

From Summary of Environmental Law in the United States - CEC

INTRODUCTION TO THE UNITED STATES LEGAL SYSTEM

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STRUCTURE OF GOVERNMENT

The United States is a federalist system. The national government has specific, enumerated powers, and the fifty sovereign states retain substantial autonomy and authority. Both the national government and each state government is divided into executive, legislative and judicial *branches* (*noun. a part of a government or other large organization that deals with one aspect of its work. syn department*). Written constitutions, both federal and state, form a system of separated powers, checks and balances among the branches.

NATIONAL-SUBNATIONAL RELATIONS

Any powers not delegated to the federal government in the Constitution, nor prohibited by it to the states, are reserved to the states, or to the people. U.S. Const. amend. X. *Nonetheless* (*adverb. In spite of this fact. Syn nevertheless*), the powers of the federal government are extensive. The federal government's authority to regulate interstate commerce, U.S. Const. art. I, sec. 8 cl. 3, makes it the predominant force in environmental regulation. The states, under their general police powers to protect the public health, safety and welfare, also retain substantial independent authority to issue environmental protection laws applicable to their citizens and residents. Potential conflicts between state and federal regulation in all areas, including environmental protection, are governed by the Supremacy Clause of the U.S. Constitution. U.S. Const. art. VI. The federal Constitution, federal laws, and international treaties are supreme to state or local law; state and local laws that contradict federal laws or treaties are thus *preempted* (*to prevent sth from happening by taking action to stop it*) and can be declared unconstitutional by a federal court. Although the Constitution sets forth the basic framework for national- subnational relationships in the U.S., many environmental statutes add detail to specific

aspects of those relationships within the broader constitutional framework. For example, federal statutes might explicitly preempt, or explicitly waive any preemption of, state law. See, e.g., Toxic Substance Control Act (TSCA), 15 U.S.C. sec. 2617; Clean Water Act (CWA), 33 U.S.C. sec. 1370; Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. sec. 136v; Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. sec. 9614; and Resource Conservation and Recovery Act (RCRA), 42 U.S.C. sec. 6929. Some federal environmental statutes create national minimum standards delegating primary implementation of federal programs to states that meet certain federal standards. States are free to enact stricter regulations. See, e.g., CWA, 33 U.S.C. sec. 1370; RCRA, 42 U.S.C. sec. 6929. When a state is delegated federal authority, EPA and the state will sign a Memorandum of Agreement establishing their respective responsibilities and necessary procedures. Many federal environmental statutes also provide for grants, technical assistance and other support to assist the states in furthering national policies or programs. See, e.g., TSCA, 15 U.S.C. sec. 2627; CWA, 33 U.S.C. sec. 1329 (h). A U.S. citizen can be subject to both federal and state law on environmental

NATIVE GOVERNMENTS / ABORIGINAL PEOPLES

Native Americans have significant rights of self-government under the U.S. Constitution, which stem from their own sovereignty. Among other powers, tribal governments have the power to tax, to pass their own laws and to have their own courts. Nonetheless, the general rule is that federal laws of general applicability apply equally to Native Americans and their property. *Federal Power Commission v. Tuscarora*, 362 U.S. 99, 116 (1960); *U.S. Department of Labor v. Occupational Safety and Health Administration*, 935 F.2d 182 (9th Cir. 1991). Exceptions to this general applicability of federal law apply where Congress intended to exempt Native Americans; where the issues relate to the core of Native American self-governance and self-organization; or where application would abrogate rights guaranteed by Native American treaties. Even in these areas, however, Congress can expressly apply a statute to Native Americans. Many of the federal environmental laws have specific provisions explaining how the law applies to Native American tribal lands. The provisions vary, but typically grant to Native American tribal governments similar rights and responsibilities as those granted to states. See, e.g., CWA, 33 U.S.C. sec. 1377; Safe Drinking Water Act (SDWA), 42 U.S.C. sec. 300j-11; Clean Air Act (CAA), 42 U.S.C. sec. 7601(d); CERCLA, 42 U.S.C. sec. 9626; and Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C.

sec. 1300. The Bureau of Indian Affairs (BIA) is charged with carrying out the major portion of the trust responsibility of the United States to Native American tribes. This trust includes the protection and enhancement of Native America lands and the conservation and development of natural resources, including fish and wildlife, outdoor recreation, water, rangeland, and forestry resources. BIA was created in the War Department in 1824 and transferred to the Department of the Interior in 1949. In addition, the trust responsibility generally applies to all other federal agencies as well.

State Laws.

Native American tribes are usually not subject to state law except under very limited circumstances. See *Cabazon Band of Mission Indians v. California*, 480 U.S. 202 (1987).

SOURCES AND HIERARCHY OF LAW

The Constitution.

The Constitution of the United States is the "supreme law of the land;" it provides the basis for the U.S. government, and guarantees the freedom and rights of all U.S. citizens. No laws may contradict any of the Constitution's principles and no governmental authority in the U.S. is exempt from complying with it. The federal courts have the sole authority to interpret the Constitution and to evaluate the federal constitutionality of federal or state laws.

International Treaties.

Treaties made by the United States are the Supreme law of the land and under the U.S. Constitution, as are federal. In the case of a conflict between a treaty and a federal statute, the one that is later in time or more specific will typically control. Treaties to which the United States is a party may be found in the U.S. Treaties Service, the Statutes at Large, the Treaties and other International Acts Series issued by the State Department, and the United Nations Treaty Series. Treaties are often implemented by federal statutes.

(Adoption of Treaties, Treaties in Domestic Law.

The President has "power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." U.S. Const. art. II, sec. 2. The treaty power is thus divided between the executive branch and the legislative branch of the U.S. government. The Senate's role is to advise and consent to a treaty; the President's roles are to make and to ratify or accede to a treaty. The Senate can attach a condition to its consent requiring that the treaty be amended by the President, or that the President enter certain

"reservations." The President may only ratify or accede to the treaty with the Senate's changes. See Restatement (Third) of the Foreign Relations Law of the United States, Section 303, Reporter's Note No.3 (1987).

Senate's Advice and Consent.

The Senate's Committee on Foreign Relations has exclusive jurisdiction over treaties and executive agreements. The Committee prepares the resolution,

which gives the Senate's consent to the ratification of the treaty. The Senate can base its approval on conditions set forth in the resolution. Conditions can be amendments, reservations, understandings, declarations, and statements (or provisos) and they may be offered at any time during the Committee's deliberations, or during consideration in the full Senate prior to the vote on the resolution. A majority vote is required in Committee and in the Senate for incorporating a condition into the resolution. Adoption of the resolution then requires a two-thirds vote in the Senate. The Senate has several options. It can amend, make a reservation, issue a Senate "understanding" or "declaration" regarding the general issue, or make "statements regarding related issues of U.S. law."

Ratification.

After the Senate consents to a treaty, the President is free to ratify it. Ratification is the formal process declaring the willingness of the state to be bound by a treaty. Ratification is usually confirmed in a formal document called an "instrument of ratification." The President must give effect to all conditions imposed by the Senate for its consent. If the President decides that under international law the treaty cannot be interpreted as the Senate has required, he has no authority to ratify the treaty, unless the instrument of ratification is accompanied by express language conforming to the Senate's understanding. The instrument of ratification includes the title of the treaty, the date of signature, the countries involved, and the languages used. The President can also attach a statement of understanding or a declaration regarding the Senate's understanding of a treaty, even if the Senate did not offer a formal reservation or understanding.

Exchange and Deposit.

To be bound internationally, a state must exchange or deposit its instrument of ratification. It is this international act of exchange or deposit which allows the formal entry into force of a treaty, usually at a later specified date. Generally, bilateral treaties are exchanged, while multilateral treaties are deposited. If treaties are to be deposited, they usually state where and with whom.

Proclamation.

When the necessary exchange or deposit has been completed and the treaty has entered into force, the President issues a Presidential proclamation that

the agreement is in force. The proclamation of a treaty is a national act by which the text of a ratified treaty is publicized. After signing, the President returns the proclamation to the Secretary of State, which will publish it with the treaty text in U.S. Treaties and Other International Agreements, and register it with the United Nations Secretariat pursuant to Article 102 of the UN Charter. According to Article 102, no party can invoke a treaty agreement before any organ of the United Nations until it is registered with the United Nations. U.N. Charter art. 102, para.2.)

Federal Statutes.

Federal Statutes are published first in Slip Law, then in the Statutes at Large and subsequently in the United States Code. An example of a cite to a federal statute is: 42 U.S.C. sec. 9607, which would refer to title 42, section 9607 of the U.S. Code. Federal statutes may be challenged in federal court.

Agency Rules and Executive Orders.

Federal administrative bodies issue rules and regulations of a quasi-legislative character; valid federal regulations have the force of law and preempt state laws and rules. Rules and regulations may only be issued under statutory authority granted by Congress. The President also has broad powers to issue executive orders. An executive order is a directive from the President to other officials in the executive branch. Proposed and final rules, executive orders and other executive branch notices are published daily in the Federal Register. No person may be subject to any rule required to be published in the Federal Register and not so published. 5 U.S.C. sec. 552(a)(1). Every federal agency must publish: descriptions of its organizational structure; general statements of how the agency functions; its rules of procedures, available forms and descriptions of all papers, final reports or examinations; and all substantive rules or statements of general applicability adopted by the agency. Rules may be challenged in federal court. The federal courts have sole authority to review agency rules and actions to ensure they are legal under the substantive federal statute. An official citation to the Federal Register includes the volume, page number and year, for example: 43 Fed. Reg. 11,110 (1978). Final administrative rules are published first in the Federal Register and then in the Code of Federal Regulation; an example of an official citation to the Code is 40 C.F.R. pt. 260, which refers to title 40, part 260 of the Code of Federal Regulations.

Judicial Opinions.

The United States is a common law country. Every U.S. state has a legal system based on the common law, except Louisiana (which relies on the French civil code). Common law has no statutory basis; judges establish common law by applying previous decisions (precedents) to present cases. Although typically affected by statutory authority, broad areas of the law, most notably relating to property, contracts, and torts are traditionally part of the common law. These areas of the law are mostly within the jurisdiction of the states, and thus state courts are the primary source of common law. Federal common law is relatively narrow in scope; primarily limited to clearly federal issues that have not been addressed by a statute. Reported decisions of the U.S. Supreme Court and of most of the state appellate courts can be found in the official reporter of the respective courts. Those decided from at least 1887 to date can also be found in the National Reporter System, a system of unofficial reporters. Decisions of lower state courts are not published officially but can usually be found in unofficial reports. When referring to a case, a citation typically includes the name of the case and the volume and pages of the reporter, as well as the date for example, *Kleppe v. New Mexico*, 426 U.S. 529 (1976). Citations to federal courts of appeals are found in volumes abbreviated F., F.2d, or F.3d, and district courts are in volumes abbreviated F. Supp. The decisions of other specialized federal courts such as Claims of bankruptcy decisions are also reported. The system for citing state cases is similar. A correct citation would be *Wagen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W. 2d 437 (1980), meaning the case was decided in 1980, is found on page 260 of volume 97 of the second series of Wisconsin State Reporters (the official reporter), as well as page 437 of volume 294 of the second Northwestern set of the National Reporter System.

State Constitutions and Statutes.

State constitutions are the supreme law within the state. State statutes must conform to the respective state's constitution. All state constitutions and legislation can be preempted by federal legislation or the federal Constitution. See Section 1.1.3: National-Subnational Relations. Municipal charters, ordinances, rules, and regulations apply only to local issues; they typically can be preempted by either state or federal law.

Citation.

To ensure uniformity in citation styles for all law-related publications or writings, most citation to legal sources in the United States follows the Uniform System of Citation, also known as the Bluebook. The Bluebook is updated every few years by a consortium of law schools. Among other things, the Bluebook provides the abbreviations for all state and federal courts, statutory compilations, and administrative rules.

ROLE OF THE LEGISLATURE IN THE LAW-MAKING PROCESS

The U.S. Congress has exclusive authority to enact federal legislation. The process by which a proposed bill becomes a law can be very complex and take years. (For more detailed information)

Introduction of Bills.

Bills may originate in either the House of Representatives or the Senate, except that all bills for raising revenue must originate in the House of Representatives. U.S. Const. art. I, sec. 7. Only Senators and Representatives (also known as Members of Congress) can introduce a bill in their respective chamber. When bills are introduced, they are given a bill number. The numbering system starts over with each session of Congress, and bill numbers run in chronological order according to when the bill is introduced. Bills in the House of Representatives are given the initial H.R. and Senate Bills are given the initial S. Thus, H.R. 1, would be the first bill introduced in a new session of Congress or the House of Representatives (a session of Congress lasts for two years).

Committee Consideration.

After a bill is introduced, it is assigned to one or more committees in the chamber where it was introduced. A committee can amend, rewrite, recommend, or ignore the bill or report back to the full chamber with no recommendation. Committees typically also submit a report explaining their views of the bill when sending a bill to the full House or Senate. (For more information)

Floor Debate and Vote.

Once the bill has emerged from committee consideration, it moves to the "floor" of either the House of Representatives or the Senate (again depending on where the bill was introduced). The entire chamber debates and may amend the bill. It then takes an open vote on the bill. For noncontroversial votes, the chamber will take a voice vote, but if any legislator asks for a roll call, then each member's vote is made separately and publicly.

Passage in Both Chambers.

If the bill passes the first chamber, it is sent to the other chamber where the process described above is repeated. If the bill is amended in the second chamber, it must be sent back to the first Chamber because both chambers must agree on the amendments. If the two chambers cannot immediately agree on how to pass identical legislation, the bill will be sent to a joint committee (comprised of both House of Representatives and Senate members), which will attempt to work out a compromise among the different versions of the bill. If the joint committee is successful, the bill will be returned to both chambers for a vote.

Overriding a Presidential Veto.

Once an identical bill passes both the House and the Senate, it is sent to the President who can do the following: (1) sign it and thus make it a law; (2) do nothing and after 10 days, if Congress stays in session, it becomes law; (3) do nothing and if Congress adjourns within 10 days, it does not become law; or (4) reject the bill by vetoing it and the bill will not become law unless the veto is overridden by Congress. Congress may override the President's veto by approving the bill again with at least a two-thirds majority vote in both the House and the Senate. The bill then becomes a law despite the President's veto.

Public Access to Information.

All floor debates and votes are published the following day in the Congressional Record. Legislators can review the Congressional Record before it is published to change or add a statement. Committee reports for major legislation are published separately by the Government Printing Office. In recent years, many committee hearings, floor debates and votes have been broadcast live through CSPAN (Cable Satellite Public Affairs Network), a cable television network that provides twenty-four hour coverage of public affairs.(For more information about C-SPAN)

State Legislatures.

The state legislatures act in much the same way, although the process for enacting a bill within the legislatures is often more streamlined. Every state

legislature, except Nebraska's, has two chambers. Most governors have veto power over state legislation, analogous to the veto power of the President.

Citizen Initiatives.

Unlike the federal government, several states also allow for citizen initiatives. In some of these states, citizens can hold a direct vote on a specific proposed law directly. In other states, citizen initiatives may force the legislatures to vote on an issue. To get a specific initiative on the election ballot or on the legislature's docket typically requires that organizers collect a certain number of signatures of eligible voters.

ROLE OF THE EXECUTIVE IN THE LAW-MAKING PROCESS

The U.S. Executive Branch is responsible for implementing most laws passed by the Congress. Agencies in the executive branch issue rules, make adjudications and provide other opinions and guidelines in an effort to implement the laws. The Administrative Procedure Act (APA) governs these activities. The President also has the power to issue executive orders. Executive orders are Presidential directives governing actions by other federal officials and agencies. The President's authority over the executive branch is limited only by the Constitution and federal statutes.

NOTICE AND COMMENT RULEMAKING

Under the APA, any agency decision that sets binding obligations or standards for a class of people is a rule. Rulemaking is particularly important in technical areas such as environmental law, where the Congress has historically delegated broad discretion to the agencies to implement the statutes. Most administrative rules go through a process known as notice and comment rulemaking. Before issuing most rules, the agency must issue a notice of proposed rulemaking in the Federal Register. This notice must describe the proposed rule, and give the public at least thirty days to provide comments. After receiving the comments, the agency can issue a final rule, along with a general statement describing the rule's authority and purpose. Because the agency is required to consider all nonfrivolous comments, the agencies will often respond to comments in issuing a final rule. Rules made by regulatory agencies have the force and effect of legislation. Any interested party that participates in the rulemaking can challenge the legality of the rule in a court.

Adjudications.

The second major type of agency action is an adjudication. Adjudications occur where the agency is making a binding, case-specific decision for example, siting, permitting, or licensing a particular activity or facility. In such instances the agencies are acting like courts in making decisions that settle specific disputes between parties or between the government and a party. Under the APA, these adjudications must be made "on the record after opportunity for a hearing." Any party to the adjudication can typically appeal the decision for judicial review. See Section 1.5: Role of the Courts.

State Administrative Procedures.

State agencies operate similarly. Every state has an administrative procedures statute, which provides procedural rights for affected parties and for the public. Many of these are based on a Model State Procedures Act.

ROLE OF THE COURTS

The role of the judiciary is to decide cases and controversies between adversarial parties, including the government. Through the concept of stare decisis judicial decisions in U.S. jurisdictions can act as binding precedent for subsequent decisions. In most cases, when an appellate court makes a decision it not only decides who wins the specific case, but also provides a detailed written opinion that explains the basis for the court's decision to guide lower courts in handling future cases. Every level of the federal courts has the power to interpret the federal Constitution, and federal laws and regulations. The courts also exercise judicial review over federal statutes and agency actions, and determine the constitutionality of federal and state laws. To the extent any statute or agency action is found to be unconstitutional, it is invalid. Federal courts also interpret federal legislation and federal agency rules and decisions.

Judicial Review of Agency Action.

Many federal environmental statutes provide specific standards for judicial review of agency actions under the statute. See, e.g., CAA, 42 U.S.C. sec. 7607; RCRA, 42 U.S.C. sec. 6976; TSCA, 15 U.S.C. sec. 2618. In the absence of any specific statutory review procedures, the APA grants a general right of judicial review of any adverse, final agency action. The reviewing court can decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the agency action. The reviewing court has the authority to compel any agency action unlawfully withheld or unreasonably delayed, or to set aside any agency action, findings or conclusions the court finds to be: (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege or immunity; (C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; (D) adopted without procedures required by law; (E) unsupported by substantial evidence in administrative cases; or (F) unwarranted by the facts to the extent that the facts can be reviewed by the court. Many judicial challenges to administrative agency rules go directly to a court of appeals and are not further tried by the district courts. 5 U.S.C. secs. 701-706.

Common Law.

The U.S. is a common law country. Every state is based on the common law, except Louisiana (which is based on the French civil code). Common law has

no statutory basis; judges establish common law through written opinions that are binding on future decisions of lower courts in the same jurisdiction. Broad areas of the law, most notably relating to property, contracts, and torts, are traditionally part of the common law. These areas of the law are mostly within the jurisdiction of the states, and thus state courts are the primary source of common law. The area of federal common law is primarily limited to federal issues that have not been addressed by a statute.

Judicial Procedures.

All courts follow a strict set of procedural requirements. In 1938 the Supreme Court promulgated the Federal Rules of Civil Procedure, which are periodically updated and renewed by the U.S. Judicial Conference. They are uniform in all federal jurisdictions, although each federal court may also adopt additional rules. Every state court has its own set of rules, which are typically not as detailed or strict as the federal rules. In courts of original jurisdiction, judges are usually provided with juries to decide all questions of facts. The right to a jury is generally guaranteed by the federal Constitution in federal cases, and state constitutions typically contain similar provisions which apply in state cases.