SUPPORT YOUR LOCAL SHERIFF: FEDERALISM AND LAW ENFORCEMENT UNDER THE FEDERAL LAND POLICY AND MANAGEMENT ACT

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"What we do with the public lands of the United States tells a great deal about what we are—what we care for—and what is to become of us as a nation."[1]

Senator Henry M. Jackson

"If a Bureau field man spots a hundred minibikes wrecking the side of a mountain or catches someone walking off with a rock adorned with petroglyphs, his only recourse is to hop in his truck, drive to the nearest sheriff's office or police station, collar an officer of the law, and bring him back to the scene of the crime—by which time, of course, the dust of the minibikes would have settled and the rock be either gone or tossed on the ground."[2]

Charles S. Watson, Jr.

"BLM . . . doesn't even have the money nor the personnel to fulfill its responsibilities of land management, let alone launch into the field of part-time, eventually full-time law enforcement."[3]

U.S. Representative James Santini

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1. 121 CONG. REC. 1857 (1975) (remarks of Sen. Jackson), *reprinted in* SENATE COMM. ON ENERGY & NATURAL RESOURCES, 95TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, at 64 (1978) [hereinafter cited as FLPMA LEGISLATIVE HISTORY].

2. T. WATKINS & C. WATSON, JR., THE LANDS NO ONE KNOWS 143 (1975).

3. Transcript of Business Meeting of Subcomm. on Public Lands, House Comm. on Interior and Insular Affairs 281 (Sept. 8, 1975).

GENERAL SIGNIFICANCE OF FLPMA

The Federal Land Policy and Management Act of 1976 [FLPMA][4] represents a landmark achievement in the management of the public lands of the United States. For the first time in our history, one law provides comprehensive authority and guidelines for the management and protection of the federal lands and their resources administered by the Bureau of Land Management [BLM]. Since BLM manages more federal land than all other federal resource agencies combined, the new policies contained in FLPMA are particularly important.

One of the most significant policies set out in the Act is the strong and pervasive stress on cooperation and consultation by the federal land managers with state and local government officials. This general policy thrust is implemented in the enforcement authority set out in section 303 of FLPMA.[5] This section provides the basic enforcement authority needed by any land management agency including penalties such as fine, imprisonment, and injunctions to prevent persons from violating the Secretary of the Interior's regulations.[6] Similar authority has been available to the National Park Service and the United States Forest Service since 1905.[7] In addition, the Secretary is authorized to cooperate with state and local law enforcement officials.[8] This cooperation includes having state and local officials enforce federal regulations[9] and having the Secretary assist state and local officials by providing funding for state and local enforcement of state and local laws.[10]

Obviously, section 303 is a very important part of FLPMA. It has a number of significant features, some of which will be treated by other participants in this Symposium. This Article will discuss three basic aspects of section 303 in varying degrees of detail. First, the role of federalism in federal land management will be briefly discussed. Second, the various provisions of FLPMA dealing with federalism issues will be outlined. Finally, there will be a more detailed discussion of the federalism aspects of the provisions of subsections (c) and (d) of section 303.

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4. 43 U.S.C. §§ 1701-1782 (1976).
5. *Id.* § 1733.
6. *Id.* § 1733(a)-(b).
7. 16 U.S.C. §§ 10, 10a (1976); *see id.* §§ 471, 551.
8. 43 U.S.C. § 1733(c)(1)-(2) (1976).
9. *See id.* § 1733.
10. *See id.* § 1733(d).

GENERAL BACKGROUND OF FEDERAL-STATE RELATIONS IN FEDERAL LAND MANAGEMENT

Federal lands and resources are often located within one or a few states, although their development and use may be of vital national consequence.[11] In the foreseeable future, national needs and concerns will force the federal government to adopt resource policies in the national interest which may be inconsistent with the preferences or even the best interests of the localities where natural resources are found or used.

The past decade has seen the emergence of a new set of national issues involving federal lands and resources which are imposing serious strains on the fabric of state-federal relationships.

Today it is essential to reflect diverse state requirements in federal decisionmaking, to recognize and provide for mitigation of the disproportionate impacts of some policies on particular states, and to assist all of the states in coping with the impact of federal policies.

The national issues with the highest current visibility concerning federal lands involve the role of state government in federal programs and proposals to increase domestic energy self-sufficiency through development of federally owned energy resources. For the longer term, all these issues assume constitutional dimensions and involve fundamental problems: institutional arrangements for regional and national planning; balancing environmental concerns with developmental requirements; national, regional, and state allocation of costs and benefits; and the manner in which state concerns and interests are to be reflected and accommodated in national policies and decisions. These problems usually involve multistate or national interests which go beyond the jurisdiction or the financial and technical capabilities of single state governments. Examples include: (1) Regional environmental problems such as damage resulting from Outer Continental Shelf development, air pollution in the southwestern region, dedication of limited western water resources to industrial uses, and increasing salinity in the Colorado River and its tributaries; (2) development of regional energy resources such as western coal reserves, Alaska oil and gas, oil shale, and the Outer Continental Shelf for national purposes; and (3) the social, economic, and environmental impacts which affect particular states or regions disproportionately, such as the impact of using one region's resources for the benefit of other regions and the siting of nuclear and fossil fuel power plants, refineries, and strip mines. These

11. *See* PUBLIC LAND LAW REVIEW COMMISSION, ONE-THIRD OF THE NATION'S LAND 121-38 (1970) [hereinafter cited as PLLRC REPORT].

problems pose severe challenges but also present great opportunities for our federal-state system of government.

No comprehensive or satisfactory set of institutional arrangements has been developed to facilitate a coordinated federal and state governmental response to these issues. Traditionally, when the national consequences of particular developmental programs are discovered, a national program or policy is prepared in response. To the extent that the impacted states and regions are able to make their views known at the federal level—whether through public opinion, congressional influence, or legal obstruction of particular federal proposals—accommodation of state interests is made on a case-by-case or issue-by-issue basis. When the traditional approach fails, proposals for federal preemption are advanced, often without a genuine effort to resolve or accommodate potentially divergent federal and state interests.

Neither of the above approaches is satisfactory. Both create uncertainty, invite conflict, and impede orderly and logical planning at the federal and state levels. Neither directly addresses the difficult question of how best to resolve energy, natural resource, and environmental controversies which place national requirements in conflict with the individually affected state's economic, social, and environmental objectives.

Without greater cooperation between federal, state, and local levels of government to accommodate truly divergent needs and objectives, the likelihood of creative and enduring programs is greatly diminished.

Moreover, it is increasingly apparent that the country has neither the luxury of unlimited time nor unlimited resources in which to develop these programs. The responsibility for devising the kinds of procedures and institutions necessary to accommodate the economic, social, and environmental interests of both state and federal government rests with public officials at all levels of government. Yet, since these problems involve the use of federal lands and resources, Congress has a special responsibility. The challenge is also a great opportunity for progress.[12]

12. A number of recent laws dealing with federal lands, and particularly energy resources, illustrate how Congress has attempted to deal with the federalism issue.

(1) Coal. The federal government owns about half of the estimated recoverable coal reserves in the United States. In the past, production of these resources has been very limited. Now, however, there is great interest in development of federal coal deposits, which are located primarily in the western States. But many of these states have expressed great concern over the potential impact of large-scale strip mining on their environment and lifestyle; they fear a "boom and bust" cycle.

Congress has reacted to these concerns in several different ways. The action of greatest significance to date was the enactment, over President Ford's veto, of the Federal Coal Leasing Amendments Act. Pub. L. No. 94-377, 90 Stat. 1083 (codified at 30 U.S.C. §§ 181-287 (1976)). This act

GENERAL FEDERALISM PROVISIONS OF FLPMA

In addition to the enforcement provisions of section 303, FLPMA contains a variety of mandates and authorities dealing with federal-state relationships. The most important of these are numerous requirements dealing with land use planning which enunciate a basic national policy that "the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts."[13]

This policy is implemented by a number of specific provisions in the Act. The most important of these is the comprehensive directive in subsection 202(c)[14] that in the development and revision of the land use

established many new policy guidelines for leasing. These include a requirement that the Secretary consider the impacts of mining on the surrounding area including "impacts on the environment, on agricultural and other economic activities, and on public services." 30 U.S.C. § 201(a)(3)(c) (1976).

The 1976 leasing law also increased the share of mineral leasing revenues paid to the states from 37.5% to 50%. *Id.* § 191. The additional 12.5% is to be used by the states with "priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this Act for (1) planning, (2) construction and maintenance of public facilities, and (3) provision of public services." *Id.*

The long-sought surface coal mining legislation also addresses the question of federal-state relationships. In its twice-vetoed form the bill asserted exclusive federal jurisdiction over regulation of strip mining of federal coal. *See* CONFERENCE REPORT ON H.R. 25, § 523, S. REP. NO. 94-101, 94th Cong., 1st Sess. 56-57 (1975). There were, however, express provisions for cooperative agreements between the Secretary of the Interior and the states which could lead to single agency (federal or state) regulation of mining of federal, state, or private coal. *Id.*

In 1976 and early 1977, former Interior Secretary Kleppe entered into agreements with several states which allow them to regulate, under state law, mining of federal coal. Under these agreements, the Department, in effect, adopted state reclamation laws as a federal regulation. The states, as one might expect, take the position that state reclamation laws apply to federal lands in any event. The Department has always rejected that position. The issue has not been resolved by the courts.

The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.A. §§ 1201-1328 (Supp. 1978), expressly provides that states with federally approved reclamation programs may elect to regulate all surface coal mining within their borders, including mining of federal coal. *Id.* § 1273(c).

(2) Outer Continental Shelf Oil and Gas. During the next decade, development of conventional oil and gas from the United States Outer Continental Shelf may well provide the largest single source of increased domestic supply. The Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 (1978) (to be codified in scattered sections of 16, 43 U.S.C.), contains several directions for federal coordination with states. In fact, one of the stated purposes of the Act is to "assure that States, and through States, local governments, which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the Outer Continental Shelf." 43 U.S.C.A. § 1802(6) (West Supp. 1978). Among other provisions, the Act includes a complete section on coordination and consultation with state and local governments. *Id.* § 1345. This provision directs the Secretary to accept recommendations of a Governor if the Secretary determines "that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." *Id.* § 1345(c).

(3) National Forests. Although the National Forest Management Act of 1976, 16 U.S.C. §§ 1600-1614 (1976), was originally designed to establish guidelines for timber harvesting on national forests, it also contains several provisions dealing with federal-state relations. For example, state and local governments must review forest management plans. *Id.* § 1604(a).

13. 43 U.S.C. § 1701(a)(2) (1976).

14. *Id.* § 1712.

plans required by the Act as a basis for management activities, the Secretary shall coordinate with state and local governments and that "[l]and use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act."[15]

Although law enforcement is the principal focus of this Article, the legislative history of this land use planning "consistency" requirement gives considerable insight into the varied approaches to federalism considered by Congress during its development of FLPMA. Senate bill 507, as introduced[16] and reported by the Senate Interior Committee, simply required land use plans to be "coordinated so far as he [the Secretary] finds feasible and proper . . . with the land use plans . . . of State and local governments."[17] This language was amended on the Senate floor to add a requirement that the land use plans "consider current use and zoning patterns of land affected by the use of national resource lands." This addition was sponsored by Senator Packwood of Oregon and was endorsed by the National Association of Counties. The amendment was adopted by unanimous consent and with almost no debate.[18] Senator Packwood indicated that the language was "just a request to the Secretary that he consider what States and counties are planning when he does his own land use planning with public lands."[19]

The House Interior Committee, however, was prepared to give state and local plans a much stronger role by providing that "[l]and use plans . . . shall *conform to* State and local plans to the maximum extent consistent with Federal law and the purposes of this Act."[20] The Committee report adopted that position and further provided: "The responsibility for determining whether maximum conformance has been achieved is placed in the appropriate Secretary who is expected by the Committee to make every reasonable effort to achieve consistency."[21] Some Committee members, however, were troubled by the possible implications of the Committee language. Representative Morris Udall stated his concern that there would be no review over the adequacy of the state and local program.[22] Despite his misgivings, the

15. *Id.* § 1712(b)(9).
16. 121 CONG. REC. 1846 (1975).
17. *Id.* at 1848; S. REP. No. 94-583, 94th Cong., 1st Sess. 4 (1975).
18. 122 CONG. REC. 4048-49 (1976).
19. *Id.* at 4049.
20. H.R. 13777, 94th Cong., 2d Sess. § 202(b)(8) (1976) (emphasis added).
21. H.R. REP. No. 94-1163, 94th Cong., 2d Sess. 5 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6175-228.
22. H.R. REP. No. 94-1163, 94th Cong., 2d Sess. 23 (1976). Representative Udall stated:

> Federal consistency is a good concept and I strongly support it, but only where there is some review of the adequacy of the state and local program. For example, under the Coastal Zone Management Act, as under the proposed land use bill, Federal actions must be consistent with Management Programs developed by the State—but only after

Committee language was passed by the House of Representatives.

The Senate-House Conference Committee resolved the differing approaches without difficulty by adopting a compromise proposal[23] which made clear that the ultimate decision of determining "the extent of feasible consistency between BLM plans and such other plans rests with the Secretary of the Interior."[24] As the conferees' language makes clear, the compromise reflected the Senators' concern that the ultimate supremacy of the federal government and its laws with respect to federal lands be retained and recognized.[25]

Sales, exchanges, and other transfers of federal lands out of federal ownership must also be coordinated with state and local governments,[26] as must issuance of rights-of-way and establishment of transportation corridors.[27]

These requirements carry out the broad recommendation of the Public Land Law Review Commission [PLLRC]:

> State and local governments should be given an effective role in Federal agency land use planning. Federal land use plans should be developed in consultation with these governments, circulated to them for comments, and should conform to state or local zoning to the maximum extent feasible. As a general rule, no use of public land should be permitted which is prohibited by state or local zoning.[28]

In addition, FLPMA provides new opportunities for state and local governments to acquire federal lands needed for nonfederal public purposes, frequently at little or no cost.[29] Finally, FLPMA adds a provision to the revenue-sharing provisions of the Federal Coal Leasing Amendments Act[30] which provides for federal loans to state and local governments to meet mineral development impacts in advance of obtaining fifty percent of the leasing receipts.[31]

Each of these provisions could be the subject of more comprehensive treatment in the context of federalism. For our purposes here, however, it is now appropriate to begin to focus on the law enforcement

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the program is approved by the Secretary pursuant to the criteria of that Act. I therefore hesitate to approve the broad language of section 202 that will require federal conformance until such time as we have comprehensive land use planning for our non-federal lands.

23. FLPMA, LEGISLATIVE HISTORY, *supra* note 1, at 762.

24. *See* H.R. REP. No. 94-1724, 94th Cong., 2d Sess. 58 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6229-30.

25. "This affirmed the need to maintain the integrity of governing Federal laws and Congressional policies." *Id.*

26. 43 U.S.C. §§ 1713, 1716, 1718, 1720, 1791 (1976).

27. *Id.* §§ 1763, 1765.

28. PLLRC REPORT, *supra* note 11, at 61.

29. *See* 43 U.S.C. § 869 (1976).

30. 30 U.S.C. § 191 (1976).

31. 43 U.S.C. § 1747 (1976).

provision of FLPMA, particularly subsections 303(c) and (d).[32]

32. Essential to any discussion of federal-state relationships in law enforcement on federal lands is a clear understanding of legislative jurisdiction on those lands. For a detailed discussion of legislative jurisdiction, see REPORT OF ATTORNEY GENERAL, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES (1956).

The jurisdiction clause of the Federal Constitution, U.S. CONST. art I, § 8, cl. 17, provides that Congress shall have the power to exercise exclusive jurisdiction over such area, not exceeding 10 miles square, as may become the seat of government, and similar authority over all places acquired by the federal government, with the consent of the state involved, for federal works. *See* Kleppe v. New Mexico, 426 U.S. 529, 542 (1976); Pacific Coast Dairy v. Department of Agric., 318 U.S. 285, 294 (1943).

In 1841, Congress adopted Resolution 6, S.J. Res. 6, 27th Cong., 1st Sess., § 6, 5 Stat. 468 (1841) (current version at 40 U.S.C. § 255 (1976)), which required states to consent to exclusive federal legislative jurisdiction over properties acquired by the federal government on which it would place improvements. Anxious to have federal installations, such as post offices and arsenals within their boundaries, the state governments responded by enacting general consent statutes which were applicable to all land thereafter acquired by the federal government.

Through reservations in statehood acts and by outright cessions, the federal government has also acquired legislative jurisdiction over substantial acreages of public domain land to which the 1841 statute never applied. Nevertheless, the Supreme Court, in 1885, held such reservations and cessions to be constitutional, even though they were not covered by the jurisdiction clause. Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 541-42 (1885). It was unneccessary for the United States to request exclusive jurisdiction in order to obtain it. *Id.*

Federal administrators were reluctant to suggest the United States not accept exclusive jurisdiction over lands to which the state consent statutes were applicable. And, although most of the state consent statutes were amended over a period of time to provide for the reservation of some measure of jurisdiction, the result was that for a period of almost 100 years the United States obtained more than proprietorial jurisdiction over most of the lands acquired by it. At the same time, paradoxically, state jurisdiction continued to extend to the bulk of lands that had never left federal ownership.

In 1940, Resolution 6 was amended by Congress to eliminate the presumption of federal acceptance and to make acquisition of exclusive jurisdiction discretionary with federal administrators. Act of Feb. 1, 1940, ch. 18, 54 Stat. 19 (1940) (current version at 40 U.S.C. § 225(1976)). The amendment served to retard the acquisition of exclusive jurisdiction by the federal government on acquired properties. But it did not eliminate the practice entirely, since some federal administrators, perhaps from force of habit, failed to take affirmative action to refuse to accept the jurisdiction which automatically attached under the state statutes.

As a result of acquisitions under Resolution 6, the 1940 amendment, the status of public domain lands, and varied reservations by the states, there is now a hodgepodge of diverse shades of legislative jurisdiction over federal lands. There have evolved four general categories of federal jurisdiction: (1) Exclusive—the federal government possesses all of the state's authority except the right of the state to serve criminal and civil process in the area for activities occurring outside the area; (2) concurrent—the state grants to the federal government what would otherwise be exclusive jurisdiction, but reserves to itself the right to exercise concurrently the same powers; (3) partial—the federal government has been granted the right to exercise certain of the state's authority, with the state reserving the right to exercise by itself, or concurrently, other authority beyond the mere right to serve process; (4) proprietorial—the United States has acquired some right or title to an area within a state but no measure of the state's authority over the area. Where there has been piecemeal acquisition, more than one category of jurisdiction may be applicable in the same area.

Two other provisions of the Constitution are germane to the power which the federal government may exercise over its lands: The property clause, U.S. CONST. art. IV, § 3, cl. 2, and the supremacy clause, *id.* art VI, cl. 2.

While the property clause was originally thought to apply only to federally held lands outside the boundaries of any state, later judicial decisions leave no doubt that plenary authority is vested by this provision in Congress as to the protection, management, and disposition of federal lands within the states. *See* Kleppe v. New Mexico, 426 U.S. 529, 540, 543 (1976).

The Constitution, laws of the United States, and treaties made under its authority are declared to be the supreme law of the land in the supremacy clause. Conflicting state law must yield to federal law, and without the consent of Congress, a state cannot interfere with an agency or instrumentality of the United States engaged in a lawfully authorized activity. Congress, therefore, is authorized to pass laws with respect to the administration of the property of the United States, and no state may interfere with the exercise of that power by the United States. The only limitations on this authority are those contained in the Bill of Rights.

THE FEDERAL-STATE COOPERATIVE PROVISIONS OF THE ENFORCEMENT SECTION

Subsections (c) and (d) of section 303 are the FLPMA provisions that deal directly with the federalism issue in law enforcement on public lands.[33] In order to fully appreciate why Congress enacted these provisions one must take a look at the development of the concepts involved. The most appropriate place to begin is the 1970 report of the Public Land Law Review Commission.[34]

PLLRC Report

The Commission identified the lack of authority to enforce laws

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Most of the public lands administered by the Secretary of the Interior through the BLM fall within the proprietary jurisdiction category. In other words, state and local laws, as well as federal laws, apply to these lands. This fact is, of course, the basic premise behind provisions of subsection 303(d), 43 U.S.C. § 1733(d) (1976). It is also recognized and maintained by subsection 701(g) of FLPMA which provides that nothing in the Act "shall be construed . . . as a limitation upon any State criminal statute or upon the police power of the respective States, or as derogating the authority of a local police officer in the performance of his duties, or as depriving any State or political subdivision thereof of any right it may have to exercise civil and criminal jurisdiction on the national resource lands." *Id.* § 1701 note.

The reference to "national resource lands" is an inadvertant retention of language from the Senate-passed version of the Act. In view of the conference report agreement to use the term "public lands" rather than "national resource lands" this language is muddied. However, it is clear that the intent of the law runs to the lands defined in the law as "public lands."

33. The statutory language is as follows:

> (c)(1) When the Secretary determines that assistance is necessary in enforcing Federal laws and regulations relating to the public lands or their resources he shall offer a contract to appropriate local officials having law enforcement authority within their respective jurisdictions with the view of achieving maximum feasible reliance upon local law enforcement officials in enforcing such laws and regulations. The Secretary shall negotiate on reasonable terms with such officials who have authority to enter into such contracts to enforce such Federal laws and regulations. In the performance of their duties under such contracts such officials and their agents are authorized to carry firearms; execute and serve any warrant or other process issued by a court or officer of competent jurisdiction; make arrests without warrant or process for a misdemeanor he has reasonable grounds to believe is being committed in his presence or view, or for a felony if he has reasonable grounds to believe that the person to be arrested has committed or is committing such felony; search without warrant or process any person, place or conveyance according to any Federal law or rule of law; and seize without warrant or process any evidentiary item as provided by Federal law. The Secretary shall provide such law enforcement training as he deems necessary in order to carry out the contracted for responsibilities. While exercising the powers and authorities provided by such contract pursuant to this section, such law enforcement officials and their agents shall have all the immunities of Federal law enforcement officials.
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> (2) The Secretary may authorize Federal personnel or appropriate local officials to carry out his law enforcement responsibilities with respect to the public lands and their resources. Such designated personnel shall receive the training and have the responsibilities and authority provided for in paragraph (1) of this subsection.
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> (d) In connection with the administration and regulation of the use and occupancy of the public lands, the Secretary is authorized to cooperate with the regulatory and law enforcement officials of any State or political subdivision thereof in the enforcement of the laws or ordinances of such State or subdivision. Such cooperation may include reimbursement to a State or its subdivision for expenditures incurred by it in connection with activities which assist in the administration and regulation of use and occupancy of the public lands.

43 U.S.C. § 1733(c)-(d) (1976).

34. *See* PLLRC REPORT, *supra* note 11.

and regulations governing use of public lands as one of the major problems of public land management. It also stressed the urgent need for such authority caused by rapidly increasing public use of the public lands. In its discussions of environmental protection[35] and outdoor recreation,[36] the Commission underscored the need for such authority. The Commission believed that enforcement was a federal responsibility:

> In the absence of trained personnel such as those employed by the National Park Service, increased use of public lands places disproportionate burdens on local police authorities. When the Federal Government, through the development of recreation facilities attracts additional people to an area, it should assume the responsibility of regulating and controlling them.[37]

The Commission also recognized the basic need to clarify the laws relating to trespass or unauthorized use of public lands,[38] pointing out that when there are no governing federal statutes, state law concerning trespass is applicable where the state has not ceded legislative jurisdiction to the federal government. State statutes vary widely. Penalties for the same trespass may be greater in one state than another. Some states have very strict procedural requirements, while those of other states are very informal.

Those who use the public lands and those who administer them are entitled to a clear expression of policy concerning trespass and a more uniform expression of operating rules. For example, operating "dune buggies" on federal lands might be treated as a trespass by one agency but ignored by another agency on similar lands in different areas. Clear definitions, uniformly applied, would make violations more easily identifiable and permit more expeditious enforcement action. The Commission concluded: "Statutes and administrative practices defining unauthorized use of public lands should be clarified, and remedies available to the Federal Government should be uniform among land management agencies. Where necessary, statutory authority for policing by Federal agencies should be provided."[39]

Section 303 of FLPMA, of course, implements this recommendation with respect to public lands. It is interesting to note that subsection 303(g) expresses for the first time the basic rule that "[t]he use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary or other responsible authority, or

35. *Id.* at 85-86.
36. *Id.* at 206-07.
37. *Id.* at 207.
38. *Id.* at 259-60.
39. *Id.* at 259.

contrary to any order issued pursuant to any such regulation, is unlawful and prohibited."[40]

Congress Acts on National Forests

The next step in the move toward enforcement authority for public lands occurred in 1971, when Congress passed the so-called State and Local Law Enforcement Act.[41] This Act authorizes the Secretary of Agriculture to cooperate with any state or political subdivision in the enforcement of local law on lands within the national forest system. Such cooperation may include reimbursement for expenditures incurred in connection with activities on such lands. As can be easily seen by comparing their language, the 1971 Act is the model for subsection 303(d) of FLPMA.[42]

The initiative for this Act came from Congressman Johnson of California whose district contained national forest lands heavily impacted by recreation users. Both the House and Senate committees involved saw the legislation as meeting an urgent need in a way that best protected the interests of the public and the federal, state and local officials involved.[43]

As will be seen, the same situation was taking place on BLM-ad-

40. 43 U.S.C. § 1733(g) (1976).

41. Act of Aug. 10, 1971, Pub. L. No. 92-82, 85 Stat. 303 (codified at 16 U.S.C. § 551(a) (1976)).

> The Secretary of Agriculture, in connection with the administration and regulation of the use and occupancy of the national forests and national grasslands, is authorized to cooperate with any State or political subdivision thereof, on lands which are within or part of any unit of the national forest system, in the enforcement or supervision of the laws or ordinances of a State or subdivision thereof. Such cooperation may include the reimbursement of a State or its subdivision for expenditures incurred in connection with activities on national forest system lands. This Act shall not deprive any State or political subdivision thereof of its right to exercise civil and criminal jurisdiction, within or on lands which are a part of the national forest system.

42. *Id. Compare* 16 U.S.C. § 551(a) (1976) *with* 43 U.S.C. § 1773(d) (1976).

43. H.R. REP. No. 92-233, 92d Cong., 1st Sess. 2-3 (1971); S. REP. No. 92-312, 92d Cong., 1st Sess. 1-2 (1971), *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 1376-79.

The following excerpts from the House Committee Report clearly indicate the problems addressed and the factors considered in arriving at the policy expressed by the Act:

> Unfortunately, lands of the National Forest System are experiencing what appears to be a national trend toward more vandalism, destruction of property, theft and personal assaults. With the large influx of national forest visitors, many of whom are visitors from other States, formidable problems of law enforcement are occurring.
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> From the trend established over the past few years, it is obvious that visitations to recreation areas will continue to increase annually. It is obvious, also, that as tourism increases in these areas, needed protection for the individual tourist will also increase.
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> Forest rangers are not trained to be police officers, and should not be doing the work required of regular law enforcement officers. Since the State and local governments are straining now to provide what service they can, the Forest Service has tried to bridge the gap. It is trying to assume a responsibility that the State and local governments want to shoulder, but cannot because of limited funds.
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> Of course, these problems could be met by substantially increasing the number of Federal law enforcement officers. It is believed, however, with the enactment of H.R.

ministered public lands. Both the Administration and the Congress felt that a similar authority should be granted to the Secretary of the Interior. Thus, they included in the enforcement section the provisions of subsection 303(d) of FLPMA[44] which are a refinement of the 1971 Act.

Legislative History of Subsections 303(c) and (d)

The legislative history of FLPMA goes back to the late 1950's. It includes the historic exchange of letters between President Kennedy and House Interior Committee Chairman Wayne Aspinall in 1962 and 1963,[45] which led to the enactment of the Wilderness Act of 1964,[46] the establishment of Public Land Law Review Commission,[47] and the two very important "interim" public land laws—the Classification and Multiple Use Act[48] and the Public Land Sales Act in 1964.[49] Although these laws did not directly address the enforcement issue, they laid the foundation for the first truly comprehensive, permanent proposal for public land management made by any Administration. That proposal was submitted to Congress in July 1971 by the Nixon Administration.[50]

The enforcement provisions of this draft legislation[51] are the fore-

3146, the enforcement of the laws would be retained by State and local authorities, which is the logical source for enforcing basic criminal and civil law.

Therefore, the committee believes that H.R. 3146 offers a much more realistic and reasonable solution to the problem, one which is compatible with a sound philosophy of local, State, and Federal governmental relations. The bill gives the Secretary of Agriculture authority to reimburse State and local governments for law enforcement expenses incurred on National Forest System lands, and in no way interfere with the rights of the State and local governments to exercise civil and criminal jurisdiction. If the public and National Forest System lands are to be protected, and they have to receive this protection, then it is imperative that the proposed legislation be enacted.

H.R. REP. No. 92-233, 92d Cong., 1st Sess. 2-3 (1971).

44. 43 U.S.C. § 1733(d) (1976).

45. FLPMA LEGISLATIVE HISTORY, *supra* note 1, at iv-v.

46. Pub. L. No. 88-577, § 2, 78 Stat. 890 (1964) (codified at 16 U.S.C. §§ 1131-1136 (1976)).

47. Pub. L. No. 88-606, § 4, 78 Stat. 983 (1964) (codified at 43 U.S.C. §§ 1391-1400 (1976)).

48. 43 U.S.C. §§ 1411-1418 (1976).

49. *Id.* §§ 1421-1427 (1976). *See* Harvey, *Public Land Management Under the Classification and Multiple Use Act*, 2 NAT. RESOURCES L. 238 (1969).

50. FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 1172.

51. *Id.* § 11, at 1179-80.

(a) Violations of regulations which may be adopted for the purpose of protecting the national resource lands, other public property, and the public health, safety and welfare and identified by the Secretary as being subject to the sanctions provided for by this section shall be deemed to be a misdemeanor and shall be punishable by a fine of not more than $10,000 or imprisonment for not more than one year, or both. Any persons charged with the violation of such regulations may be tried and sentenced by any United States commissioner or magistrate designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in 18 U.S.C. 3401.

(b) At the request of the Secretary, the Attorney General may institute a civil action in a district court of the United States or the highest court in a U.S. territory for an injunction or other appropriate order to prevent any person from utilizing the national resource lands in violation of regulations issued under this Act.

(c) The Secretary may designate and authorize employees as special officers who may make arrests or serve citations for acts committed on the public lands which are in violation of regulations identified pursuant to subsection 11(a).

runners of subsections 303(a), (b), and (c)(2) of FLPMA.[52] Section 4 of this proposal became subsection 303(g) of FLPMA.[53] Significantly, neither the 1971 proposal nor the bills reported by the Senate[54] and the House[55] committees contain anything similar to subsection 303(c)(1)[56] or 303(d)[57] of FLPMA.

In 1973, the Nixon Administration resubmitted its proposal for a National Resource Lands Management Act in Senate bill 1041.[58] Section 311[59] of that proposal included language similar to the State and Local Law Enforcement Act.[60] By then, however, the Administration had fallen behind Senator Jackson,[61] who, on January 18, 1973, introduced Senate bill 424, which provided even more comprehensive enforcement authority.[62] In fact, the Jackson bill contained all of the basic provisions of subsection 303 of FLPMA except those portions of subsection 303(c) dealing with use of state and local officials to enforce federal laws and regulations.[63]

During the 93d Congress only the Senate took positive action on the public land management issue, including the enforcement questions. On July 8, 1974, the Senate passed the Jackson bill on a vote of seventy-one to one.[64] Section 308 of the bill was identical to subsection 303(d) of FLPMA.[65]

(d) Upon the sworn information by a competent person, any United States commissioner, magistrate, or court of competent jurisdiction may issue process for the arrest of any person charged with the violation of law or the designated regulations. Nothing herein shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken in the act of violating the law or the designated regulations.

Id.

52. *Compare id. with* 43 U.S.C. § 1733 (1976).

53. *Compare* FLPMA LEGISLATIVE HISTORY, *supra* note 1, § 4, at 1176, *with* 43 U.S.C. § 1733(g) (1976).

54. *See* S. REP NO. 92-1163, 92d Cong. 2d Sess. (1972). Section 11 of Senate Bill 2401 was identical to Secretary Morton's proposal except that the fine was not more than $1,000 instead of $10,000.

55. *See* H.R. REP. NO. 92-1306, 92d Cong., 2d Sess. (1972). Section 406 of House Bill 7211 was identical to section 11 of Senate bill 2401.

56. 43 U.S.C. § 1733(c)(1) (1976).

57. *Id.* § 1733(d). The Committee bills did contain enforcement authority but neither bill was considered on the Senate or House floors.

58. S. 1041, 93d Cong., 1st Sess. (1973), *reprinted in* FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 1491-1527.

59. *Id.* § 311, at 21, *reprinted in* FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 1511.

60. Act of Aug. 10, 1971, Pub. L. No. 92-82, 85 Stat. 303 (codified at 16 U.S.C. § 551a (1976)).

61. Chairman of the Senate Committee on Interior and Insular Affairs.

62. S. 424, 93d Cong., 1st Sess. (1973), *reprinted in* FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 1475-90.

63. *Compare id.* at 1485-87 *with* 43 U.S.C. § 1733 (1976).

64. FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 1759-60. The bill as passed is in *id.*, at 1703-59.

65. *Compare id.* at 1711 *with* 43 U.S.C. § 1733(d) (1976).

The Committee report set forth its rationale from this provision:

Visitors and property on national resource lands are entitled to protection under State law; but, in the past, State and local law enforcement officials have not policed the national resource lands with any degree of regularity. This is largely because these offi-

The 94th Congress Acts

The 94th Congress began the process all over again. This time the effort was to be, at long last, crowned with success. Thus, the legislative history compiled in 1975 and 1976 gives the critical indications of the concerns and problems considered by Congress and its intent in formulating the enforcement provisions that actually were enacted into law. The following discussion will identify and describe the very different approaches taken by the House of Representatives and the Senate on this issue, and set out the rationale for the resolution of those differences. Together with the background already set forth, this material will serve to explain the particular and unusual approach to the question of federalism in enforcement which Congress adopted in FLPMA.

Senate Action in the 94th Congress. Senate action in the 94th Congress began with introduction of Senate bill 507 by Senators Haskell, Jackson, and Metcalf on January 30, 1975.[66] As introduced, the bill contained enforcement provisions[67] virtually identical to the Jackson bill as passed by the Senate the year before.[68] In their introductory statements both Senators Jackson and Haskell stressed the importance of the enforcement authority.[69] Senator Jackson pointed out "the appalling absence of the enforcement authority so necessary for any land management agency."[70]

The Senate Interior Committee reported Senate bill 507 to the Senate on December 18, 1975.[71] Changes were neither recommended nor made to sections 307 and 308 prior to passage in the Senate on February 25, 1976.

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cials' constituents—the local citizenry—do not live on those lands. Furthermore, most State and local law enforcement programs suffer from a chronic shortage of funds and manpower. Most national resource lands are relatively extensive in size and sufficiently remote to make their policing expensive. Therefore, many State and local law enforcement officials reach these lands only during rescue operations or special calls.

In order to make the policing of national resource lands more attractive to State and local law enforcement personnel, section 308 would provide the Secretary with the authority to contract (and thus pay) for it. Under this section, State and local law enforcement agencies would be reimbursed for extraordinary services. Normal law enforcement duties would continue to be supplied by State and local personnel on a nonreimbursable basis.

S. REP. No. 93-873, 93d Cong., 2d Sess. 48 (1974), *reprinted in* FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 1580.

66. S. 507, 94th Cong., 1st Sess. (1975) (codified at 43 U.S.C. § 1701-1782 (1976)). The bill appears in 121 CONG. REC. 1847-56 (1975), *reprinted in* FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 54-63.

67. 121 CONG. REC. 1850-51 (1975), *reprinted in* FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 57-58.

68. *Compare id. with* FLPMA LEGISLATIVE HISTORY, *supra* note 1, § 308, at 1711.

69. 121 CONG. REC. 1846-47, 1857-58 (1975).

70. *Id.* at 1857. The Ford Administration, as the Nixon Administration did previously, supported the bill. S. REP. No. 94-583, 94TH CONG., 1ST SESS. 90-109 (1975).

71. S. REP. No. 94-583, 94th Cong., 1st Sess. 90-109 (1975).

The rationale for section 307 was to provide the Department of the Interior the needed enforcement power to regulate the public lands.[72] The rationale behind section 308 was identical to that advanced in the Jackson bill.[73] The Senate saw no reason to withhold from the BLM the enforcement authority that other federal land management agencies had possessed for years. At the same time, it recognized that BLM personnel lacked the training and experience of state and local law enforcement officers.

House of Representatives Action in the 94th Congress. While the Senate was in the process of approving enforcement provisions that strongly resembled those proposed by the Nixon and Ford Administrations, the House of Representatives was striking out in a different direction—at least with respect to the respective roles of BLM and state and local officials in enforcement of federal laws and regulations governing use of federal lands. The FLPMA predecessors, originally introduced in the House during the 94th Congress, contained law enforcement provisions that were essentially the same as those in Senate bill 507 and the Administration proposals.[74] Both bills[75] called for federal enforcement of federal laws and regulations, as did the Senate and Administration bills.[76] All authorized federal help for state and local enforcement of state and local laws as did the 1971 Act for national forest lands. This was, of course, eventually to become subsection 303(d) of FLPMA.[77]

During the hearings on these bills, however, House Committee members, led by Representative James Santini of Nevada, began to express serious reservations about federal enforcement of federal laws on public lands:

> One final issue . . . pertains to the conferring of law enforcement authority upon the Bureau of Land Management. I would like to invite your comments because I shared, yesterday, the apprehensions of many people in the State of Nevada . . . that this would propose an encroachment of a large, Federal armed force coming on the land . . . a Federal army upon our State.

72. *Id.* at 57-58. The detailed discussion of the purposes of section 307 of S. 507 together with the Committee's rationale for including it in the legislation is set out at S. REP. No. 94-583, 94th Cong., 1st Sess. 90-109 (1975).

73. *Compare* S. REP. No. 94-583, 94th Cong., 1st Sess. 60 (1975) *with* S. REP. No. 93-873, 93d Cong., 2d Sess. 48 (1974).

74. *Compare* H.R. 5224, 94th Cong., 1st Sess. § 307 (1975) *and* H.R. 5622, 94th Cong., 1st Sess. §§ 307, 308 (1975) *with* S. 507, 94th Cong., 1st Sess. § 307 (1975), S. 1041, 93d Cong., 1st Sess. § 311 (1973) *and* S. 424, 93d Cong., 1st Sess. §§ 307, 308 (1973) (reported in FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 1711).

75. H.R. 5224, 94th Cong., 1st Sess. § 307 (1975); H.R. 5622, 94th Cong., 1st Sess. §§ 307, 308 (1975).

76. See note 66 *supra.*

77. *Compare* H.R. 5224, 94th Cong., 1st Sess. § 308 (1975) *and* H.R. 5622, 94th Cong., 1st Sess. § 308 (1975) *with* 43 U.S.C. § 1733(d) (1976).

> You can appreciate my constituents' sensitivity. I don't think it is necessary. I can't quite buy a biologist being turned into a law enforcement officer . . . .[78]

Representative Santini went on to suggest that the best approach would be to place the primary responsibility for enforcement on state and local officials, with federal employees participating only if necessary to supplement them. One of the major stated concerns spurring his approach was a fear that inexperienced and untrained land managers would be carrying firearms.[79] Santini also pointed out that state and local officials were just as concerned as federal land managers about damage to the public lands—perhaps even more so.[80]

As the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs began to mark up the legislation, Representative Santini continued to pursue the enforcement issue. He advocated a policy of requiring the Secretary of the Interior to hire state or local law enforcement officials to enforce federal laws and regulations on federal lands. The basic purpose of this approach was acceptable to the other subcommittee members. However, members were concerned that the provision could prevent the Secretary from enforcing the law himself through BLM employees. Subcommittee Chairman Representative John Melcher suggested a compromise to make it clear that the federal officials could be the enforcers if state or local officials were not interested.[81]

The language ultimately developed by the Subcommittee was contained in section 302 of House bill 13777,[82] which was introduced by Representative Melcher on May 13, 1976. That bill was a "clean bill"[83] and was reported by the House Interior Committee two days later.[84]

Subsection 302(d) of House bill 13777 was identical to Senate bill

78. *Public Land Policy and Management Act of 1975: Hearings on H.R. 5224 Before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs*, 94th Cong., 1st Sess. 240 (1975).

79. *Id.* at 242.

80. Mr. Santini stated:

> [Y]ou have existing law enforcement agencies from the State police down through the county sheriff in every county, in every Bureau of Land Management use area; at least in my State and we represent the second largest area.
>
> I walked over much of that land in the last campaign and conferred, talked and visited the local law enforcement agencies. They are receptive and they are concerned. They share a common concern in terms of trespasser abuse of public lands. To them in the county that land is far more important to them than to the Bureau of Land Management officials in Reno or Las Vegas. They are seeing some of the violations committed.

Id. at 243.

81. Transcript of Business Meetings of Subcomm. on Public Lands, House Comm. on Interior and Insular Affairs (July 29, Sept. 8-9, 1975).

82. H.R. 13777, 94th Cong., 2d Sess. § 302, 53-56 (1976).

83. A "clean bill" is the result of committee mark-up of previous bills, and is, in effect, the legislative language that the committee has agreed to report.

84. H.R. REP No. 94-1163, 94th Cong., 2d Sess. § 302, 55-59 (1976).

507 as passed by the Senate, and became subsection 303(d) of FLPMA.[85] Thus, both the Senate and the House agreed, in effect, to extend the provisions of the 1971 law dealing with national forests to the public lands administered by BLM.[86] Obviously, federal cooperation and financial assistance to state and local officials enforcing *state* and *local* law on federal lands was not controversial. The House committee report urged the Secretary to use this authority.[87]

However, state enforcement of *federal* laws and regulations on federal lands was a different matter. Subsection 302(c) of House bill 13777 took a drastically different tack than the Administration or the Senate.[88] Unlike Senate bill 507, House bill 13777 would have required the Secretary to contract with state and local law enforcement officials to enforce federal laws and regulations on federal lands.[89] In addition, the House would have given the state officials all of the powers the BLM officials would receive under Senate bill 507.[90]

The Committee report did not do much to amplify the intent of subsection 302(c).[91] However, the dissenting views make it clear that the concept of state and local enforcement of federal law on federal land was not acceptable to several Committee members. Representative John Seiberling and seven other members set out their views that the BLM employees had inadequate authority to enforce the rules and regulations on public land. They still must call the local sheriff, who may be miles away, to arrest persons who break regulations and destroy the lands. Moreover, the Secretary must only offer reasonable contracts with state enforcement personnel when they are needed with-

85. *Compare* H.R. 13777, 94th Cong., 2d Sess. § 302 (1976) *with* S. 507, 94th Cong., 1st Sess. § 308 (1975) *and* 43 U.S.C. § 1733(d) (1976).

86. *Compare* 43 U.S.C. § 1733(d) (1976) *with* 16 U.S.C. § 551a (1976).

87. The Committee expects the Secretary of the Interior to construe this authority broadly, for the purpose is to provide financial assistance to States and their subdivisions where the existence of large areas of public lands deprives the governmental entity of adequate enforcement of laws and ordinances as they apply to the public lands.

H.R. REP. NO. 94-1163, 94th Cong., 2d Sess. 15 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6189.

88. *Compare* H.R. 13777, 94th Cong., 2d Sess. § 302(c) (1976) *with* S. 507, 94th Cong., 1st Sess. § 301 (1975).

89. *Id.*

90. *Id.* See note 41 *supra*.

91. Subsection (c) provides the Secretary of the Interior with authority to enforce his regulations and for that purpose to execute and serve warrants, make arrests, and engage in search and seizure under prescribed conditions and rules. However, it directs the Secretary to rely to the maximum feasible degree on State and local law enforcement officials for enforcement under this section. To this end, he will offer mutually acceptable contracts to those officials willing and able to take on this work on a reimbursable basis. In the absence of such contracts, the Secretary will provide for law enforcement by Federal personnel. The Secretary is directed to provide adequate training to those upon whom he relies for law enforcement.

H.R. REP. NO. 94-1163, 94th Cong., 2d Sess. 15 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6189.

out stating what qualifications the state personnel must possess.[92] As we will see, the House amended the provision to coincide more closely with the Senate version.

The House floor debate on House bill 13777 took place on July 22, 1976.[93] Representative Seiberling immediately announced his intention to amend the provisions of subsection 302(c). Seiberling objected to the policy of having the BLM rely on state and local enforcement personnel. He proposed to amend the section so that the Secretary would not have to contract with state personnel every year. Moreover it would allow him to "designate trained federal personnel" as law enforcement officers to assure that the laws are adequately enforced.[94]

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92. The dissenting view stated:

> Although one of the most objectionable provisions of this section was partially cleaned up by the Committee—pertaining to enforcement of regulations by the Secretary—the section remains unworkable. At present, Bureau of Land Management employees have totally inadequate authority to enforce laws and regulations relating to the natural resources of the public lands, such as destruction of archeological sites, harassment of wildlife, destruction of land by off-road vehicles. Normally, the only remedy available for BLM officials is to make a citizen's arrest or call the local sheriff, who may be many miles distant and who also may be philosophically unsympathetic to Federal regulations.
>
> This bill does nothing to improve that situation. It directs the Secretary to offer "reasonable" contracts to state and local law enforcement officials whenever their help is needed to enforce Federal laws and regulations. *Only* if those authorities *refuse* such a contract can the Interior Department exercise enforcement authority. Thus BLM officials would *still* have to call the local sheriff.
>
> Furthermore, there is no assurance or requirement in the bill that the local enforcement authorities will have the necessary qualifications for carrying out these added responsibilities, especially for those concerning resource management. Indeed, the Secretary cannot even take into account past unsatisfactory performance as a reason for not offering the contract. Nor, in the draft of the Committee report which we reviewed, was there any definition of what a "reasonable" contract would consist of.
>
> For many years the National Park Service, U.S. Forest Service and Fish and Wildlife Service have had effective enforcement authority on the lands they manage. Curiously, the bill gives the necessary authority for the California Desert but does not do so for the rest of our public lands, where the same kinds of problems exist.

H.R. REP. No. 94-1163, 94th Cong., 2d Sess. 233-34 (1976).

93. The debate may be followed in 122 CONG. REC. 23435-508 (1976).

94. 122 CONG REC. 23436 (1976), *reprinted in* FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 669. Representative Seiberling set out the situation as follows:

> The BLM currently has very limited law enforcement authority, mainly relating to the protection of certain animals and resources on the public lands. Yet with increased public use of these lands, crimes of all types are increasing—crimes against people as well as against natural resources. A BLM employee can witness a crime being committed, but the most he can do is either drive many miles to the local sheriff or else make a citizens arrest, which throws him into personal jeopardy, both legal and physical. In many cases it is extremely difficult to convince local officials to enforce Federal laws and regulations, since often there are no corresponding State laws and since the local officials do not have the immunities of a Federal officer.
>
> Except for the California desert, H.R. 13777 does very little to improve this situation. The bill would require the Interior Department to rely to the maximum practicable extent on State and local police to enforce Federal laws and regulations. It requires the Secretary to annually negotiate and offer a reasonable law enforcement contract to State and local enforcement officials. Only if the officials lack authority to contract or decline the Secretary's contract, could the Secretary designate Federal personnel to enforce Federal laws or regulations.
>
> I intend to offer an amendment that would clarify the Secretary's authority for law enforcement. It would still require the Secretary to achieve maximum feasible reliance

When the Seiberling amendment[95] was being debated, Representative Santini attacked it as leading to establishment of a "federal police force" in an agency (BLM) which was already beleaguered and undermanned. The better position, he argued, would be to allow the local enforcement personnel who live on the land and are trained in law enforcement to enforce the federal laws on the public domain.[96]

The amendment was adopted over Representative Santini's protest and House bill 13777 passed.[97] The stage was now set for a Senate-

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upon local law enforcement officials, and would authorize him to offer contracts to appropriate local law enforcement officials. It would not require him to offer these contracts each and every year. It would, however, allow him to designate trained Federal personnel to carry our Federal law enforcement responsibilities, whether or not the local officials accept the contracts. And it would assure that our Federal laws are adequately enforced and that our public lands are fully protected.

Id.

95. The amendment reads as follows:

(C)(1) When the Secretary determines that assistance is necessary in enforcing Federal laws and regulations relating to the public lands or their resources he shall offer a contract to appropriate local officials having law enforcement authority within their respective jurisdictions with the view of achieving maximum feasible reliance upon local law enforcement officials in enforcing such laws and regulations. The Secretary shall negotiate on reasonable terms with such officials who have authority to enter into such contracts to enforce such Federal laws and regulations. In the performance of their duties under such contracts, such officials and their agents are authorized to execute and serve any warrant or other process issued by a court or officer of competent jurisdiction; make arrests without warrant or process for a misdemeanor he has reasonable grounds to believe is being committed in his presence or view, or for a felony if he has reasonable grounds to believe that the person to be arrested has committed or is committing such felony; search without warrant or process any person, place, or conveyance according to any Federal law or rule of law; and seize without warrant or process any evidenciary item as provided by Federal law. The Secretary shall provide such law enforcement training as he deems necessary in order to carry out the contracted for responsibilities. While exercising the powers and authorities provided by such contract pursuant to this section, such law enforcement officials and their agents shall have all the immunities of Federal law enforcement officials.

(2) The Secretary may designate Federal personnel to carry out law enforcement responsibilities with respect to the public lands and their resources. Such designated personnel shall receive the training and have the responsibilities and authority provided for in paragraph (1) of this subsection.

Id. at 23465, *reprinted in* FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 698.

96. *Id.* at 23466, *reprinted in* FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 699. Santini went on to state:

But, I think there is an even more fundamental reason to support the committee language and to oppose the gentleman's amendment. That is the fact that we are asking our already beleaguered, undermanned and, in some instances, inefficient Bureau of Land Management entities to assume the responsibility of traffic policeman. It is inherently disastrous. One primary responsibility is resource management. The other primary responsibility is law enforcement. I submit that the examples of where this arrangement has been applied by the Forest Service apply here. When we use the local deputy sheriff or the local law enforcement entity to assume responsibility for protecting what he regards as his land, and that person is given the proper training—that person is far more efficient because that man or woman lives on that land. He or she is a trained law enforcement officer. That person is far more capable of meeting responsibilities of law enforcement than the graduate botanist. They are excellent resource managers. They are not law enforcement officers.

Id.

97. *Id.* at 23482, *reprinted in* FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 716.

House Conference Committee to resolve the differences between the two versions.

Conference Committee Action. As has been already noted, the language of 303(d) was identical in both versions and thus not an issue in the conference.[98] When the conferees began meeting it was clear that there were only two significant differences in the two versions of subsection 303(c). The first was the House language calling upon the Secretary to offer contracts to local law enforcement officials under which those officials would enforce federal laws and regulations.[99] This was part of a policy of "maximum feasible reliance" upon local enforcement. The second was the Senate bill's express grant of authority to federal officials to carry firearms in performance of their enforcement of federal law on federal lands.[100]

There was considerable debate in conference over the two differences which quickly became linked. The Senate conferees insisted that federal law enforcement officers had to have the authority to carry firearms, just as state and local officials do. Some House conferees led by Representative Santini were reluctant to agree to this.

Senators Jackson and McClure raised another issue: Did the House language actually give state and local officials the status of federal law enforcement officers?[101] Their concern led to the specific statement in subsection 303(c)(2) that "[t]he Secretary may *authorize* Federal personnel *or* appropriate *local officials* to carry out his law enforcement responsibilities."[102]

The Senate conferees were willing to go along with the House emphasis on giving local officials the first opportunity to be the enforcement agents for the federal government. However, they did want to include language designed to make it clear that the ultimate responsibility for enforcing federal laws on federal lands was in the federal officials. They also felt that authority to carry firearms was an essential adjunct of that authority. The compromise agreed to, which became law, melded both approaches. The Senate provisions authorizing firearms were included. With respect to the House preference for local enforcement, the Joint Statement of Managers accompanying the Conference Report said:

> The conferees accepted the policy in the House amendments

98. *See* text & notes 68-73 *supra.*
99. 122 CONG. REC. 23464 (1976), *reprinted in* FLPMA LEGISLATIVE HISTORY, *supra* note 1, at 697.
100. S. 507, 94th Cong., 1st Sess. § 307(c) (1975). The version as passed is in 122 CONG. REC. 4427 (1976).
101. See Transcripts of Meetings of Senate-House Conference on S. 507 (Sept. 15 & 22, 1976).
102. 43 U.S.C. § 1733(c)(2) (1976) (emphasis added).

> that the Secretary of the Interior seek maximum feasible reliance *in his discretion* upon local law enforcement officials in enforcing Federal laws and regulations. The Secretary is expected to keep this goal in mind, as well as his authority to assist local law enforcement officials in enforcing local laws and regulations, as he carries out *his primary responsibility* of assuring adequate law enforcement for the public land areas.[103]

Final Senate and House Action. There was almost no debate in either the Senate or the House on approval of the Conference Report. The only mention of subsections 303(c) and (d) was a reference by Representative Melcher to the inclusion of the authority of law enforcement officials to carry firearms.[104]

CONCLUSION

We have explored in some detail FLPMA's unusual approach to enforcement of federal laws and regulations dealing with the largest system of federal lands—the national resource lands—administered by the Bureau of Land Management. What conclusions can be drawn about this approach? What led Congress to depart from its long-established past practice of exclusive reliance on federal employees for federal enforcement? What benefits may come from giving states and local officials a role in enforcing federal laws on federal lands?

Clearly, one of the major reasons for subsection 303(c)'s emphasis on use of state and local law enforcement officials was congressional recognition of the special and delicate nature of law enforcement activities. Armed peace officers have an awesome and frequently dangerous responsibility in our society. They have a duty to avoid harming citizens to the maximum extent possible. In carrying out their duties, they frequently have to deal with excited, angered, vicious, drunk, or unstable individuals. Training and experience are vitally necessary to adequate performance of the enforcement functions. Thus, subsection 303(c) can be viewed as Congress' recognition of the long-time experience and expertise of state and local officials in this demanding role. Surely, in one sense, Representative Santini was right, a biologist is not a policeman.

However, subsection 303(c) also recognizes that enforcement of *federal* laws on *federal* lands is, and must be, under the Constitution a

103. H.R. REP. NO. 94-1724, 94th Cong., 2d Sess. 60 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6232 (emphasis added). It should be noted that the term "Conference Report" refers to the actual statutory language agreed to by the Senate-House Conference Committee. The Joint Statement of Managers is designed to explain the effect of the language in the conference report.

104. 122 CONG. REC. H12009 (daily ed. Sept. 30, 1976).

federal responsibility. While Congress under its property clause authority could and did authorize the delegation of federal authority to state or local officials, Congress could not abdicate its responsibility.

Both subsections 303(c) and (d) also reflect Congress' recognition that federal, state, and local governments share legislative jurisdiction over almost all the lands subject to FLPMA. As a result, the activities which take place on these lands are frequently governed by or subject to, federal, state, and local laws and regulations. Indeed the individual act of destroying public property at a federal campground can be a violation of several laws of several jurisdictions. When one recalls the kinds of situations cited in the congressional reports, the advantages of close cooperation and sharing of enforcement authority among all three levels of government become obvious. This is a classic illustration of the potential for saving tax dollars and improving government performance by intergovernmental coordination. If these subsections work in practice as intended by their framers, the personnel with the necessary skills will be on-the-ground with the least possible expenditures.

An additional potential benefit may be a reduction of the all too frequent arguments between federal land managers, on the one hand, and state and local officials, on the other, over the relative values and preferred uses of federal lands and resources. If, in fact, the enforcement provisions of FLPMA result in closer working relationships among federal, state, and local representatives, this will increase the chances for mutual understanding and sharing of goals and objectives.

Only time will tell whether the emphasis of subsections 303(c) and (d) on local enforcement will be realized. Responsible BLM officials are eager to make both the contract and cooperative programs work. Unfortunately, there has been very little interest to date by state or local law enforcement officials in using the contract approach of subsection 303(c). BLM has funded an analysis by the National Sheriffs Association of the reasons for this reticence.

At this point, there appear to be three main reasons. First, the general training requirement of 320 hours of general law enforcement subjects plus fifty to eighty hours on federal laws is difficult for many sheriff's deputies to meet, particularly where the local manpower situation cannot afford to let people spend eight to ten weeks off the job in training. Second, both state and local officials feel more comfortable enforcing "their own" laws, rather than federal regulations. Third, local officials feel that enforcement of certain federal laws or regulations, such as those designed to protect wild horses, would be political liabilities for them.

Happily, the cooperative programs under subsection 303(d) are making much better, but still limited, progress. During fiscal year 1978, thirteen cooperative agreements were in effect. BLM expects this to increase to between fifteen and twenty during 1979. Limited federal funding has cut down in participation.

BLM believes the cooperative program works very well in areas where there is intensive public use of federal lands. For example, vandalism in busy, large campgrounds declines when the sheriff is known to patrol. Much better order is maintained at special events such as off-road vehicle races if a few deputies are present. BLM believes that either approach can be effective where (1) BLM has a need for enforcement *and* the funds to pay for the local support; and (2) the local officials are willing to participate and can meet the applicable federal or state training standards.[105]

Despite limited state and local participation, BLM has *not* created the "Federal army" whose anticipated presence worried Representative Santini. As of January, 1979, more than two years after enactment of FLPMA, BLM had a total of thirty enforcement officers. Seventeen were "desert rangers" employed in the California Desert Conservation Area program authorized by section 601 of FLPMA. Thirteen were "special agents" employed throughout the public lands. Most of their time was devoted to enforcement of the Wild Free-Roaming Horses and Burros Act of 1971.[106]

Clearly, the opportunity for much greater exercise of the innovative approaches envisioned by subsections 303(c) and (d) remains. Hopefully, there will be increased use of these programs during the next year or two. Annual federal funding for the cooperative programs should be increased from the present level of $250,000. One or two successful contract programs could spark much greater interest by all concerned than has been shown up to now.

I hope this will happen because I firmly believe that Congress was right when, in enacting the enforcement provisions of FLPMA, it took the cooperative federalism approach and told the Secretary of the Interior and all public land managers, "Support your local sheriff."

105. State standards apply under the cooperative approach. Federal standards apply where contracts are used.

106. The information about the current status of implementation of subsections 303(c) and (d) is from the author's discussions with James Richardson, Chief, Division of Fire and Protection Management, in BLM Headquarters Office, Washington, D.C.