

## **“CUSTOM AND CULTURE” ORDINANCES: NOT A WISE MOVE FOR THE WISE USE MOVEMENT**

ANDREA HUNGERFORD\*

I.	INTRODUCTION.....	458
II.	THE “WISE USE” MOVEMENT .....	458
	A. <i>What is a “Custom and Culture” Ordinance?</i> .....	461
	B. <i>Alleged Legal Basis</i> .....	468
	C. <i>Alleged Benefits</i> .....	470
III.	LEGAL BASIS FOR INVALIDATING CUSTOM AND CULTURE ORDINANCES .....	472
	A. <i>Precedent</i> .....	472
	B. <i>Violation of the Supremacy Clauses</i> .....	475
	1. <i>Waivers of Sovereign Immunity</i> .....	476
	2. <i>Application to Custom and Culture Ordinances</i> .....	481
	C. <i>Conclusion: Custom and Culture Ordinances are Invalid</i> .....	484
IV.	LITIGATION STRATEGIES .....	484
	A. <i>Establishing Standing</i> .....	484
	1. <i>Injury-in-Fact</i> .....	484
	2. <i>Causation</i> .....	489
	3. <i>Redressability</i> .....	490
	4. <i>Prudential Standing</i> .....	491
	5. <i>Organizational Standing</i> .....	491
	B. <i>Establishing Ripeness</i> .....	493
	C. <i>Filing in State or Federal Court</i> .....	495
	D. <i>Seeking Remedies</i> .....	496
	1. <i>Declaratory Relief</i> .....	496
	2. <i>Injunctive Relief</i> .....	497

---

\* Student, Northwestern School of Law of Lewis and Clark College, J.D. expected 1995; B.A. 1992, Stanford University. The author credits her work with the Pacific Northwest National Wildlife Federation Natural Resources Center for providing the genesis for this article, and extends her appreciation and gratitude to National Wildlife Federation attorney Peter Frost and Lewis & Clark Northwestern School of Law Professor William Funk for their extensive comments and suggestions.

E.	<i>Potential Lawsuit Patterns</i> .....	498
V.	CONCLUSION.....	502

## I. INTRODUCTION

In 1991, Catron County, New Mexico passed the first “custom and culture” ordinance, mandating that the federal government “coordinate and consult” with the County and take into consideration the County’s custom and culture before managing public lands.<sup>1</sup> Since passage of the Catron County ordinance, similar ordinances have stealthily spread throughout the western states, received very little statewide publicity, and often very little publicity within the county itself. Little has been written about the ordinances, and very few court challenges have been initiated against the ordinances.

This article addresses the content, impact, and future of custom and culture ordinances. Section II examines the movement spearheading the ordinances and outlines the basic features of the ordinances. Section III considers past administrative and judicial challenges to the ordinances and analyzes the manner in which local attempts to regulate the federal government violate the federal Constitution. Section IV examines various procedural considerations that play a role in legal challenges to the ordinances, including standing, ripeness, and legal strategy. Section V concludes that custom and culture ordinances merit legal challenges, regardless of their actual effectiveness.

## II. THE “WISE USE” MOVEMENT

During the late 1970s, a loose coalition of industry-funded, development-oriented groups headed by former Secretary of the Interior James Watt instigated the inappropriately named “Wise Use” Movement. Beginning with the “Sagebrush Rebellion” and gaining steam throughout the Reagan and Bush presidencies, the Movement worked toward having undeveloped federal lands in the West transferred to the private sector for commercial exploitation. The Movement also waged a self-styled war against public land ownership, pressing two themes: that environmentalists destroy communities, and that private property rights are paramount. Wise Use proponents preached the gospel of private

---

1. Catron County, N.M., Ordinance No. 004-91 (May 21, 1991) (repealed by Catron County, N.M. Ordinance No. 003-92 (Oct. 6, 1992)).

property and self-determination, and the evils of interfering government agencies.<sup>2</sup>

The Wise Use Movement claims that its battle is waged against two enemies. Enemy number one is the federal government, as illustrated by the preamble to one custom and culture ordinance: "Federal and state agents threaten the life, liberty, and happiness of the people of Klamath County. They present a clear and present danger to the land and livelihood of every man, woman, and child. A state of emergency prevails that calls for devotion and sacrifice."<sup>3</sup> Enemy number two are the environmentalists, whom Wise Use proponents characterize as "yuppies" who have "no conception or feel for the land"<sup>4</sup> and "who know as much about the environment as a crocodile does about becoming a vegetarian."<sup>5</sup> According to the Wise Use Movement, environmentalists "will only become content when *ALL* humankind is relegated to the life-style of the Stone Age and *ALL* land has been locked

---

2. Ron White, *Using County Government to Protect Your Customs, Culture, and Economy*, FEDERAL LANDS UPDATE, Aug. 1993, at 2. "Constitutionally protected rights, especially property rights, are the foundation of private enterprise—the system we live in. Contrasted to communism—the failed system currently being discarded around the world—private enterprise has created unprecedented prosperity and liberty." *Id.*

3. Klamath County, Or., Land and Water Management Plan, at xviii (May 1994).

4. Wray Schildknecht, *Hope for the Future: Why the County Government Movement was Born*, FEDERAL LANDS UPDATE, June 1993, at 2.

Most Green Activists have been raised in large towns and cities and have no conception or feel for the land. They have lost their understanding of: (1) the qualities and principles which made our county great; (2) where the urban umbilical cord leads-back to production of food and fiber from the land. For them, milk and meat comes from cartons and packages in the grocery store. For them tax dollars, rural economies, and people must be sacrificed to satisfy their own selfish interest. And most seriously, for them integrity does not get in their way. Anyone who is a qualified environmentalist and who has real experience in the management of natural resources recognize that the activist groups are not bound by any requirement to be truthful in their statements about the environment or those who oppose their ideas.

*Id.*

5. James Faulkner, *How to Save Your County From the State and Federal Agencies*, FEDERAL LANDS UPDATE, April 1993, at 4.

The majority of the middle class who profess to be "environmentalists" command a high 5 figure salary, own 3.5 cars, have 2.4 children, know as much about the "environment" as a crocodile does about becoming a vegetarian.

To hear the Green Activists lament, you would think that the citizens' right to bring custom, culture and economic consideration into play is tantamount to dirty pool.

*Id.*

up.”<sup>6</sup> The Movement claims that the government agencies, “staffed by power and money hungry bureaucrats” are in league with the environmentalists, “pushing their loony but well-financed agendas and wrecking much of the environment.”<sup>7</sup>

The end of the Reagan and Bush years brought an end to executive support for the programs and policies of the Wise Use Movement. Searching for a new way to foster local control over federally owned public lands, the Movement has recently taken a different tack, focusing on local governments throughout the West. Movement members are securing passage of custom and culture county ordinances, which require local approval for federal land management practices and make it a criminal offense for federal employees to carry out their duties if they conflict with the county ordinances.

These ordinances have begun springing up all across the West, beginning in Catron County, New Mexico, in 1990.<sup>8</sup> The Movement has also begun holding “how-to” conferences around the West, providing instructions on how to get these ordinances passed. The National Federal Lands Conference, created in 1989, has become a major player in the Movement, hosting how-to conferences and selling copies of the Catron County ordinance to interested counties for \$250 apiece. The Conference is staffed with attorneys, as well as ranchers, including James Watt’s protégé Karen Budd.

Budd initiated her involvement with the movement in 1980, while doing public relations work for the Reagan/Bush campaign. She was subsequently appointed to the Department of the Interior, where she worked under James Watt. Budd and Watt took their cause to the courtrooms while working for the conservative Mountain States Legal Foundation, and Budd is now “the hired gun of choice for ranchers facing court action from federal agencies.”<sup>9</sup> Budd was involved in the formulation of the original Catron County ordinances, and cites her own experience as a rancher in support of the ideas promulgated by the movement. “You know,” Budd has said, “we’ve been living in the same house, working in the same land for five generations. Now, if we were as

---

6. *Id.* (emphasis in original).

7. White, *supra* note 2, at 1.

8. Catron County, N.M., Ordinance No. 004-91.

9. James N. Baker, John Taliaferro, & Patricia King, *Who's Who: 20 for the Future*, NEWSWEEK, Sept. 30, 1991, at 33.

bad as they say we are, we wouldn't have lasted five generations.”<sup>10</sup> Budd also promotes the belief that all grazing permits, including her own, constitute private property which, under the Fifth Amendment, cannot be taken without just compensation.<sup>11</sup>

A. *What is a “Custom and Culture” Ordinance?*

The provisions of most custom and culture ordinances are applicable to both federal and state activities on federally owned and state-owned lands.<sup>12</sup> In addition, at least one ordinance mandates that its provisions are also to be applied to private lands within the county owned by non-profit organizations, associations, or corporations.<sup>13</sup>

The first basic component in all custom and culture ordinances is language that requires the federal government to consider the county's custom and culture. General language within the ordinances insists that the guiding principle behind federal land management of public lands within the county be preservation and enhancement of the county's custom and culture.<sup>14</sup> Although not specifically stated, the custom and culture deserving of protection in these counties is the century-old tradition of land use for the purposes of ranching, grazing, farming, and timber harvesting.<sup>15</sup> Some of the ordinances also include private

---

10. Diane Knox, *Home on the Range*, THE AMERICAN LAWYER, at 112.

11. *Id.*

12. Lake County, Or., Ordinance No. 24, § 1.0 (Aug. 19, 1992); Walla Walla County, Wash., Ordinance No. 219, § 19.04.010 (Dec. 21, 1993); Catron County, N.M., Ordinance 004-91; Lincoln County, N.M., Ordinance No. 91-7 (Jan. 14, 1992).

13. Lake County, Or., Ordinance No. 24, § 1.0.

14. Walla Walla County, Wash., Ordinance No. 219, § 19.04.050. Specifically, the ordinance calls for:

To the fullest extent required or permitted by law, including this Ordinance, all federal and state agencies shall, in all actions considered, proposed or taken, that affect or have the potential of affecting the use of land or natural resources within Walla Walla County: . . . consider the effects such actions have on (i) community stability; (ii) maintenance of custom, culture and economic stability; and (iii) conservation and use of the environment and natural resources, as part of the action taken. . . .

*Id.*

15. Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525, 549 (1993/1994). “The promoters of the county governments assume that ‘custom and culture’ are almost entirely the local extractive or resource-dependent industries such as logging, mining, ranching, and farming.” *Id.*

property ownership and “self-determination” as part of the county’s custom and culture.<sup>16</sup>

In conjunction with the mandate in custom and culture ordinances that a county’s custom and culture be maintained, many of the ordinances require that current levels of grazing,<sup>17</sup> farming,<sup>18</sup> and timber harvesting<sup>19</sup> continue, or that federal agencies ensure that their actions on public lands do not render these activities financially infeasible.<sup>20</sup> Even more extreme, some ordinances place control of grazing permits<sup>21</sup> and timber sales<sup>22</sup> in the hands of the county. Similarly, the ordinances may mandate that all federal agency actions concerning recreational use and

---

16. Catron County, N.M., Ordinance No. 004-91 at 3-4. “[W]e declare that all natural resource decisions affecting Catron County shall be guided by the principles of protecting private property rights, protecting local custom and culture, maintaining traditional economic structures through self-determination, and opening new economic opportunities through reliance on free markets.” *Id.*; see also Lincoln County, N.M., Ordinance No. 91-7 at 2. “The nature and intent of Lincoln County government land use planning is to protect the custom and culture of County citizens through protection of private property rights and private rights in public lands . . . to ensure self-determination by local communities and individuals.” *Id.*

17. Catron County, N.M., Ordinance No. 004-91, at 9. “[G]razing livestock on federal and state lands should be continued at levels consistent with custom and culture. . . .” *Id.*; see also Lincoln County, N.M., Ordinance No. 91-7, § III(A)(1); Lake County, Or., Ordinance No. 24, § 5.2 “Lands that have been dedicated to grazing will continue to be dedicated to grazing.”

18. Catron County, N.M., Ordinance No. 004-91, at 90. “Federal and state governments should not obstruct agricultural opportunities on their respective lands.” *Id.*; Lake County, Or., Ordinance No. 24, § 5.1 “Opportunities for agriculture on Federal and State lands shall be continued at levels consistent with historical custom and culture. . . .” *Id.*; “Federal and State governments should not obstruct agricultural opportunities on their respective lands.” *Id.* at § 5.3.

19. Catron County, N.M., Ordinance No. 004-91, at 11-72. “Opportunities for a sustainable wood products industry shall be continued at levels consistent with custom and culture . . . .” *Id.*; see also Walla Walla County, Wash., Ordinance No. 219, § 19.04.070(B). “To the extent permitted by law, federal and state agencies shall avoid taking actions that reduce opportunities for a timber and wood products industry to be continued at levels consistent with the custom, culture and economy of Walla Walla County.” *Id.*; Lake County, Or., Ordinance No. 24, § 6.16. “Lands dedicated to timber production will continue to be dedicated to timber production.” *Id.*

20. Walla Walla County, Wash., Ordinance No. 219, § 19.04.060(C). “To the extent permitted by law, federal and state agencies shall avoid taking actions that have the effect of obstructing, or making financially inefficient, agricultural and livestock production within Walla Walla County.” *Id.*; see also Catron County, N.M., Ordinance No. 004-91, at 10. “Incentives for improving grazing lands and promoting good land stewardship shall be developed through” fee schedules and increasing grazing capacity. *Id.*

21. Boundary County, Idaho, Ordinance No. 92-2, § 3 ¶ 4 (Aug. 3, 1992) (mandating that all grazing on federal lands must be approved by the County).

22. Boundary County, Idaho, Ordinance No. 92-2, § 3(A)(4) (providing that the County is charged with management and sale of timber on federal lands within the County boundaries and that federal agencies must get County approval before making changes in timber sales or volume projections).

wildlife management on the public lands be consistent with the county’s custom and culture.<sup>23</sup>

The second basic component in all custom and culture ordinances is language requiring the federal agencies to coordinate and consult with the county on all land management and planning issues concerning the public lands located within the county. Some of the ordinances contain a general provision insisting that the federal agencies consult with the county on all land management issues,<sup>24</sup> while others specify consultation and coordination for specific land uses, such as grazing or wildlife management.<sup>25</sup> The ordinances may add to these general consult and coordinate mandates by requiring that the federal agencies prepare written reports,<sup>26</sup> conduct economic impact studies,<sup>27</sup> or undertake additional measures before implementing land management policies.<sup>28</sup>

---

23. See, e.g., Walla Walla County, Wash., Ordinance No. 219, § 19.04.080(B). “Federal and state agencies shall avoid taking actions affecting recreational, cultural, wilderness, and wildlife opportunities within Walla Walla County that are incompatible with local custom, culture and economic stability or preservation and use of the environment, or that otherwise fail to protect private property rights and local determination.” *Id.*; see also Lake County, Or., Ordinance No. 24, §§ 12.5-.6 (providing that federal agencies must develop, implement, and coordinate with the County noxious weed, predator, and rodent control plans consistent with “recognized husbandry practices”).

24. Boundary County, Idaho, Ordinance No. 92-2, § 2. “[A]ll federal and state agencies shall comply with the Boundary County Land Use Policy Plan and coordinate with the County Commission for the purpose of planning and managing federal and state lands within the geographic boundaries of Boundary County, Idaho.” *Id.*; see also Catron County, N.M., Ordinance No. 004-91, at 10. “Federal and state land managing agencies shall coordinate with the [County] Board on all matters affecting livestock grazing on public lands.” *Id.*

25. Lincoln County, N.M., Ordinance No. 91-7, § 111(A)(3) (federal agencies must coordinate with the County Board on all public land agricultural matters); see also Catron County, N.M., Ordinance No. 004-91, at 12. “Federal and state land and wildlife management and enforcement agencies shall coordinate with that [County] Committee on all matters regarding wildlife.” *Id.*

26. Boundary County, Idaho, Ordinance No. 92-2, § 2, (Federal agencies must submit written reports of all proposed actions to the county before it may undertake any action); Lake County, Or., Ordinance No. 24, § 1.4 (Federal agencies must submit written reports to the County analyzing the purposes, objectives, and impacts of proposed federal actions on public lands).

27. Boundary County, Idaho, Ordinance No. 92-2, § 3(A)(6) (economic impact statement and mitigation measures, subject to county approval, must be prepared before federal agencies may change any land use).

28. Walla Walla County, Wash., Ordinance No. 219, § 19.04.050(B), (C), (E), (F), & (H).

To the fullest extent required or permitted by law, including this Ordinance, all federal and state agencies shall, in all actions considered, proposed or taken, that affect or have the potential of affecting the use of land or natural resources within Walla Walla County: . . . coordinate procedures to the fullest extent possible with the County, on an equal basis and not with the County as subordinate, prior to and during the taking of any federal or state action; . . .

Some ordinances go beyond requiring federal agencies to merely coordinate and consult with the counties by mandating that the county itself assume primary responsibility for public land management,<sup>29</sup> or by forbidding federal agencies' implementation of any land management policies or procedures without first obtaining county approval.<sup>30</sup> In addition to coordination and consultation, many of the ordinances require that federal agencies explore alternatives that will cause less disruption to custom and culture, and adopt mitigation measures that will lessen the impact of federal land management on the county's custom and culture.<sup>31</sup>

---

meet with the County to establish, through a memorandum of understanding or otherwise, the process for such coordination, including joint planning, joint environmental research and data collection, joint hearings, and joint environmental assessments; . . . not, in any environmental impact statement or otherwise, assume that any proposed actions would be consistent with County conditions or would have a non-significant impact, without coordination and consultation with the County and review of data specific to the County; . . . in absence of a direct constitutional conflict, coordinate with the County so as to comply with federal and state statutes and regulations, and County laws, policies and plans, including the Comprehensive Plan; . . . not violate through regulatory means or otherwise any private property rights of citizens of Walla Walla County.

*Id.*

29. Boundary County, Idaho, Ordinance No. 92-2, § 3(A)(4) (County designated as lead planning agency for all federal lands, state lands, waters, and natural resources).

30. *Id.* (federal agencies must obtain county approval before taking management or planning action on public lands).

31. *Id.* at § 3(A)(6) (economic impact statement and mitigation measures, subject to county approval, must be prepared before federal agencies may change any public land use); *see also* Catron County, N.M., Ordinance No. 004-91, at 5. "Before federal and state land agencies can change land use, adverse impact studies on uses shall be conducted and mitigation measures adopted with concurrence from Catron County. Adverse impact studies shall address community stability [and] local custom and culture. . . ." *Id.*; Walla Walla County, Wash., Ordinance No. 219, § 19.04.050(D) & (G):

To the fullest extent required or permitted by law, including this Ordinance, all federal and state agencies shall, in all actions considered, proposed or taken, that affect or have the potential of affecting the use of land or natural resources within Walla Walla County: . . . submit a list and description of alternatives in light of possible conflicts with the County's laws, policies and plans, including the Comprehensive Plan; consider reconciling the proposed action with the County's laws, policies, and plans, including the Comprehensive Plan; and after such consideration, take all practical measures to resolve such conflict and display the results of such consideration in appropriate documentation; . . . take appropriate mitigation measures adopted with the concurrence of the County to mitigate adequately adverse impacts on culture, custom, economic stability or protection and use of the environment . . . . Lake County, Or., Ordinance No. 24, § 3.6 (Federal agencies must prepare cultural and economic impact studies

Custom and culture ordinances also contain provisions that address specific agency actions, such as disposition of public lands within the county. For instance, an ordinance may prohibit the federal government from acquiring more public land within the county, unless the government offsets its acquisition by transferring an equivalent amount of public land to private ownership.<sup>32</sup> In fact, several ordinances require county approval prior to any disposition of public lands.<sup>33</sup> Other ordinances simply mandate that all federal land disposals and exchanges must “benefit” the citizens of the county.<sup>34</sup>

In addition to targeting particular types of agency actions, custom and culture ordinances also target agency actions in specific environmental arenas, including water resources, grazing, air pollution controls, and wildlife management. In the area of water resources, ordinances reserve for the county the right to designate wetlands,<sup>35</sup> limit

and adopt mitigation measures in coordination with the County before changing any public land use).

*Id.*

32. Boundary County, Idaho, Ordinance No. 92-2, § 3(A)(2) (Federal government cannot add land to its public holdings without offsetting an equivalent amount by transfer from public to private ownership); *see also* Lincoln County, N.M., Ordinance No. 91-7, § I(A)(1) & (2) (Federal government cannot obtain private land unless parity is maintained) and the amount of nonfederal land within the County will be increased); Catron County, N.M., Ordinance No. 004-91, at 45. “Federal land agencies shall not acquire any private lands . . . without first ensuring . . . [t]hat private property interests are protected and enhanced.” *Id.*; Lake County, Or., Ordinance No. 24, § 3.2.

Federal land agencies should not acquire any additional private lands, public lands or rights in private lands within Lake County without first ensuring that . . . a minimum parity exists in land ownership status between private, State, and Federally owned land; and . . . all private property interests are protected and enhanced.

*Id.*

33. Boundary County, Idaho, Ordinance No. 92-2, § 3(A)(4) (federal acquisition, disposal or exchange of public lands is subject to County approval); *see also* Catron County, N.M., Ordinance No. 004-91, at 5. “The general public, the state of New Mexico and local communities shall be notified of, consulted about, and otherwise involved in all federal and state land adjustments in Catron County. Catron County concurrence shall be required prior to any such land adjustments.” *Id.*

34. Lincoln County, N.M., Ordinance No. 91-7, § I (all federal and state land disposals must benefit County citizens); *see also* Walla Walla County, Wash., Ordinance No. 219, § 19.04.090. “[T]he design and development of all federal and state land acquisitions, including by forfeiture, donation, purchase, eminent domain or trust, and disposals, including adjustments and exchanges, [shall] be carried out to the benefit of the citizens of Walla Walla County.” *Id.*

35. Walla Walla County, Wash., Ordinance No. 219, § 19.04.100(C).

To the extent permitted by law, Walla Walla County shall have the authority to define and designate wetlands, and to the extent such authority is exercised,

the federal government's ability to acquire water rights,<sup>36</sup> and nullify the prohibition against filling or dredging a wetland without a permit.<sup>37</sup> In the air pollution category, ordinances state that designation of non-attainment areas within the county pursuant to the Clean Air Act<sup>38</sup> must comply with all county air quality standards and use plans.<sup>39</sup> Some ordinances also address wilderness by requiring county approval before any additional lands within the county may be designated as wilderness areas<sup>40</sup> or by forbidding outright any future wilderness designation.<sup>41</sup>

Custom and culture ordinances also influence the manner in which federal agencies enact and enforce protection of wildlife and habitat, as mandated by the Endangered Species Act<sup>42</sup> and the Wild and Scenic Rivers Act.<sup>43</sup> For instance, an ordinance may condition federal designation of wild and scenic rivers upon compliance with the county's water use plan,<sup>44</sup> or may place the power to designate rivers as wild and

---

and otherwise in accordance with law, federal and state agencies shall act in compliance with acceptance and enforcement of such definitions and designations. In addition, the County may continue to develop, in coordination with private land owners and governmental agencies, water management plans that encompass water resources on both governmentally owned and privately owned lands.

*Id.*

36. Walla Walla County, Wash., Ordinance No. 219, § 19.04.100(F). “[F]ederal and state agencies shall not acquire for any public purpose any interest in water rights within Walla Walla County without (i) first coordinating and consulting with the County, and (ii) ensuring that private water rights are protected.” *Id.*; see also Lake County, Or., Ordinance No. 24, § 4.1. “[A]ny water right transfers shall result in no net loss of irrigated lands on the county tax base.” *Id.*

37. Boundary County, Idaho, Ordinance No. 92-2, § 4(A)(1) (the federal government may implement or enforce § 404 of the Clean Water Act only if the County consents).

38. Clean Air Act, 42 U.S.C. §§ 7401-7671g (1988 & Supp. IV 1992).

39. Walla Walla County, Wash., Ordinance No. 219, § 19.04.110(B). “Any proposed designation of federal or state pollution non-attainment areas and any other federal or state action that has any effect on air resources within Walla Walla County shall be coordinated with the County and shall comply with all County air quality standards and use plans.” *Id.*

40. Boundary County, Idaho, Ordinance No. 92-2, § 3(A)(4) (federal agencies must get County approval before making changes in primitive or wilderness designation).

41. *Id.* at § 7(A)(3) (no wilderness designation is permitted within the County); Lake County, Or., Ordinance No. 24, § 7.3. “No additional Wilderness, roadless or research natural areas shall be designated in Lake County.”

42. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-43 (1988 & Supp. V 1993).

43. Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-87 (1988 & Supp. V 1993).

44. Boundary County, Idaho, Ordinance No. 92-2, § 4, ¶ 3 (any federal proposal regarding wild and scenic river designation within the County must comply with the County's water use plan); see also Catron County, N.M., Ordinance No. 004-91, § II.7 (Any federally proposed designation of Wild and Scenic Rivers shall be coordinated with the County Commission and shall

scenic in the hands of the county.<sup>45</sup> The ordinances may require that federal agencies implement Endangered Species Act recovery plans that will have the least impact on the county's custom and culture,<sup>46</sup> or the ordinances may prohibit federal agencies from even enacting recovery plans unless and until the county consents.<sup>47</sup>

To ensure compliance, custom and culture ordinances contain enforcement language, often providing for criminal prosecution of any violators. Many ordinances state that anyone violating any provision of the ordinance will be guilty of a misdemeanor, and punished by either a

---

comply with all County water use plans.); Lake County, Or., Ordinance No. 24, § 4.8 ("Lake County may develop Wild and Scenic River policies of its own design.")

45. Catron County, N.M., Ordinance No. 004-91, § II.10 ("Catron County shall develop Wild and Scenic River Designations of its own design and shall require full federal compliance in the acceptance and enforcement of such designations."); *see also* Boundary County, Idaho, Ordinance No. 92-2, § 4(A)(4) (Wild and Scenic Rivers Act can be implemented by federal agencies only if the County consents, and the County will design its own Wild and Scenic Rivers designation).

46. Lincoln County, N.M., Ordinance No. 91-7, § II(A)(1)(b) (federal agencies must consult with the County concerning all Endangered Species Act protection plans); *see also* Walla Walla County, Wash., Ordinance No. 219, § 19.04.080(C).

In connection with any action related to sensitive, threatened or endangered plant or animal species, a federal or state agency shall . . . (ii) Base the listing of a species on the best scientific and commercial data relating specifically to Walla Walla County and not generalized over a wider geographic area; (iii) List a species as threatened or endangered only after taking into account the efforts of Walla Walla County to conserve the species . . . (v) In designing critical habitat, base the designation on the best scientific data available and, after taking into consideration economic impacts, exclude as critical habitat all impacted areas unless, based upon the best scientific and commercial data available, failure to designate would result in extinction of the species . . . (viii) Not develop protective regulations or recovery plans if a Walla Walla County plan is in place to protect effectively the species within Walla Walla County; (ix) Protect the species through alternatives with the least impact on the custom, culture and economic stability and preservation and use of the environment of Walla Walla County; and (x) To the extent permitted by law, take appropriate mitigation measures adopted with the concurrence of the County to mitigate adequately any impact on custom, culture, economic stability, and protection and use of the environment, including any impact on public use and access and private property rights.

Lake County, Or., Ordinance No. 24, § 7.1 (the County may oversee all federal protection and recovery activities for federally listed threatened and endangered species).

47. Boundary County, Idaho, Ordinance No. 92-2, § 3(A)(4) (federal agencies must get County approval before making changes in wildlife recovery plans); *see also* Boundary County, Idaho, Ordinance No. 92-2 (the Endangered Species Act may be enforced by federal agencies only if the County consents).

jail term or a fine, or both.<sup>48</sup> Finally, several custom and culture ordinances contain additional miscellaneous provisions. For instance, the Lake County, Oregon custom and culture ordinance requires that all public hearings regarding management of public land be held within the county.<sup>49</sup>

*B. Alleged Legal Basis*

In asserting that custom and culture ordinances are legal and consistent with federal environmental laws and the federal Constitution, proponents of the ordinances rely on several existing statutes and regulations. First, in support of their position that counties' custom and culture must be protected, Wise Use proponents point to one of six broad policy directives included in section 101 of the National Environmental Policy Act of 1969 (NEPA),<sup>50</sup> which states:

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice . . . .<sup>51</sup>

Wise Use proponents focus on the provision concerning "historic, cultural, and natural aspects," isolating "cultural" and looking to Webster's Dictionary to find that "culture" is defined as including "customary beliefs."<sup>52</sup> However, the proponents had to go to the 1867

---

48. Boundary County, Idaho, Ordinance No. 92-2, § 10, ¶ 2 (violations of the County ordinance carried a penalty of a \$300 fine, six months in jail, or both); *see also* Walla Walla County, Wash., Ordinance No. 219, § 19.04.170(D).

Every person, who under color of law, statute, ordinance, regulation, or custom, willfully subjects any person within Walla Walla County to the deprivation of any property rights secured or protected by this Ordinance shall be guilty of a misdemeanor punishable by not more than 30 days in jail, a fine of not more than \$500, or both.

49. Lake County, Or., Ordinance No. 24, § 13.1.

50. 42 U.S.C. §§ 4321-70d (1988 & Supp. IV 1992).

51. 42 U.S.C. § 4331(b)(4) (1988).

52. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 522 (1971).

edition of Bouvier's Law Dictionary<sup>53</sup> to find a definition of "culture" that included "custom."<sup>54</sup> "The [approach of Wise Use proponents] is to take 'cultural' out of context, alter the word to 'culture,' find an outdated dictionary that includes 'customary' within a definition of 'culture' and then transmute 'customary' to 'custom.'"<sup>55</sup> Only through this creative distortion of statutory construction<sup>56</sup> are Wise Use proponents able to cohesively argue that NEPA requires the preservation of culture, and thus requires the active protection of local customs such as grazing, mining, and logging.<sup>57</sup>

Second, in support of their position that the ordinances' coordination and consultation requirements do not conflict with federal law, Wise Use proponents point to the Federal Land Planning and Management Act (FLPMA) and related Forest Service and Bureau of Land Management (BLM) regulations, which require that the public be allowed to comment on and participate in public land management, and that federal agencies coordinate their activities with affected state and local governments.<sup>58</sup> Wise Use proponents take the position that "local government land use plans and policies are to be considered on equal

---

53. JOHN BOUVIER, *BOUVIER'S LAW DICTIONARY* 530 (12th ed. 1867).

54. Handout from Karen Budd to attendees at the National Federal Lands Conference meetings (list of citations) (on file with author).

55. Reed, *supra* note 15, at 550.

56. The term "custom and culture" is not found in any of the statutes or regulations of the U.S. Forest Service, the Fish and Wildlife Service, the Bureau of Land Management, the National Environmental Policy Act, the Endangered Species Act, or the Wild and Scenic Rivers Act. *Id.* at 551.

57. *County Ordinance Movement: Wanting Control of Federal Lands*, FRONTLINE REPORT, Dec. 1993/Jan. 1994, at 7.

58. See Federal Lands Planning and Management Act, 43 U.S.C. § 1712(f) (1988); 43 C.F.R. § 1610.4 (1993). "At the outset of the planning process, the public, other Federal agencies, State and local governments and Indian tribes shall be given an opportunity to suggest concerns, needs, and resource use, development and protection opportunities for consideration in the preparation of the resource management plan." *Id.*; 16 U.S.C. § 1604 (1988). "The Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies." *Id.*; 36 C.F.R. § 219.7(a) (1994). "The responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies, State and local governments, and Indian tribes" *Id.*; 40 C.F.R. § 1506.(2)(b) (1994). "Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements. . . ." *Id.*; Jeanette Burrage, *The County Movement: A Review by the Northwest Legal Foundation, a Public Interest Law Firm*, FEDERAL LANDS UPDATE, Nov. 1993, at 3.

footing and should have the same weight in the decision making process as federal land use plans.”<sup>59</sup>

C. *Alleged Benefits*

Wise Use proponents claim that the underlying purpose behind securing passage of custom and culture ordinances in counties throughout the western United States is encouragement of the “American tradition of self-government.”<sup>60</sup> According to the Wise Use Movement, the ordinances encourage a reduction in bureaucracy, increased economic stability for the counties, and reaffirmation of the American tradition of self-determination.<sup>61</sup> The Movement claims that the ordinances are designed to combat recent county economic losses caused by transfer of private property ownership to tax-exempt organizations, and by loss of jobs dependent on use of federal lands.<sup>62</sup> In general, the Wise Use Movement characterizes the enactment of county ordinances as an opportunity to go on the offensive, after years of defending against claims brought by environmental groups:

The best offense we have is the county land planning process devised by Catron County. The Green activists have admitted that it is the most serious threat to their agenda and must be stopped at all costs. By using the county land planning process, we have taken the offensive for the first time, and have the other side on the defensive. Between 85 and 95 counties have passed land plans or are in the process of doing so. The Green activists have admitted that they are incapable of combating this process as it grows and spreads across the country.<sup>63</sup>

Opponents of the Wise Use Movement counter that the Movement encourages counties to pass custom and culture ordinances in order to harass and intimidate federal agencies and local citizens, place

---

59. *County Ordinance Movement: Wanting Control of Federal Lands*, FRONTLINE REPORT, Dec. 1993/Jan. 1994, at 7 (quoting Karen Budd).

60. Burrage, *supra* note 58, at 3.

61. *Id.* at 7.

62. Karen Budd, *County Governments and Federal Lands Part II*, FEDERAL LANDS UPDATE, May 1991, at 1.

63. James Faulkner and Ruth Kaiser, *Know Your Adversary*, FEDERAL LANDS UPDATE, Jan. 1993, at 4.

additional burdens on federal agencies, pursue court challenges in hopes of being heard by a conservative judiciary, and garner publicity and support for passage of state and federal "takings" legislation.<sup>64</sup> In support of these conclusions, the opposition points to slogans propagated by the Wise Use Movement like, "Join the County Government Movement, It's your only hope!"<sup>65</sup> In fact, many opponents of the Movement believe that the Movement has achieved its short-term goals: influencing agency behavior, enacting anti-environmental county ordinances, and generating grassroots support.<sup>66</sup> "The Wise Use Movement has certainly gotten the attention of the affected agencies . . . which may have been its motivation in the first place."<sup>67</sup>

Because of the difficulty of monitoring local government proceedings, it is unknown how many custom and culture ordinances have been passed to date. The National Federal Lands Conference claimed in June 1993 that 175 of 200 counties in the western United States have passed, are in the process of passing, or are considering passing custom and culture ordinances.<sup>68</sup> Locations where ordinances currently exist include counties in New Mexico,<sup>69</sup> Idaho,<sup>70</sup> Washington,<sup>71</sup> and Oregon.<sup>72</sup>

A typical pattern adopted by proponents of the custom and culture ordinances is to first adopt the ordinances as interim emergency measures. Wise Use proponents claim that these interim plans are policy declarations regarding the use of public lands within the county.<sup>73</sup> Citizen committees then prepare final plans which supersede the interim

---

64. Kevin Bixby, A Report on the County Movement with Emphasis on its Activities in New Mexico 3 (Oct. 1, 1992) (on file with author).

65. Schildknecht, *supra* note 4, at 4.

66. Bixby, *supra* note 64, at 21.

67. Anita P. Miller, *All is Not Quiet on the Western Front*, 25 THE URBAN LAWYER 827, 840 (1993).

68. Schildknecht, *supra* note 4, at 4.

69. Lincoln County, N.M., Ordinance No. 91-7 (Jan. 14, 1992).

70. Boundary County, Idaho, Ordinance No. 92-2 (Aug. 3, 1992).

71. Walla Walla County, Wash., Ordinance No. 219 (Dec. 21, 1993).

72. Klamath County, Or., Land and Water Management Plan (May 1994); Lake County, Or., Ordinance No. 24 (Aug. 19, 1992); Union County, Or., Ordinance No. 1993-5 (Jul. 21, 1993); Malheur County is currently considering passing a custom and culture ordinance (telephone conversation with Malheur County Clerk's Office, Sept. 23, 1994).

73. See generally Thomas D. Lustig, *Goadng the Federal Beast with Local Land Use Ordinances While Bootstrapping Your Way Past the Straight Face Test*, LOCAL CONTROL OF PUBLIC LANDS (1993).

plans.<sup>74</sup> This procedure was initiated in Catron County, which passed an emergency interim land use plan in 1990, and then codified the interim plan in a comprehensive county land use plan, passed in 1992. In addition, several counties have passed other complementary laws, meant to fortify the policies set forth in the custom and culture ordinances. For instance, in addition to a custom and culture ordinance, Catron County has also adopted the federal Civil Rights Act as a county ordinance, providing that federal land grazing permits constitute property rights, and deprivation of those rights violate the Civil Rights Act.<sup>75</sup> Catron County also adopted as county ordinances the Public Rangelands Improvement Act of 1978<sup>76</sup> and Reagan's Executive Order 12630,<sup>77</sup> which defines property rights protected under the Fifth Amendment as including "investment backed expectations."<sup>78</sup>

### III. LEGAL BASIS FOR INVALIDATING CUSTOM AND CULTURE ORDINANCES

#### A. *Precedent*

The legality of custom and culture ordinances is largely untested. Catron County, which passed the first such ordinance, was advised by the Department of Agriculture in 1990 that the ordinance was "null and void as applied to the administration of any federal lands by any officer or official of the Forest Service."<sup>79</sup> The Department clarified that the ordinance violated the Property and Supremacy Clauses of the federal Constitution and was unconstitutionally vague as to what actions were proscribed because "the County cannot in any way proscribe or dictate land management functions undertaken by the Forest Service pursuant to federal laws, regulations or policies."<sup>80</sup> The Department informed Catron County that any attempt to enforce the ordinance against any

---

74. *County Ordinance Movement*, *supra* note 57, at 7.

75. Barry Sims, *Private Rights in Public Lands?* THE WORKBOOK (Southwest Research & Information Center, Albuquerque, N.M.) Summer 1993, at 55.

76. 43 U.S.C. §§ 1901-08 (1988).

77. Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988).

78. Knox, *supra* note 10, at 112.

79. Lustig, *supra* note 73 (quoting letter from James Perry, Assistant General Counsel, United States Department of Agriculture, to Buddy Allred, Catron County Commission Chairman (Sept. 7, 1990)).

80. *Id.*

Department employee would constitute a felony pursuant to 18 U.S.C. § 111.<sup>81</sup>

Several years later, Montana Attorney General Joseph P. Mazurek reached the same conclusion concerning the legality of custom and culture ordinances in an advisory letter requested by Custer and Lewis & Clark Counties.<sup>82</sup> With regard to the coordination and consultation provisions of the ordinances, the Montana Attorney General advised the counties that, although existing regulations and statutes do require federal agencies to allow public comment and participation, and do require federal agencies to coordinate their actions with the planning efforts of local governments, “these coordination provisions do not *require* federal officials to follow local government plans or ordinances.”<sup>83</sup> Further, with regard to provisions of the ordinances restricting the federal government’s disposition of public lands, the Montana Attorney General stated that “a county government does not have the authority to prevent the federal government from acquiring lands within a county.”<sup>84</sup>

Lincoln County, New Mexico, initiated the first appearance of these ordinances in a courtroom. The Lincoln County ordinance mandated that federal acquisition and exchange involving private lands must maintain the existing parity between private and federal lands.<sup>85</sup> While the Lincoln County ordinance was in effect, the BLM initiated a land exchange with a private landowner, exchanging 1,015 acres of in-county private land and 330 acres of in-county water rights for out-of-county federal land. As a result of the exchange, Lincoln County faced a net loss of privately owned land within the County.

Lincoln County sued both the BLM and the landowner in state court for violating the Lincoln County ordinance by failing to maintain

---

81. *Id.*

82. Letter from Joseph P. Mazurek, Attorney General for the State of Montana, to Mike McGrath, Lewis and Clark County Attorney, and Keith D. Haker, Custer County Attorney (June 11, 1993) (on file with author).

83. *Id.* (emphasis added).

84. *Id.*

85. Lincoln County, N.M., Ordinance No. 91-7, § I(A)(2)(a) “[A]n overriding goal of any land sale, transfer or exchange is to maintain parity in land ownership status between public and private entities.” *Id.*

parity when engaging in a land exchange.<sup>86</sup> Lincoln County also sued the BLM in federal district court for failing to consult and coordinate with the County.<sup>87</sup> However, the Lincoln County Commission later voted not to pursue the lawsuits, and instead signed a Memorandum of Understanding with the BLM, assuring a role for the County in future BLM land use actions.<sup>88</sup>

The only custom and culture ordinance that has proceeded completely through either a state or federal court is an ordinance passed by Boundary County, Idaho, that was subsequently challenged by environmental groups in Idaho state court. Petitioners alleged that Boundary County Ordinance No. 92-2<sup>89</sup> was preempted by federal law, and thus violated the Property and Supremacy Clauses of the federal Constitution.<sup>90</sup> Defendants contended that the ordinance's provisions were consistent with existing federal laws that require consultation and coordination with local land use plans. Any other provisions, defendants

---

86. County of Lincoln v. United States, No. CV-92-223 (12th Dist. Ct., County of Lincoln, State of New Mexico) (the federal government subsequently removed the lawsuit to federal district court).

87. County of Lincoln v. United States, No. CIV-92-1474 JP (Dist. Ct. N.M.).

88. Miller, *supra* note 67, at 838-39; *see also* Sims, *supra* note 75, at 57.

89. Boundary County, Idaho, Ordinance No. 92-2 (Aug. 3, 1992): federal agencies must obtain County approval before taking management or planning action on federal lands (§ 3(A)(4)); federal acquisition, disposal or exchange of public lands is subject to County approval (§ 3(A)(4)); the federal government is prohibited from acquiring private lands unless approved by the County, parity is maintained, and private property rights are enhanced (§ 3, ¶ 2); federal agencies cannot change wildlife habitat, recovery plans, timber sales or volume projections, restricted access, road closures, or wilderness designation unless approved by the County (§ 3(A)(4)); the County is designated as the lead planning agency for management and planning of federal public lands, waters, and natural resources (§ 3(A)(4)); federal agencies must prepare detailed impact statements and mitigation measures, subject to County approval, before making any change in public land use (§ 3(A)(6)); the federal government may implement or enforce § 404 of the Clean Water Act only if the County consents (§ 4(A)(1)); the federal government may enforce the Endangered Species Act only if the County consents (§ 3(A)(4); § 7(A)(1)); the Wild and Scenic Rivers Act may be implemented by the federal government only if the County consents, and the County will design its own Wild and Scenic Rivers designation (§ 4(A)(4)); all grazing on federal lands must be approved by the County (§ 3(A)(4)); the County is charged with the management and sale of timber on federal lands (§ 3(A)(4)); control of wildlife on federal lands is subject to approval by a County committee (§ 7(A)(2)); no federal lands may be designated as wilderness (§ 7(A)(3)); access to and across federal lands is subject to County limitations (§ 9); the penalty for violating this ordinance is a \$300 fine, six months in jail, or both (§ 10(A)(2)).

90. Plaintiffs' Brief in Support of Motion for Summary Judgment at 17-31, Boundary Backpackers v. Boundary County, No. CV 93-9955 (1st Jud. Dist. of Idaho Jan. 27, 1994).

claimed, merely reflected policy statements and County land use recommendations.<sup>91</sup>

The Idaho state court sided with petitioners, issuing a declaratory ruling that the Boundary County ordinance was unconstitutional. The court found that the consultation and coordination provisions of the ordinance violated the Supremacy Clause, because

[a]lthough Congress may direct federal officials to consult with state and local governments in coordination of land and resource management planning, the federal provisions do not require federal officials to follow local government plans or ordinances. Local governments may enact land use plans or ordinances that affect federal public lands so long as the ordinances do not conflict with federal land use or federal law.<sup>92</sup>

The court also held that other provisions of the ordinance, such as the clause prohibiting the federal government from acquiring more public lands or exchanging public for private lands were also preempted, and thus also violated the Supremacy Clause.<sup>93</sup>

#### *B. Violation of the Supremacy Clauses*

The Supremacy Clause of the United States Constitution provides that, when federal and state laws conflict, federal law will prevail as the controlling law.<sup>94</sup> The effect of the Supremacy Clause is to preclude state regulation of the federal government’s activities. The Supreme Court first articulated this doctrine in *McCulloch v. Maryland*<sup>95</sup> when, relying on generalized notions of federal supremacy, the Court invalidated a state tax on a federal bank. “[T]he constitution and the laws made in pursuance thereof are supreme; that they control the constitution

---

91. Defendants’ Memorandum of Points and Authorities in Support of Motions to Dismiss and Opposing Plaintiffs’ Motion for Summary Judgment at 13, *Boundary Backpackers v. Boundary County*, No. CV 93-9955 (1st Jud. Dist. of Idaho Jan 27, 1994).

92. *Boundary Backpackers v. Boundary County*, No. CV 93-9955, slip op. at 14 (1st Jud. Dist. of Idaho Jan. 27, 1994).

93. *Id.* at 15.

94. U.S. CONST., art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

95. 17 U.S. (4 Wheat.) 316 (1819).

and laws of the respective States, and cannot be controlled by them.”<sup>96</sup> Therefore, absent a congressional waiver of this sovereign immunity, the “activities of the Federal Government are free from regulation by any state.”<sup>97</sup>

Custom and culture ordinances are specifically designed to exert local control over the federal government’s activities on public lands. The ordinances’ provisions specify what the federal government may or may not do, or what prerequisites the federal government must satisfy before it may act. Thus, this attempt to locally regulate the federal government’s activities violates the Supremacy Clause.

Of course, Congress may choose to waive sovereign immunity and authorize states to regulate federal instrumentalities.<sup>98</sup> However, such a waiver cannot be implied, but must be “unequivocally expressed.”<sup>99</sup> Congress’ decision to subject the federal government to state law must constitute a clear congressional mandate, comprised of specific legislation which makes the congressional authorization of state control clear and unambiguous.<sup>100</sup>

#### 1. Waivers of Sovereign Immunity

Although on its face the custom and culture ordinance is a local attempt to regulate the federal government, in violation of the Supremacy Clause, proponents of the ordinances may argue that various federal environmental statutes have expressly waived the federal government’s claim of sovereign immunity. Three major environmental statutes contain waiver provisions: the Resource Conservation and Recovery Act (RCRA),<sup>101</sup> the Federal Water Pollution Control Act (Clean Water

---

96. *Id.* at 426.

97. *Mayo v. United States*, 319 U.S. 441, 445 (1943).

98. *Id.* at 446.

99. *United States v. Testan*, 424 U.S. 392, 399 (1976) (citations omitted).

100. *Hancock v. Train*, 426 U.S. 167, 179 (1976).

Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the states, an authorization of State regulation is found only when and to the extent there is “a clear congressional mandate”, “specific congressional action” that makes this authorization of state regulation “clear and unambiguous.”

*Id.* (citations omitted); *see also* *Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary, United States Dep’t of Energy*, 683 F.2d 1171, 1178 (8th Cir. 1982).

101. 42 U.S.C. § 6961(a) (1988).

Act),<sup>102</sup> and the Clean Air Act.<sup>103</sup> These waiver provisions have resulted in judicial rulings that the federal government must comply with state environmental laws in certain instances.<sup>104</sup>

The Supreme Court decided two companion cases in 1976 that have become the seminal interpretation of the waiver provisions contained in these environmental statutes. *Hancock v. Train*<sup>105</sup> concerned the waiver provision in section 118 of the Clean Air Act,<sup>106</sup> and *Environmental Protection Agency v. California State Water Resources Control Board*<sup>107</sup> concerned the waiver provision in section 313 of the Clean Water Act.<sup>108</sup> In both cases federal facilities were emitting pollution in states that required such polluters to obtain state permits.

The Supreme Court held that federal installations are not required to submit to state regulatory permit procedures absent clear and unambiguous congressional authorization. Neither the Clean Water Act nor the Clean Air Act evinced a clear and unambiguous intent to require federal installations to obtain state permits, but they did show a sufficient congressional intent to require the federal agencies to comply with the substantive pollution standards established by the state laws. The Court’s reasoning was based on the fact that the statutes waived federal immunity only with regard to state requirements. Examining the language and legislative history of the statutes, the Supreme Court concluded that the statutory term “requirements” was synonymous with “standards,” and that “standards” meant only state-established emission and effluent levels.<sup>109</sup>

---

102. 33 U.S.C. § 1323(a) (1988).

103. 42 U.S.C. § 7418(a) (1988).

104. See *California v. United States*, 438 U.S. 645, 656-57 (1978) (federal reclamation projects must follow state water laws); *Hancock v. Train*, 426 U.S. 167, 178-80 (1976) (federal government must comply with state air pollution standards); *California v. Environmental Protection Agency*, 511 F.2d 963, 968-69 (9th Cir. 1975) (federal agencies must comply with state environmental standards); *Columbia Basin Land Protection Ass’n v. Schlesinger*, 643 F.2d 585, 604-06 (9th Cir. 1981) (federal government must comply with state environmental standards).

105. 426 U.S. 167 (1976).

106. 42 U.S.C. § 7418 (1970).

107. 426 U.S. 200 (1976).

108. 42 U.S.C. § 7613 (1970).

109. *Hancock*, 426 U.S. at 180.

[W]e are not convinced that Congress intended to subject federal agencies to state permits. We are unable to find in § 118, on its face or in relation to the Clean Air Act as a whole, or to derive from the legislative history of the

Furthermore, the Court found that requiring federal agencies to obtain state permits would have accorded states undue control over federal instrumentalities.<sup>110</sup> The applicable state regulatory scheme empowered the state to deny permits to and forbid operation by an installation even if it complied with all state substantive standards. The Court concluded that it could not find an intent to delegate such power to the state absent a clearer congressional expression in the language or legislative histories of the statutes.<sup>111</sup> Hence, the Court concluded that pollution from federal installations could not exceed the emission or effluent levels set by the state, but that the federal installations need not comply with state permitting procedures.<sup>112</sup>

This holding was overturned by Congress in 1977 through its amendments to RCRA,<sup>113</sup> the Clean Water Act,<sup>114</sup> and the Clean Air

Amendments any clear and unambiguous declaration by the Congress that federal installations may not perform their activities unless a state official issues a permit.

*Id.*

110. *Id.* at 184.

111. *Id.*

In view of the undoubted congressional awareness of the requirement of clear language to bind the United States, our conclusion is that with respect to subjecting federal installations to state permit requirements, the Clean Air Act does not satisfy the traditional requirement that such intention be evinced with satisfactory clarity . . . we can only conclude that to the extent it considered the matter in enacting § 118 Congress has fashioned a compromise which, while requiring federal installations to abate their pollution to the same extent as any other air contaminant source and under standards which the States have prescribed, stopped short of subjecting federal installations to state control.

*Id.* at 198-99.

112. In contrast, the Court ruled in *California v. United States*, that compliance with state water appropriation permit procedures was required by the clear and unambiguous language of § 8 of the Reclamation Act, which states:

[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, . . . and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws . . . .

43 U.S.C. § 383 (1988). The Court found that this language plainly referred to compliance with all state laws, not merely standards, and that the nation's long history of state control of water resources and federal deference to state prerogatives concerning water policies was recognized by the Reclamation Act's legislative history. *California v. United States*, 438 U.S. 645, 674-75 (1978).

113. The Act states that:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity

Act.<sup>115</sup> Subsequently, the Ninth Circuit ruled in *Parola v. Weinberger*<sup>116</sup> that, as a result of the amended sovereign immunity waiver in RCRA, federal military installations must conform with a local regulation granting exclusive garbage collection rights within the city limits. Similarly, the Tenth Circuit ruled in *United States v. New Mexico*<sup>117</sup> that state regulations concerning the incineration of hazardous waste fell within RCRA’s waiver of federal sovereign immunity. The court reasoned that the conditions imposed by the state constituted an objective, preexisting state standard capable of uniform application, and thus qualified as a requirement under RCRA. Therefore, the conditions fell within RCRA’s sovereign immunity waiver.<sup>118</sup> However, the courts have also held that the amended waiver provisions do not constitute a

---

resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, *both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief)*, respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.

42 U.S.C. § 6961 (italicized portion added by the 1977 amendment).

114. The Clean Water Act provides that:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, *administrative authority, and process and sanctions* respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. § 1323(a) (1988) (italicized portion added by the 1977 amendment).

115. The Clean Air Act provides that:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, *administrative authority, and process and sanctions* respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity.

42 U.S.C. § 7418(a) (italicized portion added by the 1977 amendment).

116. 848 F.2d 956 (9th Cir. 1988).

117. 32 F.3d 494 (10th Cir. 1994).

118. *Id.* at 497.

waiver of sovereign immunity with respect to criminal sanctions<sup>119</sup> or civil penalties.<sup>120</sup>

Other federal statutes contain provisions that waive the federal

119. In *California v. Walters*, 751 F.2d 977 (9th Cir. 1985), the Ninth Circuit held that, while the Veterans Administration was required by RCRA to comply with state law governing disposal of hazardous waste, and had waived sovereign immunity with respect to sanctions of the nature of injunctive relief, it had not waived immunity with respect to criminal sanctions.

[The amended RCRA waiver provision] has enough clear and unambiguous language to overcome the government's sovereign immunity to permit requirements, . . . [but does] not show at all, much less clearly and unambiguously, an intent to subject the United States to criminal sanctions in addition to permit requirements. Moreover, as the government points out, the legislative history of [RCRA] does not show a clear intent to waive the immunity to criminal sanctions.

*Id.* at 979. In *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990), the Tenth Circuit held that the State of New Mexico's action to collect a fine from the Department of the Air Force for violating state hazardous waste laws was barred by sovereign immunity, because civil penalties did not constitute a "requirement" of state law, which federal agencies are required to adhere to under RCRA.

[T]he word 'requirements' in section 6001 does not unambiguously include civil penalties. . . . The word can reasonably be interpreted as including substantive standards and the means for implementing those standards, but excluding punitive measures.

. . .

[Further,] the circumstances surrounding the enactment of RCRA do not show a clear intention to waive federal sovereign immunity to state civil penalties. The legislative history is quite general and makes no reference to such measures. . . .

*Id.* at 1295.

120. In *United States Dep't of Energy v. Ohio*, 112 S. Ct. 1627 (1992), the Supreme Court held that federal sovereign immunity from liability for civil fines imposed by the state for past violations of CWA or RCRA had not been waived. Instead, § 313 of the Clean Water Act subjected the federal government to liability only for civil penalties arising under federal law or imposed by state court to enforce its order of process.

[T]he statute makes no mention of any mechanism for penalizing past violations, and this absence of any example of punitive fines is powerful evidence that Congress had no intent to subject the United States to an enforcement mechanism that could deplete the federal fisc regardless of a responsible officer's willingness and capacity to comply in the future.

The drafters' silence on the subject of punitive sanctions becomes virtually audible after one reads the provision's final sentence, waiving immunity "from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief." The fact that the drafter's only specific reference to an enforcement mechanism described "sanction" as a coercive means of injunctive enforcement bars any inference that a waiver of immunity from "requirements" somehow unquestionably extends to punitive fines that are never so much as mentioned.

*Id.* at 1640.

government’s sovereign immunity as well. For instance, the Supreme Court has held that section 8 of the Reclamation Act of 1902<sup>121</sup> requires the federal government to comply with all state water appropriation permit procedures.<sup>122</sup> Similarly, the Ninth Circuit has held in *Columbia Basin Land Protection Association v. Schlesinger*<sup>123</sup> that section 505 of the Federal Land Management Planning Act of 1976 (FLPMA)<sup>124</sup> requires the federal government to comply with state substantive environmental standards, but not state certification procedures.<sup>125</sup>

## 2. Application to Custom and Culture Ordinances

Although waiver of sovereign immunity provisions do exist in several environmental statutes, proponents of the custom and culture ordinances will be unable to effectively utilize these provisions to defend the constitutionality of the ordinances. First, most of the statutes that contain waiver provisions—RCRA, the Clean Water Act, and the Clean Air Act—deal with pollution management and abatement. In contrast, very few of the custom and culture ordinance provisions are concerned

---

121. 43 U.S.C. § 383 (1988).

122. See *California v. United States*, 438 U.S. 645 (1978).

123. 643 F.2d 585 (9th Cir. 1981).

124. 43 U.S.C. §§ 1701-84 (1988 & Supp. V 1993).

125. Specifically, the Ninth Circuit noted:

[O]ur inquiry is the statutory interpretation of § 505 of FLPMA, specifically the phrase “compliance with State standards.” We find, first, that this clearly indicates congressional intent that the BPA meet the substantive standards of the State of Washington’s Siting Act. . . . Our next inquiry is whether the [federal government] also must go through the certification process and get a certificate from the Governor. We hold that it does not. The statute refers to standards, it does not mention procedures . . . The statute never defines the term, nor does its legislative history, but the normal use of the term, and that used by the Supreme Court in *Hancock* and *EPA*, is “substantive requirements.” Moreover, to require the [federal government] to receive a state certificate would imply that the state could deny the application, which would give them a veto power over the federal project. This clearly cannot be the meaning that Congress intended. Much stronger language would be needed for us to conclude that Congress was delegating so much power from the federal government to the states. Congress would not delegate such an important function as the decision of whether and where to distribute electric power from federal facilities to total state control in such a brief statement.

*Id.* at 605. See also *Citizens and Landowners Against the Miles City/New Underwood Powerline v. Secretary, United States Dep’t of Energy*, 683 F.2d 1171 (8th Cir. 1982) (neither § 103 of Department of Energy Organization Act 42 U.S.C. § 7113 (1988) nor § 505 of FLPMA, 43 U.S.C. § 1765 (1988) evidenced the necessary congressional intent to require federal facilities to comply with a state statute and obtain a permit to construct a power line).

with pollution control, but instead concentrate on issues of land management. For instance, none of the provisions in the Walla Walla County custom and culture ordinance relate to disposal or management of hazardous waste, and thus the RCRA waiver provision will prove useless to the ordinance's defense. Similarly, the Walla Walla ordinance does not speak to water pollution, but only to the right to designate wetlands.<sup>126</sup>

However, at least a few of the provisions contained in a typical custom and culture ordinance concern matters that may be covered by the Clean Water Act and Clean Air Act waiver provisions.<sup>127</sup> For instance, the Walla Walla ordinance addresses both the federal government's ability to acquire water rights<sup>128</sup> and federal compliance with county air quality standards and use plans.<sup>129</sup> Thus, the county may be able to make a colorable argument that the waiver provisions in the Reclamation Act of 1902 and the Clean Air Act protect these provisions of the ordinance from invalidity under the Supremacy Clause.

It is still likely that the custom and culture ordinances will not survive scrutiny, however, because the ordinances always single out the federal government for regulation, instead of treating the federal government like any other private party. Statutory provisions that waive sovereign immunity do not allow a state to discriminate against the federal government, but are merely an allowance on the part of the

---

126. Walla Walla County, Wash., Ordinance No. 219, § 19.04.100(C).

To the extent permitted by law, Walla Walla County shall have the authority to define and designate wetlands, and to the extent such authority is exercised, and otherwise in accordance with law, federal and state agencies shall act in compliance with acceptance and enforcement of such definitions and designations. In addition, the County may continue to develop, in coordination with private land owners and governmental agencies, water management plans that encompass water resources on both governmentally owned and privately owned lands.

*Id.*

127. See *infra* notes 35-41 and accompanying text.

128. *Id.* “[F]ederal and state agencies shall not acquire for any public purpose any interest in water rights within Walla Walla County without (i) first coordinating and consulting with the County, and (ii) ensuring that private water rights are protected.” *Id.*; see also Lake County, Or., Ordinance No. 24, § 4.1. “[A]ny water right transfers shall result in no net loss of irrigated lands on the county tax base.” *Id.*

129. Walla Walla County, Wash., Ordinance No. 219, § 19.04.110(B). “Any proposed designation of federal or state pollution non-attainment areas and any other federal or state action that has any effect on air resources within Walla Walla County shall be coordinated with the County and shall comply with all County air quality standards and use plans.” *Id.*

federal government that it may be treated by the state as any other private party. For instance, section 313 of the Clean Water Act provides that federal facilities shall be subject to state and local requirements “in the same manner, and to the same extent as any nongovernmental entity.”<sup>130</sup> The waiver provisions of both the Clean Air Act<sup>131</sup> and RCRA<sup>132</sup> contain similar language.

Custom and culture ordinances, however, are not enacted in an attempt to regulate the federal government to the same degree as private parties. Instead, the ordinances single out the federal government as the only party to whom the ordinance applies. The land management activities of private citizens are not regulated by custom and culture ordinances; only the federal government (and, in some cases, the state government) must coordinate and consult with the county before engaging in certain activities, and must act in accordance with the county’s custom and culture. Thus, the custom and culture ordinances do not fall within the purview of the waiver language in the Clean Air Act or the Clean Water Act.

Of course, it would be possible for counties to formulate ordinances within the boundaries laid out by the statutory waiver provisions. For instance, a county could implement an ordinance that subjected all parties, both private and governmental, to a permitting process before any party undertook any activity that might result in the discharge of a pollutant into a navigable body of water.<sup>133</sup> In other words, any party who wished to undertake any use of water within the county would first have to obtain a permit. The county would then have the discretion to attach conditions to any permit that it subsequently granted in order to insure that permittees’ activities did not cause water pollution. In addition, the county would be able to deny any party a permit unless the party complied with all substantive county water pollution standards. At the least, such a permitting process would enable the county to force the federal government to comply with the county’s procedural processes.<sup>134</sup>

---

130. 33 U.S.C. § 1323(a) (1988).

131. 42 U.S.C. § 7418 (1988).

132. 42 U.S.C. § 6961 (1988).

133. *See* 33 U.S.C. § 1323(a) (1988).

134. *See California v. United States*, 438 U.S. 645 (1978).

C. *Conclusion: Custom and Culture Ordinances are Invalid*

The waiver of sovereign immunity that may be found in several federal environmental statutes can be used by counties interested in subjecting the federal government to regulatory procedures and substantive environmental laws. However, existing custom and culture ordinances do not satisfactorily take advantage of the waiver provisions in either RCRA, the Clean Water Act, or the Clean Air Act and, as written, violate the Supremacy Clause by attempting to locally regulate the federal government.

IV. LITIGATION STRATEGIES

A. *Establishing Standing*

The requirement in Article III of the United States Constitution that a case or controversy must exist in order for a court to exercise jurisdiction over a cause of action requires a plaintiff to establish that it has standing, that its complaint is fit for judicial review, and that its cause of action is not moot. In order to establish standing in federal court, a plaintiff must satisfy a three-part test: (1) plaintiff must have suffered some actual or threatened injury as a result of the defendant's allegedly illegal conduct; (2) plaintiff's injury must be fairly traceable to the challenged action; and (3) plaintiff's injury must be likely to be redressed by a favorable decision.<sup>135</sup> So long as standing for one plaintiff is established, it is unnecessary to consider standing for other plaintiffs.<sup>136</sup>

1. Injury-in-Fact

An injury-in-fact is an "invasion of a legally-protected interest which is . . . concrete and particularized, and . . . 'actual or imminent, not 'conjectural' or 'hypothetical.'""<sup>137</sup> In the past, environmental organizations have successfully asserted standing to pursue lawsuits on the basis of a wide variety of alleged environmental injuries. The Supreme Court has recognized that injury to environmental, recreational, and aesthetic interests is sufficient to establish standing<sup>138</sup> and that "the

---

135. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

136. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

137. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (citations omitted).

138. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

desire to use or observe an animal species . . . is undeniably a cognizable interest for purpose[s] of standing.”<sup>139</sup> Individuals who enjoy the recreational use and aesthetic beauty afforded by the area at issue, including watching, feeding, and hunting the wildlife will be able to establish ““specific injury experienced by ascertainable individuals who’ live in or recreate” in the area, sufficient to establish injury.<sup>140</sup>

In fact, many courts have held that merely residing near an area threatened by environmental injury constitutes an injury sufficient to support standing.<sup>141</sup> However, the Supreme Court has held that an individual must point to use and enjoyment of a particular resource or area, and must allege that his use and enjoyment of that particular area will be harmed by the challenged conduct, in order to assert a sufficiently cognizable injury for purposes of standing.<sup>142</sup>

In *Idaho Conservation League v. Mumma*,<sup>143</sup> the Ninth Circuit determined that Idaho Conservation League (ICL) members showed a personal stake in the matter at issue sufficient to support standing by alleging that the planned development of wilderness areas would destroy their enjoyment of those areas. The court noted that plaintiffs’ failure to identify specific locations where harm would occur did not destroy plaintiffs’ standing, because the development of specific locations had not yet been authorized.<sup>144</sup> “To the extent that the *threat* of development in one specific area is sufficient . . . a similar threat to a number of specified areas also must suffice, so long as the plaintiffs have alleged that the injury would be felt by individual members.”<sup>145</sup>

Establishing standing will be the toughest hurdle for an environmental group challenging a custom and culture ordinance to

---

139. *Lujan*, 112 S. Ct. at 2137.

140. *Nat’l Wildlife Fed’n v. Agric. Stabilization and Conservation Serv.*, 901 F.2d 673, 677 (8th Cir. 1990).

141. *Goos v. Interstate Commerce Comm’n*, 911 F.2d 1283, 1290 (8th Cir. 1990); *Pymatuning Water Shed Citizens For A Hygenic Env’t v. Eaton*, 506 F. Supp. 902, 903 (W.D. Pa. 1980), *aff’d*, 644 F.2d 995 (3d Cir. 1981); *Loveladies Property Owners Ass’n, Inc. v. Raab*, 430 F. Supp. 276, 280 (D.N.J. 1975), *aff’d*, 547 F.2d 1162 (3d Cir. 1976); *Sierra Club v. Aluminum Co. of America*, 585 F. Supp. 842, 848-49 (N.D.N.Y. 1984); *State of Michigan v. City of Allen Park*, 501 F. Supp. 1007, 1013 (E.D. Mich. 1980); *Montgomery Env’tl. Coalition v. Fri*, 366 F. Supp. 261, 264 (D.D.C. 1973).

142. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

143. 956 F.2d 1508 (9th Cir. 1992).

144. *Id.* at 1517 (emphasis in original).

145. *Id.*

surmount. The group will first have to assert that it consists of concerned citizens who regularly participate in the public land planning and management process within the county. The group will next have to assert that its members regularly enjoy, and plan to continue to enjoy, particular areas on the public lands within the county, where they bird watch, take photographs, camp, hike, and enjoy the wildlife and the aesthetics of the wilderness. Third, the group will have to assert that the custom and culture ordinances will effectively short-circuit the federal planning and management process, and thus the particular wilderness areas enjoyed by the members will be adversely affected.

For instance, if a federal agency is required to explore alternatives to wildlife protection and mitigate the effects of that protection on the county's economic stability—neither of which requirements are found in the Endangered Species Act—then it is foreseeable that endangered species will not receive the same degree of protection that they currently receive under federal laws. Thus endangered species will be adversely impacted, which will in turn injure the members' interests. Or, for example, if federal agencies are forced to follow the guidelines within the ordinance which insist that the agencies take no actions that make livestock production financially inefficient within the county, then the agencies may be unable to take measures like reducing the number of Allotment Unit Months (AUMs) or halting grazing in certain environmentally damaged areas. As a result, the ecosystems in those areas will not only fail to improve, but will continue to deteriorate.

This type of injury-in-fact is the same as asserted in *Boundary Backpackers v. Boundary County*<sup>146</sup> before the Idaho state court.<sup>147</sup> In their motion for summary judgment, plaintiffs argued that individuals and organization members would suffer the following harms: the backpacker organization would suffer injury because the ordinance prohibited the wilderness designation that the group had sought; Audubon Society members would suffer injury because the ordinance would interfere with protection for birds and their habitat; individual citizens who participated in the public lands planning and management process would suffer injury because the ordinance would interfere with their participation in Forest Service planning, management, and activities; individuals who observed

---

146. *Boundary Backpackers v. Boundary County*, No. CV 93-9955 (1st Jud. Dist. of Idaho Jan. 27, 1994).

147. Standing requirements for cases before the Idaho state courts are not identical to the requirements necessary to successfully assert standing in federal court discussed above.

and enjoyed wildlife would suffer injury because the ordinance might destroy Endangered Species Act protection activities; a private land owner would suffer injury because the ordinance would interfere with his decision to sell his land to the federal government; and a professional wilderness guide would suffer injury because the ordinance would interfere with his livelihood.<sup>148</sup> The Idaho state court judge held that the petitioner environmental groups had standing because “[a] review of the affidavits establishes that one or more of the plaintiffs may suffer damage to recreational and aesthetic interests as a result of Defendants’ enforcing provisions of the Ordinance.”<sup>149</sup>

Counties that have passed custom and culture ordinances may argue that the ordinances’ interference with all of the above-listed interests is not a foregone conclusion, but environmental groups need not prove that these results will undoubtedly come about in order to maintain standing. However, for purposes of determining standing, it is a party’s nonfrivolous claims that are determinative, not whether the party can sustain those claims by proof on the merits.<sup>150</sup> Further, the fact that the alleged injury is “threatened,” rather than “actual” does not defeat the claim.<sup>151</sup>

Counties defending custom and culture ordinances may also argue that any injury to environmentalists would be inflicted by federal actors, not by the ordinances *per se*. Thus, the counties could maintain that this chain of action—that the ordinance will interfere with federal land planning and management, which will in turn adversely affect the environment—is too tenuous to support a claim of standing.

The fact that the alleged potential injury would be the result of a chain of events need not doom the standing claim.<sup>152</sup> “In numerous cases, courts have ruled that a possible chain of third-party responses to agency action was sufficient to confer standing.”<sup>153</sup> Therefore, although the alleged potential injury would actually result from a third-party response—namely, federal agency inaction—the ordinance would be the

---

148. *Boundary Backpackers v. Boundary County*, No. CV 93-9955, slip op. at 7-9 (1st Jud. Dist. of Idaho Jan. 27, 1994).

149. *Id.* at 8-9.

150. *City of St. Louis v. Department of Transp.*, 936 F.2d 1528 (9th Cir. 1991).

151. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Heckler v. Mathews*, 465 U.S. 728, 738 (1984); *Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 491 (9th Cir. 1987).

152. *Wilderness Society v. Griles*, 824 F.2d 4, 12, 18 (D.C. Cir. 1987).

153. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1515 (9th Cir. 1992).

cause of that inaction, and thus standing in a lawsuit opposing the ordinance would not necessarily be destroyed.

The missing link in potential plaintiffs' position, however, is whether federal actors will actually pay any attention to custom and culture ordinances. In the past, at least one federal agency has made clear that it will consider the ordinances null and void.<sup>154</sup> Assumably, then, the agency will ignore the ordinances and will not comply with their requirements. If federal employees do not engage in the activities required by the custom and culture ordinances, then environmentalists will not suffer any of the injuries referred to above.

In order to survive this challenge to their claim of standing, environmental groups must find some way to show that the third party—the federal actors—is at least likely to act according to the direction of custom and culture ordinances. Environmental groups may address this problem in several ways. One approach would be to try to locate a federal employee who would testify that he has complied with the requirements of a custom and culture ordinance in the past, or that he would comply with such requirements in the future, either because of instructions that he has received from his superiors, or on the basis of his own judgment.

Second, potential plaintiffs might try to get a federal agency to work with them by conceding that it would not consider a custom and culture ordinance null and void unless so ordered by a court. Such testimony would imply that federal agencies would order their employees to comply with the requirements of custom and culture ordinances. This partnership would be in both parties' interests; not only would the plaintiff environmental group bolster its assertion of standing, but the federal government would help insure that an ordinance attempting to control its activities was struck down, without actually having to participate in a lawsuit, devote the necessary resources, and deal with the resulting publicity.

Third, potential plaintiffs might be able to locate a county commissioner from a county that has passed a custom and culture ordinance who is willing to testify that his county plans to enforce the

---

154. Letter from James Perry, Assistant General Counsel, United States Department of Agriculture, to Buddy Allred, Catron County Commission Chairman (Sept. 7, 1990), stating that the Department of Agriculture considered the ordinance "null and void as applied to the administration of any federal lands by any officer or official of the Forest Service."

ordinance and prosecute any federal employees who fail to comply with the requirements outlined in the ordinance. At first glance, this would appear to be a difficult assignment for potential plaintiffs, because it is only logical to assume that county commissioners who favor custom and culture ordinances will have no interest in helping plaintiffs establish standing to challenge such ordinances in court. However, it is possible that some county commissioners may be interested in insuring that the ordinances are legal and actually enforceable, instead of just having one on the books as a political or policy statement. Further, a commissioner might find it politically popular within his county to publicly state that he intends to enforce the county’s custom and culture ordinance. On the other hand, potential plaintiffs might be able to find a commissioner who opposed passage of a custom and culture ordinance, but whose opposition was overruled. Such a commissioner would probably be more than willing to contribute to any effort to striking down an ordinance that he has already publicly opposed.

In all of these instances, it would be most helpful if the potential plaintiff environmental groups were able to secure the testimony of a federal agent or county commissioner who was employed in the county at issue, or a federal agency that owns and manages land within the county at issue. If no such witness is available, the testimony of a federal employee or county commissioner from another county that has passed a custom and culture ordinance would still be valuable, but would only amount to anecdotal evidence. In such an instance, although the plaintiff’s ability to establish standing would not be as assured, the plaintiff would at least have additional support for its contention that counties are likely to enforce custom and culture ordinances, and that federal employees are likely to abide by those ordinances.

## 2. Causation

The second standing prong requires that the alleged injury be fairly traceable to the challenged action, and not the result of the independent action of some third party not before the court.<sup>155</sup> However, plaintiffs need not show that the challenged action will inevitably lead to the threatened injury. If the challenged action makes it possible for the threatened injury to occur, plaintiffs need only demonstrate sufficient

---

155. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (citations omitted).

likelihood of actual occurrence to meet their burden of showing causation.<sup>156</sup>

Proponents of custom and culture ordinances may argue that plaintiffs' alleged injury would be caused not by the custom and culture ordinance, but by third parties' decisionmaking and resulting actions. However, the Ninth Circuit rejected such an argument in *Idaho Conservation League v. Mumma*.<sup>157</sup> The court noted that, where the failure to make wilderness recommendations would not have occurred but for the Secretary's decision, the fact that development in those areas might never take place or that a redrafted Environmental Impact Statement (EIS) might change the Secretary's recommendation was irrelevant.<sup>158</sup> The court pointed to the fact that the asserted injury at issue was that, due to a deficient EIS, environmental consequences and reasonable alternatives might be overlooked. Therefore, the ultimate outcome after additional procedures were followed was not at issue.<sup>159</sup>

The custom and culture ordinances could possibly cause a similar outcome. If the ordinances go into effect, the level of county control would interfere with the varied interests of plaintiffs noted above. It is irrelevant that any eventual injury to plaintiffs would be caused by federal agency action or inaction, because it is the ordinance that would compel that action or inaction. In accordance with this position, an Idaho state court judge held in *Boundary Backpackers* that petitioner environmental groups had adequately established causation: "The [Boundary County] Ordinance imposes an overlay of County control upon state and federal public lands, waters, and wildlife. Enforcement of the Ordinance could result in interference with the various interests claimed by Plaintiffs."<sup>160</sup>

### 3. Redressability

In order to satisfy the third standing prong, plaintiffs must establish that it is likely, as opposed to merely speculative, that the alleged injury will be redressed by a favorable court decision.<sup>161</sup> Redressability for environmental groups' alleged injuries is easily dealt

---

156. *Wilderness Society v. Griles*, 824 F.2d 4, 18 (D.C. Cir. 1987).

157. 956 F.2d 1508, 1518 (9th Cir. 1992).

158. *Id.*

159. *Id.*

160. *Boundary Backpackers v. Boundary County*, No. CV 93-9955, slip op. at 10 (1st Jud. Dist. of Idaho Jan. 27, 1994).

161. *Lujan*, 112 S. Ct. at 2136 (citations omitted).

with, because if the court grants declaratory judgment and determines that the ordinances are unconstitutional, and therefore illegal and unenforceable, plaintiffs’ alleged injuries will be prevented.

#### 4. Prudential Standing

In addition to the standing requirements imposed on plaintiffs by Article III of the United States Constitution, plaintiffs must also meet judicially-developed prudential standing requirements. In order to do so, plaintiffs’ complaint must fall within the “zone of interests to be protected or regulated by the statute or constitutional guarantee in question.”<sup>162</sup> Therefore, the matter at issue cannot be an “abstract question[] of wide public significance which amount[s] to [a] generalized grievance[]” best addressed in the representative branches.<sup>163</sup> With regard to a lawsuit against a custom and culture ordinance, this issue may be dealt with summarily, as plaintiffs’ interest in redressing the ordinance’s constitutional violations is clearly within the zone of interests protected by the Supremacy Clause.

#### 5. Organizational Standing

In addition to the ability of individual members of environmental organizations to assert standing, the organizations themselves also have standing to pursue a cause of action against the county that has passed a custom and culture ordinance. An organization “may have standing in its own right to seek judicial relief from injury to itself.”<sup>164</sup>

There are several criteria that indicate whether an organization will be able to successfully assert standing. First, an organization is usually found to have standing if it has expended resources against the alleged illegal activity. An organization’s “expenditure of resources to advocate against the [challenged action] and to assist its members in responding to the [challenged action] creates a cognizable injury to that organization.”<sup>165</sup> Second, an organization will be found to have standing where its members have been individually injured.<sup>166</sup> An injury to an

---

162. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 465, 475 (1982) (citation omitted).

163. *Id.*

164. *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

165. *Finley v. National Endowment for the Arts*, 795 F. Supp. 1457, 1470 (C.D. Cal. 1992) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982)).

166. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

organization's members occurs if the members are chilled in their work by the uncertainty of whether they are in compliance with the law.<sup>167</sup> Third, while an organization must have more than a mere interest in the issue in order to assert standing,<sup>168</sup> an interest in aesthetic, conservation, and recreational values will support standing when an organizational plaintiff alleges that its members use the area and will be adversely affected.<sup>169</sup> The Ninth Circuit upheld a similar claim of organizational standing in *Mt. Graham Red Squirrel v. Espy*.<sup>170</sup> The court stated:

In its complaint, Sierra Club alleged that "the organizations [bringing suit] and their members derive scientific, recreational, and aesthetic benefit and enjoyment from the existence in the wild of the Mt. Graham Red Squirrel." Sierra Club supports its claim to standing by arguing that these interests would be irreparably harmed if the squirrel were permitted to become extinct. The logic of such a position is hard to dispute. Moreover, there is no question that harm to these kinds of interests is sufficient to make out injury in fact under current standing doctrine.<sup>171</sup>

An environmental group's cause of action against a county concerning the constitutionality of a custom and culture ordinance presents a similar situation. The environmental group may allege that its members derive recreational, aesthetic, and scientific benefit and enjoyment from the existence of the wildlife and their habitat on public lands within the counties. The environmental group may further allege that these interests will be injured if the ordinance is enforced, because federal agencies will be hindered in their protection of the environment pursuant to federal environmental statutes and, the wildlife and the habitat enjoyed by the members will be harmed. Thus, as in *Mt. Graham Red Squirrel*, the environmental organizations, along with individual members, may successfully assert standing.

---

167. *Finley*, 795 F. Supp. at 1470.

168. *Sierra Club*, 405 U.S. at 739.

169. *Defenders of Wildlife, Friends of Animals and their Env't v. Hodel*, 851 F.2d 1035, 1040 (8th Cir. 1988); *Coalition for the Env't v. Volpe*, 504 F.2d 256, 167 (8th Cir. 1974).

170. 986 F.2d 1568, 1581 (9th Cir. 1993).

171. *Id.* (brackets in original).

*B. Establishing Ripeness*

In addition to a successful assertion of standing, the case and controversy section of Article III of the United States Constitution requires plaintiffs to assert that their claim is fit for judicial review. “[R]ipeness requires are an additional inquiry into ‘whether the harm asserted has matured sufficiently to warrant judicial intervention.’”<sup>172</sup> In deciding whether an issue is ripe for review, the court evaluates “both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.”<sup>173</sup> Those issues that are ripe for judicial review: (1) are primarily legal; (2) do not require further factual development; and (3) exist where the challenged action is final.<sup>174</sup>

Establishing ripeness may be another difficult hurdle for environmental group plaintiffs to clear. Defendants of custom and culture ordinances may colorably argue that where a custom and culture ordinance has not yet been applied or enforced, the controversy will not be ripe for review until the ordinance is actually put into effect.

However, “[a] challenge to a statute or regulation that has not yet been applied is generally considered fit for judicial determination if the issue raised is a ‘purely legal one,’ or one which ‘further factual development will not render more concrete.’”<sup>175</sup> Thus, a facial challenge to the legality of a law may be ripe for judicial review, even though the law has not yet been enforced. “Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.”<sup>176</sup>

An allegation that an ordinance is preempted by federal law, even before the ordinance is applied, is ripe for review where the ordinance’s validity will not likely depend upon the factual setting in which it is applied, and where its operation is not hypothetical or speculative.<sup>177</sup>

---

172. *Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm’n*, 659 F.2d 903, 915 (9th Cir. 1981), *cert. granted sub nom.*, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm’n*, 457 U.S. 1132 (1982), *cert. denied*, 457 U.S. 1133 (1982), *aff’d*, 461 U.S. 190 (1983) (quoting *Warth v. Seldin*, 422 U.S. 490 (1975)).

173. *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967).

174. *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990).

175. *Pacific Legal Found.*, 659 F.2d at 915 (citations omitted).

176. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (citation omitted).

177. *Pacific Legal Found.*, 659 F.2d at 915 (citations omitted).

“One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.”<sup>178</sup> Thus, a facial challenge of unconstitutionality is ripe when plaintiffs are challenging the entire custom and culture ordinance, not just the outcome of applying the ordinance to a particular factual setting.

The Supreme Court found a challenge to disposal requirements based on a claim of federal preemption to be ripe for review in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm’n*.<sup>179</sup> The Court based its determination on the fact that the question of preemption is predominantly legal, and that the postponement of a decision would work a substantial hardship on the plaintiffs.<sup>180</sup> Similarly, the Ninth Circuit held that the issue of whether a county could require an oil company to obtain a permit, or whether the county’s requirement was preempted by federal law, was ripe for review.<sup>181</sup> The Ninth Circuit found the issue fit for judicial review even though the county had not yet enforced its permit requirement, because the issue of whether the county could exercise such control without violating the Supremacy Clause would persist, whether or not a permit was ever granted.<sup>182</sup>

The Seventh Circuit reached the same conclusion in *Kerr-McGee Chemical Corp. v. City of West Chicago*<sup>183</sup> when it held that a chemical company’s challenge to certain city regulations as preempted by federal law and its prayer for injunctive and declaratory relief were ripe for review.<sup>184</sup> In reaching its determination, the court noted that the chemical company was not just objecting to the application of a particular section of the regulations, but had alleged that the regulations at issue were completely preempted.<sup>185</sup> The court also noted that the regulations directly affected the chemical company’s disposal plans, and the city had made clear its intent to enforce the regulations through several different means, including arrest.<sup>186</sup>

---

178. *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).

179. 461 U.S. 190 (1983).

180. *Id.*

181. *Ventura County v. Gulf Oil Corp.*, 601 F.2d 1080, 1085 (9th Cir. 1979), *aff’d*, 445 U.S. 947 (1980).

182. *Id.*

183. 914 F.2d 820 (7th Cir. 1990).

184. *Id.* at 825.

185. *Id.* at 824.

186. *Id.* at 823-24.

Similarly, the Idaho state judge also held in *Boundary Backpackers* that the environmental group’s suit was ripe for review. The court’s determination was based on Idaho law, however, under which “[p]laintiffs do not have to demonstrate that a specific action be taken by the County as a prerequisite to obtaining declaratory relief. A declaratory judgment can afford preventive relief or may relate to a right that ‘is only yet in dispute or a status undisturbed but threatened or endangered.’”<sup>187</sup> The court stated that Boundary County’s intent to follow the ordinance could cause loss of public lands that plaintiffs use recreationally and aesthetically.<sup>188</sup> Thus, because the lawsuit involved “actual and existing facts which threaten or endanger the rights of one or more of the Plaintiffs,” the matter was justiciable because “[r]uling on the constitutionality of the Ordinance will clarify and settle the legal relations in issue.”<sup>189</sup>

### C. *Filing in State or Federal Court*

Several considerations come into play when a potential plaintiff is deciding whether to file a complaint in federal or state court. Weighing in favor of filing in federal court is the possibility that a federal court decision may be more useful as precedent. For instance, if a custom and culture ordinance was defeated in Washington federal court, although that decision would not be binding in other districts, a federal court decision, much more than a state court decision, would constitute significant persuasive precedent. Further, a success in federal court would firmly establish that environmental groups have standing to pursue custom and culture ordinances. Similar victories in state courts are not always as beneficial to future lawsuits in federal courts, because the standard that must be met in order to establish standing differs from that which must be met in order to establish standing in federal court. Further, the standard for establishing standing in state court is often less onerous than the standing burden that must be met in federal court.

Also weighing in favor of filing in federal court is the general belief that federal judges are more likely to render a favorable decision for environmental groups and are less likely than state court judges to

---

187. *Boundary Backpackers v. Boundary County*, No. CV 93-9955, slip op. at 11 (1st Jud. Dist. of Idaho Jan. 27, 1994) (citations omitted).

188. *Id.*

189. *Id.* at 12.

favor the local attorneys and the policies behind custom and culture ordinances, including gaining greater local control. However, the flip side of this coin is that obtaining a favorable decision in state court beats the Wise Use proponents at their own game. A large part of the Wise Use Movement's platform and appeal stems from its "us against them" philosophy—the idea that the huge federal bureaucracy is trampling on the rights of the little people. Because the Movement is using this battle cry as its platform, a decision from a federal court judge may, in the long run, garner additional support for the Movement's contention that outsiders are coming in and telling the county citizens how to manage their lands. However, invalidation of a custom and culture ordinance by a local judge at the state court level stands a good chance of discrediting the Movement's us against them theme and, at the least, will not provide the Movement with even more fuel for its claim that the big bad government is coming in from the outside and trampling the little guy.

*D. Seeking Remedies*

Another matter that a prospective plaintiff must address prior to filing a complaint against a custom and culture ordinance is which type of relief to seek. In addressing this issue, a prospective plaintiff must consider both what type of relief a court is most likely to grant as remedy to an unconstitutional ordinance, and what type of relief will most quickly and completely rectify the harm caused by the contested custom and culture ordinance.

1. Declaratory Relief

By requesting declaratory judgment in its prayer for relief, plaintiff is asking the court to declare the binding legal obligations of the defendant. The power to grant declaratory relief is conferred upon the courts by 28 U.S.C. § 2201.<sup>190</sup> The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where

---

190. Specifically, the statute states that:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201 (1988).

it is appropriate.<sup>191</sup> Further, a party is not required in all instances to “take irretrievable steps and accrue peril” before it may obtain declaratory relief.<sup>192</sup>

The only hard and fast prerequisite to a grant of declaratory judgment is the requirement that a “case of actual controversy” must exist.<sup>193</sup> Once this prerequisite has been met, a grant of declaratory relief is within the district court’s discretion, and is to be exercised in the public interest.<sup>194</sup> Two principal criteria weigh in favor of rendering a declaratory judgment: (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue; and (2) when the judgment will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.<sup>195</sup>

A prayer for declaratory relief would be proper with regard to an environmental group’s complaint against a county’s passage of a custom and culture ordinance, because declaratory judgment is the quickest, most efficient way to strike the ordinance off the books completely, in addition to preventing the ordinance from being enforced.

## 2. Injunctive Relief

Declaratory relief may be used as a predicate to further relief, including injunctive relief.<sup>196</sup> Injunctive relief is proper when necessary to prevent state officials from interfering with federal rights.<sup>197</sup> In particular, injunctive relief is proper to prevent state officials from violating the federal laws or the United States Constitution.<sup>198</sup>

In order to obtain permanent injunctive relief, plaintiff must establish: (1) success on the merits of plaintiff’s claim; (2) that irreparable harm to the environment and to plaintiff’s interests will result if injunctive relief is not granted; (3) that injunctive relief is in the public interest; and (4) that the harm to the environment that will result if the

---

191. FED. R. CIV. P. 57.

192. *A. S. Abell Co. v. Chell*, 412 F.2d 712, 719 (4th Cir. 1969).

193. 28 U.S.C. § 2201 (1988).

194. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 126 (1968).

195. *McGraw-Edison Co. v. Preformed Line Prods. Co.*, 362 F.2d 339, 342 (9th Cir.), *cert. denied*, 385 U.S. 919 (1966).

196. FED. R. CIV. P. 57; 28 U.S.C. § 2202; *Powell v. McCormack*, 395 U.S. 486 (1969).

197. *Ex Parte Young*, 209 U.S. 123, 160-62 (1908); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

198. CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3566 (1984).

injunction is not granted outweighs the harm to the defendant that will result if the injunction is granted.<sup>199</sup>

Although injunctive relief would only prevent the enforcement of a custom and culture ordinance, but would not eliminate it from the books, a prayer for injunctive relief may be proper to ensure that a county does not enforce the ordinance while a lawsuit is pending. Injunctive relief would be proper in this instance because enforcement of the ordinance would violate the Due Process Clause of the 14th Amendment and the Supremacy Clause of Article IV of the United States Constitution. Therefore, an injunction prohibiting county officials from enforcing the ordinance would prevent the officials from violating the Constitution.

*E. Potential Lawsuit Patterns*

Finally, other questions of legal strategy should be addressed by potential plaintiffs before pursuing complaints against custom and culture ordinances. In analyzing these considerations, potential plaintiffs should focus on what they hope to accomplish by challenging custom and culture ordinances: do they simply want to strike down existing ordinances, or do they wish to use the publicity generated by successful lawsuits to discourage passage of similar ordinances across the West?

First, interested parties should consider whether the best course of action is to pursue a lawsuit against only one custom and culture ordinance as a case study, in hopes that a victory will discourage other county governments from enacting similar ordinances. Of course, if other parties do not challenge custom and culture ordinances in other counties, and if the counties that still have such ordinances on the books refuse to voluntarily nullify them, then all of the plaintiff's efforts have resulted only in the deletion of one custom and culture ordinance. In contrast, potential plaintiffs may decide to file as many lawsuits as financially feasible, in an attempt to strike down as many custom and culture ordinances as possible. One possible complication of this course of action is that plaintiffs may end up with a mixed bag of results: some courts may nullify the ordinances, but plaintiffs' claims may be rejected by other courts. The result would be a confusing mixture of cases that did not state definitively whether custom and culture ordinances are

---

199. *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505 (9th Cir. 1988).

lawful. If the legal status of custom and culture ordinances was unclear, it is doubtful that many counties would be discouraged from continuing to pass or enforce such ordinances.

Second, interested parties should consider whether to challenge Catron County-style lawsuits, which contain the most egregious language, or to pursue second generation ordinances, which have been more carefully drafted in an attempt to avoid constitutional challenges. Because Catron County ordinances contain flagrantly unconstitutional provisions, court challenges to these ordinances may be the easier battles to win. However, defeat of a Catron County ordinance may only encourage counties to resort to second generation ordinances in the future. Defeat of a second generation ordinance, on the other hand, may nip any further Wise Use county government efforts in the bud. The down side to this approach is that a judicial victory over second generation ordinances is not nearly as assured. Therefore, in order to win, plaintiffs will have to dedicate more time, energy, and money to the court battle, and even then, victory is not guaranteed.

Third, interested parties should determine whether the best approach is to pursue custom and culture ordinances individually, or to form a coalition that is able to share information and tactics. This query may raise interesting issues if the potential parties include established environmental public interest organizations, among which battles have previously been waged as to whether coalition-building is the most effective means of pursuing the respective goals of the organizations. Because different philosophies exist among national environmental public interest groups, working together in some organized fashion in an attempt to eliminate custom and culture ordinances may also cause dissension with regard to some of the issues mentioned above. Such issues may include which types of ordinances should be pursued and how many lawsuits are necessary to accomplish the goals of the organizations.

One final valid point for potential plaintiffs to consider before challenging custom and culture ordinances is whether eliminating the ordinances is worth the time, effort, and financial commitment that goes into a lawsuit. It may be argued that there is no need to strike down the ordinances, because most of the counties will never attempt to enforce them and, even if a county did jail a federal employee for implementing federal environmental laws without following ordinance policies, the federal government would nip any such enforcement in the bud.

In fact, a plaintiff challenging the validity of a custom and culture ordinance may even have trouble getting a federal court to consider his cause of action. If the court concludes that the ordinance is unlikely to be enforced, or that federal agencies are unlikely to heed the ordinance and will not be prosecuted as a result, the court may conclude that no controversy exists sufficient to satisfy the case or controversy requirement of Article III of the federal Constitution.<sup>200</sup> The Supreme Court reached such a conclusion in *Tileston v. Ullman*,<sup>201</sup> where it refused to consider whether a Connecticut statute prohibiting the use of contraception by unmarried couples was lawful, because the statute had never been enforced against the plaintiff. Only when the state of Connecticut actually enforced the statute did the Court render a decision on the merits of the plaintiff's claim.<sup>202</sup>

However, several strong arguments exist in favor of dedicating resources to fighting custom and culture ordinances in court. First, one or more counties may actually attempt to enforce the ordinances, and may succeed in doing so without federal intrusion. The impact of custom and culture ordinances on the environmental health of both public and private lands in the affected counties may be significant. The ordinances will potentially undermine the protective provisions of federal environmental statutes. For instance, the ordinances often seek to prevent federal agencies from acquiring land and implementing recovery plans for habitat and wildlife protection, as provided for under the Endangered Species Act. Another example is the effect of the ordinances on enforcement of the Clean Air Act. According to the ordinances, the counties often are no longer required to comply with the air quality standards established for the State. The ordinances also often interfere with enforcement of the Clean Water Act by allowing the counties to define what areas constitute a "wetland," and therefore what areas deserve protection under the Clean Water Act.

Also, by threatening criminal prosecution, custom and culture ordinances may chill federal employees' ability and willingness to carry out their duties, as stated in various federal environmental statutes and regulations. If federal employees are chilled from carrying out their

---

200. U.S. CONST. art. III, cl. 2.

201. 318 U.S. 44 (1943).

202. *Griswold v. Connecticut*, 381 U.S. 479 (1963) ("[D]oubts [of whether a 'case or controversy' exists] are removed by reason of a criminal conviction" springing from the state statute at issue.). *Id.* at 481.

duties, federal environmental laws will no longer be effectively implemented and enforced. For example, many of the ordinances prohibit federal employees from reducing the number of cows on a grazing allotment because a reduction is not consistent with the counties' custom and culture. Many of the ordinances also prohibit federal employees from implementing recovery plans for threatened and endangered species in the counties unless a higher standard of proof is met than is currently required by the Endangered Species Act. Similarly, many of the ordinances prohibit federal employees from enforcing portions of the Clean Water Act and Clean Air Act, instead requiring that the employees comply with the counties' designation of what constitutes a wetland and what constitutes acceptable ambient air quality standards. As a result of federal employees' inability to implement and enforce federal environmental statutes and regulations, the wildlife and habitat within the counties will receive even less protection than what is currently provided by the federal government.

The ordinances may also succeed in altering the balance of environmental, cultural, and economic considerations that go into federal agencies' implementation of federal environmental statutes. For example, the ordinances usually require the agencies to consider the effects of any agency action on the counties' custom, culture, and economic stability. The ordinances often state that federal agencies may not take any action (even if that action includes implementation of an environmental statute) if that action would render economically inefficient any livestock, agricultural, or timber harvesting activities within the counties.

Thus, the overriding result of the presence of custom and culture ordinances may be to chill federal employees' ability and willingness to carry out their duties, as stated in various federal environmental statutes and regulations. As a result, environmental laws will not be effectively implemented, and the protection provided for wildlife and habitat that is implicit in those laws will cease to exist.

A second reason for pursuing custom and culture ordinances is that environmental groups and other interested parties may be able to generate favorable publicity from successful lawsuits against the ordinances, helping to further their policies in other arenas as well. Similarly, striking down custom and culture ordinances may be an effective means of destroying support and publicity that the Wise Use Movement garners from successful passage of the ordinances.

Finally, a strong argument can be made for the proposition that custom and culture ordinances should be challenged simply on principle. The ordinances attempt to severely hamstring the federal government's attempts at environmental protection, and on that basis alone, whether or not the goals of the ordinance are achieved, elimination of the ordinances is worth the fight. The message articulated by custom and culture ordinances is that private property rights are paramount, surpassing any environmental and resource management concerns, and that grazing, farming, and timber harvesting should continue at historical levels, simply because it has always been done that way. Challenge to and deletion of these ordinances sends a counter-message: we must all consider not only our own needs and interests, but the needs of the environment as a whole, and while we may have license to use the country's public lands, that license does not grant us the right to do with the lands as we will, but the responsibility to manage those lands wisely and preserve their character and beauty for future generations.

#### V. CONCLUSION

Courts are likely to find that custom and culture ordinances, as currently written, constitute local attempts to regulate the federal government that do not fall within the purview of any statutory waiver of sovereign immunity, and thus violate the Supremacy Clause. However, whether the courts ever reach the merits of this issue is not nearly as assured, and depends on the litigation strategy pursued by potential plaintiffs and the means by which plaintiffs attempt to establish standing and ripeness.