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COMMENTS

NATIONALIZING LAKE TAHOE

INTRODUCTION

The Lake Tahoe Basin (Basin) is a central, 506 square-mile resort area for Northern California and Northwestern Nevada. Its year-round attractions include magnificent scenery, skiing, boating, gambling, accessible wilderness, and nightclub entertainment. During the past two decades, concern has grown that urbanization of the Basin could destroy the beauty and recreational quality of the region. As a result, a unique planning body, the Tahoe Regional Planning Agency (TRPA), was created by agreement between Nevada and California, with the consent of Congress. The effectiveness of the TRPA in dealing with the growth problem at Lake Tahoe has been called into question. Amendments strengthening the TRPA have been proposed, but disagreements between the two state legislatures have prevented any change. The possibility of federal intervention is now being threatened to encourage a compromise.

While effective reform of the TRPA may yet be accomplished, the possibility of direct federal intervention at Lake Tahoe warrants consideration. The possible forms that such an intervention might take require evaluation. This comment will examine the problems faced by the TRPA and the present federal role in the Lake Tahoe Basin. It will then focus on alternative forms of federal participation. In particular, creation of a national recreation area and imposition of federal land use controls will be explored as viable ways to protect this unique lake basin in the absence of effective state land management controls.

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1. ENVIRONMENTAL PROTECTION AGENCY, THE LAKE TAHOE STUDY 13 (1975) [hereinafter cited as EPA TAHOE STUDY]. The Lake Tahoe Basin encompasses 324,000 acres, of which 122,000 acres (191 sq. miles) are lake surface. Id. at 18.


The Tahoe Regional Planning Agency: Creation and Problems

Efforts to bring regional planning to Lake Tahoe were begun in the late 1950's by local residents and resulted in the 1980 Plan. Published in 1964, that plan attempted to determine how the Basin could best be developed as a resort area and warned of sewage and water problems in the coming years. Local governments began to accept the need for directed, if not controlled, growth within the Basin. A bi-state study, published in 1967, urged formation of a limited bi-state planning agency for the Lake Tahoe Basin. In response to that study, the California legislature passed a bill to create such an agency. In 1968, a special session of the Nevada legislature passed an amended version of the California act, which was accepted by California. Congress ratified the bi-state compact in the closing days of its 1969 session, and the TRPA was born.

The compact directed the TRPA to prepare regional plans for land use, transportation, recreation, conservation,

6. Wilsey, Ham & Blair, Lake Tahoe 1980 Regional Plan (1964). See L. Baxter, Regional Politics and the Challenge of Environmental Planning 3 (1974). "The preservation of beauty was seen as generally necessary for the continued growth of such an economy (sophisticated tourist), but not as something having intrinsic value or indicating particularly important values in the Basin ecosystem." Id.
7. In 1967, Nevada and California adopted standards and programs for Lake Tahoe water quality that required export of all effluent from the Basin. These programs were approved by the Secretary of the Interior. EPA, Task Report 1 (1973) (prepared for EPA's study of Lake Tahoe) (available for inspection at EPA, Region IX, San Francisco, Cal.).
8. EARLY PLANNING, supra note 5, at 95.
13. The TRPA was to function on three levels: a governing board consisting of five representatives from each state (three from local governments and two appointed by the governor), id. art. III(a); an advisory planning commission made up of state and local, health and planning officials and four local residents, id. art. III(h); and a planning staff, id. art. IV(a).
14. At one point, lawsuits for inverse condemnation amounted to more than $250,000,000 after the TRPA adopted its regional land use plan and implementing ordinances. EPA Tahoe Study, supra note 1, at 83; see also EPA, Public Hearings on Adequacy of and Need for Extending Federal Oversight and Control in order to Pre-
and public services and facilities. The compact granted the agency some enforcement powers, but also contained major limitations. First, a majority vote of each state’s representatives on the TRPA governing board was required for denial of a development application. If no dual majority was reached within sixty days, the proposed project was deemed approved. This resulted in a number of de facto approvals of major projects. Second, gaming casinos that were licensed on the date the compact passed the Nevada legislature, or that were to be constructed on land zoned for casino use on a master plan effective on that same date, were to be considered conforming uses by the TRPA. The effect of this exemption continues to be felt as new casinos take shape at Stateline. Third, the TRPA was given no state or federal funding in the compact and was directed to pursue only regional goals, avoiding interference with local authority. These limits caused the TRPA to serve the Fragile Ecology of Lake Tahoe 249 (Sept. 21-22, 1973) (statement of George C. Finn, Skyland property owner) [hereinafter cited as EPA Hearings] (available for inspection at EPA, Region IX, San Francisco, Cal.).


16. Id. art. VI(a). The TRPA was to adopt rules, regulations, and ordinances that would support accomplishment of the regional plans. These requirements were to be enforced by the TRPA, the states, and the local governments, but the states and localities were to be permitted to adopt and enforce higher standards than those adopted by the TRPA. Id.

17. Id. art. III(g).

18. Id. art. VI(k).

19. For example, a regional shopping center and two major casino-hotels were approved under this rule, although a majority of the TRPA governing board (seven of the ten) opposed the projects. Dep’t of Housing & Urban Development, Assessment of the Effectiveness of the TRPA 9 (May 6, 1976) [hereinafter cited as HUD Assessment].


21. Eadington & Hattori, supra note 10, at 6; Rice, Two Shadows Etched Across Tahoe Terrain, Nevada St. J., April 15, 1979, at 16, col. 1. There is a question as to whether the TRPA can interfere at all in gaming operations, such as conditioning approval of non-gaming projects of casinos on restriction of gaming floorspace. Nevada St. J., Jan. 28, 1979, at 44, col. 2.

22. Act of Dec. 18, 1969, Pub. L. No. 91-148, art. III, 83 Stat. 360. Funding was to come from the five counties in the Basin. Each one was to contribute to the TRPA budget in the same ratio as the ratio of the full cash value of taxable real property that each county had jurisdiction over in the Basin. Id. art. VII(a); see also E. Constantini & K. Hanf, The Environmental Impulse and Its Competitors: Attitudes, Interests, and Institutions at Lake Tahoe 54 (1973). Each state was forced to take one of its counties to court to force the county to make its contribution to the TRPA budget. People ex rel. Younger v. County of El Dorado, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971); State ex rel. List v. Douglas County, 90 Nev. 272, 524 P.2d 1271 (1974); State ex rel. List v. Douglas County, 92 Nev. 114, 546 P.2d 235 (1976).

to relegate funds to planning and continuous, expensive litigation and effectively left zoning enforcement duties with local governments.  

Both the governing board and the planning commission of the TRPA contained a majority of local officials, further ensuring that local government interests would continue to dominate the future of the Basin.  

This placed the TRPA planning staff in an adversary role. Its professional recommendations were often altered by the planning commission to conform to local political reality before submission to the governing board for approval. In addition, the TRPA was given no power to modify or disapprove state public works projects. It could only review the projects and make recommendations to the states. Finally, the federal government was given no clear role in the TRPA scheme. Congress did condition its consent to the compact on the insertion of a provision requiring the seating of a non-voting federal member on the TRPA governing board, and directed the Secretaries of Agriculture and Interior to cooperate, if requested, with the TRPA. However, there has never been a congressional declaration that the Tahoe Basin is of national significance.


26. W. Felts & G. Wandesford-Smith, supra note 25, at 31; Ames, supra note 10, at 16; see generally C. Finkelstein, Planning and Politics: A Staff Perception of the TRPA (1974). This was particularly true in development of the regional land use plan. Id.


28. Id. art. VI(d). This exemption has been a sore spot for Nevadans. “We all deplore the overdevelopment on the California side, and will now have a voice in that. That includes a say in their plans to export sewage, which would affect the Truckee River, which serves Reno.” S.F. Chronicle, Apr. 20, 1977, at 14, col. 1 (statement of Nev. State Senator Thomas Wilson after passage of Nevada’s proposal for amending the bi-state compact). The public works exception has also meant that HUD’s designation of the TRPA as “Areawide Planning Organization” for purposes of reviewing all public works projects in the Basin has little meaning. HUD, Task Report 1 (1973) (prepared for EPA’s study of Lake Tahoe) (available for inspection at EPA, Region IX, San Francisco, Cal.); Letter from Thomas R. Jacob, Gov’t Affairs Coordinator for TRPA, to author 2 (Dec. 20, 1977) (on file at Santa Clara Law Review).


30. Id. § 2.

31. The only congressional intent that can be pointed to is the preamble which
Ten years after its creation, the TRPA is still beset by controversy. Fundamental philosophical conflicts between California and Nevada plague the agency. Californians, often obsessed by the presence of casinos run on California tourist dollars, are frustrated by the continued urbanization of the Basin and direct their disappointment at the TRPA. Nevadans remain suspicious of a Basin takeover by the more populous and developed California side. There is general agree-
ment that something must be done, but there the agreement ends.34

In 1975, the Nevada legislature considered amendments to the bi-state compact that would have added more state-wide members to the TRPA, increased the budget, and eliminated the dual majority requirement.35 Reduced by gaming and Douglas County lobbying interests36 to a simple broadening of representation on the agency, the amendments were never seriously considered by California.37 In 1976, the California legislature enacted sweeping amendments to the compact.38 These amendments provided for 1) state financial support, 2) elimination of the gaming and public works exemptions, 3) the levying of fines for violation of TRPA ordinances with the resulting revenue earmarked for enforcement, 4) the alteration of the dual majority/sixty day rules to result in de facto rejection rather than approval, and 5) a declaration of federal policy toward the Basin.39

These amendments went too far for the Nevada legislature, which adopted more limited amendments in 1977.40 The Nevada legislature accepted the elimination of the public works exception and the alteration of the dual majority rule,41 but rejected the other California proposals.42 The Nevada amendments contained a continued gaming exemption within limited geographical areas, allocated fines of TRPA ordinance violators to the states’ general funds, broadened the membership of the TRPA planning commission, and contained no declaration of federal policy.43 With the rejection of these Nevada proposals by the California legislature,44 the federal government stepped in. With Charles Warren, Chairman of the Coun-

34. See HUD Assessment, supra note 19, at 11-12.
35. Eadington & Hattori, supra note 10, at 5.
36. Id. at 4-5.
37. Id. at 5.
38. Id. This was partly attributable to the 1974 TRPA approval (under the de facto rule) of five major projects (including three new casinos) in the Basin. Id.
41. Eadington & Hattori, supra note 10, at 5-6.
42. Id.
cil on Environmental Quality, acting as arbitrator, the two state governors reached agreement on a proposed amended compact to be submitted to the state legislatures in 1979.45

As would be expected, the proposal was a compromise—combination of changes. The dual majority rule would have been reversed. The TRPA would have had 180 days to review a proposal.46 If the governing board failed to act, or if a majority of the members from each state could not be attained, the project would have been considered rejected.47 All state and local projects would have been subject to this review.48 The TRPA would have been responsible for preparing an Environmental Impact Statement (EIS) for each private or government project that would “significantly affect the human environment.”49

The TRPA would have been mandated to prepare a comprehensive EIS establishing environmental thresholds that would limit the present regional plan.50 Until its adoption by the TRPA, a strict review process would have been in place that might well have resulted in a moratorium on development in the Basin.51

The proposal would have broadened the membership of the TRPA governing board, giving statewide appointees a majority and inhibiting membership on both local and TRPA boards.52 In addition, a federal representative from the United States Forest Service would have been seated on the advisory planning commission.53

Gaming locations would have been limited to those presently existing.54 Additions to casinos would have been subject to TRPA review, but expansion of gaming floorspace within an

46. S.B. 250, § 1, art. VI(q), Nev. Legis. 1979 Reg. Sess.
47. Id.
48. Id. art. VI(k).
49. Id. art. VII(b)(2)(C).
50. Id. art. VI(e).
51. Id.
52. Id. art. III(a), (h).
53. Id. art. III(h). TRPA board members and employees would have been exempted for any act in an official capacity unless the act were malicious, id. IV(d), as the U.S. Supreme Court recently decided. See text accompanying notes 125-126 infra.
54. S.B. 250, § 1, art. VI(g). Nev. Legis. 1979 Reg. Sess. Construction of any casino that is presently being litigated would have been allowed if the courts approved the construction. Id. art. VI(g)(1)(A).
existing casino structure would have needed only the approval of the Nevada Environmental Commission.\textsuperscript{55}

Funding of the TRPA would have been shared by local governments according to their property value jurisdiction in the Basin plus a set amount.\textsuperscript{56} State funding would have been discretionary; federal funding was not mentioned. Civil fines would have been available for penalizing violators of TRPA ordinances, plans, or compact.\textsuperscript{57}

It was proposed that Congress require all federal agencies to cooperate with the TRPA\textsuperscript{58} and conduct their activities, such as licensing and granting of permits, in accordance with the TRPA's regional plan.\textsuperscript{59}

The proposal was subjected to immediate criticism and controversy.\textsuperscript{60} Further, Nevada Governor O'Callaghan, who supported the proposal, left office in January, 1979, and the support of his successor was uncertain.\textsuperscript{61} Six difficult months of negotiation followed, with numerous stops and starts\textsuperscript{62} and continued encouragement from Chairman Warren.\textsuperscript{63} On the last day of the Nevada legislative session, a proposed compact was finally passed and signed into law.\textsuperscript{64}

The basic framework that had been agreed to by the governors was left intact by Nevada. A three-tiered voting procedure was enacted: a simple majority for routine business; a majority of the board members from the state where a proposed project would be located plus a simple majority of the whole board for a project proposal; and a majority of each state's delegation for TRPA plans and ordinances.\textsuperscript{65} The board would have 180 days

\textsuperscript{55} \textit{Id.} art. VI(g)(2)-(3).
\textsuperscript{56} \textit{Id.} art. VIII.
\textsuperscript{57} \textit{Id.} art. VI(m).
\textsuperscript{58} Bill Drafting Request, § 2, enclosure to Letter from Robert E. Stewart, \textit{supra} note 45.
\textsuperscript{59} \textit{Id.} § 3. The language used was almost identical to that of the Coastal Zone Management Act of 1972. 16 U.S.C. § 1456(c) (1976).
\textsuperscript{60} Criticism included accusations of no-growth policies, incompatibility with the Nevada Constitution, bias by Chairman Warren, and a failure by the governors to consult legislative leaders. Nevada St. J., Jan. 13, 1979, at 29, col. 3; \textit{id.}, Jan. 24, 1979, at 56, col. 1; Sacramento Bee, Jan. 13, 1979, at B1, col. 3.
\textsuperscript{61} Governor Robert List, 1979 State of the State Message (Jan. 17, 1979), \textit{reprinted} in Nevada St. J., Jan. 18, 1979, at 41, col. 3.
\textsuperscript{63} Nevada St. J., May 25, 1979, at 1, col. 3.
\textsuperscript{65} 1979 Nev. Stat. ch. 575 § 1, art. III(g).
to vote or be subject to a court order requiring a vote. An altered approach to Environmental Impact Statements was proposed.

Gaming expansion would be absolutely stopped, with the TRPA prohibited from permitting any gaming expansion. Statewide appointment to the Nevada delegation was watered down.

The two provisions, however, that sparked the greatest controversy were put into the compact during the final days of the session. First, the moratorium on project construction pending adoption of environmental thresholds was limited to thirty months, with a requirement that the TRPA adopt the environmental thresholds in that time. The moratorium itself was limited by permitting construction of three approved casinos, any subdivision with a subdivision map filed, any subdivision in a financially troubled improvement district, and any apartment with a permit application on file.

Second, judicial restrictions were inserted into the compact. Any action concerning TRPA decisions on specific real property would have to be brought in the judicial district where the property was located. Further, in declaring any preliminary relief, a court would have to require the posting of a bond "in a sum equal to the costs and damages which the court finds may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

California leaders quickly rejected Nevada's proposal.

66. Id.
67. Id. art. VII.
68. Id. art. VI(d).
69. Id. art. III(a)(2). A majority of members of Nevada's delegation could still be from the "region."
71. 1979 Nev. Stat. ch. 575 § 1, art. VI(c).
72. Id. This would allow a 40% increase in residential and visitor population during the moratorium in Douglas County, Nev., alone. Nevada St. J., May 16, 1979, at 20, col. 4. Included in this figure would be at least 450 new homes in the Round Hill General Improvement District near Stateline. Id., May 28, 1979, at 9, col. 1.
73. 1979 Nev. Stat. ch. 575 § 1, art. VI(h)(1).
74. Id. art. VI(h). For a discussion of the impact such a provision would have, see Henson & Gray, Injunction Bonding in Environmental Litigation, 19 SANTA CLARA L. REV. 541 (1979).
75. "It negates not only six months of work but would lead to further degradation of the Lake rather than protecting it." Cal. Sen. John Garamendi, quoted in Nevada St. J., May 31, 1979, at 1, col. 4.

California Governor Brown vetoed the 1979 California contribution to the TRPA. This may lead to the dissolution of the TRPA and its planning efforts in the near future. S.F. Chronicle, July 17, 1979, at 5, col. 1.
Negotiations may resume, but unless a special session of the Nevada legislature is called, any further action by Nevada must wait until the next regular legislative session in 1981.\textsuperscript{76} In the meantime, the Nevada legislature placed a sixty-day moratorium on Basin development that was identical to that in its compact proposal\textsuperscript{77} and permanently restricted gaming expansion.\textsuperscript{78}

If the bi-state effort fails in Nevada, California, or Congress, California leaders stand ready to push for massive federal intervention through creation of a national recreation area.\textsuperscript{79} There is also an ongoing push for more Forest Service acquisition of casino sites in the Basin.\textsuperscript{80} Because it is likely that the bi-state compact will not be approved in both state legislatures in a form that creates an effective TRPA, it is necessary to consider just what federal intervention might entail. The present federal role serves as an introduction to future possibilities.

\section*{The Federal Role Today}

The federal government is already significantly involved in the Basin. Since Army Captain John C. Fremont discovered

\begin{itemize}
\item \textsuperscript{76} Id.
\item \textsuperscript{77} 1979 Nev. Stat. ch. 575 § 4. Apparently, this moratorium will have little effect given the exceptions in the bill and the interpretation that it does not apply at all to small property owners. See Nevada St. J., June 4, 1979, at 23, col. 1.
\item \textsuperscript{78} 1979 Nev. Stat. ch. 575. "[[It serves notice on the state of California . . . that we in Nevada are not shirking our responsibility." Gov. Robert List, \textit{quoted in} Nevada St. J., May 5, 1979, at 10, col. 1.
\item \textsuperscript{79} Nevada St. J., May 23, 1979, at 1, col. 1; S.F. Chronicle, May 3, 1979, at 6, col. 2; Wash. Post, Feb. 4, 1978, at A2, col. 2; Letter from James W. Burns, Ass't to Huey D. Johnson, Sect'y for Cal. Resources Agency, to author (Nov. 16, 1978) (on file at Santa Clara Law Review); Western Regional Council, \textit{Federal Policy for the Lake Tahoe Basin} 21 (Aug. 15, 1978) [hereinafter cited as Federal Policy]. "[T]he entire effort to preserve Lake Tahoe will be disbanded and either the lake will be overwhelmed by gambling and development interests or the federal government will intrude and establish the area as a national recreation area." Charles Warren, Chairman, Council on Environmental Quality, \textit{quoted in} Nevada St. J., Jan. 20, 1979, at 32, col. 2.
\item \textsuperscript{80} Such a proposal faces the unanimous opposition of Nevada's congressional delegation. Nevada St. J., Feb. 14, 1979, at 1, col. 5 (Senator Howard Cannon); id., Feb. 16, 1979, at 1, col. 6 (Senator Paul Laxalt); id., Feb. 14, 1979, at 9, col. 3 (Rep. Jim Santini).
Lake Tahoe in 1844, federal involvement through control of land and water, technical assistance, and monetary aid has steadily increased. The role of the federal government has often been the subject of disputes between and among various levels of government.

Today, there are at least twenty-two federal agencies with some involvement in the Basin, ranging from the technical advice of the Geological Survey to the predominant land ownership of the Forest Service. Federal investment in purchases, construction, and grants in the Basin between 1964 and 1974 amounted to $85,921,847. However, functional limits placed on each federal agency and the silence of Congress as to a policy for Lake Tahoe have prevented federal agencies from shaping, and at times even affecting, the future of the region.

Forest Service

The most important federal agency at Lake Tahoe is the Forest Service. Since the first Tahoe Forest Reserve lands were withdrawn from the public domain in 1907, the Forest Service has acquired over 128,000 acres of land in the Basin and is planning to acquire more. These federal lands are divided among three national forest jurisdictions and in turn, two Forest Service regions. The presidential representative to the TRPA has become, by tradition, the Regional Forester from the Forest Service Western Region. His obligation to speak for the federal government at TRPA meetings has somewhat enhanced the influence of the Forest Service in Basin matters.

82. See generally W.T. JACKSON & D. PISANI, A CASE STUDY IN INTERSTATE RESOURCE MANAGEMENT: THE CALIFORNIA-NEVADA WATER CONTROVERSY, 1865-1955 (1973) [hereinafter cited as INTERSTATE RESOURCES].
83. EPA, Agency Responsibilities within the Tahoe Basin (Jan., 1978).
85. TRPA, Cultural and Historical Significance of the Lake Tahoe Region, A Guide for Planning 15 (1971) [hereinafter cited as Cult/Hist Significance].
86. Letter from Glenn Smith, Lake Tahoe Basin Management Unit Planning Coordinator, to author (Dec. 27, 1977) (on file at Santa Clara Law Review). This represents about 63% of Basin land. Id. See also Federal Policy, supra note 79, at 6.
87. Cult/Hist Significance, supra note 85, at 15. The three national forests are: Toiyabe, Tahoe, and Eldorado. Id. In 1973, a unified management unit for Basin Forest Service land was formed (Lake Tahoe Basin Management Unit) by the Forest Service. Letter from Glenn Smith, supra note 86, at 2.
88. Letter from Glenn Smith, supra note 86, at 1.
Forest Service ownership of an increasing percentage of Lake Tahoe land has not had a significant effect on development in the region. Most of the Forest Service land is devoted to recreation or preservation; much of it is in unusable areas. However, as urbanization has consumed more and more land, federal control of certain areas, such as Camp Richardson, has constrained development, and public use pressure has steadily increased. The general land use plan of the Forest Service calls for modest development of additional public facilities, but it is primarily a declaration for preservation of the quality of recreational opportunities at Lake Tahoe.

Forest Service support of the TRPA has been vital to its continued existence. The basic source for the TRPA's land use plan was the land capability study developed by the Forest Service in cooperation with the Soil Conservation Service. The TRPA also used Forest Service offices, information, and technical advice to develop its plans. Although not required to do so, the Forest Service lent credibility to the TRPA by submitting its development plans to the TRPA for review.

89. Cult/Hist Significance, supra note 85, at 15. Forest Service control did halt a proposal to build a major airport near Camp Richardson. W.T. Jackson & D. Pisani, From Resort Area to Urban Recreation Center: Themes in the Development of Lake Tahoe 1946-1956, at 14-15 (1973) [hereinafter cited as Resort to Urban]. That control also restricted South Lake Tahoe's attempt to use Forest Service land to dispose of sewage effluent through spraying. Early Planning, supra note 5, at 71. Perhaps the most important constraint on growth at Lake Tahoe was the existence of large landholdings by the affluent, which in turn preserved those areas for purchase by the public. See Lake Tahoe Environmental Education Comm'n, Tahoe Reflections: An Anthology, 1974-1976, at 9 (1976); see, e.g., Cult/Hist Significance, supra note 85, at 16; Resort to Urban, supra, at 19-20.


91. See note 89 supra.

92. LTBMU Plan, supra note 80, at 16; U.S. Forest Service, Task Report 2 (1973) (prepared for EPA's study of Lake Tahoe) (available for inspection at EPA, Region IX, San Francisco, Cal.). Public visits have increased from 144,450 per year in 1960, to 1,899,000 in 1970. Id.

93. LTBMU Plan, supra note 80.

94. Land Capability Study, supra note 90; Statement of Douglas R. Leisz, supra note 80, at 7.

95. L. Baxter, supra note 6, at 21-22; Ames, supra note 10, at 16; C. Finkelstein, supra note 26, at 17. "The TRPA's planning efforts would have been completely paralyzed at the beginning had the Forest Service team and its resources not been immediately available to the TRPA Staff." L. Baxter, supra note 6, at 22.

96. Letter from Glenn Smith, supra note 86, at 1. "The Federal establishment has been supportive of TRPA for a long time and will continue to be. We believe that
Other Agencies

Other federal involvement in the Basin has been primarily in the areas of water control and project funding. Federal influence over the use of Lake Tahoe's water was not exercised until the beginning of the twentieth century.\(^7\) Since then, the Army Corps of Engineers and the Bureau of Reclamation have engaged in a number of disputes over water levels and diversion schemes.\(^8\) Agreements and court decrees have limited federal discretion in determining use of the Truckee River, which flows from Lake Tahoe.\(^9\) Continuing litigation of federal water rights for preservation of the Pyramid Lake Indian Reservation fishery may alter the status quo of the water situation.\(^10\)

Federal funding of public and private projects has also been a subject of controversy. The Environmental Protection Agency (EPA) and its predecessor, the Federal Water Pollution Control Administration, made matching grants of approximately $5,800,000 for sewer projects on the California side of Lake Tahoe from 1966 to 1973.\(^101\) These federal funds facilitated changes in land use patterns in the Basin, significantly increasing intensive commercial recreation, such as hotels, motels, and condominiums.\(^102\) The resulting intensified land use has
caused increased water pollution from erosion and sedimentation and increased air pollution from automobiles.103

The federal government has been involved in improving the highway system at the Lake, particularly through the forest highway program.104 The United States Department of Transportation has supported TRPA’s study of regional transportation,105 but California withdrew its support of the study to protest TRPA’s reliance on automobiles and highways, bringing regional transportation planning to a standstill.106 On the eastern edge of the Basin, the construction of a new federal forest highway, the Kingsbury Grade, has promoted commuting by casino employees between Stateline and Nevada’s Carson Valley.107

Federal funding for regional planning efforts has been provided by the Department of Housing and Urban Development (HUD)108 in hopes of strengthening the efforts of the TRPA.109 In 1972, HUD placed a moratorium in the Basin on all federal loans for new housing construction in forest-zoned lands and in areas without adequate sewer service.110 This attempt to affect

103. EPA Tahoe Study, supra note 1, at 64. EPA has designated the TRPA as the lead agency in the Basin for planning of the areawide waste treatment management program. Id. at Preface. The EPA is also requiring the TRPA to develop a regional plan for air quality attainment by 1979. This could result in EPA intervention to ensure compliance with those standards. Nevada St. J., Dec. 28, 1977, at 24, col. 3.

104. Federal Highway Administration, Task Report 1 (1973) (prepared for EPA’s study of Lake Tahoe) (available for inspection at EPA, Region IX, San Francisco, Cal.).


106. Federal Policy, supra note 79, at 5; see generally CTRPA, Regional Transportation Plan (Aug., 1978).


108. Letter from Alan Goldfarb, HUD Regional Planning & Management Officer, to author 2 (Jan. 25, 1978) (on file at Santa Clara Law Review). HUD’s predecessor agency, the Housing & Home Finance Agency, had helped fund the 1980 Plan. Early Planning, supra note 5, at 94; see text accompanying notes 6-7 supra. A total of about $548,000 has been given to the TRPA by HUD. Letter from Alan Goldfarb, supra, at 2.


110. HUD, Task Report, supra note 28, at 1. This moratorium was actually begun in 1971 when HUD placed a moratorium on all new housing construction loans in the Basin until the TRPA was able to develop its regional plan, approved in 1972. Id. The Army Corps of Engineers also placed a moratorium on pier construction permits in 1971 and did not lift that moratorium until the TRPA promulgated its shorezone ordinance and plan in 1976. L. Baxter, supra note 6, at 30. See Army Corps of Engineers, Task Report 1 (1973) (prepared for EPA’s study of Lake Tahoe) (available for inspection at EPA, Region IX, San Francisco, Cal.).
development through housing loans is limited by the increasingly high cost of housing in the Basin, which precludes federal financing in the first place.\footnote{111}{Letter from Alan Goldfarb, supra note 108, at 2. See also HUD, Review of HUD Moratorium on the Lake Tahoe North Shore (1977).}

Since 1966, the Heritage Conservation and Recreation Service (formerly the Bureau of Outdoor Recreation) has provided nearly $10,000,000 in matching grants to California and Nevada for purchase and development of recreational areas at Lake Tahoe.\footnote{112}{Letter from Frank E. Sylvester, Regional Director, Pacific Southwest Region, Bureau of Outdoor Recreation, to author 1 (Jan. 10, 1978) (on file at Santa Clara Law Review). For a detailed list of California use of the funds, see Cal. Dep't of Resources, Project List, Approved Projects, Land & Water Conservation Fund Program, 1965-66 through 1976-77, at 5-6 (Oct., 1977). Nevada funds were used to improve its Lake Tahoe State Park. Nev. Div. of Parks, Task Report 2 (1973) (prepared for EPA's study of Lake Tahoe) (available for inspection at EPA, Region IX, San Francisco, Cal.).} Land acquisitions by the Forest Service in the Basin have required an additional $35,000,000 from the same Land and Water Conservation Fund.\footnote{113}{Letter from Frank E. Sylvester, supra note 112, at 2.}

Agency Coordination

There has been little formal coordination of federal efforts to encourage and facilitate state and bi-state solutions to the Basin's problems. This lack of federal coordination, plus the creation of regional agencies, has added confusion, and some important agencies have expressed concern that they are being left out of the planning process because of this proliferation of bureaucracy.\footnote{114}{Cal. State Lands Div., Task Report 3 (1973); see also Nev. Dep't of Fish & Game, Task Report 2 (1973); Cal. Dep't of Fish & Game, Task Report 13 (1973) (all of the above prepared for EPA's study of Lake Tahoe) (all of the above are available for inspection at EPA, Region IX, San Francisco, Cal.).} The Forest Service has taken the lead in encouraging coordinated support of the TRPA, particularly in requesting federal moratoria on permits and loans.\footnote{115}{HUD, Press Release (July 21, 1971). See note 110 supra.}

In 1978, the Western Regional Council\footnote{116}{The Western Regional Council is made up of regional Cabinet Secretary representatives and federal agency regional directors. See Federal Policy, supra note 79, at Memorandum of Consensus. See also M. DERTHICK, BETWEEN NATION AND STATE 158-66 (1974).} published a federal policy on Lake Tahoe that will act as a guideline for federal agencies operating in the Basin.\footnote{117}{Federal Policy, supra note 79.} The policy expresses continued support for the TRPA, but it does not suggest that federal
goals be made subservient or necessarily consistent with those of the TRPA. Instead, it speaks directly to protecting federal lands and achieving high environmental quality standards through the TRPA as a clearinghouse for requests for federal funds from local governments in the Basin. The policy statement does suggest that federal funds be given to the TRPA for its operations. This policy of the Council would bow to an agency's congressional mandate, should there be any conflict of policies.

Until Congress declares its policy toward Lake Tahoe, the federal effort there will continue to depend on the good will of each federal agency official, limited by the same functional restrictions that have existed since the federal government first came to the Basin in the nineteenth century.

Judicial Review

The federal courts have also influenced planning in the Basin. In 1974, the court of appeals for the Ninth Circuit ruled that only federal courts could settle a dispute concerning the construction of the TRPA compact, because congressional consent to the compact made it a federal statute, and individual state court construction of the compact might prevent the uniformity of interpretation necessary for its success. The following year, a district court ruled that the TRPA could not be sued for inverse condemnation because it lacked the power of eminent domain. In 1976, the Ninth Circuit confirmed its earlier ruling on federal court authority to rule on compact construction when it found that questions concerning the interpretation and application of TRPA ordinances were federal questions. Once again, the court referred to the need for uniformity of compact interpretation.

The United States Supreme Court determined that the TRPA board is immune from suit for any actions that it may

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118. *Id.* at 13, 19.
119. *Id.* at 20.
123. *League to Save Lake Tahoe v. B.J.K. Corp.*, 547 F.2d 1072, 1075 (9th Cir. 1976).
124. *Id.*
take as a legislative body. The Court found that while the state sovereign immunity provisions of the eleventh amendment did not apply to the TRPA, since it was a separate body, the absolute legislative immunity did.2

State courts retain the power to rule on questions concerning the states' right to participate in the bi-state compact and to compel counties to contribute money to the TRPA.2

POTENTIAL FEDERAL ROLES IN THE TAHOE BASIN

If the two states cannot agree on management of the Tahoe Basin and the federal government's role has been only a weak coordination of agency functions and land ownership by the Forest Service, the question of federal involvement becomes even more important.

It is certainly not a new question. In 1900, Senator William Stewart of Nevada proposed the establishment of a Lake Tahoe national park. Such a national park was considered a number of times during the early 1900's, but the continued alteration of Lake Tahoe's environment by construction of homes and resorts defeated those proposals.

In 1970, Congress ordered the Department of the Interior to study Lake Tahoe for a possible national lakeshore. The Department published a "bland, uninformative, noncommittal, and virtually useless" document in 1973. The report con-

126. Id. at 1178-80. The dissenting Justices were troubled by the fact that TRPA board members are not elected and, therefore, not true legislators. Id. at 1180 (Marshall, J., dissenting in part), 1181 (Blackmun, J., dissenting in part).
129. BUREAU OF OUTDOOR RECREATION, LAKE TAHOE: A SPECIAL PLACE (1973) [hereinafter cited as BOR REPORT]; E. CONSTANTINI & K. HANF, supra note 22, at 53 (quoting U.S. Senator John Tunney). The draft report prepared by the local Bureau of Outdoor Recreation region made a number of very innovative suggestions, generally
cluded that the Basin failed to meet a requirement that new recreation areas significantly increase the quantity of recreational opportunities in a region.\textsuperscript{132}

While awaiting this study, Congress authorized the EPA to study the role of federal agencies at Lake Tahoe and to make recommendations for improving federal responsiveness to Tahoe's problems.\textsuperscript{130} Published in 1975, the EPA study recommended that Congress declare a national policy toward Lake Tahoe and begin continuing oversight of federal and TRPA efforts to protect the national interest in the Basin.\textsuperscript{134} Congress took no action on the recommendations of either study.

In considering what shape federal action in the Tahoe Basin should take in the future, five alternatives warrant discussion: 1) the traditional approach of improving the coordination of existing federal activities in the Basin; 2) the expansion of federal land acquisition within the Basin; 3) the establishment of a national recreation area; 4) the imposition of direct federal land use control; and 5) the creation of a federal regional commission to replace the TRPA. These approaches are

 supporting an extensive national recreation area. BOR Draft,\textsuperscript{supra} note 25. That draft was allegedly quashed by Nevada interests. Ames,\textsuperscript{supra} note 10, at 17.

132. Recreation Advisory Council, Circular No. 1, at 4-5 (1963); BOR Report,\textsuperscript{supra} note 131, at 5. The report was the subject of immediate criticism:

How much better it would be for persons in position of national leadership, such as Morton, to go into the hustings to extoll the justifications for a much stronger role of the federal government in preserving Lake Tahoe.

If Tahoe is a place of national value, which it is, then the federal government should be more actively engaged in promoting and enhancing that value.

S.F. Examiner, June 2, 1973, at 7, col. 1. Carrying capacity has been criticized as not being of primary importance for national recreation areas. Public Land Law Review Comm'n, One Third of the Nation's Land, A Report to the President and to the Congress 214 (1970) [hereinafter cited as One Third].

133. Federal Water Pollution Control Act Amendments of 1971, Pub. L. No. 92-500, § 2, 86 Stat. 833. The original bill proposed in the Senate sought to place the EPA Administrator in the position of reviewing all federal and federally funded projects that might result in discharges into Lake Tahoe. The administrator would have been prohibited from approving any permits for such activity if it conflicted with preserving the water of the Lake or with the Clean Air Act. The administrator would also have been required to review all "development activities, environmental quality and regional planning in the Tahoe Basin area." S. Rep. No. 414, 92d Cong., 1st Sess. 22, reprinted in [1971] U.S. Code Cong. & Ad. News 3668, 3689. The report said: "The Lake Tahoe Basin is a unique National resource urgently requiring effective Federal action to preserve its environmental quality." Id.

134. EPA Tahoe Study,\textsuperscript{supra} note 1, at 4. The EPA determined that, although federal control of public lands was adequate to protect Tahoe's ecology, federal influence on private lands was not. Id. at 87-88.
not mutually exclusive in application, but they are best understood individually.

**Improved Coordination**

The federal government speaks about growth problems in the Tahoe Basin in a variety of voices. The effort to promulgate a federal policy within the Western Regional Council may provide federal agencies with standards for approaching their responsibilities within the Basin. However, regional councils have been criticized for their lack of authority to address truly controversial issues. While the council may be able to keep agencies informed, congressional mandates to each agency take precedence.

Two alternatives to the regional council approach have been suggested. First, a federal administrator without ties to any one agency could be appointed to act as federal coordinator for Lake Tahoe. However, the same problems of authority would remain. Second, the Council on Environmental Quality could be given authority to review all federal and federally funded projects in the Basin. This would go far beyond the limited authority that the Council has been given in the past, and has received little support.

The EPA has noted that federal coordination is not a significant problem in the Basin; rather, the real issue is coordination of all levels of government. Until there is a clear vision of what the Lake Tahoe Basin should be, better federal coordination may increase efficiency, but it will probably not solve any major environmental problems.

**Land Acquisition**

As a general goal, the Forest Service has indicated in its general plan that it hopes to acquire at least all of the high hazard areas identified in its land capability study, or about

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135. *Id.* at 63; HUD Assessment, *supra* note 19, at 13.
136. See text accompanying notes 116-120 *supra*.
138. EPA TAHOE STUDY, *supra* note 1, at 99-100.
142. EPA TAHOE STUDY, *supra* note 1, at 97-100.
seventy-six percent of the Basin. At present, the Forest Service owns about two-thirds of this high-hazard land. It has also forecast acquisition of a total of about 50,000 acres of Basin land through 1987. Each year, however, the Tahoe acquisition plans of the Forest Service must compete with other applications for the limited Land and Water Conservation Fund. A bill to ensure money for Lake Tahoe land acquisition over an extended period of years was introduced in the House of Representatives in 1977, but it died in committee.

In 1978, $12.5 million in matching funds were provided to the Heritage Conservation and Recreation Service by Congress to purchase two casino sites at Stateline. The funds were to be then given to the Forest Service after two conditions were met: 1) Nevada and California each provided $6.5 million in matching funds; and 2) the states agreed to restrict gambling to sites presently in operation. No funds were provided by the Nevada legislature, and the casinos may be built in the near future.

Priorities for acquisition of Basin land have not been definitely stated. Some suggest that the Forest Service should first acquire property scheduled for imminent development that would affect public lands or adversely affect the Basin as a whole. The EPA has recommended that lakeshore acquisition should be the first priority and that Forest Service purchases should be directed at promotion of public enjoyment values rather than reaction to development threats.

The forms that land acquisition may take are varied. The Forest Service has relied on negotiated purchases and ex-

144. LAND CAPABILITY STUDY, supra note 90, at 20.
145. LTBMU Plan, supra note 80, at 35.
146. See text accompanying note 113 supra.
149. Id.
150. Rice, supra note 21.
152. EPA TAHOE STUDY, supra note 1, at 110.
changes at Lake Tahoe. As the value of land increases due to population, zoning, and location, it may become necessary to use eminent domain. Individual estates have faced tax laws that do not give credit for donation to the federal government. The EPA has urged that these federal laws be changed to encourage testamentary gifts of land to the public.

Land exchange may be encouraged by both states to avoid withdrawal of more land from property tax rolls. Exchanges may be particularly attractive to Nevada where eighty-four percent of the land is owned by the federal government. Exchanges would probably require the cooperation of other federal landowners, such as the Bureau of Land Management, so that equally valuable land outside the Basin could be traded for Basin land. The EPA has indicated that exchanges of land are procedurally difficult when various federal agencies are involved.

It is, of course, possible to acquire less than a fee interest in desired land. Acquisition of scenic easements or development rights has not been undertaken at Lake Tahoe by the Forest Service, although Congress has encouraged this approach in a number of national recreation areas because it saves money and preserves individual property ownership. Or, the Forest Service could acquire land subject to a life estate or an estate for years in the owner of the land. Again, the

153. Id. at 33-36.
154. Id. at 113-14.
155. Id.; see also EPA Hearings, supra note 14, at 164.
159. See Statement of Huey D. Johnson, supra note 156.
160. EPA Tahoe Study, supra note 1, at 113.
163. See U.S. Forest Service, Sawtooth NRA, How and Why We Buy Scenic Easements (undated).
acquisition cost is reduced, and the owner maintains some property rights in the land.

It has been suggested that an environmental tax credit could be given to holders of desirable land\(^{165}\) amounting to a four percent credit of the value of the land and improvements applied against the landowner's federal income taxes.\(^{166}\) In this way, a formula would be derived whereby the federal government would become the fee owner over a 25-year period. This approach has also not been tried.

So that speculation and inflation do not devour congressional appropriations for land acquisitions, a number of suggestions have been made. They include: freezing the price of all lands that the government will purchase at the time authorization is given for purchase; giving the Forest Service the right to preempt a transfer of land ownership by paying the transfer price; and acquiring an interest in property with an option to buy the remaining interest at a price established when the initial interest is acquired.\(^{167}\) These methods are untried and dependent on congressional authorization.

Forest Service acquisition of more land in the Basin is certainly important if public access and recreation in the Basin are to be ensured. A long-range program of land acquisition will be difficult without a congressional declaration of national interest and a congressional guarantee of continued funding. Innovative approaches, such as tax credits, scenic easements, deterrence of speculation, and federal land exchange could be incorporated in this congressional mandate. Federal land acquisition can be very useful in overcoming insufficient zoning authority, such as the TRPA's inability to prevent casino construction.\(^{168}\) However, it is a poor strategy for affecting land use if it is used without zoning support.\(^{169}\)

A National Recreation Area

In the late 1950's, it was recognized that there were areas in the nation that possessed national environmental significance but were neither sufficiently unique to qualify as a na-

\(^{165}\) EPA Hearings, supra note 14, at 159 (statement of Roy Robinette, President, League to Save Lake Tahoe); EPA Tahoe Study, supra note 1, at 115.

\(^{166}\) EPA Hearings, supra note 14, at 159.

\(^{167}\) EPA Tahoe Study, supra note 1, at 116.

\(^{168}\) LTBMU Plan, supra note 80, at 35-36.

\(^{169}\) EPA Tahoe Study, supra note 1, at 109.
national park nor primitive enough to be considered wilderness. To protect these areas and to expand recreational opportunities, Congress created national lakeshores, seashores, and recreation areas. This flexible designation permits areas to be protected while allowing activities such as mining, fishing, and home ownership within the boundaries of the areas. A national recreation area (NRA) can be managed by either the Forest Service or the National Park Service.

There are many forms that an NRA may take. It can be simply a reorganization of lands already owned by the federal government, or it can require extensive acquisition of private and state lands. While focusing on recreational opportunity, the purposes of an NRA can vary and can certainly include preservation of natural beauty.

A central issue in the creation of an NRA is the decision as to which lands will be encompassed by the new area. The exclusion of lands controlled by powerful business or political interests has sometimes been necessary to gain congressional approval. Whatever the boundaries, NRA's usually include a lot of private land that is not intended for acquisition by the federal government. In order to deal with this private land and its potential for incompatible development, Congress has exerted influence over its use.

NRA Models. The three basic types of land use influence that Congress has used in the past are: consultation with local governments as to desirable zoning ordinances; suspended condemnation of private lands for so long as federally-approved, local zoning ordinances are in effect; and suspended condemnation of private lands for so long as those lands are in compliance with federally-promulgated land use standards.

The Cuyahoga Valley National Recreation Area was created to serve the residents of the Akron-Cleveland, Ohio area,
and is an example of the first type of land use influence. Acquisition was supplemented by consultation with local jurisdictions on ordinances that would protect the NRA. Congress encouraged the use of scenic easements in acquisition, but when the acquisition appropriation ran out, the National Park Service was forced to rely on persuading local governments to regulate private land use in or near the NRA. Congress made it clear that there was to be neither federal preemption of local zoning authority nor any badgering of local governments by the Park Service.

Cape Cod National Seashore was created to preserve the Massachusetts shore by using a suspended power of condemnation. If Cape Cod communities regulated use of private land within the seashore through Interior Department-approved ordinances, then the Park Service could not condemn the improved property covered by those ordinances. If the property was required for access to, or was a part of, the beach or water, then the property was subject to condemnation. The Secretary of the Interior established standards for zoning ordinances which prohibited any commercial or industrial districts within the national seashore. Setbacks were established. Uses other than residential were to be allowed if they were consistent with the character of the area. Signs were restricted. Variances and exceptions were permitted, subject
to the Secretary’s review. Local jurisdictions could submit their ordinances to the Secretary for review, which was binding on the Department of the Interior.

The Sawtooth National Recreation Area in Idaho was also established to preserve a way of life. Subdividers were entering the Sawtooth Valley in increasing numbers, and Congress wanted to stop the development. Because the two local counties had very limited zoning schemes, the Forest Service was authorized to establish land use standards, using the suspended power of condemnation for compliance enforcement. Within the boundaries of the NRA, there were about one hundred ranches, which were considered conforming uses, and four active subdivisions with about five hundred homes. The standards promulgated by the Forest Service were quite specific, including height limits, frontage and square foot minimums, and specifications for paints and roofs. Compatible commercial development was permitted if it met a need in the area. Subdividers were encouraged to work with the area ranger to meet land use standards. Subdivider cooperation with the Forest Service resulted in the continued development of unincorporated Sawtooth City, a group of subdivisions. Appeals from decisions by the area ranger as to compliance with standards were provided for up the chain of command to the Secretary of Agriculture and to the federal district court.

Advantages of an NRA. Perhaps of greatest significance in the creation of an NRA is the congressional declaration that an area such as Lake Tahoe is indeed a nationally significant area that merits protection. This provides federal agencies and

190. Id. § 27.4.
192. Id. §§ 460aa-460aa-14.
195. Sawtooth Hearings, supra note 194, at 89. Altogether, some 1100 landowners were affected by the standards. Letter from Paul Zimmerman, supra note 194, at 1.
196. 36 C.F.R. § 292.16(d)-(e) (1978).
197. Id. § 292.16(f)(1).
198. Id. § 292.16(d)(2).
courts with a statutory standard for reviewing their responsibilities within an area and facilitates cooperation between the various federal agencies.  

Creation of an NRA also includes an appropriation for land acquisitions and a focus for future funding of improvements, maintenance, and acquisitions. National seashores and lakeshores have generally been provided with a mandate to acquire shoreline property and access to that property, so a significant increase in public ownership of this lakefront property could be expected. There is usually a provision to acquire state-owned lands within NRA boundaries. Such a provision for Lake Tahoe would relieve California and Nevada of the costs of development, maintenance, and protection of state parks in the Basin and allow a shift in resources to other parts of the states.

A Lake Tahoe NRA could consist simply of an aggregation of state and federal lands in the Basin. However, because such an NRA would probably be created because of dissatisfaction with the TRPA, it is more likely that extensive private lands would be included within the boundaries of the NRA. Therefore, use of the Cuyahoga model of zoning consultation would be unlikely if increased federal influence over land use were desired. The Cape Cod model of strongly encouraging consistent ordinances might be used if the TRPA was retained to control private land use. Under that model, TRPA's enforcement power could be supplemented by the NRA threat to use eminent domain against recalcitrant localities and property owners. The Sawtooth model would, of course, preempt local land use control within the boundaries of an NRA with Forest Service control, and this would be the greatest expression of a lack of confidence in local and TRPA land use efforts.

The extent to which an NRA would serve as a focus for federal activity in the Basin would probably depend on what lands and responsibilities were granted to the managing agency. Perhaps the Forest Service should be given review power over all federal and federally funded projects in the

201. EPA TAHOE STUDY, supra note 1, at 4.
203. See, e.g., id. § 460aa-2(f).
204. Each state's laws allow such a transfer of state land to the federal government when certain jurisdictional questions are resolved. CAL. GOV'T CODE § 14665 (West Supp. 1979); NEV. REV. STAT. ch. 328 (1973).
NATIONALIZING LAKE TAHOE

Basin, although other federal agencies would retain certain authority under the NRA multiple-use concept.

Disadvantages of an NRA. A traditional NRA would not solve all of the growth problems of Lake Tahoe. Many of the NRA's have been endangered by growth, often fostered by other federal agencies. For example, the Atomic Energy Commission (AEC) proposed a nuclear generating plant on the edge of the Indiana Dunes National Lakeshore. The National Park Service strongly opposed the plant because it would cause serious damage to the lakeshore, including alteration of marsh and pond levels. The AEC ignored the protest, and only a federal court was able to alter the AEC attitude. Padre Island National Seashore is required to allow the United States Navy to continue use of gunnery and bombing ranges within the seashore. The Bureau of Reclamation is proposing further development of the Whiskeytown Reservoir facilities in California that would destroy much of the natural and historical value of that Park Service-administered area. At Glen Canyon NRA in the Southwest, the Bureau of Land Management retains authority to administer mining and grazing leases without Park Service oversight. Federal agency conflicts and the impact of growth are simply not solved by creation of an NRA.

A traditional NRA is also limited in its authority to affect land use, even within its own boundaries. An offer to assist local governments in zoning or a threat to condemn private property may be effective when local jurisdictions are cooperative or undeveloped, but without one of these elements, an NRA can face severe threats to its integrity. For example, at Fire Island National Seashore in New York, the Park Service ran out of acquisition money. Under the Cape Cod model, it was powerless to prevent inconsistent development within the seashore until Congress appropriated more money. Indiana

205. Porter County Chapter of the Izaak Walton League of America v. Atomic Energy Comm’n, 515 F.2d 513, 527 (7th Cir. 1975).
206. Id. at 530.

Efforts by environmentalists to preserve our natural habitat—in this instance, Fire Island—cannot help but strike a sympathetic chord. Indeed, this is particularly true where, as here, this laudable purpose ap-
Dunes National Lakeshore was also established under a suspended power of condemnation. Dissatisfaction with the response of local government in establishing zoning ordinances apparently led to revocation of the suspension and to authorization to buy all land within the lakeshore. At the Whiskeytown Reservoir, the Park Service is helplessly watching land development on the northern boundary of the NRA, and local governments have been unwilling to take any preventative action.

Land acquisition under an NRA is a very limited tool to affect land use because it is costly and dependent on the availability of money from year to year. Lake Tahoe is a particularly difficult area to use the power of condemnation, or the threat of it, for zoning. Although public land comprises seventy percent of the land in the Basin, the remaining thirty percent is the more valuable and includes housing for 45,000 permanent residents, an incorporated city, and most of the shoreline. The assessed valuation (one-fourth of the actual value) of the City of South Lake Tahoe alone is about $130,000,000. The two Stateline casino sites being considered for Forest Service acquisition are worth approximately $25,000,000. Enforcement of land use standards by eminent domain might run into the hundreds of millions of dollars, particularly if non-conforming uses were purchased as has been done in the Sawtooth NRA. Acquisition of property only because it violates land use standards may have no relation whatsoever to an overall acquisition plan.

Appears frustrated by a federal statutory scheme which, despite its lofty terms, provides a mere chimera of environmental protection. Id. at 1142. The court found that the federal government had no legal interest at all in whether development went ahead or not. Id. at 1146. For a description of the coordination and cooperation problems at Fire Island, see National Park Service, General Management Plan, Fire Island (Sept., 1977).

213. Whiskeytown Plan, supra note 208, at 50.
214. EPA TAHOE STUDY, supra note 1, at 28-41; Letter from Glenn Smith, supra note 86, at 2.
217. Letter from Paul Zimmerman, supra note 194, at 1.
Direct Federal Land Use Control

Regulation of private land use through injunction and citation for zoning violations is more efficient and economical than attempting to condemn violators' property. Through zoning, private property rights are largely preserved, and local government continues to receive the property taxes on that property.

Nevertheless, political and constitutional restraints have prevented Congress from seeking direct control over private land use. There is a belief that federal exercise of the police power, particularly in regulating private land use, is improper and perhaps unconstitutional. This theory has been eroded by extensive regulation of activities, which, though formerly left to the states to regulate, affect national interests.

The police power has been defined as "the power by which the government abridges the freedom of action of the free use of property of the individual in order that the welfare of the state or nation may not be jeopardized."

Although Congress possesses no constitutional grant of a general police power, it can use police-like power through "indirection," justifying the exercise on its constitutional powers.

The most common justification for indirect exercise of police-like power has been the Commerce Clause. A great deal of interstate automobile traffic occurs in the Basin. Lake Tahoe itself is an interstate, navigable waterway, and the Basin's problems are interstate. Interstate disagreement over transportation programs is tying up traffic at South Shore, and interstate air pollution affects the Basin's environment.


220. Cushman, supra note 219, at 291.

221. U.S. Const. art. I, § 8, cl. 3.


223. For example, air pollution from the Sacramento Valley often drifts into the Basin. EPA Tahoe Study, supra note 1, at 21. California's Air Resources Board has been given responsibility for drawing up the air quality plan for the California side of the Basin. As part of that plan, it is recommending imposition of motorists' fees for all cars visiting the Basin from the California side. Although motorists traveling on to Nevada would be exempted, it has the potential to impede interstate commerce. San Jose News, May 10, 1979, at 2F, col. 1.
If the Commerce Clause justification for federal land use control seems a bit too indirect, the Property Clause may provide a stronger justification. The Supreme Court has indicated that this constitutional grant of power to Congress encompasses much more than regulation of conduct on federal lands.

In *Camfield v. United States*, two ranchers had erected a fence on their own land that denied access to federal lands, in violation of a federal statute. The Supreme Court affirmed their conviction on a nuisance theory, holding that Congress has the right of a proprietor to prevent nuisances, and within its power as a legislator, can determine what is a nuisance per se. The Court stated:

While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States at the mercy of state legislation.

This case was supported thirty years later by *United States v. Alford*. Mr. Alford had left a fire unattended near forest reserve lands in violation of a federal statute. Justice Holmes, writing for the unanimous Court, determined that Congress intended to regulate fires on both public lands and adjacent private lands. Citing the Property Clause and *Camfield*, he stated: "Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests."

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225. 167 U.S. 518 (1897).
227. 167 U.S. at 522-23.
228. Id. at 524-25.
229. Id. at 525-26.
232. 274 U.S. at 265. The Court emphasized: "The danger depends upon the nearness of the fire, not upon the ownership of the land where it is built." Id. at 267.
233. Id. at 267.
Courts have emphasized that the power of Congress to regulate conduct on federal lands is "without limitations." An interpretation of the Wild Free-Roaming Horses and Burros Act confirmed the breadth of that power in Kleppe v. New Mexico. The New Mexico Livestock Board entered federal land to round up wild burros that had been interfering with a rancher's cattle grazing under federal permit. The Supreme Court upheld the constitutionality of the Wild Horses Act, finding that the wild burros were ecologically related to federal land, and therefore within the protection of congressional power under the Property Clause. Although the Court did not have to reach the question of the constitutionality of federal regulation of wild burro capture on private land, it noted Camfield and stated:

[T]he . . . passage refers to the scope of congressional power to regulate conduct on private land that affects the public lands. And Camfield holds that the Property Clause is broad enough to permit federal regulation of fences built upon private land adjoining public land when the regulation is for the protection of federal property. Camfield contains no suggestion of any limitation over Congress' power over conduct on its own property; its sole message is that the power granted by the Property Clause is broad enough to reach beyond territorial limits.

How far beyond territorial limits the Property Clause power reaches has never been determined.

In 1977, the Kleppe decision was applied to conduct on neighboring state property in United States v. Brown. A duckhunter traveling through Voyagers National Park on a state-owned waterway was arrested by park rangers for carrying a gun in violation of Park Service regulations. The appellate court affirmed the hunter's conviction by expansively

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237. Id. at 543.
238. Id. at 538 (emphasis in original).
239. Id. at 539, 547. The Kleppe decision also noted congressional discretion in determining if a threat to public land exists and that the Court would be inclined to defer to this congressional determination. Id. at 541 n.10.
The court concluded that congressional power over federal lands includes "the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands." How such broad construction of the Property Clause and the corresponding judicial deference to the judgment of Congress would combine to affect the direct federal land use control of private land is uncertain. Such controls on private lands within the boundaries of, or adjacent to, a national recreation area would appear to fall within the permissible reach of Kleppe. The Forest Service has clearly indicated its concern that continued urbanization of the Lake Tahoe Basin may deny the public use of its majority ownership of the Basin. Regulation of this interference with a fundamental purpose of the federal lands certainly seems to be a proper exercise of congressional power under the Property Clause.

Assuming the constitutionality of direct federal land use control, an inquiry into the form of that control is necessary. The Forest Service would probably propose a Basin management plan similar to its approach for management of its own lands in the Basin. The Forest Service general plan provided for a two-step evaluation of land. First, land capability

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241. Id. at 822. Almost identical language was used in the Kleppe case. 426 U.S. at 536.
242. 552 F.2d at 822.
243. Private development as it takes place utilizes the capacity of the Basin (transportation, water, sewers, etc.) and precludes the possible use of public lands for public purposes. If a "fair share" of the capacity is preserved for the use of public lands, then development of the private lands would not be adverse to the public interest. The objective would be to determine and to assure a fair share of capacity for each.

Statement of Douglas R. Leisz, supra note 80, at 5.
244. See One Third, supra note 132, at 82; Federal Environmental Law 31 (E. Dolgin & T. Gilbert eds. 1974). "It would be feasible to invest in the Secretary of Agriculture control over the development, administration, and enforcement of zoning ordinances and permits in or near a National Lakeshore." BOR Draft, supra note 25, at 95. But see Land Use Hearings, supra note 218, at 185-86 (statement of Rogers B. Morton questioning what would be left of state sovereignty if the federal government took over land use control).

For a discussion of just how broad the Kleppe decision may be, including perhaps a congressional power to force private landowners to submit to ecological nuisances and intrusions from federal lands, see Notes & Comments, Constitutionality of the Free-Roaming Wild Horse and Burros Act: The Ecosystem and the Property Clause in Kleppe v. New Mexico, 7 Env't'L L. 137 (1976).
245. LTBMU Plan, supra note 80, at 45-50.
throughout the Basin was determined. Then, the land capability designation was assigned types and intensities of development suitable for that land capability. This second step was called land suitability. The TRPA used this framework to develop its regional plan, but deviated from the Forest Service study regarding twenty-six percent of the TRPA-regulated land. It could be expected that the Forest Service would strictly apply its land capability/suitability analysis and deal with non-conforming uses through eminent domain or amortization.

In establishing the capability/suitability standards, scenic and recreational values would be given strong consideration. The first draft of the Bureau of Outdoor Recreation’s study of Lake Tahoe suggested use of landscape flow evaluation to preserve the scenic beauty of the Basin. For example, if one wanted to preserve the view of Mount Tallac from anywhere on the Lake, a landscape conservation district might be established to protect the area around Mount Tallac. Determination of the important scenic areas would, of course, involve subjective decisions, but they would not be many, due to the large percentage of public land ownership in the Basin.

The EPA has suggested, and the Forest Service has apparently supported, a more dynamic approach to land use planning and control. Instead of creating a static regional plan, the EPA and the Forest Service are developing an environmental threshold approach. This would involve setting threshold standards for ecological values, such as water quality and wildlife habitat, continuously monitoring those values, and then altering land use standards to avoid crossing the thresholds. This approach assumes that mankind cannot be certain what effects continued development may have on the Basin. Outside effects, such as air pollution from Reno or Sacramento, could be more flexibly factored into land use decisions. Such an approach would, however, deprive property owners of the greater

246. Land capability is defined as “the level of use an area can tolerate without sustaining permanent damage through erosion and other causes.” LAND CAPABILITY STUDY, supra note 90, at 4.
247. Id. at 24-25.
248. HUD Assessment, supra note 19, at 8.
251. EPA TAHOE STUDY, supra note 1, at 93. See text accompanying note 50 supra (suggested environmental thresholds for the TRPA).
predictability that a more static regional plan would provide.

There are significant problems involved in imposing federal land use control. Meaningful public input from individual property owners would be difficult to obtain, because political pressure could only be brought through Congress rather than local and state government. Any federal regional plan would no doubt have to comply with the National Environmental Policy Act, with its attendant environmental impact statements.\textsuperscript{252} The deprivation of power over land use decisions from the two states and the various counties would be significant. In addition, the Lake Tahoe Basin is an important source of tax revenue,\textsuperscript{253} and federal control of land use would likely mean a more static level of revenue for local governments in the area. In turn, the services to be provided by local jurisdictions would largely be controlled by federal land use decisions. Federal zoning, however, might offer to property owners the economic advantage of reverse condemnation payments for downzoning.\textsuperscript{254} If that were provided by Congress, it would ease the shock to property owners and perhaps reduce opposition to a federal takeover of zoning.

\textit{A Tahoe Basin Authority}

One last alternative should be mentioned: a nationalized TRPA, made up of a nationally representative majority.\textsuperscript{255} Dependent solely on federal funding, it would be able to avoid functional limitations that management of the Basin by a conventional federal agency such as the Forest Service would have. Such an authority would also make Lake Tahoe a special entity that would not suffer from the divided attention or support of a Cabinet Secretary.

The only model that exists at the present time is the Tennessee Valley Authority (TVA). Analysis of the TVA suggests

\begin{footnotesize}
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\item \textsuperscript{252} 42 U.S.C. §§ 4321-4361 (1976); see also Statement of Douglas R. Leisz, supra note 80, at 3-4.
\item \textsuperscript{253} Ayer, supra note 32, at 1322; Ayer, \textit{A Trip Through the Fiscal Wilderness}, CAL. J., Jan., 1972, at 14. For example, in 1970, El Dorado County’s portion of the Basin contributed 52¢ of every county tax dollar in revenue and received only 30¢ back in services. \textit{Id}.
\item \textsuperscript{254} Sawtooth Hearings, supra note 194, at 57 (statement of U.S. Senator Frank Church); BOR Draft, supra note 25, at 99.
\item \textsuperscript{255} The first draft of the Bureau of Outdoor Recreation study of Lake Tahoe suggested adding a national majority to the TRPA governing board, but did not go so far as to advocate a completely independent management agency. BOR Draft, supra note 25, at 82-85.
\end{enumerate}
\end{footnotesize}
that its success was based on the special circumstances of the recovery from the Great Depression. The TVA was created to spur development and became quite financially independent through power generation revenue. It was not a comprehensive agency for all federal activity in its region, but devoted itself only to development of resources.

Such an entity at Lake Tahoe could be created only with the special interest of powerful politicians, such as the President. The difficulty of gaining support for a traditional NRA indicates that such a special interest will probably not exist in the near future.

CONCLUSION

Whether the TRPA will or should continue to function is a question that will be determined by political bargaining between Nevada and California. The decision on the TRPA's future will certainly influence what the federal role at Lake Tahoe will be. This comment has described the reservoir of federal power available to affect the growth of the Lake Tahoe Basin. The efforts of the Western Regional Council have provided a framework for coordinating federal action, but more federal involvement is needed if the public interest at Lake Tahoe is to be fully protected. To continue to rely on uncertain appropriations for land acquisition and on the good will of the many federal agencies involved is to continue to place Lake Tahoe and the public interest in the area in jeopardy.

At a minimum, a congressional declaration of the national interest in Lake Tahoe should be made. Such a declaration would direct federal agencies to subordinate their functional goals to that national interest and would provide a statutory standard for managing all federal activity in the Basin. Then, Congress could establish a national lakeshore at Lake Tahoe. The creation of such an NRA would provide Congress with the flexibility to innovate in acquiring land, seeking adequate land use standards, and coordinating federal and federally funded activities in the Basin. It would tend to ensure that the plan-

257. Id. at 329-30.
258. Id. at 329-33; see also M. Derthick, supra note 116, at 22-45.
259. For an evaluation of the TRPA, see Cal. Dep't of Finance, Regional Planning at Lake Tahoe, An Analysis (1977).
ning, maintenance, and development of the federal lands in the Basin were adequately funded. Designation as a national lake-shore would indicate congressional intent to acquire lakefront property, with an ultimate goal of acquisition of all of the lake-shore. Finally, establishment of a congressionally-mandated federal management unit in the Basin would ensure that its ecology was continuously monitored.

Creation of an NRA at Lake Tahoe might be a first step toward direct control of Basin land use by the federal government. However, Congress has the power to mandate as powerful or as weak an NRA as protection of the national interest requires. It would appear that Congress has the constitutional power to impose direct federal land use control to protect any federal land. Yet only the endangering of a nationally significant area would be sufficient to compel Congress to take this unprecedented step in exercising its Property Clause power.

Lake Tahoe and its Basin have been studied extensively in the past two decades, but no one has determined how much more development the Basin can withstand. There are fundamental questions to be answered before Congress could decide whether the national interest requires direct federal zoning. Would implementation of TRPA's regional plan be adequate to protect the Basin? Should the present level of use of the Basin be maintained or even cut back? Should all vacation homes or gaming be barred from the Basin? Perhaps the congressional declaration of the national interest in Lake Tahoe would help provide answers. Perhaps yet another study of Lake Tahoe is required to determine the environmental thresholds of the Basin.

There is no substitute for Lake Tahoe as a recreation center. It lies within easy driving distance of all of Northern California and Northwestern Nevada. The Basin provides a wide variety of recreational opportunities, and yet is large enough to accommodate a large number of people. California and Nevada may save local control of land use by reaching an effective compromise on the region's future. If the two states do not

262. EPA Tahoe Study, supra note 1, at 93.
263. In 1973, the peak seasonal population was estimated at about 129,700 (about 26,000 of these were permanent residents). The estimated seasonal population peak if all land in the Basin were developed to the highest level compatible with Forest Service land studies would be about 364,800. Id. at 40-41.
reach such a compromise, the nation’s interest in the preservation of this unique lake basin demands that Congress develop a land management system in the Basin that will protect this national resource.

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