Protecting California's Federal Public Lands in the Trump Era

INTRODUCTION

The federal government owns 45.8 million acres of property in California, approximately 46 percent of the state's total land area.[1] Soon after President Trump took office in 2017, his administration began to threaten widespread rollbacks of protections on federal public lands.[2] The State of California drafted California Senate Bill 50 (SB 50) in response to signals after the 2016 election that the Trump administration and Republican-controlled Congress were contemplating expansive sales of federal public lands, including national parks, wilderness areas, and monuments, to private parties.[3] Through SB 50, California lawmakers sought to regulate the conveyance of federal public lands in the state from the federal government to private parties in an effort to discourage such conveyances[4] and keep public lands public.[5]

The Trump administration's actions, aided by the Republican-controlled Congress during the first two years of the Trump presidency, have largely borne

DOI: https://doi.org/10.15779/Z38W08WH1Q

1. *See* CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., 7-5700, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 7 (2017). The federal government owns approximately 28 percent of total land across the United States. *See id.* at 6. By state, the percentage of federally owned land ranges from 0.3 percent in Connecticut and Iowa to 79.6 percent in Nevada. *See id.* at 7.

2. On March 27, 2017, President Trump approved a bill blocking implementation of the Bureau of Land Management's (BLM's) Planning 2.0 rule, limiting the public's ability to provide input about oil drilling on public lands. *A Timeline of Donald Trump's War on Public Lands*, OUTSIDE ONLINE (Feb. 5, 2018), https://www.outsideonline.com/2277446/public-lands-war-timeline. The next day, he declared an executive order directing the Department of the Interior to review and minimize guidelines about energy development on and near public lands, including national parks and wildlife refuges. *Id.* In April 2017, President Trump signed executive orders to permit oil drilling in Arctic waters and to review, and possibly revoke, the status of national monuments. *Id.* In August 2017, then-Secretary of the Interior Ryan Zinke recommended revising or eliminating ten national monuments. *Id.*

3. *Federal Public Land: Conveyances: Hearing on SB 50 Before the Assem. Judiciary Comm.*, 2017–18 Leg. 4 (Cal. July 11, 2017) [hereinafter Legislative Hearing July 2017]; Lisa Belenky & Kim Delfino, *SB 50: California sets a course to keep public lands public*, A.B.A. GROUPS (Nov. 9, 2019), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/november-december-2018/sb-50/.

4. S.B. 50, Ch. 535, 2017–18 Leg. Sess. (Cal. 2017).

5. *See generally Federal Public Land: Conveyances: Hearing on SB 50 Before the Sen. Judiciary Comm.*, 2017–18 Leg. (Cal. Apr. 4, 2017) (creating a right of first refusal for the California State Lands Commission regarding sales of federal public land in the state) [hereinafter Legislative Hearing April 2017].

out the concerns of SB 50's drafters.[6] The Trump administration has altered federal public lands management by decreasing the size of national monuments, reducing habitat protections for endangered species, and expanding fossil fuel extraction on public lands.[7] Meanwhile, Congress revoked a new Bureau of Land Management rule intended to increase public participation in federal land use planning and permitted oil leasing in the Arctic National Wildlife Refuge, enabling President Trump's natural resource management priorities in what some consider "the most substantial rollback in public lands protections in American history."[8] While the newest Congress has demonstrated a much greater willingness to protect public lands by passing the Natural Resources Management Act,[9] the administration may still continue to repeal protections through executive action.[10]

The federal government filed suit challenging the constitutionality of SB 50 and prevailed in the district court.[11] In light of the outcome of that litigation, this In Brief examines alternative approaches that California might take to achieve the policy goals of SB 50. While not without challenges, the alternative likely to

6. In February 2018, BLM reversed a previous decision to withhold 1.3 million acres of public lands in the California Desert Conservation Area from mining. *See* BUREAU OF LAND MGMT., BLM CANCELS WITHDRAWAL PROPOSAL IN CALIFORNIA DESERT (2018). In August 2018, BLM announced that it was considering opening 400,000 acres of public lands and 1.2 million acres for which it owns mineral rights in California to hydraulic fracturing. *See* Scott Martelle, *The Trump administration wants to open public lands in California to fracking, linked to quakes in other states*, L.A.TIMES (Aug. 9, 2018), https://www.scribd.com/article/385917556/Commentary-The-Trump-Administration-Wants-To-Open-Public-Lands-In-California-To-Fracking-Linked-To-Quakes-In-Other-States.

7. *See* Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining "The Public" in Public Land Law*, 48 ENVTL. L. 311, 316 (2018).

8. *Id*. at 311.

9. Congress has recently changed course, passing the Natural Resources Management Act (NRMA) in February 2019. *See* Alejandra Borunda, *10 places that will be protected by Congress's new public lands bill*, NAT'L. GEOGRAPHIC (Feb. 27, 2019), https://www.nationalgeographic.com/environment/2019/02/10-new-protected-places-congress-public-lands/. The NRMA will protect more than two million acres of public lands across the country, including 1.3 million acres of new wilderness areas. *See id*. Three hundred and seventy-five thousand of these acres will be in California, in part expanding and further connecting Death Valley National Park, Joshua Tree National Park, and the Mojave National preserve. *Id.* The law also permanently reauthorizes the Land and Water Conservation Fund, which funds a large portion of public lands protection through fees and royalties paid by fossil fuel companies operating in federal waters. *See* Coral Davenport, *Senate Passes a Sweeping Land Conservation Bill*, N.Y. TIMES (Feb. 12, 2019), https://www.nytimes.com/2019/02/12/climate/senate-conservation-bill.html.

10. President Trump signed the bill into law on March 12, 2019. *See* Ally Riding, *President Trump signs Natural Resources Management Act into law*, INDEPENDENT (Mar. 13, 2019), http://suindependent.com/natural-resources-management-act/. However, his administration continues to pursue plans to enable drilling on protected habitat affecting the sage grouse, protected lands in Utah, in the Arctic National Wildlife Refuge, and many coastal waters. *See* Coral Davenport, *In Show of Bipartisanship, House Approves a Sweeping Land Conservation Bill*, N.Y. TIMES (Feb. 26, 2019), https://www.nytimes.com/2019/02/26/climate/public-lands-conservation.html.

11. Memorandum and Order Re: Cross-Motion for Summary Judgement, United States v. California, No. 2:18-cv-00721-WBS-DB, at *18 (E.D. Cal. Nov. 1, 2018) [hereinafter Memorandum and Order].

face the fewest constitutional and political barriers would be to regulate federal public lands transferred into private ownership.

I. LEGAL BACKGROUND

A. Constitutional Framework

The Supremacy Clause, the Property Clause, and more than one century of case law govern the delineation of state and federal regulatory power over federal public lands.

The Supremacy Clause declares that the U.S. Constitution and federal laws are the "supreme Laws of the Land . . . notwithstanding" any state laws or constitutional provisions.[12] States have "no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress."[13] Accordingly, courts apply the Supremacy Clause to strike down state laws that regulate or discriminate against the federal government, through the doctrine of intergovernmental immunity,[14] and those that federal laws preempt.[15]

States have traditionally exercised jurisdiction over the property within their borders, including title to and transfer of such property,[16] although the Property Clause places some limits on states' power to regulate federal lands. The Property Clause grants the federal government the "power to dispose of and make all needful rules and regulations respecting" federal property,[17] determinations which are primarily Congress' to make.[18] Yet, the federal government does not have exclusive jurisdiction over public lands,[19] as the fact that it owns land within any given state "does not withdraw those lands from the jurisdiction of the State."[20] Thus, states may enforce their own civil and criminal laws on federal lands "so long as those laws do not conflict with federal law."[21] However, state laws may not interfere with Congress' ability to "prescribe the times, the conditions, and the mode of transferring" federal property,[22] or otherwise obstruct the purposes of federal laws passed under the Property

12. U.S. CONST. art. VI, cl. 2.
13. M'Culloch v. Maryland, 17 U.S. 316, 436 (1819).
14. *See* Memorandum and Order, *supra* note 11, at *5–*6.
15. Courts will find a state law preempted when it interferes with or contradicts federal law. Legislative Discussion April 2017, *supra* note 5, at 8.
16. *Id.*
17. U.S. CONST. art. IV, § 3, cl. 2.
18. *See* Kleppe v. N.M., 426 U.S. 529, 536 (1976).
19. *See id.* at 544.
20. Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930).
21. Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987).
22. Gibson v. Chouteau, 80 U.S. 92, 93 (1872).

Clause.[23] Nevertheless, courts give state regulations that serve legitimate state interests "a strong presumption of validity."[24]

B. Crafting, Passing, and Amending SB 50

The California Senate introduced SB 50 in February 2017 to help protect federal public lands in California from executive and congressional threats.[25] State Senator Ben Allen drafted the bill in response to federal threats to sell public lands across the country,[26] including national parks, wilderness areas, and monuments, starting after the 2016 election.[27] The Trump administration began a review of national monuments in April 2017, including six in California,[28] which resulted in a recommendation to revise or eliminate ten national monuments.[29] Given these threats, the California legislature established a mechanism for protecting federal public lands through state law.[30]

The state legislature enacted SB 50 in October 2017. The law provided that conveyances of federal public lands would be void unless the California State Lands Commission (SLC) was provided the right of first refusal or the right to arrange the transfer of the federal property to another entity.[31] The law provided that SLC must issue a certificate of compliance prior to the conveyance.[32] SLC would have to waive these rights for conveyances it deemed "routine,"[33] as well as for certain exceptions including federal public lands conveyed according to a conservation plan or conveyed to a federally recognized Native American tribe.[34]

---

23. *See* Ventura Cty. v. Gulf Oil Corp., 601 F.2d 1080, 1086 (9th Cir. 1979).

24. N.D. v. United States, 495 U.S. 423, 433 (1990).

25. California Senate President Pro Tempore Kevin de León said that SB 50 would help protect California from President Trump's threats to "dismantle core environmental protections, weaken the EPA and fast-track new fossil-fuel developments on public lands" while Congress was "racing to roll back landmark protections like the Endangered Species Act." Melody Gutierrez, *Fearing Trump, California lawmakers move to safeguard environmental rules*, S.F. CHRONICLE (Feb. 23, 2017), https://www.sfchronicle.com/politics/article/California-bills-would-keep-current-environmental-10955444.php.

26. The bill's legislative history notes that the number of proposed conveyances of federal public lands increased following the 2016 election of President Trump. "California's landscape would be permanently altered . . . [its] residents and environment could be deprived of access to, and the benefits from, this land in its current condition" if the federal government sells federal public lands in California or leases it for extractive purposes. Legislative Hearing April 2017, *supra* note 5.

27. Legislative Hearing July 2017, *supra* note 3; Belenky & Delfino, *supra* note 3.

28. Susan Mason, *Opinion: Trump's public lands attack economically misguided*, MERCURY NEWS (Mar. 15, 2018), https://www.mercurynews.com/2018/03/15/editorial-trumps-public-lands-attack-economically-misguided/.

29. OUTSIDE ONLINE, *supra* note 3.

30. "This bill . . . responds to reports that the President and the Republican-majority Congress may move to sell federal public lands to private interests, thereby removing federal protection from environmentally sensitive lands in national parks, national wilderness areas, and national monuments located within California." Legislative Hearing July 2017, *supra* note 3.

31. S.B. 50, Ch. 535, Div. 6, p. 4, Ch. 5, § 8560(a)(2)(A), 2017–18 Leg. Sess. (Cal. 2017).

32. *Id*. at § 8560(b)(2)(D)(i).

33. *Id*. at § 8560(b)(2)(D)(ii).

34. *Id*. at § 8560(f)(1)–(3).

SB 50 also prohibited presenting a deed or other federal public land conveyance document to a county recorder's office without an SLC certificate of compliance, with civil penalties of up to $5,000 for violations.[35] Finally, SB 50 required SLC to "ensure . . . that future management of the conveyed federal public land [would be] determined in a public process that gives consideration of past recognized and legal uses of those lands."[36] The law came into effect on January 1, 2018.

The California legislature amended SB 50 in June 2018, after the federal government filed suit challenging the law's constitutionality.[37] The amendment narrowed the law's scope by declaring that SLC must automatically issue certificates for certain federal public land conveyances.[38] However, since more than 93 percent of federal public lands in California would not qualify for such automatic certificates,[39] the amendment did not greatly narrow SB 50's scope in practice.

C. The Federal Government's Challenge to SB 50

On April 2, 2018, the United States Department of Justice filed suit in the Eastern District of California seeking a declaration that SB 50 was unconstitutional and an injunction to prevent its enforcement.[40] The federal government first contended that SB 50 violated the doctrine of intergovernmental immunity, and thus the Supremacy Clause, by purporting to directly regulate the United States and discriminating against the United States and those with whom it deals.[41] The federal government also argued that federal laws preempted SB 50.[42]

In its November 1, 2018 ruling, the district court agreed with the federal government's first argument.[43] By requiring that SLC have a right of first refusal, SB 50 "trespasse[d] on the federal government's ability to convey land to

35. *Id.* at Div. 7, Ch. 3.4, § 6223.

36. S.B. 50, Ch. 535, CAL. PUB. RES. CODE, Div. 6, p. 4, Ch. 5, § 8560(e) (2018).

37. *See* Memorandum and Order, *supra* note 11, at *5.

38. These included conveyances to the State of California and conveyances of federal public lands not managed by the National Forest Service, Bureau of Reclamation, Bureau of Land Management, U.S. Fish and Wildlife Service, or National Park Service, except for lands part of a national monument or marine sanctuary, containing national conservation lands, in the National Register of Historic Places, or designated for preservation or conservation. *See* Div. 6, p. 4, Ch. 5, § 8560(f)(4)–(5).

39. *See* Vincent, *supra* note 1. Forty-three million of California's forty-six million acres of federal public lands would not qualify because they are managed by the National Forest Service, Bureau of Land Management, or National Park Service. *Id.*

40. Complaint for Declaratory and Injunctive Relief at 11, United States v. California et al., No. 2:18-cv-00721-WBS-DB (E.D. Cal. 2018).

41. The federal government argued that SB 50 discriminated against those with whom the federal government deals because it restricted conveyances of federal public lands but no other property conveyances in California. *See id*. at 13.

42. The federal government argued that the Act for the Admission of the State of California into the Union, the Property Clause, and other federal statutes and regulations governing federal land conveyances preempted SB 50. *See id*. at 14.

43. *See* Memorandum and Order, *supra* note 11, at *7.

whomever it wants"[44] and thus would give California the ability to "directly obstruct the activities of the Federal Government," violating intergovernmental immunity.[45] The court declined to rule on the federal government's field or conflict preemption claims or to sever any part of SB 50.[46] Thus, it granted the federal government's motion for summary judgment, declaring SB 50 unconstitutional and permanently enjoining its enforcement.[47] At the time of publication, California has not appealed this decision.

II. PURSUING THE POLICY GOALS OF SB 50

The California legislature embraced multiple goals in passing SB 50. Its main goals were to protect California's federal public lands from transfer to private entities,[48] retain public access to these lands,[49] and ensure their continued environmental preservation.[50] Local communities also supported SB 50 as it would protect the jobs and tax revenues that tourism on federal public lands provides.[51] Although the district court declared SB 50 unconstitutional,[52] California may still pursue the goals it embraced in SB 50 through the means identified below.

A. Policy Goals of SB 50

The legislature passed SB 50 primarily to ensure continued public access to federal public lands in California and "protect against the ill-conceived privatization of these lands."[53] The preamble of SB 50 establishes the state policy to "discourage conveyances that transfer ownership of federal public lands in California from the federal government."[54] The law's author, Senator Ben Allen, stated that SB 50 aimed not to fully block the sale of public lands, which he acknowledged that the state cannot do, but to enable efficient processing of routine conveyances while serving as "a protection for extreme cases."[55] Then-Lieutenant Governor Gavin Newsom declared that the state intended to "thwart

44. *Id*. at *10.
45. 495 U.S. 423, 437–38 (1990).
46. *See* Memorandum and Order, *supra* note 11, at *15, *18.
47. *See id*. at *18.
48. S.B. 50, Ch. 535, CAL. PUB. RES. CODE, Div. 6, p. 4, Ch. 5, § 8560(a)(1)(b)(1) (2017).
49. Joseph Tanfani, *Trump administration steps up war with California over environmental protections*, L.A. TIMES (Apr. 2, 2018), https://www.latimes.com/politics/la-na-pol-california-environment-suit-20180402-story.html.
50. *See* Memorandum and Order, *supra* note 11, at *4.
51. Legislative Hearing April 2017, *supra* note 5.
52. *See* Memorandum and Order, *supra* note 11, at *18.
53. Legislative Hearing July 2017, *supra* note 3.
54. S.B. 50, Ch. 535, CAL. PUB. RES. CODE, Div. 6, p. 4, Ch. 5, § 8560(a)(1)(b)(1) (2018).
55. Matt Zapotosky, *Justice Department sues California again, this time over state law on transfer of federal lands*, WASH. POST (Apr. 2, 2018), https://www.washingtonpost.com/world/national-security/justice-dept-sues-california-again-this-time-over-state-law-on-transfer-of-federal-lands/2018/04/02/e45b7cc6-3693-11e8-9c0a-85d477d9a226_story.html?utm_term=.bbe3dd7308b2.

Trump's plans to auction off California's heritage to the highest bidder" and protect the state's cherished public lands.[56] Legislators sought to ensure that federal public lands remain public, managed for all Californians, including future generations.[57] By requiring that SLC ensure that any conveyed federal public lands remain managed in means determined by the public and recognizing past land uses,[58] SB 50 was crafted both to retain public access to federal public lands and to empower the public to help determine how conveyed lands should be managed.

Furthermore, the state intended to protect the natural resources and inherent environmental value of many federal public lands, including forests, watersheds, wildlife habitat, and conservation lands.[59] One of the law's stated goals was to prevent the removal of "environmentally sensitive" federal public lands from federal protection or to ensure that such lands would be protected by arranging conveyances to parties SLC deemed to be "good steward[s] of the land."[60] Legislators also sought to prevent permanent alteration of public lands through development or resource extraction, including mining and timber harvest.[61]

Finally, SB 50 protected the jobs and tax revenues that benefit local communities through tourism on federal public lands in their borders. Accordingly, several local governments supported the legislation, including the Marin County Council of Mayors and Councilmembers.[62]

B. Alternative Approaches and Their Challenges

California might take several other approaches to further the policy goals of SB 50. These include regulating state as well as federal public land conveyances, using eminent domain to acquire conveyed public lands, and regulating federal public lands, which each face challenges.

1. Regulating State and Federal Public Land Conveyances

New legislation mandating regulation of both state and federal public land conveyances would likely avoid SB 50's flaw of unconstitutionally discriminating against persons "with whom [the United States] deals."[63] However, a court may still find that such legislation would violate

56. Tanfani, *supra* note 49.
57. *Id*.
58. S.B. 50, Ch. 535, CAL. PUB. RES. CODE, Div. 6, p. 4, Ch. 5, § 8560(e) (2018).
59. Belenky & Delfino, *supra* note 3.
60. Legislative Hearing July 2017, *supra* note 3.
61. Legislative Hearing April 2017, *supra* note 5.
62. *See id*.
63. If new legislation also applied to those with whom the state deals, a court would not likely find that it discriminated against those with whom the U.S. deals, which was part of the district court's holding that SB 50 unconstitutionally violated the Supremacy Clause. *See* Memorandum and Order, *supra* note 11, at *11.

intergovernmental immunity by regulating the United States, as did SB 50.[64] Such a law would still obstruct the federal government's ability to convey its land, regardless of whether it applied the same rules to conveyances of state public lands. Also, by expanding the scope of lands SLC must assess before granting conveyances, such a law may be costly and hard to administer.

2. Eminent Domain

Alternatively, California could acquire federal public lands conveyed to private parties through eminent domain.[65] The use of eminent domain by states is "a fairly core feature of state sovereignty" and would not likely be preempted by federal law,[66] although under the Takings Clause, governments may not take private property for public use without just compensation.[67] The Supreme Court has interpreted the "public use" requirement broadly in recent years, holding that a project must merely serve a legitimate "public purpose" and giving substantial deference to legislatures.[68] Using eminent domain to acquire previously federal public lands would likely pass this "public purpose" test, as such property would presumably be made available to the public to access, serve public goals of environmental protection, and perhaps provide economic benefit through the creation of jobs to manage such lands once in state ownership.[69]

However, relying on eminent domain would be an expensive and time-consuming approach, requiring significant investment of taxpayer resources to provide compensation to all purchasers of federal public lands across the state. While using its right of first refusal under SB 50 would have been similarly costly if the state bought these lands itself, SB 50 permitted SLC to arrange conveyance to other entities,[70] which presumably would not have required state funds. Regardless, using eminent domain might also foment political backlash, both due to the taxpayer funds required and the general opposition to the use of eminent domain.[71]

---

64. *See id*.

65. Eric Biber, *Can California keep its federal lands public?*, LEGALPLANET (Mar. 6, 2017), http://legal-planet.org/2017/03/06/can-california-keep-its-federal-lands-public/.

66. *Id*.

67. U.S. CONST. amend. V.

68. The Court held that a city's proposed economic development project served a legitimate public purpose even though the public would not have access to the full property. Kelo v. City of New London, 545 U.S. 469, 480 (2005).

69. This would be similar to the economic benefit provided by the project in *Kelo*, which did not provide public access to most of the property to be used, yet was still deemed to have a sufficient "public purpose." *Id*. at 478.

70. S.B. 50, Ch. 535, CAL. PUB. RES. CODE, Div. 6, p. 4, Ch. 5, § 8560(a)(2)(A) (2018); *see also* Zapotosky, *supra* note 55.

71. The backlash following *Kelo* exemplified political opposition to the use of eminent domain, with polls finding over 75 percent of the public "opposed the substance of the Court's holding." Logan Strother, *Beyond* Kelo*: An Experimental Study of Public Opposition to Eminent Domain*, 4 J. L. & CTS 2,339 (2016).

3. Regulating Federal Public Lands

California could also attempt to regulate the uses of federal public lands while those lands remain in federal ownership. However, such regulations would likely face similar issues of preemption by federal laws as did SB 50.[72] States may act within their police power to pass laws affecting uses of federal lands when the laws are intended to further a rational purpose and do not conflict with federal law.[73] If California passed regulations to limit uses of federal public lands, such as development or resource extraction, the regulations could survive a constitutional challenge if they served a legitimate state interest, did not violate intergovernmental immunity, and were not preempted by federal law.[74] However, if the intent of such regulations was to limit or prevent uses of these lands permitted by federal laws,[75] they would likely be deemed unconstitutional.[76] Because many federal statutes passed through Congress' power under the Property Clause permit extractive activities on federal lands, including mining and oil and gas drilling, regulations restricting these activities on federal public lands would likely be deemed to obstruct the accomplishment of congressional purposes or objectives.[77]

C. The Most Viable Alternative: Regulating Private Lands

California may have more flexibility to regulate federal public lands that are sold to private owners.[78] California, or its local governments, could pass legislation creating zoning or land use regulations and restrictions on uses of federal public lands conveyed to private parties.[79]

1. Zoning Laws in California

In California, many authorities affect land use regulation. The "clear hierarchy of land use laws" starts with the U.S. Constitution and federal laws, then the state constitution and laws, and proceeds with a city's general plan, its

72. Biber, *supra* note 65.

73. Omaechevarria v. Idaho, 246 U.S. 343, 352 (1918).

74. *See* N.D. v. United States, 495 U.S. 423, 433 (1990). In *Granite Rock*, the Supreme Court found that the California Coastal Commission's rule regarding permitting of mining on federal land within California was constitutional and not preempted by federal laws as it was an environmental regulation and did not regulate nor prevent the mining entirely. *See* Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987). However, the Court has found state regulations that frustrate federal legislation and thus obstruct the accomplishment of the full purposes and objectives of Congress to be unconstitutional. *See* Ventura Cty. v. Gulf Oil Corp., 601 F.2d 1080, 1086 (9th Cir. 1979).

75. This approach would be in contrast to the rule in *Granite Rock* which merely provided environmental regulations regarding such activities. *See* 480 U.S. at 580.

76. *See id.*

77. The regulation in *Ventura County* was also deemed to obstruct the accomplishment of congressional purposes and objectives. *See* 601 F.2d at 1080.

78. Biber, *supra* note 65; Belenky & Delfino, *supra* note 3.

79. *See* Belenky & Delfino, *supra* note 3.

specific plan if one exists, the zoning code, and other sources.[80] Cities have authority to enact broad land use and zoning laws under their police power,[81] and they frequently zone to "restrict development and uses from certain geographical areas" or to provide incentives to promote desired land uses.[82] California cities and counties enjoy "broad powers to control land use."[83] Nevertheless, "[s]tate law is the foundation for local planning in California," based upon which cities and counties "adopt their own sets of land use policies and regulations."[84] Local legislation that conflicts with state general law is void under the California Constitution through state preemption,[85] with an exception for charter cities.[86]

While California has allowed much flexibility for local governments to craft zoning regulations to suit their needs, the state legislature has the power to amend existing laws or create additional laws to add zoning requirements.[87] Thus, California could "adopt new legislation imposing zoning and planning regulations or restrictions on new owners of public lands."[88] The California legislature could "'pre-zone' federal lands to restrict or prevent development and mandate public access" on conveyed public lands to achieve the main policy goals of SB 50.[89]

California might also update its General Plan Guidelines, which the Governor's Office of Planning and Research maintains to help guide local governments in creating and updating their general plans.[90] Because "California legislative policy strongly favors the preservation of open spaces,"[91] the state may be able to use its Guidelines to protect conveyed federal public lands from development. Under the California Constitution, the state legislature has the power to define open space land in order to "promote the conservation,

80. ADAM U. LINDGREN ET AL., CALIFORNIA LAND USE PRACTICE, Ch. I, §1.12 (Cal. Cont. Ed. Bar, updated Oct. 2018).

81. *Id*. at §1.1.1.

82. *Id*. at Chapter IV: Zoning, § 4.1(A).

83. *Id*. at § 4.19(C).

84. California requires cities and counties to adopt general plans, which then guide zoning and other land use regulations. GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, A CITIZEN'S GUIDE TO PLANNING 2 (2001).

85. Lindgren, *supra* note 80, at Ch. I, §1.6(b).

86. Charter cities have "broader powers and autonomy to enact local land use regulations"—they must follow general state laws for "matters of statewide concern" but their regulations that "exclusively relate to . . . municipal affairs predominate" in conflicts with general state law. *Id*. at §1.11(A)(D). Thus, the state may not be able to require charter cities to pass land use regulations to mandate federal access or limit activities on conveyed public lands, unless it can argue that such requirements are "matters of statewide concern" to protect an interest of state citizens to previously public lands. *Id*.

87. The legislature intended to "provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters." CAL. GOV'T CODE § 65800, (1965) *amended by* Stats. 1980, Ch. 1152.

88. Belenky & Delfino, *supra* note 3.

89. Biber, *supra* note 65; *see also* Belenky & Delfino, *supra* note 3.

90. The Guidelines enable local decision makers to further their own priorities "while meeting larger state goals." GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, 2017 GENERAL PLAN GUIDELINES 1 (2017).

91. *See id.* (citing Gisler v. Cty. of Madera, 38 Cal. App. 3d 303, 307 (Ct. App. 1974)).

preservation and continued existence of open space lands."[92] The open space element of the Guidelines "identifies areas that provide value in an essentially undeveloped condition and creates a plan to preserve such areas."[93] Previously federal public lands may be such areas.

However, the state may face political opposition to requiring local governments to pass certain land use and zoning regulations. This might be avoided by providing financial incentives for local governments to voluntarily change their regulations, but such an approach would be expensive. It would also be costly to map public lands across the state to enable cities and counties to zone these lands. Thus, unless local governments align with the state's goal to protect access to and prevent certain activities on public lands, this approach may face barriers as well.

2. Constitutional Implications

States have the power to regulate uses of private land.[94] Zoning regulations are generally constitutional unless they are arbitrary and unreasonable or "without substantial relation to public health, safety, morals, or general welfare."[95] These zoning regulations may survive a constitutionality challenge on the basis that they are not arbitrary but rather intended to limit harmful activities on properties that were previously protected as federal public lands. Also, by maintaining public access to lands to which the public has traditionally had access,[96] such regulations might not be found "without substantial relation to public health, safety, morals, or general welfare."[97]

This approach would not likely face the same constitutionality challenge as SB 50. While that law directly regulated the federal government, these regulations would regulate private parties and would not discriminate against the federal government because the regulations would deal directly with the private purchasers of federal lands. Of course, a court may still find that this approach discriminates against private parties with whom the federal government deals by imposing regulations on these parties but not purchasers of other lands. If

92. CAL. CONST. art. XIII, § 8.

93. "Open-space land" is defined as "any parcel or area of land or water that is devoted to an open-space use." CAL. GOV'T CODE § 65560(b) (2018). "Such lands or waters may provide value related to, among other things, recreation, health, habitat, biodiversity, wildlife conservation aesthetics, economy, climate change mitigation and adaptation, flood risk reduction, managed natural resources production, agricultural production, and protection from hazardous conditions." 2017 GENERAL PLAN GUIDELINES, *supra* note 90, at 121. Together with the conservation element and land use element of the Guidelines, the open space element may help ensure "long-range preservation" of open lands important for conserving "the State's natural resources." *See id.*

94. Biber, *supra* note 65.

95. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

96. In 2018, then-Lieutenant Governor Gavin Newsom declared that "safeguarding public lands is in our DNA as Californians—so much so that we have enshrined the principle in our state Constitution." Tanfani, *supra* note 49.

97. *Village of Euclid*, 272 U.S. at 395.

California could demonstrate that there was a rational reason for this discrimination, such as improving public welfare by maintaining public access to historically public lands, the regulations may survive.

3. The Potential for Takings Litigation

However, by passing regulations to limit the uses of previously public lands owned by private individuals, California may open itself up to takings litigation,[98] which would increase the costs of such regulations. Property owners may argue that any regulations mandating public access would constitute a physical taking as a compelled, physical invasion of their property.[99] Courts might alternatively deem such regulations total takings, which require compensation for regulations that deny all economically viable use of a property unless the owner's desired use was prohibited by a pre-existing law.[100] Yet, compensation is only required for total takings in "the extraordinary circumstances when no productive or economically beneficial use of land is permitted."[101] Finally, property owners may argue that the regulations constitute takings under the *Penn Central* test, which considers the economic impact of a regulation on the property owner, the regulation's interference with the owner's reasonable investment-backed expectations, and the character of the regulation.[102]

The state may face total takings claims from property owners claiming that the regulations requiring public access or limiting uses of their land deny them of all economically viable use of their land. If the regulations only affect future purchases of federal public lands and do not apply retroactively, California could argue that the property owner's desired use of their property was prohibited by preexisting law and does not require compensation, even if it denied them of all economically viable use of their property.[103] However, regulations in effect at the time of purchase may still be subject to takings claims.[104] Thus, regulations limiting uses of conveyed public lands might nonetheless be considered takings if passed before the conveyances. However, purchasers would still have to show that the regulations prevented them from obtaining any economic benefit from their properties, as compensation is only required for total takings that deny all

98. The Takings Clause requires governments to compensate property owners when its regulations "g[o] too far," but not for all regulations affecting private property. Penn. Coal Co. v. Mahon, 260 U.S. 393, 413–15 (1922).

99. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

100. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

101. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 330 (2002).

102. Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127–36 (1978).

103. *See Lucas*, 505 U.S. at 1029.

104. In *Palazzolo v. Rhode Island*, the Court reiterated that property owners' right to improve their property "is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions" but that regulations existing at the time of purchase are not necessarily free from takings claims, because such regulations are "not transformed into a background principle of the State's law by mere virtue of the passage of title." 533 U.S. 606, 627–30 (2001).

"productive or economically beneficial use of land."[105] The state might limit the success of total takings claims by allowing property owners to charge a reasonable fee for public access to their property, similar to fees charged to enter national parks and monuments. This approach would allow owners to receive some economic benefit, although it may pose administrability challenges, including to oversee pricing structures.

Although property owners might also claim compensation under the *Penn Central* test,[106] the state has stronger grounds to rebut this type of claim. Property owners could argue that regulations limiting activities such as extraction had a significant economic impact and those mandating public access were severe.[107] However, if regulations only apply to future purchases, the state could convincingly argue that any investment-backed expectations with which the regulations interfered were unreasonable because the regulations existed prior to the purchase.

CONCLUSION

Each of the alternative approaches for achieving the policy goals of SB 50 faces distinct challenges. Even the most viable approach is an imperfect substitute for keeping the federal government from selling off its public lands or allowing the state to step in and buy such lands. While regulating uses of and access to federal public lands sold to private purchasers would advance some goals of SB 50, the lands would no longer be truly public. As state politicians have declared, Californians deeply value their shared heritage and common claim to public lands. The state may choose not to pursue alternative approaches to SB 50, either due to the challenges involved with any approach or because conveyances of federal public lands in California do not become as much of a problem as expected. Given the recent change in congressional will to protect public lands, the Trump administration may not be able to pursue its public lands management priorities as aggressively as it did in the first two years of the Trump presidency. Nevertheless, the passage of SB 50 had significance. At the very least, the law raised important questions about the role of state preferences in the management of federal public lands and served as a symbolic challenge to the Trump administration's apparent disregard for the value that Americans place on public lands.

Naomi Wheeler

105. *Tahoe-Sierra*, 535 U.S. at 330 (citation omitted).
106. *See Penn. Central*, 438 U.S. at 127–36.
107. *Id.*