states still were concerned that the Department of Commerce would permit inconsistent actions to proceed based upon claims of overriding concerns for national interest or national security. Finally, some states were disap-

66. Memorandum on Compliance with State of Washington Coastal Zone Management Program from Officer in Charge of Construction, TRIDENT to District Engineer, Army Corps of Engineers, Seattle, Washington (Sept. 10, 1976). The Navy informed the Washington State Department of Ecology that due to national security requirements, the pier facility would not conform to the state's coastal policies encouraging increased public access and recreation. The Department of Ecology conceded that since no practical alternatives were available to promote these goals within the framework of this military installation, the project could proceed as proposed.

67. 42 U.S.C. §§ 4321-61 (1976). This Act requires federal agencies to develop environmental impact statements for major federal actions "significantly affecting" the quality of the human environment. 42 U.S.C. § 4332 (1976). For cases dealing with the problems of construing this phrase, see, e.g., City of Davis v. Coleman, 521 F.2d 661, 8 ERC 1259 (9th Cir. 1975); and Wisconsin v. Butz, 389 F. Supp. 1065, 7 ERC 1651 (E.D. Wis. 1975). See also Concerned About Trident v. Rumsfeld, 555 F.2d 817, 9 ERC 1370 (D.C. Cir. 1977) (suit challenging the sufficiency of the United States Navy's environmental impact statement).

68. CZMA authorizes the Secretary of Commerce to set aside a state objection to an
pointed that, by virtue of the exclusion of federal lands, the federal consistency provisions would not apply when the impacts resulting from activities on such lands were confined within the federal land boundaries. Thus, these states feared that even with the consistency requirements, they were prevented from exercising comprehensive authority to influence the management of federal coastlands.

These fears appear to be unfounded. States still may retain considerable control over federal lands that cannot be brought within the scope of CZMA. CZMA does not take away from coastal states the legislative authority which they previously could assert over federal lands.69 CZMA simply removes federal lands from the boundaries of the management program “coastal zone” and thus from direct state control pursuant to a federally approved coastal program. Accordingly, coastal states are still free to exercise authority on excluded federal lands when such state action is authorized by some provision other than CZMA. The following part of this Article explores this opportunity in greater detail.

III

STATE AUTHORITY OVER FEDERAL LANDS OTHER THAN THAT PROVIDED BY CZMA

A. The Constitutional Framework

Pursuant to its constitutional powers, Congress can exercise broad authority to manage federal lands.70 As noted earlier, two of the bases for the exercise of such authority are the Jurisdiction Clause71 and the Property Clause72 of the Constitution. As will be described more fully

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72. Id. art. IV, § 3, cl. 2. See note 35 supra and accompanying text.
below, this constitutional foundation, coupled with the Supremacy Clause of the Constitution,73 authorizes the federal government to supersede state authority over federal lands.74

By virtue of the tenth amendment to the Constitution, the powers not delegated to the United States, nor granted to the citizens of the nation, are reserved to the states.75 These reserved powers broadly encompass the right to prescribe legislative rules to promote the health and welfare of the public.76 Subject to the constitutional constraints cited above, states generally may exercise regulatory authority over federal lands pursuant to these reserved powers.77

Although at first glance this balance of authority appears to be weighted heavily in favor of federal control over federal lands, in reality, opportunity for state participation in the management of federal lands is substantial. Critical to understanding the balance of authority over federal lands is the fact that while Congress has the constitutional power to displace state management authority over federal lands, it has rarely chosen to exercise this power fully. In a number of enactments, Congress has specifically granted states the authority to regulate federal facilities for the purpose of achieving a broad range of national objectives in the areas of conservation and management of natural resources.78 Subsumed under this broad authority is control over federal land activities. In certain other statutes specifically governing federal land use by private parties, Congress either has been silent with respect to the supersession of state authority, has favored concurrent state management, or has expressly granted state authority, thereby permitting states to exercise legislative authority over federal lands.79 The question in each instance then, is to determine the extent to which Congress has either promoted or prohibited state authority over federal lands.

As a result of their increasing interest in managing coastal resources, including those situated on federal coastlands, several coastal states have been examining this issue in greater detail. For example, in analyzing the possible application of state law to federal lands, the State of Oregon noted that while the state as a general rule could not interfere with the federal government’s lawful exercise of its functions

73. The Supremacy Clause provides that federal law “shall be the supreme Law of the Land.” Id. art.VI, cl. 2.
75. U.S. CONST. amend X.
78. See notes 87-110 infra and accompanying text.
79. See notes 131-38 infra and accompanying text.
on federal lands, "under various statutes, regulations and executive orders the federal government has to a greater or lesser extent, depending upon the land and the particular activity involved, subjected itself to the application of state law." The State of California came to the same conclusion when reviewing the relationship between the state's coastal zone management authority and development of federal coastlands.

These states and others observed that differing legal issues and presumptions concerning the permissibility of state regulation of federal land activities apply depending upon whether the state attempts to regulate the actions of federal agencies or the actions of private parties. Specifically, federal facilities are subject to state regulation only when there is an explicit congressional or executive waiver of immunity. In the absence of such a waiver, there is a presumption of exclusive federal control. However, there is a reverse presumption in the case of private activities on federal lands. State authority applies so long as Congress has not acted to preempt the field. The succeeding material explores this distinction, and offers some examples of areas in which, because Congress or the Executive Office of the President has shared its authority, states still may act.

B. State Authority over Federal Facilities on Federal Lands

One way that states may exercise some control over excluded federal lands is by utilizing their authority to apply state air and water quality, waste management, water appropriation, and other environmental requirements to federal facilities on federal lands.

As a general rule, federal facilities used as a means to carry out the functions of the federal government may not be subjected to state regulation. In *Fort Leavenworth Railroad Co. v. Lowe,* the Supreme Court declared:

[I]nstrumentalities for the execution of its [United States] powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers.

This federal facility immunity is premised upon a broader immunity

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80. Letter on State Regulation of Activities Occurring on Federal Lands from Peter S. Herman, Senior Counsel, Oregon Department of Justice to Arnold Cogan, Director, State Department of Environmental Quality, at 4 (Nov. 7, 1974).
82. 114 U.S. 525 (1885).
83. Id. at 539.
doctrine first articulated in *McCulloch v. Maryland*\(^{84}\) where the Supreme Court held, by virtue of the Supremacy Clause, that state regulation could not interfere with the federal government's implementation of its constitutionally authorized functions.\(^{85}\)

The doctrine of federal facility immunity is not the final word, however. There is no constitutional rule which compels the Congress to exclude states from participating in the management of federal land activities, and this qualification applies as well to the operation of federal facilities on such lands. Thus, Congress may affirmatively express that federal facilities are subject to state regulation.\(^{86}\) Some examples of such congressional deference are provided below. Before examining these examples, however, it is important to discuss how the presumption of federal facility immunity actually works.

The United States Supreme Court emphasized the substantial weight of this presumption in the companion cases *Hancock v. Train*\(^{87}\) and *EPA v. California*.\(^{88}\) In the *Hancock* litigation, the Court interpreted section 118 of the Clean Air Act (CAA),\(^{89}\) which requires federal facilities to comply with state and local air pollution control requirements to the same degree as nonfederal facilities. In reviewing Congress's consent to a waiver of federal immunity, the Court held that the CAA provision required federal agencies to ensure that air pollution from their facilities did not exceed state standards. However, the Court indicated that it would not go so far as to require federal facilities to obtain state air quality control permits. The Court justified this limitation on the ground that CAA does not reflect an explicit congressional intent to subject federal installations to state procedural as well as substantive requirements.\(^{90}\) The Court invoked the federal immunity presumption when it declared:

> Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only where and to the extent

\(^{84}\) 17 U.S. (4 Wheat.) 316 (1819).

\(^{85}\) Since this federal facility immunity doctrine is derived independently of the Property Clause of the Constitution, it applies equally to cases where the facility is on lands leased, as well as owned, by the federal government. *Cf.* Penn Dairies Inc. v. Milk Control Comm'n, 318 U.S. 261, 267-69 (1943) (federal facility immunity could be claimed by federal government, but not by private contractor furnishing milk to Army base on government-leased land). See note 47 *supra* and accompanying text.

\(^{86}\) Mayo v. United States, 319 U.S. 441, 448 (1943).

\(^{87}\) 426 U.S. 167, 8 ERC 2100 (1976).

\(^{88}\) 426 U.S. 200, 8 ERC 2089 (1976).


\(^{90}\) 426 U.S. at 180, 8 ERC at 2106.
there is a "clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."

In *EPA v. California*, the Court interpreted section 313 of the Federal Water Pollution Control Act Amendments of 1972 (FWP-CAA), which requires federal installations to comply with state water pollution control requirements to the same degree as nonfederal facilities. As it had done in the *Hancock* case, the Court held that as a result of the absence of an explicit statutory directive pertaining to federal agency compliance with state procedural requirements, states could not compel federal facilities to obtain state administered National Pollutant Discharge Elimination System permits. These two cases, *Hancock* and *California*, in effect, acknowledged that state substantive law was paramount, but left the Environmental Protection Agency with the exclusive responsibility for enforcing state water and air quality standards applicable to federal facilities.

For the purposes of air and water quality management, however, the substance/procedure distinctions developed in these cases have become moot as a result of congressional action which set aside the Supreme Court's statutory interpretations. In the Clean Air Act Amendments of 1977 (CAAA), Congress amended section 118 to require federal agencies to comply with all state and local government procedural requirements for the control and abatement of air pollution. As a consequence of this amendment, federal facilities must comply with state procedures to assure conformance with air quality standards when required by state law.

Following modification of the federal air quality law, Congress proceeded to pass the Clean Water Act of 1977 which amends FWP-
In the new Act, Congress again directs federal agencies to comply with state and local procedural as well as substantive requirements, this time for the control and abatement of water pollution. As it had done in CAAA to make certain its intent was not misconstrued by the executive or judicial branches, Congress explicitly declared that state law would apply to facilities operated by federal agencies "notwithstanding any immunity of such agencies, officers, agents or employees under any law or rule of law." Accordingly, under present law there exists comprehensive state authority to enforce air and water quality requirements upon federal facilities.

The Resource Conservation and Recovery Act of 1976 (RCRA) provides the latest example of this emerging trend of congressional delegation to the states of control over federal facilities. This Act offers technical and financial assistance to states for the development of management plans and facilities for the safe disposal of waste materials. RCRA requires all federal agencies with jurisdiction over any solid waste management facility or disposal site, or which engage in any activity resulting in disposal of waste materials, to comply with all state and local government requirements, both substantive and procedural, governing control and abatement of waste disposal. The significance of this provision is apparent in light of the federal ownership or operation of over 20,000 facilities that are engaged in activities which generate or manage solid waste.

These emerging congressional initiatives have been complemented recently by judicial and executive actions to enhance state authority over federal facilities. In a recent and surprising decision construing

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101. Id.
102. However, both the new air and water quality acts contain, in the federal facility compliance sections, directives permitting presidential selection of installations which may be excluded from emission requirements if there is a finding of overriding national interest. 42 U.S.C.A. § 7418 (West Supp. 1978); 33 U.S.C.A. § 1323 (West Supp. 1978).
104. Id. §§ 6941-6949.
105. Id. §§ 6961. As in the air and water quality acts, this RCRA section allows for presidential selection of national interest exceptions. See note 102 supra.

The State of Alaska was one of the first states to take full advantage of this newly delegated authority. Alaska advised the private operator of Naval Petroleum Reserve No. 4 that the operator had to apply to the State Environmental Conservation Department for a solid waste permit governing disposals from the Reserve. When the Department of the Navy responded that it would consider the matter carefully, Alaska rejoined that it was not requesting consideration and voluntary concurrence as a matter of comity, but was ordering mandatory compliance by the Navy with state law pursuant to the requirements of RCRA. [1976] 7 ENVIR. REP. (BNA) 1378. See also [1978] 8 ENVIR. REP. (BNA) 2058.
section 8 of the Reclamation Act of 1902, the United States Supreme Court provided added strength to the power of states to impose requirements on federal reclamation projects. In *California v. United States*, the Court held that Department of the Interior reclamation activities pertaining to the appropriation, purchase, or condemnation of water rights, as well as water distribution from reclamation projects, were controlled by state law, and that a state could impose permit conditions not inconsistent with congressional provisions authorizing the reclamation project. In cases decided prior to *California v. United States*, the Court had refused to construe the Reclamation Act in a manner favorable to the application of broad state authority. However, precedent was distinguished as the Court pursued the path of cooperative federalism.

On October 13, 1978, the President of the United States issued Executive Order 12088 requiring federal facility compliance with all substantive and procedural pollution control requirements applicable to private parties, thereby waiving the federal facility immunity privi-

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109. Id. at 2995-96, 3000-01, 11 ERC at 1827-28, 1832. The background of the case is as follows. After review of the New Melones Dam federal reclamation project, the California State Water Resources Control Board ruled that water for the project could not be allocated to the federal government unless it agreed to and complied with various state permit conditions. In response, the United States sought a declaratory judgment that the federal government may impound whatever unappropriated water is necessary for a federal reclamation project without complying with state law. The district court held that section 8 of the Reclamation Act did no more than encourage the federal government, as a matter of comity, to seek a state determination regarding the availability of unappropriated water, and to give notice to the state of the scope of a proposed reclamation project. United States v. California, 403 F. Supp. 874, 9 ERC 2041 (E.D. Cal. 1976). The Ninth Circuit Court of Appeals partially overruled this position by holding that section 8 as a matter of law, rather than comity, compelled the federal government to comply with a state's determination on availability of water. However, the court would not go so far as to allow California to impose permit conditions. United States v. California, 558 F.2d 1347, 9 ERC 2062 (9th Cir. 1977). The Supreme Court reversed and held for an expansive interpretation of section 8.

110. See *United States v. Gerlach Live Stock Co.*, 339 U.S. 275 (1950); *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958); *Dugan v. Rank*, 372 U.S. 609 (1963); and *City of Fresno v. California*, 372 U.S. 627 (1963). The Court's decision is noteworthy not only for its apparent disregard for precedent which limited state authority over reclamation projects, see Justice White's dissent at 98 S.Ct. at 3003-11, 11 ERC at 1834-40, but also for the Court's abandonment of the substance/procedure distinction developed in the CAA and FWPCA cases. See notes 87-94 supra and accompanying text. In reviewing section 8 of the Reclamation Act, the Ninth Circuit Court of Appeals argued that the State could not impose permit conditions because the Act "is no more specific in subjecting federal projects to state permit requirements than are the statutes construed [by the Supreme Court in the CAA and FWPCA cases]." 558 F.2d at 1350, 9 ERC at 2064. On review, the Supreme Court paid no notice to this argument.

lege with regard to environmental laws. The Executive Order covers not only CAAA, Clean Water Act, and RCRA, but also the Toxic Substances Control Act, Safe Drinking Water Act, Noise Control Act of 1972, Marine Protection, Research and Sanctuaries Act of 1972, Federal Insecticide, Fungicide, and Rodenticide Act, and radiation guidance issued pursuant to the Atomic Energy Act. The Order requires that whenever a state notifies a federal agency of a violation of an applicable pollution control standard, the agency must provide the state with a plan and implementation schedule to achieve and maintain compliance.

The above descriptions of state power authorized by the federal air, water, waste, and reclamation statutes, and Executive Order 12088 offer some examples of existing authority upon which states may rely to supplement their management efforts under CZMA. Pursuant to these authorities, coastal states are provided with an opportunity to apply procedural as well as substantive state environmental protection requirements to federal facilities situated on excluded federal coastlands. The next subsection deals with the possibilities of state control over private uses of excluded federal lands.

C. State Authority over Private Activities on Federal Lands

Another way states may exercise some control over excluded federal lands is by regulating private activities on those lands through such means as taxation, mineral development restrictions, and land use planning. State authority over private activities on federal lands is broader than state authority over federal facilities since a reverse presumption applies. If a state retains some legislative jurisdiction over federal lands—including those lands covered by the CZMA exclude...
sion—that state may regulate private activities on those lands unless Congress has expressly preempted such state action. Affirmative congressional action to set aside state authority is required because the federal immunity presumption discussed above does not apply to the management of private activities on federal lands.

In order to exercise this kind of authority, a state must retain some legislative jurisdiction over the excluded federal lands. The former Director of the Bureau of Land Management (BLM), Department of the Interior, has noted that

a state which intends to regulate land using activities in a given respect, as by zoning for purposes of land use control, holds authority to include Federal land areas within the geographic extent of such regulation if the State holds legislative jurisdiction over such areas. Such regulations, if otherwise valid, will be enforceable as to private land using activities except to the extent that such regulations might interfere with essential federal functions which are duly authorized in accordance with the United States Constitution.

It is true that the retained legislative jurisdiction of the states is limited by federal authority under the Property Clause of the Constitution. In Kleppe v. New Mexico, the United States Supreme Court held that the Property Clause gives the United States complete power over federal lands, and that congressional exercise of this power necessarily overrides conflicting state laws under the Supremacy Clause. This means Congress has the capability (which it exercised in the Kleppe case) to preempt state management of federal lands.

The federal Property Clause power, however, only supersedes state legislative authority if Congress chooses to exercise it fully. Only an affirmative expression of congressional intent to supersede state authority is sufficient to preempt state power. Thus, if Congress chooses not to preempt state legislative authority, but rather, remains silent and allows states to act concurrently, or expressly directs the exclusive application of state law to federal lands, states are in a position to manage private activities on federal lands. Some examples of how states may

124. See text accompanying notes 82-86 supra.
126. U.S. CONST. art IV, § 3, cl.2. See note 35 supra, and accompanying text.
128. Id. at 539-43. But see Engdahl, supra note 77, at 309-10, where Professor Engdahl expresses the controversial view that the Property Clause was not intended to carry the weight of an enumerated power which could take precedence over state law through reliance upon the Supremacy Clause. In light of congressional pronouncements based upon the Property Clause mandate directing Congress to implement "all needful Rules and Regulations," see text accompanying note 35 supra, and judicial decisions affirming such action—e.g., the Kleppe case—Professor Engdahl has little support for his opinion.
effectively manage such activities are provided below.\textsuperscript{130}

1. State Taxation as a Land Management Tool

One means of promoting rational management of land is through the use of selective taxation schemes. For example, a severance tax on natural resource removal can provide the funding necessary to ensure proper reclamation of exploited areas. In addition, this revenue can be used to provide the public facilities and services required because of federal land development activity.

By virtue of the federal immunity doctrine, states may not tax federal facilities.\textsuperscript{131} However, as noted above, this immunity doctrine does not apply to private assets on federal lands. Several cases have upheld the right of states to tax private activities on federal lands in the absence of congressional preemption. One of these cases involved an express authorization by Congress permitting such a state tax, while another case relied on congressional silence in finding such a tax valid.

In \textit{Mid-Northern Oil Co. v. Walker},\textsuperscript{132} a federal lessee brought suit to enjoin enforcement of a state license tax on its annual leasehold production. The United States Supreme Court held that section 32 of the Mineral Leasing Act of 1920\textsuperscript{133} contained an expression of congressional consent to such a state tax.\textsuperscript{134} The Court noted that the consent provision was incorporated into the Act to "remove from the field of controversy" the authority of states to impose taxes upon lessees without regard to the interest of the United States in the federal lands.\textsuperscript{135}

\textsuperscript{130} For the most part, the examples discussed here cover land use planning and energy development on excluded federal lands. These are the same major issues which must be addressed in a state's coastal management program. Thus, the examples were selected to demonstrate the opportunities for integrating coastal zone and federal land management. There are additional opportunities for intergovernmental coordination in federal land management in noncoastal areas. \textit{See e.g.}, Omaechevarria v. Idaho, 246 U.S. 343 (1918) (approving application of state grazing law on federal lands); Bureau of Land Management, Department of the Interior, \textit{Oil Shale Leases, Notice of Sale,} 38 Fed. Reg. 33,187, 33,191 (1973) (setting forth oil shale lease conditions requiring compliance with state pollution control and reclamation standards).

\textsuperscript{131} Van Brocklin v. Tennessee, 117 U.S. 151 (1886). \textit{But see United States v. County of Fresno,} 429 U.S. 452 (1977), where the United States Supreme Court appeared to weaken the impact of the federal immunity doctrine. In this case, federal employees working at several national forests in California were assessed a state property tax on their possessory interest in housing supplied by the Forest Service as part of their compensation. California law imposed a tax on possessory interests in improvements on publicly owned, tax-exempt land. The federal government protested and the Court held the tax to be constitutional. The Court declared that neither the federal government's immunity from state taxation inherent in the Supremacy Clause nor the federal status of the property prevented California from assessing this particular tax. \textit{Id.} at 464-68.

\textsuperscript{132} 268 U.S. 45 (1925).


\textsuperscript{134} 268 U.S. at 49.

\textsuperscript{135} \textit{Id. See also} Hagood v. Heckers, 182 Colo. 337, 513 P.2d 208 (1973), where the Colorado Supreme Court held that the Mineral Leasing Act did not preempt application of
In the subsequent case of *Wilson v. Cook*, the United States Supreme Court made clear the fact that Congress need not have inserted such a consent provision in the Mineral Leasing Act. In *Wilson*, the Court sustained a state tax applied to a contractor's severance of timber from federal lands. The Court held that the contractor could not avail himself of the federal immunity protection and concluded that by virtue of the state's retention of concurrent legislative jurisdiction over the federal lands at issue, and by virtue of Congress' failure to exert Property Clause authority to preempt state law, the state could impose the severance tax on the private user of the federal government's timber. Unlike the *Walker* case, the Court relied upon congressional omission to supersede existing state authority rather than commission in the form of an explicit consent for state action.

2. *State Control of Federal Land Mineral Development*

The Act of May 10, 1872 permits individuals to file mining claims on unappropriated federal lands in their efforts to discover valuable hard-rock minerals such as gold, silver, nickel, and copper. If a valuable mineral deposit is discovered by the claimant, a patent may be issued granting title to the land. In enacting this law, Congress did not attempt explicitly to preempt state laws.

The proposition that states may regulate private activities in the absence of explicit congressional preemption was highlighted in *State ex rel. Andrus v. Click*, where the Governor of Idaho (now Secretary of the Interior) brought suit against an individual working an unpatented mining claim on federal lands within a national forest. The state sought to apply Idaho's dredge and placer mining protection law to the claimant's activities and thereby require a state permit and restoration of the land. The Idaho Supreme Court conceded that when Congress exercises its legislative authority under the Property Clause, "conflicting state laws must fall by reason of the Supremacy Clause." However, the court added that in the absence of congressional action setting aside state authority, the state could exercise its jurisdiction over federal lands. In this instance, the federal government had set comparatively low standards for mineral land management and restoration, and

state income tax assessments on overriding royalties paid in part consideration for the assignment of federal oil and gas leases.

137. *Id.* at 486-87; *see also* S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946).
138. *See note* 134 *supra* and accompanying text.
141. *Id.* § 29.
143. *Id.* at 795, 554 P.2d at 973.
the court decided this did not protect miners from additional, more rigorous state requirements.144

Unlike the Mining Act of May 10, 1872, the Mineral Leasing Act of 1920,145 as amended, contains explicit congressional consent to state authority.146 The Act empowers the Department of the Interior to issue leases for exploration and development of coal, oil and gas, oil shale, and other minerals on federal lands.147 However, this authority is qualified by the caveat that "none of [the lease] provisions shall be in conflict with the laws of the State in which the leased property is situated."148 This provision reserves to the states broad authority to implement requirements equal to or more stringent than federal land use requirements.149

Relying on this reserved authority, the State of Wyoming filed suit against the Department of the Interior claiming that the Department's coal leasing and reclamation regulations, to the extent they precluded application of state law to mineral leasing on federal lands, were illegal and in excess of the authority accorded to Interior by the Mineral Leasing Act of 1920.150 The suit subsequently was dismissed following the signing of a consent order stipulating recognition by the federal government that Wyoming's environmental laws applied to federal coal lands.151 Thereafter, the Department of the Interior entered into similar intergovernmental agreements with New Mexico,152 Utah,153 North Dakota,154 Colorado,155 and Montana.156 Recent amendments to the Mineral Leasing Act of 1920 have provided states with even further

144. Id. at 796, 554 P.2d at 974. Explicit recognition of state authority for management of hard-rock mineral exploitation on federal lands may be forthcoming in future legislation. In the first session of the 95th Congress, the Administration introduced legislation amending the antiquated Mining Act of May 10, 1872. Proposed provisions direct the Secretary of the Interior to adopt state environmental regulations which are as strict or stricter than federal standards, and to enter into cooperative agreements with states to enforce environmental requirements. See [1977] 8 Envir. Rep. (BNA) 681-82.


146. Id. § 187.


151. See 30 C.F.R. §§ 211.10(e)(1), 211.74(g)(1), 211.77(a) (1977) for the Department of the Interior-State of Wyoming agreement.

152. Id. §§ 211.10(e)(3), 211.74(g)(3), 211.77(c).

153. Id. §§ 211.10(e)(2), 211.74(g)(2), 211.77(b).

154. Id. §§ 211.10(e)(4), 211.74(g)(4), 211.77(d).

155. Id. §§ 211.10(e)(6) 211.74(g)(6), 211.77(f).

156. Id. §§ 211.10(e)(5), 211.74(g)(5), 211.76-1, 211.77(e).
CZMA AND EXCLUDED FEDERAL LANDS

authority to control federal lands.157

The Surface Mining Control and Reclamation Act of 1977 (Strip Mining Act)158 is the latest example of the continuing congressional effort to promote intergovernmental coordination in the management of those federal lands subject to mineral exploitation. The Act authorizes each state to assume exclusive jurisdiction in regulating surface coal mining and reclamation operations for all non-federal lands within the state.159 Where federal lands are located in a state with an approved program, federal land management must, at a minimum, include the requirements of the approved state program.160 In addition, any state with an approved program may elect to enter into a cooperative agreement with the Interior Department to provide state regulation of surface coal mining and reclamation on federal lands within the state.161

On December 13, 1977, the Department of the Interior published initial environmental protection regulations to implement the Strip Mining Act.162 The regulations pertain to both federal and non-federal lands, and provide interim controls federal applicable to all coal mining operations regulated by a state until the state has an approved program or a federal regulatory program is in place. Parts 718 and 720 of the regulations declare that states are not precluded from exercising authority to enforce state laws unless compliance with state requirements would preclude adherence to the Strip Mining Act, and that the Interior Department will adopt any state law which is found to provide a more stringent performance standard for surface coal mining and reclamation operations than comparable federal requirements.163 Despite this effort to coordinate its interim regulatory program with existing state requirements, the Interior Department was sued by a number of state and industry parties which alleged that the federal government

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157. 30 U.S.C. § 201 (1976). Section 201(a)(2)(B) of the amendments provides that any lease which permits surface coal mining in a National Forest must be submitted to the state for review. If there is a state objection, the Secretary of the Interior must delay issuing the lease for six months during which time the Secretary must reconsider the proposal in light of the state's objections. Section 201(a)(3)(E) mandates that all coal leases must comply with the requirements of CAA, as amended, and FWPCA, as amended, and presumably this includes state law promulgated pursuant to these Acts. Finally, section 201(b)(1) states that all exploration licenses must contain conditions to protect the environment and shall be subject to all applicable state and local government laws and regulations.


159. Id. § 1253(a).

160. Id. § 1273(a).

161. Id. § 1273(c).


163. Id. at 62,700 (to be codified at 30 C.F.R. §§ 718.1, 720.11).
had overstepped its authority in a manner which invaded certain rights and interests subject to exclusive state control. In essence, plaintiffs argued that the Department’s regulations were too onerous and would preclude application of state requirements which were more permissive than the federal directives. Assuming the Department of the Interior’s performance standards are upheld, the result will lead to minimum national uniform standards regulating surface mining and reclamation, with the states imposing more stringent measures if they so desire.

3. State Influence in Federal Land Use Planning and Management Efforts

States have influence over the planning and management efforts of the various federal agencies in charge of federal lands. Approximately sixty percent of such lands are administered by the Bureau of Land Management (BLM), Department of the Interior. Under the Federal Land Policy and Management Act of 1976, the Interior Department is directed to manage federal lands in a manner which protects the quality of the scenic, historical, ecological, environmental, air, water, and archeological values thereon, while at the same time providing food and habitat for fish, wildlife, and domestic animals, promoting outdoor recreation, and fostering development of domestic sources of minerals, foods, timber, and fiber. In parts of the Act, Congress explicitly directed that states be allowed to participate in this comprehensive planning and management effort. The Act requires the Interior

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165. Most of Interior’s surface mining regulations have been upheld, while others are being subject to further consideration by the agency and may, in the future, be challenged in court. See [1978] 9 Envr. Rep. (BNA) 3-5, 820-21.

166. PLLRC Report, supra note 22, at 21.


169. The states have particularly powerful influence over the granting of proprietary rights-of-way. Both the Department of the Interior and the Department of Agriculture (the latter with respect to national forest lands) are authorized under the Act to issue rights-of-way over federal lands. Id. §§ 1761-1771. However, this authority is tied to the explicit congressional requirement that rights-of-way be in compliance with state standards for air and water quality, public health and safety, environmental protection, siting, construction, operation, and maintenance whenever state standards are more stringent than applicable federal standards. Id. § 1765.
Department to develop land use plans which provide for the multiple use of federal lands. In the development of such plans, the Department must provide for compliance with applicable state air, water, noise, and other pollution control standards or implementation plans. Furthermore, federal land use plans must be consistent with state and local land use measures to the maximum extent permitted by federal law.

The other major federal land manager besides BLM is the Forest Service, Department of Agriculture, which administers about one-fourth of all federal lands. The Forest Service manages the National Forest System pursuant to extensive legislative directives which, in their entirety, are subject to an express congressional provision reserving to the states legislative jurisdiction over national forest lands notwithstanding the fact that such lands are owned by the federal government.

In addition to their reserved legislative jurisdiction, states now have direct input into the management of national forest lands. Congress supplemented earlier directives with the passage of the National
Forest Management Act of 1976\textsuperscript{176} This Act requires the Forest Service to develop forest management plans which provide for the multiple use and sustained yield of the products and services obtained from national forests. These products and services include, in part: timber, outdoor recreation, range utilization, and watershed, fish, wildlife, and wilderness protection. The Act directs the Secretary of Agriculture to insure that timber will be harvested only where protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other bodies of water.\textsuperscript{177} This legislation again exemplifies a congressional commitment to promote intergovernmental coordination in federal land management by directing the Secretary to provide state and local governments with an opportunity to comment on the formulation of standards, criteria, and guidelines which address these as well as other forest management planning issues.\textsuperscript{178}

The description of the federal-state interface for federal land taxing schemes, mineral exploitation, and multiple-use planning has been set forth to highlight the opportunities available for states to influence the management of federal lands. Full utilization of a state's taxing power, and expanded application of its land use planning, facility siting and construction, and pollution control requirements to private activities on excluded federal lands can effectively complement a state's CZMA effort. Use of these tools can therefore promote management of coastal resources carved out of a state's coastal zone by the CZMA exclusionary clause, along with comprehensive management of lands and waters within a state's coastal zone.

IV
INSURING A CONTINUED, VIABLE FEDERALISM IN THE MANAGEMENT OF FEDERAL COASTLANDS

As a general rule, the tools described above permit state laws to apply to public and private activities on federal coastlands when, short of frustrating the federal policy being pursued, such laws are equal to or more stringent than the directives authorized by the relevant federal land use program. This proviso raises the important question of what the consequences are of state coastal management initiatives which fall below the minimum standards necessary to protect adequately federal coastlands,\textsuperscript{179} or which are so restrictive that they result in impairment

\textsuperscript{177} Id. § 1604(g)(3)(E).
\textsuperscript{178} Id. § 1604(d).
\textsuperscript{179} See Kleppe v. New Mexico, 426 U.S. 529 (1976).
of federal goals. In such cases, federal law not only remains applicable to federal land activities, but may also extend to adjoining nonfederal coastlands if necessary to protect the national interest in the management of federal lands.

The issue of state failure to manage adequately resources adjacent to federal lands was addressed in United States v. Brown. In this case, the Court of Appeals for the Eighth Circuit held that congressional power over federal lands included the authority to regulate activities on nonfederal public waters adjoining the federal lands when necessary to protect wildlife and visitors on federal property. The court relied on the Kleppe decision which forecast the principle that, if regulation were required to protect federal lands, the Property Clause would be broad enough to reach beyond territorial limits. The Brown/Kleppe rationale is equally applicable to state CZMA efforts to manage coastal zone resources adjacent to excluded federal lands. Should a state's initiatives jeopardize the protection of such lands, the federal government could step in and assert that the Property Clause extends extraterritorially into the coastal zone to supersede state law.

A contrasting concern is that states may become overzealous in attempting to protect coastal resources, thereby frustrating federal policy encouraging federal land development. This concern is most apparent in the energy development area, and is illuminated by pending litigation in California. On September 9, 1977, the American Petroleum Institute, the Western Oil and Gas Association, and a number of their member oil and gas companies brought suit against NOAA to prevent approval of California's coastal management program.

180. See Hunt v. United States, 278 U.S. 96 (1928), and New Mexico State Game Comm'n v. Udall, 410 F.2d 1197 (10th Cir.), cert. denied, 396 U.S. 961 (1969).
182. Id.
183. Id. at 822.
185. Some commentators have suggested even bolder action, calling for federal intervention and coastal planning in the event a coastal state fails to address adequately national environmental interests in any area of the coastal zone. See Chasis, Who's Minding the Shore, in 4 Coastal Zone '78, Symposium on Technical, Environmental, Socioeconomic and Regulatory Aspects of Coastal Zone Management 2663 (1978) (published by the American Society of Civil Engineers). The author, an attorney with the Natural Resources Defense Council, Inc., recommends amendment of CZMA to require the federal government to develop an environmentally sensitive coastal program for a state when the state fails to protect sufficiently natural resources along the coast. See also A. Simon, The Thin Edge, Coast and Man in Crisis, Chapter 10 (1978).
186. American Petroleum Inst. v. Knecht, Civil No. 77-3375-RJK (D.C. Cal., complaint filed September 9, 1977). The California coastal management program was eventually ap-
Plaintiffs argued, in part, that the state had not given adequate consideration to the national interest in the planning for and siting of energy facilities and as a result, the state's exercise of federal consistency authority would frustrate oil and gas development on the Outer Continental Shelf adjacent to California. This argument could also apply to potential state impairment of development efforts on excluded federal coastlands.

Shortly after this litigation was initiated, the U.S. Department of Energy, seeking authority to be the final arbiter of whether a coastal state had sufficiently and affirmatively addressed energy development needs within its coastal management program, circulated a proposed amendment to CZMA. Under the proposed scheme, a state coastal program could not be approved until the Energy Department was satisfied that the energy component of the program was adequate. Following interagency review and comment, the proposed amendment was withdrawn, but its import should not be forgotten. The Department of Energy initiative demonstrates a willingness on the part of the federal government to pressure states toward greater responsiveness to national interests.

CONCLUSION

If the dominant trend of recent congressional legislation permitting states to share the responsibility for management of federal coastlands is to continue, states must meet the challenge already offered. In brief, they must demonstrate a serious commitment toward achieving national goals within the context of state coastal management efforts. This objective is particularly critical with respect to federal coastlands since these areas are not the private domain of the states proved by NOAA, but only after the district court stayed application of the federal consistency provisions pending final judgment in the case.

187. Plaintiffs argued in the district court that, by virtue of CZMA, California was obliged to provide a commitment to accommodate energy facilities within its coastal zone. NOAA rejected this interpretation of the Act declaring that it was sufficient for the California coastal program to contain directives which demonstrate that energy facilities in the national interest would not be unreasonably excluded from the coastal zone. Federal Defendants' Motion for Summary Judgment and Memorandum of Law in Support of Motion for Summary Judgment, Civil No. 77-3375-RJK, at 45-54 (C.D. Cal., motion filed Dec. 19, 1977).

In a Memorandum of Decision and Order the district court sustained the position of the federal defendants. 456 F. Supp. 889, 12 ERC 1193 (C.D. Cal. 1978).


188. See note 60 supra, comparing Outer Continental Shelf development with exploitation of the resources on excluded federal lands.

189. [1977] 8 E N V I R. REP. (BNA) 1020. NOAA strongly criticized the measure arguing that it would undermine the conservation thrust of CZMA by overly emphasizing the energy facility siting aspects of the program.
within which they are situated, but instead are held in trust for the benefit of the nation.

If coastal states fail to exert a strong effort to achieve a cooperative approach to the management of coastal resources, future judicial and legislative decrees may set aside narrowly conceived, parochial state actions. As demonstrated by the *Brown decision*,\(^\text{190}\) such pronouncements may not only apply to federal coastlands, but also to adjoining state coastal zone areas whose use is vitally interrelated with the management of federal coastlands.

Although a problem exists concerning intergovernmental management of federal coastlands, this Article has attempted to show that the underlying difficulties do not result from state inability to influence management decisions, but rather from state failure to utilize fully existing authority. Part of the blame must also rest with federal land management agencies which traditionally have failed to promote comprehensive intergovernmental coordination.

In the final analysis, the way to ensure a viable, continuing federalism in the management of such lands is for states to exercise, in cooperation with the federal government, their full range of powers in a manner which will concurrently serve state coastal management goals and recognize the unique national interests associated with federal coastlands. Federalism offers both an opportunity and a responsibility. It may be retained and enhanced by careful administration, but it may also be undermined by state action which does not fully address national interest considerations. If the CZMA experiment in state planning for the nation's coastal resources is to move forward, coastal states must pursue a policy which confirms the value of a federal-state partnership in the management of federal coastlands.

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\(^{190}\) See notes 181-83 *supra* and accompanying text.